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September 11, 2017

Hon. Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543-0001

Re: Jeffrey Clark v. Louisiana
No: 16-9541

Dear Sir:

Enclosed please find the original and ten copies of the State's Brief in Opposition to the Petition for Writ of Certiorari in the above captioned case. Also enclosed, please find one (1) copy to be marked as filed and returned in the enclosed self addressed, stamped envelope.

Thanking you in advance for your usual courtesy, I remain

Very truly yours,

Juliet Clark,
Assistant District Attorney

C: w/ enclosure: G. Ben Cohen, Esq.

No. 16-9541

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

JEFFREY CLARK,

*Petitioner,*

v.

STATE OF LOUISIANA,

*Respondent,*

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

# BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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**CAPITAL CASE**

## QUESTIONS PRESENTED FOR REVIEW

1. Whether Louisiana's capital sentencing scheme comports with this Court's decision in *Ring v. Arizona,* 536 U.S. 584 (2002)? (Petitioner's first question presented, rephrased).

2. Whether the instant case implicates this Court's holding in *Tison* v. *Arizona,* 481 U.S. 137 (1987), and whether certiorari is warranted to reconsider that holding? (Petitioner's second question presented, rephrased.)

3. Certiorari should not be granted to review the Supreme Court of Louisiana's denial of Petitioner's claim of improper contact between a deputy and an alternate juror who did not deliberate.

4. Whether the Supreme Court of Louisiana's opinion in the instant case, holding that Clark voluntarily and intelligently waived his right to counsel and exercised his right of self-representation, comports with this Court's 6th Amendment jurisprudence? (Petitioner's fourth question presented, rephrased).

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## OPINION BELOW

The December 19, 2016 decision of the Supreme Court of Louisiana is reported at 220 So. 3d 583 (La. 12/19/16). Pet. App. 1a-151a.

## JURISDICTION

The judgment of the Louisiana Supreme Court was entered on December 19, 2016. That court denied petitioner's timely petition for rehearing on March 13, 2017. This Court has jurisdiction under 28 U.S.C.§ 1257(a).

## STATEMENT OF THE PROCEEDINGS BELOW[1]

On March 15, 2004, a West Feliciana Parish grand jury returned an indictment charging Jeffrey Clark,[2] David Brown, Robert Carley, Barry Edge, and David Mathis with the first degree murder of Captain David Knapps (in violation of LSA-R.S. 14:30),who was beaten stabbed, and bludgeoned to death in the officers' restroom of Louisiana State Penitentiary's Camp "D" education building.

On December 10, 2009, a change of venue was granted for purposes of jury selection, only. On February 5, 2010, the defendant and his co-defendants were severed for trial, and an amended indictment was filed as to Clark.

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[1] For a detailed statement recounting the testimony and evidence offered in the guilt and penalty phases of the trial, the respondent refers this Court to the Supreme Court of Louisiana's opinion affirming the defendant's conviction on direct appeal, which is adopted, for purposes of the instant brief, and incorporated by reference. Pet. App. 5a-41a.

[2] Unless otherwise noted, references to "Clark" are to the petitioner, Jeffrey Clark.

The first trial in this matter commenced in July of 2010, but a mistrial was declared during opening statements.

On April 14, 2011, the Clerk of Court received and stamped as filed Clark's pro se *Motion for Self Representation* and the accompanying letter dated April 9, 2011. Pursuant to this motion, on April 27, 2011, the trial court conducted extensive colloquies with the defendant and appointed counsel pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), before granting Clark's request to represent himself in certain aspects of his trial while maintaining the assistance of his appointed attorneys with respect to others.

Clark was thereafter tried in May of 2011. With assistance from his appointed attorneys, Clark gave the opening and closing statements and questioned numerous fact witnesses during the guilt phase of his trial. Under Clark's direction as lead counsel,[3] his appointed attorneys conducted the penalty phase qualification and general *voir dire* and questioned all of the expert witnesses during the guilt phase. On May 15, 2011, the jury unanimously returned a verdict of guilty as charged of first degree murder.

On May 16, 2011, the penalty phase of the trial was held, and the jury returned a verdict of death.[4] The jury found as aggravating circumstances that 1) the defendant

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[3] The trial court conducted additional discussions with Clark and appointed counsel attorneys on April 28, 2011, during which Clark maintained that he still wanted to represent himself unequivocally.." Supplemental Record Vol. 1 of 1, filed January 29, 2015.

[4] Clark waived his right to self-representation during the penalty phase.

was engaged in the perpetration or attempted perpetration of the aggravated kidnaping of Lt. Douglas Chaney and Sgt. Reddia Walker; 2) the defendant was engaged in the perpetration or attempted perpetration of an aggravated escape; 3) the victim, Captain Knapps, was a peace officer engaged in the lawful performance of his duties at the time of the murder; 4) the defendant was previously convicted of an unrelated murder;[5] and 5) the defendant knowingly created a risk of death or great bodily harm to more than one person.

Pursuant to the jury's determination, the trial court sentenced Clark to death on May 23, 2011, after first denying his motions for new trial and post verdict judgment of acquittal. Clark filed a motion for reconsideration of sentence (claiming that the trial court had discretion to set aside the jury's death sentence and that the death sentence was unconstitutional based on evolving standards of decency), which was denied on August 12, 2011. Clark's motion for appeal was subsequently granted by the trial court.

