No. 09-570

In The

Supreme Court of United States

STATE OF DELAWARE,

Petitioner,

v.

JAMES COOKE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Delaware

BRIEF IN OPPOSITION

JOSEPH A. GABAY
Counsel of Record
LAW OFFICE OF JOSEPH A. GABAY
901 North Market Street
Suite 840
Wilmington, DE 19801
(302) 654-2125

JENNIFER KATE AARONSON
AARONSON & COLLINS, LLC
8 East 13th Street
Wilmington, DE 19801
Counsel for Respondent

(CAPITAL CASE)

QUESTIONS PRESENTED

1. Whether a criminal defendant has a fundamental constitutional right to direct his counsel to present a "factual innocence-based defense" irrespective of counsel's professional judgment?

2. Whether an unresolved disagreement between counsel and defendant regarding pursuit of a "concession-of-guilt and mitigation" defense constitutes a conflict of interest that violates the defendant's Sixth Amendment right to counsel?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

STATUTES

RULES

James E. Cooke respectfully asks this Court to deny the petition seeking review of the judgment of the Supreme Court of Delaware.

OPINIONS BELOW

The opinion of the Delaware Supreme Court (Pet. App. A1-A143) is officially reported at 977 A.2d 803. The opinion of the Delaware Supreme Court denying the prosecution's Petition for Writ of Mandamus (Pet. App. A268-A282) is officially reported at 918 A.2d 1151.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATEMENT OF THE CASE

Respondent generally accepts Petitioner's recitation of the facts of the offenses for which James E. Cooke was convicted. (Pet. 1-6). The following is also relevant to consideration of the Petition.

1. During pre-trial consultations with counsel, Respondent expressly rejected a plea of guilty and the pursuit of a verdict of guilty by mentally ill (GBMI) by trial counsel. (Pet. App. 10-11).

2. Trial counsel informed the trial judge that Cooke did not agree with *their* decision to seek a GBMI verdict during an office conference to discuss jury selection. Counsel explained that Cooke did not agree with their decision about how to best defend the case: counsel wanted to assert that Cooke was guilty but mentally ill, while Cooke wished to maintain his factual innocence and did not want his counsel to present evidence that he was mentally ill.

Trial counsel explained the issue as follows:

> It may come to a head, it may not. Mr. Cooke has one idea about how to defend this case; his counsel has a different idea. . . I have written him at length and explained to him that in counsel's view . . that if the decision is the purpose of the litigation then the decision rests with Mr. Cooke about what to do. However, if the decision pertains to trial tactics and strategy, it is his counsel's decision what to do. That's with respect to the first phase of the case. Assuming we're facing then the second phase of a case, a penalty phase, I have written to Mr. Cooke and given him my opinion that . . .the presentation of a mitigation case is in the discretion of trial counsel. Although there have been circumstances where defendant's decision to waive mitigation evidence has been accepted.
>
> * * *
>
> [Co-counsel] and I have the view that we can't present a claim of guilty but mentally ill without having to renounce innocence; that Mr. Cooke can maintain his innocence, as he may do if he chooses to testify, yet we will be able to present, on his behalf, a claim of guilty but mentally ill. And so there is going to be, I think, at some point probably before we begin the evidence and make opening statements where we are going to need to go on the record and hash this out on the record, and go forward from there. (Pet. App. 11 – 13).

Trial counsel knew that Cooke wanted to maintain his factual innocence and explained that Cooke would likely testify that "he had consensual sex with Lindsey Bonistall, he left and after that she must have been murdered by somebody else." (Pet. App. 15). But, in their view, "that does not preclude counsel from pursuing a claim of guilty but mentally ill." *Id.*

Trial counsel thought that the trial judge needed to engage in a colloquy with Cooke and address the disagreement on the record prior to trial. *Id.* Trial counsel correctly predicted that failure to address the disagreement prior to trial might result in "some kind of disastrous happening during trial," such as an outburst by Cooke. *Id.*

3. The disagreement between Cooke and his counsel was brought to the trial judge's attention again the day before jury selection was to begin. The prosecutor pointed out that all of the psychiatric/psychological experts had determined that Cooke was competent to stand trial and further explained that if trial counsel decided to introduce evidence to support a GBMI

verdict, despite Cooke's objections, then trial counsel would be suggesting to the jury that Cooke's preferred defense of innocence was not valid. (Pet. App. 16).

2

The prosecutor said that "it would get particularly knotty, I suppose, if the defendant were to testify and say, 'I did not kill Lindsey Bonistall,' and defense were to then present psychiatric or psychological testimony from [defense experts], which, among other things, includes the defendant's admission that he did kill Lindsey Bonistall." (Pet. App. 17).

That is exactly what happened at trial.

4. During jury selection, the prosecution repeatedly requested that the trial judge engage in a colloquy with Cooke addressing the issue of whether trial counsel could pursue a GBMI verdict despite Cooke's objections. (Pet. App. 18-20). Trial counsel then reversed course and objected to the trial judge engaging in a colloquy with Cooke about the disagreement, even though trial counsel originally had requested the colloquy. (Pet. App. 19).

The prosecution subsequently moved *in limine* for an order to preclude Cooke's counsel from presenting evidence to support a guilty but mentally ill verdict or any other evidence of mental illness unless either: (1) trial counsel informed the trial judge that there was no longer a dispute with Cooke about whether to pursue the verdict and that Cooke agreed with the presentation of evidence to support the verdict, or (2) the trial judge engaged in a colloquy with Cooke and determined that Cooke agreed with his counsel's decision to seek a guilty but mentally ill verdict. (Pet. App. 20).

