No. 20-6851

IN THE
Supreme Court of the United States

JEFFREY LEE ATWATER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the Florida Supreme Court erred in holding that Petitioner failed to state a Sixth Amendment violation under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), when Petitioner neither objected to his counsel conceding guilt to a lesser charge nor informed his counsel that the objective of his defense was to maintain his factual innocence of the murder that formed the basis for the charged offenses.

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STATEMENT

1. In the summer of 1989, tensions between Petitioner and Ken Smith had reached their peak. *See* Pet. App. 18, 20 & n.4. "Smith was having a relationship with [Petitioner's] aunt," and Petitioner was "jealous." Pet. App. 20 n.4, 58. Petitioner also "believed Smith was abusing [his aunt]." Pet. App. 20 n.4. And Smith had resolved to cut Petitioner off financially, telling a friend that he was "not going to give [Petitioner] any more money." Pet. App. 19. From their interactions, Smith had grown "afraid" of Petitioner. Pet. App. 30.

Those fears were soon realized: Petitioner told others that "he intended to kill Smith." Pet. App. 20. For three days, Petitioner sought Smith to no avail. *Id.* But finally, he found Smith at Smith's apartment building. Pet. App. 18. "[T]o gain entrance" to the building and "get by the security desk at the entrance," Petitioner "misrepresented himself as Smith's grandson." Pet. App. 20. He then "proceeded to Smith's room where he remained for about twenty minutes." Pet. App. 18. During that time, Petitioner stabbed Smith nine times in the chest and nine times in the back, cut him 20 times across different parts of his body, punctured him twice in the abdomen, and beat him so severely that Smith suffered multiple broken bones. Pet. App. 18–19. The "injuries occurred while [Smith] was alive." Pet. App. 19. Petitioner also robbed Smith, rummaging his body for money and leaving his pants pockets turned inside out. *See id.*

After the murder, Petitioner "told several people that he had killed Smith." Pet. App. 18. He told his aunt and cousin that he had "enjoyed it." Pet. App. 30.

He was also found with "blood on his shoes and pants that was not" his own. *Id.*

2. Police arrested Petitioner the same day. Pet. App. 18. The State charged him with first-degree murder and robbery and sought the death penalty. *Id.*

Faced with "overwhelming evidence of guilt," Pet. App. 29, Petitioner's counsel concluded that there was no "chance at getting an acquittal." Pet. App. 28. The best strategy available "was to save [Petitioner's] life." *Id.* To that end, counsel argued during closing that Petitioner was not guilty of the death-eligible charge of first-degree murder but was instead guilty of only the lesser-included charge of second-degree murder. Pet. App. 92–93. Petitioner did not object at trial to counsel's decision to concede guilt to a lesser offense. *See* Pet. App. 92–96.[1]

Despite counsel's efforts, the jury found Petitioner guilty of first-degree murder and robbery. Pet. App. 18. They recommended death by a vote of 11-1. *Id.* The trial judge agreed and entered that sentence. *Id.* The Florida Supreme Court affirmed, Pet. App. 20, and his conviction became final on April 18, 1994, when this Court denied his petition for a writ of certiorari. *Atwater v. Florida*, 511 U.S. 1046 (1994).

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[1] The first time he purportedly expressed discontent with the decision was in a meeting with counsel after the guilty verdict. Pet. App. 218. He also claims to have disputed the concession strategy in a *pro se* motion at sentencing, *see id.*, in which he told the trial court: "You know right now I just would like to put a verbal motion before this Court of rule 3.600, grounds for new trial. There is evidence that was available during the trial that wasn't gathered by my attorneys, you know, and I feel that I did not receive a fair and impartial trial because of this." Pet. 4.

3. Petitioner later sought postconviction relief in state court. Pet. App. 26. As relevant here, Petitioner claimed that his trial counsel "was ineffective because counsel conceded guilt" to a lesser charge "without [Petitioner's] consent." Pet. App. 27. The postconviction court ordered an evidentiary hearing on this claim. Pet. App. 28. There Petitioner testified that he had always maintained to his attorneys that he was innocent. Pet. App. 186. He continued that "[t]here was never a discussion of any such magnitude about conceding guilt. If there had been . . . I would have told them point blank, no, you are not to do it." Pet. App. 189. He claimed that his trial counsel never discussed strategy with him because counsel apparently expected the court to continue his trial. Pet. App. 188. Petitioner also testified that John White, a member of his trial team, showed Petitioner the State's evidence before trial and asked whether he would like to plead guilty. Pet. App. 190. Petitioner did not say whether he responded to this question. *See id.*

