No. 21-871

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,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

The trial court erroneously informed Mr. Brown that his attorney had a "professional obligation" which "required" him to present all the mitigating evidence known to counsel. Pet. App. 19. In doing so, the court incorrectly represented to Mr. Brown that counsel had a duty to call Mr. Brown's mother as a penalty phase witness to testify about her personal childhood abuse, over Mr. Brown's vociferous objection.

At the *Faretta* hearing, Mr. Brown told the trial court that he had an eighth-grade education, Pet. App. 17, and admitted "I don't think I can question a witness," Pet. App. 21, but stated he was waiving counsel because, relying on the trial court's misrepresentation of counsel's duties, he felt "this is the step that I have to take to protect my mother," Pet. App. 21. The trial judge, still "kinda muddy on the law," Pet. App. 41 n.16, held that Mr. Brown was knowingly and intelligently waiving his right to counsel under these circumstances.

1. Did the Louisiana Supreme Court err in holding, based on the record, that Mr. Brown's waiver of counsel was not knowing and intelligent under *Faretta v. California*, 422 U.S. 806 (1975), because existing Louisiana jurisprudence provided that a capital defendant has a right to impose a condition of employment on counsel, yet Mr. Brown had received advice leading him to believe counsel had an obligation to overrule his lawful directions not to present a particular type of mitigation evidence?

2. Was the Louisiana Supreme Court correct to deem this invalid waiver of counsel structural error, especially given that the state admitted that "two of the seven classes of structural error recognized by the United States Supreme Court" were involved in the case? State's Br. 7.

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INTRODUCTION

On the eve of the penalty phase of David Brown's trial, his counsel finally informed the trial judge of a conflict that had been brewing between trial counsel and defendant, possibly for years. Pet. App. 17. Mr. Brown made clear to counsel that he objected to "the presentation of certain mitigation evidence," Pet. App. 13—specifically, evidence that would require his mother's traumatic past to be aired in court. Pet. App. 17. Counsel, however, believed that he was "ethically obligated" to present such a defense. SA3-SA4.[1] The only way, then, for Mr. Brown to prevent counsel from including Mr. Brown's mother's story in the defense, at least as counsel advised him, was for Mr. Brown to waive his right to counsel and represent himself at the penalty phase of his capital trial.

After a *Faretta* hearing encompassing only 14 transcript pages, *see* SA22-36, during which the judge told Mr. Brown that trial counsel had a "professional obligation" to present this evidence, Pet. App. 19, the court accepted Mr. Brown's waiver of counsel as knowing and voluntary, Pet. App. 24. Mr. Brown then became the first and only capital defendant in Louisiana state court to represent himself at the penalty phase of his trial. Consistent with his admission to the judge during the *Faretta* colloquy that he did not know how to question a witness, Pet. App. 21, he "present[ed] no penalty phase opening statement, no cross-examination of the State's witnesses,

[1] Reference to "SA" herein are to the "Supplemental Appendix" filed with this response.

no objections" to the State's evidence, "no mitigation evidence, and no closing argument." Pet. App. 176-77. Unsurprisingly, he was sentenced to death.

The Louisiana Supreme Court concluded that, based on this record, the trial judge erred in finding Mr. Brown's waiver of his right to counsel was knowing and intelligent. Pet. App. 41-42. In so holding, it made no sweeping pronouncements of law, but found that "in light of" the unusual circumstances of the case, and under pre-existing Louisiana and United States Supreme Court law, Mr. Brown's Sixth Amendment rights had been violated and he was entitled to a new penalty phase. Pet. App. 43. The court also affirmed his convictions.

Petitioner, though, attempts to transform this fact-specific and limited holding into a categorical one that threatens to disrupt the balance of power between counsel and defendant and destroy the proper role of the trial judge. Cert. Pet. 23. This is a recasting of the case; these broad and dramatic questions were not raised or preserved below.

Yet even after the makeover Petitioner has given this case, the petition fails to demonstrate that this Court's typical grounds for certiorari are met. To begin, the opinion below is not some grand extension of this Court's holding in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). In reaching its conclusion that Mr. Brown's waiver of counsel was not knowing and intelligent, the court below examined and applied Louisiana precedent to hold that the trial judge—who admitted he was "kinda muddy on

the law," Pet. App. 41 n.16—misadvised Mr. Brown that his counsel had a "professional obligation" and was therefore "required" to put up the mitigation evidence related to Mr. Brown's mother. Pet. App. 19. The court went so far as to highlight that *McCoy bolstered* its conclusion, but was not *necessary* to it, since preexisting Louisiana Supreme Court precedent tread the same ground. Pet. App. 41 n.16.

At any rate, even if the opinion below *were* principally about how to read *McCoy*, Petitioner does not allege that high courts have split on this issue. *See generally* Cert. Pet. In failing to do so, Petitioner also demonstrates that the question—were it even presented by this case—is not ripe for this Court's review. Lower courts have not had ample time to apply *McCoy* in the few years since it was decided, vitiating the need for this Court's intervention.

Further, Petitioner's argument that this decision will fundamentally change the relationship between trial courts, clients, and attorneys is unavailing. The holding of the opinion below applies only to the specific (and unusual) circumstance present in this case, which came about due to mistaken advice from defense counsel and an insufficient inquiry by the trial judge. And were there any question whether the results of this case could be repeated, two separate concurrences point out the multitude of professional responsibility rules that would prevent future counsel from using this decision strategically. The court below itself, then, went to great lengths to prevent the opinion from having an impact beyond this case.