On April 12, 2012, Clark filed a motion for new trial. Following the Supreme Court of Louisiana's remand, a closed and limited evidentiary hearing was held on October 23, 2012 and August 6, 2013. At the conclusion of the hearing, the trial judge

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[5] Clark was previously convicted of the 1984 first degree murder of Andrew Cheswick, an offense for which a sentence of death was imposed, but set aside by the Supreme Court of Louisiana, which found on direct appeal that the State's discussion of appellate review during the penalty phase opening statements "so denigrated the responsibility of the jury as to deprive the defendant of a fair determination of sentence." In that case, Clark was subsequently re-sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

determined that there was an insufficient basis for requiring testimony from the actual jurors who deliberated and denied the motion for new trial and *Supplemental and Supporting Grounds for New Trial Based Upon Additional Information Concerning Deputies and Jurors.*

The Supreme Court of Louisiana entered a judgment affirming Clark's conviction and sentence on December 19, 2016, and denied petitioner's timely petition for rehearing on March 13, 2017.

## ARGUMENTS FOR DENYING THE PETITION

### I. Louisiana's capital sentencing scheme comports with the Sixth Amendment in light of *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court's holding in *Hurst v. Florida*, 136 S.Ct. 616 (2016) does not require a jury reaching its ultimate sentencing determination in the "selection phase"[6] of a capital sentencing proceeding to determine that "death is an appropriate punishment" *beyond a reasonable doubt.* In so contending, Petitioner misinterprets this Court's

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[6] Of significance, this Court noted in *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998):

> . . . our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. *Tuliaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Ibid.* In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.*, at 972, 114 S.Ct., at 2634-2635.

*See also*, *Kansas v. Carr*, 136 S.Ct. 633 (2016); *Jones v. U.S.*, 527 U.S. 373 (1999).

holding in *Hurst* and incorrectly describes the Louisiana capital sentencing scheme at issue.

### A. A review of this Court's holdings in *Apprendi v. New Jersey, Ring v. Arizona,* and *Hurst v. Florida,* demonstrates that Petitioner's reliance on *Hurst* is misplaced.

A brief review of this Court's jurisprudence, beginning with this Court's decision in *Jones vv. United States,* 526 U.S. 227 (1999), demonstrates that Clark's reliance on *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Ring,* and *Hurst* is misplaced.

In *Jones,* this Court held that, that with regard to federal prosecutions, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment,[7] submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 1219-1228.

The following year, this Court decided *Apprendi.*[8] In reversing this case involving a state statute and implicating the Due Process Clause of the Fourteenth Amendment, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

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[7] Of note, it has long been recognized that the Fifth Amendment's grand jury requirement is not binding on the states. *Hurtado v. California,* 110 U.S. 516 (1884).

[8] The petitioner, Charles C. Apprendi, shot into the home of an African-American family and subsequently made a statement indicating that the crime was racially motivated. As a result, he was charged and later convicted under New Jersey law with second degree possession of a firearm for an unlawful purpose. Thereafter, the prosecutor filed a motion to enhance the petitioner's sentence. The trial court then found by a preponderance of the evidence that the crime was racially motivated and proceeded to sentence the petitioner to an enhanced penalty.

be submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 474-497.

In *Ring*, this Court reconsidered the constitutionality of Arizona's capital sentencing scheme, previously found to be constitutional in *Walton v. Arizona,* 497 U.S. 639 (1990), in light of the *Apprendi* decision. Under Arizona law, "[b]ased solely on the jury's verdict finding Ring guilty of first-degree murder, the maximum punishment Ring could receive was life imprisonment" unless at least one aggravating factor was found to exist beyond a reasonable doubt. *Ring, supra,* at 597. As such, the question presented in *Ring* was whether, in light of the *Apprendi* decision, that aggravating factor may be found by the judge. *Id.* Finding *Walton* and *Apprendi* to be irreconcilable, this Court explicitly overruled its prior decision in *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty, holding that:

> Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi,* 530 U.S. at 494 n. 19, 120 2348, the Sixth Amendment requires that they be found by a jury.

*Id.* at 609.

Recently, in *Hurst*, this Court held that Florida's capital sentencing scheme[9]

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[9] This Court described Florida's capital sentencing scheme at issue in *Hurst* as follows:

> The additional sentencing proceeding Florida employs is a "hybrid" proceeding "in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Ring v. Arizona,* 536 U.S. 584, 608, n. 6, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. § 921.141(1) (2010). Next, the jury renders an "advisory sentence" of life

violates the Sixth Amendment in light of *Ring*, expressly overruling its pre-*Apprendi* decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S.Ct., at 624.

Significantly, *Hurst,* represents an application of, and not an expansion of *Apprendi* and *Ring*. Like *Ring*, *Hurst* focuses on the jury's factual finding of an aggravating circumstance to make a defendant death eligible. It does not address the ultimate sentencing determination in the "selection" phase of the capital sentencing proceeding. As such, Petitioner's reliance on *Hurst* is misplaced.

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> or death without specifying the factual basis of its recommendation. § 921.141(2). "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." § 921.141(3). If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." Ibid. Although the judge must give the jury recommendation "great weight," *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) (per curiam ), the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors," *Blackwelder v. State*, 851 So.2d 650, 653 (Fla.2003) (per curiam ).

*Hurst*, *supra,* at 620.

### B. Louisiana's capital sentencing scheme comports with this Court's holdings in *Apprendi* and *Ring* by requiring that a jury find the existence of an aggravating circumstance beyond a reasonable doubt during the "eligibility" phase of the capital sentencing scheme.

