Supreme Court, U.S.
FILED
NOV 6 - 2009
OFFICE OF THE CLERK

No. 09-570

In The
Supreme Court of the United States

STATE OF DELAWARE,

Petitioner,

v.

JAMES E. COOKE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JOSEPH R. BIDEN, III
Attorney General of Delaware

PAUL R. WALLACE
Chief of Appeals
Counsel of Record

LOREN C. MEYERS
Special Deputy Attorney General

DANIELLE J. BRENNAN
GREGORY E. SMITH
Deputy Attorneys General

DEPARTMENT OF JUSTICE
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Counsel for Petitioner

November 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

(CAPITAL CASE)
QUESTIONS PRESENTED FOR REVIEW

James E. Cooke faced a death sentence for the horrific rape and murder of Lindsey Bonistall. With Cooke's cooperation, his experienced defense team engaged in exhaustive pre-trial investigation and litigation that sought to exclude much of the State's case for guilt. At the same time, they developed a case that Cooke was guilty but mentally ill (GBMI), a strategy to mitigate his criminal responsibility and potential sentence. When their pre-trial efforts excluded little of the "avalanche of evidence" against Cooke, his attorneys knew that the GBMI case developed, and later presented, was the only plausible strategy that could meet the ultimate goal of avoiding his execution. Heading into jury selection, however, Cooke's one-time disquiet with a GBMI strategy evolved into overt dissent, expressed both to the trial judge and before the jury. Cooke was convicted and sentenced to death. The questions presented here are:

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.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case as printed on the cover page.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	13
I. The Question of Who Has Ultimate Authority Over Whether to Employ an "Innocence-Based" or a "Concession-Of-Guilt" Defense Is Important, Recurring and Has Led to a Conflict in Decisions of the Lower Federal and State Courts	14
A. The Issue Presented Is a Recurring One That Concerns Core Principles Regarding Sixth Amendment Rights	14
B. The Decision Below Contributes to the Conflict Among Federal Circuits and State Supreme Courts Regarding Who in the Counsel-Defendant Relationship Has Ultimate Authority Over the Decision to Conduct a Concession-Based Defense	17
C. Resolution of the Question Is Important to the Management of Criminal Trials	22

TABLE OF CONTENTS – Continued

Page

D. The Sixth Amendment Gave Respondent No Right to Direct His Attorneys to Present an "Innocence-Based" Defense Irrespective of Counsel's Professional Judgment 25

II. An Unresolved Disagreement with Counsel Over Defense Strategy Is Not a "Conflict of Interest" Violative of the Sixth Amendment 32

CONCLUSION 36

APPENDIX

Opinion of the Delaware Supreme Court reversing Respondent's convictions and death sentence: *Cooke v. State*, 977 A.2d 803 (Del. 2009) .... App. 1

Sentencing Decision of the Delaware Superior Court: *State v. Cooke*, 2007 WL 2129018 (Del. Super. Ct. June 6, 2007) .... App. 144

Excerpt of Proceedings, *Ex Parte* Conference in *State v. Cooke*, ID No. 0506005981 (Del. Super. Ct. Feb. 22, 2007) .... App. 266

Opinion of the Delaware Supreme Court denying the State's pre-trial petition for a writ of mandamus: *In re Petition of the State (Cooke)*, 918 A.2d 1151 (Del. 2007) .... App. 268

