No. 16-8255

In the Supreme Court of the United States

ROBERT LEROY MCCOY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF ALABAMA, ARKANSAS, IDAHO, INDIANA, KANSAS, MONTANA, NEVADA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WYOMING AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether it is unconstitutional for defense counsel to admit an accused's guilt to the jury over the accused's express objection.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The amici States prosecute crimes and incarcerate criminals, so they have two countervailing interests implicated by the question presented in this case. On the one hand, the States have an interest in the finality of state-court criminal convictions, which would be undermined by the per se reversal of convictions without a showing of prejudice. On the other, the States have an interest in maintaining society's "high degree of confidence in its criminal trials." *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring). This interest compels the States to ensure that defendants who choose not to represent themselves receive effective, professionally competent legal representation.

The amici States believe this Court's decisions in *Faretta v. California*, 422 U.S. 806 (1975), and *Strickland v. Washington*, 466 U.S. 668 (1984), already strike the right balance between these two interests when a criminal defendant disagrees with his lawyer's trial strategy. If the defendant disagrees with his lawyer's proposed strategy *before trial*, *Faretta* provides that the defendant may reduce his lawyer to standby counsel and represent himself. If the defendant disagrees with his lawyer's strategic decisions *after trial*, *Strickland* gives him the right to challenge his conviction on the grounds that his counsel's unreasonable strategy prejudiced his defense. These well-worn precedents protect the defendant's right to the assistance of counsel without disrupting the general rule that a lawyer "has—and

must have—full authority to manage the conduct of the trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

Unsatisfied with the balance struck in *Faretta* and *Strickland*, the petitioner proposes a third way: a new right that allows a defendant to compel his lawyer to contest all the elements of an offense, even if the lawyer believes that strategy is unreasonable and detrimental to his client's interests. This proposed rule undermines the States' interest in finality without any countervailing benefit to the accuracy or fairness of criminal trials. In practice, it would be difficult to administer; limiting this rule to the supposedly narrow category of admissions of guilt would be challenging at best. In short, this rule is a solution in search of a problem. The Court should reject it and simply leave the law in its current state.

To be clear, the amici take no position on how *Faretta* and *Strickland* would apply to the facts of this case. Although the defendant apparently asked to hire a different lawyer or to represent himself before trial, the trial court denied those requests. Moreover, despite trial counsel's reasonable strategic decision to concede several elements of the offense at the guilt phase, he was allegedly unprepared to make a robust case for leniency at the penalty phase. It may well be, therefore, that the petitioner has a strong case for reversal under existing precedents. But on the question before this Court, the Court should not let these allegedly bad facts make especially bad law. The Court should affirm the lower court.

SUMMARY OF ARGUMENT

In a capital trial, particularly when there is overwhelming evidence of the defendant's guilt, partial concession of guilt can be a reasonable strategic decision. By admitting to incontrovertible facts, defense counsel builds credibility with the jury, allowing counsel to argue a defense of diminished capacity or to present an effective mitigation case. Sometimes, as in the present matter, defense counsel may reasonably believe that the evidence and his obligations to his client and the trial court prevent him from pursuing any other strategy.

When a defendant disagrees with counsel's decision to concede guilt, however, he has two options. First, pursuant to *Faretta v. California*, 422 U.S. 806 (1975), he may reduce his lawyer's role to standby counsel prior to trial and represent himself. Second, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), he may raise a claim of ineffective assistance of counsel after trial. These cases—*Faretta* and *Strickland*—effectively protect both the defendant's right to counsel and the rule that a lawyer "has—and must have—full authority to manage the conduct of the trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

The rule for which the petitioner now argues—that a defendant may prevent his lawyer from conceding guilt, even if counsel believes that the defendant's alternative strategy is unreasonable and detrimental to his case—undermines the *Faretta*/*Strickland* framework and would be unwieldy, if not impossible, to administer. Therefore, the Court should reject this

proposed rule and leave the law in its current state, which amply protects defendants' rights.

ARGUMENT

I. It is appropriate for a criminal defense attorney to concede one or more elements of an offense in the face of overwhelming evidence.

In any criminal prosecution, defense counsel must play the hand dealt by the evidence, testimony, and his client's explanation of events. While some hands are clear winners, others must seem to have been drawn from a stacked deck, leaving counsel with few options and almost no chance of success. In the latter case, sometimes the most effective strategy is to concede one or more elements of an offense. This is especially true in capital cases, where often the only point of the proceeding is to determine whether the defendant will receive a punishment of life without parole or of death.