Finally, the decision below is correct on the merits. In holding that it is not error for counsel to acquiesce to a client's wish to forgo certain mitigating evidence at the penalty phase, the Supreme Court of Louisiana applied two of its own decisions, *State v. Felde*, 422 So.2d 370 (La. 1982), and *State v. Bordelon*, 33 So.3d 842 (La. 2009), neither of which the Petitioner challenged below (just as Petitioner did not challenge that any error here would be structural). Those decisions clearly indicate that a Louisiana attorney does *not* have a professional responsibility to put on mitigation evidence against a client's wishes, as even Petitioner acknowledges. *See* Cert. Pet. 22. In short, there is no question that as a matter of state precedent dating back 40 years, Mr. Brown was improperly informed that his only options were to represent himself or accept the presentation of particular evidence he vigorously opposed, rendering his waiver of counsel unknowing and unintelligent.

Ultimately, in a long and painstaking opinion, the Louisiana Supreme Court rejected each of Mr. Brown's challenges to his underlying convictions. Those convictions remain in place and are final. The Court below reversed only the penalty phase of Mr. Brown's trial, due to this Sixth Amendment violation.

This Court should deny certiorari.

STATEMENT OF THE CASE

A. Factual Background

On October 30, 2016, a jury found David Brown, respondent here, guilty of three counts of first-degree murder. Pet. App. 12. The State sought the death penalty,

Pet. App. 7, and planned to proceed to the penalty phase on October 31. Pet. App. 13. The State's petition does not concern Mr. Brown's underlying offense or guilt phase proceedings, but rather, what transpired immediately after he was found guilty.

1. At the eleventh hour, defense counsel informed the trial court of a conflict with Mr. Brown.

On October 31, just before opening statements were set to begin for the penalty phase, Mr. Brown's counsel, Dwight Doskey, alerted the court for the first time of a conflict between Mr. Brown and his attorneys relating to the presentation of mitigation evidence concerning Mr. Brown's mother. Pet. App. 16. Specifically, Mr. Brown explained to the court that he wasn't "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." SA5.

Mr. Doskey told the court that he had explained to Mr. Brown that, given their disagreement, Mr. Brown had two options. Pet. App. 16. He could: 1) allow his attorneys to handle the penalty phase as they believed they were ethically obligated to, which included calling Mr. Brown's mother and questioning other witnesses about her extensive trauma and abuse; or 2) discharge counsel and proceed pro se at the penalty phase. *Id.*

Counsel informed the court that Mr. Brown, presented with these options, had chosen the latter. *Id.* Mr. Brown confirmed this, telling the court that he "came to this decision years ago"—that he would not allow his mother to be put through the

trauma of testifying—and had previously "discussed this with Mr. Doskey." Pet. App. 17.

In short, "on the seventh week of trial, with a sequestered jury of citizens waiting outside the courtroom, the conflict was for the first time disclosed to the judge and prosecutor with no motion, no memoranda of law and without the solutions set forth by jurisprudence." Pet. App. 177. The trial judge noted he had only "minutes notice" and admitted to being "kinda muddy on the law and how to proceed." Pet. App. 177-78; *see also* Pet. App. 41 n.16. The court requested overnight memoranda on the law of waiver of counsel at the sentencing phase of a capital case. Pet. App. 178.

The trial court adjourned for the day, and convened a closed *Faretta* hearing the next morning, on November 1. Pet. App. 17. Counsel did not see or consult with Mr. Brown between these hearings, SA43, SA47, and at no point was Mr. Brown evaluated for competency, Pet. App. 177 n.1.

2. The trial court conducted a rapid-fire *Faretta* hearing.

Despite the court's request for memoranda on the waiver issue, defense counsel "treat[ed the court's] direction as an invitation," SA51, first opting to file nothing, then—in the wee hours of the morning—submitting a motion to withdraw as counsel, accompanied by a brief memorandum taking no position on the waiver issues, SA51-SA61; *see also* Pet. App. 178. The next morning, the court proceeded with a *Faretta* hearing. Pet. App. 17. The total hearing spanned only 14 hearing transcript pages. SA22-36.

The trial court asked about the witnesses Mr. Brown's counsel intended to call in the penalty phase. Mr. Brown listed the nine potential witnesses be believed his counsel planned to call, SA26, and made clear that he objected only to the presentation of testimony by his mother and his uncle Calvin, because "[t]here'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." Pet. App. 18.

The judge apprised Mr. Brown that he would forfeit claims of ineffective assistance of counsel if he chose to represent himself. Pet. App. 22. The judge alluded to other risks inherent in self-representation without specifying them: "[w]hatever mistakes, whatever risk you take for representing yourself, whatever problems you cause for yourself is on you." *Id.*

The answers Mr. Brown gave at the hearing raised red flags about his competency to waive counsel. He testified that he had attended school through the eighth-grade, and had seen a psychiatrist in his youth and had taken prescribed medication, Pet. App. 17-18, but stopped because it "made [him] a zombie," SA24. He explained that he didn't think he could question a witness, and planned on presenting no mitigating defense if self-represented. Pet. App. 21.

3. The trial court incorrectly presented Mr. Brown's options.

During the *Faretta* hearing, the trial court had an exchange with Mr. Brown regarding the ability of his counsel to proceed with limited mitigation witnesses per Mr. Brown's request. The trial judge repeated what counsel had previously told Mr.

