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

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY CLARK, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

1. Louisiana's death penalty statutory framework specifically provides for two jury findings only one of which must be found beyond a reasonable doubt, raising the following question: Whether the Louisiana Supreme Court erred in upholding petitioner's death sentence, when the jury made only one of the two statutory required jury findings beyond a reasonable doubt?

2. Petitioner was sentenced to death as a principal involved in aggravated escape under circumstances where the State conceded that it would not know who inflicted the blows that caused the victim's death. Whether standards of decency have evolved rendering the execution of a defendant prosecuted as a principal to first degree murder unconstitutional when, as the State conceded, jurors could not know who inflicted the blows that caused the victim's death?

3. Whether testimony establishing communications between a deputy monitoring the trial and an alternate juror in front of other jurors about the trial constitutes sufficient evidence to be presumptively prejudicial?

4. Whether the Louisiana Supreme Court's rule -- that an indigent defendant must accept his trial counsel's decision to concede his guilt of second degree murder over his express objections or represent himself -- vitiates the voluntariness of petitioner's waiver of counsel?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Clark respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court affirming his convictions and death sentences.

The petitioner is the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming Mr. Clark's conviction and sentence issued on December 19, 2016, *State v. Clark,* 2012-0508 (La. 12/19/16), ___So.3d ___, 2016 La. LEXIS 2512, and is reprinted in the Appendix A at Pet. App. A, 1a-153a.

The opinion of the Louisiana Supreme Court denying rehearing is at *State v. Clark*, 2012-0508 (La. 03/13/2017), ___ So. 3d. ___, 2017 La. LEXIS 494, and is reprinted in the Appendix B, at Pet. 154a.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court on the basis of 28 U.S.C. § 1257. The Louisiana Supreme Court denied Petitioner's appeal on December 19, 2016. The

Louisiana Supreme Court denied Petitioner's application for rehearing on March 13, 2017. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution and the Louisiana Code of Criminal Procedure:

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. V.

The Sixth Amendment provides:

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

U. S. Const. amend. VI.

The Eighth Amendment provides

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. Const. amend. VIII.

The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. amend. XIV.

Louisiana Revised Statute, Title 14, Section 24 provides:

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

La. R.S. 14:24.

Louisiana Revised Statute, Title 14, Section 30 provides:

> A. First degree murder is 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 escape, ….
>
> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, peace officer, or civilian employee of the Louisiana State Police Crime Laboratory or any other forensic laboratory engaged in the performance of his lawful duties, or when the specific intent to kill or to inflict great bodily harm is directly related to the victim's status as a fireman, peace officer, or civilian employee.

La. R.S. 14:30

Article 905.3 of the Louisiana Code of Criminal Procedure provides:

> **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. The court

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

La. C. Cr. P. Art. 905.3 (emphasis in original).

STATEMENT OF THE CASE

A. The Offense

On December 28, 1999, at least six inmates at Angola State Penitentiary were involved in an escape attempt. These inmates were petitioner (Jeffrey Clark), Robert Carley, David Brown, David Mathis, Barry Edge and Joel Durham.[1] "The escape attempt was thwarted when prison officials discovered the disturbance and quickly surrounded the education building." Pet. App. 1a. The inmates sought to contact the FBI or the Department of Justice to turn themselves in to authorities. Warden Cain, in charge of the prison, "told the inmate that he [Cain] was in charge and that the hostage-takers would not be talking to anyone." Pet. App. 11a, fn 23.

Department of Corrections Secretary Richard Stalder testified that when the escape was thwarted, Jeffrey Clark "was the first inmate to leave the building, followed by Carley and Brown." Pet. App. 15a. Durham and Mathis continued to hold guards hostage. The tactical team, led by Warden Cain and Secretary Stalder, proceeded to enter the facility, killing Durham and shooting Mathis in the face. Upon entry into the building, Captain David Knapps was discovered beaten, bludgeoned and stabbed in the security bathroom. Pet. App. 1a, 15a.

Inmates present during the escape attempt were lined against the walls and beaten. See Pet. App. 31a, fn 42. Petitioner presented evidence that he was beaten as well. Pet. App. 74a. As the Louisiana Supreme Court described:

---

[1] As the Louisiana Supreme Court noted, "A seventh inmate, Robert Cooper, was involved in the escape attempt but was not charged with the murder or any other crime, though he was the subject of a subsequent DOC disciplinary action." Pet. App. 2a, fn2.

> The defendant's evidence consisted of the testimony of four inmates, who claimed they heard or saw several unidentified correctional officers beating the defendant near the transport bus in the early morning hours of December 29, 1999; the testimony of the defendant's former appointed counsel, Burton Guidry, who observed severe bruising on defendant's legs on January 6, 2000 (which appear in photographs taken of said bruising by [Mr. Clark's then counsel] that same day).

Pet. App. 74a, The courts in Louisiana rejected the credibility of this evidence.

B. The Guilt Proceedings

Petitioner Jeffrey Clark, along with the four other inmates, was indicted on March 15, 2004, for the 1999 murder of Captain David Knapps. Clark was prosecuted first. At an initial trial, his appointed counsel proceeded under a theory that Clark had committed a second or first degree murder but did not warrant the death penalty. The case mis-tried. The case proceeded to trial a second time. With advance warning of his trial counsel's plan, Clark objected to defense counsel's decision to admit his guilt. With no other option, Clark chose to represent himself. Pet. App. 3a.

At trial, Clark's defense was that he had been engaged in an escape but that he withdrew from the escape before the killing of Captain Knapps; he argued that Captain Knapps blood got on his clothes when he attempted to intervene in the hallway to protect Captain Knapps – rather than in the bathroom where the state alleged that Captain Knapps was killed.

The state prosecuted Mr. Clark as a principle to first degree murder, forecasting that jurors would "never . . . know which inmate wielded which weapon" during the attack on Capt. Knapps. Pet. App. 4a. The prosecution conducted voir dire on the law of principals. The indictment alleged Mr. Clark was guilty as a principal.