TABLE OF AUTHORITIES

Page

CASES

Aizupitis v. State, 699 A.2d 1092 (Del. 1997) 7

Allen v. Sobina, 148 Fed. Appx. 90 (3d Cir. 2005) 18

Arko v. People, 183 P.3d 555 (Colo. 2008) 16, 19

Bell v. Cone, 535 U.S. 685 (2002) 31

Boykin v. Alabama, 395 U.S. 238 (1969) 30

Bultron v. State, 897 A.2d 758 (Del. 2006).................32

Cade v. United States, 898 A.2d 349 (D.C. Ct. App. 2006) 15

Commonwealth v. Cousin, 888 A.2d 710 (Pa. 2005) 25

Cuyler v. Sullivan, 446 U.S. 335 (1980).....................34

Daniels v. State, 538 A.2d 1104 (Del. 1988)................7

Davenport v. DiGuglielmo, 215 Fed. Appx. 175 (3d Cir. 2007)...15

Delaware v. Van Arsdall, 475 U.S. 673 (1986)...........22

Estelle v. Williams, 425 U.S. 501 (1976) 29

Faretta v. California, 422 U.S. 806 (1975).....22, 27, 32

Florida v. Nixon, 543 U.S. 175 (2004)...............*passim*

Godinez v. Moran, 509 U.S. 389 (1993) 27

Gonzalez v. United States, 128 S.Ct. 1765 (2008)..15

Haynes v. Cain, 298 F.3d 375 (5th Cir. 2002)...16, 18, 19, 20

TABLE OF AUTHORITIES – Continued

Page

Jacobs v. Kentucky, 870 S.W.2d 412 (Ky. 1994).....16, 21

Johnson v. Zerbst, 304 U.S. 458 (1938) 28, 32

Jones v. Barnes, 463 U.S. 745 (1983)....14, 15, 22, 28, 33

Kansas v. Marsh, 548 U.S. 163 (2006)..........................2

King v. Kenna, 266 F.3d 816 (8th Cir. 2001)..............28

Knowles v. Mirzayance, 129 S.Ct. 1411 (2009)..........26

Lingar v. Bowersox, 176 F.3d 453 (8th Cir. 1999)..18

McCarthy v. United States, 394 U.S. 459 (1969).......28

McKaskle v. Wiggins, 465 U.S. 168 (1984).................24

McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984)..18

McNeill v. Polk, 476 F.3d 206 (4th Cir. 2007)............16

Mickens v. Taylor, 535 U.S. 162 (2002)................34, 35

Monge v. California, 524 U.S. 721 (1998)..................30

Morris v. Slappy, 461 U.S. 1 (1983)...........................33

Neder v. United States, 527 U.S. 1 (1999) 22

New York v. Hill, 528 U.S. 110 (2000)............14, 15, 33

People v. Bergerud, 203 P.3d 579 (Colo. Ct. App. 2008)..17, 34

People v. Ramey, 604 N.E.2d 275 (Ill. 1992)........17, 18

Pineo v. State, 908 A.2d 632 (Me. 2006).....................15

Ring v. Arizona, 536 U.S. 584 (2002).........................31

Sanders v. State, 585 A.2d 117 (Del. 1990).............7, 8

TABLE OF AUTHORITIES – Continued

Page

Schiriro v. Landrigan, 550 U.S. 465 (2007)..............28

Sell v. United States, 539 U.S. 166 (2003)................23

Simmons v. Commonwealth, 191 S.W.3d 557 (Ky. 2006)..16

State v. Anaya, 592 A.2d 1142 (N.H. 1991)................21

State v. Carter, 14 P.3d 1138 (Kan. 2000)..................21

State v. Cooke, 2006 WL 2620533 (Del. Super. Ct. Sept. 8, 2006)...6

State v. Cooke, 909 A.2d 596 (Del. Super. Ct. 2006)..6

State v. Cooke, 910 A.2d 279 (Del. Super. Ct. 2006)..6

State v. Cooke, 914 A.2d 1078 (Del. Super. Ct. 2007)..6

State v. Cross, 132 P.3d 80 (Wash. 2006)...................34

State v. Wallace, 2007 WL 545563 (Del. Super. Ct. Jan. 26, 2007)...8

Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007)..35

Strickland v. Washington, 466 U.S. 668 (1984) ...*passim*

Treece v. State, 547 A.2d 1054 (Md. 1988)...........16, 21

Tuilaepa v. California, 512 U.S. 967 (1994) 30

Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991)..18

TABLE OF AUTHORITIES – Continued

Page

United States v. Acty, 77 F.3d 1054 (8th Cir. 1996) 34

United States v. Boigegrain, 155 F.3d 1181 (10th Cir. 1998) 33

United States v. Cronic, 466 U.S. 648 (1984) 12, 20, 26, 29, 30

United States v. Dawes, 874 F.2d 746 (10th Cir. 1989) 33

United States v. Farhad, 190 F.3d 1097 (9th Cir. 1999) 23

United States v. Fredman, 390 F.3d 1153 (9th Cir. 2004) 17

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 32

United States v. Holman, 314 F.3d 837 (7th Cir. 2002) 20

United States v. Kaczynski, 239 F.3d 1108 (9th Cir. 2001) 16, 24

United States v. Stantini, 85 F.3d 9 (2nd Cir. 1996) 34

United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) 20

United States v. Thomas, 417 F.3d 1053 (9th Cir. 2005) 20

United States v. Wellington, 417 F.3d 284 (2nd Cir. 2005) 28

Wainwright v. Sykes, 433 U.S. 72 (1977) 15, 24, 33

TABLE OF AUTHORITIES – Continued

Page

Wallace v. Davis, 362 F.3d 914 (7th Cir. 2004) 28

Wheat v. United States, 486 U.S. 153 (1988) 33

Wiggins v. Smith, 539 U.S. 510 (2003) 25

Woodward v. Epps, 580 F.3d 318 (5th Cir. 2009) 14, 15

Yarborough v. Gentry, 540 U.S. 1 (2003) 25, 26

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI 2

U.S. CONST. amend. XIV 2

STATUTES & RULES

28 U.S.C. § 1257 2

DEL. CODE ANN. tit. 10, § 162 (Supp. 2008) 1

DEL. CODE ANN. tit. 11, § 9902 (Supp. 2008) 2

DEL. CODE ANN. tit. 11, § 9903 (Supp. 2008) 2

OTHER AUTHORITIES

Wayne R. LaFave et al., CRIMINAL PROCEDURE (3d ed. 2007) 14, 15, 29, 34

American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) 29

American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2 (2009) 23

TABLE OF AUTHORITIES – Continued

Page

Gary Goodpastor, THE TRIAL FOR LIFE: EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASES, 58 N.Y.U. L. Rev. 299 (1983) 30, 31

Christopher Johnson, THE LAW'S HARD CHOICE: SELF-INFLICTED INJUSTICE OR LAWYER-INFLICTED INDIGNITY, 93 Ky. L.J. 39 (2004)..................15, 24, 28

Joel S. Newman, DOCTORS, LAWYERS, AND THE UNABOMBER, 60 Mont. L. Rev. 67 (1999).................23

Sharon G. Scudder, WITH FRIENDS LIKE YOU, WHO NEEDS A JURY? A RESPONSE TO THE LEGITIMIZATION OF CONCEDING A CLIENT'S GUILT, 29 Campbell L. Rev. 137 (2006) 14

Martin Sabelli & Stacey Leyton, TRAIN WRECKS AND FREEWAY CRASHES: AN ARGUMENT FOR FAIRNESS AND AGAINST SELF-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM, 91 J. Crim. L. & Criminology 161 (2000) 16, 22, 23

H. Richard Uviller, CALLING THE SHOTS: THE ALLOCATION OF CHOICE BETWEEN THE ACCUSED AND COUNSEL IN THE DEFENSE OF A CRIMINAL CASE, 52 Rutgers L. Rev. 719 (2000).......................23

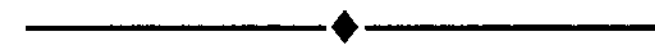
Welsh S. White, EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES: THE EVOLVING STANDARD OF CARE, 1993 U. Ill. L. Rev. 323 (1993)...31

PETITION FOR WRIT OF CERTIORARI

The Attorney General of Delaware, on behalf of the State of Delaware, respectfully petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court reversing respondent's convictions and death sentence is officially published at 977 A.2d 803. (App. 1-143). The sentencing decision of the Delaware Superior Court is not officially reported but is available at 2007 WL 2129018. (App. 144-265). The opinion of the Delaware Supreme Court denying the prosecution's pre-trial petition for a writ of mandamus is officially published at 918 A.2d 1151. (App. 268-82).



STATEMENT OF JURISDICTION

The judgment of the Delaware Supreme Court was entered July 21, 2009.[1] On October 16, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

---

[1] Delaware appellate practice does not provide for any separate document known as a judgment. Instead, the Clerk of the state supreme court enters a docket notation based on the final paragraph of the written decision. *See* DEL. CODE ANN. tit. 10, § 162 (Supp. 2008).

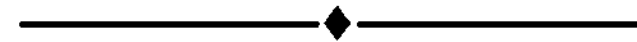
November 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the judgment of the Delaware Supreme Court reversed respondent's convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented.[2] *See Kansas v. Marsh*, 548 U.S. 163, 167 (2006).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV.



STATEMENT OF THE CASE

A state grand jury in August 2005 indicted respondent James E. Cooke, charging him with two

[2] *See* DEL. CODE ANN. tit. 11, §§ 9902(d), 9902(e), 9903 (Supp. 2008).

counts of first degree murder and related offenses, stemming from the May 1, 2005 rape and killing of University of Delaware coed Lindsey Bonistall and two other burglaries that had occurred nearby in the several days before the murder. After a six-week trial, a jury convicted respondent of all of the charged crimes. After a penalty hearing, respondent was sentenced to death for each of the murder convictions. On appeal, the state supreme court, by a vote of 3 to 2, reversed the convictions and sentences. (App. 1-143).

1. On the night of April 26, 2005, the apartment of Cheryl Harmon in Newark, Delaware was burglarized. When Harmon returned home at about 11:30 p.m. that night, she found written on the living room wall in bright red nail polish, "We'll be back." More warnings were found in the bathroom and bedroom. Various items had been taken from the apartment, including two rings engraved with Harmon's name. (App. 4).

On the night of April 29, graduate student Amalia Cuadra awoke in her Newark apartment to an intruder standing in her bedroom, shining a light in her face. Cuadra, thinking it was her roommate, called out "Carolina? Carolina?" The intruder told Cuadra to keep quiet and demanded she give him money. As Cuadra complied and retrieved her wallet, she grabbed her cell phone. When she gave the intruder $45 in cash, he then demanded her credit cards. Cuadra surrendered two. She then dialed "911" on the cell phone, but did not hit send. The intruder

demanded that Cuadra unrobe, but she instead screamed out her roommate's name several times. The intruder attempted to take the cell phone, but when he saw 911 on the screen, he fled. In addition to the cash and credit cards, the intruder took Cuadra's backpack which contained a luggage tag bearing her name, diet pills in a silver metal container, and an iPod. (App. 5).

