No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL LANIER WATKINS,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari *to the Georgia Court of Appeals*

(Ga. Ct. App. No. A19A1853)

(Ga. Sup. Ct. No. S20C1071)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

1. Did Petitioner receive ineffective assistance of counsel when his trial counsel, against Petitioner's instruction, asked the trial court to return a conviction on a lesser-included offense that had not been specifically charged?

LIST OF PARTIES

All parties to this Petition appear on the cover.

LIST OF RELATED PROCEEDINGS

Trial Court Judgment:

State v. Watkins, No. 16-ER-158-H. (Superior Court, Elbert County, Georgia). Judgment entered October 19, 2017. Motion for new trial denied March 13, 2019.

Appellate Judgments:

Watkins v. State, No. A19A1853 (Ga. Ct. App.). Judgment entered January 30, 2020. Motion for reconsideration denied March 19, 2020.

Watkins v. State, No. 2S0C1071 (Ga. Sup. Ct). Petition for certiorari denied September 28, 2020.

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Michael Lanier Watkins respectfully petitions for a *writ of certiorari* to review the judgment of the Georgia Court of Appeals.

OPINIONS BELOW

The decision of the Georgia Supreme Court denying certiorari was not selected for publication. It is reprinted in the Appendix. [App. 1].

The decision of the Georgia Court of Appeals was not selected for publication. It is reprinted in the Appendix. [App. 3].

The decision of the trial court is unreported but is included in the Appendix. [App. 13].

JURISDICTION

This Court has jurisdiction to review the judgment of the Georgia Court of Appeals with respect to the federal questions raised and ruled upon below, because the Georgia Supreme Court denied discretionary review of the case. 28 U.S.C. § 1257. *See also Interstate Circuit v. Dallas*, 390 U.S. 676, 678 n.1 (1968) ("The Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the Court of Civil Appeals." (citing 28 U.S.C. § 1257)). The Georgia Supreme Court denied discretionary review on September 28, 2020. [App. 1].

This Petition is timely because it has been filed within 150 days of the denial of discretionary review. *See* Order of March 19, 2020, 589 U.S. __ (2020)

(extending the period for filing petition for *certiorari* to 150 days during the Covid-19 pandemic).

CONSTITUTIONAL PROVISIONS INVOLVED

> 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.

U.S. Const. Amend. VI.

> 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, § 1.

STATEMENT OF THE CASE

I. The Proceedings in the Trial Court.

In a Georgia state court, Mr. Watkins was indicted and tried to the bench on a three-count indictment arising out of the drowning of Meredith Leigh Watkins on June 18, 2013. Count I alleged malice murder by drowning. Count II alleged felony murder, with a predicate felony of aggravated assault. And Count III alleged aggravated assault in that Mr. Watkins "did unlawfully make an assault upon the person of Meredith Leigh Watkins with water, an instrument which when used offensively against a person is likely to result in serious bodily injury, by placing said person in a creek while said person was so intoxicated that she was incapable of swimming…."

A. Mr. Watkins Is Convicted of a Lesser-Included Offense, at His Own Lawyer's Suggestion, at a Bench Trial.

At Mr. Watkins' bench trial, the judge acquitted Mr. Watkins of malice murder and aggravated assault, but it convicted him of a lesser-included charge on Count II: involuntary manslaughter via the commission of an unlawful act other than a felony—reckless conduct. *See* [App. 3 & n.1].

The trial court's order denying the later-filed motion for new trial summarized the facts that it had found as follows:

> [T]he evidence adduced at trial showed that on Tuesday, June 18, 2013, the Elbert County Sheriff's office responded to Cold Water Creek in Elbert County, Georgia, in reference to a drowning victim. Upon arrival at Cold Water Creek, law enforcement met with Michael Watkins, the ex-husband of the victim. Michael Watkins

advised that for the past several days Meredith Watkins, the victim, had been drinking heavily and using prescription drugs. Michael Watkins reported that around 12:00 a.m. that morning, Meredith Watkins wanted to go swimming.[1] Meredith Watkins wanted to go to the water shed, but Michael Watkins insisted on going to Cold Water Creek. Upon arrival, at the boat ramp, Meredith Watkins allegedly told Michael Watkins that she was only going to swim out to the buoy and back. After Meredith Watkins swam only approximately fifty feet from the shore, she went under water and never surfaced again.[2]

Michael Watkins stated that he attempted to contact the Elbert County 911 for assistance, however he claimed his phone displayed No Service. Michael Watkins claimed he went to a nearby home and attempted to get assistance, but no one would answer. He then drove to Johnny Smiths residence and had him call 911. The Defendant traveled back to Cold Water Creek, entered the creek, and attempted to snag Meredith Watkins with a cane, claiming that he decided that perhaps he could rescue her. The Defendant claimed he was terrified of water and could not bring himself to enter the creek,[3] however witnesses testified he was wet up to waist, and that one sleeve was wet to the shoulder.

