No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BURTON
Petitioner

v.

STATE OF DELAWARE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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QUESTION PRESENTED

Did petitioner's attorney provide ineffective assistance of counsel that violated petitioner's Sixth and Fourteenth Amendment rights to a fair trial and to meaningfully oppose the prosecution's case by stipulating to the prosecution's evidence without petitioner's consent and despite petitioner's plea of not guilty?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Statutes

Other

No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF DELAWARE

Petitioner, William Burton, by and through his counsel Christopher S. Koyste, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Delaware Supreme Court filed on December 26, 2018, cited as *Burton v. State*, No. 287, 2018 (Del. December 26, 2018) and appearing at A1-6.

OPINION BELOW

The Supreme Court of Delaware issued an opinion on December 26, 2018 affirming the Delaware Superior Court's denial of Mr. Burton's motion for postconviction relief, finding that Mr. Burton was not prejudiced by defense counsel's stipulation to the prosecution's evidence.[1] The Delaware Supreme Court's opinion appears at A1-6 and is reported as *Burton v. State*, No. 287, 2018 (Del. Dec. 26, 2018).

[1] Despite being raised in Mr. Burton's postconviction filings, opening brief on appeal and reply brief on appeal, the Delaware Supreme Court's opinion did not address whether trial counsel's objectively unreasonable stipulation to the State's evidence without Mr. Burton's consent and in light of Mr. Burton's plea of not guilty infringed on Mr. Burton's constitutional right to a fair trial, to meaningfully oppose the prosecution's case and to make fundamental decisions concerning his case, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. (A4-6, 151-162, 181-187, 228-238, 256-264).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the Supreme Court of Delaware for which petitioner seeks review was issued on December 26, 2018. This petition is filed within 90 days of the Delaware Supreme Court's decision in compliance with United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 6 provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense. (U.S. Const. amend. VI).

United States Constitution, Amendment 14 provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV).

STATEMENT OF THE CASE

Petitioner William Burton (hereinafter referred to as "Mr. Burton" or "petitioner") was convicted of Drug Dealing (one count), Aggravated Possession (one count), Possession of Drug Paraphernalia (one count), and Possession of Marijuana (two counts) following a one day bench trial. (A51-56). Petitioner was sentenced to life in prison pursuant to Delaware's habitual offender statute. (A57-60). Although a stipulation of waiver of petitioner's right to a trial by jury was properly executed, the record lacks evidence of petitioner's consent to any further stipulations. (A50-56). Prior to the start of petitioner's bench trial, petitioner's attorney (herein after referred to as "petitioner's attorney" or "defense counsel") stipulated to the prosecution's drug evidence, conceding the identity, weight, and location where the drugs were found, as well as the chain of custody.[2] (A52-53). In light of the particular offenses with which petitioner was charged and the statutory definitions of those offenses, defense counsel's stipulation substantially reduced the State's burden at trial, as the State only needed to show that Mr. Burton possessed the drugs found in his bedroom and jacket, and in the case of the Drug Dealing charge, that he possessed them with the intent to manufacture or deliver.[3] (A54-55).

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[2] The trial court later determined that defense counsel had additionally conceded the chain of custody, because "the State entered the drugs and medical examiner's report [into evidence] without objection", and because defense counsel's cross-examination of the testifying officer "did not challenge that [the] seized substance was illegal drugs." (A29).

[3] To prove the Drug Dealing charge, the State had to show that Mr. Burton "[m]anufacture[d], deliver[ed], or possesse[d] with the intent to manufacture or deliver a controlled substance in a Tier 4 quantity". (16 *Del. C.* § 4752(1) (2013)). To prove Mr. Burton's guilt for Aggravated Possession, the State had to establish that he "[p]ossesse[d] a controlled substance in a Tier 5 quantity." (16 *Del. C.* § 4752(3) (2013)). To prove Possession of Marijuana, the State had to show that Mr. Burton "knowingly or intentionally possesse[d], use[d], or consume[d] a controlled substance or a counterfeit controlled substance classified in [16 *Del. C.*] § 4714(d)(19). . . ." (16 *Del. C.* § 4764(b) (2013)). To prove Mr. Burton's guilt for Possession of Drug Paraphernalia, the State had to demonstrate that he "use[d],or possess[ed]

Based on information received from a "past-proven and reliable confidential informant", officers from Probation and Parole conducted an administrative search of petitioner's residence in Wilmington, Delaware. (A44-46, 53). During their search, law enforcement seized an off-white chunky substance, a green plant-like substance, a white powder substance, and miscellaneous items such as a scale, grinder and baking soda. (A54). The substances were submitted to Delaware's Office of the Chief Medical Examiner ("OCME") for testing on March 4, 2013. (A41). The substances were weighed and tested, and a report was authored on May 15, 2013 asserting that the substances tested positive for cocaine and Cannabis and weighed 28.45 grams and 0.93 grams respectively. (A41-42).