During the early morning hours of May 1, an intruder entered the apartment of Lindsey Bonistall. The burglar encountered Bonistall in her bedroom, attacking her there. Bonistall was beaten, bound and gagged, and she was strangled with a knotted t-shirt. The assailant then raped Bonistall and strangled her to death. In an effort to eliminate biological evidence, the assailant doused Bonistall's body with bleach. He then placed Bonistall's body in the bathtub; after covering her with pillows, a wicker basket, and a guitar, he lit a fire. Before starting the fire, however, the killer scrawled various statements in blue marker on the walls and countertops. (App. 5-7).

The fire awakened neighbors at about 3 a.m. The Fire Marshal discovered Bonistall's body late that morning, under portions of the melted bathtub wall that had collapsed on top of her. The medical examiner determined the cause of death to be strangulation. (App. 7).

2. In the early morning hours of April 30, respondent had returned to his Newark residence where he lived with his girlfriend, Rochelle Campbell,

and their children. Seeing Cuadra's backpack, Campbell asked respondent about it. Campbell saw an iPod in the bag, a tin-looking container, and a name tag bearing a "Spanish" name. (App. 7-8).

After giving some excuse for having Cuadra's backpack, respondent showed Campbell her credit cards and discussed trying to use them at a nearby automatic teller machine. Campbell told him to take the bag and cards away and not bring them back. (App. 151). Respondent left to use the cards. Surveillance video from the bank showed respondent as he attempted to do so. Co-workers, neighbors, and Campbell all identified respondent as the person in the video. (App. 8).

After Bonistall's murder, respondent, while attempting to disguise his voice, made three calls to the Newark Police 911 call center. During these calls, respondent identified himself as "John Warn" and claimed to have knowledge of Bonistall's murder and the Harmon and Cuadra home invasions. Although those crimes had not yet been linked by the police, respondent used the names of two of the other home invasion victims ("Cheryl" and "Carolina," pronounced as Cuadra said it, "Caroleena"), and he gave details about each of the three crimes that had not been released to the public. Campbell subsequently testified that the caller's voice was that of respondent. (App. 8-9, 157).

Handwriting analysis of the writing on the walls of Bonistall's and Harmon's apartments included

respondent as the writer. Material recovered from underneath Bonistall's fingernails revealed a mixture of Bonistall's and respondent's DNA. In addition, DNA was extracted from the semen sample taken from Bonistall's vaginal area. Analysis of that sample established the probability of the DNA coming from anyone other than respondent being at least 1 in 676,000,000,000,000,000,000. (App. 9).

3. When respondent faced trial for the brutal rape and murder of Lindsey Bonistall, the ultimate goal was escaping Delaware's execution chamber. He wanted his two respected and experienced criminal defense attorneys to achieve this goal by convincing a jury that he was not the man who beat, raped, strangled and then set Lindsey afire. An exhaustive pre-trial investigation and tenacious course of pre-trial litigation[3] challenged the admissibility and validity of the evidence of respondent's actual identity as Bonistall's killer, but to little avail. *State v. Cooke*, 2006 WL 2620533 (Del. Super. Ct. Sept. 8, 2006) (denying suppression); *State v. Cooke*, 914 A.2d 1078,

---

[3] In various pre-trial proceedings, the defense team had filed a motion for a proof positive hearing; two motions to suppress physical evidence; nine motions *in limine* to exclude different forms of expert testimony or scientific evidence; a motion for a change of venue; a motion for relief from prejudicial joinder; and a motion to declare the Delaware death penalty statute unconstitutional. *State v. Cooke*, 910 A.2d 279, 281 (Del. Super. Ct. 2006) (denying change of venue); *State v. Cooke*, 909 A.2d 596, 599 (Del. Super. Ct. 2006) (denying severance).

(Del. Super. Ct. 2007) (motions *in limine* – granting in part and denying in part).

Given this pre-trial litigation and the discovery that prosecutors had turned over, respondent's attorneys were fully aware of the overwhelming physical and scientific evidence of respondent's guilt that he faced at trial. Respondent, moreover, had confessed to his killing of Bonistall to both of his attorneys (App. 267), to a defense psychologist (App. 166-67), and to a pastoral counselor (App. 60-61). In the words of one of respondent's attorneys, the defense faced "an avalanche of evidence." (App. 64-65).

Counsel had also been developing, for more than a year, a strategy aimed at obtaining a verdict of guilty but mentally ill (GBMI).[4] Respondent met with

---

[4] In 1982, Delaware adopted the verdict of "guilty but mentally ill" (GBMI). *Aizupitis v. State*, 699 A.2d 1092, 1096 (Del. 1997); *Daniels v. State*, 538 A.2d 1104, 1106-08 (Del. 1988). The jury must be instructed on GBMI any time the evidence adduced at trial warrants the instruction, "regardless of a defendant's desire to avoid it." *Daniels*, 538 A.2d at 1111. The defendant, however, is not required to disavow his innocence in order to have the jury instructed on GBMI; the prosecution must prove the defendant's guilt beyond a reasonable doubt before the jury can return a verdict of GBMI. *Sanders v. State*, 585 A.2d 117, 131 (Del. 1990).

A verdict of GBMI allows the court to impose the same sentence that could have been imposed, including a sentence of death, if the jury had returned a verdict of guilty. *Id.* at 124-25, 128-29. But in a capital murder prosecution, if the jury has returned a verdict of GBMI, Delaware law requires that the jury, at the penalty phase, "be instructed that a finding of guilty but mentally ill establishes mitigation as a matter of law. . . ." *Id.* at

(Continued on following page)

the defense psychologist six times and for more than twenty hours. (App. 164). He also was examined by a defense psychiatrist (App. 172) and a psychiatrist retained by the State. (App. 188). Respondent was always compliant with the examinations and testing even though the doctors felt he was, at times, "playing" with them. (App. 167). The defense experts diagnosed respondent as having long-standing Schizotypal Personality Disorder (App. 164) and/or a Mixed Personality Disorder with a mixture of Schizoid/ Schizotypal and Paranoid features (App. 172); both diagnoses, they determined, could support a GBMI verdict. Even the diagnosis of Antisocial Personality Disorder advanced by the State's expert, in their view, did not foreclose an attempt to obtain a GBMI verdict. *See State v. Wallace*, 2007 WL 545563, *15 (Del. Super. Ct. Jan. 26, 2007) (diagnosis of conduct disorder could support verdict of GBMI).

Throughout the pre-trial investigation and preparation, respondent's attorneys met with him more than fifty times. (App. 267). They had fully informed him of the merits of the various defense options, including GBMI. During these consultations, respondent expressly rejected pursuit of a GBMI strategy insisting instead that his attorneys maintain his

---

135. *See id.* at 133 ("a jury which proceeds to a punishment hearing following a guilty but mentally ill verdict must be made aware of the significance of its verdict, which constitutes a finding that the defendant's mental illness contributed to his culpability").

factual innocence and not present evidence that he was mentally ill. (App. 10-11). As trial neared, counsel had "agreed to disagree" with respondent over which defense strategy to pursue. (App. 11).

