No. 18-6869

IN THE
SUPREME COURT OF THE UNITED STATES

MARIO ANDRETTE MCNEILL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the North Carolina Supreme Court correctly concluded that neither the Sixth nor Eighth Amendment requires the trial court to compel defense counsel in a capital case to present mitigating evidence during the penalty phase where the defendant expressly instructs counsel not to do so.

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STATEMENT

This case involves the Sixth and Eighth Amendment implications where a capital defendant expressly instructs his defense counsel not to present mitigating evidence during the penalty phase. The Supreme Court of North Carolina concluded that neither requires the trial court to compel counsel to present such evidence.

1. The facts of petitioner's crimes are not in dispute. *See generally* Pet. App. 2-15, 19-23. Many of his movements were captured by video surveillance footage placing him at the trailer park and with his five-year-old victim, Shaniya Davis, at the hotel; he stipulated to the same at trial.

In the early morning of 10 November 2009, petitioner was looking to "hook up." When he was unsuccessful convincing any adult woman to do so, he went to the trailer park unit where Shaniya lived with her mother, Antoinette, and aunt, Brenda. He took Shaniya at approximately 5:30 a.m.

From there he went to a hotel, checking in after 6:00 a.m., pretending he was there with his daughter. He carried Shaniya through a back entrance around 6:30 a.m., and spent less than an hour in the hotel room with her. Petitioner's pubic hair was found on the bed's comforter.

Petitioner also was in phone contact with Brenda during this time. Antoinette first reported Shaniya missing to police around 6:50 a.m., Brenda texted petitioner immediately after that call, and they contacted each other several times after police arrived to investigate Shaniya's disappearance.

At approximately 7:40 a.m., after taking Shaniya back to his car and checking out from the hotel, petitioner turned onto and drove down Highway 87. Cellular location analysis confirmed that petitioner's phone traveled from the hotel to a specific area or intersection known as the Johnsonville and Barbeque area of Highway 87; it was there at least between 8:22 and 8:25 a.m.

Two days later, petitioner was identified and interviewed, in part successfully. He eventually admitted taking her, once shown the surveillance footage. He insisted, however, that he was just taking Shaniya to a drycleaners to meet some unnamed persons. The focus of the interview changed when petitioner suddenly stated that he was waiting to get a call "to come kill her." *Id.* at 12.

Shaniya's dead body was found hidden near where petitioner's phone had stopped along Highway 87. Shaniya had injuries to her vaginal area and upper thighs, as well as other injuries consistent with sexual assault—including the absence of a hymen, and blood found on vaginal swabs, rectal swabs, oral swabs, the crotch area of Shaniya's panties, and her shirt. *Id.* at 19-20. The cause of death was airway obstruction or asphyxiation. *Id.* at 20.

In addition to the surveillance footage placing him at the trailer park and with Shaniya at the hotel, petitioner's pubic hair and Shaniya's head hair, as well as blood, were also found on a blanket discarded at the trailer park. *Id.* at 20-21. "Considerable forensic evidence" also linked petitioner to the location of Shaniya's body; this

evidence included soil samples and metal fibers found on his car's gas pedal, and the cellular location data. *Id.* at 22-23.

2. On July 5, 2011, petitioner was indicted for, *inter alia*, first degree murder, sexual offense against a child, first-degree kidnapping, human trafficking of a minor victim, sexual servitude of a minor victim, and indecent liberties with a child. He was tried at the April 8, 2013, Criminal Session of Cumberland County Superior Court. On May 23, 2013, the jury unanimously found petitioner guilty of the above offenses, including first degree murder.

3. On the morning the penalty phase was to begin, petitioner confirmed for his attorneys that he did not want to present mitigating evidence or offer any argument in support of the jury's recommending life in prison. (T. 6234-35) It was a decision he had been contemplating for approximately three years, with petitioner first telling counsel of it in 2010. (T. 6238-39, 6255-56) Trial counsel told the court that they were bound by petitioner's instructions but it was not their desire to forego presenting mitigating evidence. (T. 6234-36)

Counsel identified—and made an offer of proof by way of exhibits—what mitigation evidence they otherwise wished to present. (T. 6237-38) Counsel also confirmed that petitioner was fully informed of his situation and of the purpose and process of the sentencing hearing, including what counsel's role should be. (T. 6238-39)

The trial court examined petitioner. He confirmed that he did not want counsel to present any mitigating evidence or offer any argument. But petitioner would not disclose his reasons to the court, and smiled when he refused to do so. (T. 6240) The court advised and petitioner understood "that the death penalty in North Carolina is real"; and that just because "[North Carolina hadn't] put anybody to death in a long time doesn't mean we don't have a death penalty." (T. 6241) The court asked:

> THE COURT: Do you understand there is a real possibility that a jury could sentence you to death and that that sentence could be carried out?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And are you telling me you don't want to resist that in any way?
>
> THE DEFENDANT: No.
>
> THE COURT: No, you don't want to resist or no, you're not telling me that?
>
> THE DEFENDANT: No, I'm not resisting.

(T. 6241-42)

Petitioner was next asked to turn and face his mother, and specifically told her he did not want her to present any evidence on his behalf. (T. 6242) He indicated the same as to each of the other proposed witnesses.

