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

No. 16-9541

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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REPLY BRIEF

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

The State's Brief in Opposition (BIO) forthrightly acknowledges that the issues presented in the Petition for Certiorari are squarely presented to this Court, adequately preserved and ripe for review; and the BIO does not suggest that they are unimportant or outside the guidelines for this Court's review.

I. The BIO Does Not Dispute That There Is A Split Amongst The Circuits Regarding Whether The "Findings" Prerequisite To Imposition Of The Death Penalty Must Be Beyond A Reasonable Doubt.

In his petition for certiorari, Mr. Clark identified the broad split amongst the state courts concerning whether the determination that "death is the appropriate punishment" is a jury finding subject to Sixth Amendment protection. The State's BIO squarely addresses the merits of the claim arguing, "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…" BIO at 10-11. The BIO goes on to observe that Louisiana law holds "Neither *Ring*, nor Louisiana jurisprudence requires jurors to reach their ultimate sentencing determination beyond a reasonable doubt." BIO at 11 citing Pet. App. 141a. This is the question.

This Court should address the split amongst the state courts identified by the State of Florida when it asked this court to address the "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).[1] Unlike the case of *Florida v. Hurst*, the issue in this case does not rest upon an independent

[1] Florida's Petition for Certiorari observes:

> The high courts of at least three states have held that the Sixth Amendment confers no such right. See Ex parte Bohannon, No. 1150640, 2016 WL 5817692, at *6 (Ala. Sept. 30, 2016) (adhering to prior holding that the Sixth Amendment "does not require that a jury weigh the aggravating circumstances and the mitigating circumstances because, rather than being a factual determination, the weighing process is a moral or legal judgment that takes into account a theoretically limitless set of facts") (quotation marks and citation omitted); id. ("Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment."); *State v. Belton,* No. 2012-0902, 2016 WL 1592786, at *9 (Ohio Apr. 20, 2016) ("the weighing process amounts to a complex moral judgment about what penalty to impose upon a defendant who is already death-penalty eligible") (quotation marks omitted); State v. Gales, 694 N.W.2d 124, 145 (Neb. 2005) (rejecting argument that Sixth Amendment requires "that a jury must also conduct the weighing function of capital sentencing").
>
> With the decision at issue here, the Florida Supreme Court has joined at least three states on the other side of that split. See *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam), overruling Brice v. State, 815 A.2d 314 (Del. 2003); State v. Whitfield, 107 S.W.3d 253, 259-61 (Mo. 2003), called into doubt by *State v. Nunley*, 341 S.W.3d 611, 626 n.3 (Mo. 2011) (noting widespread disagreement with *Whitfield* in case where issue was waived); State v. Ring, 65 P.3d 915, 946 (Ariz. 2003); see also *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003).

Florida v. Hurst, 2017 U.S. S. Ct. Briefs LEXIS 521, at 40. The split in the courts is actually more entrenched than the State of Florida advertised. Nevada, Wyoming and Connecticut (before it abolished the punishment) required proof beyond a reasonable doubt on the weighing question. See *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (*Apprendi* rule applicable to weighing determination because a "finding [that no mitigation evidence outweighs aggravation evidence] is necessary to authorize the death penalty in Nevada."); *State v. Rizzo*, 266 Conn. 171, 242 (2003) (finding "the jury must be instructed that its level of certitude be beyond a reasonable doubt when determining that the aggravating factors outweigh the mitigating factors . . ."); *Olsen v. State*, 2003 WY 46, 67 (Wyo. 2003) ("If the jury is to be instructed to "weigh" . . . the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.") (emphasis added). California, Indiana, and New Mexico, Maryland and Illinois (before they abolished capital punishment) did not. *People v. Lewis,* 43 Cal. 4th 415 (2008) ("[t]here is no federal constitutional requirement that a jury [] conduct the weighing of aggravating and mitigating circumstances . . ."); *Ritchie v. State,* 809 N.E.2d 258, 268 (Ind. 2004) ("The outcome of weighing does not increase eligibility . . . [and] is therefore not required to be found by a jury under a reasonable doubt standard."); *Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003) ("the weighing process is not a fact-finding one based on evidence."); *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[b]ecause the weighing of the evidence is a function distinct from fact-finding, Apprendi does not apply here."); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005) ("balancing process is not 'a fact necessary to constitute the crime with which [the defendant] is charged' such that it would invoke the constitutional requirement of proof beyond a reasonable doubt . . .").

state ground—as the Louisiana Supreme Court has squarely addressed the question under what the federal constitution requires.