Louisiana has established five degrees of homicide: first-degree murder, second-degree murder, manslaughter, negligent homicide and vehicular homicide. LSA-R.S. 14:29. Second-degree murder includes intentional murder and felony murder, and provides for punishment of life imprisonment without the possibility of parole. LSA-R.S. 14:30.1. First degree murder is defined to include a narrower class of homicides as set forth in numbered subparagraphs of LSA-R.S. 14:30.

If the district attorney seeks a capital verdict, an individual found guilty of first-degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the same jury in a separate proceeding. § 14:30 C(1). Louisiana Code of Criminal Procedure Article 905.3 provides in pertinent part that:

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

Louisiana Code of Criminal Procedure Article 905.6, provides in pertinent part that "[a] sentence of death shall be imposed only upon a unanimous determination of the jury."

Clark mistakenly reads *Hurst* to require that a Louisiana jury's ultimate

sentencing determination must be not only unanimous, but made beyond a reasonable doubt, basing his conclusion, in part, on the inclusion of the words "jury findings" in the heading of LSA-C.Cr.P. art. 905.3. However, the headings of the articles of Louisiana's Code of Criminal Procedure do not constitute parts of the law ( See, LSA-C.Cr.P. art. 10) and, contrary to Petitioner's assertions, LSA-C.Cr.P. art. 905.3 does not provide "as an essential element, a precondition necessary for a death sentence, the finding that death is an **appropriate** punishment." Although the jury must consider mitigating circumstances before determining the sentence of death should be imposed, it is the unanimous finding, beyond a reasonable doubt of an aggravating circumstance that renders the defendant eligible for the death sentence.

As such, the Louisiana Supreme Court correctly found that Louisiana's capital sentencing scheme comports with *Apprendi* and *Ring* because it requires a jury to find beyond a reasonable doubt the existence of at least one aggravating circumstance necessary for imposition of the death penalty:

> *Ring* requires only that jurors find beyond a reasonable doubt all of the predicate facts that render a defendant eligible for the death sentence, after consideration of the mitigating evidence. *Id.*, 536 U.S. at 609, 122 S.Ct. At 2443. Neither *Ring*, nor Louisiana jurisprudence requires jurors to reach their ultimate sentencing determination beyond a reasonable doubt. *State v. Koon*, 96-1208, p. 27 (La. 5/20/97), 704 So.2d 756, 772-773 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard.").

Pet App. 141a (Citation omitted). As such, the respondent submits that certiorari should be denied.

## II. Certiorari is not warranted to reconsider this Court's holding in Tison v. Arizona.

Petitioner asks this Court to reconsider its holding in *Tison v. Arizona*, 481 U.S. 137 (1987) that "major participation in the felony committed, combined with reckless disregard for human life, is sufficient to satisfy the . . . culpability requirement" in *Enmund v. Florida*, 458 U.S. 782 (1982). The respondent submits that such reconsideration is not warranted in the instant case.

### A. Louisiana does not authorize the death penalty under circumstances in which capital punishment was held to be disproportional in *Enmund*, and Louisiana Revised Statute 14:30A(1) and (2) require more than the "major participation in the felony committed, combined with reckless disregard for human life" found sufficient in *Tison*.

In *Enmund*, this Court found the death penalty to be a disproportionate sentence for a robber convicted of murder under Florida's felony- murder rule.[10] This Court stated: "We have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime 'so grievous an affront to humanity that the only adequate response may be the penalty of death.' *Enmund*, 458 U.S. at 797 (citing

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[10] This Court noted that, in assessing the degree of Enmund's guilt, the Florida Supreme Court found:

> [T]he only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money.

*Enmund*, 458 U.S., at 786 (quoting *Enmund v. State*, 399 So. 2d 1362, 1370 (Fla. 1981)).

*Gregg v. Georgia,* 428 U.S. 153, 184 (1976)(footnote omitted)). Focusing on Enmund's own conduct and culpability, this Court concluded that the Eighth Amendment did not permit the imposition of the death penalty "on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*

As this Court recognized in *Tison v. Arizona,* its decision in *Enmund*:

> . . . explicitly dealt with two distinct subsets of all felony murders when addressing whether Enmund's sentence was disproportional under the Eighth Amendment. At one pole was Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state. Only a small minority of States even authorized the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime. The Court held that capital punishment was disproportional in these cases. *Enmund* also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to kill, or intended to kill. The Court clearly held that the equally small minority of jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted.

*Tison v. Arizona*, 481 U.S. 137, 149 (1987).

Significantly, Louisiana was deemed by this Court in *Enmund* to fall within a category of "eleven states requir[ing] some culpable mental state with respect to the homicide as a prerequisite to conviction of a crime for which the death penalty is authorized[,]" and in which "actors in a felony murder are not subject to the death penalty without proof of their mental state, proof which was not required with respect to Enmund. . . " *Enmund*, 458 U.S., at 789-790, and fn. 7. Louisiana was also deemed

to fall within the smaller subcategory of eight of these eleven states which made "knowing, intentional, purposeful, or premeditated killing an element of capital murder." *Id.* As such, Louisiana fell within the jurisdictions in which the death penalty continued to be authorized, on the opposite pole from *Enmund.* Subsequently, in *Tison,* this Court addressed a situation that fell "into neither of these neat categories, " because Arizona fell within an additional, intermediate category of nine states that "required a finding of some aggravating factor beyond the fact that the killing had occurred during the course of a felony before a capital sentence might be imposed[,]" and "into a sub-category of six States which made 'minimal participation in a capital felony committed by another person a [statutory] mitigating circumstance.'" *Tison*, 481 U.S., at 147 (quoting *Enmund*, 458 U.S., at 792), and 150.