Petitioner's trial counsel testified differently. The other member of his trial team, Michael Schwartzberg, said that he believed that the State had enough evidence to convict Petitioner of first-degree murder and that he had "[d]efinitely" discussed that reality with Petitioner before trial. Pet. App. 152. As for conceding guilt to second-degree murder during closing, Schwartzberg testified that though he lacked an "independent recollection," he "believe[d] that [he] did" tell Petitioner about the lesser-offense concession strategy. Pet. App. 159. He said that he had never failed to explain his strategy to a client, Pet. App. 169, and that it was his "standard

practice" to tell the client "ahead of time" about a lesser-offense concession strategy. Pet. App. 159. To his recollection, Petitioner never expressed "any kind of complaint with . . . trying to get a lesser-included offense." Pet. App. 170. Both members of Petitioner's trial team disputed trying to press him to concede guilt outright before the trial. Pet. App. 141, 166. And Schwartzberg believed that there would have been little benefit to conceding total guilt, so he did not think that he "would ever [have] had that discussion." Pet. App. 166.

After the hearing, the postconviction court denied relief. The court did not "resolve the factual dispute over whether [Petitioner's] lawyers discussed [the lesser-offense concession] strategy with him." *Atwater v. Crosby*, 451 F.3d 799, 808 (11th Cir. 2006) (reviewing the issue on review of a later 28 U.S.C. § 2254 petition). Rather, the court denied the motion because it found that "the concession of guilt was a 'legitimate trial strategy even without the defendant's knowledge or consent.'" *Id.*

The Florida Supreme Court affirmed. Pet. App. 26–30. The court avoided the factual dispute, too, though it noted that although Schwartzberg "did not recollect a specific conversation" with Petitioner "as to whether [he] would consent" to conceding a lesser offense, he testified that he "always explains his strategy to his clients and would have done so in this case." Pet. App. 28. The Florida Supreme Court instead held that counsel's performance was not deficient because, given the "overwhelming evidence of guilt" against Petitioner, Pet. App. 29, counsel's decision to concede guilt to a lesser charge "was

reasonable." Pet. App. 30. In any event, the court held, even if counsel had performed deficiently, Petitioner could not establish prejudice because "there is no reasonable possibility that the jury would have reached a different conclusion given the evidence against him." *Id.*

Petitioner later filed the same habeas claim under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. *Atwater v. Crosby*, No. 8:02-cv-1103 (M.D. Fla.). The district court denied relief, and the Eleventh Circuit affirmed, holding that the Florida Supreme Court did not act contrary to, or unreasonably apply, clearly established federal law. *Atwater*, 451 F.3d at 809. This Court denied review. *Atwater v. McDonough*, 549 U.S. 1124 (2007).

4. Petitioner followed his first state postconviction motion with four more, "each of which was denied and affirmed on appeal." Pet. App. 2–3 (citing *Atwater v. State*, 892 So. 2d 1011 (Fla. 2004); *Atwater v. State*, 6 So. 3d 51 (Fla. 2009), *cert. denied*, *Atwater v. Florida*, 558 U.S. 846 (2009); *Atwater v. State*, 118 So. 3d 219 (Fla. 2013); *Atwater v. State*, 234 So. 3d 550 (Fla. 2018), *cert. denied*, *Atwater v. Florida*, 139 S. Ct. 182 (2018)).

Then, in 2019, Petitioner filed his sixth state postconviction motion—the motion at issue here. Pet. App. 2. In it, Petitioner alleged that his trial counsel violated his right to autonomy under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), when counsel conceded his guilt to the lesser charge of second-degree murder. Pet. App. 4–5. Petitioner executed an affidavit in support of his motion. Pet. App. 216–19. The affidavit asserted that he and his counsel had "no

conversations about conceding [his] guilt," and that the first time he learned that counsel planned to concede guilt "was during the rebuttal closing arguments." Pet. App. 218. He claimed that he "continually maintained [his] innocence" to his attorneys, and that if his attorneys had told him about their lesser-offense concession strategy beforehand, he "would not have agreed to it." Pet. App. 219. Finally, in describing his meeting with counsel before the trial, he again noted that the attorneys presented him with the State's evidence, but he did not claim that they asked him to plead guilty outright, nor did he claim that he refused to plead guilty. Pet. App. 218.