The court engaged in a colloquy to make sure petitioner's decision was knowing and voluntary. (T. 6243-45) After, the court informed petitioner:

> THE COURT: Now, I'm going to submit mitigating factors on your behalf because that's my job. Anything that arises from this evidence I'm going to submit to this jury as a mitigating factor, but I may not think of all the ones that your lawyers think of and some of the ones that they have proposed will not be in evidence because you won't let it. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> 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.
>
> THE COURT: Do you have any questions for me about what we've just been talking about?
>
> THE DEFENDANT: No.

(T. 6245-46)

Later, petitioner reiterated that he did not want to present any mitigating evidence on his behalf—there was nothing the court could say to change his mind. (T. 6251-52) Yet the court took a recess for petitioner to again speak to counsel to reconsider. It "bother[ed]" the court that petitioner thought the whole matter was "funny." (T. 6251)

The recess was to no avail; despite the court's examining petitioner again, he was adamant. (T. 6252-57) He did not want his counsel to present evidence, object to the state's evidence, or give any closing argument. (T. 6254-55) During this second colloquy, counsel advised:

> MR. POPE: Our position was that if the client can make such a crucial decision as to whether or not to put on evidence, then certainly he should be able to make a decision whether or not to make a closing argument...I would like to add too that Mr. McNeill has not been inclined to present mitigation evidence since 2010.

(T. 6255)

Petitioner's counsel wanted the jury to be told of petitioner's decision *and* that it was against counsel's advice—and secured such an instruction over the state's objection. (T. 6258-62; *see also* T. 6246-47 (counsel inquiring whether the jury would be told of the same)) The state "believe[d] that the defense bringing that to the forefront create[d] some kind of potential sympathy for the defendant" from the jury. (T. 6259; *see also* T. 6261-62)

4. During the penalty phase of the trial, the state submitted the facts of these crimes, petitioner's three earlier convictions each for assault inflicting serious bodily injury, and victim impact testimony from the father and half-sister of the victim. Per petitioner's instructions, his counsel did not present any additional mitigation evidence.

Following the statutory procedures set forth in North Carolina, the jury was, however, presented with and considered seven mitigating circumstances from all other evidence presented, in addition to the aggravating circumstances submitted. *See* Pet. App. 96, n. 16. The jury recommended death; the trial court accepted that recommendation and sentenced petitioner to the same.

5. The Supreme Court of North Carolina affirmed petitioner's convictions and sentences; as to the preservation issue raised here the court saw no reason to revisit its earlier ruling in *State v. Grooms*, 540 S.E.2d 713 (N.C. 2000). Pet. App. 95.

REASONS FOR DENYING THE PETITION

No one disputes that petitioner's express decision not to present additional mitigating evidence at the capital sentencing phase was informed and knowing. Petitioner claims, however, that the Sixth and Eighth Amendments require the trial court to compel defense counsel to present such evidence. His arguments do not warrant this Court's review for multiple reasons.

First, the facts of this case do not present the question petitioner asks this Court to resolve. The petition treats this case as involving a tactical dispute over how to achieve petitioner's aim of avoiding the death penalty. To the contrary, however, petitioner decided to accede to, and did not want to resist, the death penalty. His goal had been freedom, and once that was lost nothing else mattered. At best for petitioner, there exists an unresolved factual predicament to his argument.

The conflict petitioner alleges also is illusory. None of the five courts petitioner relies upon squarely hold that either the Sixth or Eighth Amendment *requires* that mitigating evidence be presented when the defendant insists that it not be. To the contrary, each undermines at least part of petitioner's argument; and the California, Florida, and Delaware courts he cites have upheld a capital defendant's foregoing presenting mitigating evidence. Moreover, every court to squarely decide petitioner's Sixth and Eighth Amendment arguments has reached the opposite conclusion on his claims.

Next, as to his Sixth Amendment merits argument, petitioner forfeited much of it when he failed to argue to the North Carolina Supreme Court that "[a]fter 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." Pet. at 3. To the contrary, he expressly conceded there that "the Sixth Amendment right to effective counsel under *Strickland v. Washington*, 466 U.S. 668...(1984), does not preclude a defendant from waiving the introduction of mitigating evidence," Pet. N.C. Br. 220, and that "defense counsel's failure to introduce any mitigating evidence *cannot* be regarded as deficient performance." *Id.* at 224 (emphasis added).

Just the same, there was no Sixth Amendment violation where petitioner himself invited the action. By no measure can petitioner complain of any ineffectiveness when he was the one who prevented his lawyer's efforts to present

mitigating evidence in the first instance. *See, e.g., Autry v. McKaskle*, 727 F.2d 358, 360-61 (5th Cir. 1984). Petitioner's own case says the same. *See State v. Koedatich*, 548 A.2d 939, 995-96 (N.J. 1988). And there is at least some evidence his actions were taken intentionally to sow error.