In an email to the trial judge notifying him of the State's intent to make the motion, the prosecutor explained that "the ultimate choice of whether or not to pursue a guilty but mentally

ill verdict is the defendant's to make, and that counsel cannot override that choice when (as is the case here) it is expressly communicated to them by a competent client." (Pet. App. 20).

While presenting the motion, the prosecutor stated: "[W]e have a client who is

communicative with counsel and has expressly said, after getting the best possible legal advice from two esteemed members of the defense bar, that he does not want to present a guilty but mentally ill defense." (Pet. App. 20-21). In addition, "the defendant's confession, if it be such, only comes into evidence through the guilty but mentally ill defense expert witness…" [Emphasis added] (Pet. App. 21).

Trial counsel disagreed. They explained that they only brought the dispute to the trial court's attention because counsel wanted to avoid "any mid-trial surprises:" "It was not brought as an invitation to the State to attempt to have this Court dictate to counsel what counsel can say to the jury in opening statements." (Pet. App. 21).

At this point, Cooke said, "I've got to speak to the Judge." (Pet. App. 22). The trial judge refused to do anything with regard to the dispute and would not hold a colloquy with Cooke.[1] (Pet. App. 24).

5. Immediately after the prosecution's opening statement, Cooke requested to "address the Court" regarding the deprivation of his constitutional rights. (Pet. App. 26-27). Over

[1] The State filed a Petition for Writ of Mandamus requesting the Delaware Supreme Court to determine pre-trial whether, "in the event of an irreconcilable disagreement between defense counsel and the defendant about a decision to seek a verdict of guilty but mentally ill, … the defendant's wishes prevail, " and if so, to direct the Superior Court to preclude Cooke's attorney's from presenting evidence that would support a GBMI verdict. *In re Petition for Writ of Mandamus*, 918 A.2d 1151, 1152-53 (Del. 2007) (Pet. App. 24). The Delaware Supreme Court denied the State's application on procedural grounds.

the prosecution's objection, the trial judge deferred until after the defense's opening statement: the trial judge wanted Cooke to have a chance to "hear his legal voice in the same context as he heard the State's legal voice." (Pet. App. 28).

4

Counsel for Cooke focused the entirety of their opening statement on Cooke's mental illness and requested a verdict of GBMI. (Pet. App. 29).

In the colloquy with the court, Cooke responded as follows:

> Yeah, sure. I'm full of matters. I've got a lot of problems, I mean, with my counselors. They went beyond, you know, the reasons that – with this mental ill defense. I never agreed to none of that stuff and I've got the papers, you know, that prove I never agreed to that stuff and that's like going over my head, taking my rights from me, you know. (Pet. App. 31).

6. Trial counsel, over Cooke's objection, waived cross-examination of every fact witness called by the state in its case-in-chief. Trial counsel's waiver of cross-examination of Amalia Cuadra (who testified about the burglary of her home) precipitated another outburst. (Pet. App. 32-36).

The Delaware Supreme Court noted that Cooke was "apparently upset because Cuadra gave the police a few different versions of what the intruder looked like." (Pet. App. 33, *fn*. 13).

Despite a suspension of the proceedings and chastisement by the trial judge, Cooke again protested when trial counsel refused to ask Amalia Cuadra any questions after the conclusion of her direct examination the next day stating: "All these witnesses pass here. You got no questions for none of them." (Pet. App. 36, 37). Cooke's continued protestations regarding counsel's refusal to cross-examine witnesses resulted in trial counsel's request that Cooke be banished from the courtroom. [Emphasis added] (Pet. App. 37).

A declaration by Cooke, "I'm not guilty. And they chose this mentally ill, and not me," in the presence of the jury resulted in Cooke's attorney's requesting a mistrial. (Pet. App. 45). The mistrial motion was denied. (Pet. App. 47-48).

7. During the course of the trial, the trial judge engaged in a series of colloquys with

Cooke aimed at determining whether Cooke could "behave" in the courtroom during the proceedings; however, the trial judge never addressed Cooke's objection to his attorneys presenting evidence and arguing that Cooke was guilty but mentally ill. (Pet. App. 32, 35-48, 51-53).

8. Trial counsel made a second motion for a mistrial when Cooke was tackled by corrections officers in the courtroom, in the presence of the jury, as Cooke objected to the defense presentation of evidence supporting a GBMI verdict. (Pet. App. 53-54). The trial judge not only denied the mistrial motion but banished Cooke to a holding cell to watch the proceedings by television. (Pet. App. 54, 55).

9. During the defense case, Cooke's counsel admitted Cooke's confession to the Bonistall rape and murder through the testimony of two mental health experts who opined Cooke was guilty but mentally ill. (Pet. App. 57).

10. In an *ex parte* conference with the judge, trial counsel explained that Cooke wanted to testify but that they did not want to assist Cooke in his choice: "we feel strongly that if he does choose to testify, he do it without the assistance of his attorneys." (Pet. App. 63). Counsel expressed their belief to the trial judge that Cooke "beyond a reasonable doubt. . .that he's guilty of these offenses and [they were] of the reasonable belief that he will probably testify to the contrary." (Pet. App. 64). Cooke's counsel requested the trial judge call Cooke as a

witness. (Pet. App. 63). The trial judge determined that trial counsel was not required to call Cooke to testify. Rather, Cooke would be seated at the witness stand when the jury was brought into the courtroom, the trial judge would ask the clerk to administer the oath and Cooke could testify as he chose. (Pet. App. 65-66).