The body of Meredith Watkins was found 21 feet from shore in 3 feet of water. She was face down with her arms crossed over her chest. Her glasses were still on her face. The area to her body from the shore is consistently a depth of only 3 feet.

Her toxicology indicated the presence of tramadol, 0.14 mg/L, zolpidem (Ambien), 0.19 mg/L, diazepam and nordiazepam (both lower than the lowest calibrator of 100mcg/L). Her ethyl alcohol was 0.348 grams per 100 mL, which had to be diluted because the

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[1] According to the trial testimony, swimming was one of her favorite activities.

[2] Mr. Watkins said that "[s]he went to the end of the dock that was close to the boat ramp…and dove in." After swimming for a while, "she just dropped."

[3] He said that he "went out as far as he felt safe" trying to find her.

> initial sample was higher than the highest calibrator. [4] There was no indication of recent injury in the autopsy.
>
> The pathologist concluded Meredith Watkins died of drowning complicated by acute multiple drug and alcohol intoxication.
>
> Meredith Watkins was shot in the back with a small caliber firearm several months (October 2012) before her drowning in an incident for which the perpetrator was never identified, but Michael Watkins was the only other person present. Their residence contained many small caliber weapons. Six days after Meredith's death, Michael Watkins attempted to probate a will written by Meredith Watkins in 2004 making Michael Watkins the beneficiary of all of her property, including 5 acres of real property.
>
> Subsequent to being arrested, Michael Watkins confessed to an inmate in the Elbert County Jail.[5] The information provided by the jail house informant is consistent with the scene and with information regarding Meredith that only the Defendant would know.

[App. 13-15].

In acquitting Mr. Watkins of malice murder and instead convicting him on a lesser-included offense of involuntary manslaughter, the trial court followed

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[4] Ms. Watkins had a long history of alcohol abuse that—in the words of her mother, who testified on Mr. Watkins' behalf—was "totally out of control." For example, Ms. Watkins had DUI arrests in 2011, 2012, and 2013, with alcohol levels between 0.20 and 0.30. Her long history of alcohol abuse would be expected to allow her to develop a high tolerance for alcohol and still function. Thus, when she was seen in the hospital on May 4, 2013, and found with an alcohol level of 0.406, the medical records indicate that she was "awake, alert, and conversing" during the physical exam.

[5] According to the jail-house informant, Mr. Watkins confessed to him: "[S]he liked to go swimming. And he went over to Coldwater Creek; Coldwater Creek, down to the boat ramp. And he got out; got out of the truck and he walked down to the boat ramp. You know, she went out on the boat ramp and that's when he went out and hold her down until she drowned; until she drowned right there. And he ran and went and got some help." Obviously, the trial court rejected this supposed confession in significant part: The trial court acquitted Mr. Watkins of malice murder and aggravated assault.

Mr. Watkins' trial counsel's suggestion during closing argument. Trial counsel had argued in part as follows: "I'm not a gambler, Judge… I have to call the evidence the way I see it…. [T]here's reasonable doubt that he murdered her…. [H]e was negligent in affording her the opportunity to go swimming…. That's the worst he's guilty of…. And that's involuntary manslaughter. That's a lesser included."

Upon conviction, the trial court sentenced Mr. Watkins to ten years' imprisonment.

B. The Trial Court Denied a Motion for New Trial.

Following the appointment of successor counsel, the trial court held a hearing on Mr. Watkins' motion for new trial. Mr. Watkins alleged (among other things) that he had received ineffective assistance of counsel. At the hearing, two witnesses testified: trial counsel and Mr. Watkins.

Trial counsel testified that he asked the court to consider the lesser-included offense because he was worried about the possibility of a guilty verdict on malice murder. On one or more occasions "prior to trial," trial counsel told Mr. Watkins that asking for the lesser-included charge would be part of his trial strategy. [App. 29].

Mr. Watkins testified, however, that before the closing argument, he and trial counsel discussed again whether to ask for a lesser-included offense. According to Mr. Watkins, "he told me he wanted to do that [i.e. ask for a lesser-included] and I told him not to do that." [App. 31].

Even though trial counsel did not contradict Mr. Watkins recollection of their pre-closing meeting and even though Mr. Watkins testified that he specifically objected to his trial counsel's proposed strategy before closing argument, the trial court denied the motion for new trial. [App. 13]. To the extent that there were any error about the propriety under Georgia law for convicting on the lesser-included offense (as Mr. Watkins had argued), the trial court held that any error "was invited by counsel as part of his trial strategy….." [App. 19]. Because the court found that trial "[c]ounsel's strategic trial decisions in this case were informed by the evidence," they were not constitutionally unreasonable and thus no ineffective assistance had occurred. [App. 20].