A. Conceding the elements of an offense is often the best strategy.

This Court has recognized that in a difficult case, conceding guilt to a lesser charge may be the most logical strategic decision. Considering the particular stakes of a capital trial, "the gravity of the potential sentence . . . and the proceeding's two-phase structure vitally affect counsel's strategic calculus," and "'avoiding execution [may be] the best and only

realistic result possible.'" *Florida v. Nixon*, 543 U.S. 175, 190–91 (2004) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 1040 (2003)). Other federal and state courts have made similar acknowledgments of the reasonableness of strategic concession.[1] Even

[1] *See, e.g.*, *Darden v. United States*, 708 F.3d 1225 (11th Cir. 2013) (rejecting contention that strategic concession of guilt triggers presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), "even if defense counsel's strategy to concede guilt was a reasonable, even excellent one"); *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("[W]hen counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision."); *Lingar v. Bowersox*, 176 F.3d 453, 459 (8th Cir. 1999) ("[T]he 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 473 (7th Cir. 1991) ("It is [not a forced guilty plea] if in closing argument counsel acknowledges what the course of the trial has made undeniable—that on a particular count the evidence of guilt is overwhelming. Such acknowledgment can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) 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."); *Walker v. State*, 194 So. 3d 253, 282 (Ala. Crim. App. 2015) ("Alabama follows the majority view and holds that it is not per se ineffective assistance for an attorney to partially concede a defendant's guilt."); *Taylor v. State*, 696 S.E.2d 686, 691 (Ga. Ct. App. 2010) (holding that it was reasonable to concede guilt to one charge where evidence was overwhelming); *State v. Prtine*, 799 N.W.2d 594, 600 (Minn. 2011) ("Conceding intent to kill is an understandable strategy because it was done in an attempt to build credibility with the jury on the self-defense claim while simultaneously hoping to obtain an acquittal on the top count and a conviction on the least

Clarence Darrow employed strategic concession in a difficult case, asking that his young clients' lives be spared but admitting, "I do not know how much salvage there is in these two boys. . . . I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." *Nixon*, 543 U.S at 192 (citation omitted).

Indeed, the failure to concede guilt can amount to "mismatched" presentations at the guilt and penalty phases—for example, arguing first that the defendant was not the shooter, then arguing that while he shot the victim, he was mentally unstable. As one capital defense expert explained, "It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?* 42 MERCER L. REV. 695, 708 (1991). This Court recognized in *Nixon* the problem of taking such an approach, concluding that counsel "must strive at the guilt phase to avoid a counterproductive course" and that "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" 543 U.S. at 191–92. Even the ABA Guidelines, though not dispositive as to the standard of effective assistance,

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serious count."); *Pinnell v. Palmateer*, 114 P.3d 515, 529 (Or. 2005) ("A concession of petitioner's involvement in a felony murder reasonably could have been made in order to preserve his credibility with the jury and avoid convictions for aggravated murder, thus avoiding the death penalty. Such a decision strikes us as a reasonable exercise of professional skill and judgment.").

e.g., *Bobby v. Van Hook*, 558 U.S. 4, 8–9 (2009), stress, "Nor will the [penalty-phase] presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 1.1, Commentary (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 927 (2003).

Counsel's failure to make a unified guilt- and penalty-phase presentation can give rise to ineffective assistance allegations. For example, in a recent Ohio case, the defendant argued on appeal "that based on the 'overwhelming evidence' of guilt, the only reasonable strategy at trial was to concede guilt rather than pursue a defense that there was reasonable doubt as to who killed the victims." *State v. Sowell*, 71 N.E.3d 1034, 1050 (Ohio 2016). In Texas, a defendant argued that "counsel was deficient in failing to offer a 'unified theory' that applied at both the guilt-determination and the punishment-determination phases of his trial," *Mendoza v. Thaler*, No. 5:09cv86, 2012 WL 12817023, at *2 (E.D. Tex. Sept. 28, 2012), while in Louisiana, a defendant argued that counsel were ineffective for "focusing on blaming the victim and discrediting DNA evidence despite the identity of the criminal never being in dispute." *Hoffman v. Cain*, No. 09-3041, 2012 WL 1088832, at *14 (E.D. La. Mar. 30, 2012). One defendant in North Carolina argued both sides, "claiming that based on [his] confessions and state court guilty plea, his guilt should have been conceded

in an attempt to save him from the death penalty," but that "[b]y the same token, . . . [his] guilt was improperly conceded at trial." *Jackson v. United States*, 638 F. Supp. 2d 514, 599 (W.D.N.C. 2009).