Too, the Sixth Amendment does not compel the defendant to contest the state's evidence or offer a defense against his express instructions. To the contrary, it gives those decisions to the defendant. And this Court has recognized that the accused properly "may hold life in prison not worth living" and thus when he "makes it plain that the objective of 'his defense' is" *no longer* "to maintain innocence...his lawyer must abide by that objective and may not override it." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1504 (2018). By citing *McCoy*, petitioner apparently agrees that if his true objective was to accede to the death penalty his Sixth Amendment claim must fail—but it was.

Still, assuming petitioner did not wish to die, the decision not to further contest the state's case was a fundamental one. And this Court has previously treated a defendant's similar decision not to contest the state's case—despite otherwise professing his innocence—as akin to a plea of guilty. Thus it was petitioner's to make.

Even so, were petitioner's true objective the preservation of his life—and his instructions not to present any further mitigating evidence a mere tactical disagreement about how best to achieve that objective—there has been no showing that his decision was unreasonable. Rather, it is certainly within the realm of

reasonable tactical decisions. But we are not privy to petitioner's reasoning because neither he nor counsel would share it. That his actions were not successful does not prove them unreasonable.

Petitioner's Eighth Amendment claim suffers a similar fate. There is a fundamental difference between a court preventing a capital defendant from presenting mitigating evidence—which this Court's Eighth Amendment cases forbid—and a court *compelling* him to do so.

And, in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), this Court brushed this claim aside. That Blystone had chosen not to present any additional mitigating evidence did not matter to this Court. *Id.* at 306 n.4. The Eighth Amendment was nevertheless "satisfied" by a system that "allow[ed] the jury to consider all relevant mitigating evidence" "offered by the defendant." *See id.* at 307-09.

This Court has since held that so long as the statutory system allows the jury to consider any mitigating evidence the defendant presents—or wants presented—the system "cannot be said to impermissibly, much less automatically, impose death." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006). And "[t]he thrust of [this Court's] mitigation jurisprudence ends" with safeguarding the opportunity to present such evidence—*not* requiring that it be taken. *Id.* at 175.

Similarly, his appeal to dignity, and claim to arbitrariness, fail. While his notion is certainly noble, it is because of the dignity and autonomy of the accused that his express instructions must be abided not the other way around. *See McCoy*. 138 S.

Ct. at 1511. Additionally, that similarly-situated defendants make different, quite personal and sometimes unwise, decisions in their respective cases does not evince that either the decision, or the right to make it, is constitutionally-infirm.

Also, his Eighth Amendment argument fails for more practical reasons. The unwilling defendant who arrives at such an impasse with counsel—and if left no other option—will undoubtedly discharge counsel so that, as *pro se* defendants, they can decide for themselves not to present the mitigating evidence. Indeed, petitioner cites favorably a case where the *pro se* defendant did just that. Besides, such defendants will at the least refuse to cooperate; and in other cases will intentionally sabotage his counsel's efforts or preferred evidence. Petitioner's solution to appoint independent counsel does not counteract that problem.

Lastly, petitioner's case is not a good vehicle because any error in his case was harmless. The mitigating evidence his counsel wished to offer cannot have affected the jury's decision; he does not bother to claim that it would.

I. THE FACTS OF THIS CASE DO NOT PRESENT THE QUESTION PETITIONER ASKS THIS COURT TO RESOLVE.

The petition treats this case as involving a tactical dispute over how to achieve petitioner's aim of avoiding the death penalty. *See, e.g.*, Pet. at i (setting out this objective in the first sentence of the introductory paragraph in the Question Presented and in the question itself); *id.* at 3 ("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."). To the contrary, however, he decided to accede to the death penalty; counsel were proposing a tactic that went against that objective.

The petition relies heavily on petitioner's response to one question. Pet. at 6. But he plucks this line from context, and ignores that the proposed action and key colloquy evinced his real objective: if not freedom then death—or at least to not "resist" the jury's recommending death or "that [the] sentence could be carried out[.]" (T. 6241-42; *see also* T. 6246 ("My goal was freedom. I lost my freedom. It doesn't matter now.")) It was not a decision petitioner took lightly. Counsel acknowledged that petitioner contemplated it for nearly three years, since 2010. (T. 6238-39, 6255-56)

Likewise, trial counsel did not contend that life was his objective during the penalty phase colloquy. Rather, they acted as if petitioner chose to accede to the death penalty—because he had. Nor was the trial court asked to resolve whatever ambivalence petitioner now pretends exists.

At best, there is an unresolved factual dispute concerning his true objective. This Court is not the place to resolve this factual predicate to his argument. *Cf. Kennedy v. Bremerton School District*, No. 18-12 (U.S. January 22, 2019) (this Court denying certiorari where "important unresolved factual questions would make it very difficult if not impossible at this stage to decide the...question that the petition asks us to review").

II. THE CONFLICT PETITIONER ALLEGES IS ILLUSORY.

Of the five courts petitioner relies upon (at 16-17) as conflicting with the decision below, none supports his claim that either the Sixth or Eighth Amendment, alone or together, *requires* that mitigating evidence be presented even when the defendant insists that it not be. Every court to squarely decide has instead held otherwise.

