

No. _____

IN THE
SUPREME COURT OF UNITED STATES

ALVIN FELICIANOSOTO - PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- 1) Whether the Eighth Circuit Court of Appeals erred on direct review in failing to remand the case to the district court when a challenge under *McCoy v. Louisiana*, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018) is raised and the record is unclear as to whether trial counsel's concession of guilt violated his autonomy to decide the objective of his defense?

LIST OF PARTIES

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IN THE
SUPREME COURT OF UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is reported at 934 F.3d 783.

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided this case was August 15, 2019. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence*. (emphasis added)

STATEMENT OF THE CASE

Felicianosoto was indicted and convicted pursuant to a jury trial of one count of Conspiracy to Distribute a Controlled Substance, in violation of 21 USC 841(a)(1) and 846, and one count Possession with Intent to Distribute a Controlled Substance, in violation of 21 USC 841(a)(1). In closing, defense trial counsel focused on the credibility of witnesses as it relates to the count for Conspiracy to Distribute a Controlled Substance. (JT 324-342). However, as it related to the Possession with Intent to Distribute more than 50 grams of methamphetamine count, without any authority in the record or otherwise, Felicianosoto's trial counsel asked for the jury to return a conviction on that count. Specifically, Felicianosoto's trial counsel stated as follows:

Yes, he distributed it, or attempted to, and for that I'm not asking you to acquit him. The government is right. In that Verdict Form there was more than 50 grams in his possession with intent to distribute. That is guilty.

(JT 334:3-7). In fact, the very last words of Felicianosoto's trial counsel were:

Ladies and gentlemen of the jury, my client is guilty on Count 2 for the methamphetamine he possessed when he was arrested. It's about 104 or 105 grams, whatever it was in the exhibit. He's guilty of that.

I would ask you to return that verdict. It's not often I ask for a guilty verdict. But that's the guilty verdict.

On the charge of conspiracy, I respectfully, respectfully request that you return a verdict of not guilty. Thanks.

(JT 342:2-12).

Indeed, Felicianosoto, on the record at motions hearings at trial rejected advice by prior trial counsel to admit guilt even to an offense that was less severe

than what was sought by trial counsel. *See* Transcript of Ex Parte Motion Hearing on May 9, 2017. Had Felicianosoto desired to admit guilt to any portion of the offense, he would have pled guilty prior to the Superseding Indictment being filed in his case, and certainly prior to trial.

The jury returned a guilty verdict on both counts. (JT 352-353). A sentencing hearing was held on July 9, 2018. Felicianosoto spoke at sentencing, denied guilt and placed blame on the government and trial counsel. (ST 21-32). Felicianosoto was sentenced to 210 months custody. DCD 96. Felicianosoto's trial counsel's motion to withdraw was granted by the Eighth Circuit Court of Appeals and new appellate counsel was appointed on July 18, 2018, after a Notice of Appeal had been filed. Felicianosoto, challenged his conviction based upon a violation of his right to autonomy under *McCoy v. Louisiana*, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). The Eighth Circuit Court of Appeals affirmed the conviction and the sentence imposed by the district court. *See generally United States v. Felicianosoto*, 934 F.3d 783 (8th Cir. 2019).

REASONS FOR GRANTING THE PETITION

- I. The Eighth Circuit Court of Appeals erred on a matter of public importance when, on direct review, it failed to remand the case to the district court when a challenge under McCoy v. Louisiana, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018) was raised and the record is unclear as to whether trial counsel's concession of guilt violated his right to autonomy.*

This Petition seeks that the Court issue a writ of certiorari to set the proper remedial process seeking redress of a violation of a defendant's right to autonomy as set forth in *McCoy v. Louisiana*, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). There, the United States' Supreme Court reasoned:

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in “grant[ing] to the accused personally the right to make his defense,” “speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.” *Faretta*, 422 U. S., at 819-820, 95 S. Ct. 2525, 45 L. Ed. 2d 562; see *Gannett Co. v. DePasquale*, 443 U. S. 368, 382, n. 10, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (the Sixth Amendment “contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense”). Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.” *Gonzalez v. United States*, 553 U. S. 242, 248, 128 S. Ct. 1765, 170 L. Ed. 2d 616 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal. See *Jones v. Barnes*, 463 U. S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant’s own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence These 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*.

Id. at 1508.

In the case at hand, the Eighth Circuit found that the record was not clear as to whether Felicianosoto did or did not desire to admit guilt to any portion of the indictment. Specifically, the Eighth Circuit reasoned:

The record does not reflect that Felicianosoto made any “express statements of [his] will to maintain innocence” in response to his attorney’s concessions, either to his counsel or the court. *Id.* As a result, Felicianosoto has not demonstrated at this juncture that his counsel’s concession of guilt violated his autonomy to decide the objective of his defense. We recognize there may be facts not in the present record that might demonstrate such a violation. Felicianosoto remains free to renew his Sixth Amendment claim in a motion under 28 U.S.C. § 2255.

Felicianosoto, 934 F.3d at 787.