11. Cooke testified that he did not agree with his attorneys' decision to pursue a GBMI verdict and that he was not guilty and not mentally ill. He further stated, "I been got rid of these public defenders. I fired them a long time ago." (Pet. App. 67). "It's like I'm my own counselor." (Pet. App. 68). "How can a man prove he's innocent if his public defender's not doing it?" (Pet. App. 68-69).

Cooke's testimony did not proceed smoothly. The jury was thrice taken out of the courtroom. (Pet. App. 68). At the conclusion of Cooke's testimony, the trial judge ruled that Cooke waived his presence in the proceedings by his "contumacious, disruptive, disrespectful" behavior during his testimony. (Pet. App. 69).

12. Following the prosecution's rebuttal case wherein the prosecution called an expert to rebut trial counsel's evidence supporting GBMI, Cooke testified again. Cooke's testified, against the advice of his attorneys, that he was "defending my own self." (Pet. App. 74). When Cooke failed to follow the trial judge's directive that he could only testify on matters relating to the prosecution's rebuttal, the jury was excused and Cooke was removed from the courtroom. (Pet. App. 75).

13. In closing argument, Cooke's counsel argued that Cooke's disagreement with his attorneys was evidence of Cooke's mental illness and Cooke's testimony should be believed. (Pet. App. 76-77).

> Mr. Cooke cannot or will not admit his mental illness, that's part of his pathology. And, in the context of this case, mental illness is not a defense, it's not an excuse, it's merely Mr. Cooke's mental status when he committed these crimes. **And he committed these crimes, and you should find him guilty, guilty but mentally ill. We have all heard Mr. Cooke's statement, "I'm not guilty. I'm not mentally ill." With all due respect to Mr. Cooke, the evidence proves that he's wrong on both counts.**

(Pet. App. 77) (Emphasis added).

Defense counsel later summarized his closing argument stating: "I stood in front of this jury and said, 'He's guilty,' and 'Just determine whether he's ill or not.'" (Pet. App. 77 fn.23).

REASONS FOR DENYING THE PETITION

I. The Question of Whether a Defendant Has the Ultimate Authority to Plead Guilty, Waive a Jury or Testify in His Own Defense is Well Established Under this Court's Jurisprudence

The Delaware Supreme Court held that trial counsel's concession of guilt as to all charges and pursuit of a GBMI verdict over Cooke's vociferous and repeated protestations that he was innocent and not mentally ill deprived Cooke of his constitutional right to make the fundamental decisions regarding his case. (Pet. App. 84). Those fundamental decisions included whether to plead not guilty and have a trial by jury where he has the opportunity to confront and cross-examine adverse witnesses and whether to testify. (Pet. App. 83-84).

The Delaware Supreme Court's holding is consistent with this Court's jurisprudence reserving to the defendant the autonomy to make the most basic decisions affecting his case. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (right to plead not guilty); *Duncan v. Louisana*, 391 U.S. 145, 149 (1968) (right to trial by jury); *Pointer v. Texas*, 380 U. S. 400, 403 (1965) (right to confront witnesses); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (right to not testify).

In *Jones v. Barnes*, this Court affirmed that a defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). The Court cited the ABA Standards for Criminal Justice,

which also assigns those decisions to the defendant. ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980); *see also Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (holding that the Constitution does not permit counsel to enter a guilty plea over a defendant's objection). The Model Rules of Professional Conduct and the Model Code of Professional Responsibility concur that the decision of how to plead belongs to the defendant. Model Rules of Prof'l Conduct R.

1.2 (a) (2003); Model Code of Prof'l Responsibility Canon 7-7 (1981).

The Sixth Amendment provides an "implied" right "to defend [that] is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819-820 (1975). Certain decisions regarding the exercise of basic trial rights are so personal to the defendant "that they cannot be made for the defendant by a surrogate." *Florida v. Nixon*, 543 U.S. 175, 187 (2004).

Such choices "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant." *Gonzales v. United States*, __ U.S. __, 128 S. Ct. 1765, 1771, 170 L.Ed.2d 616 (2008) ("[S]ome basic trial choices are so important that an attorney must seek the client's consent in order to waive the right.") (citing *Nixon*, 543 U.S. at 187).

A lawyer is "an assistant" and not a "master" because otherwise "the right to make a defense [would be] stripped of the personal character upon which the [Constitution] insists." *Faretta v. California*, 422 U.S. 806, 820 (1975). The Court of Appeals for the Eleventh Circuit recognized that "[c]riminal defendants possess two categories of constitutional rights: those which are waivable by defense counsel on the defendant's behalf, and those which are considered 'fundamental' and personal to [the] defendant, waivable only by the defendant."

United States v. Teague, 953 F.2d 1525, 1531 (11th Cir. 1992). The Third Circuit recognized that the right to testify is personal to the defendant, and thus, only the defendant may waive it. *See*, *United States v. Penny-Cooke*, 65 F.3d 9, 10 (3d Cir. 1995). Every other circuit court to consider this question concurred. *See United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir. 1994), vacated without consideration of this point, 53 F.3d

94 (5th Cir. 1995); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987); *Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993) (assuming without deciding that right to testify may not be waived by counsel).

The right to decide what plea to enter, similar to the decision as to whether to testify, is Cooke's fundamental and personal right, waivable only by Cooke and not by his counsel. Therefore, the decisions whether to plead not guilty, have a trial by jury in which adverse witnesses were cross-examined and to testify were Cooke's alone to make, a principle that has long been established as such in this Court's jurisprudence.