The state did not present a single witness to Mr. Clark's participation in the attack. Indeed, the only evidence placing Mr. Clark in the security bathroom and participating in the fatal beating was the testimony of an inmate witness, who claimed to have engaged in a cockamamie scheme with Clark after the homicide to manufacture evidence against Clark. Although the physical evidence indicated Mr. Clark's proximity to Capt. Knapps at some point, this evidence did not exclude the reasonable hypothesis that Clark was guilty of a lesser offense.

The State argued in closing that petitioner could be guilty solely as a principal. The trial court instructed the jury that it could convict based upon a finding that Mr. Clark had acted as a principal. After several hours of deliberation, jurors "requested to hear the instructions on first degree murder and principals again . . . ." Pet. App. 35a. The jury then returned a verdict of first degree murder.

Defendants Edge and Carley were subsequently convicted of first degree murder, and both received life sentences. Defendant Mathis pled guilty in exchange for a life sentence. Defendant Brown was also convicted of first degree murder. Out of the five co-defendants, only Brown and petitioner received a sentence of death. Pet. App. 3a, fn. 5.

C. The Louisiana Death Penalty Scheme

Prior to Petitioner's penalty phase, the defense challenged the Louisiana scheme which imposed two separate findings on the jury before a defendant could be sentenced to death. Counsel asked that both of these findings be made "beyond a reasonable doubt." The Court rejected that request. On appeal, the Louisiana

Supreme Court upheld the district court's ruling, holding "Neither *Ring*, nor Louisiana jurisprudence, requires jurors to reach their ultimate sentencing determination beyond a reasonable doubt." Pet. App. 141a.

Petitioner also challenged whether the death sentence in this case satisfied the requirements of *Enmund* and *Tison*, as a result of the scheme which rendered him eligible solely as a principal to first degree murder. The Louisiana Supreme Court rejected this claim reviewing the evidence of culpability and finding there was

> sufficient evidence [] presented to the jury from which the jury clearly concluded that neither the degree of the defendant's participation nor mental state at the time of the attempted escape and murder of Capt. Knapps would exempt him from imposition of the death penalty. . . . even under one of the defendant's many versions, his behavior throughout the ordeal more than adequately reflects reckless indifference.

Pet. App. 47a-48a.

Petitioner noted that in subsequent trials against his co-defendants, the state had alleged that his co-defendants had specifically inflicted the blows that killed Captain Knapps. Pet. App. 149a-150a. Further, petitioner asked the court to consider whether evolving standards of decency that marked a maturing civilization rendered the execution of a defendant with *Tison*-level culpability unconstitutional. The Court rejected these challenges.

D. Post-Trial Discovery of Juror and Deputy Conduct

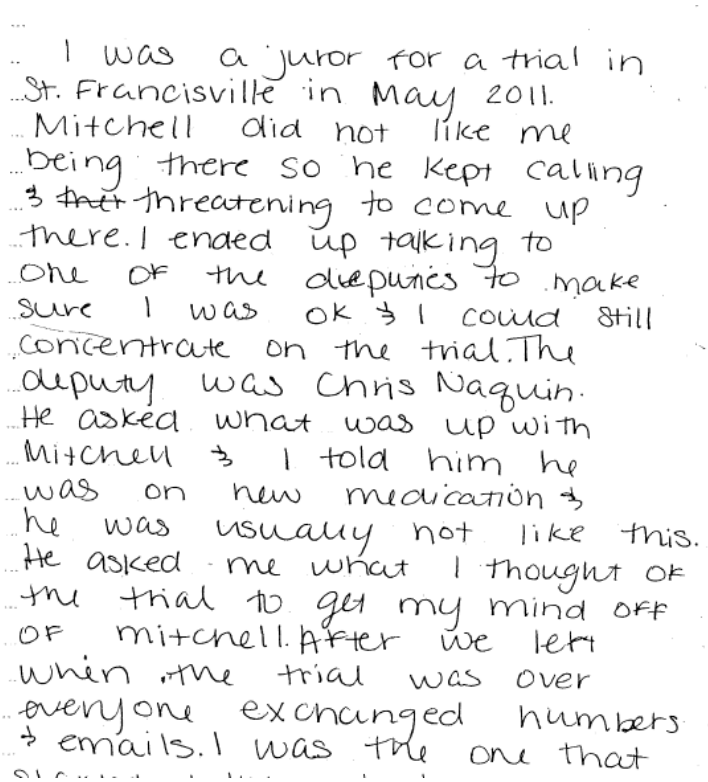
After trial, the St. Tammany Parish Sherriff's Office (STPSO) conducted an internal investigation into the conduct of a Deputy Christopher Naquin when an alternate juror's husband complained about the deputy's contact with his wife (the

juror). When the trial prosecutor was first informed, he reported to the STPSO investigator that the evidence was "not Brady." Some of the material was nevertheless turned over to the defense.

The disclosed documents indicated that conversations between the alternate juror and the deputy occurred in front of other jurors on numerous occasions:

> Meanwhile, Deputy Naquin and Deputy Terrebonne spoke with Amber about the issue at hand, to which Amber advised us that he was on medication, but didn't go into detail about his medication. Amber advised us that is not the first time he has done this type of thing and/or acted in this manner.
>
> Deputy Naquin was contacted by his supervisor Sergeant Tyron Washington, who advised us that he has obtained all of Mitchell's information (address, description and type of vehicle). Once receiving this information Deputy Naquin turned the information over to West Feliciana S.O. and they put extra patrol units in the area of the hotel to which we were staying.
>
> Deputy Naquin and Deputy Terrebonne continued to talk with Amber to make sure she was okay and was still able to focus on the trial. Amber advised she was okay, but will still think about it in the back of her head. Deputy Naquin and Deputy Terrebonne spoke with Amber and few other jurors or numerous occasions. We would always talk in a group or were others could see everything along with hear everything.