B. Conceding offense elements was a reasonable strategy in this case.

Robert McCoy's case presents a textbook example of a reasonable strategic concession. The evidence against him was damning. Cell phone records placed him in Bossier City, Louisiana, at the time that his estranged wife's mother, stepfather, and son were murdered. The 911 call recorded one victim pleading with "Robert" just before the sound of a gunshot. A white Kia registered to McCoy was seen fleeing the scene, and when an officer gave chase, the driver—a man matching McCoy's description—abandoned the car, scaled a fence, and ran across the Interstate. Officers found the handset of the victims' home telephone in the Kia, as well as ammunition and a Walmart receipt for its purchase earlier that day. Surveillance footage from that Walmart revealed that the purchaser also matched McCoy's description. McCoy was arrested four days later in Lewiston, Idaho, having hitchhiked west in a series of eighteen-wheelers. A silver handgun was found in the cab where he had been riding. *State v. McCoy*, 218 So. 3d 535, 541–44 (La. 2016).

Faced with three counts of first-degree murder and the possibility of the death penalty, McCoy's counsel, Larry English, had few good options. Compounding

the matter, English had little time to prepare, thanks to McCoy's pro se motion for speedy trial; he had difficulty assembling a team because of the short time frame; and he had a client who was, at best, unhelpful. *Id.* at 544–46. McCoy disagreed with English's strategy to have him declared indigent in order to finance a mitigation team. *Id.* at 546. He continued to file detrimental pro se motions. *Id.* When a second defense attorney was appointed to assist English, McCoy "unequivocally declined [his] assistance." *Id.* at 548. Most troubling, however, was McCoy's declaration that he would be offering an alibi. When English informed the court that they had no such alibi evidence, McCoy unsuccessfully attempted to fire him. *Id.*

Months before trial, English concluded that the only reasonable strategic choice was to concede guilt and hope to avoid the death penalty. He even encouraged McCoy to take a guilty plea, should one be offered. *Id.* at 558. English determined that McCoy's supposed alibi was incredible, and presenting an alibi defense would be contrary to his ethical obligations to the court. *Id.* at 564; *see* LA. R. PROF'L CONDUCT 1.2(d). Therefore, he conceded guilt in his opening statement, asking the jury to find McCoy guilty of second-degree murder because of his client's "serious emotional issues." *McCoy*, 218 So. 3d at 549.

English's strategy in this case was objectively reasonable—and it might have been successful, had McCoy not intervened. Refusing to relinquish his claim of an alibi, McCoy took the stand against English's advice, "testif[ying] to his alibi defense and

[seeking] to refute the State's evidence with his theories of a vast conspiracy that landed him on trial for his life." *Id.* at 549. Unsurprisingly, the jury convicted McCoy as charged, and after the penalty phase, they recommended death. *Id.* at 550.

Suppose that English had instead accepted McCoy's strategy and presented his unbelievable alibi defense, insisting to the jury that his client was nowhere near the scene of the murders, despite the cell phone records, surveillance video, 911 recording, and abandoned car. When this strategy inevitably failed, what, then, could English have presented at the penalty phase to secure a sentence less than death? Having lost all credibility with the jury by presenting a ludicrous defense, what could he have done to save his client's life? Arguing that McCoy was not the killer in the guilt phase, then arguing that he was emotionally disturbed at the penalty phase, would not have been a convincing case. When the circumstances of McCoy's trial are considered in toto, English's decision to concede guilt in an effort to build credibility with the jury and save McCoy's life was objectively reasonable. That he did so in contravention of McCoy's wish to pursue a futile alibi defense makes the decision no less so.[2]

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[2] Indeed, under certain conditions, counsel's decision to *honor* a defendant's wishes as to strategy may constitute ineffective assistance. For example, in *Hayes v. State*, 56 So. 3d 72 (Fla. Dist. Ct. App. 2011), the postconviction court was found to have erred in summarily dismissing an ineffective assistance claim where trial counsel, acting on the defendant's wishes, abandoned an insanity defense. The appellate court noted that the defendant had "a significant history of mental illness" and determined that

II. The Court should not create a special rule that applies only when a defendant and his lawyer disagree about conceding the elements of an offense.

