No. 18-6869

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ANDREW DESIMONE*
Assistant Appellate Defender
Andrew.J.DeSimone@nccourts.org
**Counsel of Record*

DANIEL K. SHATZ
Assistant Appellate Defender
Daniel.K.Shatz@nccourts.org

HEIDI REINER
Assistant Appellate Defender
Heidi.E.Reiner@nccourts.org

Office of the Appellate Defender
123 West Main Street, Suite 500
Durham, North Carolina 27701
(919) 354-7210

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Petitioner, Mario Andrette McNeill, respectfully files this Reply to Respondent's Brief in Opposition, addressing the State's position that Mr. McNeill's claims under the Sixth and Eighth Amendments are unworthy of review and without merit.

INTRODUCTION

The State concedes this Court has never directly addressed whether a capital defendant is entitled to override counsel's choice to present mitigating evidence at sentencing, nor whether the Eighth Amendment's heightened reliability demands

require presentation of mitigating evidence to ensure an individualized determination of the appropriateness of a death sentence to a given defendant for a given crime. (BIO 10-12.)[1] Mr. McNeill's case presents the ideal vehicle to do so. This Court should grant review.

ARGUMENT

I. The question presented is one that comes up repeatedly, produces conflicting results, is likely to recur, and should be resolved by this Court.

The State contends the court split on the issues raised is "illusory," but the State's case summaries tell another story. (BIO 14-16.) The State admits, for example, both Florida and South Carolina have allowed the presentation of mitigating evidence against a defendant's wishes. (BIO 14-15.) The State also acknowledges the New Jersey Supreme Court has concluded imposition of the death penalty cannot be deemed sufficiently reliable without the presentation of mitigating evidence. (BIO 16.) *See State v. Koedatich*, 548 A.2d 939, 994-95 (N.J. 1988).[2] As

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[1] Page citations are abbreviated as follows: Respondent's Brief in Opposition, BIO; Mr. McNeill's Petition for Writ of Certiorari to the Supreme Court of North Carolina, PWC; Mr. McNeill's appellate brief to the Supreme Court of North Carolina, App. Br; and the trial transcript, Tp.

[2] The State's criticism of *Koedatich* is that "it's far from clear . . . the court relied solely on the Eight Amendment," though the State admits the court relied at least in part on the Eighth Amendment. (BIO 16.) It is, of course, required that courts consider policies and other indicia of a

such, these jurisdictions are in conflict with North Carolina, which demands that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to [ ] tactical decisions," "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, 735 (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").

The sheer number of cases addressing this issue demonstrates it is likely to recur in the lower courts. (PWC 14-17, BIO 14-17.) The variety of rationales courts rely on to reach decisions is further evidence that this Court's guidance is required. *Id.* Lower courts have struggled with the question long enough and arrived at very different conclusions. North Carolina is at one extreme and employs a judicially-created rule that absolutely bars counsel from advocating for a capital client at sentencing in support of the client's stated objective should that client wish for any reason to forego presentation of mitigating evidence. *See Grooms*, 540 S.E.2d at 735; *Ali*, 407 S.E.2d at 189. Mr. McNeill's case provides the ideal vehicle to resolve the split among, and provide guidance to, the lower courts which are forced regularly to struggle with the issue.

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society's evolving moral standards to determine whether a punishment comports with the Eighth Amendment. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 564-68 (2005).

II. The Sixth Amendment does not compel absolute deference by counsel to a defendant's wishes.

A. Mr. McNeill unequivocally identified the objective of his defense at sentencing: he did not wish to die.

Throughout its Brief in Opposition, the State attempts to muddy the waters and suggests that Mr. McNeill's objective was a death sentence or was unclear. (BIO 8, 13, 20, 22, 23.) Neither is accurate. The record is clear: Mr. McNeill wanted to live. Mr. McNeill was asked directly whether he wanted to die. (Tp 6246.) He said no. (Tp 6246.) This alone sufficiently establishes Mr. McNeill's objective. The State tries to frame this conversation as demonstrating Mr. McNeill wished to "accede to . . . the death penalty." (BIO 8.) That conclusion, however, is contradicted by Mr. McNeill's words and actions.