"The right to make these [fundamental] decisions is nullified if counsel can override them against the defendant's wishes." (Pet. App. 97). When Cooke exercised his ultimate authority to make certain fundamental decisions, "his attorneys insisted on their own objective." (Pet. App. 101).

Over Cooke's objection, trial counsel: (1) effectively negated Cooke's fundamental right to enter a plea of not guilty by conceding Cooke's guilt on all charges in the opening statement (including the statutory aggravating circumstances making Cooke eligible for the death penalty)

thereby denying Cooke (a) the "assistance" of counsel in his chosen objective; and (b) the benefit of the reasonable doubt standard and meaningful adversarial testing (Pet. App. 86-87); (2) negated Cooke's fundamental right to testify in his own defense by (a) refusing to call Cooke as a witness which required the trial judge to announce to the jury that it was the time for Cooke to testify; and (b) admitting into evidence Cooke's confession to defense retained experts, which

Cooke denied, in an effort to achieve their own objective of a GBMI verdict (Pet. App. 89); and (3) negated Cooke's fundamental right to an impartial jury by (a) telling the jury, over Cooke's objection, in their opening that he was mentally ill; (b) telling the jury in closing argument that Cooke's testimony was not credible and should not be believed; and (c) repeatedly seeking to exclude Cooke from the proceedings and requesting a mistrial on two occasions because Cooke's outbursts in which he asserted that he was not guilty and not mentally ill was "highly prejudicial to the defense that "*we're* [defense counsel] putting on." (Pet. App. 91) (emphasis in original).

Overriding Cooke's fundamental decisions regarding his case resulted in "complete chaos at trial." (Pet. App. 106). Trial counsel's overbearing conduct completely deprived Cooke of his fundamental constitutional trial rights and the Delaware Supreme Court's opinion is consistent with this Court's jurisprudence regarding a defendant's autonomy to make said decisions.

A. The Delaware Supreme Court Decision Does Not Contribute to a Conflict Among Federal Circuits and State Supreme Courts

The Delaware Supreme Court correctly found that defense counsel's override of Cooke's fundamental decisions regarding his case negated Cooke's constitutional rights and created a "structural defect" in the proceedings as a whole. (Pet. App. 102). There was a two-fold breakdown in the adversarial system of justice that pervaded Cooke's entire trial: (1) Cooke's attorneys did not "assist" Cooke with the trial objective of obtaining a not guilty verdict; and (2)

in pursuing their own inconsistent objective of proving that Cooke was guilty but mentally ill, defense counsel failed to subject the prosecution's case to meaningful adversarial testing and undermined the due process requirement that the prosecution prove Cooke's guilt (and eligibility for the death penalty) beyond a reasonable doubt. (Pet. App. 102).

On the questions of Cooke's guilt and eligibility for the death sentence, Cooke's

attorney's were completely aligned with the prosecution: defense counsel helped the prosecution by admitting a confession to defense experts that was beyond the prosecution's reach, argued that Cooke's testimony was not credible and told the sentencing judge and jury that Cooke committed the crimes. (Pet. App. 102-03).

The Delaware Supreme Court correctly applied the *Cronic* standard and this case is materially distinguishable from all cases cited by petitioner as "contributing to a conflict among federal circuits and state supreme courts."

The Sixth Amendment provides that a criminal defendant shall have the right to "the assistance of counsel for his defense." The right to counsel has been accorded "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Assistance which is ineffective in preserving fairness does not meet the Constitutional mandate. *Strickland*, 466 U.S. at 685-86. A defendant need not show a probable effect upon the outcome where assistance of counsel has been denied entirely or during a critical stage of the proceeding. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. *See Cronic*, 466 U.S. at 658-59.

The *Strickland* / *Cronic* Distinction

Ordinarily, to prevail on an ineffective assistance of counsel claim, a defendant must satisfy *Strickland*'s two-part test. *Strickland v. Washington*, 466 U.S. 668, 700 (1984). First, "a defendant must demonstrate that 'counsel's representation fell below an objective standard of reasonableness,' with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. *Strickland*, 466 U.S. at 688. When assessing whether an attorney's performance was deficient, the court "must indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Second, if counsel was deficient, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

The Supreme Court's decision in *Cronic* created a very limited exception to the application of *Strickland*'s two-part test in situations that "are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). This Court identified three situations implicating the right to counsel where the Court will presume that the petitioner has been prejudiced. *Bell v. Cone*, 535 U.S. 685 (2002).

First are situations in which a petitioner is denied counsel at a critical stage of a criminal proceeding. *Bell*, 535 U.S. at 696 (quoting *Cronic*, 466 U.S. at 659). Second, and relevant here, are situations in which a petitioner is represented by counsel at trial, but his or her counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* Finally, prejudice is presumed when the circumstances surrounding a trial prevent a petitioner's attorney

from rendering effective assistance of counsel. *Id*. (citing *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932)).

In *Cronic*, the Court explained what it considered to be "meaningful adversarial testing":

> The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaning adversarial testing. When a true adversarial criminal trial has been conducted … the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses it character as a confrontation between advisaries, the constitutional guarantee is
>
>
>
> violated.

Cronic, 466 U.S. at 656-57 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)). The Court further explained that the defendant must show either a deprivation of a constitutional right "of the first magnitude" or "specific errors of counsel [that] undermined the reliability of the finding of guilt." *Id.* at 659 & n. 26.