Brown: that counsel had a "*professional obligation*" and was "required" to put up the best defense possible, which in his judgment, included calling Mr. Brown's mother and uncle as mitigation witnesses. Pet. App. 19 (emphasis added). (In truth, the Louisiana Supreme Court had previously held that a defendant can limit his defense at the penalty phase, and require counsel to do the same as a condition of employment. *See infra* 12). The trial court later reiterated that if counsel were representing Mr. Brown, counsel would call Mr. Brown's mother and uncle as mitigating witnesses: "if he's representing you, he's calling them." Pet. App. 20. The court once again affirmed counsel's "professional, ethical, moral obligations to defend and present mitigation evidence that's known to him." SA34.

For his part, Mr. Brown reiterated that if counsel "was willing to not put [on] my mother and Uncle Calvin," he could have "called anybody that he wanted besides that," but that that since counsel was "unwilling to do that," Mr. Brown had to represent himself. Pet. App. 20-21. He explained: "this is the step that I have to take to protect my mother." Pet. App. 21; *see also* Pet. App. 23 ("I just feel like this is the decision I have to make to protect my mother, and whatever consequences I have to suffer I'm willing to take that.").

Despite these exchanges, in which the trial court made a crucial error in instructing Mr. Brown on the law that led to Mr. Brown believing he had to choose between having counsel who would put on his mother and representing himself, and despite the trial court's belief that Mr. Brown was making a "foolish decision," Pet.

App. 24, the trial court granted Mr. Brown's waiver of his right to counsel, Pet. App. 23. The court cited Mr. Brown's presence during six weeks of the guilt phase, his understanding that he was waiving future challenges of ineffective assistance of counsel, and his "extreme ability to control his actions" as justification for its decision. Pet. App. 24.

Thus, after being presented with "a classic Hobson's choice" under the incorrect legal guidance that his counsel was obligated to present his mother and uncle as mitigation witnesses, Pet. App. 176, Mr. Brown opted to waive counsel.

4. Mr. Brown, now unrepresented, proceeded to the penalty phase and was sentenced to death.

Mr. Brown proceeded to the penalty phase entirely unrepresented, without even standby counsel. *See* Pet. App. 45 n.20. He sat at counsel table, restrained by a leg brace and shock device, unable to move about the courtroom. *See* Pet. App. 47. He called no witnesses and made no arguments. Pet. App. 13. Although his previous attorneys had lined up a number of mitigating witnesses aside from his mother and uncle, as he had explained to the judge earlier, Mr. Brown lacked the ability to engage in questioning. Pet App. 21. The single phrase that Mr. Brown uttered during the entirety of the proceedings was "I rest." Opening Br. 8. He was subsequently sentenced to death. Pet. App. 14.

B. Procedural History

Mr. Brown, now with the assistance of counsel, timely appealed his conviction and sentence to the Supreme Court of Louisiana. Pet. App. 14. As relevant here, he argued that he was erroneously instructed that he did not have the right to limit the presentation of mitigating evidence at the penalty phase and that, as a result, his waiver of his right to counsel was unknowing, unintelligent, and involuntary. Pet. App. 15. He discussed relevant Louisiana Supreme Court cases, including *State v. Felde*, 422 So.2d 370 (La. 1982), *State v. Bordelon*, 33 So.3d 842 (La. 2009), and *State v. Clark*, 851 So.2d 1070 (La. 2003). *See* Opening Br. 15; Reply Br. 3; *see also* Pet. App. 26 (noting same). He argued these errors were structural in nature, and required reversal of the penalty phase without the requirement of a showing of prejudice. *See* Opening Br. 37; Pet. App. 26-27.

In its response brief to the Louisiana Supreme Court, the State discussed *Felde* (and ignored *Bordelon* and *Clark*), but did not argue that case—or Mr. Brown's reading of it—was inconsistent with, or superseded by, this Court's opinion in *McCoy*. The State also did not contest that, assuming there was error, that error was structural. In fact, it alleged the *opposite*, observing that the case "places in tension two of the seven classes of structural error recognized by the United States Supreme Court." State's Br. 7.

The court below rendered its judgment on September 30, 2021 in an opinion authored by Justice Crichton, affirming Mr. Brown's conviction against his challenges thereto, but vacating Mr. Brown's death sentence and remanding to the trial court to conduct a new penalty phase. Pet. App. 2.

Because it found the issue of insufficient waiver "intrinsically tied" to the trial court's misstatements of law on Mr. Brown's right to limit mitigating evidence, the Supreme Court of Louisiana addressed these issues together. Pet. App. 16, n.8. After setting out the facts as discussed above, Pet. App. 16-25, and Mr. Brown's arguments on appeal, Pet. App. 25-27, the court surveyed the legal standards governing the Sixth Amendment issues, without clarifying whether the application of any single rule was independently sufficient for its judgment. The court noted a criminal defendant's Sixth Amendment right to counsel, which is coextensive with the same right enshrined in Article I, § 13 of the Louisiana Constitution. Pet. App. 27-28. A defendant can waive his right to counsel and represent himself, but "[t]he assertion of the right to self-representation must be clear and unequivocal . . . and the relinquishment of counsel must be knowing and intelligent." Pet. App. 28. To meet that standard, the court explained, a "trial court must necessarily provide an accurate description of the defendant's right to counsel that he or she is relinquishing." Pet. App. 30.