In addition to stating that he did not wish to die, Mr. McNeill cooperated with many of counsel's choices to avoid a death sentence. For example, Mr. McNeill allowed counsel to participate in the charge conference and submit a list of mitigating factors to the trial court. (Tpp 6330, 6336-47; Def's Ex. S-1.) Mr. McNeill allowed defense counsel to renew their motions and ask for a life sentence at the end of evidence in the sentencing phase. (Tp 6300.) Defense counsel also objected during the State's closing without protest from Mr. McNeill. (Tpp 6392-95.) When the jurors went back to deliberate, defense counsel again renewed their motions and requested a life sentence without objection from Mr. McNeill. (Tpp 6441-42.) After the verdict, defense counsel requested a jury poll. (Tp 6447.) Then, defense counsel again

renewed their objections and asked for life, all without Mr. McNeill objecting. (Tp 6455.) The defense renewed its objections yet again before entering notice of appeal, and again, did so without objection from Mr. McNeill. (Tp 6469.)

The State's assertions that Mr. McNeill was uncooperative and for three years had been planning not to present mitigation are untrue. The State did not point to any evidence that Mr. McNeill hindered counsel's mitigation investigation. (*See* Tpp 6255-56) (counsel were fully prepared to present mitigation). While Petitioner had been *considering* not presenting mitigation for approximately three years, it is also true that immediately following the guilt/innocence phase of trial, counsel anticipated presenting mitigation with Mr. McNeill's blessing. At the end of the day on Thursday, 23 May 2013, immediately following Mr. McNeill's conviction, defense counsel were planning to present a half day or more of mitigating evidence. (Tpp 6222-23). That Friday, Mr. McNeill again told his attorneys to present mitigation evidence. (Tp 6256) ("[W]hen we talked with him Friday when we weren't in court, we both went back to see him. At that point he was inclined to present mitigation evidence.") Over the weekend, Mr. McNeill changed his mind about presenting mitigation but told the trial court he would permit his lawyers to object during the capital sentencing hearing if the State tried to do anything improper in its efforts to secure a death sentence. (Tpp 6256, 6253-54). Under the circumstances, it is apparent that Mr. McNeill cooperated with counsel on all but the presentation of mitigation witnesses, equivocating on that question until the last moment but maintaining throughout his desire to live.

B. This Court's precedent makes clear that a defendant dictates the objective of his defense and counsel chooses the means of reaching that objective at trial.

The State argues in the alternative that even if Mr. McNeill's objective was to live, "the decision not to present any evidence or contest the state's case is a fundamental one . . . for [Mr. McNeill] to make." (BIO 20.) This argument also fails. While this Court's recent decision in *McCoy* holds the objective of an individual's defense is his or hers to determine, this Court's precedent also makes clear, as the State concedes (BIO 22), trial choices supporting that objective are counsel's to make. *Compare McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (holding the "[a]utonomy to decide [ ] the objective of the defense" is a decision "reserved for the client); *Faretta v. California*, 422 U.S. 806, 819-20 (1975) (stating that a defendant's choice in exercising the right to proceed without counsel must be honored out of respect for the individual),[3] *with McCoy*, 138 S. Ct. at 1508 (holding that counsel "mak[es] decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" (quoting *Gonzalez v.*

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[3] Respondent's use of brackets to substitute "defense or advice" for "lawyer" (BIO 21), suggests this Court resolved the issue here in *Faretta*. (BIO 21.) However, *Faretta* clearly delineates between situations in which a defendant chooses self-representation and those in which a defendant chooses to be represented by counsel: "[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." *Faretta*, 422 U.S. at 820.

United States, 553 U.S. 242, 248 (2008)); *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"); *Gonzalez*, 553 U.S. at 249 ("Numerous choices affecting conduct of the trial, including . . . the witnesses to call" do not require client consent).

Here, Mr. McNeill stated two wishes: (1) to live, and (2) to not present testimony from mitigation witnesses. Only the first – his objective of a life sentence – was Mr. McNeill's alone to make. The choice about how to pursue that goal – so long as consistent with Mr. McNeill's underlying objective – was counsel's to make under this Court's jurisprudence. North Carolina's obstruction of that balance under *Ali* and *Grooms* is unconstitutional in capital sentencing.

C. The Sixth Amendment does not compel total deference by counsel to a defendant's wishes, as North Carolina's absolute impasse rule suggests.