II. The Georgia Court of Appeals Affirmed the Conviction.

The Georgia Court of Appeals agreed that Mr. Watkins had not received ineffective assistance. It held that this Court's decision in *McCoy v. Louisian*a, ___ U.S. ___, 138 S. Ct. 1500 (2018), and the rule that an attorney may not admit guilt over a client's objection, only applies in capital cases. [App. 10-11]. Further, the court held that the trial court—which had made no factual findings about whether Mr. Watkins, as he testified, objected just prior to closing arguments—was entitled to conclude that Mr. Watkins had concurred in trial counsel's strategy. [App. 11].

III. The Georgia Supreme Court Declined Certiorari.

The Georgia Supreme Court denied Mr. Watkins' timely petition for certiorari on September 28, 2020. [App. 1].

IV. Mr. Watkins Raised the Federal Question Presented Below.

Following the appointment of new counsel, Mr. Watkins raised the ineffectiveness of his trial counsel in his motion for new trial. The trial court ruled on that federal issue. Mr. Watkins again raised the issue to the Georgia Court of Appeals, which ruled on it. And he raised the issue in his petition for certiorari to the Georgia Supreme Court.

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition. As explained below, the Georgia Court of Appeals wrongly held inapplicable this Court's decision in *McCoy*, 138 S. Ct. 1500. Further, in granting this Petition, this Court can also resolve a split that has long plagued the lower courts concerning whether trial counsel or the client has the ultimate decision about whether to request consideration of a lesser-included offense.

I. The Court Below Wrongly Refused to Apply *McCoy*, 138 S. Ct. 1500 to Mr. Watkins' Case.

The Georgia Court of Appeals below should have reversed Mr. Watkins's conviction. He did not receive the effective assistance of counsel contemplated under the U.S. Constitution.

Because counsel himself admitted in closing arguments that his client had been criminally negligent, counsel violated the rule that this Court set forth in *McCoy*, 138 S. Ct. 1500. There, this Court held that trial counsel had been ineffective in a death-penalty case for admitting guilt over his client's objection,

even though that strategy was the best way to minimize the chance of death in sentencing. In doing so, this Court explicitly held that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *Id.* at 1510. Doing so is a bright-line structural error that results in an automatic retrial without the need to show specific prejudice. *Id.* at 1511 ("Counsel's admission of a client's guilt over the client's express objection is error structural in kind.").

In rejecting *McCoy*, the Georgia Court of Appeals (and the unpublished 11th Circuit decision that it relied upon)[6] impermissibly restricted *McCoy* to the capital context—even though the question presented to this Court did not impose such a limitation. *E.g.*, *id.* at 1507 ("We granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection."). Further, the reason for this Court's holding—guaranteeing a client the "[a]utonomy to decide that the objective of the defense is to assert innocence….", *id.* at 1508—applies equally when the potential punishment is death and when it is a term of years. *Cf. also Lee v. United States*, __ U.S. __, 137 S. Ct. 1958 (2017) (holding that trial counsel was ineffective for inducing client to take a plea when, despite the impossible odds, client would have preferred a trial had he known of the consequences of a finding of guilt). Consequently, other courts have not understood *McCoy* to

[6] *In re Brown*, 2019 U.S. App. LEXIS 14798 (11th Cir. May 17, 2019).

be limited to the capital context. *See, e.g.*, *United States v. Rosemond*, 958 F.3d 111, 123 (2d Cir. 2020) (applying *McCoy* in a non-capital context); *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019) (same); *United States v. Holloway*, 939 F.3d 1088, 1101 (10th Cir. 2019). *Cf. also Brookhart v. Janis*, 384 U.S. 1, 7 (1966) (holding that trial counsel cannot, without the client's consent, "enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a [full] trial….").

The unrebutted evidence at the hearing on the motion for new trial was that, despite their understanding "prior to trial," [App. 29], Mr. Watkins instructed counsel to go for an all-or-nothing approach in closing arguments, [App. 31]. In other words, as in *McCoy*, Mr. Watkins' objective was complete innocence—but trial counsel argued at least partial guilt. Certiorari is thus appropriate because the Georgia Court of Appeals wrongly "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c).

II. This Petition Will Also Allow the Court to Resolve a Dispute Among the Lower Courts Concerning Whether Clients or Counsel Have the Final Decision About Whether to Propose Consideration of a Lesser-Included Offense.

As explained below, the lower courts are divided into at least three camps about whether, for Sixth Amendment purposes, the client or counsel "owns" the right to request consideration of a lesser-included offense. This Petition

also presents the Court with an opportunity to resolve that split, an independent reason to grant the Petition. U.S. Sup. Ct. R. 10(b).

A. Three Approaches to the Issue Exist.

Everyone agrees that "the accused has the 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 an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citation omitted).

