No. 09-570

DEC 22 2009

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

REPLY BRIEF FOR THE STATE OF DELAWARE

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REASONS FOR GRANTING THE PETITION

When addressing a situation in which a capital defendant and his counsel disagree on whether to employ an "innocence-based" or a "concession-of-guilt" defense at trial, this Court's precedents frame the core question presented – with whom does the authority to make the final decision lie – but they do not answer it. More specifically, the Court in *Florida v. Nixon*[1] left open whether defense counsel can strategically concede guilt at trial over the express objection of the defendant. (*See* Pet. 13-14). This question needs resolution because just as counsel sometimes may not obtain a defendant's express consent to a concession-based defense, counsel sometimes has a client who expressly objects to such a defense, even though counsel has reasonably concluded that it is the only hope to avoid a death sentence.

The decisions that must be made in a criminal trial fall into two categories: (1) those that the defendant himself must make, *Jones v. Barnes*, 463 U.S. 745, 751 (1983); and (2) those that are tactical or strategic ones that counsel is charged with making, even over a defendant's express objection. *See New York v. Hill*, 528 U.S. 110, 114-15 (2000); *Wainwright v. Sykes*, 433 U.S. 72, 93 & n.1 (1977) (Burger, C.J., concurring). Conceding guilt at trial does not fall into the first category as either a guilty plea itself, *Gonzalez v. United States*, 128 S.Ct. 1765, 1773

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[1] 543 U.S. 175, 188 (2004).

(2008) (Scalia, J., concurring), or as "the functional equivalent to a guilty plea." *Nixon*, 543 U.S. at 188. A concession of guilt at trial, therefore, perforce falls into the category of tactical or strategic judgments that defense counsel can make, even over the express objection of the defendant. Thus, as posited in the second question presented, a disagreement between counsel and a defendant over whether to conduct such a concession-based defense strategy is not the sort of conflict that violates the Sixth Amendment.

Respondent does not dispute that, as the Court acknowledged in *Nixon*, his capital murder prosecution and the life-or-death stakes involved could "reasonably [have led his counsel] to focus on the trial's penalty phase, [when] counsel's mission is to persuade the trier that [respondent's] life should be spared." 543 U.S. at 191. Instead he claims that, even though he employed counsel rather than proceeding *pro se,* the decision to engage the GBMI strategy was his alone to make (Brf. in Opp. 9-10) or, if not, that advancing that defense strategy over his express dissent represented a *Cronic*[2] violation. (Brf. in Opp. 14). But nowhere does respondent contest that *Nixon* left open the question presented by his case: in fact, he admits as much. (Brf. in Opp. 19). Respondent's main contention is that the Delaware Supreme Court decided the issue correctly. But the confusion that the trial judge, the prosecutors, and the defense counsel

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[2] *United States v. Cronic*, 466 U.S. 648 (1984).

in this case experienced illustrates the need for this Court to provide a definitive answer.

I. The Question of Who Has Ultimate Authority Over Whether to Employ an "Innocence-Based" or a "Concession-Of-Guilt" Defense Must Be Resolved and this Case Presents the Ideal Vehicle to Do So.

A. Respondent's Prosecution Starkly Presents the Good Faith Disagreement That Can Occur and the Reasons to Side with Counsel's Choice of Defense.

Respondent wanted his attorneys to convince a jury that he was not the man who raped and killed Lindsey Bonistall. Those attorneys, both well-experienced criminal defense counsel, vigorously challenged the admissibility and validity of the evidence of respondent's actual identity as Bonistall's killer, but met with little success. (Pet. 6). As a result, respondent's attorneys were fully aware of the "avalanche" of evidence of respondent's guilt that he faced at trial. (Pet. App. 64-65; Pet. App. 133 – "given the strength of the evidence, [] . . . [Cooke's] guilt was not the subject of any reasonable dispute").

Counsel also developed, for more than a year, a strategy aimed at obtaining a verdict of guilty but mentally ill and respondent was always compliant with the needed examinations. The defense experts rendered diagnoses that respondent's counsel could use to support a GBMI verdict. (Pet. 7-8). Before trial,

respondent's attorneys met with him more than fifty times (Pet. App. 267) and fully discussed the various defense options, including GBMI. But respondent expressly rejected pursuit of a GBMI strategy, insisting instead that his attorneys maintain his factual innocence and not present evidence that he was mentally ill. (Pet. App. 10-11).

