No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MARIO ANDRETTE McNEILL,

Petitioner,

-v-

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

The defendant in this capital case, who stated his objective was not to receive a death sentence, instructed counsel to completely forego the presentation of mitigation evidence during the sentencing phase of his trial. Counsel alerted the trial court that this instruction was contrary to their advice and that, if allowed to do so, they would choose to present mitigating evidence that had previously been developed. Following binding North Carolina precedent, the trial court ordered counsel to follow the defendant's instructions. On appeal, the North Carolina Supreme Court affirmed this ruling, declining to overturn its prior precedent. This case thus presents the following recurring and important question, on which lower courts are split:

> Whether the Sixth Amendment right to counsel and the Eighth Amendment prohibition on cruel and unusual punishment allow a state to give binding force to a capital defendant's instruction to counsel to completely forego the presentation of available mitigating evidence, rather than allowing counsel to present such evidence as counsel's chosen means of achieving the defendant's stated objective of avoiding a death sentence?

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Petitioner, Mario Andrette McNeill, respectfully petitions this Court pursuant to Supreme Court Rules 10, 12, 13, and 14, to issue a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina, entered in the above case on June 28, 2018.

INTRODUCTION

This case presents an important issue that this Court has not addressed and that has generated a clear split of authority: whether state law permitting a capital

defendant to override counsel's choice to present mitigating evidence in the penalty phase of a capital trial violates the Sixth Amendment delineation of decision-making authority between counsel and client and the Eighth Amendment's mandate to consider available mitigating evidence to ensure heightened reliability and individualized determination by a capital sentencing jury.

This Court has never directly addressed the issue of whether a capital defendant is entitled to override counsel's choice to present mitigating evidence at sentencing. *See, e.g.*, *Soto v. Commonwealth*, 139 S.W.3d 827, 855 (Ky. 2004) (stating that "[t]he United States Supreme Court has yet to address this particular issue" and collecting cases in which defendants were found to have a "right to voluntarily and intelligently waive the presentation of mitigating evidence"). Similarly, this Court has never directly addressed the issue of whether the Eighth Amendment's heightened reliability demands require the presentation of mitigating information to ensure an individualized determination of the appropriateness of a death sentence to a given defendant for a given crime. State courts of last resort and lower federal courts have grappled with the issue, resulting in a deeply-entrenched split, with courts on each side of the split applying various public policy and Sixth and Eighth Amendment rationales to justify or forbid the practice.

North Carolina courts explicitly permit capital defendants to forego presentation of mitigating evidence in capital trials pursuant to a judicially created rule stating that "when counsel and a fully informed criminal defendant client reach

an absolute impasse as to … tactical decisions," including whether to present mitigating evidence at capital sentencing, "the client's wishes must control." *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991). *See also State v. Grooms*, 540 S.E.2d 713, 734-35 (N.C. 2000). The Supreme Court of North Carolina applied *Ali* and *Grooms* to this case, concluding that there was "no reason to revisit or depart from [its] earlier holdings" vesting complete decision-making authority regarding the presentation of mitigation evidence in the defendant when there was an absolute impasse between client and counsel on the issue. *State v. McNeill*, 813 S.E.2d 797, 837 (N.C. 2018).

This Court's Sixth Amendment right-to-counsel jurisprudence makes clear that some decisions, including "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, . . . forgo an appeal," and admit guilt at trial are the defendant's to make, even against the advice and will of counsel. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Other decisions, "including the objections to make, the witnesses to call, and the arguments to advance" do not require a defendant's consent and are instead within an attorney's control. *Id.* at 1509 (citing *Gonzalez v. United States*, 553 U.S. 242, 249 (2008)). Under this line of cases, North Carolina's *Grooms* decision goes too far. After a defendant has explicitly identified his goal as receiving a life sentence instead of death, the choice whether to present mitigation evidence in order to achieve that objective should be counsel's to make.

In addition, since *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court has made clear that the constitutional validity of a state's death penalty scheme depends on the presence of safeguards that guarantee individualized consideration of the circumstances of each crime and each criminal defendant. Without such safeguards, the death penalty is meted out in an arbitrary and disproportionate fashion in contravention of the Eighth Amendment's protection against cruel and unusual punishment. North Carolina's willingness to forego consideration of any mitigating information at a capital sentencing trial is impermissible – regardless of a defendant's wishes – to the extent it prevents a sentencing body from hearing and considering relevant mitigating evidence that could render the death penalty inappropriate as applied to a particular capital defendant.

As set out more fully below, there is an entrenched split of authority regarding whether states may prohibit counsel from presenting mitigating evidence when instructed not to do so by a capital defendant. This Court should resolve the split of authority and grant certiorari in this case.

OPINION BELOW

The opinion of the Supreme Court of North Carolina issued on June 8, 2018, denying Mr. McNeill's direct appeal is attached hereto as Appendix A and is also available at *State v. McNeill*, 813 S.E.2d 797 (N.C. 2018). The Supreme Court of North Carolina's judgment entered June 28, 2018, is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of North Carolina denying Mr. McNeill's direct appeal was entered on June 28, 2018. *See* Appendix B. On August 22, 2018, Chief Justice Roberts granted Petitioner's timely-filed motion for extension of time within which to file this Petition until November 25, 2018.[1] *See* Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as Mr. McNeill is asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV § 1.

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[1] Because November 25, 2018, is a Sunday, by operation of Supreme Court Rule 30.1 the Petition is due Monday, November 26, 2018.