Of note, the Tison brothers were convicted of the capital murders of four victims, which "charges were based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnaping is a capital murder" and "that each participant in the kidnaping or robbery is legally responsible for the acts of his accomplices." *Tison*, 481 U.S., at 141-142. The trial judge found, in this pre-*Ring* case, the following aggravating factors that were subsequently upheld by the Arizona Supreme Court on Appeal: (1) the murders had been committed for pecuniary gain; and (2) the murders were especially heinous. *Tison*, 481 U.S., at 142. The trial court found three non-statutory mitigating facts, no statutory mitigating factors, and specifically found that the "participation of each [petitioner] in the crimes giving rise to the

application of the felony murder rule in this case was very substantial," and that each "could reasonably have foreseen that his conduct . . . would cause or create a grave risk of . . .death." *Id.*

Noting that the facts indicate "that the Tison brothers' participation in the crime was anything but minor," and the facts also would "clearly support a finding they both subjectively appreciated that their acts were likely to result in the taking of innocent life" this Court identified the issue raised by the case as one not specifically addressed by *Enmund*: "whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life[,]" . . . a point which *Endmund* "does not specifically address." *Tison*, 481 U.S., at 152. This Court held:

> [T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

*Id.* at 157-158. Therefore, "major participation in the felony committed, combined with reckless disregard for human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158.

In reaching its holding in *Tison*, this Court again reviewed the statutes of the various states, and counted Louisiana as one of "only 11 states authorizing capital punishment [that] forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and likelihood of killing is so substantial

as to raise an inference of extreme recklessness." *Id.* at 154. In other words, in *Tison*, this Court found that the death penalty was not excessive under circumstances in which Louisiana law would **not** have permitted it to be imposed.[11]

As such, and based upon a review of this Court's decisions in *Enmund* and *Tison*, the respondent submits that certiorari should be denied on this issue as:

1) Louisiana was not one of the States which authorized the death penalty under circumstances in which capital punishment was held to be disproportional in *Enmund;* and 2) in order to impose the death penalty, Louisiana requires more than the "major participation in the felony committed, combined with reckless disregard for human life" found sufficient by this Court in *Tison*.

### B. The Supreme Court of Louisiana found the evidence in the instant case to be constitutionally sufficient to establish that Clark had the specific intent to kill Capt. Knapps, distinguishing this case from *Tison* and rendering its reconsideration unnecessary.

Additionally, this case is easily distinguished from *Enmund* and *Tison*, by: 1) the Supreme Court of Louisiana's determination that the evidence in the instant case was constitutionally sufficient to establish, beyond a reasonable doubt, that Clark had the specific intent to kill Captain Knapps; and 2) evidence of his direct, active, and major

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[11] At all times relevant to the instant case, and on dates of this Court's decision in *Tison* and *Enmund*, LSA-R.S. 14:30 A(1) defined first degree murder in pertinent part as "the killing of a human being: (1) **when the offender has specific intent to kill or to inflict great bodily harm** and is engaged in the perpetration or attempted perpetration of . . . aggravated kidnapping, [and] aggravated escape [.]" (Emphasis added).

participation in the actual killing of Capt. Knapps.

On direct appeal, the Petitioner challenged the sufficiency of the evidence of intent to kill or to inflict great bodily harm as required by LSA-R.S. 14:30(A)(1) and (2). Pursuant to the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 316-319 (1979). The Supreme Court of Louisiana concluded that "the totality of the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince beyond a reasonable doubt the jury, who obviously resolved credibility issues against the defendant, **that the defendant had formed the specific intent to take the life of Capt. Knapps**. Pet. App. p. 46a.

Significantly, the Supreme Court of Louisiana rejected petitioner's argument that "the State's evidence was insufficient because 'not one witness saw him attacking Capt. Knapps' or 'saw a weapon in [his] hands at any time,'" and his claim that "so much blood was spilled and spread to so many places by so many people that making a reliable determination as to how the blood got where it got is beyond the capacity of any rational juror." Pet. App., pp. 43a-44a. The Supreme Court of Louisiana stated:

> As an initial matter, the defendant's arguments ignore: the testimony of inmate Shockley (to whom the defendant admitted to participating in the attack and hitting Capt. Knapps in the head with the mallet); the testimony of inmate Taylor (who saw the defendant in the hallway with what appeared to be blood on his grey sweatshirt, pants, and hands and holding what appeared to be a weapon in his hands); and the testimony of Col. Scanlan (whose testimony revealed the defendant's active and dynamic participation in the crime, based on the defendant's transfer lift shoeprints found in th in the officer's restroom, where Capt. Knapps lost substantial amounts of blood, as well as on the blood spatter pattern on the grey sweatshirt linked to the defendant, as the habitual wearer).
>
> . . .

