IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO.: 2:15-CR-472
	)	
DYLANN STORM ROOF	)	

EIGHTH AMENDMENT OBJECTION TO PERMITTING DEFENDANT TO PROCEED PRO SE IN CAPITAL TRIAL AND TO WAIVE MITIGATION

Standby counsel file this memorandum arguing that the Eighth Amendment precludes capital defendants from proceeding *pro se* and waiving the presentation of any evidence in mitigation. The Eighth Amendment's requirement of heightened reliability in death penalty proceedings, and the community's interest in fair and proper administration of the criminal justice system require, in capital cases, that the defendant be represented by counsel able to handle the many complex issues that arise in such cases, and to present all of the information bearing on the appropriateness of a punishment less than death. Because these issues relate to the defendant's capacity to enter a waiver of counsel in the first instance, we believe ourselves authorized to file this pleading notwithstanding the defendant's motion to represent himself and the Court's order that we cease filings on behalf of the defendant. *Cf. United States v. Rauser*, 378 Fed. Appx. 229 (3d Cir. 2010) (describing standby counsel's role in obtaining competency evaluation for *pro se* defendant).

I. The Eighth Amendment's heightened reliability requirement prevents defendants from proceeding *pro se* in capital trials.

As discussed in Dkt. No. 704, a primary function of the Eighth Amendment is to require heightened reliability in the process by which the punishment of death is inflicted. This is important to the defendant, who faces the ultimate punishment, and to the community, which requires assurance that the ultimate punishment will be imposed only upon the fair administration of justice.

Unlike the Fifth or Sixth Amendments, which affirmatively confer rights upon citizens, the Eighth Amendment restricts the government's power to punish. A defendant may not, for example, voluntarily subject himself to an unconstitutional punishment by waiving the limitations imposed by the Eighth Amendment. Thus both banishment and mutilation are impermissible punishments even where defendants agree to submit to them. *Henry v. State*, 280 S.E.2d 536 (S.C. 1981); *State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985). As we began to describe in Dkt. No. 704, the personal rights conferred by the Sixth Amendment, for example, must give way to society's interest in a reliable and fair trial. A defendant's right to represent himself at trial must, under certain circumstances, bow to society's preeminent interest in preserving the integrity of the system as a whole and ensuring a fair and lawful outcome. *See Indiana v. Edwards*, 554 U.S. 164, 176-77 (2008) (permitting courts to require mentally ill defendants to proceed with counsel); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984) (setting limits on defendants' ability to waive right to public trial in favor of freedom of the press).

The defendant has no right to represent himself in a capital trial, and even less so at the penalty phase of such a trial. As an initial matter, this is because the reliability of the most complicated proceeding known to the criminal law, *see* Dkt. No. 704, cannot be assured with an untrained layperson – in this case, a twenty-two year-old ninth-grade dropout with a GED – acting as lead counsel. But the federal constitutional right to self-representation stems from the Sixth Amendment, *Faretta v. California*, 422 U.S. at 819, which explicitly provides to the "accused" the right to "appear and defend in person" "[i]n all criminal prosecutions." This provision does not by its terms apply to the penalty phase of a capital proceeding. *See State v. McGill*, 213 Ariz. 147, 158-59 (2006) (holding that similar language in the Arizona constitution limited a defendant's right to self-representation in capital sentencing). *See Martinez v. Court of Appeal of California*, 528 U.S. 152, 159-161 (2000) (holding that Sixth Amendment was inapplicable to self-representation on appeal). *See also White v. Woodall*, 134 S. Ct. 1697, 1703 (2014) ("[I]t is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase.") (citation omitted).

A defendant's interest in autonomy is diminished following conviction. *See Martinez*, 528 U.S. at 163. The defendant is no longer cloaked in the presumption of innocence (indeed, he must prove mitigating factors by a preponderance of the evidence), so the need to "make" or "conduct" a "defense," of his own choosing, or to "defend himself" is different. *Faretta*, 422 U.S. at 807 ("[T]he question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."). *See also McCaskle v.*

Wiggins, 465 U.S. 168, 177, n.8, (1984) ("[T]he defendant's right to proceed *pro se* exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged.").

This diminishing of the interest in individual autonomy following conviction is even greater if the convicted capital defendant seeks to represent himself for some purpose other than to present his own case for life. If the defendant, for example seeks actively to assist the government in obtaining the death penalty, or is indifferent to the result of his sentencing phase, the logic of *Faretta* fails. "[T]he respect for the individual which is the lifeblood of the law," *Faretta*, 422 U.S. at 834, must above anything else, be respect for the life of the individual. The Sixth Amendment does not compel us to honor a convicted capital defendant's election to represent himself in order to prevent a case for life from being presented, or without regard to whether one is presented.

II. Presentation of a case for life is required under the Eighth Amendment, in order to assure the community's interest in fair administration of justice.