In *Bell*, this Court clarified when an attorney's failure to subject the prosecution's case to meaningful adversarial testing results in a constructive denial of counsel. Reiterating language found in *Cronic*, this Court stated that an attorney must "*entirely* fail[] to subject the prosecution's case to meaningful adversarial testing" for the presumption of prejudice to apply. *Bell*, 535 U.S. at 696 (quoting *Cronic*, 466 U.S. at 659) (emphasis in original).

In other words, an attorney must completely fail to challenge the prosecution's case, not just individual elements of it. *Id.* Critically, for purposes of this case, the Court further noted that when applying *Strickland* or *Cronic,* the distinction between counsel's failure to oppose the prosecution entirely and the failure of counsel to do so at specific points during the trial is a "difference . . . not of degree but of kind," and that this distinction hinges on whether a defendant alleges a defect in the "proceeding as a whole" or "at specific points" of the trial. *Id* at 696-697.

Under this rationale, when counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, counsel has made a tactical decision.

Id. By making such choices, defense counsel has not abandoned his or her client by entirely failing to challenge the prosecution's case. Such strategic decisions do not result in an abandonment of counsel, as when an attorney completely fails to challenge the prosecution's

case. *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002). *Cronic* is reserved only for those extreme cases, such as here, in which counsel fails to present any defense. *Id*. Prejudice is presumed in such cases because it is as if the defendant had no representation at all. *Id*.

In this case, the record demonstrates that trial counsel was completely aligned with the prosecution and had abandoned their client. Trial counsel conceded that Cooke committed the crimes, offered affirmative evidence of Cooke's guilt and argued Cooke was not credible. Unlike *Bell*, there was a defect in the "proceedings as a whole," not simply "at specific points" in the trial. *Bell*, 535 U.S. at 697.

The Delaware Supreme Court correctly applied *Cronic* to this extreme case in which counsel abandoned Cooke and failed to present any defense.

B. The Delaware Supreme Court Opinion is Consistent with Federal Circuit and State Supreme Courts interpreting the *Strickland* / *Cronic* Distinction

The Delaware Supreme Court's decision is consistent with the federal circuit and state supreme court cases that recognize the basic distinction between a concession to a lesser included offense and acknowledging that the evidence establishing a lesser included offense is overwhelming and a concession to the only factual issues in dispute. It is that difference that is at the core of the *Strickland* / *Cronic* distinction.

Circuit court decisions have elaborated on the distinction between ineffective assistance of counsel and the constructive denial of counsel. Collectively, these decisions reinforce the

notion that defense counsel must *entirely* fail to subject the prosecution's case to meaningful adversarial testing for the *Cronic* exception to apply. *Gochicoa v. Johnson*, 238 F.3d 278, 285 (5th Cir. 2000) (holding that "when the defendant receives at least some meaningful assistance, he must prove prejudice in order to obtain relief for ineffective assistance of counsel" (quoting

Goodwin v. Johnson, 132 F.3d 162, 176 n. 10 (5th Cir. 1997)).

Thus, when analyzing an attorney's decision regarding concession of guilt at trial, courts have found a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute. *See United States v. Swanson,* 943 F.2d 1070, 1074 (9th Cir. 1991) (holding that "[a] lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing"); *State v. Carter*, 14 P. 3d 1138, 1146 (Kan. 2000) (reversing “because counsel’s abandonment of his client’s defense [by conceding the only disputed facts in closing argument] caused a breakdown in our adversarial system of justice.”).

In contrast, those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel. As such, they have analyzed them under the two-part *Strickland* test. *See United States v. Short*, 181 F.3d 620, 624-5 (5th Cir. 1999) (holding that counsel’s statements, which did not admit guilt, but which implicated the defendant, were reasonable in light of the overwhelming evidence presented at trial); *Lingar v. Bowersox*, 176 F. 3d 453, 458 (8th Cir. 1999) (stating that “the decision to

concede guilt of the lesser charge of second-degree murder was a reasonable tactical retreat rather than a complete surrender"); *Underwood v. Clark*, 939 F.2d at 474 (concluding that defense counsel's concession during closing arguments of a lesser included offense was "a sound tactic when the evidence is indeed overwhelming . . . and when the count in question is a lesser

count, so that there is an advantage to be gained by winning the confidence of the jury"); *McNeal v. Wainwright*, 722 F.2d 674, 676 (11th Cir. 1984) (finding that McNeal's attorney's statements conceding manslaughter during a murder trial were tactical and strategic and did not constitute a forced guilty plea). Those examples do not apply here.

The Delaware Supreme Court applied the correct standard; a presumption of deficient performance and a presumption of prejudice is reserved for cases in which counsel, as here, fails to meaningfully oppose the prosecution's case and "entirely fail[s] to function as the client's advocate". *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Florida v. Nixon*, 543 U.S. 175, 189 (2004).

C. The Issue Presented by Petitioner is not a Recurring One that Remains Unresolved by *Florida v. Nixon*.

An attorney has a duty to consult with the defendant regarding "important decisions," including questions of overarching defense strategy. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Concerning the decisions on the objectives of the representation, including the decision whether to plead guilty, waive a jury, confront witnesses and testify in his own defense, a lawyer "must both consult with the defendant *and* obtain consent to the recommended course of action." *Nixon*, 543 U.S. at 187. (emphasis added).