The court also outlined the legal framework governing the relative decisionmaking authority of attorney and client. It explained that certain fundamental trial decisions are the prerogative of the defendant (citing *Jones v. Barnes*, 463 U.S.

745 (1983)), whereas strategic decisions belong to counsel (citing *New York v. Hill*, 528 U.S. 110 (2000)). Pet. App. 30-31. The court next noted that, under its decision in *Felde*, "a defendant can limit his defense at the penalty phase of trial." Pet. App. 31 (quoting *Felde*, 422 So.2d at 395). It went on to quote from this Court's later opinion in *McCoy v. Louisiana*, Pet. App. 32-33, highlight its own subsequent observation that *McCoy* is "broadly written and focuses on a defendant's autonomy to choose the objectives of his defense," Pet. App. 33 (quoting *State v. Horn*, 251 So.3d 1069, 1075 (La. 2018)), and quote from another of its decisions, *State v. Bordelon*, 33 So.3d 842 (La. 2009), which held that a defendant may waive the right to present mitigating evidence during the penalty phase, Pet. App. 34-35.

Observing that the question of whether a relinquishment of counsel was "knowing and intelligent . . . must be determined based on the facts and circumstances of each case," Pet. App. 28 (quoting *State v. Bridgewater*, 823 So.2d 877, 894 (La. 2002)), the court concluded that, here, the trial judge furthered an "erroneous interpretation of defendant's Sixth Amendment rights" in stating that Mr. Brown's counsel was required to present all mitigating evidence to constitute the best defense as determined by *counsel*. Pet. App. 41. The court observed that its decision was consistent with this Court's opinion in *McCoy*, decided after the trial court's decision, but that *Felde* and *Bordelon* alone would have dictated the same result. Pet. App. 41 n.16. The court concluded that this misstatement of law rendered Mr. Brown's waiver of counsel unknowing and involuntary because it stymied his ability to proceed with his

"eyes open" and bound him in a forced choice that compromised his autonomy. Pet. App. 42-43. Lastly, the court determined the error here to be structural, not subject to harmless error review. Pet. App. 43-44.

Justice Crichton, who wrote the majority opinion, also wrote a separate concurring opinion in which he emphasized that the *Faretta* hearing was doomed from the start—the tardiness with which counsel informed the trial judge of the long-brewing issue meant none of the parties were able to sufficiently study the legal questions beforehand. Pet. App. 177. Justice Crichton suggested that counsel's conduct, which included filing a motion to withdraw overnight before the *Faretta* hearing, may have fallen short of the capital attorney's obligation to continue to represent a client seeking self-representation under the relevant Louisiana rules. Pet. App. 178 n.1 (quoting LAC 22:XV.Chapter 9 § 911(G)(1)).

Having provided context for the inadequacy of the *Faretta* hearing, Justice Crichton explicitly described how the Louisiana Rules of Professional Conduct will prevent this decision from being used as a blueprint for "sowing reversible error in the penalty phase." Pet. App. 180. Rules addressing attorney diligence (Rule 1.3) and attorney-client communication (Rule 1.4(a)(2)), among others, might be invoked to prevent an attorney from waiting until the eve of the penalty phase before presenting the issue to the trial judge. *Id.* Other rules would be implicated if an attorney claims not to know of the holding of this case. Pet. App. 180-81.

Justice McCallum also wrote a separate concurrence. Pet. App. 183. He, too, took pains to ensure the ruling would be good for this case only, warning—in no uncertain terms—of the disciplinary sanctions that might befall an attorney who would seek to use the opinion in this case as part of a campaign of "[d]eliberate procedural sabotage." Pet. App. 185.

Retired Justice Knoll, sitting by designation, dissented in part. Pet. App. 186. The dissent did not take issue with the scope of the opinion or its reading of Louisiana law or the law of this Court, but would have found the waiver of counsel intelligent and voluntary based on the facts of the case and would have found any error to be harmless, rather than structural. Pet. App. 186.

REASONS FOR DENYING THE PETITION

I. Petitioner Seeks Factbound Error Correction On State-Court Precedent Not Challenged Below.

A. The Court Below Held That Mr. Brown's Waiver Of Counsel Was Not Knowing And Voluntary Due To Misstatements Of Law And Other Problems With The *Faretta* Hearing.

Rather than some broad declaration extending the scope of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), as Petitioner paints it, the decision below represents a narrow and fact-specific holding: that Mr. Brown's waiver of counsel was not knowing, voluntary, and intelligent where the trial court misstated the law in erroneously

informing Mr. Brown that "defense counsel was 'required' to present all the mitigating evidence that counsel believed would make the best case in defense's favor." Pet. App. 41.[2]

Whether a defendant's relinquishment of counsel is knowing and intelligent is an inherently case-specific question, as the court below well understood. It explained that under its precedent, "[w]hether the defendant has knowingly, intelligently, and unequivocably asserted the right to self-representation must be determined based on the facts and circumstances of each case." Pet. App. 28. Trial courts are charged with conducting *Faretta* hearings to "'determine according to the *totality of the circumstances*'" whether the waiver is valid, and establish "'on the record a knowing and intelligent waiver *under the overall circumstances.*'" Pet. App. 29 (emphases added) (quoting *State v. Strain*, 585 So.2d 540, 542 (La. 1991)).

