CERTIFICATION OF WORD COUNT: 9495

SUPREME COURT, STATE OF COLORADO 2 E. 14th Avenue, Denver, CO 80203 On Certiorari to the Colorado Court of Appeals, **06CA 013** Weld County District Court Case Number 02CR457 **Petitioner: THE PEOPLE OF THE STATE OF COLORADO ,** v. **Respondent: ALLEN BERGERUD**	FILED IN THE SUPREME COURT JUL 0 6 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK Case Number: 08SC 936
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This Court granted *Certiorari* on two Issues posited by the People:

1) Whether criminal defendants have a fundamental constitutional right to direct their counsel to present an "innocence-based defense," irrespective of counsel's professional judgment.

2) If there is such a constitutional right, what procedures should this Court devise to ensure that defendants are aware of said right, any waiver of it is done in a knowing, voluntary, and intelligent manner, and that counsel is acting pursuant to the defendant's directions and not on the basis of his own professional judgment

The People's issues are based on the People's misunderstanding of the nature of the right recognized by the Court of Appeals. In order to fully understand the nature of the right recognized, this Court must have an accurate understanding of what occurred at the beginning of the second trial.[1]

STATEMENT OF NECESSARY FACTS

On April 12, 2002, Mr. Bergerud was charged with first degree murder (after deliberation) of his ex-wife, L.C., and her boyfriend L.Y., and two counts of first degree assault of the two Weld County Sheriffs' Officers that responded to the

[1]The People present in detail their version of the facts, presumably to demonstrate that Mr. Bergerud's claim of self-defense was destined to failure. As will be argued below, this is unimportant. The Court of Appeals did not hold that a defendant has the right to choose a particular innocence- based defense. Instead, the Court held, that counsel cannot impose a guilt-based defense over a defendant's express objections, and that the trial court violated Mr. Bergerud's right to counsel when it forced him to either accept a guilt-based defense or proceed *pro se*.

scene. v. 1, 37. On August 27, 2002, the District Attorney's Office filed notice of its intent to seek the death penalty. *Id.*, 77. On June 6, 2005, the District Attorney gave notice that the State would no longer be seeking the death penalty, based in part upon Mr. Bergerud's mental and physical disabilities. v. 5, 1755. Mr. Bergerud's IQ was in the range of 77-79, which is the "borderline range."

In the first trial, Mr. Bergerud's retained counsel pursued a mental status defense, pointing to his severe disabilities and his extreme intoxication. In the first trial, the jury was instructed only on first degree murder, and not on any lesser included offenses. The jury was unable to reach a verdict and a mistrial was declared. When the public defender substituted into the case, however, Mr. Bergerud made it clear that he did not want to pursue this defense in the second trial as it presumed him guilty of lesser offenses, and he wanted to assert an innocence-based defense, to wit, self-defense.

The Attorney's Opening Statement at the Second Trial

In Opening Statement, defense counsel essentially admitted Mr. Bergerud's guilt except as to offenses requiring premeditation and planning. She began by arguing

> What happened on April 7, 2002 was horrible. It was violent, and it was tragic. But it was not first degree murder after deliberation. And what happened in that field that night was not calculated. It was not planned. It was not first degree murder after deliberation.

v. 74, 246. This theme was repeated again and again. *See e.g. id.*, 246 ("You will hear through the presentation of evidence that Allen Bergerud did not plan this. He did not intend this and he did not commit deliberate murder."). Defense counsel undercut anything her client might testify to when she said,

> See, Allen Bergerud was not thinking clearly that night. In fact, he was so out of it, so hasty, so impulsive, that at times it becomes hard to even understand what happened out there. Allen Bergerud himself today cannot believe what happened out there. And it may be that Mr. Bergerud doesn't know how things happened out there, or that he's convinced himself otherwise. But it is hard to understand what happened because it was a tragic disaster from beginning to end, a tragic disaster.

Ibid. As she began to conclude the Opening Statement, counsel stated:

> There is a difference between a person who plans a murder and then cooly goes about executing their plan, and someone who on their worst day at their worst level of functioning reaching their breaking point, loses it, and does something catastrophic that they did not plan, they did not think about, they did not reflect upon beforehand.

Id., 255-256. Defense counsel concluded with:

> He did not plan. He did not reflect. He did not consider. He acted but he did not think. And at the end of this case, Mr. Connors and I will ask you to find him not guilty of charges that require intent and after deliberation.

Id., 255.

After Opening, defense counsel immediately approached the bench and requested an opportunity to speak privately with Mr. Bergerud. *Id.*, 256. After a brief recess, Mr. Bergerud complained that his lawyers were not listening to the information he gave them, and that they were coming up with "an explanation that is in their minds." *Id.*, 257. *See* v. 6, 2081. He said he had been having arguments with them at the jail about the defense they were pursuing, and that he had told them that they had a conflict of interest. He said that they were not paying attention to him. v. 74, 257.

The prosecutor said that Mr. Bergerud's only two options were to continue with his attorneys' course of action or represent himself. v. 74, 257. The Court affirmed that those were his only choices. *Id.*, 258. The Court asked, "Do you want to have them continue or try to represent yourself?" *Id.*, 258. Mr. Bergerud said only that he did not want them representing him. *Id.*, 258-259.

In camera, the judge further inquired how Mr. Bergerud wanted the case to be defended. v. 74, 263. He said that his former attorneys, who got off the case because he could no longer afford their fees, said that, at the next trial, he should go with self-defense. *Id.*, 263. However, he reported, his current attorneys just "shut

me off" when he discussed these things. *Id.*, 263. For months, he had been telling his current attorneys that the defense they were pursuing was not acceptable. *Id.*, 264. He thought they were making progress, but then was "totally shocked when they came out with opening statement." *Id.*, 264.