The "basic thesis" of this Court's decisions according criminal defendants the right to counsel is that "the help of a lawyer is essential" to a fair trial because the defendant "lacks the skill and knowledge" to identify or present his most effective defense. *Faretta*, 422 U.S. at 832–33 & n.43 (internal citations omitted). In recognition of the "superior ability" of "trained counsel" to evaluate the strengths and weaknesses of a case and to advocate the client's cause, the Court has rejected a per se rule that "the client, not the professional advocate, must be allowed to decide what issues are to be pressed." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Instead, the general rule is that an attorney "has—and must have—full authority to manage the conduct of the trial." *Taylor*, 484 U.S. at 418; *see Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) ("[Counsel], not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.").

The petitioner's proposed rule creates an exception to these general principles for "concessions of guilt."

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even though counsel was respecting his decision, it was unclear whether counsel's decision to abandon the defense was reasonable. *Id.* at 73–74.

But that exception is neither necessary nor advisable. A concession of guilt is no different than any other kind of strategic concession or tactical withdrawal that a lawyer may make over the course of a trial. *Faretta* and *Strickland* already provide a remedy for a defendant who disagrees with his counsel's strategic decisions before trial and afterwards. Moreover, the petitioner's proposed exception presents serious administrability concerns.

A. A concession of guilt by counsel is not the equivalent of a guilty plea.

Although a lawyer usually has the right to make tactical decisions regarding trial strategy, the Court has addressed four "fundamental" areas reserved to the defendant personally: "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones*, 463 U.S. at 751. The petitioner erroneously argues that a lawyer's concession of one or more of the elements of an offense at trial is the equivalent of a guilty plea. This argument is wrong for three reasons.

First, as a practical matter, a concession on an offense element is neither more important nor more dispositive than any other strategic concession or tactical decision that a lawyer might make. A lawyer may decline to move to suppress key evidence, call a witness, press a particular kind of defense, such as self-defense or an alibi, or argue a non-frivolous issue on appeal. *See Taylor*, 484 U.S. at 418 ("Putting to one side the exceptional case in which counsel is

ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial."); *Jones*, 463 U.S. at 753–54 (attorney may reject defendant's request to argue non-frivolous issue on appeal). Presumably, a lawyer may also stipulate to the foundation and admissibility of the government's evidence, removing these burdens from the prosecution. While these decisions may end up being dispositive, they are nonetheless counsel's call.

Courts recognize a lawyer's authority to make these decisions, not because they are insignificant, but because making these kinds of strategic decisions is the job of counsel. The Constitution mandates the provision of counsel because "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," such that he "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Although it may be different in degree for a lawyer to concede an element of the charged offense during his opening statement or closing argument, it is no different in kind from strategic decisions that we reasonably expect to be within a lawyer's control.

Second, a guilty plea is not just a formalized concession—it is an absolute waiver of every constitutional right associated with a criminal trial. As this Court has explained, 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). A guilty plea thus effects a waiver of several constitutional rights, including the rights to a jury trial and to a determination of guilt by proof 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 whether to enter a guilty plea is a personal choice that ultimately resides with the defendant. *See, e.g.*, *Jones*, 463 U.S. at 751; *Brookhart v. Janis*, 384 U.S. 1, 7 (1966).

By contrast, statements by counsel conceding one or more elements of an offense do not effect a waiver of the right to a jury trial or to proof of guilt beyond a reasonable doubt, let alone supersede the need for a trial altogether. The prosecution still must prove the defendant's guilt through competent evidence, and the defendant can seek to exclude evidence that is particularly prejudicial and challenge his conviction on appeal or in postconviction proceedings based on alleged trial errors. *See United States v. Gomes*, 177 F.3d 76, 84 (1st Cir. 1999) ("Counsel's concession was not a guilty plea, which involves conviction without proof, and is therefore properly hedged with protections. Here, the government had to provide a jury with admissible evidence of guilt and did so in abundance."); *Bell v. Evatt*, 72 F.3d 421, 430 (4th Cir. 1995); *Underwood*, 939 F.2d at 474.