The court below observed that "for such waiver to be knowing and intelligent, the trial court must necessarily provide an accurate description of the defendant's right to counsel that he or she is relinquishing." Pet. App. 30. It concluded that the trial court here did *not* provide an accurate description of that right, based largely on prior Louisiana Supreme Court precedent. For example, the court explained that it held in *Felde*, "a defendant can limit his defense consistent with his wishes at the penalty phase of trial." Pet. App. 31 (quoting *Felde*, 422 So.2d at 395). Under *Felde*,

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[2] In fact, the dispute pertained only to one aspect of the mitigating evidence—facts surrounding Mr. Brown's mother's history of sexual abuse. Pet. App. 14.

then, a defendant has a "constitutional right to impose a condition of employment on his counsel." 422 So.2d at 395. And, likewise, the court observed that in *Bordelon*, it held that a defendant may "self impose[]" limits on his defense and "waive[] his right to present mitigation evidence." Pet. App. 35 (citing *Bordelon*, 33 So.3d at 865).

In short, the trial court was just wrong on the law when it told Mr. Brown "that defense counsel was 'required' to present all the mitigating evidence that counsel believed would make the best case in defense's favor." Pet. App. 41. He was not. Under decades-old Louisiana Supreme Court precedent, a defendant can limit his defense at the penalty phase, and require the same of counsel. Petitioner agrees on the state of the law, acknowledging that the court below cited to authorities holding 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." Cert. Pet. 19. The decision, then, is based on the trial court's embrace of this misstatement in his colloquy with Mr. Brown.

But there were other facts here that also led the court to find Mr. Brown's waiver of counsel unknowing and involuntary. Rather than the issue being raised and resolved in pre-trial proceedings, the trial court didn't have adequate time to consider the issue. As the majority's author explained, "on the seventh week of trial, with a sequestered jury of citizens waiting outside the courtroom, the conflict was for the first time disclosed to the judge and prosecutor with no motion, no memoranda of law and without the solutions set forth by jurisprudence." Pet. App. 177. The trial court

"only had 'minutes notice'" of the issue "and admitted that he was 'kinda muddy on the law and how to proceed.'" Pet. App. 177-178. Rather than brief the issues, resolve the disagreement with Mr. Brown, or examine Mr. Brown's competency to engage in self-representation, defense counsel submitted a motion to withdraw on the morning of the *Faretta* hearing. Pet. App. 178. These are not the kind of conditions that lead to a knowing and voluntary waiver of counsel for the critical question of whether a defendant should be put to death.

There is also compelling evidence that the *Faretta* colloquy itself was deficient because there was insufficient inquiry to determine that Mr. Brown was "literate, competent, and understanding," and the trial court failed to sufficiently inform him of "the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835-36. As Justice Crichton, the majority's author, pointed out, Mr. Brown "was unequivocal that he did not know how to represent himself and would prefer not to do so." Pet. App. 176. Mr. Brown clearly expressed this inability to engage in self-representation: "I don't think I can question a witness . . . I just don't have—emotionally, I don't know how to question somebody—you know what I'm saying—in a situation like this." Pet. App. 179. The trial judge conducted a brief colloquy in which he told Mr. Brown that "whatever risks you take . . . is on you" without specifying what those risks were. Pet. App. 22. These facts shaped the Louisiana Supreme Court's determination that Mr. Brown's waiver failed to pass muster as knowing and voluntary under *Faretta*.

Under all of these conditions, the court below concluded that the trial court should not have allowed the jury to undertake "the truly awesome responsibility of decreeing death for a fellow human," *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985), where the defendant "chose" to self-represent based on a fundamental misunderstanding of his options, presented at a rushed and slapdash *Faretta* hearing. Pet. App. 41.

B. The Decision Below Is A Straightforward Application Of Unchallenged State Precedent.

It is axiomatic that this Court does not pass on issues not pressed below. *See Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (observing that this Court ordinarily does not "consider claims neither raised nor decided below"). Yet Petitioner ignores this maxim, asking this Court to review a decision premised on the Louisiana Supreme Court's interpretation of the scope of its earlier, unchallenged precedent.

In support of its holding, the court below relied on two prior Louisiana cases, both affirming a defendant's ability to impose limitations on mitigation evidence during their penalty phase defense: *State v. Felde*, 422 So.2d 370 (La. 1982) and *State v. Bordelon*, 33 So.3d 842 (La. 2009). Pet. App. 33-34. Petitioner seems to acknowledge that it never challenged the correctness of those cases, instead arguing to this Court that the Louisiana Supreme Court's interpretation of the scope of its own precedent is wrong. Cert. Pet. 20-22. Expounding on the meaning and scope of Louisiana Supreme Court cases is, of course, the prerogative of the Louisiana Supreme Court.

To the extent Petitioner is now arguing that *Felde* and *Bordelon* were themselves incorrect and cannot be taken as premises in analyzing the question in this case, Petitioner failed to assert these arguments to the Louisiana Supreme Court. Indeed, although Petitioner now attempts (weakly) to distinguish *Bordelon*, it failed to even *mention* it in the briefings below. Moreover, the State included a massive block quote from *Felde*, characterizing it as "the proper understanding of a defendant's right to limit his defense." State's Br. 11. Ultimately, Petitioner's dispute is with the Louisiana Supreme Court's reading of its own cases—readings which were affirmatively embraced (*Felde*) or ignored (*Bordelon*) below.