Mr. Bergerud's request for a different Opening Statement[2]

Mr. Bergerud requested that, if his attorneys were to proceed with the trial, they retract their opening statement and make a new one. v. 75, 3. He said that he did not want to represent himself, but if he had to "that's what I will do." *Id.*, 5. When the Court said that he had the right to counsel, Mr. Bergerud said that he "would like to have counsel during these proceedings," and, if he had to go *pro se*, he needed assistance and would want advisory counsel. *Id.*, 6, 9, 11. He said that there was a conflict of interest. *Id.*, 7. Mr. Bergerud said that he understood, when the court asked if he knew that he was taking a great risk of not presenting his case if he represented himself. *Id.*, 12, 20-21.

The Court advised Mr. Bergerud of his right to testify, v. 75, 4-5, 7. The Court advised him that he had no right to pick his lawyer. *Id.*, 7. He advised him of

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[2]The People's recitation of "facts" relating to Mr. Bergerud's request for change of counsel is at best misleading. It is for this reason that Mr. Bergerud believes it is necessary to set forth in detail what actually occurred.

the charges and possible penalties. *Id.*, 8. His attorneys made it clear that they were not moving to withdraw from the representation. *Id.*, 10. Mr. Bergerud said he had no legal training, and had completed only through 12th grade. v. 75, 8.

Mr. Bergerud then discussed the conflict. Mr. Bergerud said that, after the first trial, his attorney said that they should have gone with self-defense instead of the defense of intoxication. *Id.*, 15-16. He said he told his new attorneys, the public defenders, that he had an excellent attorney the first time, but that the mental impairment and toxicology defenses had not worked, and that he wanted to go with self-defense at the new trial. v. 75, 16. Mr. Bergerud said that he raised this with his attorney two or three times, but each time they said that they would not go with self-defense. *Id.*, 17. They told him that they were the only attorneys that he was going to get and that he did not have a choice. v. 75, 17.

The court asked Mr. Bergerud what it really meant to run a self-defense case, for example, could he just take the stand at this trial and assert it. v. 75, 17. Mr. Bergerud said that he believed that the opening statement was critical, and that it needed to be re-done. *Id.*, 17-18.

The court ruled that there was not a conflict of interest, and that the disagreement between Mr. Bergerud and counsel did not result in a complete

breakdown in communication. v. 75, 20. Therefore, the court would not be appointing the Alternate Defense Counsel. *Id.*, 20-21. After giving Mr. Bergerud another moment to discuss the matter with his attorneys, Mr. Bergerud said that he wanted to go with self-defense, and that his attorneys told him he needed advisory counsel. *Id.*, 21. When this was denied, Mr. Bergerud said, "I'll just go by myself." *Id.*, 22. *See also id.*, 44. The Court made the following ruling:

> Defense counsel is not the alterego or mouthpiece of the accused but a trained advocate charged with representing an accused within parameters of the code of professional responsibility and according to their obligations and duties as officers of the court. Further, objections to trial strategies of defense counsel that do not rise to a level of ineffective assistance of counsel, without more, do not constitute a conflict of interest, nor a complete breakdown of communication and thus do not amount to good cause for removal of their attorneys.

v. 75, 25-26. The court found that his "decision to fire his counsel and proceed without advisory counsel and to go forward with this trial is being made knowingly and intelligently." *Id.*, 37. The court made further findings regarding Mr. Bergerud's demeanor, and his apparent understanding of the proceedings, questions, and answers. *Id.*, 45.

In closing argument, the prosecutor told the jurors that they should not feel sorry for Mr. Bergerud, because he had counsel but then chose to represent himself. v. 82, 153-154.

Mr. Bergerud appealed his conviction, arguing that he was denied his right to counsel when the court required him to either acquiesce to his attorneys' decision to proceed with a guilt-based defense or to proceed *pro se*.

The Court of Appeals held that Mr. Bergerud's constitutional right to counsel was violated by requiring him to choose between having counsel or proceeding with an innocence-based defense. The Court framed the issues as "whether defendant's waiver of counsel was voluntary in the light of the choices he was given." *People v. Bergerud*, 203 P.3d 579, 582 (Colo. App. 2008). In analyzing this issue, the Court stated that it must first determine whether "a decision to forego an innocence based defense in favor of seeking less serious convictions..[i]s a fundamental one regarding the objective of case or, or is merely a strategic one regarding the means of pursuing those objectives." *Id.* at 583. The Court held that "a decision to forego a defense of complete innocence (however strategically sound this decision may be) cannot be made by counsel over a defendant's *express* wishes." *Ibid.* (emphasis added).

ARGUMENT

DO CRIMINAL DEFENDANTS HAVE A FUNDAMENTAL CONSTITUTIONAL RIGHT TO DIRECT THEIR COUNSEL TO PRESENT AN "INNOCENCE-BASED DEFENSE," IRRESPECTIVE OF COUNSEL'S PROFESSIONAL JUDGMENT? [3]

The question posed is twofold: First, does the defendant have a fundamental constitutional right to proceed with an innocence based defense. The second part of the question deals with whether counsel can override the defendant's fundamental constitutional right.

The right of a defendant to insist that counsel proceed with an innocence based defense is a bright line rule. As this Court recently noted "[s]ome trial decisions implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant." *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008); *see also Gonzalez v. United States*, __ U.S. __, ___, 128 S.Ct. 1765, 1771 (2008) ("some basic trial choices are so important that an attorney must seek the client's consent in order to waive the

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[3]The issue as framed seems to presume that Counsel's professional judgment is always paramount. If this were so, then counsel should be free to accept a plea bargain on behalf of his or her client whenever that is in the client's best interest regardless of whether the client agreed to it. This is not constitutionally permissible. *See Boykin v. Alabama*, 395 U.S. 238 (1969).

right"). Among those rights are the right to maintain one's innocence when charged with a crime and at the very least require the People to prove their case at trial beyond a reasonable doubt. Both the due process clauses of the United States and Colorado constitutions prohibit criminal conviction except on proof of guilt beyond a reasonable doubt. Colo. Const. Art. II, §25; U.S. Const., Amend. XIV; *In re Winship*, 397 U.S. 358 (1970); *People v. Dunaway*, 88 P.3d 619 (Colo. 2004). When counsel, in opening statement, over the express objection of the defendant, waives the defendant's fundamental constitutional right by relieving the People of this burden, the fundamental fairness of the trial is "called into question." By requiring a defendant to choose between the two most fundamental constitutional rights afforded criminal defendants – the right to counsel (U.S. Const. Amend VI; Colo. Const., art. II, § 16) and the right to require the People to prove their case beyond a reasonable doubt (Colo. Const. Art. II, §25; U.S. Const., Amend. XIV) – the trial court violated Mr. Bergerud's fundamental rights before the trial had even begun. *See People v. Montour,* 157 P.3d 489 (Colo. 2007) (Defendant's constitutional rights were violated by a statute that required him to choose between his right to plea guilty to the offense, and his right to a jury determination of his sentence in a capital case.)