California. The first decision to issue, *People v. Deere*, 710 P.2d 925 (Cal. 1985), has been repudiated by the court that issued it. *See People v. Bloom*, 774 P.2d 698, 714-15 (Cal. 1989) (rejecting the defendant's reliance on *Deere*, and holding that his intention to seek the death penalty and the trial court's ruling allowing him to do so was not "violative of defendant's rights or contrary to any fundamental public policy").

Florida. The Florida Supreme Court gave the trial court the *discretion* to order a presentence investigation report or appoint stand-by counsel to prepare mitigating evidence, ostensibly for policy reasons. *See Muhammad v. State*, 782 So. 2d 343, 364 (Fla. 2001). In *Marquardt v. State*, 156 So.3d 464 (Fla. 2015), it also allowed the trial court to appoint independent counsel to present such evidence.

Decidedly absent, however, is any holding that either the Sixth or Eighth Amendment *requires* that mitigating evidence be presented over the defendant's objection. To the contrary, *Marquardt* holds that the defendant who "waive[s] the presentation of mitigation evidence" cannot show the prejudice needed for an

ineffectiveness claim; and also allows "the defendant himself [to] argu[e] in favor of the death penalty." *Id.* at 490. Neither decision mentions the Eighth Amendment at all.

And, in *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), the court previously *upheld* the capital defendant's discharging counsel and proceeding *pro se* in order to seek the death penalty. It further held that "all competent defendants have a right to control their own destinies," and that "there was no error in not appointing counsel against [the defendant's] wishes to seek out and to present mitigating evidence and to argue against the death sentence." *Id.* at 804.

South Carolina. Likewise, the South Carolina Supreme Court in *State v. Winkler*, 698 S.E.2d 596 (S.C. 2010), *cert. denied*, 563 U.S. 963 (2011), did not address any Eighth Amendment claim or this precise Sixth Amendment claim. It held that the trial court did not itself err in *allowing* counsel to present mitigating evidence; it did not hold that counsel would be ineffective had they failed to do so, or that the defendant was compelled to present such mitigating evidence. *Id.* at 587-88. And the court upheld the death sentence—hardly warranting the state's seeking further review.

Delaware. The Delaware decision he cites, *State v. Ashley*, 1999 Del.Super.LEXIS 210 (2002), is not an appellate decision and was reversed on other grounds. Besides, the defendant there was *pro se*, meaning any statements about counsel's discretion when counsel and the defendant disagree was dicta. Further, the

court permitted the *pro se* defendant to forego presenting mitigating evidence with the Delaware court relying on *Wallace v. State*, 893 P.2d 504, 511-12 (Okla. 1995) (a case that petitioner agrees contradicts his argument). It did not hold that either the Sixth or Eighth Amendment requires otherwise.

New Jersey. Finally, even *State v. Koedatich*, 548 A.2d 939 (N.J. 1988), does not create a square conflict. The New Jersey Supreme Court wholly rejected the defendant's Sixth Amendment ineffectiveness claim—creating no conflict on that aspect of the question presented. And it's far from clear that, in accepting his death-penalty-based argument, the court relied solely on the Eighth Amendment.

To the contrary, the court was "unpersuaded by defendant's *legal* reasoning," but found "persuasive *policy* reasons exist for not allowing a [capital] defendant" to forego "his right to present mitigating evidence..." *Id.* at 993 (emphases added). The court then elaborated, bringing in some Eighth Amendment considerations but also pointing to New Jersey's statutory scheme. *Id.* at 993-94. All in all, a 1988 opinion that avowedly relies on "policy reasons" and the state's statutory scheme hardly creates a clear conflict on the Eighth Amendment issue.

* * *

In contrast, "[t]he vast majority of courts considering this issue have reached the opposite conclusion" on petitioner's Sixth and Eighth Amendment claims. *State v. Arguelles*, 63 P.3d 731, 753 (Utah), *cert. dismissed*, 540 U.S. 1071 (2003); *see also, e.g., United States v. Davis*, 285 F.3d 378, 384-85 (5th Cir.), *cert. denied*, 537 U.S.

1066 (2002); *Frye v. Lee*, 235 F.3d 897, 906-07 (4th Cir. 2000), *cert. denied*, 533 U.S. 960 (2001); *Wallace v. Ward*, 191 F.3d 1235, 1247-48 (10th Cir. 1999), *cert. denied*, 530 U.S. 1216 (2000); *Singleton v. Lockhart*, 962 F.2d 1315, 1322 (8th Cir. 1992); *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990); *State v. Maestas*, 299 P.3d 892, 958-64 (Utah 2012); *State v. Hausner*, 280 P.3d 604, 629 (Ariz. 2012); *Chapman v. Commonwealth*, 265 S.W.3d 156, 169-70 (Ky. 2007); *State v. Jordan*, 804 N.E.2d 1, 16-17 (Ohio), *cert. dismissed*, 543 U.S. 952 (2004); *State v. Dunster*, 631 N.W.2d 879, 906 (Neb. 2001), *cert. denied*, 535 U.S. 908 (2002); *Zagorski v. State*, 983 S.W.2d 654, 657-59 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999); *State v. Coleman*, 660 N.E.2d 919, 933 (Ill. 1995); *Wallace v. State*, 893 P.2d 504, 511-12 (Okla. 1995).