PROCEEDINGS BELOW

On July 5, 2011, a Cumberland County North Carolina Grand Jury indicted Mr. McNeill for first-degree murder and other related, non-capital offenses. The case was tried at the April 8, 2013, Criminal Session of Cumberland County Superior Court before the Honorable James F. Ammons, Jr. On May 23, 2013, the jury returned verdicts acquitting Mr. McNeill of one non-capital offense and convicting him of the remaining counts, including first-degree murder.

During the penalty phase of Mr. McNeill's capital trial, the State introduced evidence that Mr. McNeill had previously been convicted of three counts of assault inflicting serious bodily injury. The State also presented victim impact testimony from the father and half-sister of the victim.

The morning of the sentencing hearing, Mr. McNeill told his attorneys he did not want them to present mitigation evidence or give closing arguments in the penalty phase.[2] Mr. McNeill also stated that he did not want to die.

> THE COURT: Do you clearly understand that you can be put to death?
> THE DEFENDANT: Yes.
> THE COURT: Is that your desire?
> THE DEFENDANT: No.

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[2] Counsel told the court they were aware Mr. McNeill was considering this position, but that on the previous court date he was poised to allow counsel to present evidence in mitigation of punishment.

(Vol. 33 T p 6246). Trial counsel made clear to the court that Mr. McNeill's desire to forego a mitigation presentation was very much against their advice and that counsel wished to present testimony from four witnesses on Mr. McNeill's behalf. The trial court expressed concern about the fairness and validity of the capital proceedings in the absence of a mitigation presentation.[3] Nevertheless, in accord with North Carolina precedent, the trial court determined that there was an

[3] *See, e.g.*, THE COURT: Don't you think some of them [mitigation witnesses] have some bearing on this decision? THE DEFENDANT: Yes. (T p 6242); THE COURT: You understand that you are completely and totally tying your lawyers' hands? THE DEFENDANT: Yes. THE COURT: And there are things that may happen that should not happen during this sentencing hearing because you are tying your lawyers' hands? THE DEFENDANT: Yes. THE COURT: And there are things that probably should happen that will not happen because you're tying their hands? THE DEFENDANT: Yes. (*Id.* at 6245); THE COURT: Do you clearly understand that you can be put to death? THE DEFENDANT: Yes. THE COURT: Is that your desire? THE DEFENDANT: No. THE COURT: Then tell me why you won't let your lawyers try to help you? THE DEFENDANT: My goal was freedom. I lost my freedom. It doesn't matter now. (*Id.* at 6246); THE COURT: The main goal I have during this entire proceeding is to provide a fair and impartial trial for you and the State of North Carolina with as little error as possible on my part. You're making it very difficult for me to provide a fair and impartial trial for you by not following the advice of your attorneys. Do you understand that? THE DEFENDANT: Somewhat. (*Id.* at 6250-51); THE COURT: All right. I'm going to take a recess and I want you to talk to [the defense team] one more time. It bothers me that you think this is funny and maybe that's a coping mechanism. But they may take you to Raleigh some day and execute you. Do you understand that? THE DEFENDANT: Yes. (*Id.* at 6251).

absolute impasse between Mr. McNeill and his attorneys regarding the presentation of mitigation evidence and ordered the attorneys to acquiesce to Mr. McNeill's wishes. Defense counsel presented no evidence at sentencing. After 27 minutes of deliberation, the jury returned a death verdict. Judge Ammons sentenced Mr. McNeill to death for first-degree murder and to consecutive sentences for the remaining offenses.

The Supreme Court of North Carolina affirmed Mr. McNeill's convictions and sentences on direct appeal in an opinion issued on June 8, 2018. *McNeill*, 813 S.E.2d 797. The Supreme Court of North Carolina entered its judgment affirming the convictions and sentences on June 28, 2018. Under N.C. R. App. P. 32(b), the judgment entered on June 28, 2018, is the actual judgment in the direct appeal.

STATEMENT OF THE CASE

This Court has never directly addressed the issue of whether a capital defendant is entitled to override his or her counsel's choice to present mitigating evidence at sentencing.[4] Nor has this Court addressed whether a capital defendant

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[4] In *Schriro v. Landrigan*, 550 U.S. 465 (2007), an AEDPA case in which this Court concluded that the circuit court erred in determining that the district court abused its discretion in declining to grant an evidentiary hearing, this Court presumed without deciding that a defendant is permitted to waive the presentation of mitigating evidence. *Id.* at 481. *But see Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of

is barred from withholding all mitigating evidence from a capital sentencing body given the Eighth Amendment's heightened reliability demands.[5] State courts of last resort and lower federal courts are split on the issue, and within each side of the split, courts rely on various Sixth Amendment, Eighth Amendment, and public policy rationales to answer the question. Given the divergence, this Court should grant certiorari to definitively answer the question of whether, as North Carolina courts hold, capital defendants, whose stated trial objective is to live, may prevent presentation of mitigating evidence at sentencing against counsel's will.

I. THIS COURT'S SIXTH AMENDMENT JURISPRUDENCE HAS LONG RECOGNIZED THAT SOME DECISIONS MUST BE LEFT TO DEFENDANTS WHILE OTHERS ARE LEFT TO DEFENDANTS' COUNSEL.