4. When, after the week-long jury selection and prior to the opening of evidence, the disagreement over the GBMI strategy was broached in court, defense counsel emphasized to the trial judge that they were not "conceding guilt here . . . We're going to challenge every shred of evidence, if appropriate, if we think it's appropriate in helping Mr. Cooke's defense . . . I'm going to tell [the jury] it's up to them to decide whether the State has proven guilt." Counsel further explained that respondent had not indicated that he wished to proceed *pro se*. He wanted his lawyers to represent him. Lastly, counsel noted that they "ha[d] made some progress in speaking with" respondent about the GBMI defense. (App. 21-22). As events at trial unfolded, however, it was clear that counsel and respondent were at an impasse regarding the defense employed.

In his opening statement, defense counsel performed as promised, telling the jury:

> 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 during this trial. . . . *If*, based on the evidence presented you find him guilty, then consider all of the evidence and *if* you find to your satisfaction

> that the evidence establishes that he's mentally ill, say so. . . .

(App. 29-30) (emphasis added).[5]

There were numerous outbursts by respondent during trial.[6] Respondent complained often that his counsel "wasn't representing me right" and was "going over my head" because "[t]hey [we]re using their own strategies . . . to make it look like I'm this mentally ill person . . . [but] with this mental illness defense. I never agreed to none of that stuff." (App. 31-32, 40).

At the close of the guilt phase, after the "avalanche of evidence" had been presented, defense counsel told the jury:

> 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. But you are the judges of that, you'll consider all

[5] The trial judge later instructed the jury, "Before you can consider this possible verdict [GBMI] for any of these charges, however, you must first find that the State has established the defendant's guilt as to that charge beyond a reasonable doubt. If you find the defendant not guilty of any charge or charges, you do not consider this possible verdict as to that charge." (App. 195).

[6] The situation was such that the prosecution, during the early stages of the trial proceedings, applied to the Delaware Supreme Court for a writ of mandamus to resolve who controlled the GBMI versus "innocence-based" defense decision. The prosecution efforts were unsuccessful. (App. 268-82).

> of the evidence and reach your verdict. I'm confident that you will find Mr. Cooke guilty but mentally ill on all the counts.

(App. 77).

Respondent was found guilty of all charges, including those burglaries and associated offenses stemming from the invasions of the residences of Harmon and Cuadra. (App. 145-46). The jury unanimously recommended that respondent be sentenced to death on each of the murder convictions, and the trial judge imposed a death sentence on each. (App. 144-265).

5. Represented by different counsel on direct appeal, respondent's convictions and death sentences were reversed by a sharply divided Delaware Supreme Court.

a. The majority held that respondent's attorneys violated his Sixth Amendment rights by pursuing a defense of GBMI over his express objection, rather than presenting a defense of innocence. (App. 84). The majority held that trial counsel's GBMI strategy "deprived Cooke of his constitutional right to make fundamental decisions regarding his case," *i.e.*, the fundamental decision of whether to plead guilty. (App. 84, 85-87). Because of this disagreement over strategy, the majority found that a conflict developed between respondent and his counsel, manifested by respondent's frequent outbursts before the jury that resulted in his removal from the courtroom. (App. 91). Because of this conflict in the presentation of the

defense case, the majority concluded that respondent had not received the assistance of counsel in pursuing his chosen strategy, and that trial counsel did not subject the prosecution's case to meaningful adversarial testing. In so pursuing a GBMI strategy over respondent's objections, the majority found that respondent's attorneys undermined other trial rights of respondent. (App. 92-93).

The majority found that this Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004), did not require a different result. The defendant in *Nixon* was only unresponsive to, instead of affirmatively opposed to, his counsel's strategy to concede commission of the murder at the guilt phase as part of a strategy designed to avoid a death sentence during the penalty phase of the trial. (App. 94). Here, respondent expressly opposed counsel's strategy. This conflict between respondent and his counsel, the majority determined, meant that counsel's performance was to be analyzed under this Court's analysis in *United States v. Cronic*, 466 U.S. 648 (1984). (App. 99). The majority applied *Cronic* based on its view that respondent's conflict in strategy with his attorneys produced a complete breakdown in the adversarial process. (App. 102). Under *Cronic*, the majority presumed that respondent suffered prejudice from his attorneys' decision to argue to the jury for a verdict of GBMI. That, it found, required reversal of respondent's convictions. (App. 109).

b. The dissent viewed the correct analytical framework to be that set out in *Strickland v.*

Washington, 466 U.S. 668 (1984). (App. 121). The dissent too found this Court's decision in *Nixon* to be useful, but not controlling. (App. 126). The minority fundamentally disagreed with the majority's conclusion that respondent's trial attorneys did not subject the prosecution's case to adversarial testing. (App. 132-33). The minority recognized the overwhelming evidence the prosecution had presented against Cooke. (App. 128). Given this evidence of Cooke's guilt, and precisely because it was a capital murder prosecution, defense counsel's decision to pursue GBMI over Cooke's objections constituted a rational strategic decision. (App. 136-37).

REASONS FOR GRANTING THE PETITION

In *Florida v. Nixon*, this Court stated that "[w]e granted certiorari . . . to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient." 543 U.S. 175, 186-87 (2004). The Court in *Nixon* established that when counsel employs a concession of guilt as a defense strategy, counsel's decision is to be assessed under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), even if the capital defendant is unresponsive to his counsel and only silently acquiesces to the strategy. *Nixon*, 543 U.S. at 192. But the Court's "heavy emphasis on the client's refusal to make a choice" suggests that "the *Nixon*

Court arguably was reserving for another day the question of whether the counsel could have insisted upon the strategy if the client had opposed it." 3 Wayne R. LaFave et al., CRIMINAL PROCEDURE § 11.6(b) at 790 (3d ed. 2007).[7] That question, starkly posed here, is just as important and should be resolved by this Court.

I. The Question of Who Has Ultimate Authority Over Whether to Employ an "Innocence-Based" or a "Concession-of-Guilt" Defense Is Important, Recurring and Has Led to a Conflict in Decisions of the Lower Federal and State Courts.

A. The Issue Presented Is a Recurring One That Concerns Core Principles Regarding Sixth Amendment Rights.

The Court has written that "the accused has the ultimate authority to make 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, 751 (1983). Counsel, however, bears principal responsibility for the conduct of the defense. *See New York v.*

---

[7] *Accord, e.g.*, *Woodward v. Epps*, 580 F.3d 318, 327 (5th Cir. 2009) (noting defendant's case might have "present[ed] a closer question" if defendant had expressed disagreement with counsel's strategy); Sharon G. Scudder, WITH FRIENDS LIKE YOU, WHO NEEDS A JURY? A RESPONSE TO THE LEGITIMIZATION OF CONCEDING A CLIENT'S GUILT, 29 Campbell L. Rev. 137, 155 (2006).