In *Nixon*, defense counsel decided that the best strategy was to concede in the guilt phase that the defendant had committed murder and to concentrate on attempting to spare the

defendant's life in the penalty phase. Unlike this case, the defendant had confessed to the police. *Nixon*, 543 U.S. at 183. Unlike this case, when counsel consulted with the defendant regarding the proposed strategy, the defendant did not respond affirmatively or negatively. *Id*. at 186-87. Counsel for Nixon then proceeded with the concession of guilt without the client's express

consent. *Id*. at 186-87.

This Court held that "[t]he reasonableness of counsel's performance, after consultation with the defendant yields no response, must be judged in accord with the inquiry generally applicable to ineffective-assistance-of-counsel claims." *Id*. at 178. This Court further explained that a presumption of prejudice "is not in order based *solely* on the defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant." *Id*. at 179 (citing *Cronic*, 466 U.S. at 659).

The Delaware Supreme Court noted the "stark contrast" between the facts of *Nixon* and the facts of this case. Tacit consent was never an issue because "Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty."[2] (Pet. App. 95-96). The holding in *Nixon* was

[2] The Delaware Supreme Court, in a footnote, stated:

> We note that a hypothetical was presented during oral argument in *Nixon* with a striking similarity to the facts before us. Justice Souter presented counsel for the United States (as amicus curiae supporting the state of Florida) with a hypothetical defendant who "goes whole hog" in announcing to the jury and the trial judge that he disagrees with his counsel's decision to concede guilt and that he is innocent. Counsel responded that, under those circumstances, alternative counsel should be appointed. Justice Souter agreed, but further inquired whether, if no alternative counsel is appointed, "there is any possibility … of finding adequate counsel?" Counsel responded "Probably not…." and conceded that this type of situation would "lead to such a breakdown in the attorney-client

expressly qualified as applying only to the factual scenario in which the defendant is unresponsive to counsel's proposed strategy.

Consistent with this Court's jurisprudence in *Jones, supra* and *Faretta, supra*, the

Delaware Supreme Court distinguished this case factually, holding:

> However, where, as here, the defendant *adamantly objects* to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury. The right to make these decisions is nullified if counsel can override them against the defendant's wishes. In this case, the trial court's failure to address the breakdown in the attorney-client relationship allowed defense counsel to proceed with a trial objective that Cooke expressly opposed. This deprived Cooke of his Sixth Amendment right to make fundamental decisions concerning his case. (Pet. App. 96-97) (emphasis in original).

The materially distinguishable facts of Cooke's adamant and vociferous objections from the outset are the precise circumstances by which *Nixon* is distinguished.

Mr. Cooke had the right to make certain fundamental decisions with respect to his case and trial. Those rights were trampled by his own counsel. Their actions were in direct contradiction with the Constitution and the decisions of this Court.

There is neither confusion in the law, nor in its application to this case. Accordingly, the first question presented by Petitioner does not merit review.

> relationship that [the attorney] couldn't possibly render effective assistance of counsel." Transcript of Oral Argument at 22-23, *Nixon*, 543 U.S. 175 (No. 03-931). (Pet. App. 96).

II. The Question of Whether Conflict of Interest Invokes the Protection of the 6th and 14th Amendment is Well Established When this Court's Jurisprudence is Applied to the Facts of this Case

Petitioner's second question presented distinctly narrows the issue presented to the Supreme Court of Delaware. Additionally it presents a question which need not be resolved based upon the underlying facts of this case.

Petitioner seeks to confine the question to when a "conflict of interest… violates the Sixth Amendment right to counsel."

As part of its plea supporting the Petition they wrote:

> This Court should make clear that an irreconciled disagreement constitutes a violation of the Sixth Amendment *only* where there is a complete bilateral breakdown in communication between the attorney/client *and* that breakdown prevents effective assist of counsel. Citing *Mickens*, *supra*: and *Stevenson v. Lambert*, 504 F. 3d 873, 886 (9th Cir. 2007)

(Pet. 35)

In the Supreme Court of Delaware, Mr. Cooke presented the issue in a far broader fashion, because the actual and irreconcilable conflict of interest went far beyond "an unresolved disagreement regarding pursuit of a 'concession of guilt and mitigation' defense." The conflict also included by way of illustration and not limitation the concession of guilt to all charges, a refusal to call Cooke as a witness, and the admissions of affirmation evidence of guilt.

Even if this Court were to grant the Petition and ultimately reverse on this question, it would not change the Supreme Court of Delaware's reversal which was based upon a panoramic, rather than a limited, review of the facts, including the trial judge's failure to intervene.

Further the issue posed by Petitioner is neither novel, nor unresolved, when read in conjunction with settled law and the facts of this case.

The right to an attorney with undivided loyalty free of any conflicts of interest is subsumed within the constitutional rights to counsel. *Wood v. Georgia*, 450 U.S. 261, 271(1981); *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 131 (3d Cir. 1984).

As the Third Circuit noted, an actual conflict of interest occurs "when, during the course of the representation, the defendant's interests diverge with respect to a material, factual or legal issue or to course of action." *United States v. Gambino, 864 F.2d 1064, 1070 (3rd Cir 1988).*

An irreconcilable conflict occurs when the breakdown in the attorney – client relationship results in the complete denial of counsel. *In re Personal Restraint of Stevenson*, 16 P.3d 1, (Wash. 2001).

As previously noted in this brief:

The conflict between trial counsel and Mr. Cooke did not begin at trial. Rather it had percolated for some time.

During the course of trial, counsel repeatedly acted at odds with their client.