In addition, despite the defendant's efforts to provide alternative explanations for the evidence tying him to Capt. Knapps' murder and to participation in the attempted aggravated escape and aggravated kidnappings, no reasonable hypothesis of innocence was presented in this case. With respect to specific intent alone, the defendant admitted from the beginning that the escape plan included armed and physically-imposing inmates targeting specific correctional officers to achieve the planned escape. On implementation, when the plan failed to be successful, the defendant and the other involved inmates clearly abandoned whatever notions they may have had about executing he escape plan without injuring or killing the hostages. Viewed in a light most favorable to the prosecution, the physical evidence showed, *inter alia*, that: (1) Capt. Knapps' blood was on every outer layer of clothing tied to the defendant, on layers of clothing underneath as saturation stains, and on the defendant's hands and shoes; and (2) the defendant was present in the officers' restroom when Capt. Knapps had suffered at least great bodily harm, if not the fatal blows to his head, as evidenced by the defendant's bloody lift transfer shoeprints. This evidence combined with the defendant's post-murder behavior, in continuing to direct the evolving plan and negotiations with Angola personnel, which included observing without the slightest objection his accomplices' repeated threats to Sgt. Walker with the bloody ice pick-like shank, provided ample support that a rational jury could have found that the defendant possessed the requisite intent to kill or to inflict great bodily harm beyond a reasonable doubt. In addition, despite the defendant's periodic claim that the uninvolved inmates never intended to hurt anyone, he admitted in his letter to Warden Vannoy that the involved inmates discussed killing Lt. Ross as part of the planned escape and, in fact, killed Capt. Knapps because they could not locate Lt. Ross (and Capt. Knapps refused to tell them where Lt. Ross was), apparently thinking that killin a state prison guard would somehow facilitate their escape.

The jurors could reasonably have considered this addition evidence of the defendant's intent to kill or inflict great bodily harm. Moreover, the jury may have found credible the testimony of inmate Shockley, regarding the jailhouse confession made by the defendant in which he stated that he was the one who hit Capt. Knapps in the head with the mallet in the restroom (in effect inflicting the fatal blows), while Durham stabbed Capt. Knapps in the chest. [fn. 50]

> Fn. 50. As indicated hereinafter, the autopsy revealed that the involved inmates inflicted numerous potentially fatal wounds to Capt. Kapps. In addition to the fatal mallet

> blows to his head, Capt. Knapps was also stabbed in the head, chest, and spleen, as well [as] cut on the throat, narrowly missing his carotid artery and jugular vein.
>
> Thus, direct and circumstantial evidence linked the defendant to the first degree murder of Capt. Knapps, and the **totality of the evidence, viewed in the light most favorable to the prosecution, was suficient to convince beyond a reasonable doubt the jury, who obviously resolved issues of credibility against the defendant, that the defenant had formed the requisite specific intent to take the life of Capt. Knapps**. This assignment of error is without merit.

Pet. App., pp. 43-46.

The Supreme Court of Louisiana also rejected Petitioner's claim that allegedly "minor participation" in Capt. Knapps' murder renders imposition of the death penalty against him unconstitutional:

> The physical evidence of the defendant's active and direct participation in the crime (e.g. blood spatter on his sweatshirt and other clothing as well as his blood soaked pants, and bloodstained jacket, shoes, and hands), dynamic presence at the murder scene (e.g., blood transfer shoe prints in the restroom), detailed knowledge regarding what took place in that restroom (e.g. defendant's account set forth in the October 17, 2001 letter to Warden Vannoy), and jailhouse confession to participating in the attack and bludgeoning of Capt. Knapps in the head with one of the mallets, *inter alia*, provide substantial support that his participation was in fact major. In addition, even under one of the defendant's many versions, his behavior throughout the ordeal more than adequately reflects reckless indifference.

Pet. App., p. 46a-48a. And in conducting its independent proportionality review pursuant to LSA-C.Cr.P. art. 905.9 and La. S.Ct. Rule XXVIII, § 1, the Louisiana Supreme Court further cited "the physical evidence and expert testimony regarding the defendant's direct role in Capt. Knapps's death. Pet. App., pp. 149a-150a.

In light of the sufficiency of the evidence establishing Clark's specific intent to

kill and the evidence of his "active," "direct," and "major" participation in the killing of Capt. Knapps, the State submits that the constitutionality of the death penalty in the instant case is not dependent on *Tison's* holding that "major participation in the felony committed, combined with reckless disregard for human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158. As such, the respondent submits that reconsideration of this Court's holding in *Tison* is not warranted, and that certiorari should be denied.

## III. Certiorari is not warranted to review the denial of the motion for new trial, after an evidentiary hearing, based upon the allegation of improper contact between a Deputy and an alternate juror.

In *Smith v. Phillips*, 455 U.S. 209 (1982), this Court stated that it had "long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity *to prove actual bias*." (Emphasis added).

As an example, the Court in *Smith v. Phillips* cited its decision in *Remmer v. United States,* 347 U.S. 227 (1954):

> In *Remmer*. . . a juror in a federal criminal trial was approached by someone offering money in exchange for a favorable verdict. An FBI agent was assigned to investigate the attempted bribe, and the agent's report was reviewed by the trial judge and the prosecutor with disclosure to defense counsel. When they learned of the incident after trial, the defense attorneys moved that the verdict be vacated, alleging that "they would have moved for a mistrial and requested that the juror in question be replaced by an alternate juror" had the incident been disclosed to them during trial. *Id.* at 229.
>
> This Court recognized the seriousness not only of the attempted bribe, which it characterized as "presumptively prejudicial," but also of the undisclosed investigation, which was "bound to impress the juror and [was] very apt to do so unduly." *Ibid.* Despite this recognition, and a conviction that "[t]he integrity of jury proceedings must not be

> jeopardized by unauthorized invasions," *ibid*, the Court did nto require a new trial like that ordered in this case. Rather, the Court instructed the trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a hearing with all interested parties permitted to participate." *Id.*, at 230, 74 S.Ct., at 451 (emphasis added.). In other words, the Court ordered precisely the remedy which was accorded by Justice Birns in this case.