This Court recently reaffirmed the well-established Sixth Amendment assistance-of-counsel principle that "[a]utonomy to decide [ ] the *objective* of the defense" is a decision "reserved for the client." *McCoy*, 138 S. Ct. at 1508 (emphasis added). This tenet remains true even in cases in which evidence of guilt is

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the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[5] In *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), this Court noted the fact of the defendant's desire "not to present any proof of mitigating evidence during his sentencing proceedings" despite "receiving repeated warnings from the trial judge, and contrary advice from his counsel[,]" and presumed without deciding that a defendant is permitted to waive the presentation of mitigating evidence. *Id.* at 306 n.4. *But see Webster*, 266 U.S. at 511, *supra* n.4.

overwhelming and counsel "reasonably assess[es] a concession of guilt as best suited to avoiding the death penalty." *Id.* The Sixth Amendment grants the accused a personal right "to make his defense," *id.* (quoting *Faretta v. California*, 422 U.S. 806, 819-20 (1975), "and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law," *id.* at 1507 (internal quotation marks omitted). *See also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (stating that some decisions of a "fundamental" nature are controlled by the defendant, including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

The flip side of *McCoy*, of course, is that trial management decisions, including the decision about whether to present certain witnesses or evidence, are decisions controlled by counsel. *See, e.g.*, *McCoy*, 138 S. Ct. at 1508 ("Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" (quoting *Gonzalez*, 553 U.S. at 248)); *id.* at 1509 ("Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. *See Gonzalez*, 553 U. S., at 249 ('[n]umerous choices affecting conduct of the trial' do not require client consent, including 'the objections to make, the witnesses to call, and the arguments to advance')"); *id.* at 1516 (Alito, J., dissenting) ("Among the decisions that counsel is free to make unilaterally are the following: choosing

the basic line of defense, . . . cross-examining witnesses, offering evidence and calling defense witnesses, and deciding what to say in summation"); *Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (client must accept attorney's decisions regarding the conduct of the trial, including the decision of whether to put certain witnesses on the stand); *Jones v. Estelle*, 722 F.2d 159, 165 (5th Cir. 1983) (finding that decisions regarding "[w]hether to call a particular witness, object to evidence, offer additional evidence or rest, or [to] advance a particular defense at all" are decisions within the lawyer's control).

Any undue interference with the Sixth Amendment's right to counsel constitutes an impermissible "breakdown of the adversarial process." *United States v. Cronic*, 466 U.S. 648, 657 (1984). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 658. Because assistance of counsel is vital, a trial is "presumptively unreliable" where "the accused is denied counsel at a critical stage of his trial," and where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. Where a defendant is subject to this type of constructive denial of counsel, prejudice is presumed. *Id.* at 659-60.

II. THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE HAS LONG RECOGNIZED THAT DEATH IS DIFFERENT AND THAT BEFORE A STATE MAY IMPOSE A DEATH SENTENCE, THE SENTENCING BODY MUST CONSIDER THE PARTICULAR CIRCUMSTANCES OF THE CRIME AND DEFENDANT, INCLUDING ANY MITIGATING EVIDENCE THAT MIGHT MAKE THE DEATH PENALTY INAPPROPRIATE.

Well-established Supreme Court precedent dictates that under the Eighth and Fourteenth Amendments, a sentence of death cannot be "wantonly and . . . freakishly imposed." *Furman v. Georgia,* 408 U.S. 238, 310 (1972) (Stewart, J., concurring). To avoid random and disproportionate imposition of the death penalty, capital sentencing requires an individualized determination on the basis of the character of the defendant and the circumstances of the crime. *See, e.g.*, *Eddings v. Oklahoma,* 455 U.S. 104, 110–12 (1982); *Gregg*, 428 U.S. at 188–95. This is a constitutional imperative: "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . *requires* consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976) (emphasis added). *See also Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (same).

The finality of the death penalty renders it "qualitatively different from a sentence of imprisonment, however long." *Woodson*, 428 U.S. at 305. Accordingly, "there is a corresponding difference in the need for reliability in the determination

that death is the appropriate punishment in a specific case." *Id.*[6] After *Furman*, most death penalty states, including North Carolina, developed sentencing schemes meant to satisfy *Gregg*'s reliability requirements by allowing for the presentation of mitigating evidence for consideration and weighing by the sentencer in a bifurcated trial. *See Furman*, 408 U.S. 238. *See generally, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978) (holding a statute unconstitutional where it precluded defendant from introducing certain mitigating evidence); *Gregg*, 428 U.S. 242 (approving statutes that require consideration of mitigating circumstances). *See also Roberts v.*

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[6] This Court has consistently underscored the need for heightened reliability in cases where the death penalty is at issue. *See e.g. Ake v. Oklahoma*, 470 U.S. 68, 77-83 (1985) (fact-finding must be especially reliable in capital cases, thus justifying the expansive use of expert assistance); *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983) (recognizing greater need for reliability in the sentencing determination in a capital case "because there is a qualitative difference between death and any other permissible form of punishment"); *Gregg*, 428 U.S. at 188 ("the penalty of death is different in kind from any other punishment imposed under our system of justice"). The requirement of heightened reliability in capital cases has formed the legal basis upon which the Court has repeatedly broadened constitutional protections for capital defendants. *See e.g. Turner v. Murray*, 476 U.S. 28 (1986) (expanded *voir dire* in capital cases); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (limits in capital cases on prosecutorial argument diminishing jury's responsibility); *Beck v. Alabama*, 447 U.S. 625 (1980) (requiring instruction on lesser-included offenses in capital cases); *Green v. Georgia*, 442 U.S. 95 (1979) (state hearsay rules must bend in capital cases to allow consideration of mitigating evidence).