The State's Brief in Opposition makes repeated attacks on a *Strickland* claim Mr. McNeill did not raise. (BIO 9, 10, 11, 12, 14, 15, 18, 19.) In so doing, the State conflates an unraised *Strickland* claim with the Sixth Amendment *Cronic* claim Mr. McNeill actually made. *See United States v. Cronic*, 466 U.S. 648, 659-60 (1984).

1. *Mr. McNeill's Sixth Amendment* Cronic *claim is squarely preserved.*

The State acknowledges Mr. McNeill raised a *Cronic* claim below (BIO 17), but attempts to dismiss those efforts by stating they were made "conclusorily" (BIO 17) and conflating that claim with the distinct Sixth Amendment *Strickland* claim Mr.

McNeill did not raise. (BIO 18; App. Br. 221, 224.) In fact, Mr. McNeill thoroughly raised and preserved in the North Carolina Supreme Court the *Cronic* claim raised in his Petition to this Court:

> As discussed above, 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 under *Strickland* because counsel had to obey *Ali* and the trial court's ruling. However, the trial court's ruling under *Ali* violated the Sixth Amendment right to effective assistance of counsel under *United States v. Cronic.*
>
> *Cronic* error can occur when circumstances other than the deficient performance by counsel arise that make "the adversary process itself presumptively unreliable" -- circumstances that prevent counsel from "subject[ing] the prosecution's case to meaningful adversarial testing . . . ." *Id.* at 659, 80 L. Ed. 2d at 668. In such a situation, prejudice is presumed because "'the likelihood that any lawyer, even a fully competent one, could provide effective assistance' is remote." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336 (1993) (quoting *Cronic*, 466 U.S. at 659-60, 80 L. Ed. 2d at 668); *United States v. Ragin*, 2016 U.S. App. LEXIS 4556, *16 (4th Cir. Mar. 11, 2016). Such circumstances can include a trial court's ruling that prevents a "fully competent" attorney from "subject[ing] the prosecution's case to meaningful adversarial testing." For example, in *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000), this Court relied on the *Cronic* presumption of prejudice in reversing a conviction for first-degree murder in a capital case where the trial court's denial of defense counsel's motion to continue made it highly unlikely that new defense counsel could have adequately prepared for a complex capital trial.
>
> The trial court's ruling under *Ali*, which prevented defense counsel from introducing any mitigating evidence, was presumptively prejudicial *Cronic* error because it prevented defense counsel from subjecting the State's penalty case to meaningful adversarial testing. It is vital to realize that Mr. McNeill did not want a death sentence. Although he told the trial court in the immediate aftermath of his multiple convictions in the guilt/innocence phase that his "goal was freedom," and that "[i]t doesn't matter now" (Vol. 33 T p 6246), he also told the trial court that he did not want to be executed. *Id.* By ruling under *Ali* that defense counsel could not present any mitigating

> evidence, the trial court prevented counsel from conducting meaningful adversarial testing of the State's penalty case in working toward their client's aim of avoiding a death sentence. As a result, the trial court's ruling was presumptively prejudicial under *Cronic*.

(App. Br. 224-25).

2. The State's repeated references to harmlessness and invited error are misplaced.

As a result of the State's conflation of Mr. McNeill's *Cronic* claim and an unraised *Strickland* claim, the State repeatedly appeals to the harmless and invited error doctrines. (*See, e.g.*, BIO 9, 12, 19, 29.) First, the *Cronic* error actually raised by Mr. McNeill was not invited. Defense counsel expressly requested a ruling allowing them to present mitigation evidence over Mr. McNeill's personal objection. That very objection cannot possibly invite this error.

Second, harmlessness does not apply, as the error alleged here is structural and prejudice is presumed. *See, e.g.*, *Cronic*, 466 U.S. at 659-60 ("[C]onstitutional error of the first magnitude . . . may be present . . . when . . . the likelihood that any lawyer . . . could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."); *Arizona v. Fulminante*, 499 U.S. 279, 309-10 ("[S]tructural defects in the constitution of the trial mechanism, [ ] defy analysis by 'harmless-error' standards").