Initially, this Court must determine what constitutional rights are implicated in this case. The first right implicated is the right to counsel. The Court of Appeals reversed the conviction because of the violation of this right. *See Bergerud, supra,* 203 P.3d at 587 ("defendant's convictions cannot stand because he unconstitutionally was denied an attorney to advocate for his innocence.")

The basis for the Court of Appeals' holding was that the court cannot premise a defendant's right to counsel on the defendant accepting his attorney's decision to judicially admit that the defendant committed a crime different from the one with which he was charged. The question then becomes whether the decision to pursue a guilt-based defense is one left solely to counsel. In order to answer this, the Court must first look at the fundamental difference between an innocence -based defense and a guilt-based defense. The People's repeated use of the term "technical defense" to distinguish between a guilt-based defense and an innocence-based defense is incorrect.

There are two broad category of defenses. One, which can be called an innocence-based defense, is simply the claim that the defendant is not guilty of a crime or that the state has failed to prove its case beyond a reasonable doubt. The other broad category is a guilt-based defense– i.e. one in which the defendant

concedes that he committed the criminal act with criminal intent but argues that he is guilty of a lesser offense than charged. Within these broad categories are various defenses or theories which can be denominated "technical" defenses. That is, they are defenses because the law says they are defenses. Under the category of innocence-based defenses, there are "technical" defenses such as self defense, duress, consent, etc. There are also the "non-technical" defenses such as mistaken identity, a claim that the crime did not occur, or that the People did not meet their burden of proof, or an argument that the defendant's conduct did not constitute a crime under the statute under which he or she is being prosecuted.

A guilt-based defense is a defense that admits the defendant's guilt to a crime and then asks the jury to decide which crime it is that the defendant committed. In the guilt-based category are the defenses that the defendant did not have the *mens rea* to commit the crime charged, but had the *mens rea* for a different crime– e.g. he killed the person but did not do so after deliberation, or it was done recklessly rather than knowingly, or it was done negligently. In the case of the crime of theft, the defense that the value of the items taken was less than that alleged, or in an assault case the guilt-based defense could be that the injuries do not meet the threshold of serious bodily injury, and so on. In all of these cases, the defendant is

acknowledging guilt to a crime, and the dispute is over what crime he or she committed.

The distinction between a guilt-based defense and an innocence-based defense is not "technical," it is fundamental. In *Boykin v. Alabama, supra,* the Supreme Court recognized that

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, 378 U.S. 1[(1964)].

Boykin v. Alabama, 395 U.S. at 243. Defense attorneys are very well familiar with the distinction between guilt-based and innocence-based defenses. It is not an overly complicated concept, but rather, one attorneys learn in any introductory law school course and one encountered routinely in the practice of criminal defense.

When counsel argues that his client should be convicted of a crime, it is the equivalent of the entry of a guilty plea. The jury is being asked to find that the defendant is guilty of a crime less serious than the one he is accused of committing. Once counsel stands up in opening statement and concedes his client's guilt and then goes one step further and fashions a "defense" centered not around the defendant's innocence but rather centered around disputing whether the defendant

had the mental state required to be convicted of the level of crime of which he is charged, counsel cannot then, in closing argument, credibly ask the jury to find the defendant not guilty. The only option available at that point is to ask the jury to find the defendant less culpable. In other words, counsel is asking the jury to provide the defendant with something the prosecutor would not – a conviction to a lesser offense. This is the equivalent of a guilty plea. Counsel is in essence asking the jury to fill in the blanks of the plea agreement, namely the crime to which the defendant is pleading guilty. *See Melton v. People,* 157 Colo. 169, 401 P.2d 605 (1965)(where defendant had already entered a plea of guilty to the charge of murder, and all that was left to be decided at the trial was the degree of the offense, it was acceptable for counsel to state in the Opening Statement that the defendant was guilty of second degree murder).

Mr. Bergerud claimed he was not guilty of a crime. He has a fundamental right to make that claim. Counsel cannot override that decision and instead state that his client is guilty of a crime.

The People appear to argue that regardless of whether the right is a fundamental constitutional one or not, because there would be a plethora of problems if that right were enforced, this Court should not recognize that right. Mr.

Bergerud responds: First, the People do not answer the question posed – does the defendant have such a right. Second, the problems the People perceive are not really problems at all.

The Court of Appeals did not hold that a defendant has absolute control over which "technical" defenses to present. The Court of Appeals simply ruled that an attorney does not have the right to impose a guilt-based defense over a client's objection, and that forcing a defendant to choose between proceeding with an innocence-based defense *pro se*, or proceeding with a guilt-based defense with counsel denies the defendant of the right to counsel.

The People's reliance upon *United States. v. Cronic*, 466 U.S. 648, 656 n.19 (1984) is somewhat misplaced. Certainly the court in *Cronic* did not envision a scenario where the attorney simply stands up and tells the jury that the defendant committed a crime and that their function is solely to determine which crime he committed. In fact the Court in *Cronic* said as much: "At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Ibid.* What counsel cannot do is – over his client's express objection – concede his client's guilt.