As noted in the opposition to Question One of the Petition, trial counsel conceded guilt to all charges during his opening. In addition to being inapposite to Cooke's wishes to pursue a factual innocence defense, the concession included acknowledgement of guilt to offenses not directly related to the homicide in question.

During the course of presenting evidence of Cooke's alleged mental illness during the

defense case, a purported confession was elicited by Cooke's counsel from a defense expert without Cooke being asked to waive the privilege.

Indeed all his in-court statements to that point would indicate he would have invoked the privilege.

When it came time for Mr. Cooke to elect to testify, counsel sought to block his right to take the stand.

The Supreme Court of Delaware found that trial counsel refused to call Mr. Cooke as a defense witness, leaving the trial judge to do so.

Trial counsel did not question Mr. Cooke, rather he testified in narrative from. Cooke maintained his innocence.

Ultimately the case moved to closing arguments. Here Cooke's counsel argued that the jury should convict him but with a verdict of guilty but mentally ill. He asserted that Mr. Cooke was wrong when he said he wasn't guilty and also when he said he wasn't mentally ill. He

concluded by stating: **"I'm confident that you will find Mr. Cooke guilty but mentally ill on all the counts."** (Pet. App. 77).

Respondent elects to expand on certain elements of the conflict to demonstrate the severity of the rift and how it disintegrated Mr. Cooke's right to a fair trial.

Guilty but Mentally Ill

A criminal defendant has authority over certain "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745(1983)). See also, Delaware Lawyers' Rules of Professional Conduct ("DLRPC") Rule 1.2(a) (a lawyer shall abide by a defendant's decision "as to a plea to be entered"); *ABA Standards for Criminal Justice Prosecution Function and Defense Function* Standard 4-5.2 (a) (i) (3d ed. 1993) (assigning specific choice of what plea to enter to the defendant).

Because the right to plead not guilty is a fundamental right, a lawyer may not waive a defendant's right without the public acknowledgement and consent of the defendant. *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988). Delaware Superior Court Criminal Rule 11 and decisional law establishes, in all criminal cases, that "defendant may plead not guilty, guilty, nolo contendere, or guilty but mentally ill."

It is undisputed that in Delaware GBMI is a guilty plea. In its Reply to Answers to Complaint for Extraordinary Writ, the State acknowledged that a plea of GBMI is the "functional

equivalent" of a guilty plea. (State Reply to Answers to Compl. For Extraordinary Writ, # 11 App. 8). Rule 11, therefore, requires the court engage in the same colloquy for a guilty plea because plea of GBMI under Delaware law, is not a "defense" to criminal liability. *Sanders v. State*, 585 A.2d 117, 130-131 (Del. 1990).

The trial judge held that GBMI is a plea not a defense nor is it an affirmative defense. There is no burden of proof and a GBMI plea or verdict subjects a person to the same potential

penalties as a finding of guilty. (Pet. App. 146).

Further, to change Cooke's plea from not guilty to GBMI required the court to engage in a colloquy and make a finding that Cooke's decision was knowing and voluntary. There is a presumption against the waiver of constitutional rights and for a waiver to be effective it must be clearly established that there was an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

A colloquy was required because the predicate to pursue a GBMI (similar to NGRI) is an admission of guilt to the offenses. The trial court was required to determine that Cooke's admission of guilt to all counts of the indictment was knowing, intelligent and voluntary. No such inquiry occurred.

Notwithstanding the well-settled Federal and State protections, trial counsel conceded Cooke's guilt within seconds of beginning his opening statement and advised that the defense will "prove that Mr. Cooke is mentally ill." (Pet. App. 86).

He continued:

> And most simply put, what the defense in this case is going to do is to prove that Mr. Cooke is mentally ill. And at the end of this part of the case, the defense is going to ask you that you find Mr. Cooke mentally ill and really that's all we're going to a ask of you to do. We're not going to ask you to ignore substantial evidence presented by the State. We're simply going to ask you to look at all of the evidence that is presented to you to look at all of the evidence that is presented to you during trial. (Pet. App. 29-30). Guilty but mentally ill is not some trick that allows Mr. Cooke to avoid responsibility. It does not make him not guilty. It does not take away any of your sentencing options. (2/2 at 4-5; A-169-170) (emphasis added).

The trial court took that statement to be an admission of guilt. (Pet. App. 146).

It was a violation of Cooke's rights for the Court to accept a guilty plea from Cooke's lawyers. *Brookhart, supra.*

Throughout the case Cooke objected to the plea of guilty but mentally ill being proffered and argued against surrendering his rights. (Pet. App. 31, 32, 35, 39, 43, 54, 66).

The parties agree that the procedure utilized by trial counsel in this case involved so significant a surrender of Cooke's constitutional rights that reversal is required. (State Reply to Answers to Compl. For Extraordinary Writ, #8; A6-7). In *Brookhart,* the defendant agreed through counsel to be tried by a judge in a procedure by which the state was required to prove only a prima facie case. Like Cooke, Brookhart insisted that he was "in no way… pleading guilty." Id. at 1. The defense surrendered the right to cross-examine or introduce contrary evidence. Id. at 2.

Writing for the Court, Justice Black narrowed the question to "whether counsel has the power to enter a plea which is inconsistent with his client's expressed desire and thereby waive

his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine witnesses against him." Id. at 7. The Court held that such a procedure violated the Sixth Amendment.

Justice Harlan wrote a separate opinion in which he concluded that Brookhart made such a significant surrender of trial rights that it was a virtual plea of guilty and it offended Due Process for such a plea to be entered over protest. Id. at 9 (Harlan, J., separate opinion).