Trial lasted approximately six weeks, and respondent's counsel continued to try to consult with and advise him throughout. During the trial, respondent made the key fundamental decisions afforded him, i.e., whether to actually plead guilty, have trial by jury, and testify. His counsel cross-examined the State's witnesses where advantageous and called witnesses on respondent's behalf in support of the GBMI defense strategy that had been developed. (Pet. App. 133). Respondent neither sought to dismiss counsel and proceed *pro se*, nor did he request the appointment of new counsel. Counsel for their part never expressed an unwillingness or disinterest in representing respondent, and they never sought to withdraw from representation. Consequently, the only fact here that could be the basis of a Sixth Amendment claim is that respondent's counsel did not, at his insistence, discard the plausible GBMI defense and pursue the wholly implausible defense of actual innocence.

B. The Questions Presented Are Important, Recurring and Have Led to Conflict In the Decisions of the Lower Courts.

Conflicts over defense strategy, exemplified by respondent's trial, present an important issue that involves the presentation of evidence of mental illness. Such conflicts further arise over decisions whether to ask that the jury find the defendant guilty of lesser offenses, whether counsel concedes that a defendant is guilty of some, but not all, of the charges, and whether to present a theory of self-defense or some other innocence-based defense. (Pet. 16-17). Given the increase in the use of defenses that involve a form of guilt concession, there is little doubt the question of who has the final word on such a defense strategy will continue to arise. *E.g.*, 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 . . . resist presentation of evidence of mental illness.").

The question of who makes the final decision over which course the defense should take has engendered a split in the lower courts between: (1) those 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 fails to subject the prosecution's case to "meaningful adversarial testing"; and (2) those that 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. (Pet. 17-22).

Respondent makes no plausible argument to dispute the conflict among the 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, but claims only that the Delaware Supreme Court's decision is correct. (Brf. in Opp. 16). Respondent attempts to deny the split by attempting his own read of guilt concessions, rather than by the courts of appeals' or state supreme courts' actual holdings. (Brf. in Opp. 16-17). Yet the conflict of authority is real.

Some courts, such as the Fifth Circuit in *Haynes v. Cain*,[3] which respondent virtually ignores, have considered the issue and rejected the Delaware Supreme Court's untenable position, holding instead that a guilt concession in a capital case over the defendant's express objection does not violate the Sixth Amendment. *Id.* at 382. It is, therefore, beyond

[3] 298 F.3d 375, 382 (5th Cir. 2002) (en banc).

dispute that the questions presented are important, will recur, particularly in capital cases, and that the conflict will not be resolved without this Court's intervention.

C. Resolution of the Questions Presented Is Important to the Management of Criminal Trials.

Implied in the enumerated "right to counsel" guaranteed by the Constitution is the right to the assistance of effective counsel. As explained in *Strickland v. Washington*, the right to counsel exists to guarantee assistance from an attorney that is sufficient to warrant the defendant's reliance on the proceeding and to ensure that the government obtains convictions in fair trials. 466 U.S. 668, 684-86 (1984). And just last term the same considerations led the Court to limit the exercise of the Sixth Amendment right to self-representation. *Indiana v. Edwards*, 128 S.Ct. 2379, 2387 (2008) ("a self-representation right at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel . . . and undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial").

Respondent's, and the lower court's, reliance on one answer of *amicus* counsel in the *Nixon* oral argument is, at best, unpersuasive and myopic. (Brf. in Opp. 19 n.2; Pet. App. 96 n.64). That shortsighted

view does not look to what occurs past either (1) the initial order that counsel follow defendant's command to pursue the "it wasn't me" claim or (2) a substitution of counsel. As to the first scenario, counsel has already determined "there is no bona fide defense to the charge, [that] 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. The Sixth Amendment certainly does not require counsel to do so. *Id.* The circumstances of this case also show the futility of the second possible course. There is absolutely no reason to believe that new counsel will view the evidence or prospects for an innocence-based defense any differently than did the first team of attorneys. In fact, one would reasonably question the competence of any defense team that did. Adopting a rule requiring serial substitution until finding counsel who generally agrees to do respondent's bidding hardly guarantees that clients like respondent will not engage in precisely the disruptive behavior seen here. But even if a successor legal team did reluctantly advance respondent's "I didn't do it" defense, it would no doubt end up being the provision of counsel as a mere formality, not the representation by effective counsel contemplated by the Sixth Amendment.