In *Brookhart v. Janis,* 384 U.S. 1, 7 (1966) the Court ruled that the attorney could not, without the client's acquiescence, agree to a "truncated trial that is the 'equivalent of a guilty plea." for outright acquittal. To be valid, a guilty plea must be "a voluntary and intelligent choice among the alternative courses of action open to the defendant," and must be "a free and rational choice" made by the defendant. *People v. Kyler*, 991 P.2d 810, 816 (Colo.1999) (*quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). When counsel admits his client's guilt to the finder of fact, counsel has in fact waived his client's privilege against compulsory self-incrimination. *See Boykin v. Alabama, supra.* The admission of guilt is just as "compelled" when the source of the "compulsion" is the client's own attorney, as when it is compelled by the court.[4]

In her Opening Statement, v. 74, p. 246, counsel admitted a) that Mr. Bergerud committed the acts; b) that he acted hastily and impulsively; c) that he

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[4]A confession of guilt in Opening Statement may even rise to the level of a judicial admission. *Compare Kempter v. Hurd,* 713 P.2d 1274, 1279 (Colo.1986) ("A judicial admission is a formal, deliberate declaration which a party or his **attorney** makes in a **judicial** proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute."); *Larson v. A.T.S.I.,* 859 P.2d 273, 276 (Colo. App.1993) (statement of defense counsel in closing argument that automobile driver suffered physical injuries was a binding judicial admission.) *See also Salazar v. American Sterilizer Co.,* 5 P.3d 357, 365 (Colo.App.2000). *Contrast, Melton v. People, supra.*

either does not recall what happened that day or that he has "convinced himself otherwise;" d) that he reached his breaking point and "lost it;" e) that he was at his "worst level of functioning;" and f) that there is a

> "difference between a person who plans a murder and then cooly goes about executing their plan, and someone who on their doesn't know how things happened out there, or that he's convinced himself otherwise He did not plan. He did not reflect. He did not consider. He acted but he did not think. And at the end of this case, Mr. Connors and I will ask you to find him not guilty of charges that require intent and after deliberation."

Id., pp 255-56. All of these statements, taken together, constitute a judicial admission that Mr. Bergerud killed the two victims, in a hasty and impulsive manner, and that he either does not know what really happened, or he has convinced himself that he is not responsible for the killing of the two victims. The final words in the opening statement are especially telling, as counsel tells the jury that they are only going to ask that they not find him guilty of first degree murder. After the opening statement, the only issue in dispute was what level of homicide Mr. Bergerud committed.

Just recently, in *Arko v. People*, 183 P.3d 555 (Colo. 2008) this Court determined that the decision of whether to request a lesser-non-included offense instruction was a tactical decision reserved for counsel. This Court distinguished

the request for such instructions from the decision of what plea to enter. As this Court noted, when lesser non-included instructions are requested, the defendant retains the right to argue for outright acquittal. This option is lost when counsel, over his or her client's objection, pursues a guilt-based defense. After counsel, in opening statement, admits that his client's actions constituted a crime, counsel cannot come back in closing argument and argue that the defendant did not commit a crime. Moreover, following such an opening statement, in which counsel even disparaged her own client's ability to recall events and impugned his credibility as a witness, the defendant's choice about whether or not to testify is heavily burdened: the defendant has to confess some form of guilt or try to explain away the glaringly inconsistent opening statement.

The People cite numerous cases to support their dual claims that either a defendant does not have a fundamental right to pursue an innocence-based defense, or if he does, recognition of the right will cause a plethora of problems. Of course, the fact that a constitutional right might make the conviction of the defendant more difficult is not a reason to abolish the right. *Cf. Davis v. Washington*, 547 U.S. 813, 833 (2006) where the Supreme Court refused to carve out an exception to the Confrontation Clause in domestic violence cases because the victims often refuse to

testify: "We may not vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." *See also State v. Mechling*, 633 S.E.2d 311, 355 (W.Va. 2006)("the protections provided by the Constitution ... cannot be sacrificed by the State upon the altar of expediency to achieve a conviction .") Moreover, the "problems" that the People list are simply chimeras.

None of the cases cited to in the Opening Brief support the People's position. The People are flat wrong about *Florida v. Nixon,* 543 U.S. 175, 187-89 (2004). *Nixon* was a capital case where the attorney conceded guilt in the trial phase of a death penalty case in an attempt to avoid the imposition of the death penalty in the sentencing phase. As the Court of Appeals correctly noted, the *Florida v. Nixon* decision relied heavily on the fact that trial counsel consulted with the defendant, who was "non-responsive," and that the trial court was made aware of this fact; the client's non- responsiveness was seen as tacit approval of the attorney's decision:

> [Counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon. Given Nixon's constant resistance to answering inquiries put to him by counsel and court, [counsel] was not additionally required to gain express consent before conceding Nixon's guilt. .... Nixon's characteristic silence each time information was conveyed to him, in sum, did not suffice to render unreasonable [counsel's] decision to concede guilt and to hone in, instead, on the life or death penalty issue.

Nixon, 543 U.S. at 189 (internal citations omitted).

The *Nixon* decision does not, as the People suggest, stand for the proposition that the determination of whether to concede guilt is one left solely to the discretion of counsel. To the contrary, the case stands for the proposition that a defendant, after being informed by counsel of the right not to concede guilt, may waive that right by not asserting that right. The Court of Appeals implicitly recognized this distinction when it stated that "a decision to forego a defense of complete innocence... cannot be made by counsel over a defendant's *express* wishes." *Bergerud*, 203 P.3d at 583 (emphasis added).

In *Nixon*, the Supreme Court actually reaffirmed that the decision to enter a plea of guilty or not guilty to a criminal charge lies solely with the defendant. The Court made it clear that it is a fundamental constitutional right guaranteed to a defendant, and a defendant's tacit acquiescence in the decision to plead is insufficient to render the plea valid. Although ultimately in that case – a capital case where the attorney conceded guilt in an attempt to save the defendant's life – the court held that counsel did not overstep his bounds in pursuing that course of action, the court did not give attorneys *carte blanche* to pursue guilt-based defenses over the objection of their clients. In the words of the court:

> Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. .... In such cases, "avoiding execution [may be] the best and only realistic result possible."