Louisiana, 431 U.S. 633 (1977); *Woodson*, 428 U.S. 280; *Jurek v. Texas*, 428 U.S. 262 (1976).

III. RELYING ON VARIOUS SIXTH AND EIGHTH AMENDMENT RATIONALES DERIVED FROM THE CASE LAW ABOVE, STATE AND FEDERAL COURTS ARE SPLIT ON WHETHER A CAPITAL DEFENDANT MAY OVERRIDE COUNSEL'S CHOICE TO PRESENT MITIGATING EVIDENCE AT SENTENCING; THIS COURT SHOULD RESOLVE THE SPLIT AND PROVIDE LOWER COURTS THE CLARITY NEEDED TO ENSURE RELIABLE DEATH SENTENCES.

Taken together, the Sixth Amendment and Eighth Amendment provisions discussed above have resulted in a court split on the issue of whether a capital defendant may, contrary to counsel's decision, choose not to present mitigation evidence, even where that request both conflicts with his stated objective and deprives the sentencing body of mitigating information and the ability to determine the propriety of a death sentence under the specific circumstances of the case. The cases creating this well-entrenched split rely on varied and conflicting rationales, including a defendant's right to waive counsel or a jury trial, the agent-principal nature of the attorney-client relationship created by the right to counsel, and the Eighth Amendment's protection against cruel and unusual punishment.

In answering the question presented, a number of courts have allowed capital defendants to waive presentation of mitigation evidence:

- *United States v. Davis*, 285 F.3d 378, 381 (5th Cir. 2002) (finding Sixth Amendment violation where court appointed independent counsel whose mitigation "presentation to the jury [ ] directly contradict[ed] the approach undertaken by the defendant");

- *Frye v. Lee*, 235 F.3d 897 (4th Cir. 2000) (acknowledging North Carolina's *Ali* rule in discussing reasonableness of fact-finding regarding defendant's decision to disallow presentation of certain mitigating evidence, a practice the court accepted);

- *Singleton v. Lockhart*, 962 F.2d 1315, 1322 (8th Cir. 1992) ("If a defendant may be found competent to waive the right of appellate review of a death sentence, we see no reason why a defendant may not also be found competent to waive the right to present mitigating evidence that might forestall the imposition of such a sentence in the first instance.");

- *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990) (rejecting Sixth and Eighth Amendment arguments against right to waive mitigation);

- *State v. Johnson*, 401 S.W.3d 1, 15 (Tenn. 2013) ("The defendant's decision to waive mitigation evidence is binding on defense counsel because the decision to waive mitigation evidence is a component of the decision to waive a jury trial, a decision left solely to the discretion of the defendant.") (collecting cases); *see also Zagorski v. State*, 983 S.W.2d 654, 658 (Tenn. 1998) (same);

- *State v. Maestas*, 299 P.3d 892 (Utah 2012) (rejecting Sixth and Eighth Amendment arguments regarding appellant's waiver of mitigation presentation at trial);

- *State v. Hausner*, 280 P.3d 604 (Ariz. 2012) (allowing capital defendant to waive mitigation);

- *Chapman v. Commonwealth*, 265 S.W.3d 156, 169 n.33 (Ky. 2007) (noting that the U.S. Supreme Court has yet to address this particular issue and citing in agreement cases upholding "a defendant's right to voluntarily and intelligently waive the presentation of mitigating evidence");

- *State v. Dunster*, 631 N.W.2d 879, 906 (Neb. 2001) (declining "to override a defendant's constitutional right to control the organization and content of his or her own defense during sentencing");

- *State v. Grooms*, 540 S.E.2d 713, 734-35 (N.C. 2000) (concluding trial court did not err in "prohibiting defense counsel from presenting evidence in mitigation" where the "defendant and his counsel had reached an absolute impasse over the tactical decision");

- *State v. Ashworth*, 706 N.E.2d 1231, 1236-37 (Ohio 1999) (permitting defendant to forego presentation of all mitigation evidence and concluding Eighth Amendment concerns are satisfied by statutory procedures);

- *Wallace v. State*, 893 P.2d 504, 511-12 (Okla. 1995) (upholding death verdict where defendant openly sought death penalty and chose to present no mitigating evidence);

- *People v. Bloom,* 774 P.2d 698, 714 (Cal. 1989) (overruling *People v. Deere*, *infra*, and concluding that as a matter of the right to self-representation the court would respect the "defendant's personal choice on the most 'fundamental' decisions in a criminal case");

- *Bishop v. State*, 597 P.2d 273, 276 (Nev. 1979) (concluding defendant "had a Sixth Amendment right not to have counsel forced upon him" after "he made it clear that he did not want to present or have standby counsel present [mitigating] evidence");

- *Nelson v. State*, 681 So.2d 252, 255 (Ala. Crim. App. 1995) ("hold[ing] that a competent defendant can waive the presentation of mitigating evidence at a capital sentencing proceeding, provided the trial court carefully weighs possible statutory and nonstatutory mitigating circumstances against the aggravating circumstances to assure that death is the appropriate sentence").