Third, even when a lawyer concedes guilt, the defendant stands to gain by having a trial. If the trial is infected by error and the defendant obtains a

mistrial or reversal, then the prosecution may be willing to bargain for a guilty plea rather than retry the case. The concession of guilt may also disrupt the prosecutor's trial strategy or plans for sentencing. Moreover, whenever a criminal case goes to trial, the prosecution must "bear the risk of jury nullification." *Old Chief v. United States*, 519 U.S. 172, 185 (1997). None of these considerations are present when a defendant pleads guilty.

B. *Farretta* and *Strickland* adequately protect a defendant's rights in this unusual circumstance.

A criminal defendant has the fundamental right "to preserve actual control over the case he chooses to present to the jury." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). That means that under this Court's caselaw, a criminal defendant who disagrees with his lawyer's proposed trial strategy has two options to register that disagreement. Before trial, the defendant may invoke his right to self-representation under *Faretta* and reduce his counsel to a standby role. When the defendant exercises that option, "all conflicts between [the defendant] and counsel [a]re resolved in [the defendant's] favor," such that the defendant's "strategic choices, not counsel's, would prevail." *Id.* at 181. In the alternative, the defendant may wait until after trial and raise ineffective assistance claims under *Strickland*. If counsel's trial strategy was outside the bounds of professionalism compared to the defendant's alternative strategy,

then *Strickland* compels that the defendant receive a new trial with a new lawyer.

The balance struck by *Faretta* and *Strickland* is sufficient when a defendant and his lawyer fundamentally disagree about what kind of investigation to conduct, the kinds of defenses that should be asserted, and whether to call witnesses in the defendant's case-in-chief. *See Taylor v. Illinois*, 484 U.S. 400 (1988). It stands to reason that the rights and remedies provided by these precedents are also sufficient when a defendant and his lawyer disagree about conceding one or more elements of the charged offense. There is no need to create a special category of strategic disagreements—whether to dispute all the elements of a charged offense—and a third way to resolve those disagreements.

The petitioner makes two arguments about the purported inadequacy of *Faretta* and *Strickland*. Neither is persuasive.

First, the petitioner erroneously argues that the *Faretta* right—the right to self-representation with standby counsel—is insufficient because invoking *Faretta* results in a defendant "losing the benefits that skilled counsel brings and to which [the defendant] is entitled." Pet. Br. 30. But this argument ignores the role of standby counsel, who are appointed to "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta*, 422 U.S. at 834.

In fact, the petitioner's view of the ideal attorney-client relationship is similar to how this Court has described the relationship between a pro se defendant and his standby counsel. The petitioner's main argument is that the Sixth Amendment gives him the personal "right to control the objectives of his defense," Pet. Br. 22, notwithstanding his lawyer's contrary strategic judgment. That is the not the role of trial counsel, but rather that of standby counsel—to "assist the defendant in . . . the defendant's achievement of *his own clearly indicated goals*." *McKaskle*, 465 U.S. at 184 (emphasis added). For example, standby counsel would have been compelled to perform the very functions that the petitioner criticizes his trial counsel for failing to perform: subpoenaing witnesses who had purported "knowledge of the police collusion and his relationship with his estranged wife, as well as an alibi witness who would testify that McCoy was in Houston on the night of the killings." Pet. Br. 15. In short, the petitioner's complaints can and should be resolved by a straightforward application of *Faretta*, not by creating a new and idiosyncratic rule about concessions of guilt.

Second, the petitioner implicitly argues that *Strickland* is an insufficient remedy because a lawyer's strategic decision to concede the elements of an offense constitutes per se ineffective assistance under *United States v. Cronic*, 466 U.S. 648 (1984). Pet. Br. 43. But there is no warrant for concluding that counsel's concession of guilt in order to bolster arguments against a capital sentence amounted to an "entire[] fail[ure] to subject to the prosecution's case

to meaningful adversarial testing." *Cronic*, 466 U.S. at 659; *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."). As explained above, the penalty phase of a capital 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), and assessing the effect of representation must take into account the unique focus of the case on the possible imposition of the death sentence. A reasoned strategic judgment by counsel to concede guilt in order to bolster arguments against a capital sentence is the opposite of a complete failure to "subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. It is instead a calculated strategic decision to test the prosecution's case in a particular way—by enhancing the defendant's prospects at sentencing.