The trial court did not hold an evidentiary hearing; it "dismissed the successive postconviction motion[] for two reasons." Pet. App. 13. "First, the court found that the postconviction motion was untimely." *Id.* The court recognized that Florida Rule of Criminal Procedure 3.851(d)(1) "requires postconviction motions in capital cases to be filed within one year of the judgment and sentence becoming final, subject to limited exceptions." *Id.* Since Petitioner's conviction became final in 1994, "[Petitioner] sought to avail himself of rule 3.851(d)(2)(B)," which creates an exception for motions that allege that "the fundamental constitutional right asserted was not established" within a year of the challenged conviction and sentence becoming final and that the right "has been held to apply retroactively." *Id.* "The trial judge found that under the plain language of the rule, a defendant cannot file a motion under this exception unless the constitutional right asserted 'has been held' to apply retroactively prior to the motion being filed." *Id.* "Because no court ha[d] held

that *McCoy* applies retroactively, the trial court found that this exception to the one-year time limitation did not apply." *Id.*

"Second, even if the postconviction motion had been timely, the court found it was without merit." *Id.* "Taking as true the factual allegations" in Petitioner's motion, the court found that *McCoy* did not apply because Petitioner "did not allege that counsel conceded his guilt over [Petitioner's] objections." *Id.* "Instead, [Petitioner's] motion states that he never discussed with his attorneys the possibility of conceding guilt." *Id.* The trial court thus found the case "to be controlled by *Florida v. Nixon*," 543 U.S. 175, 178 (2004), in which this Court held that when the defendant "'neither consents nor objects' to a proposed trial strategy of conceding guilt, there is no 'blanket rule demanding the defendant's explicit consent.'" *Id.* As a result, the trial court held that Petitioner's *McCoy* claim was "without merit" and dismissed his motion.

The Florida Supreme Court affirmed. Pet. App. 14. It agreed with the trial court that, "accepting as true the factual allegations in [Petitioner's] motion, he has failed to show entitlement to relief under *McCoy*." Pet. App. 13. "Unlike the defendant in *McCoy*, [Petitioner] does not allege that his objective was to maintain his innocence or that he expressly objected to any admission of guilt." *Id.* "Instead, [Petitioner] states that he did not discuss the possibility of conceding guilt with counsel." *Id.* "The crux of [Petitioner's] argument," explained the court, "is to fault counsel for failing to discuss with [him] the potential trial strategy of conceding guilt." *Id.* But that "[a]t its heart

. . . is not a *McCoy* claim; [Petitioner] has not alleged that counsel conceded guilt over [his] objection," so his allegations are "facially insufficient to warrant relief under *McCoy*." *Id.*

REASONS FOR DENYING THE PETITION

I. This case is a poor vehicle.

Petitioner fails to address two antecedent issues that make the question presented "academic" and his case a poor vehicle. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not be granted when the "problem" is only "academic"). First, Petitioner cannot benefit from *McCoy* because it is not retroactive. And second, his claim is time barred under Florida law.

1. Petitioner's conviction became final in 1994, *Atwater*, 511 U.S. 1046, meaning that he cannot obtain relief unless *McCoy* applies retroactively on collateral review. Yet Petitioner says nothing of this threshold issue. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply [a retroactivity analysis] before considering the merits of the claim."); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (refusing to reach the merits when petitioner asked for a new rule to be applied to his case on habeas because any decision would not have been retroactive). And indeed, *McCoy* is not retroactive under either federal law or state law.

a. From a federal-law standpoint, Petitioner cannot benefit from *McCoy* on collateral review unless

this Court announced a new rule[2] that is either substantive or a watershed rule of criminal procedure. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). *McCoy* announced neither.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). In contrast, watershed procedural rules implicate "the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 355. To qualify, the rule must (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418 (quotation marks omitted). These rules are exceedingly rare. The only rule that this Court has said "*might* fall within this exception" is the right to counsel described in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Beard v. Banks*, 542 U.S. 406, 417 (2004) (emphasis added). And "because any qualifying rule would be so central to an accurate determination of innocence or guilt [it is] unlikely that many such components of basic due process have yet to emerge." *Id.* (quotation marks omitted)*; accord Schriro*, 542 U.S. at 352; *Tyler v. Cain*, 533 U.S. 656, 666 n.7 (2001); *Sawyer v. Smith*, 497 U.S. 227, 243 (1990).

In *McCoy*, "the defendant vociferously insisted that he did not engage in the charged acts and

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[2] Because more than a year has passed since Petitioner's conviction and sentence became final, Petitioner can benefit from *McCoy* only if it established a new rule; his claim is time-barred otherwise. *See* Fla. R. Crim. P. 3.851(d).

adamantly objected to any admission of guilt." 138 S. Ct. at 1505. Even though the defendant "repeatedly and adamantly insisted on maintaining his factual innocence," however, defense counsel told the jury that the evidence unambiguously established that McCoy committed the three murders and purported to take the burden of proof off the prosecution. *Id.* at 1507, 1510. The Court held 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." *Id.* at 1505; *see infra* Part III.