Petitioner would obscure the singular procedural posture of this case—in which the "who decides" question is based on an interpretation of prior Louisiana Supreme Court decisions and intertwined with and nested within a voluntariness-of-waiver analysis—and convert the decision into an extension of *McCoy*. But, no. The court below made clear that its decision is based the "long-standing principles embodied in the Sixth Amendment" set out in its opinions in *Felde* and *Bordelon*, which the trial court ignored. Pet. App. 41 n.16. In fact, the trial court's strong statements to Mr. Brown during the *Faretta* colloquy and in its ruling regarding the obligations of counsel ran directly contrary to this state precedent independently of this Court's later decision in *McCoy*. *Id.* In other words, the court below viewed *McCoy* as supporting its conclusion that Mr. Brown's waiver of counsel was involuntary because

the trial court instructed him that his counsel *did* have an obligation to put up all mitigating evidence, but it did not purport to apply or extend *McCoy*.

II. Even Assuming The Decision Below Implicated the Questions Petitioner Presents, It Still Would Not Warrant Certiorari.

A. Petitioner Does Not Identify A Conflict Of Authority.

Even putting aside the fact that the decision below is a fact-specific application of unchallenged state precedent and not really about the "question presented" at all, this case is independently un-certworthy. At the outset, the petition fails to identify a split, demonstrating that this issue is not ripe for this Court's review. In Petitioner's estimation, this case revolves around "what is meant when *McCoy* speaks of the 'objectives' of defense." Cert. Pet. 18. This Court decided *McCoy* only a few years ago. To the extent the Court revisits any aspect of that decision, it should wait until lower courts have identified issues with—and arrived at some sort of disagreement regarding—what decisions are captured within the term "objectives."

B. The Question Is Not Of National Importance.

1. The Issue Is Exceedingly Rare

This is not an issue that is likely to recur with such frequency that it warrants intervention by this Court—in particular in the context of penalty-phase trials, as is the case here. The decision below was based on an insufficient *Faretta* waiver, premised on "several incorrect statements of law to defendant in regards to his right to limit counsel" at the penalty phase of his trial. Pet. App. 41. Such a confluence of "troubling circumstances" are no doubt exceedingly rare. Pet. App. 180.

Capital defendants seldom proceed pro se. In fact, Mr. Brown was the first Louisiana capital defendant, possibly of all time, to sit through the penalty phase unrepresented by counsel. Moreover, among the handful of cases where a capital defendant does proceed pro se, not all will involve an irreconcilable conflict with counsel, and few of those conflicts will concern the penalty phase. Fewer still involve a misstatement of law by the judge, which leads the defendant to self-represent. In short, the set of facts present in this case is unlikely to replicate itself, in Louisiana or any other state, and certainly not in numbers large enough to constitute an issue of national importance worthy of review by this Court.

2. The Decision Below Does Not Upend The Standard-Operating-Procedure of Defense Attorneys And Trial Courts.

Despite Petitioner's sky-is-falling rhetoric, the narrow, fact-specific opinion below is unlikely to have much of an impact outside of this case. *See* Cert. Pet. 23. To begin, the court below didn't perceive itself to be instituting some sort of fundamental reworking of the attorney-client relationship, or to be requiring trial courts to meddle in that realm. The court ruled that Mr. Brown's waiver of counsel was invalid, based on the unusual set of circumstances in the case—the eleventh-hour disclosure of the issue, the trial court's rushed consideration, and counsel and the court's provision of incorrect legal statements to Mr. Brown, creating a "Hobson's choice." *See* Pet. App. 177-78. Indeed, the court's discussion of the issue is replete with "in this case" limitations and references to "the record." Pet. App. 30, 41, 42.

And although the dissent disagrees with the majority's analysis in part, it doesn't criticize the opinion as having a vast sweep. *See* Pet. App. 186-200 (Knoll, J., dissenting) (disagreeing with majority's analysis of the validity of waiver, and on impact of error). Indeed, the dissent is, too, focused on the facts of this case, reproducing page after page of transcripts from the *Faretta* hearing to make its point, Pet. App. 187-191, and likewise discussing "the record" *in this case* in reaching its conclusions, *see, e.g.*, Pet. App. 186, 187, 190, 191, 193.[3]

Were there any question that the opinion would wreak havoc on the attorney-client relationship going forward, Justice Crichton's opinion puts that issue to rest. "To be licensed to practice law in the State of Louisiana," the opinion notes, "every lawyer must take an oath in which he or she swears or affirms to support the Constitution of the United States, the Constitution of the State of Louisiana and to maintain the respect due to courts of justice and judicial officers." Pet. App. 179. Not only that, but "[a]ll attorneys who practice law in this jurisdiction must comply with [Louisiana's] Rules of Professional Conduct," and this requirement is reiterated in the Louisiana Public Defender Board Capital Defense Guidelines. *Id.* Lawyers serving as lead counsel in a capital case must follow "extensive certification procedures and requirements." Pet. App. 179 n.3. The opinion then goes on to cite no fewer than eight

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[3] Similarly, although Justice McCallum lamented that "the hard work and time expended by the jury has been wasted" in this case, Pet. App. 184, he expressed no concerns for any implications for the next case.

Louisiana Rules of Professional Conduct that might be implicated by any anticipated strategic use of the opinion by hypothetical future counsel. Pet. App. 180-81. Justice McCallum, in a separate concurrence, made clear that "if such conduct were to reoccur, it would be subject to disciplinary sanctions." Pet. App. 185. In other words, members of the Louisiana Supreme Court were careful to spell out that ample state-specific rules prevent any slippage from this case to the next. In so doing, the court below all but ensured this is a ruling for this case only.