*Smith v. Phillips*, 455 U.S., at 215-216.

During the sequestration of the capital jurors in West Feliciana Parish,[12] a situation arose in which Alternate A.A.'s then-boyfriend M.M. began threatening to harm himself if A.A. did not return home right away, and eventually threatened to remove A.A. physically from West Feliciana Parish. Pet. App., p. 115-116, 120-121. Deputy Naquin was one of the deputies supervising the jurors and alternate jurors.

In March of 2012, approximately ten months after the trial in this matter, the State learned of, and subsequently disclosed to the defense, the existence of the St. Tammany Parish Sheriff's Office's internal investigation concerning a complaint against Deputy Chris Naquin, a St. Tammany Parish Sheriff's Deputy who participated in the security detail for the sequestered jurors during the Clark trial. The complaint was initiated on or about March 7, 2012, by M. M. the husband of

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[12] On December 10, 2009, a change of venue was granted for purposes of jury selection, only. Thereafter, pursuant to the provisions of LSA-C.Cr.P. art. 623.1, in May of 2011, twelve jurors and four alternate jurors were selected from a venire drawn in St. Tammany Parish and transferred to the 20th Judicial District Court in West Feliciana Parish, where the case was pending. During the guilt and penalty phases of the trial, the jurors and alternates were sequestered under the supervision of deputies of the St. Tammany Parish Sheriff's Office, instead of the West Feliciana Parish Sheriff's Office (which had participated in the investigation of the killing of Capt. Knapps).

Alternate A. A. The complaint by M.M. concerned an extra-marital relationship between his wife and Deputy Naquin. Deputy Naquin, M.M., and Alternate A.A. were interviewed in connection with this matter by the St. Tammany Parish Sheriff's Office. The investigation by the St. Tammany Parish Sheriff's Office determined that the relationship between Deputy Naquin and Alternate A.A. did not become intimate until after the end of the defendant's trial.[13] Pet. App. p. 117a.

As noted by the Supreme Court of Louisiana on direct appeal:

> During his interview, Deputy Naquin informed the internal investigator that: the affair did not begin until after trial; his contact with Ms. A.A. during sequestration included discussions regarding Mr. M.M.'s threatening behavior and general conversations to "keep Ms. A.A. focused on the trial"; and the affair ended in January 2012. Deputy Naquin's written statement included his recollections that: the trial was in February 2011 (though it was actually in May 2011); he and his partner during sequestration duty, Deputy Ryan Terrebonne, spoke with Ms. A.A. about the threats and whether she was "still able to focus on the trial"; and they "would always talk in a group or w[h]ere others could see everything, along with see everything." Deputy Naquin also included information about a situation during the defendant's trial, which occurred in a restaurant parking lot, during which Ms. A.A. appeared "upset" and had to be "calmed down" because she could not reach Mr. M.M. Deputy Naquin also admitted that: all the jurors exchanged contact information on the last day of the trial with the deputies; juror C.D. and alternate juror J.D. contacted him about a month after the trial ended; and Ms. A.A. reached out to him to discuss the situation with Mr. M.M. at an unspecified point post-trial. Deputy Naquin claimed that he and Ms. A.A. became intimate about three or four months post-trial and that the affair lasted for "about a year or so before [their] spouses found out." Deputy Naquin also stated that the relationship was, and remained intimate in October 2011 when Ms. A.A. married Mr. M.M.

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[13] According to Deputy Naquin, jurors shared their contact information on the last day of trial and requested the deputies' contact information, "so they can contact us if they have any issues with attorneys trying to contact them[.]" Alternate A.A. testified that she contacted Deputy Naquin by text message after trial to thank him

> During her interview, Ms. A.A. informed the investigator that she contacted Deputy Naquin immediately after the trial ended, and their friendship became intimate in late July or early August 2011. In her written statement, Ms. A.A. indicated that: she spoke with only Deputy Naquin, during the trial, about he concerns regarding Mr. M.M.; and "[h]e asked me what I thought of the trial to get my mind off of [M.M.]" Ms. A.A. confirmed that she initiated post-trial contact with Deputy Naquin, and she "started talking to him on the way home from the trial in May." Ms. A.A. stated that she knew they were more than friends toward the end of June 2011, and the relationship did not end until March 2012.

Pet. App., pp. 117-118.

On April 5, 2012, the defendant filed a motion for new trial predicated upon the disclosure of this information. Thereafter, the defendant filed an *Unopposed Motion for Remand to Address Motion for New Trial.*[14] Following remand by the Supreme Court of Louisiana, the trial court held a closed and limited evidentiary hearing on October 23, 2012 and August 6, 2013.[15] A number of witnesses testified at these hearing.. Pet. App., pp. 115-129. However, the most relevant testimony was that of Deputy Naquin and Alternate A.A.

Deputy Naquin testified that when he arrived in St. Francisville, he was briefed by the deputies who were there before him that there was an "issue with a boyfriend/fiancé person of one of the jurors" and he was informed that this person " was threatening to come up there and remove the juror, which that was not going to

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[14] The State did not oppose a limited hearing to address the matters raised by the documents pertaining to the investigation that were received from the St. Tammany Sheriff's Office and disclosed to the defense, but reserved the right to object to the scope of the evidentiary hearing and the manner in which it was conducted.