III. THE DECISION BELOW WAS CORRECT.

A. PETITIONER FORFEITED THE SIXTH AMENDMENT CLAIM ADVANCED HERE UNDER MCCOY.

Petitioner did not raise to the North Carolina Supreme Court the Sixth Amendment claim cast here, that: "[a]fter a defendant has explicitly identified his goal as receiving a life sentence instead of death"—*but see* pp. 12-13, *supra*—"the choice whether to present mitigation evidence in order to achieve that objective should be counsel's to make." Pet. at 3. To be sure, he argued conclusorily that the prohibition on any mitigating evidence constituted a total deprivation of counsel that was presumptively prejudicial under *United States v. Cronic*, 466 U.S. 648 (1984). *See* Pet. N.C. Br. 224. But not a word of that section alleged that counsel should have overridden petitioner's decisions because his objective was life.

Indeed, when making his Eighth Amendment claim below, he expressly conceded that "[i]n *Schriro v. Landrigan*, 550 U.S. 465...(2007), th[is] Court implied that the Sixth Amendment right to effective counsel under *Strickland v. Washington*, 466 U.S. 668...(1984), does not preclude a defendant from waiving the introduction of mitigating evidence..." *Id.* at 220. In doing so, he argued that this Court

> held that Landrigan could not prove that his trial attorneys' representation was prejudicial, as required by *Strickland*, in part because Landrigan's own conduct at trial showed that he would have refused to let his trial attorneys present any mitigating evidence they might have found...[and] that it had never required a defendant's decision not to present evidence to be informed and knowing....These two holdings in *Landrigan* admittedly rest on the unstated premise that a defendant generally has a right to waive the presentation of evidence.

Id. at 221 (citations omitted).

And, when making his Sixth Amendment claim, he further conceded that "defense counsel's failure to introduce any mitigating evidence *cannot* be regarded as deficient performance by counsel that violated Mr. McNeill's Sixth Amendment right to effective assistance of counsel." *Id.* at 224 (emphasis added).

B. THERE WAS NO SIXTH AMENDMENT VIOLATION.

1. There was no Sixth Amendment violation where petitioner invited the action.

Petitioner intentionally relinquished any right to put on mitigating evidence at the sentencing phase—which petitioner admitted in his state's brief this Court has implicitly held he could do. *See also Landrigan*, 550 U.S. at 478-80. Having "drawn the sting" petitioner cannot later complain of it on appeal. 7 W. LaFave & J. Israel,

Criminal Procedure § 27.5(c), p. 102 (4th ed. 2015) (citing *inter alia Ohler v. United States*, 529 U.S. 753 (2000)); *see also id.* at 103 ns. 123 & 124, 108 n.141; *United States v. Olano*, 507 U.S. 725, 733 (1993); *State v. Elliott*, 628 S.E.2d 735, 743 (N.C.), *cert. denied*, 549 U.S. 1000 (2006).[1]

Worse for petitioner, some courts treat this invited error as defeating the ineffectiveness claim altogether. *See Mitchell v. Kemp*, 762 F.2d 886, 888-90 (11th Cir. 1985) ("When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."), *cert. denied*, 483 U.S. 1026 (1987); *Autry v. McKaskle*, 727 F.2d 358, 360-61 (5th Cir. 1984) ("By no measure can Autry block his lawyer's efforts and later claim the resulting performance was constitutionally deficient."); *accord Puckett v. United States*, 556 U.S. 129, 138 (2009) ("If [Puckett had intentionally relinquished the right], there would be no error at all and plain-error analysis would add nothing."). This includes at least one of the courts that petitioner relies upon to allege a conflict. *See Koedatich*, 548 A.2d at 995-96.

Worse still, there is evidence that petitioner intentionally sought to sow error. *See Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc); *accord United States v. Treff*, 924 F.2d 975, 978 (10th Cir.), *cert. denied*, 500 U.S. 958 (1991). He believed his self-created predicament humorous. (*See* T. 6240 (petitioner smiling

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[1] In North Carolina, like in this and numerous federal and state courts, such specifically invited error—in contrast to mere forfeiture—is not subject even to plain error review. *E.g., State v. Jones*, 711 S.E.2d 791, 796 (N.C. App. 2011).

when he refused to tell his reasons); T. 6251 ("It bothers me that you think this is funny..."); *see also* T. 6257 (petitioner doing "origami" rather than listening)). And had the trial court forced counsel to present evidence, petitioner would likely be invoking *McCoy* or *Ali* to claim this too as reversible error. *See, e.g., State v. Freeman*, 690 S.E.2d 17, 22 (N.C. App. 2010); *see Frye*, 235 F.3d at 906-07 ("Were we to hold that [counsel] rendered ineffective assistance...we would be forcing defense lawyers in future cases to choose between Scylla and Charybdis.").

2. This Court's Sixth Amendment jurisprudence also does not support petitioner.

Petitioner's true objective was to accede to the death penalty. Even if it was not, the decision not to present any evidence or contest the state's case is a fundamental one. Thus it was petitioner's to make. And, even if it were not, there has been no showing petitioner's decision was unreasonable.