Notwithstanding the words the court used and the explicit guardrails set out in the multiple concurrences, Petitioner moans that "literally every tactical decision a defense attorney can make may now require the consent of the client." Cert. Pet. 18. No. For one, at most, the opinion below merely required Mr. Brown's attorney to abide by his expressly stated limitation on one type of mitigation evidence; it did not require counsel to affirmatively seek Mr. Brown's consent. Moreover, capital punishment mitigating evidence is distinguishable from other trial management decisions, cabining the reach of the opinion.[4]

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[4] Mitigating evidence is uniquely personal, focused on the defendant's characteristics and life experiences. Such evidence may include sensitive information about the defendant's family members' mental illness, abuse, and trauma, and is inherently personal to both the defendant and his close family members. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 516 (2003) (mitigating evidence included "severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents"); *Eddings v. Oklahoma*, 455 U.S. 104, 107 (1982) (mitigating evidence included evidence of a "troubled youth," a mother who was "an alcoholic and possibly a prostitute," and a father who resorted to "physical punishment"); *Skipper v. South Carolina*, 476 U.S. 1, 2-3 (1986) (mitigating evidence included testimony

Nor did the court below impose any additional responsibilities on trial judges. *See, e.g.*, Cert. Pet. 18, 27, 42. Under *Faretta*, trial judges were already required to conduct a hearing to assess the legitimacy of a defendant's waiver of counsel. *See Faretta*, 422 U.S. at 835. Contrary to Petitioner's misconstruction, the decision below does not now require trial judges to engage in extensive education on "legal grounding in procedural rules" of defendants seeking to proceed pro se. Cert. Pet. 26. *Faretta* explicitly explains that trial judges have no such responsibility and the opinion below does not hold otherwise. *See Faretta*, 422 U.S. at 836 (confirming that defendant's "technical legal knowledge" was not relevant to their ability to engage in self-representation). Put another way, the opinion below did not take issue with the trial court's *Faretta process* and *procedure*—indeed, the Court explicitly did not reach Mr. Brown's challenges along these lines, Pet. App. 44 nn.19, 22—only the *conclusion* the court came to by applying the incorrect law. The opinion did not infringe on the trial court's wide discretion over how to conduct these hearings or mandate certain questions or instructions, but only emphasized that courts must correctly apply well-settled Louisiana law while doing so. In short, Petitioner's pearl-clutching notwithstanding, the decision below does not rework the attorney-client relationship or risk forcing trial courts to micromanage those relationships.

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from defendant's mother, sister, and grandmother on the "difficult circumstances of his upbringing").

Reversing the decision below, on the other hand, would impose weighty new obligations on defense counsel. The Louisiana Supreme Court held that its prior precedent allows defendants to limit the type of mitigation evidence they present, and to require the same of counsel. Pet. App. 35. In other words, counsel can defer to the instructions of their clients in such situations. But if that's not correct, and if counsel is *not* allowed to follow their clients' instructions on types of mitigation evidence, then that potentially blows the doors open to a wide range of ineffective assistance of counsel claims—claims virtually identical to the one this Court rejected in *Schriro v. Landrigan*, 550 U.S. 465 (2007). That can't be right.

C. This Would Be A Poor Vehicle To Revisit the Scope of *McCoy*.

Even if the "question presented" were really presented here, this would still be a poor vehicle for addressing the meaning of *McCoy*. That is because the concerns for defendant autonomy motivating *McCoy* might carry particular weight in the penalty phase given the deeply personal nature of the evidence likely to be presented at mitigation (as here), and the seriousness of the issue that this evidence ultimately bears upon. *See supra* 23 n.4; *see also* Richard J. Bonnie, *The Dignity of the Condemned*, 74 Va. L. Rev. 1363, 1391 (1988) (arguing that "the law's duty to respect individual dignity is heightened, not diminished" in the capital context). In short, the application of *McCoy* to the penalty phase may be penalty-phase specific.

And even were this Court seeking to clarify the application of *McCoy* to the penalty phase of a capital trial, this case presents a debilitatingly poor vehicle. Arguments about applying *McCoy* to the specific context of the capital penalty phase were

not briefed below, as all parties accepted without comment that the distinction between objectives and strategy applied to the penalty phase as well as the guilt phase. And most glaringly, as is described above, the decision below does not depend on *McCoy*, but on Louisiana precedent specific to the penalty phase.

III. The Decision Is Consistent With This Court's Precedent.

A. The Court Below Correctly Applied Louisiana Precedent To Conclude That Mr. Brown's Waiver Was Invalid Under *Faretta*.

To begin, the Louisiana Supreme Court correctly read its own precedent, and determined that, based on this reading, Mr. Brown's waiver was invalid under *Faretta*. Capital attorneys in Louisiana do not have a professional obligation to ignore their clients' wishes and present all available evidence at the penalty phase of a capital trial. Thus, the trial judge misstated the law when he informed Mr. Brown that his counsel had a "professional obligation" to provide the best defense, and thus was "required" to call Mr. Brown's mother and uncle to the stand at the penalty phase. Pet. App. 19, 41.