Prior to trial, petitioner's attorney challenged the legality of the administrative search of petitioner's residence and filed a motion to suppress all evidence seized as a result of the search. (A32-40). Following a two-day hearing, the motion was denied.[4] (A32-40). On September 24, 2013, petitioner signed a stipulation of waiver of jury trial and engaged in the following colloquy with the trial court:

> THE COURT: Okay. Mr. Burton, I'm informed that you desire to waive your right to a jury trial. Is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Before accepting your waiver, there are a number of questions I'm going to ask you to ensure that it's a valid waiver. If you do not understand any of

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with intent to use, drug paraphernalia as defined in [16 *Del. C.*] § 4701(17). . . ." (16 *Del. C.* § 4771 (2013)). A Tier 5 quantity means "25 grams or more of cocaine" and a Tier 4 quantity means "20 grams or more of cocaine." (16 *Del. C.* § 4751(c)(1)(a) (2013); 16 *Del. C.* § 4751(c)(2)(a) (2013)).

[4] This issue was raised on direct appeal and denied by the Delaware Supreme Court on June 8, 2016. (A20-21). Thus, this issue has been preserved for habeas corpus review pursuant to 28 U.S.C. § 2254.

the questions at any time and you wish to interrupt the proceedings to consult further with your attorney, please say so.

Can you tell me what your full name is?

THE DEFENDANT: William David Burton.

THE COURT: And how old are you?
THE DEFENDANT: 57 years old.

THE COURT: Okay. And how far did you go in school?

THE DEFENDANT: 12th grade, Your Honor.

THE COURT: Okay. Have you taken any drugs, medicine, or any alcoholic beverages within the last 24 hours?

THE DEFENDANT: Just my diabetic medication.

THE COURT: Okay. Do you understand that you're entitled to a trial by jury on the charges filed against you?

THE DEFENDANT: Yes.

THE COURT: Do you further understand that you would have the opportunity to take part along with your lawyer in the selection of the jurors?

THE DEFENDANT: Yes.

THE COURT: Do you understand that a jury trial means that you would be tried by a jury consisting of 12 people and all 12 jurors must agree on your guilt or innocence or level of guilt?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if I approve your waiver of a jury trial the Court alone, and that would be me, would try the case and determine your innocence or guilt or level of guilt?

THE DEFENDANT: Yes.

THE COURT: Have you discussed this decision with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Has he discussed with you the advantages and disadvantages of a jury trial?

THE DEFENDANT: Yes.

THE COURT: Do you want to discuss the issue further with your attorney?

THE DEFENDANT: No.

THE COURT: Although your attorney may advise you, the final decision is yours. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: What is your decision?

THE DEFENDANT: To waive. (A50-56).

Thereafter, the trial court concluded that petitioner's waiver of his right to a trial by jury was knowingly, intelligently, and voluntarily made. (A52). Defense counsel advised the trial court that a "pretty thorough record" had been made during the suppression hearing that they were willing to rely on for purposes of appealing the court's suppression decision. (A52). Defense counsel additionally advised that for purposes of the trial, the defense was willing to rely on that record, as well as the record that the State "will make with respect to where the drugs were found and what they were and how much was found".[5] (A52). As evidenced in the transcript, the trial court's colloquy with petitioner did not include a discussion of petitioner's consent to a stipulated bench trial nor did the court ascertain whether petitioner understood that his attorney was conceding the weight and

[5] As such, defense counsel conceded that 28.45 grams of cocaine and 0.93 grams of marijuana were found in Mr. Burton's bedroom, and in his jacket also located in his bedroom, at the address Probation and Parole identified as his place of residence and which Mr. Burton acknowledged was his place of residence. (A41, 45, 49, 54-55).

identity of the prosecution's drug evidence and that the evidence had been found in his residence, and more specifically, in his jacket. (A52-54).

An exceptionally brief bench trial followed,[6] during which the State called only one witness. (A53-55). The State's witness testified that Mr. Burton identified the room in which the drugs were found as his bedroom, and that having been a drug investigator for twelve years, in his opinion, the weight of the cocaine was not indicative of personal use. (A54-55). Defense counsel asked only a few simple questions on cross-examination, all pertaining to whether Mr. Burton had access to a microwave, which he would have needed if he were cooking cocaine as the witness believed him to be. (A55). No opening or closing arguments were given by either party. (A55). Petitioner was quickly found guilty of all counts by the trial judge. (A56).