The St. Tammany Sherriff's Office secured a statement from the alternate juror:



I was a juror for a trial in St. Francisville in May 2011. Mitchell did not like me being there so he kept calling & ~~that~~ threatening to come up there. I ended up talking to one of the deputies to make sure I was ok & I could still concentrate on the trial. The deputy was Chris Naquin. He asked what was up with Mitchell & I told him he was on new medication & he was usually not like this. He asked me what I thought of the trial to get my mind off of mitchell. After we left when the trial was over everyone exchanged numbers & emails. I was the one that

Exhibits Attached as Appendix C.

Based upon the disclosed documents, petitioner filed a motion for new trial alleging extraneous influence. At the hearing, Deputy Naquin confirmed that his supervisor "informed him, before instructing him to prepare his typed statement, that a sexual relationship with Ms. A.A. during the defendant's trial would: compel a reversal; impose a huge expense on the State; and possibly result in him being charged with jury tampering." Pet. App. 122a. Nevertheless, "the trial court would not allow the defendant to obtain phone or text message records from anyone." Pet. App. 123a, fn. 114. "Despite the trial court's imposition of a strict no-contact order" between counsel and any of the potential witnesses, jurors or deputies, "several prosecutors handling the Angola 5 cases were Facebook 'friends' with jurors". Pet. App. 121a, fn. 111. One juror communicated to the trial prosecutor over a Facebook

post, "Just to let you know also, we lived with these people for 12 days and had no clue about Naquin and [Ms. A.A.]. You just wonder what the f*** people are thinking at times." Pet. App. 129a, fn. 118. The Louisiana courts rejected petitioner's request for an open hearing, and denied his request to subpoena witnesses, documents and ask questions. Pet. App. 118a-19a, 125a. These limitations were particularly harsh given the trial court's order that counsel not interview or speak to any juror, spouse of juror, or deputy.

When 9 STPSO officers, including a Chief Deputy, Major and Captain, initially testified, none notified the Court that Deputy Naquin had been terminated for "failing to keep his head down" under circumstances that even the Louisiana Supreme Court found unusual. "Although an alternative explanation was provided, STPSO fired Deputy Naquin less than two weeks after the M.M. [the coupled fiancé of Ms. A.A.] traffic stop. Deputy Naquin's personnel records reflect no prior disciplinary issues, several commendations, and a positive performance evaluation on March 2, 2012, just days before the affair with Ms. A.A. came to light . . . ." Pet. App. 120a.

As troubling, when Ryan Terrebonne, another deputy who was charged with guarding Petitioner's sequestered jury, initially testified at the evidentiary hearing, he did not reveal that he was in a romantic relationship with a different alternate juror from Petitioner's trial. By that point, Deputy Terrebonne was engaged to be married to that alternate juror. When the hearing resumed several months later, defense counsel recalled Deputy Terrebonne, but:

> the trial court refused to allow him to answer questions related to his relationship with alternate juror J.D., the demise of his marriage, his resignation from STPSO, or the jurors' consumption of alcohol at the State's expense (discussed hereinafter). ….
>
> [P]roffered documents revealed: February 2011 details about his marriage; his April 2011 adoption of a child with his wife; that he filed for divorce in June 2011; that his divorce was finalized in August 2012; he publicly acknowledged being in a relationship with Ms. J.D. in August 2012; he resigned from the STPSO in February 2013; he announced his engagement to Ms. J.D. in April 2013; and he and Ms. J.D. subsequently married.

Pet. App. 121a-22a.

Despite the trial court's limitation on questioning jurors, subpoenaing documents, and investigating the matter, the evidence presented at the hearing unequivocally established that: the sequestered jurors and deputies would socialize in the evenings, dining out and playing card games; "Ms. A.A. broke down one evening, during jury sequestration in a restaurant parking lot and [Deputy Naquin], Deputy Terrebonne, and two or three other jurors tried to console her." Pet App. 122a. Ms. A.A. described one instance in which:

> we talked about [Mr. M.M.] for a little bit, then [Deputy Naquin] **switched the subject to the trial**, I guess, just to get me focused back on what was going on at the trial," asking her how it was going. When asked during the hearing "What did he tell you about the trial?" Ms. A.A. expressly stated, "He didn't tell me anything about the trial. He just asked, you know, how -- I guess, how it was going." Ms. A.A. stated that sometimes her conversations with Deputy Naquin were in front of other jurors, including C.D. and "John."

Pet. App. 123a.

Both the trial court, and the Louisiana Supreme Court, determined that this evidence of contacts between a juror and deputy about the subject of the trial did not shift the burden to the state to rebut a presumption of prejudice.

REASONS FOR GRANTING THE PETITION

I. HURST V. FLORIDA MAKES CLEAR THAT LOUISIANA'S DEATH PENALTY STATUTE AS APPLIED IN THIS CASE IS UNCONSTITUTIONAL.

A. The Sixth Amendment Requires Any Finding Necessary to Impose a Death Sentence Be Found by a Unanimous Jury Beyond A Reasonable Doubt.

In *Apprendi v. New Jersey*, this Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" qualifies as an element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In non-capital cases, this Court rejected "any possible distinction between an "element" of a felony offense and a "sentencing factor." *Id.* at 478.

In 2002, this Court re-emphasized the significance of the Sixth Amendment to death penalty determinations. *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring,* this Court concluded that *Apprendi's* reasoning was irreconcilable with the holding in *Walton v. Arizona*, 497 U.S. 639 (1990), and overruled it in relevant part, to find that Arizona's sentencing scheme was incompatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "elements of the offense of capital murder." Instead, this Court held that the Sixth Amendment required the jury to find beyond a reasonable doubt the existence of an aggravating circumstance. *Ring* 536 U.S. at 597.