Cooke's Trial Testimony

There can be no more glaring assault in Respondent's trial rights then the events which preceded and then culminated in his testimony at trial.

Cooke's lawyers announced "some trepidation" about tendering Cooke as a witness and requested an ex parte conference with the Court in which Cooke's lawyers advised the Court of their personal opinion that Cooke was "guilty of these offenses". (Pet. App. 63).

> We are of the belief, beyond a reasonable doubt I would suggest, that he's guilty of these offenses and we are of the reasonable belief that he will probably testify to the contrary.
>
> . . . . . .
>
> And so we've reached the belief at this point, having met with him personally time after time after time, that he believes he didn't do this. An in a technical sense, that's not perjury. So we don't think you're going to hear the
>
> truth come out of his mouth, but not because he doesn't think he's telling the truth and we don't want to present his testimony. (Pet. App. 64).

. . . . . .

> I'll add that in my opinion right now at this moment in time, Mr. Cooke subjectively believes that he did not kill Lindsey Bonistal [sic]. And that's his belief, notwithstanding the avalanche of evidence to the contrary. And although this is in some ways like *Shockley*, it's different in that we cannot say, given our opinion of his subjective belief, that he did not kill Lindsey. In that sense it would not be perjury … And in our view as his lawyers, participating in the direct-examination with him would assist him not at all, it would hurt his chances to avoid a death sentence. (Pet. App. 64-65).

Of particular note during that exchange is that trial counsel never asserted a belief that they felt beyond a reasonable doubt or otherwise that Mr. Cooke would be committing perjury in his testimony. (Pet. App. 88 Fn.51).

Ultimately the trial judge called Cooke to testify because his counsel refused to do so. (Pet. App. 88).

Over his lawyers' objection, Cooke testified:

> THE WITNESS: First of all, I'd like to say I never picked this mentally ill defense. That was my public defenders' idea. Never chose it, always argued about it. As a matter of fact, the doctors they sent to me, you know, they based their own opinion–it wasn't my own words that came out of my mouth. I told them when they came to me that I didn't do anything. And that was the statement I gave them. I said, I didn't kill this person. And the public defenders, they seem to didn't care basically what I said. They misrepresented. I brought that up with the judge– (Pet. App. 66).

Criminal defendants possess two categories of constitutional rights: those which are waivable by defense counsel on the defendant's behalf, and those which are considered 'fundamental' and personal to [the] defendant, waivable only by the defendant. *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992). Here trial counsel affirmatively sought to repress Mr. Cooke's 5th and 14th Amendment rights to testify.

By going to the trial judge, pronouncing him guilty, and refusing to call him as a witness and question him they continued the actual, egregious and irreconcilable conflict which existed.

28

CLOSING ARGUMENT

Delaware's trial procedure is that the State proceeds first, followed by the defense. The State may then provide rebuttal argument.

When the State had completed its argument, counsel for Mr. Cooke rose and addressed the jury.

He stated that:

> Mr. Cooke's testimony that he's not pursuing a claim of mental illness and that it's his lawyers that are doing it, that's true." Defense counsel explained that, even thought "Mr. Cooke disagrees with his lawyers," it "does not diminish his claim of mental illness. It really reinforces it." (Pet. App. 76-77).

Defense counsel continued:

> Mr. Cooke cannot or will not admit his mental illness, that's part of his pathology. And, in the context of this case, mental illness is not a defense, it's not an excuse, it's merely Mr. Cooke's mental status when he committed these crimes. And he

> committed these crimes, and you should find him guilty, guilty but mentally ill. We have all heard Mr. Cookes's statement, "I'm not guilty. I'm not mentally ill." With all due respect to Mr. Cooke, the evidence proves that he's wrong on both counts. But you are the judges of that, you'll consider all of the evidence and reach your verdict. I'm confident that you will find Mr. Coke guilty but mentally ill on all the counts (Pet.App. 77).

Hence, Cooke's counsel closed the trial as they had begun it, not only arguing in favor of a verdict of guilty, but undermining their client's wishes, objectives and right.

They had introduced evidence (without a privilege waiver) unattainable to the State, statements made by Mr. Cooke to mental health experts which served as a confession to murder.

And in tying up the package they called their client a liar and a murder.

The conduct of counsel in closing just further illustrates the constitutional violations they perpetrated against Mr. Cooke.

SUMMARY

Those items alone present a clear picture of a very actual and irreconcilable conflict between Mr. Cooke and his trial counsel. *Mickens, supra.*

The pattern of conduct exhibited by trial counsel directly contradicts several tenets of this Court's jurisprudence.

The Supreme Court of Delaware noted that the combination of trial counsel's conduct and the refusal of the trial court to address the conflict produced "complete chaos at trial." (Pet. App. 106). The Supreme Court of Delaware properly applied the jurisprudence of this Court to the facts of this case.

When trial counsel acts in the manner it did here, the 5th, 6th and 14th Amendments are clearly implicated.

Accordingly, the second question presented by Petitioner does not merit review.

CONCLUSION

The State of Delaware has failed to establish any compelling reasons for this Court to grant their Petition for Writ of Certiorari.

Accordingly, it should be denied.

Respectfully submitted,

JOSEPH A. GABAY
Counsel of Record
LAW OFFICE OF JOSEPH A. GABAY
901 North Market Street
Suite 840
Wilmington, DE 19801
(302) 654-2125

JENNIFER KATE AARONSON
AARONSON & COLLINS, LLC
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600
Counsel for Respondent