Other courts, however, have prevented capital defendants from overriding counsel's choice to present mitigation evidence during capital sentencing:

- *Marquardt v. State*, 156 So.3d 464, 491 (Fla. 2015) (stating that trial court should appoint special counsel to investigate and present mitigating information and requiring "the preparation of a meaningful, comprehensive presentence investigation report (PSI) in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence" in accordance with procedures "which have served this state well for over a decade in ensuring 'reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation.'" (quoting *Muhammad v. State*, 782 So.2d 343, 363 (2001)); *see also Klokoc v. State,* 589 So.2d 219, 220 (Fla. 1991) (denying defendant's request to waive mitigation and appointing "special counsel to represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding");

- *State v. Winkler,* 698 S.E.2d 596, 603 (S.C. 2010) (treating the presentation of mitigation evidence during the penalty phase of a capital trial as a tactical decision left to the attorney rather than the defendant and concluding that trial counsel appropriately presented mitigating evidence against the defendant's wishes);

- *State v. Koedatich*, 548 A.2d 939, 995 (N.J. 1988) (finding Eighth Amendment violation because "[w]ithout any evidence in the record of mitigating factors we are missing a significant portion of the evidence that enables us to determine if the imposition of death was appropriate.");

- *People v. Deere*, 710 P.2d 925, 931 (Cal. 1985), *overruled by Bloom*, *supra* (deciding on public policy grounds that "[t]o allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.");

- *State v. Ashley*, 1999 Del. Super. LEXIS 210, at *3-4 (March 19, 1999), *rev'd and remanded on guilt phase grounds*, 798 A.2d 1019 (Del. 2002) (concluding "that the decision whether or not to present a mitigating case is one left to the discretion of counsel and is not one solely reserved to the defendant" and allowing *pro se* defendant to forego mitigation presentation not because he was the defendant, but because he was acting as counsel).

A. North Carolina's agent-principal view of tactical decision-making articulated in *Ali* and *Grooms* violates the Sixth Amendment.

Under North Carolina precedent, "when counsel and a fully informed criminal defendant client reach an absolute impasse as to [ ] tactical decisions," including "whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make," "the client's wishes must control." *Ali*, 407 S.E.2d at 189. The North Carolina Supreme Court created this absolute impasse rule in *Ali*, where "the defendant contend[ed] that he was denied the right to

counsel at a critical stage of his trial when the trial court and his attorneys allowed him to make the decision not to peremptorily challenge a juror his attorneys had wanted to remove." *Id.* at 188. The court based the new rule on its interpretation of non-binding American Bar Association Standards for Criminal Justice Standard 4-5.2 (2d ed. 1980) and "the principal-agent nature of the attorney-client relationship." *See id.* at 189.[7]

Nearly a decade after *Ali,* the North Carolina Supreme Court applied the absolute impasse rule in a capital case, holding "that the trial court did not err in prohibiting defense counsel from presenting evidence in mitigation" where the "defendant and his counsel had reached an absolute impasse over the tactical decision of whether to present mitigating evidence during the capital sentencing proceeding." *Grooms*, 540 S.E.2d at 734-35. So long as a capital defendant's decision not to present mitigating evidence is "fully informed" and he "underst[ands] the potential consequences of his decision," *i.e.* execution by the state, North Carolina courts deem the capital sentence satisfactory. *Id. See also State v. White*, 508 S.E.2d 253, 272 (N.C. 1998) (holding *Koedatich* inapposite as

[7] Notably, the ABA standard actually states that "[t]he decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the *exclusive province of the lawyer* after consultation with the client." *Ali*, 407 S.E.2d at 189 (quoting American Bar Association Standards for Criminal Justice Standard 4-5.2(b) (emphasis added)).

defendant White allowed counsel to present some mitigating evidence, while defendant Koedatich allowed his counsel to present none).

North Carolina's perfunctory reliance on the agent-principal theory underlying the right to assistance of counsel is insufficiently nuanced to account for the many and varied challenges that arise and decisions that must be made during an attorney-client relationship, particularly in capital cases. Indeed, the judicially-created *Ali*/*Grooms* rule turns this Court's Sixth Amendment jurisprudence on its head, leaving decision-making authority to attorneys only where the defendant does not disagree. In practice, this means that there may be cases with particularly opinionated defendants in which an attorney's expertise will not be utilized or applied to *any* trial decisions. As this Court has explained, such a system is both unworkable and counterproductive:

> Giving the attorney control of trial management matters is a practical necessity. "The adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the right to counsel. *See Powell v. Alabama*, 287 U.S. 45, 68-69 … (1932); ABA Standards for Criminal Justice, Defense Function 4-5.2, Commentary, p 202 (3d ed. 1993) ("Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile"). Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and

> to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote.

Gonzalez, 553 U.S. at 249.

Where, as here, a convicted criminal defendant is represented by counsel, counsel ought to control the presentation of evidence in furtherance of the objective of the litigation – to secure a life verdict.[8] *See Faretta,* 422 U.S. at 820 ("[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition allocate to the counsel the power to make binding decisions of trial strategy in many areas."). This is especially true at the sentencing phase of a capital trial as compared to guilt-innocence, as a convicted defendant's "autonomy interests that survive a felony conviction are less compelling" than those of an accused facing trial. *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000). *See also Betterman v. Montana,* 136 S. Ct. 1609, 1614-15 (2016) ("This understanding of the Sixth Amendment language – 'accused' as distinct from 'convicted,' and 'trial' as separate from 'sentencing' – endures today."); *Williams v. New York,* 337 U.S. 241, 246 (1949)

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[8] Alternately, mitigating evidence could be presented by a neutral third party to maintain the attorney-client relationship. The Supreme Courts of Florida and New Jersey have suggested a procedure for presenting mitigating evidence via appointed independent counsel. *See Marquardt*, 156 So.3d at 490; *Koedatich*, 548 A.2d at 997.