Nixon, 543 U.S. 190-91 (footnote and citations omitted). There are special rules in capital cases, because the nature of the punishment is unique:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Special ethical rules govern defense counsel in capital cases. *See e.g.* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

The People cite *Mobley v. State,* 626 S.E. 2d 248 (Ga. App. 2006) for the proposition that the decisions and theories to be advanced at trial are matters of tactic and strategy. First, *Mobley* is an ineffective assistance of counsel claim, not a claim that counsel, against the defendant's wishes, offered his client up as a sacrificial lamb. Moreover, in *Mobley*, defendant claimed that counsel should have

done additional research on the issue of the reliability of eyewitness identification evidence, and if he had done so "he would have been able to bring out in his examination of witnesses several of the factors that contributed to the overly suggestive and unreliable eye witness identification circumstances at play in this case." *Id.* at 255 (int. quotes omitted). In response, counsel stated that "he thought that the various theories would not inure to Mobley's benefit since he had admitted to being at the scene of the crime." *Ibid.* The Court then went on to state that "[t]rial counsel's decisions with regard to the choice of defenses and theories to be advanced at trial, even if unwise, are deemed matters of tactic and strategy; as a matter of law, strategic decisions do not amount to ineffective assistance of counsel." *Ibid.*

Mr. Bergerud does not disagree with the proposition that counsel should be able to decide which scientific theories to advance at trial. However, this does not answer the question of whether counsel can stand up at trial and, over the explicit objection of the defendant, tell the jury that his client is guilty of homicide. And if counsel can do so, he or she *certainly* cannot do so at the outset of the trial, before a single witness testifies and before the prosecution has offered any proof of guilt at all.

The People also cite *People v. Cundiff*, 749 N.E. 2d 1090, 1098 (Ill. App. 2001) for the proposition that "trial strategy includes an attorney's choice of one defense over another." In *Cundiff*, counsel pursued a theory of not guilty by reason of insanity, clearly an innocence-based defense. There is no indication that the defendant raised any objection to this defense pre-trial. After the fact, the defendant argued that perhaps counsel should have argued a different innocence-based defense (i.e. self-defense) or perhaps a different affirmative defense relating to the defendant's mental state. This case does not apply because (1) counsel pursued an innocence-based defense, not a guilt-based defense, and (2) the defendant did not object at the time. This has no bearing on the overarching issue being presented here– can counsel abandon an innocence-based defense and admit defendant's guilt to some crime when the defendant has explicitly stated that he does not wish to admit guilt? The disagreement here was not over which affirmative defense to raise, but rather whether counsel could admit guilt and simply argue for a lesser punishment.

The People's citation to *Schrier v. State,* 347 N.W. 2d 657 (Iowa 1984) is similarly misplaced. In *Schrier*, an "innocence-based defense" was pursued – Defendant denied committing the crime and counsel pursued that defense. Later

there was a dispute about how that defense was pursued. *Schrier* does not apply to Mr. Bergerud's case.

Van Alstine v. State, 263 Ga. 1, 426 S.E.2d 360 (1993), another case cited by the People, provides no support for the claim that counsel can pursue a guilt- based defense when a defendant advises counsel (here in no uncertain terms) that he does not wish to pursue such a defense. A simple review of the facts reveals that this case is of no application here. In *Van Alstine*, both the defendant and counsel agreed that a self-defense claim should be made – thus both agreed that the claim should be that the defendant was not guilty. The issue was whether counsel was ineffective for being too aggressive in pursuing this innocence-based defense – that is, arguing all or nothing by not requesting a lesser included offense instruction. The *Van Alstine* Court rejected the claim of ineffective assistance in part because the evidence strongly suggested that the defendant in fact agreed with counsel's strategy:

> In the case *sub judice*, appellant's trial counsel consulted several times with appellant and knew from those consultations that appellant "strongly" shared counsel's position that the case was one of self-defense. The strength of appellant's conviction was reflected in his testimony at the hearing on his motion, during which he continued to maintain he had acted solely in defense of self and family and acknowledged that it "has always been [his] opinion" that he was not

> guilty of murder or voluntary manslaughter. When asked whether trial counsel had discussed the matter with him, appellant testified that "we didn't discuss that *because I wasn't guilty* of murder or voluntary manslaughter.... I wasn't guilty of any of that. I'm guilty of protecting myself and my family." (Emphasis supplied.)

Van Alstine, 426 S.E.2d at 363.

The People's citation to *Vega v. Johnson*, 149 F.3d 354 (5th Cir. 1998) is also unavailing. In that case the defendant alleged a conflict because counsel had recommended that he plead guilty but the defendant wished to "continue asserting his innocence." According to the Court "[h]ad the attorney refused to allow him to enter a not guilty plea, he would have violated his ethical duty to allow Vega to choose the broad limits of the representation. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 753, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)." *Vega v. Johnson*, 149 F.3d at 360. Thus *Vega* supports Mr. Bergerud's position, not the People's.

While it may very well be true that the manner in which counsel pursues a defense, or the precise technicalities of the defense, is a decision for counsel to make, this does not mean that counsel can forego an innocence-based defense when the client has made it clear that he wishes to pursue an innocence- based defense. If counsel does not believe there is sufficient evidence to support a claim of self-defense or duress, for example, then at the very least, counsel must at the very least

make the People meet their burden of proof and zealously defend the client in challenging the People's proof. What counsel cannot do is stand up at the beginning of the trial, before evidence has even been admitted, and ask the jury to find his client guilty of a lesser crime when the client has made it clear that he does not wish to pursue that course of action.

The People's citation to *People v. Avila*, 770 P.2d 1330 (Colo. App. 1988) is similarly misplaced. In *Avila*, the defendant did not wish to discharge counsel; nor did the defendant make a claim that counsel pursued a strategy that he disagreed with. Rather, in *Avila*, defendant wished to act as co-counsel along with his appointed counsel. The court simply ruled that the defendant was not entitled to such hybrid representation – he could either represent himself or he could be represented by counsel. *Avila* has no bearing on this case.