> The dispositive question, we said, "is one not of form, but of effect." . . . If a State makes an increase in a defendant's authorized punishment contingent

> on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt.

Id. at 602. *Ring* acknowledged that the question before the Court was "tightly delineated" and did not include a challenge to the trial court's weighing of aggravating and mitigating factors or making the ultimate death determination, or the appellate re-weighing of aggravating or mitigating circumstances. *Id.* at 597 n.4.

Fourteen years later, in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court clarified the meaning of *Ring* and explicitly stated that any and all "findings" that the jury was required to make, under state law, had to comply with the federal constitution. Indeed, the Court "expressly overrule[d] *Spaziano*[2] and *Hildwin*[3] in relevant part":

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640-641[]. Their conclusion was wrong, and irreconcilable with Apprendi.

Hurst, 136 S. Ct. at 623.

B. *Louisiana's Capital Sentencing Scheme Violates the Constitution Because Only One of the Two Findings Necessary to Impose a Death Sentence Must Be Made Beyond a Reasonable Doubt.*

In Louisiana, before a defendant is sentenced to death, the Louisiana death penalty statute mandates that the jury must make two findings. The law is very clear that these are "jury *findings*" (plural).

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[2] *Spaziano v. Florida*, 468 U.S. 447 (1984).

[3] *Hildwin v. Florida*, 490 U.S. 638 (1989).

Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Added by Acts 1976, No. 694, § 1. Amended by Acts 1985, No. 231, § 1; Acts 1988, No. 779, § 1, eff. July 18, 1988.

West's Louisiana Statutes Annotated

Significantly, the Louisiana statute provides that before a sentence of death may be imposed the jury must make two findings: the first involves a beyond a reasonable doubt determination; the second does not.

Post-*Ring*, the Louisiana Supreme Court determined that Petitioner could be sentenced to death after a jury found only the existence of one statutory aggravating circumstance beyond a reasonable doubt. Pet. App. 140a-41a. Meanwhile, the court has consistently concluded that "neither *Ring*, nor Louisiana

jurisprudence, require[d] jurors to reach their ultimate sentencing determination beyond a reasonable doubt." *Id.*, citing *State v. Koon*, 96-1208, p. 27 (La. 05/20/97); 704 So. 2d 756, 772-73; *see also State v. Anderson*, 06-2987, p. 61 (La. 09/9/08); 996 So.2d 973, 1015.

But this Court expressly rejected the Louisiana Supreme Court's interpretation of *Ring* in *Hurst v. Florida*. The *Hurst* decision made clear that any and all "findings" that the jury was required to make, under state law, had to comply with the federal constitution. *See also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship*[4] requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."). Indeed, Justice Scalia rejected attempts to exclude purported sentencing considerations from the Sixth Amendment's requirements as early as his concurrence in *Ring*:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.

[4] *In re Winship*, 397 U.S. 358 (1970).

Ring, 536 U.S. at 610 (Scalia J., concurring). In Louisiana, however, they are called specifically called "*jury findings*" – which eliminates any confusion that might arise if they were called "sentencing factors or Mary Jane." If *Hurst* means anything, it mean that "jury findings" must be found unanimously and beyond a reasonable doubt.

Under Article 905.3 of the Louisiana Code of Criminal Procedure, the jury in Petitioner's case was required to find first the existence of at least one statutory aggravating circumstance. As the statute clearly says by its use of "and," in addition to the statutory aggravating circumstance, the jury also was required to determine – after considering mitigating circumstances -- that death was the appropriate sentence. As Justice Scalia reasoned, "all facts essential" to the level of punishment received by a defendant must be found by a jury "*beyond a reasonable doubt*." *Ring* 536 U.S. at 610 (emphasis added). What could be a more fundamental "finding" than the determination of whether someone should live or die? Moreover, Louisiana statutory law specifically dictates that this determination is a "jury finding." Perhaps Louisiana could, in accord with constitutional requirements, adopt a provision providing for judge sentencing, or one which mandated imposition of a death sentence based upon a finding of future dangerousness – but it does not. Instead, it provides as an essential element, a precondition necessary for a death sentence, the finding that death is an appropriate punishment.

In light of *Hurst*, the Delaware Supreme Court recently struck down a statute substantially similar to the Louisiana statute in that it did not require all necessary findings, including those related to the death determination, to be found by a jury

beyond a reasonable doubt. *Rauf v. State*, 145 A.3d 430 (Del. 2016). The court found that "the Sixth Amendment right to a jury extends to all phases of a death penalty case, and specifically to the ultimate sentencing determination of whether a defendant should live or die." *Id.* at 437. Chief Justice Strine, concurring in the majority per curiam, pointedly noted, "I am unable to discern in the Sixth Amendment any dividing line between the decision that someone is eligible for death and the decision that he should in fact die." *Id.* at 436.

C. There Is A Significant Split of Authority Among Lower Courts Concerning Whether Hurst Imposes Sixth Amendment Requirements On All Jury Findings.

As noted above, Delaware's highest court has understood *Hurst* to impose Sixth Amendment requirements on all jury findings -- not just on the existence *vel non* of an aggravating factor. The Supreme Court of Florida has reached the same conclusion. *Hurst v. State*, No. SC12-1947, 2016 Fla. LEXIS 2305, at 44 (Fl. Oct. 14, 2016); *State v. Perry,* 210 So.3d 630, 639 (Fla. 2016) (where the Florida Supreme Court "require[s] the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist."); *see also State v. Whitfield*, 107 S.W.3d 253, 259–61 (Mo. 2003); *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003); *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003). In contrast, at least three other states reject this view, and have held that the Sixth Amendment does not apply to the jury's determination that death is appropriate after a finding that aggravating circumstances outweigh the mitigating circumstances. *See Ex parte*

Bohannon, No. 1150640, 2016 WL 5817692, at 6 (Ala. Sept. 30, 2016); *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319; *State v. Gales*, 694 N.W.2d 124, 145 (Neb. 2005).