(discussing the latitude historically afforded to sentencing tribunals as compared to tribunals passing on a defendant's guilt).

The overarching principle from this Court's cases, then, is that a defendant is entitled to determine the objective of his or her defense, including, *inter alia*, whether to plead guilty or admit guilt at trial. Once a defendant has made his or her objective clear, choices consistent with that objective regarding the presentation of evidence and witnesses as a means to fulfill that objective are best left to lawyers in consultation with their client. Mr. McNeill's goal was to obtain freedom. After he was convicted of first-degree murder, that objective was moot, but Mr. McNeill stated he did not wish to die. (T p 6246). How best to achieve that objective – how not to die – should have been left to trial counsel, who had investigated and developed mitigating evidence for presentation at sentencing.[9]

Instead, North Carolina's absolute impasse rule resulted in the trial court barring counsel from advocating for Mr. McNeill at sentencing by presenting mitigating evidence in support of his stated objective not to die. These are precisely

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[9] Trial counsel were permitted to proffer to the court summaries of the testimony counsel anticipated the mitigation witnesses would give. That evidence was never before the jury. The court's instructions listed two potential statutory mitigating factors and five non-statutory mitigating factors, but those were not derived from the statements counsel proffered to the court, which would have supported additional mitigating factors and bolstered the factors that were submitted. The jury recommended a sentence of death after less than 30 minutes of deliberation.

the type of circumstances in which, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Cronic*, 466 U.S. at 659-60. The Sixth Amendment does not tolerate this sort of breakdown in the adversarial process, particularly in the sentencing phase of a capital trial where, as discussed below, heightened reliability and individualized consideration are mandated. *See* Casey Anthony, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 Am. J. Crim. L. 75, 90 (2002) (discussing the limitations of a purely Sixth Amendment approach to this question in the capital context: "This approach ignores the broader conflict between a defendant's claimed interest in choosing to waive her own challenges to the death sentence and the state's interest in a reliable sentencing determination.").

B. Even assuming *arguendo* that North Carolina's agent-principal view of tactical decision-making is sound, in the capital sentencing context, the defendant's decision-making power must yield when in conflict with the Eighth Amendment's protection against cruel and unusual punishment.

Respect for the individual as a decision-making agent, though paramount at guilt-innocence, must yield at capital sentencing, where the Eighth Amendment requires reliability and freedom from arbitrariness above all. This is true both for defendants' sakes and for society's at large. Indeed, in capital sentencing

proceedings, the relevant inquiry is whether we as a society are justified in and entitled to kill this specific individual. The only way to make that determination in accord with the Eighth Amendment is to consider mitigating factors and evidence alongside the aggravating factors the state must attempt to prove. *See Lockett*, *supra*; N.C. Gen. Stat. § 15A-2000(b)(2) (discussing a jury's responsibility to weigh the aggravating and mitigating evidence before reaching their determination about an appropriate sentence). North Carolina's absolute impasse jurisprudence critically undermines Eighth Amendment protections and cannot reign unchecked in capital cases.

This Court has stated time and again that preventing a capital sentencing jury from considering fully any aspect of proffered mitigating evidence or from giving such evidence meaningful, mitigating effect is impermissible under the Eighth Amendment. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 260 (2007) ("The same principles originally set forth in earlier cases such as *Lockett* and *Eddings* have been articulated explicitly by our later cases, which explained that the jury must be permitted to 'consider fully' such mitigating evidence and that such consideration 'would be meaningless' unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence."); *id.* at 264 ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating

evidence – because it is forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing process is fatally flawed.").

There is, however, no principled reason that the logic underlying the *Lockett* line of cases should be cabined to cases in which the defendant affirmatively chooses to present mitigating information. Juries in *all* capital trials are responsible for providing a reasoned moral response and an appropriate sentence. When deprived of mitigating considerations – whether because ineffective counsel failed to investigate, develop, or present mitigating evidence, or because the defendant expressed his hopelessness about having been convicted by "waiving" mitigation – the jury is unable to complete its central function.

> Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense.

Id. at 263-64. This underlying principle, which ensures constitutional validity, should apply in all capital cases.

A judicial rule like the one announced in *Ali* confers absolute power on a defendant to prevent the jury "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense," and thereby "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death,

that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S. at 605. Further, the rule in *Ali* prevents meaningful proportionality review on appeal, a critical safeguard that necessarily considers both aggravating and mitigating factors and is central to ensuring the lawful, nonarbitrary administration of death sentences. *See* Casey, *Maintaining the Integrity of Death*, 30 Am. J. Crim. L. 75, 97 (discussing the decreased reliability of reviews of death sentences arising from proceedings where the defendant prevented the presentation of mitigating evidence).

Under North Carolina's capital sentencing statute, a jury must determine (1) whether any aggravating circumstance or circumstances exist; (2) whether any mitigating circumstance or circumstances exist; (3) whether the mitigating circumstances found were sufficient to outweigh the aggravating circumstances found; and (4) whether, considered with the mitigating circumstances, the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty. *See State v. Gibbs*, 335 N.C. 1, 25 (1993) (citing N.C. Gen. Stat. § 15A-2000(b)). This language begs the questions: how is a jury to determine whether mitigating circumstances exist, and what is a jury to weigh when, as here, a defendant overrides his attorneys' choice to present available, mitigating evidence for the jury's consideration?