Mr. Burton appealed his conviction to the Delaware Supreme Court. (A20-21). While his appeal was pending, the State disclosed that an investigation had been opened into employee misconduct committed at the OCME which involved the tampering with and theft of suspected drug evidence stored at the facility for testing.[7] (A26, 62-63). The resulting investigation into the OCME revealed a lengthy list of employee misconduct and negligence and demonstrated a lack of reliability in the OCME's testing procedures. (A64-66). Petitioner's appeal was stayed to allow him to move for a new trial in the Superior Court based on this newly discovered evidence of OCME misconduct, which had occurred while the suspected drug evidence in petitioner's case was stored and tested at

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[6] The entire trial portion of the transcript spans only ten pages. (A53-55).

[7] Prior to the filing of Mr. Burton's January 30, 2015 motion for a new trial, the Public Defender's Office filed a general, form motion requesting postconviction relief on behalf of Mr. Burton and numerous similarly situated defendants on the basis of the OCME misconduct. (A24, 61-74). Because this motion was filed while Mr. Burton's appeal was pending, it was denied by the Superior Court on September 27, 2016 to put the case in the proper procedural context so that Mr. Burton could proceed on his first properly filed postconviction motion. (A79-80).

the OCME. (A22-31). Petitioner's motion for a new trial was denied, predominantly because petitioner's attorney had conceded the identity and weight of the alleged drug evidence, as well as the chain of custody.[8] (A29-30). The Superior Court's decision was affirmed on appeal, and petitioner's challenge to the legality of the administrative search was likewise rejected by the Delaware Supreme Court. (A20-21).

Petitioner thereafter sought postconviction relief.[9] Petitioner's Amended Motion for Postconviction Relief raised two claims: 1) that the State of Delaware violated *Brady v. Maryland* by failing to timely disclose evidence of misconduct at the OCME;[10] and 2) that petitioner's attorney was constitutionally ineffective for stipulating to the State's evidence without petitioner's consent and that this ineffectiveness deprived petitioner of his due process right to a fair trial, to meaningfully oppose the State's case and to make fundamental decisions concerning his case, pursuant to both the federal and state constitutions. (A114-162). Following an affidavit from

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[8] Specifically, the Superior Court found that by "knowingly, intelligently, and voluntarily agree[ing] to a stipulated bench trial instead of a jury trial," Mr. Burton waived his right to test the chain of custody of the drug evidence, because he had "stipulated that the drug evidence entered by the State was, in fact, illegal drugs." (A29).

[9] Petitioner initially filed a *pro se* Motion for Postconviction Relief, which was later amended once postconviction counsel was appointed by the Superior Court. (A75-78).

[10] Petitioner does not advance his *Brady* claim before this Court.

petitioner's attorney,[11] a response from the State, and a reply from petitioner, the Superior Court denied both of Mr. Burton's postconviction claims. (A7-19).

Petitioner timely appealed to the Delaware Supreme Court. (A190-239). Following briefing from both petitioner and the State, the Delaware Supreme Court issued an opinion on December 26, 2018, denying petitioner's appeal and affirming the judgment of the Superior Court as to both of petitioner's postconviction claims. (A1-6). The Delaware Supreme Court denied petitioner's ineffective assistance of counsel claim after determining that petitioner had not demonstrated prejudice under *Strickland v. Washington*. (A4-5). The court's December 26, 2018 opinion did not address petitioner's constitutional claim that his attorney's ineffectiveness deprived him of a fair trial and a meaningful opportunity to oppose the State's case, as well as overrode his decision to plead not guilty. (A4-6).

The constitutional question at issue was preserved in the Delaware Supreme Court, as petitioner asserted that the constitutionally ineffective assistance provided by defense counsel infringed on his Sixth and Fourteenth Amendment rights to the effective assistance of counsel, a fair trial, to meaningfully oppose the prosecution's case, and to make fundamental decisions concerning his case, particularly his decision to plead guilty or not guilty. (A228-238, 256-264).