Although the record does not divulge this defendant's intent for his sentencing proceeding, experience tells us that when capital defendants elect to proceed *pro se*, it is often in order to prevent presentation of mitigating evidence at the penalty phase of their trials that they cannot bear to have revealed. *See* Jennifer Berry Hawes, "Acting as own attorney, Dylann Roof helps select jury that will decide his fate," The Post and Courier (Nov. 29, 2016) (citing cases and quoting legal experts), *available at* http://www.postandcourier.com/church_shooting/after--week-delay-jury-selection-begins-in-dylann-roof/article_27281404-b56e-11e6-aca9-b3862d04ed6a.html; Tonya

Maxwell, "In Charleston shooting trial, Roof both confident and unsure," Asheville Citizen-Times, (Dec 1, 2016), *available at* http://www.citizen-times.com/story/news/local/2016/12/01/charleston-shootings-trial-roof-both-confident-and-unsure/94736774/; Mike Hayes, "No, Dylann Roof's decision to represent himself will not help him appeal his verdict," (Nov. 29, 2016), *available at* https://www.buzzfeed.com/mikehayes/no-dylann-roofs-decision-to-represent-himself-will-not-help?utm_term=.jud9QwD10E#.pjREAq8M90 . Permitting this to occur would be inconsistent with the heightened reliability required by the Eighth Amendment, as it would prevent a full airing of the issues relevant under the Federal Death Penalty Act to selection of a sentence. *See* 18 U.S.C. § 3592. Jurors are rendered unable to make a decision in which the community can have any confidence if they are presented with only the government's half of the evidence.

In addition to heightened reliability, the major Eighth Amendment test for determining constitutional questions related to the death penalty is whether the law or procedure in question meets or violates "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Supreme Court has described "maintain[ing] a link between contemporary community values and the penal system" as "one of the most important functions" that must be performed in capital proceedings, and has observed that "without [this link] the determination of punishment would hardly reflect 'the evolving standards . . . .'" *Id*. *See also Ring v. Arizona*, 536 U.S. 584, 616 (2002) (Breyer, J., concurring) (jury's role at sentencing is to "translate a community's sense of capital punishment's appropriateness in a particular

case"); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) ("describing the role of the jury as "nothing less than express[ing] the conscience of the community on the ultimate question of life or death").

The Eighth Amendment requires consideration of "the characteristics of the offender." *Graham v. Florida*, __U.S. __, 130 S.Ct. 2011, 2022 (2010). Punishment must be informed by "human attributes". *Id.* at 2021 ("under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes"). A sentence imposed without consideration of the individual and unique characteristics of the offender therefore cannot stand, as a matter of long-standing precedent. *See Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998) ("we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination"). Where the jury returns a death sentence after having been denied the opportunity to consider all mitigating evidence, the resulting sentence is considered arbitrary because it was based on a one-sided, incomplete record.

This bears relationship to the central question in any capital proceeding: whether – in the community's judgment – the proceeding has "ensure[d] that only the most deserving of execution are put to death." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Federal capital sentencing is different from sentencing in all other cases. A jury rather than a judge decides the sentence. The parties present the evidence on which the defendant will be judged, rather than the United States Probation Office, which in every noncapital case investigates the defendant and produces a report of information thought relevant before sentencing, but in a capital case, does so only after the jury has decided

on life or death. Thus, if the *pro se* defendant is permitted to forego a mitigation presentation, his jury will be deprived of information that is available to the sentencer in every other type of federal criminal case, including the most minor violations. The Court should not permit relaxation of the rules – which are intended to assure a constitutional sentence, based on a full picture of the defendant's background and characteristics – in this manner on the whim of a *pro se* defendant. No defendant should be able to opt out of the development of this important information. If opt out is permitted, and information is not presented, there can be no confidence in any resulting death sentence.

CONCLUSION

For the reasons given, the Court should not permit the defendant to proceed *pro se* or to waive presentation of mitigating evidence in this capital case.

Respectfully submitted,

DYLANN STORM ROOF

BY: s/ *Sarah S. Gannett*
Sarah S. Gannett
Assistant Federal Public Defender
Federal Public Defender for the District of Arizona
850 W. Adams Street, Suite 201
Phoenix, AZ 85007
602-382-2862
sarah_gannett@fd.org

David I. Bruck
Washington & Lee School of Law
Lexington VA 24450
540-458-8188
bruckd@wlu.edu

Kimberly C. Stevens
Capital Resource Counsel
Assistant Federal Public Defender for the
District of Oregon
1070-1 Tunnel Road, Suite 10-215
Asheville, NC 28805
336-788-3779
kim_stevens@fd.org

Emily C. Paavola
900 Elmwood Ave., Suite 200
Columbia, SC 29201
803-765-1044
Emily@justice360sc.org

Standby Counsel for Dylann S. Roof