At the heart of the criminal law is that the individual is responsible for his chosen actions. *See Faretta v. California*, 422 U.S. 806, 833 (1975) ("whatever else may be said of [the Founders], surely there can be no doubt that they understood the inestimable worth of free choice."). Even if "ultimately to his detriment, his choice must be honored out of that respect for the individual that is the life-blood of the law," as he alone suffers its consequences. *Id.* at 835 (citation omitted). And it does not matter whether that choice—even the preference for death over a life sentence—is counterproductive or to some irrational. *Cf. Whitmore v. Arkansas*, 495 U.S. 149, 164-66 (1990); *Lenhard v. Wolff*, 443 U.S. 1306, 1312-13 (1979).

And "it is one thing to hold that every defendant...has the right to the assistance of counsel, and quite another to say"—as petitioner demands here—that *the Constitution* "compel[s the] defendant to accept a [defense or advice that] he does not want." *Faretta*, 422 U.S. at 833; *see also id.* ("the notion of compulsory counsel was utterly foreign to [the Founders]"); *cf. McKaskle v. Wiggins*, 465 U.S. 168, 178 & 181 (1984); *Singer v. United States*, 380 U.S. 24, 34-35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."). That truth hardly disappears in the capital context.

To this end, petitioner relies upon *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). But *McCoy* not only reaffirms that counsel is just an assistant to a willing capital defendant, it confirms that counsel must abide by that defendant's express, but strategically ill-advised, instructions even where death is on the line. *Id.* at 1505 ("With [life and liberty] at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense.").

There, this Court was faced with an uncooperative and disruptive defendant, who discharged two counsel, hired another, and at trial sought to discharge him to hire yet another—all because counsel tactically conceded guilt. Similar to what petitioner demands here, the Louisiana Supreme Court concluded that the trial court properly compelled counsel's actions upon McCoy "because counsel reasonably believed [they] afforded McCoy the best chance to avoid a death sentence." *Id.* at 1507. This Court disagreed.

Though trial management is generally the lawyer's province, fundamental decisions—"notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal"—are reserved for the accused. *Id.* at 1508. Even if unwise, both refusing to plead guilty and rejecting the assistance of counsel in order to maintain his innocence "are not strategic choices; they are decisions about what the defendant's objectives in fact *are*." *Id.* (emphasis original). But if that is true so is the opposite decision.

Here, that decision was not simply what specific witnesses to call but whether to further contest the state's case or accede to the penalty. As this Court echoed in *McCoy*, the defendant properly "may hold life in prison not worth living and prefer to risk death" instead. *Id.* at 1508. Thus when the accused "makes it plain that the objective of 'his defence' is" *no longer* "to maintain innocence"—*i.e.*, not to resist the jury's recommending death—"his lawyer must abide by that objective and may not override it." *Id.* at 1504; *accord id.* at 1508-09.

Still, assuming petitioner did not wish to die, the decision not to further contest the state's case was a fundamental one. This conclusion is underscored by *North Carolina v. Alford*, 400 U.S. 25 (1970). There, this Court treated the defendant's similar decision not to contest the state's case—despite otherwise professing his innocence—as akin to a plea of guilty. That decision is always reserved for the accused. And it makes little sense in the Sixth Amendment context that counsel may

not compel the defendant to contest any of the state's evidence but may compel him to contest a specific phase of it.

Finally, were petitioner's true objective the preservation of his life—and his instructions not to present any further mitigating evidence a mere tactical disagreement about how best to achieve that objective—it is not clear that his decision was unreasonable. *See Wallace*, 191 F.3d at 1248 ("counsel's decision not to investigate or present mitigating evidence was completely determined by petitioner and was within the realm of reasonable tactical decisions"). Perhaps there was something embarrassing in the mitigating evidence petitioner did not want known; or he believed given how weak it was that it might have the opposite effect and upset the jury further, *see, e.g., Brecheen v. Reynolds*, 41 F.3d 1343, 1369 (10th Cir. 1994); or petitioner would have testified, *e.g.*, "had [he] not been caught, he would engage in the same behavior again." *Wallace*, 191 F.3d at 1248; *see also Bloom*, 774 P.2d at 715 ("defendant's proposed strategy by no means ensured the return of a death verdict"). There was at least the suggestion that the decision was meant to elicit sympathy with the jury. (T. 6259-62)

But we are not privy to petitioner's reasoning because neither he nor counsel would share it. (*See* T. 6238 (counsel would not violate attorney-client privilege); 6240 (petitioner would not tell the judge the reasons for his decision)) Assuming he truly wished for life, that his actions were not successful does not prove them unreasonable.

C. THERE WAS NO EIGHTH AMENDMENT VIOLATION.

1. This Court's Eighth Amendment jurisprudence does not support petitioner.

Petitioner's Eighth Amendment claim fares no better. There is a fundamental difference between a court preventing a capital defendant from presenting mitigating evidence—which this Court's Eighth Amendment cases forbid—and a court *compelling* him to do so. Yet the logic of his argument is that the Eighth Amendment requires the presentation of mitigating evidence even where the defendant prefers death to life in prison.