[15] In between these dates, the defense filed a motion to recuse the trial court, which was heard by another judge and denied. Pet. App., pp. 119a-120a.

happen[.]" Record at 1369-1370. When Deputy Naquin's attention was directed by defense counsel to an "incident in the parking lot with [A.A.]," he testified that:

> The best recollection I can have of that would be they started talking, a couple of jurors, she broke down. We tried to consult [sic] her, me and Deputy Terrebonne, and that was it. We talked to her. We got her to calm down. We got her more focused on what was going on. We just tried to get her - - take her mind away from what she was dealing with.

*Id.* at 1373.

Naquin testified that he did not know which jurors might have been present, along with Deputy Terrebonne and himself, at that time. *Id.* Naquin testifed that he did not discuss the trial with Alaniz during the parking lot "incident" and did not recall any other incident during the trial where he spoke with her regarding M.M. *Id.* at 1393-1395. Naquin's testimony appears to indicate that there was a phone call between M.M. and A.A. when they all returned to the hotel after the parking lot "incident," but that he was not the person monitoring the call so he did not hear the conversation. *Id.* at 1375. He believed Deputy Terrebonne was monitoring that call. *Id.* Deputy Naquin testified that he believed that he was the person who brought the situation [concerning the phone call] to the Court's attention on the following morning. *Id.*, at 1375-1376. Deputy Naquin testified that his relationship with A.A.began after the trial. *Id.* at 1379-1380. It began with friendly conversation and progressed. *Id.* Regarding phone numbers, Deputy Naquin testified:

> I believe the last day of the trial, all jurors shared their own information. They wanted our information so they can contact us if they have any issues with attorneys trying to contact them, so they can get our advice on it so that was the only reason the information was shared.

*Id.* at 1380. Deputy Naquin indicated that he did not know whether the jurors also collected the information to follow up with each other socially. *Id.* at 1381. Deputy Naquin testified that sometime after the trial, he, his wife, and his children had dinner with Deputy Terrebonne, Alternate J.D.[16], and Alternate A.A. and her fiancé. *Id.* at 1389-1390.

Alternate A.A. testified that when she arrived in St. Francisville for the trial, her phone was taken away. *Id.* at 1406. Her fiancé, M.M. was uncomfortable with her going to St. Francisville *Id.* She testified that M.M. was going through some medical problems, but that she knew he would be fine and did not speak with the other jurors regarding what his medical condition was. *Id.* at 1406. She did express concerns about him to some of the other jurors after several nights in St. Francisville. *Id.* at 1407. She testified that M.M. wanted her to come home, that he was worried about her because they had never been separated for a long period of time, and that he wanted to come get her. *Id.* She testified that she did speak to Deputy Naquin regarding M.M.'s health problem and why she did not understand the way he was acting. *Id.* at 1410. After they spoke about M.M., Deputy Naquin asked her "how it was going," and she just said it was going okay. *Id.* at 1420. She thought he was trying to redirect her focus from the situation with M.M. *Id.* She testified that Deputy Naquin did not tell her anything about the trial. *Id.* She believed that this occurred on one of the last nights they were in St. Francisville, outside of the restaurant at the location where the jury

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[16] A post-trial relationship also commenced between Alternate J.D. and Deputy Terrebone. Pet. App., p. 121a.

was staying, and she did not recall there being other persons around during that conversation. *Id* at 1411-1412, 1420. On other occasions that she spoke with Deputy Naquin, other jurors were present. *Id.* at 1416. Alternate A.A. testified that she sent Naquin a text after the trial to thank him for helping her through the situation with M.M. *Id.* at 1415-1416. He responded, and within a month or two, an intimate relationship ensued. *Id.*

Based on the foregoing, the Supreme Court of Louisiana correctly upheld the trial courts denial of Petitioner's motion for new trial on these grounds. As noted, "nothing in the record reflects that Deputy Naquin expressed *his own thoughts* about the proceedings or in any way attempted to influence Ms. A.A.'s opinion." Pet. App., p. 128a. A.A. was never called upon to act as a juror therefore "any of the emotional difficulties that she experienced during the trial did not directly affect the decision-making process of the jury." *Id.*

Additionally, as the Supreme Court of Louisiana found:

> A reading of the testimony taken in this case makes it clear that the communications between Ms. A.A. and Deputy Naquin during the defendant's trial were limited to causal comments meant to distract Ms. A.A. from her problems with her boyfriend M.M. and could not be considered "tampering with a juror about the matter pending before the jury," pursuant to *State v. Marchand, supa.* Further, this conduct did not constitute "extrinsic influence or relationships [that] have tainted the deliberations," as stated in *State v. Ingram.* Moreover, because we conclude that there was no "outside influence . . . brought to bear upon any juror" in this case, nor was there any "extraneous prejudicial information . . . improperly brought to the jury's attention," the LSA-C.E. art. 606 exception to the bar on juror testimony are not applicable in this case; therefore, the trial court did not err in limiting testimony at the hearing on the motion for new trial. Consequently, we find no error in the trial court's denial of a new trial based on these incidents, and we find

no merit in the defendant's twenty-first, twenty second, or twenty-fifth assignments of error.

Pet. App., p. 129a (footnotes omitted).