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[11] Defense counsel's November 27, 2017 affidavit indicated that he had no independent recollection of discussing the stipulation with Mr. Burton nor did his records confirm that such a discussion took place. Rather, defense counsel could state no more than "[he] can only assume that [he] explained to Mr. Burton that the most expeditious way to preserve an appellate issue was to conduct a bench trial", and based upon his database entry from September 23, 2013, he had "discussed plea offer and prospects for appeal for suppression issue" with Mr. Burton at the prison. Defense counsel additionally asserted that "it would have been [his] practice" to explain to a client how a stipulated bench trial would be conducted and therefore, assumed that he "probably conducted some explanation as to how the trial would proceed before [the trial judge]." (A167-168).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(c) provides that a writ of certiorari may be granted where "a state court of last resort . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Delaware Supreme Court's decision rests upon two holdings that patently conflict with this Court's constitutional holding in *McCoy v. Louisiana*. First, in failing to determine whether petitioner's guilt was unconstitutionally conceded by his attorney without his consent and despite his plea of not guilty, the Delaware Supreme Court's decision contravenes the clearly established constitutional principles guaranteeing a defendant's protected autonomy right, as expressed by this Court in *McCoy*. Secondly, in finding that petitioner's ineffective assistance of counsel claim was properly denied for failure to demonstrate *Strickland* prejudice, the Delaware Supreme Court disregards this Court's holding in *McCoy* that an unconstitutional violation of a defendant's autonomy constitutes a structural error not subject to *Strickland's* prejudice requirement.

Additionally, it appears there is disagreement between the state courts of last resort as to the scope of this Court's holding in *McCoy*.[12] As such, petitioner's case presents this Court with an

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[12] *See Krogmann v. State*, 914 N.W.2d 293, 314, 319, 321, 324 (Iowa, June 22, 2018) ("Moreover, like in *McCoy*, the violation of Krogmann's protected autonomy right was complete when the court allowed the State and the victim to unlawfully wrestle away control of issues that were within Krogmann's sole prerogative—his ability to attempt to generate bail money by mortgaging his farmland and his choice to have a jury consultant at trial."); *Thompson v. Cain*, 295 Or. App. 433, 441 (Or. App., Dec. 12, 2018) (holding that the proper inquiry for *McCoy* is what the fundamental objective of the client was, as he or she expressed it to defense counsel); *State v. Horn*, 251 So.3d 1069, 1075 (La., Sept. 7, 2018) ("We . . . decline to restrict application of the holding in *McCoy* solely to those cases where a defendant maintains his absolute innocence to any crime. *McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense."); *c.f Commonwealth v. Davis*, 481 Mass. 210, 222 n.6 (Jan. 14, 2019) (holding that the application of *McCoy* requires a defendant's "'intransigent and unambiguous objection' to his counsel's strategic decision"); *State v. Brown*, 2019 Ohio 313 (Ohio App., Jan. 31, 2019) ("We note that *McCoy* pertains to an incredibly narrow issue: that it is a defendant's choice, not his counsel's, to decide on the objective of his defense."); *see also*

opportunity to not just remedy the constitutional deprivation experienced by Mr. Burton but to clarify the scope of *McCoy* and resolve a split among the states as to the proper application of this Court's constitutional holding.

I. The Delaware Supreme Court Erred in Finding that Mr. Burton's Postconviction Claim Was Properly Denied Pursuant to *Strickland v. Washington*.

In response to Mr. Burton's postconviction claim that his attorney was constitutionally ineffective for overriding his decision to plead not guilty and depriving him of a constitutionally fair trial, pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, the Delaware Supreme Court erroneously concluded that petitioner's claim was properly denied by the Superior Court for failure to demonstrate *Strickland* prejudice. (A4-5). However, this Court's precedent required the Delaware Supreme Court to hold that stipulating to the prosecution's evidence without petitioner's knowledge or consent, when the stipulation had the practical effect of conceding all elements of the charged offenses, violated petitioner's constitutionally protected autonomy right, which thereby deprived him of a constitutionally fair trial, a meaningful opportunity to challenge the State's case and the ability to make fundamental decisions concerning his case.

This Court's precedent further required the Delaware Supreme Court to analyze petitioner's claim under the legal standard set forth in *McCoy v. Louisiana*,[13] as opposed to the more commonly used standard established in *Strickland v. Washington*.[14] Thus, in considering only whether Mr. Burton had demonstrated a reasonable probability of a different verdict but for defense counsel's

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United States v. Rosemond, 322 F.Supp. 3d 482, 487 (S.D. N.Y., 2018) (limiting *McCoy* to capital cases, stating, "[t]his Court is not prepared to read *McCoy* so broadly absent definitive guidance from the higher courts.").

[13] *McCoy v. Louisiana*, 584 U.S. ___ (2018) (slip opinion).