II. The BIO Does Not Contest That the Standards of Decency Have Evolved Since *Tison v. Arizona*

Petitioner presented significant evidence that the standards of decency have evolved since this Court issued *Tison v. Arizona*, permitting the imposition of the death penalty for a principle to first degree murder. As Petitioner noted, since *Tison*, seven states have replaced the death penalty with life without parole, and four additional states have moratoria in place. Three additional states, since *Tison*, have limited the death penalty to those who intentionally kill. The BIO does not contest that the standards of decency have evolved. Rather, the BIO's only response is to assert that "***the totality of the evidence viewed in the light most favorable to the prosecution***" was sufficient to reject "Petitioner's claim that allegedly 'minor participation' in Capt. Knapps' murder renders imposition of the death penalty unconstitutional." BIO at 19. The State continues: "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 this case is not dependent on *Tison's* holding…" BIO at 19-20. Essentially, the BIO argues that the death penalty is constitutionally imposed upon Mr. Clark because it is possible – viewing the evidence in the light most favorable to the prosecution – that he intended to kill.

But the lodestar for constitutionality here is not *Jackson v. Virginia* sufficiency of the evidence analysis. Mr. Clark was prosecuted as a *principal* to first degree murder. As denoted during his *Motion to Reconsider Sentence*, and throughout litigation on appeal, the State indicted Mr. Clark as a principal, conducted *voir dire* on the law of principals, and argued in closing that the jury could convict even though they would never know who inflicted the mortal blows. In addition, the jury was instructed on the law of principals before voting to convict Petitioner of first degree murder and sentencing him to death. In this context, applying an Eighth Amendment standard, the question is entirely ripe for this Court to review.

III. The BIO Does Not Contest that there is a Split Amongst the Lower Courts on How to Review Allegations of Extraneous Juror Influence, But Instead Argues that Louisiana's Standard Was Met in this Case.

As noted in Petitioner's initial filing, this Court 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). The Petition outlined the split in the lower courts, where five jurisdictions (the Second, Fourth, Seventh, Tenth, and Eleventh circuits) recognize a strong (but rebuttable) presumption of prejudice based upon extrinsic contacts with jurors; 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; and two more jurisdictions(Louisiana and the Third Circuit) hold that a defendant is required to prove that the external influence would have prejudiced the juror and affected the outcome.

The BIO does not argue that this split is insignificant, nor does it suggest that additional percolating in the lower courts will resolve the issue. Rather, the BIO argues that the Louisiana Supreme Court was correct when it found that Petitioner had failed to prove the external influence would have made a difference. This militates towards granting *certiorari,* as it places petitioner's case squarely within the parameters of this Court's Rule 10 guidelines. *See* Supreme Court Rule 10 (B) (noting as appropriate basis for granting certiorari "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.").

IV. The BIO Does Not Dispute That Petitioner Was Left With The Choice Of Waiving Counsel And Representing Himself, Or Being Saddled With A Lawyer Who Would Concede His Guilt Over His Objection.

The State's BIO does not dispute that the issue is ripe for this Court's review. Nor does the BIO argue that the issue is unimportant. Rather, the State argues the merits of the claim, asserting that counsel may concede elements of first and second degree murder over the defendant's objection. Quoting the Louisiana Supreme Court's Opinion, the BIO contends that Petitioner's trial lawyers were only conceding some of the elements of first or second degree murder and justifying the lower court's decision because the defendant "explained that he would much prefer

the death penalty" over the theory endorsed by his counsel that could render "a second degree murder conviction and life sentence more likely . . . ." BIO at 29. But this is the exact question presented: whether a defendant has the autonomy to choose whether his appointed lawyer concedes his guilt of some (or all) of the elements, even if his choice exposes him to a more severe punishment.

CONCLUSION

With regard to each of these questions, this case presents a clean vehicle for addressing the constitutional question. The case is on direct appeal and not complicated by questions of AEDPA deference, or state procedural bars. Petitioner respectfully asks this Court to grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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