He relies on a gloss of cases such as *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978), to support his logic. But each involved a statutory scheme that precluded mitigating evidence the defendant *wanted* considered. Not so here. It was not a statute, the judge, or the state that precluded any evidence; it was petitioner himself.

And, in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), this Court brushed aside this claim. That Blystone had chosen not to present *any* additional mitigating evidence did not matter to this Court—"[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, [Blystone] decided not to present any proof of mitigating evidence during his [capital] sentencing proceedings." *Id.* at 306 n.4. The Eighth Amendment was nevertheless "satisfied" by a system that "*allow[ed]* the jury to consider all relevant mitigating evidence" "*offered* by the defendant." *See id.* at 307-09 (emphases added).

This Court has since held that so long as the jury considers any mitigating evidence the defendant presents—or wants presented—the system "cannot be said to impermissibly, much less automatically, impose death." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006); *see also Walton v. Arizona*, 497 U.S. 639, 651-52 (1990). And the scheme here allowed petitioner to present evidence and the jury to consider it. Even then, the state must prove beyond a reasonable doubt sufficient aggravating circumstances; the jury must consider any mitigating circumstances offered (and did so here from the other evidence presented, *see* fn. 5, *infra*); and the jury must ultimately weigh and recommend death. *See* N.C. Gen. Stat. § 15A-2000(b).

"The thrust of [this Court's] mitigation jurisprudence ends" with safeguarding this opportunity—*not* requiring that it be taken. *Marsh*, 548 U.S. at 175; *see also id.* at 178 (the defendant still "bears the burden...of production"); *Graham v. Collins*, 506 U.S. 461, 490 (1993) (Thomas, J., concurring). Certainly, petitioner had the right to present mitigating evidence; but there is no commensurate or competing right that compelled him to do so. *Wallace*, 191 F.3d at 1247 ("the decision to introduce mitigating evidence is a nonfundamental right which is waivable"); *see also Singer*, 380 U.S. at 34-35; *Frye*, 235 F.3d at 906-07.

His appeal to dignity is misguided. It is because of the "dignity and autonomy of the accused" that his express instructions must be abided not the other way around. *Wiggins*, 465 U.S. at 176-177; *see also McCoy*, 138 S. Ct at 1508. While petitioner's "notion [otherwise] is certainly noble, it cannot be squared with [his own] self-

representation right," which "cannot be impinged upon merely because society, or a judge, may have a difference of opinion...as to what type of evidence, if any, should be presented." *Davis*, 285 F.3d at 384; *cf. Lenhard*, 443 U.S. at 1312-13 ("[H]owever...high minded [these] motives...[t]he idea that the deliberate decision [not to contest death] cannot be...rational" is "a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.").

This Court said as much in *McCoy*. 138 S. Ct. at 1511 ("violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp [what was] McCoy's sole prerogative" despite that it allowed the best chance to avoid death). And counsel's participation beyond that right just as easily "erode[s] the dignitary values" protected by the Eighth Amendment as those promoted by the Sixth. *Wiggins*, 465 U.S. at 182; *cf. Roper v. Simmons*, 543 U.S. 551, 560 (2005).

His claim to arbitrariness also fails. Otherwise competent evidence is often kept from the jury by the parties. Invariably, similarly-situated defendants make different, quite personal and sometimes unwise, decisions in their respective cases—*e.g.*, not to present an affirmative defense or call himself as a witness. That they do so does not evince that either the decision, or the right to make it, is constitutionally-infirm. *See Davis*, 285 F.3d at 384-85 ("This is so regardless of whether society would benefit from having a different presentation of the evidence.").

Petitioner's analogies—*e.g.*, a defendant who chooses castration or amputation as his punishment (Pet. at 31)—also miss the point. Petitioner did not choose his punishment—the jury did—let alone choose an unconstitutional punishment; death here is constitutional.[2] *See Bloom*, 774 P.2d at 715-16 ("if the trier of penalty has determined death to be the appropriate punishment...the judgment cannot reasonably be regarded as the defendant's doing...or its execution as suicide."). Rather, he chose not to present evidence, something he has the absolute right to do. Nor can any defendant just opt for death, *see* § 15A-2000(b), which petitioner ridiculously suggests could occur even were the penalty not statutorily or constitutionally available in North Carolina.

2. Petitioner's Eighth Amendment argument fails for more practical reasons.

First, the unwilling defendant who prefers death will simply prevent most mitigation evidence from reaching the jury. Those who arrive at such an impasse with counsel—and if left no other option—will undoubtedly discharge counsel so that, as *pro se* defendants, they can decide for themselves not to present the mitigating evidence. *Cf. McCoy*, 138 S. Ct. at 1506-07; *United States v. Roof*, 225 F. Supp. 3d 394, 398-402 (D. S.C. 2016). Petitioner cites favorably a case where the *pro se* defendant did just that. *See State v. Ashley*, 1999 Del.Super.LEXIS 210 (2002); *see*

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[2] Petitioner has not suggested he is incompetent or insane, or ineligible for the death penalty on any other grounds.

also Bloom, 774 P.2d at 712-13 (the defendant doing so immediately following the guilt phase).