In *United States v. Jerome*, 933 F. Supp 989 (D. Nev. 1996), another case cited by the People, the defendant made two claims. First, he claimed that counsel was ineffective for failing to recommend that he accept the plea offer. While the district court rejected this claim, the Circuit Court ruled otherwise and ordered that the plea offer be reinstated. *United States v. Jerome*, 124 F.3d 214 (9th Cir. 1997)(unpublished). As for the second claim, Mr. Jerome disagreed with his

attorney's strategy as to how to defend against the charges. While how to defend against the charges may be a strategical or tactical decision, the fact remains that counsel was in fact *defending against the charges.* This is not so when counsel pursues over his or client's objection a "defense" which consists solely of the claim that the defendant is guilty "only" of a lesser included offense.

The People's citation to *State v. Mathieu,* 960 So. 2d 296 (La. App. 5 Cir. 2007) is perplexing. In *Mathieu*, the defendant claimed that the trial court erred in allowing him to proceed *pro se.* There was nothing in the record to show that the defendant actually waived his right to counsel. The court, in reviewing the record, was trying to determine whether in fact the defendant was represented by counsel in some sort of hybrid fashion, or if counsel was simply acting as advisory counsel. In reviewing the record, the Court looked at what role the defendant played and what role counsel played. It was in this context that the Court stated that "A defendant performs the core functions of an attorney's traditional role when he formulates his own trial strategy [and] determines his own theory of defense." *Mathieu,* 960 So. 2d at 303. This has no bearing whatsoever on the issues before this Court.

United States v. Moore, 706 F.2d 538 (5th Cir. 1983), still another case cited by the People, does not address the issues presented here– whether counsel can on

his or her own forego an innocence-based defense when the defendant has indicated that he is not guilty of any crime. In *Moore,* it appears that the charges would be contested in their entirety, and the issue was how they would be contested. This was not the case here. Counsel for Mr. Bergerud stood up in opening statement and told the jury in no uncertain terms that Mr. Bergerud was guilty of homicide and that the jury's task was to determine the level of homicide.

The People cite to *State v. Carter*, 14 P.3d 1138 (Kan. 2000), however that case clearly supports the Court of Appeals' holding in this case. In *Carter,* defense counsel had determined that, in his view, it was inevitable that the defendant would be found guilty so it was best for him to simply lessen the penalty. The defendant, on the other hand, maintained his innocence and instructed counsel that he wished to defend against the charges. The Kansas court held that counsel could not impose a guilt-based defense against a defendant's wishes:

> To allow the defense counsel to argue to the jury that Carter is guilty while Carter is verbally maintaining his innocence violates his Sixth Amendment right to counsel and interferes with his due process right to a fair trial.

Carter, 14 P.3d at 1147. This is powerful guidance for this Court, and it is wholly consistent with the Opinion of the Court of Appeals.

The People's assertion that *Jones v. State*, 877 P.2d 1052 (Nev. 1994) and *State v. Anaya*, 592 A.2d 1142 (N.H. 1991) are contrary to *Nixon, supra*, is based upon a misreading of *Nixon*. *Nixon* stands for the proposition that a defendant tacitly approved counsel's decision to pursue a guilt-based defense when he was advised of this decision and did not object. It is quite different when, as here, the defendant vociferously objects to such a decision. It does not stand for the proposition that the decision of whether to pursue a guilt-based or an innocence-based defense is solely one of strategy and therefore is purely counsel's decision to make.

Mr. Bergerud made it clear to counsel and to the court that he did not wish for his attorney to admit guilt. Nevertheless, the court gave Mr. Bergerud an ultimatum – either allow your attorney to admit guilt or proceed *pro-se* to trial on two counts of first degree murder. As the Court of Appeals stated,

> The constitutional right to counsel is not "conditioned upon actual innocence," but rather is "granted to the innocent and guilty alike." *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986) ... However convincing the prosecution's proof of guilt, defendant's conviction cannot stand because he was unconstitutionally denied an attorney to advocate for his innocence.

Bergerud, 203 P.3d at 587. When Mr. Bergerud's counsel admitted his guilt in

Opening Statement, even before evidence was presented, and with the prior knowledge that Mr. Bergerud wanted an innocence-based defense, counsel – over the client's objection -- waived Mr. Bergerud's constitutional right to demand that the People prove guilt beyond a reasonable doubt.

It is important to distinguish counsel's confession of guilt in opening statement from possible jury instructions offered by counsel, and even from closing argument that counsel makes at the close of evidence.[5] There is a significant difference between offering lesser-offense instructions (included or non-included) at the close of evidence, or even suggesting in closing argument that at most the defendant is guilty of a lesser offense, and confessing in Opening Statement that the defendant has committed a criminal act with the requisite criminal intent. A decision to forego an all or nothing defense at the close of evidence does not deprive the defendant of the right to force the state to prove guilt beyond a reasonable doubt at trial.

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[5]"Opening statement is limited to the facts which the party intends to prove at trial. Closing arguments are limited to the facts and the inferences therefrom, which have been proved at trial." *People v. Hernandez*, 829 P.2d 394, 397 (Colo. App. 1991). When an attorney sticks to the facts in Opening Statement, this avoids the problem inherent in arguing for one or another degree of the offense at the outset of the case, and leaves the attorney free to argue any reasonable inferences from the facts in the attorney's closing argument.

When lesser included or non-included instructions are offered, the evidence has already been admitted and counsel now has to make a professional judgment as to how best to respond to the evidence that is already before the jury. At the close of evidence, counsel must respond to that evidence by offering appropriate jury instructions, and making appropriate closing arguments about the evidence and instructions. Defense counsel can lay out a number of different options for the jury– outright acquittal, conviction of a lesser offense, or acquittal on the offense charged but conviction on a lesser non-included offense. These options are not available when guilt to a lesser included offense is admitted in opening statement.