Certain of this split in authority, the State of Florida asked this Court to review *Hurst* anew and address the question, noting that there are significant "splits of authority among the lower courts concerning the scope of the sixth amendment right to trial by jury." *Florida v. Hurst*, 16-998 (Petition for Certiorari filed 2/13/2017). The petition identifies three states that hold that the Sixth Amendment does not apply to all jury's finding at the penalty phase. *Id*., citing *Bohannon, Belton,* and *Gales*. Thereafter, Florida notes that the Florida Supreme Court "has joined at least three states on the other side of that split." *Id.,* citing *Rauf, Whitfield*, *Ring*, and *Woldt* .

While this Court denied certiorari in *Florida v. Hurst*, 16-998, the instant case presents a far better vehicle for addressing that split in authority identified by the State of Florida. That case presents considerable questions regarding whether the state court issued an advisory opinion; whether the adoption of a new statute in Florida rendered the legal question moot; and whether the state court had ruled on state grounds. None of those problematic considerations are at issue here.

This Court should grant certiorari to resolve this split in authority.

II. STANDARDS OF DECENCY HAVE EVOLVED RENDERING THE EXECUTION OF A DEFENDANT PROSECUTED AS A PRINCIPAL TO 1ST DEGREE MURDER UNCONSTITUTIONAL.

Standards of decency have evolved since this Court in 1987 permitted imposition of the death penalty for a "major participa[nt]" in a felony murder who showed "reckless indifference to human life," even if the defendant neither killed nor intended to kill. *See Tison v. Arizona*, 481 U.S. 137 (1987) (limiting *Enmund v. Florida*, 458 U.S. 782 (1982)). Both history and this Court's recent cases suggest that the Court should consider whether standards of decency have evolved. Application of an analysis with objective and subjective components like the one this Court has used in its recent death penalty decisions, *see generally Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Supreme Court's Eighth Amendment review is based "both on consensus and our own independent judgment . . . ."), demonstrates that death is a disproportionate and therefore unconstitutional penalty for those who did not kill, attempt to kill, or intend to kill.

Petitioner raised two claims below: first, that, given that he was prosecuted as a principle, his death sentence violated *Enmund v. Florida* (Assignment of Error II)[5]; second, that evolving standards of decency warranted overturning *Tison* (Assignment of Error III). The Louisiana Supreme Court rejected petitioner's challenge under *Enmund*, finding that Clark had not raised his challenge to

[5] The Court notes: "In his second assignment of error, the defendant argues that his 'minor participation' in Capt. Knapps' murder renders imposition of the death penalty against him unconstitutional, in violation of the Sixth and Eight Amendments of the U.S. Constitution. The defendant asserts that the jurors were never required to determine that the defendant 'both killed and intended to kill Capt. Knapps.'" Pet. App. 46a-47a.

> the adequacy of the jury instructions, which included a reference to specific intent to inflict great bodily harm as set forth in LSA-R.S. 14:30(A)(1), in light of *Enmund*. . . . . Moreover, the argument ignores *Tison's* modification to *Enmund*, and, regardless, intent to inflict great bodily harm appears to be a more culpable mental state than reckless indifference.

Pet. App. 48a.

In response to Petitioner's challenge to the validity of *Tison*, the Louisiana Supreme Court considered and rejected the issue:

> ***Evolving Standards of Decency***
>
> The defendant argues in his third assignment of error that developments since the Supreme Court's *Tison* decision suggest that the Court may soon revisit the Enmund standard of permitting imposition of the death penalty only for those who kill, attempt to kill, or intend to kill. Although the defendant correctly points out that the Supreme Court has removed certain categories of death penalty eligible offenders and offenses over time, the thrust of his argument is not that this court should deem the death penalty unconstitutional per se, but rather it should do so in this defendant's case based on his allegedly limited role.

Pet. App. 48a-49a.

A. The Eighth Amendment requires that Capital Punishment be Reserved for the Worst of the Worst Offenders

This Court has made clear that

> The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.

Kennedy v. Louisiana, 554 U.S. 407, 446-47 (2008). As the Louisiana Supreme Court observed: "With respect to the defendant's subsequently tried co-defendants, Edge and Carley were found guilty of first degree murder and received life sentences because their respective juries could not unanimously agree to impose the

death sentence. Mathis pled guilty to first degree murder and received a life sentence. Only the defendant and Brown received death sentences." Pet. App. 149a. According to the Court, the "[t]he State provided some information regarding the respective roles of the co-defendants (i.e., Brown held Capt. Knapps down while others beat him to death; Carley participated in the restroom attack; Edge participated in the initial hallway attack; and Mathis acted as a lookout)…" Pet. App. 149a. While the Court found that the evidence, viewed in the light most favorable to the state established petitioner's "close proximity and active participation in" the offense, it acknowledged:

> The defendant cites testimony from the co-defendants' trials regarding (1) Carley's role as one of the leaders of the initial escape plan, as being seen bloody with the ice pick-like shank, and as being primarily responsible for taking Sgt. Walker hostage, initially, and forcing her to speak with Angola personnel at shank-point; (2) Edge's role in initially hitting Capt. Knapps in the hallway with the mallet (which were not the fatal blows, given evidence of Capt. Knapps' continued struggles with his attackers in the officers' restroom); (3) Brown's role in holding Capt. Knapps' down and dragging him, speaking on the phone with Angola personnel, and moving throughout the building and interacting with uninvolved inmates; and (4) Mathis' role as initially attacking Lt. Chaney with Durham, being armed with the half-scissors weapon most of the evening, and guarding the hallway.