Hill, 528 U.S. 110, 114-15 (2000); *Jones*, 463 U.S. at 753 n.6. In particular, counsel has the responsibility for deciding "what arguments to pursue," *Hill*, 528 U.S. at 115 (citing *Jones*, 463 U.S. at 751), and "what defenses to develop." *Wainwright v. Sykes*, 433 U.S. 72, 93 & n.1 (1977) (Burger, C.J., concurring). Beyond those generalities, there are few, if any, guideposts. *Gonzalez v. United States*, 128 S.Ct. 1765, 1773-75 (2008) (Scalia, J., concurring in judgment); Christopher Johnson, THE LAW'S HARD CHOICE: SELF-INFLICTED INJUSTICE OR LAWYER-INFLICTED INDIGNITY, 93 Ky. L.J. 39, 48-64 (2004).

This Court's decision in *Nixon* did little to clarify the situation. The focus in *Nixon* was on whether counsel needed to obtain the defendant's express consent to the defense strategy, not who had the authority to make the decision. *See* 543 U.S. at 178-79 (referring to counsel's failure to obtain defendant's "express consent"). *See also* CRIMINAL PROCEDURE § 11.6(a) at 785 ("the issue before the Court in *Nixon* was not whether the strategy adopted by the attorney there was within the defendant's control"). Given the emphasis in *Nixon* on the defendant's failure to expressly object to counsel's strategy, courts often pry some finding of consent or taciturn acquiescence from the facts. *E.g.*, *Woodward*, 580 F.3d at 326-27; *Davenport v. DiGuglielmo*, 215 Fed. Appx. 175, 180 (3d Cir. 2007) (state courts implicitly found defendant consented to use of diminished capacity defense); *Pineo v. State*, 908 A.2d 632, 635-36 (Me. 2006); *Cade v. United States*, 898 A.2d 349, 354-55 (D.C. Ct. App.

2006); *Simmons v. Commonwealth*, 191 S.W.3d 557, 564-65 (Ky. 2006). But just as counsel sometimes are unable to obtain the defendant's express consent to concession-based defenses, counsel sometimes have clients who expressly object to those defenses, even though counsel have reasonably concluded that it is the only hope to avoid a death sentence.

And to state the obvious, the issue – who has the final word on the defense strategy – is a recurring one, not resolved by *Nixon*. The conflict between counsel and client, exemplified by respondent's trial, often involves the presentation of evidence of mental illness. *E.g.*, *United States v. Kaczynski*, 239 F.3d 1108, 1116-17 (9th Cir. 2001); *Jacobs v. Kentucky*, 870 S.W.2d 412 (Ky. 1994); *Treece v. State*, 547 A.2d 1054 (Md. 1988); Martin Sabelli & Stacey Leyton, TRAIN WRECKS AND FREEWAY CRASHES: AN ARGUMENT FOR FAIRNESS AND AGAINST SELF-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM, 91 J. Crim. L. & Criminology 161, 164 (2000) ("An increasing number of mentally ill individuals enter the criminal process at the local, state, and federal level each year, and as in the *Kaczynski* case, resist presentation of evidence of mental illness."). But the question arises as well in the context of deciding whether to ask that the jury be instructed on or find the defendant guilty of lesser included offenses, *e.g.*, *Haynes v. Cain*, 298 F.3d 375, 382 (5th Cir. 2002) (en banc), *Arko v. People*, 183 P.3d 555 (Colo. 2008), or when counsel concedes that his client is guilty of some, but not all, of the charges. *E.g.*, *McNeill v. Polk*, 476 F.3d 206, 217-18 (4th Cir.

2007); *United States v. Fredman*, 390 F.3d 1153, 1156-57 (9th Cir. 2004). It also presents itself in deciding whether to present a theory of self-defense or an innocence-based defense. *E.g.*, *People v. Bergerud*, 203 P.3d 579 (Colo. Ct. App. 2008); *People v. Ramey*, 604 N.E.2d 275 (Ill. 1992). The question is, therefore, one that needs to be resolved.

B. The Decision Below Contributes to the Conflict Among Federal Circuits and State Supreme Courts Regarding Who in the Counsel-Defendant Relationship Has Ultimate Authority Over the Decision to Conduct a Concession-Based Defense.

A well-developed conflict has been long-emerging among federal circuits and state supreme courts as to whether a defense attorney's decision to employ a defense that concedes a defendant's guilt is a strategic choice within counsel's discretion, or whether the right to make such a decision is inextricably linked with a defendant's constitutional rights such that an unauthorized, and objected to, admission of guilt by one's attorney may violate the Sixth Amendment. Many courts view objected-to concessions as implicating certain fundamental decisions that are reserved personally for the accused, but many others characterize the concession of guilt as a strategic or tactical decision that defense counsel may make even over the express objection of the defendant.

The Delaware Supreme Court's decision conflicts with the decisions of at least four federal courts of appeals and one other state court of last resort, all of which have rejected the argument that a concession of guilt, employed without a defendant's consent or even over his objection, violates his fundamental decision making rights or otherwise "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Haynes*, 298 F.3d at 380-82 & n.6; *Lingar v. Bowersox*, 176 F.3d 453, 458-59 (8th Cir. 1999) ("the decision to concede guilt of the lesser charge of second-degree murder [without discussion with or consent of defendant] was a reasonable tactical retreat rather than a complete surrender"); *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991) (counsel's concession during closing arguments of a lesser included offense without the consent of the defendant 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 (11th Cir. 1984) (attorney's statements conceding manslaughter during a murder trial were tactical and strategic, could be made without defendant's prior knowledge or consent, and did not constitute a forced guilty plea); *see also Allen v. Sobina*, 148 Fed. Appx. 90, 93 (3d Cir. 2005) (per curiam) (decision to concede defendant's killing of victim, in order to focus on avoiding death penalty, "is deemed 'tactical decision' after *Nixon*"). *People v. Ramey*, *supra* (defense theory "is a matter of trial tactics or strategy which is ultimately left

for trial counsel" and a defense of self-defense can be presented over an accused's wishes); *see also Arko v. People*, *supra* (decision whether to request instruction on lesser included offense of attempted murder was tactical, strategic decision to be made by counsel even over defendant's objection).

The reasoning of those courts is exemplified by the Fifth Circuit's decision in *Haynes*. In *Haynes*, the defendant faced a first degree murder charge and the death penalty in a case with overwhelming evidence of guilt. 298 F.3d at 377. The strategy of Haynes' attorneys, aimed solely at avoiding a first degree murder conviction and the possible death sentence, was to concede that the evidence established that Haynes kidnapped, raped and robbed the victim, but did not establish that Haynes intentionally killed her. Thus, they posited, Haynes only could be convicted for second degree murder. *Id.* at 377-78. Following the opening statement, Haynes objected to his attorneys' concessions, stated that he was innocent and told the court that he had specifically requested that his attorneys not make any concessions regarding his guilt for the commission of the offense. *Id.* at 378. Haynes requested new counsel, which the trial court denied, assuring him that he had excellent attorneys and could testify if he wished. The majority of the Fifth Circuit, drawing a strong dissent from the remainder of the court *en banc*, found no violation of Haynes' Sixth Amendment fundamental decision making rights and, more specifically, that his counsel did not

"abandon[ ] their client . . . [i]nstead, they continued to represent him throughout the course of the trial, adopting a strategy which in their judgment accorded Haynes the best opportunity for a favorable outcome." *Id.* at 382; *but see id.* at 384 (Parker, J., dissenting) (describing the fundamental issue in the case as whether the Constitution "give[s] a defendant the right to require his appointed counsel to contest every charged crime when the defendant informs the judge and his appointed counsel that he is innocent and wants an 'actual innocence' defense" . . . and in this case "[t]rial counsel's concession as to Haynes' guilt on the second degree murder charge can only be described as the functional equivalent to a forced guilty plea over the objection of the defendant").