[14] *Strickland v. Washington*, 466 U.S. 668 (1984).

stipulation, the Delaware Supreme Court disregarded this Court's precedent and failed to fully and properly consider petitioner's federal constitutional claim. Thus not only were petitioner's federal constitutional rights violated in the Superior Court, they were violated again when the Delaware Supreme Court failed to apply the correct legal standard to its analysis of petitioner's claim.

To the extent that the Delaware Supreme Court assumed *Strickland* was controlling, the court is simply wrong. To the extent that the Delaware Supreme Court considered the Sixth and Fourteenth Amendment constitutional implications of the ineffectiveness alleged by petitioner and found no merit, the court is equally mistaken. To the extent that the Delaware Supreme Court failed to fully consider the Sixth and Fourteenth Amendment constitutional components of petitioner's claim as articulated in his filings, the court wholly disregarded this Court's precedent, including the directly applicable case of *McCoy v. Louisiana*.

This Court held long ago that a defense attorney has authority to manage the day-to-day conduct of the defense and "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop."[15] However, it is also well-settled that under the federal constitution, some decisions belong solely to the defendant, such as whether to exercise or waive basic trial and appellate rights, because they are so personal to the defendant "that they cannot be made for the defendant by a surrogate."[16] As this Court's precedent establishes, a criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take

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[15] *New York v. Hill*, 528 U.S. 110, 114-15 (2000); *Taylor v. Illinois*, 484 U.S. 400, 418 (1988); *Wainwright v. Sykes*, 433 U.S. 72, 93, 97 (1977) (Burger, C.J., concurring).

[16] *Florida v. Nixon*, 543 U.S. 175, 187 (2004).

an appeal",[17] and such fundamental decisions cannot be waived by counsel "without the fully informed and publicly acknowledged consent of the client."[18] As such, even though a defense attorney is not required to obtain the defendant's consent to "every tactical decision",[19] "some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right."[20]

Recently, this Court was asked to decide a related federal constitutional issue in *McCoy v. Louisiana*. This Court was presented with the question of "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection" and granted certiorari because there was a split between state courts of last resort on this issue.[21] This Court definitively held in *McCoy* that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."[22] As this Court noted, "a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her",[23] because "[t]hese are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*."[24]

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[17] *Jones v. Barnes*, 463 U.S. 745, 751 (1983); see also *Nixon*, 543 U.S. at 187; *Wainwright*, 433 U.S. at 93 n. 1.

[18] *See Taylor*, 484 U.S. at 417-18; *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

[19] *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688; *Taylor*, 484 U.S. at 417-18).

[20] *Gonzalez v. United States*, 553 U.S. 242, 250 (2008) (citing *Nixon*, 543 U.S. at 187).

[21] 584 U.S. __, __ (2018) (slip op., at 5) (2018) (citing *Cooke v. State*, 977 A.2d 803, 842-846 (Del. 2009)).

[22] *Id.* at 2.

[23] *Id.* at 6.

[24] *Id.* at 7 (citing *Weaver v. Massachusetts*, 582 U.S. __, __ (2017) (slip opinion, at 6); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000)).

In sum, *McCoy* directs that "[w]hen a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt."[25] Significantly, this Court concluded that a violation of this constitutional principle results in a structural error for which no demonstration of prejudice is required.[26] The holding of *McCoy* is entirely consistent with this Court's precedent, which has long-held that in regard to the objectives of the representation, an attorney "must both consult with the defendant and obtain consent to the recommended course of action."[27] Likewise, *McCoy* only emphasizes that which has been long-established–that although counsel may be able to better make such fundamental strategic choices, the defendant retains full autonomy to make these decisions because he or she alone experiences the consequences of them.[28]

Akin to the case presented to this Court in *McCoy*, Mr. Burton steadfastly refused to plead guilty, and defense counsel impermissibly overrode petitioner's objective of maintaining his innocence when he conceded, without petitioner's consent, the elements of the offenses. As Mr. Burton explained to the Delaware Supreme Court, and the court failed to consider, based upon the offenses with which he was charged and the statutory elements required to prove guilt beyond a reasonable doubt,[29] by stipulating to the State's evidence, defense counsel all elements of the State's

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[25] *Id.* at 7 (citing U.S. const. VI; ABA Model Rule of Professional Conduct 1.2(a) (2016)). Conversely, this Court held that "[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest." *Id.* at 9.

[26] *McCoy*, 584 U.S. __, __ (2018) (slip op., at 11-12).

[27] *Nixon*, 543 U.S. at 187.