Analogizing the decision to request a lesser-included instruction at trial to the decision about what plea to enter to the charged offense, the Illinois Supreme Court has held that the client owns the decision about whether to seek a lesser-included offense at trial:

> [T]he decision to tender a lesser included offense is analogous to the decision of what plea to enter, and that the two decisions should be treated the same. Because it is defendant's decision whether to initially plead guilty to a lesser charge, it should also be defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence. In both instances the decisions directly relate to the potential loss of liberty on an initially uncharged offense.

People v. Brocksmith, 642 N.E.2d 1230, 1232 (Ill. 1994). In so doing it aligned itself with at least three other state supreme courts. *See People v. Frierson*, 705 P.2d 396, 404 n.5 (Calif. 1985) ("[B]ecause this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses." (quotation omitted)); *State v. Boeglin*, 731 P.2d

943, 945 (N.M. 1987) ("[T]he defendant, not defense counsel, ultimately must decide whether to seek submission of lesser included offenses to the jury. (citations omitted)); *In re Trombly*, 627 A.2d 855, 856 (Vt. 1993) ("[O]nce defense counsel consults fully with the client about lesser included offenses, the defendant should be the one to decide whether to seek submission to the jury of those offenses." (quotation omitted)).

The case law from other jurisdictions, however, rejects the analogy of a request for an instruction on a lesser-included offense to a decision about whether to accept a guilty plea to the charged offense. Consequently, these other jurisdictions give counsel control over whether and when to mount an all-or-nothing strategy. *E.g., Cannon v. Mullin*, 383 F.3d 1152, 1167 (10th Cir. 2004) ("Whether to argue a lesser-included offense is a matter to be decided by counsel after consultation with the defendant." (citation omitted); *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008) ("[T]he decision whether a lesser offense instruction should be requested is distinguishable from the decision to plead guilty…. [T]he decision to request a lesser offense instruction is strategic and tactical in nature, and is therefore reserved for defense counsel."); *Van Alstine v. State*, 426 S.E.2d 360, 363 (Ga. 1993) ("[W]e do not agree…that the decision whether to seek submission to the jury of lesser included offenses rises to the same level as the decision to plead guilty or not guilty to charged offenses so as to require the defendant alone to make that decision."); *Mathre v. State*, 619 N.W.2d 627, 631 (N.D. 2000) ("[T]rial counsel's failure to consult with his client

before deciding to not request a lesser included offense instruction did not constitute ineffective assistance of counsel." (citations omitted)).

For its part, Florida lies on both sides of the divide. In capital cases, it understands *Beck v. Alabama*, 447 U.S. 625 (1980), in which this Court overturned a prohibition on instruction on lesser included offenses, to require that counsel cannot agree to forgo lesser-included offenses unless the defendant, on the record, knowingly and voluntarily waives the lesser-included instructions. *Harris v. State*, 438 So. 2d 757, 797 (Fla. 1983). But because *Beck* arose in the capital context, the Florida Supreme Court has determined that counsel controls whether to request lesser-included offenses in non-capital cases. *See Jones v. State*, 484 So. 2d 577, 579-80 (Fla. 1986) (holding that no inquiry was required as to whether the client agreed with the decision to mount an "all or nothing" defense in a non-capital case because "the role of defense counsel necessarily involves a number of tactical and procedural determinations inevitably impacting on a defendant's constitutional rights").

Thus, a three-way split exists among the lower courts about when trial counsel is authorized to request consideration of a lesser-included offense.

B. This Court Can Resolve That Split Using This Petition.

In this case, trial counsel successfully advocated that the trial court convict Mr. Watkins on a lesser-included offense. If Mr. Watkins, as the client, had the final say about whether to request consideration of lesser-included offenses—

or take a go-for-broke, all-or-nothing strategy—he would have received ineffective assistance of counsel.

If, under *McCoy*, the error is a structural error, Mr. Watkins would be entitled to relief even without a showing a prejudice.

If, however, this Court decides to apply the traditional framework of *Strickland v. Washington*, 466 U.S. 668 (1984)—with its requirements of deficient performance and prejudice—Mr. Watkins would still be entitled to relief.

Deficient performance was present. Given the unrebutted evidence that Mr. Watkins told his trial counsel in the moments before closing argument to take an all-or-nothing approach, trial counsel was obligated to follow his client's lawful instructions. *See Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring) (explaining that a client's objection to counsel's action has "the effect of revoking the agency [of counsel] with respect to the action in question" (citing *Brookhart*, 384 U.S. 1)).

Prejudice was also present. The trial court acquitted Mr. Watkins on the greater-included offense. Had the lesser-included offense not been an option, an acquittal would have resulted as a matter of law.

This Court can and should use this case to resolve the split among the lower courts.

CONCLUSION

This Court should grant this Petition and reverse the judgment below.

Dated: December 28, 2020

Respectfully submitted,

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APPENDIX