By contrast, the majority of the Delaware Supreme Court, sounding in the voice of the *Haynes* dissent, and the Ninth Circuit have held that the decision to concede guilt implicates inherently personal rights which cannot be made by anyone other than the defendant and that doing so strips the defendant's trial of the meaningful adversarial character required under the Sixth Amendment. *See United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (applying *Cronic* where defense counsel conceded, during closing argument, that no reasonable doubt existed regarding the only factual issues in dispute); *but see United States v. Thomas*, 417 F.3d 1053, 1056 (9th Cir. 2005) (assuming that concession of guilt without consultation or consent was deficient but *Cronic* not applied); *see also United States v.*

Holman, 314 F.3d 837, 842 (7th Cir. 2002) (counsel's concession of defendant's guilt on one count during opening statement constituted deficient performance, absent evidence that defendant consented to concession). Several other state supreme courts have also adopted the view that a defendant has the Sixth Amendment right to present a defense of innocence that is not to be undermined by counsel's presentation of a concession of guilt defense. *State v. Carter*, 14 P.3d 1138 (Kan. 2000) (counsel's imposition of guilt-based defense against defendant's wishes – defendant's asserted defense was that he was innocent and denied any part in the charged offenses – violated his fundamental right to enter a plea of not guilty, interfered with his right to a fair trial, and deprived him of effective assistance of counsel); *Jacobs v. Kentucky*, 870 S.W.2d 412 (Ky. 1994) (defendant's right to present his defense on merits was denied by his counsel's presentation of insanity defense over his objection); *State v. Anaya*, 592 A.2d 1142, 1147 (N.H. 1991) (finding prejudice *per se* where counsel urged the jury to convict his client of a lesser-included offense, even though his client had refused to plea to that offense and had testified to his complete innocence); *Treece v. State*, 547 A.2d 1054 (Md. 1988) (criminal defendant, not his counsel or the court, is entitled to personally decide to defend on the basis of a plea of not criminally responsible by reason of insanity).

There is no reason to now delay resolution of the issue and await further dissension in the lower

courts. This Court's review is warranted to resolve the conflict to which the Delaware Supreme Court's decision contributes.

C. Resolution of the Question Is Important to the Management of Criminal Trials.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. . . ." *Neder v. United States*, 527 U.S. 1, 18 (1999) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). There is an "inherent tension" between the right to counsel and the right to self-representation stemming from the defendant's interest in self-autonomy, an interest reflected in *Faretta v. California*, 422 U.S. 806 (1975). Sabelli & Leyton, 91 J. Crim. L. & Criminology at 168, 188, 190-95. The right to counsel exists to ensure that the government obtains convictions in fair trials. *Strickland*, 466 U.S. at 684-85. But the preference given by the Delaware Supreme Court to respondent's interest in controlling his own fate (App. 82-84) is little different from the position articulated by Justice Brennan in his dissent in *Jones*[8] and gives too little weight to the government's "compelling interest, related to its

---

[8] 463 U.S. at 759 ("[The defendant] may want to press the argument that he is innocent, even if other strategems are more likely to result in the dismissal of charges or in a reduction of punishment. . . . [T]he proper role of counsel is to *assist* him in these efforts. . . ." (emphasis in original)).

own political legitimacy, in ensuring both fair procedures and reliable outcomes in criminal trials. . . ." *United States v. Farhad*, 190 F.3d 1097, 1105 (9th Cir. 1999) (Reinhardt, J., concurring). *See Sell v. United States*, 539 U.S. 166, 179-83 (2003) (noting that "the Government has a . . . constitutionally essential interest in assuring that the defendant's trial is a fair one.").

The professional responsibility rules also provide little, if any, guidance. Rule 1.2(a) of the Model Rules of Professional Conduct allocates to the client the power to determine the objectives of the representation while giving the attorney the control over the means to achieve the objectives. But to cast the issue in terms of "objectives" and "means" hardly advances the analysis. Joel S. Newman, DOCTORS, LAWYERS, AND THE UNABOMBER, 60 Mont. L. Rev. 67, 87-89 (1999). And the rules offer no guidance on how disputes between the client and the attorney are to be ultimately resolved. They instead merely urge that counsel discuss the issue with the client in an effort to persuade the client to assent to the planned strategy. *See* Sabelli & Leyton, 91 J. Crim. L. & Criminology at 217-18; Newman, 60 Mont. L. Rev. at 95-99 (positing that Kaczynski's attorneys could have sought to withdraw from case); H. Richard Uviller, CALLING THE SHOTS: THE ALLOCATION OF CHOICE BETWEEN THE ACCUSED AND COUNSEL IN THE DEFENSE OF A CRIMINAL CASE, 52 Rutgers L. Rev. 719, 771-74 (2000).

Contrary to the thinking reflected by the state court's majority, giving a criminal defendant who is represented by counsel the authority to dictate what defense strategy to present at trial will not allay conflicts, but create them. The defendant would have effective control over how to investigate his case, what evidence to present, how to cross-examine witnesses, the instructions to request, and many other decisions that have always been left to the considered strategic and tactical judgment of counsel. *See, e.g.*, *Strickland*, 466 U.S. at 691; *see also Sykes*, 433 U.S. at 93. Adoption of a rule that counsel's actions can be directed by the defendant in such a manner verges on the creation of a *right* to "hybrid" or "mixed" representation, a right this Court has not recognized. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984).

The Court need look no further than the record in this case to see the difficulties presented by a rule that makes the choice of defense a fundamental right directly controlled by the defendant (and enforced by the trial judge), not a strategic choice left to counsel. To require, as the Delaware Supreme Court did (App. 104-06, 107-08), the trial judge to inquire and intervene into a dispute of this nature between a defendant and counsel is to make it a near certainty that the trial will be disrupted and the integrity of the proceedings eroded. *See Kaczynski*, 239 F.3d at 1116-18; Johnson, 93 Ky. L.J. at 76-77 (positing that defendants will choose to represent themselves). And the inquiry and intervention will clearly require trial judges to "delve[ ] too deeply into matters of trial

tactics, and in a fashion which may seriously undermine counsel's effectiveness and the [defendant]'s interests," *Commonwealth v. Cousin*, 888 A.2d 710, 724 (Pa. 2005) (Castille, J., concurring), thus risking judicial interference with the attorney-client relationship and defense strategy. Respondent's outbursts here generally reprised his disagreement with the GBMI strategy. His actual complaints, however, focused on matters such as the manner and scope of questioning and exposed his deluded understanding of the evidence against him, the procedural posture of the case, the applicable law and counsel's motives. (*See, e.g.*, App. 32-41; App. 178 – summarizing just some of respondent's misguided beliefs about his case). Because there was no clear answer as to where the ultimate decision-making authority lay, both the trial judge and the prosecutors were left "adrift." (App. 278-80).