Based on the foregoing, the respondent submits that certiorari is not warranted on this issue.

## IV. The Supreme Court of Louisiana's opinion, holding that Clark voluntarily and intelligently waived his right to counsel and exercised his right of self-representation, comports with this Court's 6th Amendment jurisprudence.

### A. Clark's Motion for "Self Representation"

On April 14, 2011, approximately two weeks before jury selection was due to commence in Clark's second trial, the Clerk of Court received and stamped as filed Clark's *pro se Motion for Self Representation* and accompanying letter to the Clerk of Court dated April 9, 2011.[17]

On April 27, 2011, in order to establish a valid waiver of the right to counsel pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) the trial court conducted extensive colloquies with the defendant regarding:

> . . . After a sealed continuation of the colloquy that took place in chambers with the trial court, appointed counsel, and Clark present, the trial court proceeded with colloquy in open court, at which point, Clark

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[17] This was not Clark's first motion seeking to represent himself in this matter. As noted by the Louisiana Supreme Court, "in March of 2008, the defendant sought to withdraw from his previously granted hybrid representation with appointed attorneys D'Amico and Lotwick, stating that he was satisfied with the job they were doing and finding them ' very competent.'" Then, on April 16, 2010, Petitioner filed a *Motion for Self-Representation*, which he withdrew on April 23, 2010, stating: "It was more of a strategic issue. I think we've resolved any, any matters we need to discuss. And I'm willing to dismiss it at this time."

affirmed that no one had forced, threatened, or coerced him to file the motion to represent himself, and that the decision was entirely voluntary on his part. (4/27/11, p. 49). The trial court then Clark's request to represent himself in certain aspects of his trial while maintaining the assistance of his appointed attorneys with respect to others. (4/27/11, p. 50).

On the following date, an additional discussion concerning the waiver of the right to counsel was held between the trial court, Clark, and appointed counsel concerning the role of Mr. Clark and appointed counsel.

**B. The Supreme Court of Louisiana did not err in rejecting Petitioner's claim that his waiver of the right to counsel and assertion of the right to self-representation was involuntary.**

As an initial matter, the Supreme Court of Louisiana found that Clark did not challenge the adequacy of the trial court's compliance with *Faretta v. California*, 422 U.S. 806 (1975), "[n]or could he reasonable do so as the record reflects over thirty pages of discussion regarding the defendant's capcity, knowledge, and ability to comply w with courtroom, evidentiary, and criminal procedure, with his attorneys' assistance, understanding of the dangers of self representation, and the voluntary nature of his request. Pet. App. p. 63a).[18]

Instead, on direct appeal,[19] Clark alleged that his waiver of counsel under

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[18] As noted by the Supreme Court of Louisiana, Clark was "fifty years old with some college education, has a paralegal diploma, experience assisting other inmates with legal issues, and his own experience with capital cases gleaned from his unrelated first degree murder trial, appeal, and post-conviction practice." Pet. App., p. 63a.

[19] In his petition, the Petitioner contends that the Louisiana Supreme Court mischaracterized his claim on appeal as asserting that his waiver of counsel was involuntary because his attorneys planned to concede his guilt of first degree murder. He contends that the claim involved only the concession of "elements of first and second

*Faretta v. California,* 422 U.S. 806 (1975) was knowing and intelligent, but **involuntary**. He argued that: "his waiver was forced on him by his lawyers' plan to concede his guilt against his will[,]" presenting him "with the Hobson's choice of having the assistance of counsel in the form of a concession of guilt of first degree murder that Mr. Clark rejected, or of having the assistance of no counsel at all." (Brief on Appeal, p. 44). The Louisiana Supreme Court concluded that the factual basis of this argument was false, correctly finding that the opening statement in the first trial, referrenced by defendant during the *Faretta* colloquy reflected that counsel planned only to concede that "he was involved in the attempted aggravated escape, a fact wholly supported by the testimony of numerous inmates and correctional officers and defendant's own actions and statements before, and following, efforts to secure the Camp D education building. Pet. App., p. 61a.

Additionally, the Supreme Court of Louisiana noted that Petitioner's argument on appeal was not supported by the reasons the defendant expressed for seeking to represent himself on certain aspects of the trial during the sealed portion of the *Faretta* colloquy :

> the defendant explained that he did not have a conflict with his counsel, but rather a difference in opinion regarding the proper way of presenting the case. He explained that he would 'much prefer the death penalty' over counsels' approach of building jury trust by admitting participation in the attempted aggravtaed escape, thereby rendering a second degree murder conviction and life sentence more likely, because he would have more assistance with his appeal and post-conviction efforts and therefor,

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degree murder." The respondent disagrees with Petitioner's characterization of his claim on appeal.

in his view, a greater chance to have his conviction overturned.

Pet. App., p. 61a.

Based on the foregoing, and given the extensive colloquy conducted in the instant case, the respondent submits that it is evident that Clark knowingly, intelligently, and voluntarily exercised his right to represent himself in certain phases of his trial. As such, certiorari is not warranted.

## CONCLUSION

The petitioner has failed to show that any of the issues raised herein necessitate the granting of certiorari. The State of Louisiana requests that, for the foregoing reasons, the petition for writ of certiorari be denied.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that this document was sent by first class mail, postage pre-paid

to G. Ben Cohen, The Capital Appeals Project, 636 Baronne Street, New Orleans, Louisiana, 70113, this the 11th day of September, 2017.

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