This is why this Court's decision in *Arko* supports the Court of Appeals' decision in this case. As this Court recognized in *Arko*, when counsel submits lesser (non-included) jury instructions, the defendant "retains the opportunity to advocate for outright acquittal." *Arko*, 183P.3d at 558. Thus, to the extent that *Arko* has anything to do with the issues presented herein, the Court of Appeals' ruling respects the *Arko* Court's deference to defense counsel's authority to make decisions based upon the evidence that the prosecution has presented at trial.

ISSUE 2

IF THERE IS SUCH A CONSTITUTIONAL RIGHT, WHAT PROCEDURES SHOULD THIS COURT DEVISE TO ENSURE THAT DEFENDANTS ARE AWARE OF SAID RIGHT, ANY WAIVER OF IT IS DONE IN A KNOWING, VOLUNTARY, AND INTELLIGENT MANNER, AND THAT COUNSEL IS ACTING PURSUANT TO THE DEFENDANT'S DIRECTIONS AND NOT ON THE BASIS OF HIS OWN PROFESSIONAL JUDGMENT?

The People set up a straw man when they suggest that if this Court were to recognize the obvious -- namely, that an attorney cannot, over a defendant express wishes, judicially admit in opening statement that the defendant committed a criminal act -- then a *Curtis*-type colloquy would necessarily be required whenever a guilt based defense is pursued. The People's assumption is incorrect. There are several things wrong with the theory and logic of this incorrect assumption.

First, it suggests that attorneys commonly interpose guilt based defenses when their clients have expressly stated that they are not guilty and that they want to challenge guilt at trial. Second, it ignores the facts of this case, where Mr. Bergerud made his position expressly known on the record. Third, it presumes that if this Court makes a clear pronouncement that the decision of whether to pursue an innocence-based defense or a guilt-based defense is a fundamental one belonging to the defendant, then attorneys will ignore this Court's pronouncement and proceed to

interpose such defenses against their clients expressly stated desires. Fourth, it ignores the Court of Appeals' holding that "a decision to forego a defense of complete innocence (however strategically sound this decision may be) cannot be made by counsel over a defendant's *express* wishes." *Bergerud*, 200 P.3d at 558. (emphasis added). Neither the facts before this Court, nor the decision of the Court of Appeals calls into question the need for any type of colloquy, and this Court should limit its decision to the case and controversy before it. *See Stell v. Boulder County Dept. of Social Services,* 92 P.3d 910, 914 (Colo.2004)("When possible, the policy of this court has been to resolve disputes on their merits."). In order to resolve Mr. Bergerud's case, this Court need not reach this issue and thus this Court should refrain from doing so.

The procedure suggested by the People – whereby a defendant must make a statement in open court that he wises to forego an innocence-based defense -- is completely unnecessary and constitutes an unwarranted intrusion into the attorney client relationship. This Court need only adopt a rather simple and obvious rule. If the defendant does not object to the defense being presented by counsel or does not in any other way advise the trial court of any conflict that exists between the defendant and counsel, then there is no need to inquire. *Cf. People v. Campbell,* 58

P.3d 1148 (Colo. App. 2002)("When the trial court is on notice of a conflict, it has a duty to inquire into the propriety of continued representation by current counsel. *People v. Edebohls*, 944 P.2d 552 (Colo.App.1996)."); *People v. Medina,* 193 Colo. 190, 564 P.2d 119 (Colo. 1977) (Court is not required to inform defendant of possible sentencing consequences to a plea of not guilty). Nor can a defendant bring the matter up after the fact, i.e. after a certain defense is pursued and is not successful. *Cf. Dunlap v. People,* 173 P.3d 1054, 1070 (Colo.2007)(" A defendant who validly waives the right to conflict-free counsel cannot later make a claim of ineffective assistance of counsel due to a conflict of interest.[*People v. Martinez*, 869 P.2d 519, 524 (Colo.1994)]"). It is only when a defendant affirmatively informs the trial court that an attorney is trying to impose a guilt-based defense over the client's wishes that a trial court would be obligated to take any steps.

The rule is a simple one – when the court is aware that the defendant is objecting to the imposition of a guilt-based defense and counsel refuses to acquiesce to the client's choice of which broad category of defenses to employ (i.e. guilt-based or innocence-based), this creates an irreconcilable conflict of interest entitling a defendant to new counsel. This is no different than the situation where a defendant waives any other potential conflict of interest.

Defense counsel retains the right to decide which particular defenses should be employed – i.e. self-defense, duress, etc. The only thing a defendant "controls" is the same thing he controls now – whether or not to plead guilty. If the defendant maintains his innocence, counsel need only choose from the wide range of defenses that fall into the "innocence-based" category, and is free to pursue whichever one counsel thinks is appropriate. The defendant does not get to choose whether to present self-defense, avoidance, etc. He gets to choose whether to plead guilty to a crime or maintain his innocence.

This does not and would not impact an attorney's obligations under Crim. P. Rule 16(II)(c) or (d) as it would still be the attorney's decision as to the precise technical nature of the defense to be raised. As the Court of Appeals noted, attorneys are already bound to respecting a client's wishes as to the objectives of the representation. *See Bergerud, supra*, 203 P.3d at 583, *quoting* Colo. RPC 1.2(a) ("a client decides "the objectives of representation" while an attorney decides "the means by which [these objectives] are to be pursued."). The People offer no reason why the "parade of horribles" forecast in the Opening Brief will come to pass. Mr. Bergerud submits that the practice that the attorneys and the trial court followed in this case is already exceptionally rare and that, when the client insists on the right to

test the strength of the prosecution's case at trial with an innocence-based defense, attorneys routinely respect the client's right to do so and do not stand up in Opening Statement and confess guilt.[6]

Throughout the Opening Brief, the People address issues that are not presented by the facts of this case. At issue here is whether defense counsel had the right to interpose a guilt-based defense in opening statement, over Mr. Bergerud's repeated objection. If they did not have such a right, Mr. Bergerud was denied the right to assistance of counsel when the trial court refused to retract the opening statement presented by counsel, and instead forced Mr. Bergerud to go *pro se* if he wanted to test the People's proof at trial.