D. The Sixth Amendment Gave Respondent No Right to Direct His Attorneys to Present an "Innocence-Based" Defense Irrespective of Counsel's Professional Judgment.

"The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam) (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland*,

466 U.S. at 687). Counsel, however, enjoys "wide latitude in deciding how best to represent a client," *Gentry*, 540 U.S. at 5-6, and "strategic choices made" among "plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 689-90. Contesting guilt may not be a "plausible option[ ]," *id.* at 690, when the evidence is overwhelming, and "the Sixth Amendment does not require that counsel do what is impossible. . . . If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Cronic*, 466 U.S. at 656-57 & n.19. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1422 (2009) ("Counsel also is not required to have a tactical reason – above and beyond a reasonable appraisal of a claim's dismal prospects for success – for recommending that a weak claim be dropped altogether.").

Thus, as the Court explained in *Nixon*, counsel confronted with overwhelming evidence of guilt on a charge can reasonably adopt a strategy of acknowledging the defendant's guilt in an effort to avoid undermining the credibility of arguments on other charges or on sentencing issues. 543 U.S. at 190-91. *See Gentry*, 540 U.S. at 9 ("By candidly acknowledging his client's shortcomings, counsel might . . . buil[d] credibility with the jury and persuade[ ] it to focus on the relevant issues in the case."). And as the Court acknowledged in *Nixon*, the nature of a capital murder prosecution and the life-or-death stakes involved in any capital prosecution can "reasonably [lead counsel] to focus on the trial's penalty phase,

[when] counsel's mission is to persuade the trier that his client's life should be spared." 543 U.S. at 191.

In its decision, the Delaware Supreme Court instead held that defense counsel, by eschewing respondent's directive to conduct only an "innocence-based" defense (i.e., "he didn't do it"), waived respondent's fundamental constitutional right to plead not guilty and the exercise of core trial rights. That waiver, in the court's view, could not occur "without the defendant's fully-informed and publicly acknowledged consent." (App. 83). The Delaware Supreme Court went on to hold that "the trial judge's obligation to ensure that [Cooke] receives a fair trial required the trial judge to instruct counsel not to pursue a verdict of guilty but mentally ill against [Cooke's] wishes." (App. 107-08).

That holding, however, misapprehends the decisions that are reserved to the defendant himself. When a criminal defendant exercises his right to self-representation, he holds complete control for himself. He exercises his "basic right to defend himself" and his right to do so "directly." *Faretta*, 422 U.S. at 817, 819-20. He then does so personally and may even personally conduct his own defense to his disadvantage. *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993). When the criminal defendant is represented by counsel, however, the defendant cedes control over the conduct of his defense to counsel. The defendant then only retains the decisions "whether to plead guilty, waive a jury, testify in his or her own behalf, or

take an appeal." *Jones*, 463 U.S. at 751.[9] *See* Johnson, 93 Ky. L.J. at 66-71, 90-94, 112-14.

If the state court is now correct that when counsel concedes the defendant's responsibility for the *actus* elements of an offense, he or she effectively waives the defendant's right to trial, then the waiver must be knowing, voluntary and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of a constitutional right must be "an intentional relinquishment or abandonment or a known right or privilege"). And, in turn, trial courts must ensure that is so, not simply allow the waiver to occur unless the defendant overtly objects to the court or whoever may hear him. *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (to waive any constitutional right to trial, the defendant must give a clear voluntary waiver of that right). The rule stemming from the Delaware Supreme Court's decision, however, finds no support

---

[9] Of course, it is always permissible, but not necessary, under the Sixth Amendment for counsel to act in accordance with his client's restrictions on strategy. *See Schiriro v. Landrigan*, 550 U.S. 465, 475-80 (2007); *see, e.g.*, *United States v. Wellington*, 417 F.3d 284, 289 (2nd Cir. 2005) (counsel's decision to stipulate to charges and waive jury trial not ineffective because defendant instructed counsel to pursue this strategy); *Wallace v. Davis*, 362 F.3d 914, 920 (7th Cir. 2004) (counsel's failure to present mitigating evidence not ineffective assistance because defendant repeatedly forbade counsel to do so); *King v. Kenna*, 266 F.3d 816, 824 (8th Cir. 2001) (counsel's failure to pursue evidence of defendant's incompetence not ineffective where defendant made clear that he did not want to be placed in a psychiatric institution).

in current practice, *see* CRIMINAL PROCEDURE § 11.6(c) at 798-800, or in decisions of this Court. *E.g.*, *Estelle v. Williams*, 425 U.S. 501, 508 n.3 (1976) ("The Court has not, however, engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused.").

Moreover, if the state court reached the right result in respondent's case, then the pronouncement to criminal defense counsel must be clear. Defense attorneys must be made aware that their knowledge of and experience with the professional standards for attorney performance which have been unanimously adopted by our legal institutions[10] ***must*** be jettisoned when they are instructed to do so by clients who, though legally competent, may be grossly uninformed,

---

[10] *See, e.g.*, *Cronic*, 466 U.S. at 656-57 & n.19 ("the Sixth Amendment does not require that counsel do what is impossible. . . . If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."); American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Comment 10.11 (Feb. 2003) (reprinted in 31 Hofstra L. Rev. 913, 1059 (2003)); *see id.* at Comment 10.10.1 (31 Hofstra L. Rev. at 1047-48) ("the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation. Consistency is crucial because counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime.") (internal quotation marks and footnote omitted).

mentally ill, or, at the very least, sorely lacking in sound judgment.

There is no warrant for the Delaware Supreme Court's conclusion that counsel's concession of guilt in order to bolster arguments against a death sentence amounted to an infringement of respondent's fundamental right to enter a plea of not guilty and insist on trial (App. 85-87) or was otherwise an "entire[] fail[ure] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. First, an actual plea of guilt is a waiver of all rights that inhere in a criminal trial, "a stipulation that no proof by the prosecution need be advanced," "itself a conviction." *Boykin v. Alabama*, 395 U.S. 238, 242-43 & n.4 (1969). That is not what occurred here; the GBMI strategy still required the prosecution to establish respondent's guilt beyond a reasonable doubt. Next, under a simplistic view that the only recognized goal of the defense in any criminal prosecution is to obtain an acquittal, concession of guilt by counsel may, in effect, end the meaningful adversarial contest. *See* Gary Goodpastor, THE TRIAL FOR LIFE: EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASES, 58 N.Y.U. L. Rev. 299, 328 (1983). Not so in capital cases.