Pet. App. 150a, n. 134.[6]

[6] Oddly, in considering the validity of Mr. Clark's death sentence, the Court additionally considered "alleged Brady evidence at issue in [co-defendant] Brown's motion for a new penalty phase," namely "an uninvolved inmate's testimony that Edge informed him that the defendant [Clark] and Edge made the decision to kill Capt. Knapps. *State v. Brown*, 184 So.3d 1265 (La. Feb. 19, 2016)." The Court's reliance on this evidence is inconsistent with its denial of Brown's *Brady* claim, finding it "highly implausible that, faced with [the inmate's] statement which provides no additional evidence as to who actually killed Captain Knapp, the jury would have imposed a different sentence." *State v. Brown*, 184 So. 3d 1265, 1268 (La. Feb. 19, 2016). Additionally, where this statement was ruled inadmissible hearsay for use in the Edge trial, was not introduced in Clark's trial, and was deemed immaterial with respect to Brown's *Brady* claim, there appears no reasonable basis for relying upon it to justify Mr. Clark's death sentence.

B. Objective Assessment of Evolving Standards of Decency Warrants Restricting the Death Penalty to the Worst Offenders Culpable of the Most Serious Offenses.

In determining whether an offense was one of the worst crimes, this Court has adopted an objective assessment, which includes a review of legislative and jurisprudential developments[7] since *Tison* and shows a general retreat from imposition of the death penalty. Seven states (Delaware, Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York) have eliminated the death penalty altogether, while four more (Colorado, Oregon, Pennsylvania, and Washington) have placed a moratorium on executions. Those eleven jurisdictions have joined the thirteen other jurisdictions that at the time of *Tison* already did not have the death penalty. Developments also show a more specific retreat from the imposition of the death penalty for those who did not kill or intend to kill. Of the eleven states that have stopped the death penalty since *Tison*, four (Delaware, Connecticut, Illinois, and Colorado) previously permitted execution of those who did not kill or intend to kill. In addition, three other states' high courts (Kentucky, Mississippi, and Nevada) have since limited the death penalty to only those who intentionally kill. The abandonment by these seven states of the death penalty for the category of offender that would include Mr. Clark suggests a national trend away from that penalty for those offenders. However, "extreme outlier usage [of the

[7] This analysis of death penalty schemes in 52 United States jurisdictions (the 50 states plus the District of Columbia and the federal government) draws on data and sources set out at a hearing held on Mr. Clark's *Motion to Reconsider Sentence*, which is included in Appendix D at Pet. App. 169a-70a. Pages 169a-70a are color versions that were updated and provided to the Louisiana Supreme Court and reflect what was used in the record at Pet. App. 167a-68a.

death penalty] by a particular office in a particular county tends to say more about that county . . . than it does about the standards of decency of the nation as a whole." Robert J. Smith & Zoe Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 Cornell L. Rev. 413, 145 (2016). Beyond these trends, and difficulties of categorization aside,[8] the developments make clear that the *Tison* rule has become the minority rule. Only 15—or 28%—of United States jurisdictions now allow for the death penalty based on the lesser showing required under *Tison*, while the other jurisdictions require greater culpability or reject the death penalty altogether.

Moreover, a review of sentences actually imposed shows that jurors have consistently rejected the death penalty for *Tison*-type offenses. As the evidence presented at the hearing on Mr. Clark's *Motion to Reconsider Sentence* established, *see* r. 2412 *et seq.* (attached as Appendix D), while juries nationally returned sixteen *Tison*-type death sentences between 1990 and 2000, there were only eight between 2001 and 2011. *Id.* Moreover, Louisiana is one of only ten states in which a jury has returned a *Tison*-type death sentence in the last twenty years, and one of only five states in which a jury has returned a *Tison*-type death sentence in the last ten years. *Id.*

This Court should grant certiorari to bring forth its independent judgment concerning the continued validity of *Tison.*

[8] Louisiana, for instance, is described as a state that requires both that the defendant killed and had specific intent to kill, even though the Louisiana Supreme Court has approved a death sentence under the rule of *Tison*. *State v. Anthony*, 1998-0406 (La. 4/11/00); 776 So.2d 376, 386-87.

III. This Court Should Grant Certiorari To Consider Whether Testimony Establishing Communications Between A Deputy Monitoring The Trial And An Alternate Juror In Front Of Other Jurors About The Trial Constitutes Sufficient Evidence To Be Presumptively Prejudicial.

The uncontested evidence adduced at a post-trial hearing held in this case was that a deputy spoke with an alternate juror, in front of other jurors, about the case. See Pet. App. 152a-153a. Justice Crichton concurred with the opinion but wrote separately to note that the allegations in this case were "troubling." Pet. App. 152a. *See also id.* at Pet App. 153 (citing *Wellons v. Hall*, 558 U.S. 220 (2010) ("From beginning to end judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect."). The fact that two deputies engaged in (allegedly post-trial) sexual escapades with two different alternate jurors, one of which ended the marriage of a deputy and his wife, the other of which disrupted the marriage of a juror and her husband, might give pause concerning the circumstances of the interactions between jurors and deputies.

But even aside from that, in this case, a deputy and an alternate juror both testified that they communicated about the case in front of other jurors. Whatever the deputy's intent – whether to "reassure" or "provide comfort" or to "date" the alternate juror – the uncontested evidence was that the subject of their conversation involved the case at hand. Neither the alternate juror nor the deputy could recall the actual words spoken. Everyone agreed that other jurors were present during these conversations. The district court and the Louisiana Supreme Court rejected petitioner's position that the uncontested evidence was presumptively prejudicial.

This Court recently denied certiorari in *Filson v. Tarango*, 16-1000, in which Nevada, along with a *Brief of Amici filed by Michigan and Nine other States*, asked this Court to address "a pervasive split of authority on the test for reviewing allegations of extraneous juror influence under the Sixth and Fourteenth Amendments." *See Filson v. Tarango*, 16-1000 (Brief of Petitioner, State of Nevada). Respondents argued that the *Tarango* case was 'not an appropriate vehicle' because the case was considered in habeas, and the ruling in the lower *Tarango* case simply required a hearing in the district court, and that it was "a fact-bound dispute over the burden of proof that would apply at the remand hearing."