The New Jersey Supreme Court addressed similar questions in *State v. Koedatich*, 548 A.2d at 993-94. There, the court acknowledged the "tension [that]

exists between the desires of the client as expressed to his lawyer and the constitutional necessity to insure that the ultimate penalty is not extracted in a 'wanton and freakish manner.'" *Id.*

> Certainly tension exists between the desires of the client as expressed to his lawyer and the constitutional necessity to insure that the ultimate penalty is not extracted in a "wanton and freakish manner." In normal circumstances, the lawyer is required by the Rules of Professional Conduct to "abide by a client's decisions concerning the objectives of representation."
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> * * *
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> Under our statutory scheme, a jury may impose the death penalty only if the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. If the jury did not hear the evidence allegedly in mitigation, it could have difficulty discharging its statutory, and indeed moral, duty.

Id. at 994 (adopting a lower court's reasoning and quoting *State v. Hightower*, 518 A.2d 482, 482-84 (N.J. App. Div. 1986)). *See also State v. Koedatich*, 489 A.2d 659, 659 (N.J. 1984) (O'Hern, J., concurring in part, dissenting in part from denial of defendant's motion to dismiss appeal) ("What is required at the capital sentencing stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. The record before us does not disclose how or whether the jury was informed of the essential information concerning the character of the defendant that should precede the jury's judgment.").

"Where society's interest in the reliability of the decision-making process in death penalty cases is manifested in an individualized determination based on aggravating and mitigating circumstances, a waiver of one part of this structure" – even based on a defendant's stated wishes – "invalidates the delicately balanced protection for safeguarding against arbitrary imposition of the death penalty." Linda Carter, *Mr. Justice Potter Stewart: Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 Tenn. L. Rev. 95, 111 (1987). In short, if one side of the jury's scale is artificially empty, it is impossible to determine whether the jury reached a reliable result. The Eighth Amendment does not tolerate such uncertainty.

> It is self-evident that the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty. Accordingly, we have the constitutional and statutory duty to review every judgment of death. Without any evidence in the record of mitigating factors we are missing a significant portion of the evidence that enables us to determine if the imposition of the death penalty was appropriate. Hence, we would be unable to discharge our constitutional and statutory requirement to review a judgment, and, therefore, we would fail to safeguard the state's interest in insuring the reliability of death-penalty decisions. On this ground alone, there must be a new penalty trial.

Koedatich, 548 A.2d at 995.

Indeed, one critical part of this Court's Eighth Amendment jurisprudence acknowledges citizens' compelling interest and looks to society's prevailing norms, asking whether a given punishment is consistent with "the evolving standards of

decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *See also, e.g., Atkins v. Virginia*, 536 U.S. 304 (2002) (discussing recent state legislation exempting people with intellectual disability from capital punishment). "[M]aintain[ing] a link between contemporary community values and the penal system" is "one of the most important functions" that must be performed in capital proceedings. *Trop,* 356 U.S. at 101. "[W]ithout [this link] the determination of punishment would hardly reflect the evolving standards." *Id. See also Ring v. Arizona,* 536 U.S. 584, 616 (2002) (Breyer, J., concurring) (jury's role at sentencing is to "translate a community's sense of capital punishment's appropriateness in a particular case"); *Witherspoon v. Illinois,* 391 U.S. 510 (1968) ("describing the role of the jury as "nothing less than express[ing] the conscience of the community on the ultimate question of life or death").

Because we have a societal interest in treating our citizens with some baseline level of dignity, even if a defendant desires or requests an unconstitutional punishment, we cannot allow it. *See, e.g.*, Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 Temp. Pol & Civ. Rts. L. Rev. 1 (2011)*;* Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment,* 32 Conn. L. Rev. 615, 646–47 (2000). Individual defendants may not voluntarily subject themselves to an

unconstitutional punishment by waiving the limitations imposed by the Eighth Amendment:

> [W]hile a defendant may normally make an informed and voluntary waiver of rights personal to himself, his freedom to do so must give way where a substantial public policy is involved; in such a case an appeals court may feel fully warranted in seeking to reach an issue.... Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach . . . . [T]he waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence.

Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978) (internal citations omitted). *See also State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985) (concluding that castration as a condition of punishment, even where the defendant agrees, is impermissible); *Henry v. State*, 280 S.E.2d 536 (S.C. 1981) (concluding that banishment as a punishment, even where the defendant agrees, is impermissible). To allow a defendant to choose his own sentence introduces unconscionable arbitrariness into the capital punishment system. *See Massie v. Sumner,* 624 F.2d 72, 74 (9th Cir. 1980). "[T]he state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty." *Koedatich*, 548 A.2d at 995. Accordingly, "the waiver rule cannot be exalted to a position so lofty as to require [the] Court to blind itself to the real issue – the propriety of allowing the state to conduct an illegal execution of a citizen." *McKenna,* 383 A.2d at 181. *See also* Epstein, *Mandatory Mitigation*, 21 Temp. Pol.

& Civ. Rts. L. Rev. 1, 27-28 (discussing defendants' analogous inability to waive their right to a public trial given society's parallel interest in access to public trials).