D. The Delaware Supreme Court's Decision Is Incorrect.

In its decision, the Delaware Supreme Court held that defense counsel, by eschewing respondent's

directive to conduct only an "innocence-based" defense (i.e., "he didn't do it"), waived his fundamental constitutional right to plead not guilty and his 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." (Pet. 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." (Pet. App. 107-08).

The state supreme court erroneously concluded that counsel's concession of guilt in order to bolster arguments against a death sentence violated respondent's right to plead not guilty and insist on trial (Pet. 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. On the merits, that decision fails to come to grips with *Nixon*'s rejection of the contention that conceding guilt at trial is the equivalent of a guilty plea. *Nixon*, 543 U.S. at 188.

Attempting to bring his case within the reach of *Brookhart v. Janis*, 384 U.S. 1 (1966), respondent urges that a verdict "of GBMI is the 'functional equivalent' of a guilty plea." (Brf. in Opp. 24). In respondent's view, a decision to plead guilty (or seek a GBMI trial verdict) is one left solely to the defendant, and counsel's statements acknowledging respondent's guilt were the equivalent of a guilty plea. But

respondent's analogy between counsel's statements acknowledging guilt and a guilty plea is flawed.[4] The Court has explained that a "plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *see id.* at 242-43 n.4. A guilty plea thus waives several constitutional rights, including the right to trial by jury and to the requirement that the prosecution establish the defendant's guilt beyond a reasonable doubt. *See United States v. Ruiz*, 536 U.S. 622, 628-29 (2002); *Boykin*, 395 U.S. at 242. For those reasons, the decision to plead guilty is a "fundamental decision[]" vested only in the defendant. *Jones*, 463 U.S. at 751. *See Brookhart*, 384 U.S. at 7.

Statements by counsel here, in contrast, did not waive respondent's right to a jury trial or to proof of guilt beyond a reasonable doubt, let alone obviate the need for a trial at all. Notwithstanding any acknowledgement of guilt by counsel, the prosecution still had to prove respondent's guilt through competent evidence before the jury could return a verdict of guilty or of GBMI. *Sanders v. State*, 585 A.2d 117, 131 (Del. 1990). Respondent also could seek to exclude

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[4] As also was the State's anticipatory position in the pretrial writ of mandamus filed with the Delaware Supreme Court. The State, however, did not have the benefit of the now-complete record of counsel's actual trial presentation or of the trial court's instructions to the jury. (Pet. 9-11).

evidence (as he did through a plethora of pre-trial motions), and he could challenge the outcome of the trial on the basis of alleged errors. Given the Court's explanation in *Nixon*, any concession of guilt by respondent's attorneys was not the functional equivalent of a guilty plea. *Id.* at 188 (citing *Boykin*, 395 U.S. at 242-43 & n.4). Moreover, respondent's case is easily distinguished from the situation in *Brookhart*: defense counsel in *Brookhart* had agreed to a bench trial at which the prosecution only had to present a *prima facie* case and defense counsel would neither offer evidence nor cross-examine the prosecution witnesses. 543 U.S. at 188-89. *See Brookhart*, 384 U.S. at 5-7.

Finally, the Delaware Supreme Court's finding that there existed a "conflict" that violated the Sixth Amendment was based on its erroneous decision that respondent alone could choose the defense strategy. 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." (Pet. App. 127). Respondent wanted the former; his counsel knew they could only effectively provide the latter. A defense of factual innocence may not be a "plausible option[ ]," *Strickland*, 466 U.S. at 690, and "the Sixth Amendment does not require that counsel do what is impossible." *Cronic*, 466 U.S. at 656-57 & n.19. Respondent's counsel knew the scope of the prosecution's case and used a strategy with an eye toward the ultimate goal of avoiding their client's execution.

This "conflict" over how to do so did not implicate the Sixth Amendment. Thus, the Delaware Supreme Court's decision as to the second question presented must be reversed as well.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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