The penalty phase of a capital murder trial "is in many respects a continuation of the trial on guilt or innocence of capital murder." *Monge v. California*, 524 U.S. 721, 732 (1998); *see also Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("To render a defendant eligible for the death penalty in a homicide case . . . the trier of fact must convict the defendant of

murder and find an 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (statutory aggravator must be found by jury at penalty phase beyond a reasonable doubt because it is in all respects "the functional equivalent of an element" of capital murder). With these unique proceedings focused on the possible imposition of a death sentence, the constitutional dimension of "the Assistance of Counsel for [one's] defence" also necessarily expands.[11] In turn, any examination that looks only to the efforts to seek a not guilty verdict is fundamentally flawed. *See Bell v. Cone*, 535 U.S. 685, 696-97 (2002) ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete," rather than a "fail[ure] to do so at specific points."). And the state court's consideration of only the proceedings before the jury in deciding that defense counsel had failed to test the prosecution's case in a meaningful way (App. 86-87, 102) is surely too myopic a view of counsel's performance; if nothing

---

[11] In fact, because the evidence of guilt against a capital defendant often is overwhelming, "attorneys familiar with capital cases view the penalty trial as the probable focal point of the capital case." Welsh S. White, EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES: THE EVOLVING STANDARD OF CARE, 1993 U. Ill. L. Rev. 323, 325 (1993). *See also* Goodpastor, 58 N.Y.U. L. Rev. at 331 ("[B]ecause the strength of the evidence of guilt, the penalty phase trial is the only real trial the defendant will receive.").

else, the state court's approach overlooks the substantial pre-trial work done in respondent's case.

II. An Unresolved Disagreement with Counsel Over Defense Strategy Is Not a "Conflict of Interest" Violative of the Sixth Amendment.

Respondent wanted counsel and never sought to waive his right to legal representation. Respondent did not seek to dismiss counsel and proceed *pro se*,[12] which would have required the court to conduct a searching inquiry into the request. *See Johnson v. Zerbst*, 304 U.S. at 465; *Faretta, supra.* Neither did he request the appointment of new counsel. *See, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). His counsel never expressed an unwillingness or disinterest in putting forth their best efforts on respondent's behalf. And, they never sought permission to withdraw from representation. *See, e.g.*, *Bultron v. State*, 897 A.2d 758 (Del. 2006). The sticking point here was that respondent wanted the assigned defense team, which had worked so diligently for him, to do what he wished: to wit, discard the plausible GBMI defense in favor of the wholly implausible defense of actual innocence. (App. 135 n.184 – "Cooke's

[12] Despite his other protestations, not until respondent testified on the last day of the defense case did he ever claim to have "got[ten] rid of these public defenders . . . [and] fired them a long time ago." (App. 67).

irrational and unreasonable strategy to pursue innocence").

The right to counsel does not guarantee: "a right to counsel with whom the accused has a 'meaningful attorney-client relationship,'" *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983) (citations omitted); "that a defendant will inexorably be represented by the lawyer whom he prefers," *Wheat v. United States*, 486 U.S. 153, 159 (1988); or that counsel "will take every position and make every argument that the client requests." *United States v. Boigegrain*, 155 F.3d 1181, 1187 (10th Cir. 1998) (citing *United States v. Dawes*, 874 F.2d 746, 748 (10th Cir. 1989)). And, while "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy," *Nixon*, 543 U.S. at 187, it is counsel who has the ultimate responsibility for determining "what arguments to pursue," and "what defenses to develop." *Hill*, 528 U.S. at 115 (citing *Jones*, 463 U.S. at 751); *Sykes*, 433 U.S. at 93 n.1 (Burger, C.J., concurring). As observed by the dissent below, "[a] defendant's choice to plead not guilty may result in either asserting innocence or challenging the State to prove guilt beyond a reasonable doubt." (App. 127). Respondent wanted the former; his counsel knew they could only effectively provide the latter. They acted in accordance with that well-informed knowledge and with an eye toward the ultimate goal of avoiding their client's execution.

This "conflict" did not implicate the Sixth Amendment. To do so, unwanted actions must be

"undertaken due to the attorney's other loyalties or interests." *United States v. Stantini*, 85 F.3d 9, 16 (2nd Cir. 1996); *United States v. Acty*, 77 F.3d 1054, 1056-57 (8th Cir. 1996). It is insufficient merely that the lawyer's and client's *beliefs* diverge with respect to a material factual or legal issue or to a course of action: the actual *interests* of the attorney and the defendant must diverge. *See Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980); *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002) ("[W]e have used 'conflict of interest' to mean a division of loyalties that affected counsel's performance"). Good faith disagreement over which defense strategy to employ simply is not a "conflict of interest." *See* CRIMINAL PROCEDURE § 11.9(c) at 896 ("To find an actual conflict, a court must determine that the defense counsel is subject to an obligation or unique personal interest which, if followed, would lead counsel to adopt a strategy other than that most favorable to the defendant."). To call any disagreement over strategy a "conflict of interest" adds to the growing confusion among the lower courts as to whether this situation presents a constitutionally intolerable conflict. *E.g.*, *People v. Bergerud*, 203 P.3d at 586 (disagreement over innocence-based strategy labeled a "conflict of interest"); *State v. Cross*, 132 P.3d 80, 92-93 (Wash. 2006) (conflict over whether to pursue insanity defense "not the same thing as a conflict of interest"). Moreover, the state court's decision is singular in its holding that a trial court must resolve such a disagreement by forcing counsel to aid his client in "legal suicide." (App. 65; App. 107-08 – "the trial judge [was required] to

instruct counsel not to pursue a verdict of guilty but mentally ill against [Cooke's] wishes" and instead put forth an "I didn't do anything . . . I didn't kill this person" defense).

This Court should make clear that, contrary to the holding of the Delaware Supreme Court, an unreconciled disagreement constitutes a violation of the Sixth Amendment *only* where there is a complete bilateral breakdown in communication between the attorney and client, *and* that breakdown prevents effective assistance of counsel. *Mickens*, *supra*; *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007). "Disagreements over strategic or tactical decisions do not rise to [the] level of a complete breakdown in communication," *Stenson*, 504 F.3d at 886, and are tolerable when there is no doubt but that the defendant received the level of effective representation guaranteed him by the Sixth Amendment. Adoption of the contrary rule and remedy suggested by the state supreme court here would: (1) place the existence of a constitutional violation in the complete control of a criminal defendant who can create a "conflict" by unilaterally, irrationally and vocally "checking out" of the attorney-client relationship; (2) force competent attorneys to present incompetent defenses that invite (a) spurious ineffective assistance of counsel claims and (b) unwarranted damage to their professional reputations; and (3) increase the difficulty trial courts have finding competent representation for indigent defendants. *See Strickland*, 466 U.S. at 690 (Court

rejects constitutional standard that will "discourage the acceptance of assigned cases").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH R. BIDEN, III
Attorney General of Delaware

PAUL R. WALLACE
Chief of Appeals
Counsel of Record

LOREN C. MEYERS
Special Deputy Attorney General

DANIELLE J. BRENNAN
GREGORY E. SMITH
Deputy Attorneys General

DEPARTMENT OF JUSTICE
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Counsel for Petitioner