[28] *See Faretta v. California*, 422 U.S. 806, 819-20 (1975); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Brookhart*, 384 U.S. at 7-8; *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

[29] *See supra* pp. 5 n. 3.

case but for possession and possession with intent to manufacture or distribute. (A229-230, 234-236, 258-259). However, by failing to cross-examine the State's witness on his opinion that the weight of the cocaine did not indicate personal use, defense counsel similarly offered no opposition to the State's evidence of possession with intent to manufacture or distribute. (A55).

Albeit never admitting that Mr. Burton was guilty of the charged offenses, through his actions and non-actions, defense counsel: 1) conceded petitioner's guilt without obtaining his "fully informed and publicly acknowledged consent",[30] thereby overriding petitioner's Sixth Amendment right to decide whether to plead guilty or not guilty;[31] 2) waived Mr. Burton's Sixth Amendment right to meaningfully oppose the prosecution's case;[32] 3) denied Mr. Burton his Fourteenth Amendment due process right to a fair trial;[33] and 4) deprived Mr. Burton of his Sixth Amendment right to the effective assistance of counsel.[34] Petitioner never wanted or expected his attorney to relieve the prosecution of its constitutional burden to prove each element of the offenses beyond a

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[30] *Taylor*, 484 U.S. at 417-18; *Brookhart*, 384 U.S. at 7-8.

[31] *Gonzalez*, 553 U.S. at 250 (citing *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688; *Taylor*, 484 U.S. at 417-18)); *Jones*, 463 U.S. at 751; *Wainwright*, 433 U.S. at 93 n. 1; *Brookhart*, 384 U.S. at 7-8.

[32] *United States v. Cronic*, 466 U.S. 648, 659-62 (1984) (providing for the presumption of a Sixth Amendment violation where "there is a complete denial of counsel," where counsel is absent from a critical stage of the proceeding or prevented from assisting the defendant, or where counsel fails to subject the State's case to "meaningful adversarial testing").

[33] U.S. Const. amend. XIV; Del. Const. art. I, § 7 (stating in relevant part, "nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land"); *see also Moore v. Hall*, 62 A.3d. 1203, 1208 (Del. 2013) (holding that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous, with both incorporating the concept of fundamental fairness).

[34] *Strickland*, 466 U.S. at 686 ("[T]he right to counsel is the right to the effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)).

reasonable doubt, and defense counsel violated Mr. Burton's constitutional right by overriding the objectives of the defense as decided by Mr. Burton.[35]

Although this Court had not yet decided *McCoy* at the time the Superior Court denied petitioner's claim,[36] *McCoy was* decided prior to the Delaware Supreme Court's denial of petitioner's claim. Most importantly, the applicability of *McCoy* was thoroughly raised and briefed in Mr. Burton's direct appeal filings.[37] (A232-234, 237, 263-264). Furthermore, as explained above, *McCoy* simply further refined that which this Court had already determined long ago and which is clearly found in this Court's precedent. As such, the Delaware Supreme Court's failure to consider *McCoy* in its legal analysis, or even attempt to reconcile this Court's holding in *McCoy* with the court's holding in petitioner's case, is patently unreasonable and violated Mr. Burotn's constitutional rights.

The Delaware Supreme Court's decision is equally confounding, not only because the court blatantly disregarded the applicable precedent of this Court, particularly *McCoy*, but because the court's decision materially diverges from its own prior decisions on this and related issues. As Mr. Burton explained in his Opening Brief, the Delaware Supreme Court has unequivocally held that defense counsel is not permitted to concede a client's guilt over his or her objection or without his

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[35] *McCoy*, 584 U.S. __, __ (2018) (slip op., at 7, 9); *see also Nixon*, 543 U.S. at 187; *Faretta* 422 U.S. at 819-20; *Boykin*, 395 U.S. at 243; *Duncan*, 391 U.S. at 149; *Brookhart*, 384 U.S. at 7-8; *Pointer*, 380 U.S. at 403; *Malloy*, 378 U.S. at 6.

[36] This Court decided *McCoy* on May 14, 2018 and the Superior Court denied Mr. Burton's Amended Motion for Postconviction Relief on April 30, 2018. (A7-19).

[37] Mr. Burton also noted in his Reply to the State's Response to Mr. Burton's Amended Motion for Postconviction Relief, filed in the Superior Court, that *McCoy* was pending decision and concerned an issue highly similar to that raised by Mr. Burton. (A182).

or her consent.[38] In *Cooke v. State*,[39] the Delaware Supreme Court emphasized that certain decisions are so personal to the defendant that they cannot be made by a surrogate, because they "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant."[40] Accordingly, in a divergence from the specific directives of *Cooke*, defense counsel did not obtain petitioner's "fully-informed and publicly-acknowledged consent"[41] to stipulate to the State's evidence, and petitioner was therefore deprived of a constitutionally fair trial that "meaningfully opposed the prosecution's case".[42] However in denying petitioner's postconviction claim, the Delaware Supreme Court made no attempt to reconcile the inconsistency between its holding in *Cooke* and its holding in petitioner's case.