An honest reading of the Court of Appeals' opinion reveals that the question posed to that Court was whether Mr. Bergerud was denied the right to counsel when he was given the impermissible choice of either acquiescing in his attorney's desire to proceed with a guilt-based defense, or proceeding *pro se*. In other words,

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[6]When an attorney intends to argue, at the end of trial, that the prosecution has proved only a lesser degree of the offense, the typical Opening Statement lays out the facts that will be shown that are favorable to the defense, and perhaps at the end includes a statement such as, "at the end of this trial we will be asking that you find the defendant 'not guilty' of first degree murder as charged in the Indictment." Such an argument stops short of admitting guilt in Opening Statement.

in order to exercise his right to counsel, Mr. Bergerud was compelled to admit guilt at the outset of the trial.

In Mr. Bergerud's case there was no need for any sort of colloquy, as the trial court was clearly aware that Mr. Bergerud objected to the guilt-based defense his attorney offered in opening statement. This Court does not need to establish a procedure akin to that in *People v. Curtis*, 681 P.2d 504 (Colo.1984).[7] If the defendant does not advise the court that he or she disagrees with the imposition of a guilt-based defense, then the defendant is deemed to have acquiesced to that decision. *See, e.g. Hinojos-Mendoza v. People,* 169 P.3d 662 (Colo.2007) (waiver of right of confrontation by attorney sufficient); *People v. Rawson*, 97 P.3d 315, 317 Colo. App.2004) ("'[A]n explicit statement of waiver is not invariably necessary to

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[7]Although this issue is not before the Court, Mr. Bergerud questions whether *Curtis* was in fact rightly decided and whether such a colloquy does not in fact intrude upon attorney-client relationship. The vast majority of jurisdictions have rejected the rationale of this Court in *Curtis*. **Disagreed with**: *Phillips v. State*, 782 P.2d 381 (Nev. 1989); *State v. Gulbrandson*, 906 P.2d 579 (Ariz. 1995); *Brown v. Aertex*, 124 F.3d 73 (2nd Cir 1997). **Declined to follow**: *Com. v. Hennessy*, 502 N.E.2d 943 (Mass.App.Ct. 1987); *Torres-Arboledo v. State*, 524 So.2d 403 (Fla.1988) ; *Aragon v. State*, 760 P.2d 1174 (Idaho 1988); *Underwood v. Clark*, 939 F.2d 473 (7th Cir. 1991); *State v. Walen*, 563 N.W.2d 742 (Minn. 1997); *United States v. Lore*, 26 F.Supp.2d 729 (D.N.J.1998); *Brennan v. Vose*, 764 A.2d 168 (R.I. 2001); *Johnson v. State*, 169 S.W.3d 223 (Tex.Crim.App. 2005). The State presents no compelling argument for expanding *Curtis,* and this case does not present the appropriate vehicle for doing so.

support a finding that the defendant waived ... the right to counsel; in some cases waiver may be inferred from the actions and words of the defendant. *North Carolina v. Butler,* 441 U.S. 369, 375-76 (1979).");Crim P. 23 (5)(I) (The person accused of a felony or misdemeanor may, with the consent of the prosecution, waive a trial by jury in writing or orally in court.); *People v. Jensen,* 747 P.2d 1247, 1252 (Colo.1987) ("[W]hen a defendant failed to challenge his confession's voluntariness and failed to demand a hearing on the issue, and further denied even making the statement, the trial court's failure to hold a hearing on the voluntariness issue was not improper."); *People v. Norman*, 703 P.2d 1261, 1271 (Colo.1985):

> In [*People v. Fowler,*] 183 Colo. 300, 516 P.2d 428 (1973), this court considered a similar contention. We there held that a defendant who executes a written waiver of the right to a jury trial and who does not object when the defendant's attorney, in the defendant's presence, informs the trial court of such fact, shall be deemed "to have acquiesced in, and to be bound by" the action of the attorney. *Fowler,* 183 Colo. at 304, 516 P.2d at 429 (quoting *People v. Sailor,* 43 Ill.2d 256, 253 N.E.2d 397 (1969)).

If there is no objection by the defendant to a guilt-based defense it should be presumed that counsel has discussed the matter with his or her client, has advised the client of the advantages and disadvantages doing so, and that the client agrees with a guilt-based defense. Only when the defendant objects to a guilt-based

defense and that objection is made known to the Court does an issue arise. That is precisely what occurred here, and thus in this case the trial court was obligated to compel counsel to retract the Opening Statement, or provide counsel who would proceed with an innocence-based defense.[8] The decision as to which innocence-based defense to employ would still be up to counsel. Regardless of whether this Court believes it necessary to employ a *Curtis* type colloquy in this case, Mr. Bergerud did not acquiesce to the imposition of a guilt- based defense, and he was deprived of his constitutional right to counsel when the trial court required him to either acquiesce to the imposition of a guilt-based defense or to proceed *pro se* as guaranteed by the United States and Colorado Constitutions.

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[8]Mr. Bergerud did not request substitution of counsel. He requested only that existing counsel withdraw the opening statement. v. 75, 3.

CONCLUSION

Because the fundamental right to counsel is essential to a fair trial, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court of Appeals was correct in concluding that giving Mr. Begerud the Hobson's choice of being bound by his attorney's judicial admission of guilt or proceeding *pro se*, violated his right to counsel. For the above-stated reasons, the Respondent requests that the Court of Appeals' Opinion reversing Mr. Bergerud's conviction be affirmed.

Respectfully submitted this 6th day of July, 2009

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CERTIFICATE OF MAILING

I certify that on the 6th day of July, 2009, I dispatched, by first-class mail, the foregoing Answer Brief to:

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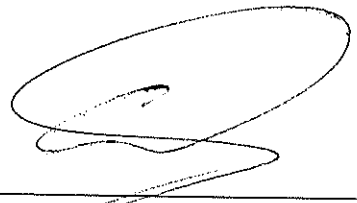

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