Allowing a capital defendant to unilaterally prevent the sentencing body from hearing information central to the appropriateness of his or her punishment cannot be tolerated if the Eighth Amendment is to retain effect. Permitting "mitigation waivers" or, more aptly, "Eighth Amendment waivers," effectively allows the defendant, not the justice system with its attendant procedural safeguards, to determine whom the state will execute. *See Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (Marshall, J., Brennan, J., dissenting) ("This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after a painstaking review of aggravating and mitigating factors. In this case, that assumption has proved demonstrably false. Instead, the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide."); *Grasso v. State,* 857 P.2d 802, 811 (Oka. Crim. App. 1993) (Chapel, J., concurring) ("The State must not become an unwitting partner in a defendant's suicide by placing the personal desires of the defendant above the societal interests in assuring that the death penalty is imposed in a rational, non-arbitrary fashion.").

Taken to its logical conclusion, permitting Eighth Amendment waivers of the protection against cruel and unusual punishment would lead to absurd results and gut the Amendment of its meaning. For example,

> If a rape defendant may waive his Eighth Amendment rights and be castrated in exchange for a lighter prison sentence, courts could allow thieves to have their hands chopped off and Peeping Toms to have their eyes gouged out. In order to raise some money for the state treasury and a victim's family, the government could pass a bill allowing capital defendants a monetary bonus if they choose – over lethal injection – public execution by guillotine in a coliseum before a paid audience.
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> Further, . . . rape defendants, child defendants, and insane defendants could choose the death penalty even though the Court has held that it violates the Eighth Amendment to execute those categories of defendants. To go further, if the Court were to eventually hold that the death penalty itself is a cruel and unusual punishment, defendants would still be able to choose that punishment as an option over prison.

Kirchmeier, *Waiving the Eighth*, 32 Conn. L. Rev. 615, 650. In short, "[a]s long as defendants are given constitutional options, any punishment would be constitutional when reformed through the power of choice." *Id.*

Without a sentencing procedure that includes "evidence arguing for and against death" – whether from the defendant or another source – "the State [and thereby society] can never have an assurance that the death penalty has been applied appropriately." Casey, *Maintaining the Integrity of Death*, 30 Am. J. Crim. L. 75, 104. *See also Kansas v. Marsh*, 548 U.S. 163, 171 (2006) (reiterating that "as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a

jury to consider any mitigating evidence comports with that requirement"). Indeed, "[i]f the defendant waives presentation of mitigating evidence, there is no guarantee [of] a meaningful distinction between those chosen to live and those chosen to die." Carter, *Maintaining System Integrity*, *supra*, 55 Tenn. L. Rev. 95, 128.

IV. MR. MCNEILL'S CASE PROVIDES THE IDEAL VEHICLE FOR DECIDING THIS ISSUE.

The record in this case is clear that Mr. McNeill was represented by counsel and that counsel had investigated, developed, and desired to present mitigating evidence on Mr. McNeill's behalf at the sentencing phase of his capital trial. Mr. McNeill's counsel made a record of their advice to Mr. McNeill and his responses in declining to heed their wishes. Mr. McNeill's case is not one of a difficult client who impeded counsel's development of mitigation throughout. Nor is it a case of a defendant seeking to die essentially by state-assisted suicide or who steadfastly believes that death is preferable to a sentence of life in prison. *See, e.g.*, *McCoy*, 138 S. Ct. at 1508. Mr. McNeill stated clearly that he did not want die. But, after just having been convicted of first-degree murder, he expressed ambivalence about his sentence, as his goal had been freedom. *See id.* (differentiating between a client's right to determine the objective of his defense and making choices about how best to achieve that objective). Accordingly, the presentation of mitigating evidence in this case by Mr. McNeill's counsel (or an independent party) would in no way override

Mr. McNeill's objective for litigating the case. *See id.* at 1509-10. On appeal in this case, the North Carolina Supreme Court plainly stated its position:

> Having considered defendant's arguments, we see no reason to revisit or depart from our earlier holdings. *See State v. Grooms*, 353 N.C. 50, 84-86, 540 S.E.2d 713, 734-35 (2000) (holding that when the defendant and his counsel had reached an absolute impasse, the trial court properly ordered defense counsel to defer to defendant's wishes not to present mitigating evidence and that this ruling did not deprive the defendant of effective assistance of counsel).

McNeill, 813 S.E.2d at 837. From this, it is clear the North Carolina Supreme Court considers the *Ali/Grooms* line of cases settled. Without intervention from this Court to clarify that some choices – including decisions about the witnesses and evidence to present consistent with the defendant's objectives – are left to counsel, the error in this case is likely to recur.

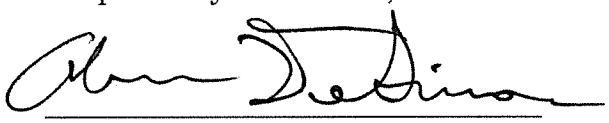
This case presents an ideal vehicle for the Court to squarely determine whether North Carolina's "absolute impasse" rule can be applied when a capital defendant attempts to override counsel's choice to present mitigating evidence, even where the constitutional validity of North Carolina's capital sentencing statute requires jurors to weigh aggravating and mitigating circumstances in determining whether to recommend a death sentence. Absent intervention by this Court, courts in North Carolina and other capital jurisdictions will continue to erode counsel's role under the Sixth Amendment and undermine the reliability considerations of the Eighth Amendment, resulting in constitutionally infirm death sentences

throughout the United States. *See* Rule 10, *Rules of the Supreme Court of the United States.*

CONCLUSION

For the reasons set forth in this Petition for Writ of Certiorari, this Court should now grant certiorari to hear Mr. McNeill's case.

Respectfully submitted,



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