A. The Lower Courts Are Split Concerning Presumption of Prejudice that Arises from Unauthorized Contact Between A Juror and A Deputy

The lower courts are split on whether there is a presumption of prejudice. The Amicus Brief of Michigan and Nine other States in *Filson v. Tarango Jr.*, makes clear the troubling split that exists in the circuit. *Filson v. Tarango Jr.* (16-1000) *Amicus Brief of Michigan et al*, at 5 citing *United States v. Dehertogh*, 696 F.3d 162, 167 (1st Cir. 2012) ("the circuits are divided on whether Remmer represents the current thinking of the Supreme Court); *Barnes v. Joyner*, 751 F.3d 229, 245 (4th Cir. 2012) ("we have recently observed, there is a split among the circuits regarding whether the Remmer presumption has survived intact following the

Supreme Court's decisions in *Phillips* [9] and *Olano* [10]") (parenthesis quoted from the amicus brief).

The brief notes that five jurisdictions (the Second, Fourth, Seventh, Tenth, and Eleventh circuits) recognize a strong (but rebuttable) presumption of prejudice based upon extrinsic contacts with jurors. *See United States v. Farhane*, 634 F.3d 127, 168-79 (2nd Cir. 2011) ("[T]he law presumes prejudice from a jury's exposure to extra-record evidence, …that presumption may be rebutted by a 'showing that the extra-record information was harmless,' …But a court may not reach further to inquire into the subjective effect of the information on jurors' mental processes or on the jury's deliberations."); *Barnes v. Joyner*, 751 F.3d 229, 245 (4th Cir. 2012) ("Stated differently, the *Remmer* presumption and hearing requirement are triggered after the party attacking the verdict satisfies the "minimal standard" of showing that "extrajudicial communications or contacts [between a juror and a third party] were more than innocuous interventions."); *Tarango v. McDaniel*, 2016 U.S. App. LEXIS 16996, 19-20 (9th Cir. Nev. Sept. 16, 2016) ("We have held that Mattox established a bright-line rule: any external contact with a juror is subject to a presumption that the contact prejudiced the jury's verdict, but the government may overcome that presumption by showing that the contact was harmless."); *United States v. Scull*, 321 F. 3d 1270, 1280 (10th Cir. 2011); *McNair v. Campbell*, 416 F. 3d 1291, 1307-08 (11th Cir. 2005).

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[9] *Smith v. Phillips*, 455 U.S. 209 (1982).

[10] *United States v. Olano*, 507 U.S. 725 (1993).

The ten-state amicus brief observed that two jurisdictions (the First and Eighth Circuits) recognize a presumption of prejudice if the defendant establishes that the extrinsic contact related to evidence not developed at trial. *See Filson v. Tarango Jr.*, 16-1000, *Amicus Brief*, citing *United States v. Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008) ("We have consistently held the *Remmer* presumption of prejudice does not apply unless the alleged outside contact relates to factual evidence not developed at trial."); *United States v. Dehertogh*, 696 F.3d 162, 167 (1st Cir. 2012) ("This court continues to assume that a presumption of prejudice exists but only where there is an egregious tampering or third party communication which directly injects itself into the jury process.").

Louisiana adopts a standard similar to the Third Circuit, which requires the defendant to prove the external influence would have prejudiced the juror and affected the outcome. *See* Pet App. at 125a. ("A constitutional due process right of fair trial by jury may be violated, if the trial jurors are subjected to influences by third parties (even including through the attending bailiffs of the State), which causes the jurors' verdict to be influenced by circumstances other than the evidence developed at the trial."); *see also United States v. Fumo*, 655. F. 3d 288, 304 (3d Cir. 2011).

B. This Case Presents A Clear Vehicle to Address the Split Within the Circuits.

This case presents a clear vehicle to address the split within the circuits, as the Louisiana Supreme Court directly found that the burden was on Petitioner (the

defendant) to prove that the contacts raised a probability of influencing the jury's verdict:

> we conclude that the distracting behavior of Mr. M.M. during the defendant's trial was insufficient to introduce inappropriate outside influences impacting the verdicts, even assuming Ms. A.A. discussed the matter with deliberating jurors and became observably upset in front of them. . . . Ms. A.A.'s personal problems do not appear to have had any reasonable probability of influencing the jury's verdicts to convict the defendant of the first degree murder of Capt. Knapps and to sentence him to death.

Pet. App. at 127a-28a. Similarly, the Louisiana Supreme Court held that the defendant's burden was to establish that the conversations between deputy and juror were intended to, or in fact did influence the juror:

> We reach a similar conclusion about the behavior of former Deputies Naquin and Terrebonne. . . . .
>
> While in the company of one or more of the twelve jurors deciding the defendant's case Ms. A.A. became upset at times over the problems she was experiencing with Mr. M.M., and on several occasions Deputy Naquin verbally comforted her and attempted to distract her by asking her what she thought about the trial proceedings and/or how things were going. However, we note that 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 opinions. Moreover, there is no indication that these limited conversations, in the presence of one or more of the twelve jurors deciding the defendant's case, was intended to, or in fact did, influence any of the twelve jurors. ….
>
> 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 casual 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," . . . . Further, this conduct did not constitute "extrinsic influence or relationships [that] have tainted the deliberations," . . . .

Pet App. at 128a-129a. The Court should not only look at the communications between jurors and those officers, but also at the impropriety and prejudice that

resulted from Officers Naquin and Terrebonne spending many hours each day and night bonding with the jurors through socializing, playing card games, etc. in a case where the defendant is accused of the murder of a law enforcement officer. Pet. App. 122a. In turn, this created extrinsic influences or relationships that tainted the deliberations.