Even assuming *arguendo* Mr. McNeill must prove prejudice specifically, he can.[4] If counsel had been permitted to present mitigating evidence, the jury would have "seen him not just as a defendant whom they had just convicted of terrible crimes against a child, but also as a person who nevertheless had the capacity to care about others and to help others – a capacity that might have been a strong enough part of his character to enable him to avoid these crimes if he had received more guidance and support in his youth from positive male role models." (App. Brief at 227.) In addition, the jury could have heard evidence developed during Mr. McNeill's competency proceedings indicating Mr. McNeill suffered "psychological problems [that] are quite complex." (Tp 2823) (testimony of psychologist Dr. James Hilkey describing the results of his evaluation of Mr. McNeill).[5] Had the jury heard this evidence, there is a reasonable probability that at least one juror would have reached a different result at sentencing. *See Wiggins v. Smith*, 539 U.S. 510, 536 (2003)

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[4] If this Court determines Mr. McNeill is required to prove prejudice, this case should be remanded to make that determination.

[5] These complex psychological problems manifested through smiles and other inappropriate affect and behavior. (*See* Tpp 2823-24.) The State uses this mitigating evidence of serious mental health problems to invent out of whole cloth an argument that Mr. McNeill "intentionally sought to sow error." (BIO 19.) The only evidence Respondent cites in support is speculative, (BIO 19) (speculating about Mr. McNeill's internal thoughts), or demonstrative of the mental health problems identified by professionals during competency proceedings, (BIO 20) (discussing inappropriate affect, behavior).

(noting that death cannot be imposed if a single juror determines mitigation outweighs aggravation).

Because North Carolina's *Ali/Grooms* rule requires counsel to defer to defendants' wishes in all cases of absolute impasse, the error in preventing counsel from presenting available mitigating evidence was structural. Even if the error were subject to harmlessness analysis, Mr. McNeill should prevail.

III. Due to society's interest in the fair administration of the death penalty, the Eighth Amendment demands mitigating information be presented alongside aggravation in capital trials.

The State dismisses Mr. McNeill's arguments under the Eighth Amendment on the basis that the plain language of North Carolina's death penalty statute permits the introduction of mitigating evidence. This argument misses the point. Although North Carolina's capital statutory scheme allows the presentation of mitigating evidence at sentencing in theory, North Carolina's judicially-created *Ali/Grooms* rule eliminates the opportunity under the circumstance present here, *i.e.*, when a client does not want counsel to present mitigating evidence counsel has chosen to present in furtherance of the defendant's stated objective.

The State's secondary critique is that it is impractical to present mitigating evidence against a defendant's wishes. (BIO 27-29.) The State's speculative concerns, however, are belied by other jurisdictions' use of independent counsel, for example, to present mitigating evidence. *See, e.g.*, *Muhammad v. State*, 782 So.2d 343, 363 (Fla. 2001). Those procedures could be employed whether the defendant is

otherwise represented or *pro se*. That the fair administration of death may require creative solutions does not make an unreliable death sentence constitutional.

Notably, the State fails to address a large component of Mr. McNeill's Eighth Amendment argument, namely, that society has a great interest in the fair administration of the death penalty. When there is tension in capital sentencing between respect for the individual as a decision-making agent and the Eighth Amendment's requirements for reliability and freedom from arbitrariness above all, Eighth Amendment considerations must prevail. *See Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (discussing the unacceptability of unnecessary risk of unfair imposition of death); N.C. Gen. Stat. § 15A-2000(b)(2) (discussing a jury's responsibility to weigh the aggravating and mitigating evidence before reaching its determination about an appropriate sentence). Under North Carolina's *Ali/Grooms* rule, courts could routinely be left without mitigating evidence to review, rendering the reliability of the result impossible to determine. North Carolina's absolute impasse jurisprudence critically undermines Eighth Amendment protections and cannot control in capital sentencings.

CONCLUSION

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

Respectfully submitted,

ANDREW DESIMONE*
Assistant Appellate Defender
Andrew.J.DeSimone@nccourts.org
**Counsel of Record*

DANIEL K. SHATZ
Assistant Appellate Defender
Daniel.K.Shatz@nccourts.org

HEIDI REINER
Assistant Appellate Defender
Heidi.E.Reiner@nccourts.org

Office of the Appellate Defender
123 West Main Street, Suite 500
Durham, North Carolina 27701
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