This Court has never suggested that reasoned, tactical judgments of the sort at issue here could trigger *Cronic*'s per se presumption of prejudice. The purpose of that presumption is to address situations in which "the adversary process [is] itself presumptively unreliable." *Id.* There could be no basis for concluding that a conviction is "presumptively unreliable" when the decision to acknowledge guilt derives from a considered assessment by counsel that the evidence against the defendant is overwhelming. Insofar as counsel's assessment in that regard may be unreasonable in a particular case, it likely would

result in a finding of prejudice under *Strickland*, but there is no warrant for applying *Cronic*'s across-the-board presumption. *See Smith v. Robbins*, 528 U.S. 259, 286–87 (2000) (concluding that *Cronic* presumption of prejudice is inapplicable to claim that counsel was ineffective in concluding that there were no meritorious arguments to be raised on appeal, because there is no reason to presume that counsel's assessment was erroneous).

C. Petitioner's proposed rule is not administrable.

The exception that petitioner asks this Court to create will be difficult to apply in three ways.

First, it will inject substantial uncertainty into every *Faretta* hearing. *Faretta* requires a trial court to hold a hearing to determine whether a defendant has voluntarily and reasonably decided to represent himself. *E.g.*, *Indiana v. Edwards*, 554 U.S. 164, 182 (2008). If petitioner's rule is adopted, then when a defendant claims the right to represent himself because he has a fundamental disagreement with his lawyer, the trial judge will need to evaluate whether his case is one of those unique cases in which the defendant may compel his lawyer to adopt a specific trial strategy, instead of reducing his lawyer to standby counsel.

This, then, raises a separate inquiry: *can* a court compel counsel to adopt the defendant's strategy when doing so would cause counsel to violate his ethical obligations? In Louisiana, for example, Rule

1.2(a) of the Rules of Professional Conduct states that a lawyer "shall abide by a client's decisions concerning the objectives of representation" and "shall consult with the client as to the means by which they are to be pursued," but Rule 1.2(d) cautions that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Indeed, Rule 3.3(a) stresses that a lawyer "shall not knowingly . . . make a false statement of fact or law to a tribunal" or "offer evidence that the lawyer knows to be false," either directly or through a witness—including his client. In the present matter, petitioner wished to proceed with his alibi case—a strategy English could not pursue in good faith and in accordance with his ethical obligations. If petitioner's rule were to be adopted, could a court then order counsel to violate the rules of professional conduct if a defendant insisted on pursuing a false, facially incredible defense like petitioner's?

Second, it will be difficult in the mine run of cases to determine whether a defendant has sufficiently "objected" to his lawyer's concession of guilt to invoke petitioner's new rule. As the petitioner rightly concedes, the *Nixon* Court addressed a similar issue and held that a lawyer may concede guilt without his client's express consent. The only difference between *Nixon* and this case is the degree to which the defendant responded when his counsel unveiled his trial strategy: while the defendant in *Nixon* was "unresponsive," 543 U.S. at 192, petitioner was adamantly against his lawyer's strategy. But this clarity in a client's wishes is unusual.

There is a wide range between unresponsive and adamant, with plenty of room for misunderstandings, 20/20 hindsight, and belated instructions to change an agreed-upon strategy. A strategy that looked promising before the prosecution's opening statement may look less promising afterwards. When does a client irrevocably commit to the concession strategy? How long does he reserve the right to change his mind? The only way to ensure that a defendant knowing and voluntarily agrees to a strategy would be to put the issue on the record like a guilty-plea colloquy. When such a colloquy would occur in the course of the trial or how it could be done without disclosing the defense strategy itself is entirely unclear.

Third, even when it might be possible to determine that a client expressly communicated his lack of consent to a strategy, it would be difficult to determine whether the lawyer actually made a strategic decision that "concedes" guilt. Statements by counsel allegedly amounting to concessions of guilt can come in a variety of forms, and it is unclear precisely what set of words—and what degree of concession—might trigger the defendant's right to object to counsel's strategy. The implications of counsel's statements might vary not only depending on the specific choice of words, but also depending on when they occur in the course of the proceedings.

These considerations militate against adopting a per se rule about a lawyer's concession of an offense's elements over a defendant's objection. Such bright-line rules fail to "take account of the variety of

circumstances faced by defense counsel" and can detract "from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 688–89. Rather than establishing such "detailed guidelines for representation" depending on what words are used and when they are stated, *Strickland*, 466 U.S. at 689, the proper course is to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case," *id.* at 690. Given the availability of this kind of nuanced review under *Strickland*, there is little to gained and much to be lost from adopting a bright-line rule here.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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