Indeed, when the trial court asked what would occur if it compelled counsel to present mitigating evidence, counsel admitted that they would have to step aside and let defendant represent himself *pro se*. (T. 6243) Petitioner's desired Eighth Amendment rule will just encourage others to demand the same at an earlier stage.

Besides, any unwilling defendant will simply choose not to cooperate. Petitioner's case again proves the point. Even with some earlier cooperation, he refused to cooperate from 2010 onward. (*See* T. 6255) Thus all counsel could muster was the testimony of petitioner's mother, sister, cousin, and little league softball coach. This level of cooperation will rarely provide more than an incomplete—and significantly weak—case for mitigation.

Even were more mitigating evidence found without help, that same defendant will easily prevent the ideal evidence—medical or mental health evidence—from reaching the jury. At the least, he will refuse to take part in any examinations or waive his HIPAA rights. And in other cases the defendant will intentionally sabotage his counsel's efforts or preferred evidence. *See Landrigan*, 550 U.S. at 476-77 ("This behavior confirms...that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered."); *Autry*, 727 F.2d at 360-61 (the defendant admitted he'd take the stand and demand death); *Marquardt*, 156 So.3d at 490 (allowing for the same).

Second, petitioner's solution—to appoint a third or fourth[3] independent counsel, Pet. at 20, n. 8; *see also* Pet.'s N.C. Br. 223-24—does not counteract that problem. New counsel is no more likely or able to overcome the unwilling defendant than original counsel.

More troubling, new counsel will have never seen the case—nor will they have spent years interacting with petitioner to build the necessary rapport needed in capital cases—and will be at best ill-prepared. This solution scarcely provides that the jury will hear a complete case for mitigation let alone assures safe navigation between the defendant's remaining constitutional interests.

IV. THIS IS ALSO NOT A GOOD VEHICLE BECAUSE ANY ERROR WAS HARMLESS.

Petitioner's case is not ideal for another reason: the claim is of no possible consequence to it. The additional mitigation that counsel wished to offer cannot have affected the jury's decision to recommend death. *See Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (such a "likelihood...must be substantial, not just conceivable"); *Lance v. Warden*, 706 Fed. Appx. 565, 572 (11th Cir. 2017), *cert. denied*, No. 17-1382 (U.S. January 8, 2019). Petitioner did not below, and does not here, bother to claim that it would.[4]

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[3] A capital defendant is entitled to two attorneys in North Carolina. *See* N.C. Gen. Stat. § 7A-450(b1); *State v. Call*, 545 S.E.2d 190, 199-200 (N.C. 2001), *cert. denied*, 534 U.S. 1046 (2001).

[4] He instead claims, under *United States v. Cronic*, 466 U.S. 648 (1984), that prejudice must be presumed. Not so. *See Landrigan*, 550 U.S. at 477-78.

Even so, the jury here was already presented with seven other mitigating circumstances—most to which *not even one* juror gave weight.[5] Petitioner's offer of proof shows the additional evidence counsel sought to present: the character testimony of three family members and petitioner's little league softball coach. (T. 6237-38, 6249-50) Notably, none of that evidence involves his mental health, capacity, or any other circumstance surrounding or excusing his heinous crimes. *See also Landrigan*, 550 U.S. at 480 (the "poor quality" of the offer did not support even a colorable claim to prejudice).

Defendant kidnapped, sexually assaulted, and trafficked a five-year-old child—pretending she was his own child to do so—all because several other women were not available for sex when he wanted it; then, he murdered Shaniya and discarded her body when he knew police were looking for her. Evidence that petitioner's mother, sister, or cousin thought he was a good person, or that his past coach might testify that he was helpful and a good player *eighteen* years earlier, cannot have altered the jury's decision.

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[5] These were: (1) the capacity of defendant to appreciate the criminality of his conduct was impaired; (2) defendant's use of drugs affected his decision making; (3) defendant voluntarily went with police for an interview; (4) Tasia McClain enjoyed socializing with defendant; (5) defendant was a good father; (6) defendant was a taxpayer; and, (7) the catch-all. One or more jurors credited only (2) and (5). *See* Pet. App. 96, n. 16.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted, this the 31st day of January, 2019.

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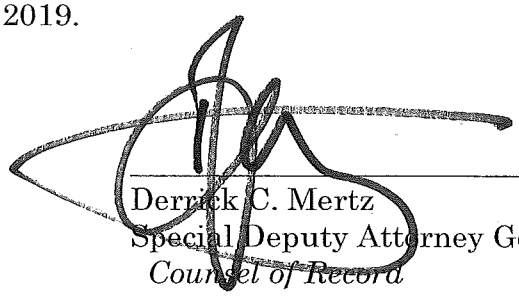
CERTIFICATE OF COMPLIANCE WITH RULE 33

I, Derrick C. Mertz, Special Deputy Attorney General for the State of North Carolina and a member of the bar of this Court, hereby certify that the State of North Carolina's brief in opposition is in compliance with Rule 33 in that it is printed in twelve-point Century Schoolbook font and it neither exceeds 40 pages, nor does the body to the brief, including footnotes and citations, contain more than 9,000 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 31st day of January, 2019.



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