Petitioner contends that the principal cases cited by the court below, *Felde* and *Bordelon*, stand only for the proposition that an attorney *may* abide by conditions imposed by a client when the conditions conflict with the obligation to provide effective representation. Cert. Pet. 22. Even under the State's own reading, then, the trial judge's statement is *still* a mistake of law: if an attorney may properly acquiesce to such a demand, as the State does not contest, she clearly does not have a professional obligation to refuse it. This fact alone means that the dueling choices given to Mr.

Brown by his defense team and reiterated by the trial judge, "placed defendant into the untenable position of having to choose between relinquishing the critical decisions regarding the presentation of certain penalty phase mitigation evidence or entirely discharging his legal representation." Pet. App. 42. "Because the trial court erroneously informed defendant that he was not entitled to limit his counsel's presentation of mitigating evidence," when in fact he could, "defendant's waiver [was] unknowing and unintelligent." Pet. App. 41.

While the decision below does not rely on the premise that counsel must allow a defendant to control his penalty phase defense, and only that he may, the Louisiana Supreme Court has routinely given a broader reading to *Felde*, using it to stand for the proposition that a capital defendant has the right to instruct his appointed counsel not to present any mitigating evidence in the penalty phase. *See, e.g., Bordelon*, 33 So.3d at 864-65. And Petitioner did not challenge the Louisiana Supreme Court's long-held interpretation of *Felde* below, and does not meaningfully do so here.

B. The Decision Below Does Not Violate The Division Of Responsibilities Between Counsel And A Defendant.

To the extent the decision below turned on any extension of *McCoy*, *but see supra* 14-18, that aspect of the opinion was correct. *McCoy* is "broadly written and focuses on the defendant's autonomy." *Horn*, 251 So.3d at 1075. It is particularly concerned about the threat posed to autonomy when a defendant is forced to make a decision that may prompt a great deal of social opprobrium. *McCoy*, 138 S. Ct. at

1508. The decision below is consistent with these considerations and with the spirit of *McCoy*.

Moreover, the cases cited by Petitioner, Cert. Pet. 17-18, do not implicate similarly substantial threats to autonomy as are present in this case or as were present in *McCoy*. Ceding decisions to counsel regarding scheduling issues, *see New York v. Hill*, 528 U.S. 110, 115 (2000), accepting a magistrate judge at *voir dire*, *see Gonzalez v. United States*, 553 U.S. 242, 250 (2008), and presenting certain appellate arguments, *see Jones v. Barnes*, 463 U.S. 745, 754 (1983), do not threaten a client's autonomy to a similar degree. The questions involved in these cases simply do not carry the risk of social opprobrium present in this case.

Nor did the defendants in those cases claim to feel as strongly about these issues as Mr. Brown, shaping what could be considered their overall objective. In fact, in *Hill* and *Gonzalez*, the records suggest that the clients did not object at all to the decisions at the time they were made, and the question was whether counsel should be required to obtain express consent from their clients in regard to the decisions at issue. *See Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring) (deeming important "that [the Court was] not speaking here of action taken by counsel over his client's objection" which would revoke counsel's agency with regard to that action); *cf. McCoy*, 138 S. Ct. at 1510 (holding that an attorney cannot admit client's guilt "over the client's intransigent objection").

C. The Decision Below Properly Concluded That The Sixth Amendment Violation Constituted Structural Error.

The court below was correct in determining that Mr. Brown's unknowing and involuntary waiver of counsel for the penalty phase of his trial constituted structural error. This Court has held that the Sixth Amendment right to counsel guaranteed by *Gideon v. Wainwright*, 372 U.S. 335 (1963), extends to sentencing, *see Mempa v. Rhay*, 389 U.S. 128, 134 (1967), and that a violation of a defendant's right to counsel is always structural error, *see Arizona v. Fulminante*, 499 U.S. 279, 294 (1991). The Louisiana Supreme Court concluded that the trial court erred in instructing Mr. Brown as to his options and his lawyer's obligations in the penalty phase. That error necessarily violated Mr. Brown's Sixth Amendment right to counsel and, therefore, that violation constituted structural error.

Petitioner's arguments, waived below, are not appropriately considered here for the first time. At the appellate stage, Petitioner did not present or brief the novel argument it now makes to this Court: that denial of counsel at the sentencing phase of a capital trial need not be considered structural where the majority of the state's aggravating evidence was admitted when the defendant *did* have the assistance of counsel. Cert. Pet. 30. Rather, Petitioner actually *acknowledged* to the court below that Mr. Brown's claims implicated "two of the seven classes of structural error recognized" by this Court. State's Br. 7. As this Court typically does not review claims that are not raised below, it should not weigh in on Petitioner's structural error argument here. *See Clingman*, 544 U.S. at 598.

In addition to being waived, Petitioner's argument is entirely unsupported. *See* Cert. Pet. 30-31 (citing no case law in support of this contention). Contrary to Petitioner's assertions, the effect of Mr. Brown's deprivation of counsel is not susceptible to quantitative assessment in the context of the other evidence presented at trial. *See id.* at 31. The unconstitutional deprivation of counsel prevented Mr. Brown from presenting *any* mitigation evidence *at all*, Pet. App. 13, fundamentally altering the structure of the penalty phase of his trial and rendering it a wholly one-sided affair, *see e.g. United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (finding structural error where "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact" of those choices on the outcome). The very nature of the right to counsel denied to Mr. Brown is not susceptible to Petitioner's parsimonious analysis.

This Court should deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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