The narrow, but important, question for the Court is whether, when defense counsel makes an express concession of guilt to a jury and the district court fails to make record regarding whether such was in violation of the defendant's right to autonomy, the case should be remanded on direct review to the district court to make findings on the issue or whether the judgment should be affirmed suggesting a defendant seek a remedy by use of a motion under 28 U.S.C. § 2255. *Felicianosoto* submits that remand is appropriate under the precedent of this Court as the decision in *Felicianosoto* is in direct conflict with at least one a state court of last resort, specifically the North Carolina Supreme Court in *State v. Thomas*, 397 SE2d 79 (N.C. 1990), and is an important issue of federal law that should be settled by this Court.

As a starting point, it is incorrect to frame this issue as an ineffective assistance of counsel claim, as was very explicitly described in *McCoy*. 138 S. Ct. at 1510-11 (“Because a client’s autonomy, not counsel’s competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence . . . to McCoy’s claim.”). As this claim is not an ineffective assistance of counsel claim, but rather a client autonomy issue, and such is appropriate for resolution on direct appeal, not by way of a motion under 28 USC § 2255.

When a lawyer admits his client’s guilt and relieves the prosecution of its burden of proof over the client’s express objection, the defendant suffers a structural error that is “so intrinsically harmful as to require automatic reversal (i.e., ‘affect

substantial rights’) without regard to [its] effect on the outcome.” *Neder v. United States*, 527 U.S. 1, 7 (1999) (*quoting* Fed. R. Crim. P. 52(a)). That is because the “constitutional deprivation” is not “simply an error in the trial process,” but “affect[s] the framework within which the trial proceeds.” *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (*quoting* *Rose v. Clark*, 478 U.S. 570, 577-578 (1986)).

The Eighth Circuit states in its opinion that “Felicianosoto cites no authority supporting his remand proposal.” *Felicianosoto* 934 F.3d at 787. However, that is simply inaccurate. It is accurate that Felicianosoto did not cite any controlling authority, as this issue has not yet been resolved by this Court and no Eighth Circuit caselaw had analyzed the issue in light of *McCoy*. However, Felicianosoto, both in briefing and oral argument, cited a decision from a state court of last resort for the proposition that remand is appropriate, specifically *State v. Thomas*, 397 SE2d 79 (N.C. 1990) (remanding case to trial court when on direct appeal “for an evidentiary hearing for the sole purpose of determining whether defendant knowingly consented to trial counsel’s concessions of defendant’s guilt to the jury.”); *see also* *State v. Cholon*, 804 S.E.2d 187 (2017) (*citing* *Thomas* regarding remand to trial court on direct appeal to make “findings of facts and conclusions of law and determine whether defendant is entitled to relief.”). In doing so, it is important to remember that *McCoy* itself resolved a division among state courts of last resort, and the states like North Carolina, which have long embraced the holding of *McCoy* (prior to *McCoy* being decided), have used this process for nearly three decades.

In addition to the simple fact that matters of structural error, when raised, are more appropriately dealt with on direct review than in a 28 USC § 2255 motion, in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1912 (2017), this Court held that remand from direct review, in comparison to review of a motion under 28 USC § 2255, is a superior option to avoid the “systemic costs of remedying the error” in a motion under 28 USC § 2255. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1912 (2017). The Court reasoned:

That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. . . .

When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, see *Strickland*, 466 U. S., at 693-694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (noting the “profound importance of finality in criminal proceedings”), and direct review often has given at least one opportunity for an appellate review of trial proceedings.

Weaver v. Massachusetts, 137 S. Ct. 1899, 1912 (2017).

In addition, although not something agreed to by Felecianosoto, it is expected that the Government may argue that, under *Weaver*, a client autonomy issue should be subject to an inquiry into prejudice rather than automatic reversal without any inquiry into prejudice. *Id.* at 1913. This Court should reject any effort by the Government to reframe client autonomy issues as ineffective assistance of counsel issues subject to a review for prejudice rather than a client autonomy issue

to be addressed on direct appeal for structural error, as such would severely limit the holding of *McCoy*.

When a lawyer admits his client's guilt and relieves the prosecution of its burden of proof over the client's express objection, the defendant suffers a structural error that is "so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to [its] effect on the outcome." *Neder v. United States*, 527 U.S. 1, 7 (1999) (*quoting* Fed. R. Crim. P. 52(a)). That is because the "constitutional deprivation" is not "simply an error in the trial process," but "affect[s] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (991) (*quoting* *Rose v. Clark*, 478 U.S. 570, 577-578 (1986)). Counsel's unauthorized admission deprives the defendant of his right to choose whether to admit guilt or defend against the charges, interposes adverse counsel between an unwilling defendant and his right to defend himself, and undermines the jury's findings by effectively relieving them of the obligation to find guilt beyond a reasonable doubt.

Potential structural error of this nature deserves a record on direct review. The district court should have made a record at the time of trial regarding whether Felicianosoto's right to autonomy was violated (or implicated) by the admission of guilt by counsel at trial. The district court failed to do so. Because it failed to do so, the Eighth Circuit should have remanded the matter to the district court to do so when the issue was raised on appeal, rather than affirming the district court and leaving the door open for a potential 28 USC § 2255 motion in the future.

CONCLUSION

For the foregoing reasons, Felicianosoto respectfully requests that the petition for a writ of certiorari should be granted.

Dated this 1st day of November, 2019.

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