Moreover, the Delaware Supreme Court specifically premised its *Cooke* holding on not only the Delaware Constitution, but on the United States Constitution; specifically, the court cited to the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment right to the effective assistance of counsel as directing its decision.[43] Thus, it is clear that under the court's own precedent, Mr. Burton's right to a fair trial under both the state and federal constitution was infringed upon when trial counsel relinquished, without Mr. Burton's consent, his right to have the prosecution prove each and every element of the offenses beyond a reasonable doubt. As such, it is unclear why

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[38] A231-232, 237 (citing *Cooke*, 977 A.2d at 809, 817, 850 (finding that even though trial counsel noted that they were not conceding guilt and were still going to challenge the State's evidence, trial counsel had violated Cooke's Sixth Amendment rights by asserting a guilty but mentally ill defense over the objections of Cooke and despite Cooke's plea of not guilty)).

[39] It should be noted that in *McCoy*, this Court specifically cited to *Cooke v. State* as an example of the split between state courts of last resort. (*McCoy*, 584 U.S. __, __ (2018) (slip op., at 5) (citing *Cooke*, 977 A.2d at 842-846)).

[40] *Cooke*, 977 A.2d at 841-42.

[41] *Id.* at 842.

[42] *Id.* at 851.

[43] *Id.* at 809, 840-843, 846, 849-851.

the court departed from such clear federal constitutional precedent, as well as its own state constitutional precedent, in failing to consider Mr. Burton's rights under the federal constitution and in reaching a finding so inconsistent with such long-standing federal authority.

It is important to note that although the Delaware Supreme Court made no factual finding as to whether petitioner's attorney did in fact give him notice of his intent to stipulate to the State's evidence or did in fact make him aware of how a stipulated bench trial would be conducted, the Superior Court *did* make this factual finding. (A5, 17). Specifically, the Superior Court stated, "[c]ounsel avers that as a matter of practice the decision to agree to a bench trial would have been clearly discussed with Defendant and that the consequences of doing so would be evaluated." (A17). The court also concluded that based on his colloquy with the court, petitioner's "decision to waive a trial by jury was knowing, intelligent, and voluntary" and "made strategically with the advice of counsel". (A17-18).

It is clear from the language used by the Superior Court that the court is erroneously equating petitioner's consent to a bench trial with petitioner's alleged consent to a stipulated bench trial. (A17-18). The court also appears to be making the factual finding that defense counsel did in fact provide petitioner with notice of his intent to stipulate to the State's evidence. (A17). However, these factual findings are clearly unsupported by the record, as the transcript of petitioner's colloquy with the court plainly shows that no discussion of the stipulation or petitioner's understanding of and consent to proceeding with a stipulated bench trial occurred. (A50-56).

Moreover, defense counsel's affidavit demonstrates that at best, "[he] can only assume that [he] explained to Mr. Burton that the most expeditious way to preserve an appellate issue was to conduct a bench trial" and that he "probably conducted some explanation as to how the trial would

proceed before [the trial judge]." (A167-168). Such speculation is undoubtedly insufficient for the Superior Court to reach the factual conclusion that Mr. Burton had knowledge of and consented to a stipulation that waived his Sixth Amendment right to meaningfully oppose the prosecution's case.[44] Most notably, even if the Superior Court correctly determined that defense counsel discussed the stipulation in advance with Mr. Burton, such a finding is immaterial to the issue at hand, as the record is crystal clear that defense counsel did not obtain Mr. Burton's "fully informed and publicly acknowledged consent" to waive his Sixth and Fourteenth Amendment rights, as is constitutionally required.[45]

Similarly, the Delaware Supreme Court's finding that the State's evidence against Mr. Burton was overwhelming lends no support to the court's erroneous denial of Mr. Burton's claim, as this Court specifically held in *McCoy* that a defendant need not demonstrate prejudice when his constitutionally guaranteed right of autonomy has been violated.[46] However, it should be noted that even though petitioner had no obligation to demonstrate *Strickland* prejudice pursuant to this Court's holding in *McCoy*, the Delaware Supreme Court failed to appreciate the fact, raised by Mr. Burton, that because trial counsel's stipulation included consent to rely upon the lengthy record made at the suppression hearing for purposes of trial, numerous pages of factual testimony that would have been otherwise inadmissible at trial, such as the fact that Mr. Burton was on probation and that he was

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[44] *Cronic*, 466 U.S. at 659-62 (providing for the presumption of a Sixth Amendment violation where "there is a complete denial of counsel," where counsel is absent from a critical stage of the proceeding or prevented from assisting the defendant, or where counsel fails to subject the State's case to "meaningful adversarial testing").