This case presents a clear vehicle for addressing the question identified by the State of Michigan and Nine other States as Amicus in *Filson v. Tarango Jr.*, above, regarding which party bares the burden to establish that extra-judicial interactions between jurors and deputies was prejudicial. Under Louisiana's view, error exists only if the defendant establishes that the extrinsic influence "tainted the deliberations" or constituted tampering. A number of other states, recognizing the difficulty of establishing "taint" presume prejudice from external interactions. This case presents an opportunity for this Court to resolve this issue.

IV. This Court is currently considering the constitutionality of the Louisiana Supreme Court's rule that an indigent defendant must choose between representing himself and accepting his counsel's decision to concede guilt over his express objections.

Louisiana has had a not altogether satisfactory compliance with its constitutional obligation to provide counsel to defendants facing capital punishment. *See e.g. Boyer v. Louisiana*, 133 S.Ct. 1702, 1708 (2013) (Sotomayor, J., with Ginsburg, J., Breyer, J. and Kagan J., dissenting) ("The Court's failure to resolve this case is especially regrettable, because it does not seem to be an isolated one. Rather, Boyer's case appears to be illustrative of larger, systemic problems in Louisiana.").

In *Nixon v. Florida*, this Court recognized that there might be salutary basis for counsel in a capital case to concede her client's guilt in preparation for the penalty phase. *See Florida v. Nixon*, 543, 581 U.S. 175 (2004). The Court, however, noted that such a concession over the client's express objection would raise constitutional concerns. In Louisiana, half of this Court's lesson has been learned. The Louisiana courts assess the propriety of counsel's express admission of guilt under a *Strickland* effectiveness standard, rather than under a question of agency and autonomy. In some cases, the Louisiana Supreme Court countenances trial counsel's concession of guilt over the defendant's express objection. *See State v. Tucker*, 2013-1631 (La. 09/01/15); 181 So. 3d 590; *State v. McCoy*, 2014-KA-1449 2016 La. LEXIS 2107 (La. Oct. 19, 2016). In other instances, the court finds the waiver of counsel knowing and voluntary where the defendant exercised his Faretta rights solely because his counsel was going to concede his guilt. *See State v. Campbell*, 2006-0286 (La. 05/21/08); 983 So.2d 810; *State v. Brown*, 2003-0897 (La. 04/12/05); 907 So.2d 1; *State v. Bell*, 2009-0199 (La. 11/30/10); 53 So.3d 437.

Here, the Louisiana Supreme Court rejected the *Faretta* challenge because defense counsel at the initial trial was going to concede (over petitioner's objection) Mr. Clark's involvement in an attempted aggravated escape[11]:

[11] The Louisiana Supreme Court mischaracterized the Faretta claim presented, asserting that "In his seventh assignment of error, the defendant argues that his decision to represent himself during certain portions of his trial, while knowingly and intelligently made, was involuntary due to his 'attorneys' unilateral decision to concede [his] guilt of first degree murder over [his] objection.' The record shows that the factual basis of this argument is false." Pet. App. 60a. The claim raised on direct appeal involved counsel's concession of the *elements* of first and second degree murder – which was a factually accurate description of the concession. This discrepancy is of no consequence to the petition at issue – since, as a matter of agency and autonomy, whether counsel was going to concede Petitioner's guilt of

> Based on defense counsel's opening statement[12] in the defendant's first trial for the murder of Capt. Knapps, which resulted in a mistrial, to which the defendant referred during the *Faretta* colloquy, his counsels' plan was to concede only 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. at 61a. In the sealed colloquy, Mr. Clark explained that he was representing himself because he did not want his counsel "admitting participation in the attempted aggravated escape, thereby rendering a second degree murder conviction and life sentence more likely." Pet App. 61a, fn. 61. The Louisiana Supreme Court articulated its view of the law – that

> acknowledgment of some degree of culpability may form part of sound defense strategy. . . . *State v. Brooks*, 505 So.2d 714, 724 (La. 1987) (trial counsel's strategy in acknowledging the defendant bore some culpability, in being in the company of the murderer at the scene of the crime, did not constitute ineffective assistance), *State v. Holmes*, 95-0208, pp. 7-8 (La. App. 4 Cir. 2/29/96), 670 So.2d 573, 577-78. See also *State v. McCoy*, 14-1449, 2016 WL 6506004 (La. 10/19/16), ___ So.3d ___.

Pet. App. at 62a.

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trespass over his express objection – or attempted aggravated escape – the concession vitiated the voluntariness of his waiver of counsel.

[12] The Court quoted parts of the opening statement:

> Let me tell you right now, ladies and gentlemen, because I'm not here to try to fool you or mislead you in any way. Evidence is going to be presented that will prove that Jeffrey Clark was involved in the aggravated - in the attempted aggravated escape. I'm not here to tell you any different, but I want you to know the truth.
>
> But what the evidence isn't going to show is that Jeffrey Clark was involved in the death, the first-degree murder death, of Captain Knapps. He did not have specific intent to kill or commit great bodily harm. He did not know that whoever killed Captain Knapps had that specific intent to kill or create great bodily harm. * * *
>
> The evidence is going to show that he did not have specific intent to kill or commit great bodily harm; therefore, he is not guilty of first-degree murder.

Pet. App. at 61a.

This Court is considering the petition in *McCoy v. Louisiana*, 16-8255, (Petition for Certiorari, Docketed March 9, 2017) which presents the same issue from the opposite side of the coin. *McCoy* identifies the broad split in the circuits and lower courts concerning whether a defendant has the autonomy to control his counsel's decision to concede guilt. See *McCoy v. Louisiana*, 16-8255 (Petition for Certiorari).

Petitioner respectfully asks that this Court hold the case, and/or consolidate it with *McCoy v. Louisiana* to address this issue. It is not difficult to envision the broad-scale erosion of the right to counsel, if an indigent capital defendant is required to choose between accepting his counsel's admission of culpability or represent himself.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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I hereby certify that this document was sent by first class mail, postage pre-paid, or delivered by hand, upon:

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