[45] *Taylor*, 484 U.S. at 417-18; *Brookhart*, 384 U.S. at 7-8; *Cooke*, 977 A.2d at 842.

[46] *McCoy*, 584 U.S. __, __ (2018) (slip op., at 11-12).

identified by a confidential informant alleging that Mr. Burton was selling crack cocaine out of his residence, were in fact admitted. (A33-35, 43-47 155-156, 185-186, 235).

Unless the State took the unusual action of revealing the identity of the confidential informant and calling him/her to testify at trial, the State would have been unable to rely on these facts to demonstrate the elements of possession and intent to manufacture or distribute. Additionally, when the OCME misconduct was disclosed by the State, Mr. Burton was denied a new trial and/or re-testing of the alleged drug evidence, because defense counsel had stipulated to the drug evidence and the chain of custody. (A29-30). As such, petitioner was clearly prejudiced by his attorney's actions, regardless of how allegedly overwhelming the evidence against him was. Nevertheless, Mr. Burton was entitled to relief even in the absence of a showing of prejudice, and Mr. Burtons's constitutional rights were further violated when the Delaware Supreme Court denied him relief on the basis of an erroneously applied legal standard.

The Delaware Supreme Court improperly affirmed the denial of Mr. Burton's postconviction ineffective assistance of counsel claim. Rather than addressing whether trial counsel's stipulation to the State's evidence, done without Mr. Burton's consent, undermined his due process right to a fair trial and overrode Mr. Burton's decision to exercise his constitutional right to have the State prove beyond a reasonable doubt each and every element of the charged offenses,[47] the court simply decided that because an acquittal was unlikely even without the stipulation, Mr. Burton was not prejudiced by his attorney's action. (A5).

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[47] *In re Winship*, 397 U.S. 358, 363-64 (1970); *see also Holland v. United States*, 348 U.S. 121, 138 (1954) (stating that the Constitution requires proof of a criminal charge beyond a reasonable doubt).

In reaching this conclusion, the Delaware Supreme Court wholly overlooked the premise of Mr. Burton's claim and the underlying constitutional rights that were violated by his attorney's objectively unreasonable action. As petitioner clearly explained to the court, in the face of his unwavering desire to challenge the State's case at trial, by stipulating to the State's evidence without his consent and by failing to challenge the minimal evidence the State presented at trial, his attorney violated his constitutional right to make fundamental decisions concerning his case, which in turn deprived him of his due process right to a fair trial and to meaningfully oppose the prosecution's case. This culminated in such a one-sided situation that the State's case could not possibly be subjected to any semblance of meaningful adversarial testing. Without meaningful opposition to the State's case, it cannot be said that Mr. Burton received the fair trial to which he was constitutionally entitled under the Fourteenth Amendment's Due Process Clause.

In only considering whether Mr. Burton had demonstrated *Strickland* prejudice, the Delaware Supreme Court departed from clear federal constitutional precedent, applied an incorrect legal standard to its analysis, and disregarded entirely this Court's holdings in *Florida v. Nixon*,[48] *Jones v. Barnes*,[49] and most significantly, *McCoy v. Louisiana*.[50]

As such, the Delaware Supreme Court had no sound basis for denying petitioner's claim and ignored federal constitutional case law in doing so. Certiorari should be granted on this issue, not only because the Delaware Supreme Court's decision was clearly erroneous and a departure from

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[48] *Nixon*, 543 U.S. at187.

[49] *Jones*, 463 U.S. at 751.

[50] *See generally McCoy*, 584 U.S. __, __ (2018) (slip op.); *see also Wainwright*, 433 U.S. at 93 n. 1., 97; *Brookhart*, 384 U.S. at 7-8; *Gonzalez*, 553 U.S. at 250; *Faretta*, 422 U.S. at 819-20; *Boykin*, 395 U.S. at 243; *Duncan*, 391 U.S. at 149; *Pointer*, 380 U.S. at 403; *Malloy*, 378 U.S. at 6.

clear federal constitutional precedent, but because clarification on the scope of this Court's holding in *McCoy* is necessary to prevent such issues from recurring in the state courts of last resort.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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