That is not a new substantive rule; it does not change "the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. Nor is it a new watershed rule of procedure. For one thing, the rule does not protect "the defendant from erroneous conviction"; it protects only "the defendant's right to make the fundamental choices about his own defense." *McCoy*, 138 S. Ct. at 1511. For another, *McCoy* did not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418. To the contrary, the "respect for the individual" that drove the Court's decision in *McCoy* has long been "the lifeblood of the law." 138 S. Ct. at 1507. A rule recognizing 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, is not a groundbreaking revelation, let alone one on par with the right to counsel described in *Gideon*. *See Beard*, 542 U.S. at 417. It is no surprise, then, that courts have uniformly held that *McCoy* does not apply

retroactively on collateral review. *See, e.g.*, *Smith v. Stein*, 982 F.3d 229, 235 (4th Cir. 2020); *Christian v. Thomas*, 982 F.3d 1215, 1224–25 (9th Cir. 2020); *United States v. Allen*, 2020 WL 3865094, at *5–6 (E.D. Ky. Feb. 28, 2020), *report and recommendation adopted*, 2020 WL 1623988 (E.D. Ky. Apr. 2, 2020); *Elmore v. Shoop*, 2019 WL 3423200, at *10 (S.D. Ohio July 30, 2019); *Johnson v. Ryan*, 2019 WL 1227179, at *2 (D. Ariz. Mar. 15, 2019); *Commonwealth v. Gonzalez*, 242 A.3d 416 (Pa. Super. Ct. 2020) (table).

b. *McCoy* is not retroactive under Florida law either. In Florida, a change in law applies retroactively only if the change, among other things, is one of "fundamental significance." *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020). A rule is of "fundamental significance" if it "(1) places beyond the authority of the state the power to regulate certain conduct or to impose certain penalties or (2) when the rule is of sufficient magnitude to necessitate retroactive application under" the three-factor *Stovall*/*Linkletter* test. *Id.* at 1019 (citing *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)). The *Stovall*/*Linkletter* factors cut in favor of retroactivity only if the new rule represents a "jurisprudential upheaval[.]" *Id.* at 1021. Mere "evolutionary refinements in the criminal law, affording new or different standards" for "procedural fairness" do not suffice. *Id.* Like this Court has for watershed procedural rules, the Florida Supreme Court has listed *Gideon* as "the prime example of a law change included within this category." *Id.*

McCoy did not announce a new rule of fundamental significance. As explained above, it does

not change the State's power to regulate conduct or impose penalties; it regulates the procedural relationship between counsel and client. Nor is it a "jurisprudential upheaval" on par with *Gideon*. The right to autonomy described in *McCoy* has long been a bedrock of American law. *See McCoy*, 138 S. Ct. at 1507. And *McCoy*'s precise holding—that counsel in that case violated the Sixth Amendment by admitting, "over the defendant's intransigent and unambiguous objection," that the defendant killed the victims, while arguing that he was not guilty of the crimes charged because he lacked the requisite *mens rea*—is merely an "evolutionary refinement" applying that bedrock principle to a specific factual scenario. *See id.* at 1507, 1512; *see also id.* at 1512 (Alito, J., dissenting) (noting that defense counsel's predicament at McCoy's trial "was the result of a freakish confluence of factors that is unlikely to recur").

Since Petitioner cannot benefit from *McCoy* on collateral review, his petition is not certworthy.

2. As the state postconviction court explained, Petitioner's claim—raised in his fifth successive motion for postconviction relief—is also time barred under Florida law. Pet. App. 3–4, 8–9.[3] Under Florida Rule of Criminal Procedure 3.851(d), a defendant seeking collateral relief more than a year after his judgment and sentence have become final must fall within a timeliness exception. Petitioner contends that his claim falls within Subsection (d)(2)(B), which

[3] The Florida Supreme Court affirmed the trial court's order denying postconviction relief but deemed it "unnecessary to address" the trial court's timeliness ruling because it held that Petitioner's claim failed on the merits. Pet. App. 14.

excepts claims alleging that (a) "the fundamental constitutional right asserted was not established" within one year of the challenged conviction and sentence becoming final and (b) the right "has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). The postconviction court held that this exception did not apply, as "neither the Florida nor United States supreme courts have held that *McCoy* applies retroactively." Pet. App. 4.

The postconviction court was right to conclude that Petitioner's motion was both "successive and untimely" under Florida law. Pet. App. 3. Petitioner filed his fifth successive postconviction motion on May 3, 2019, almost 15 years after his conviction and sentence became final. Pet. App. 2. His motion cited not one case holding that *McCoy*—the authority purportedly establishing a new and fundamental constitutional right—"*has been held* to apply retroactively," Fla. R. Crim. P. 3.851(d)(2)(B) (emphasis added), as required by the plain text of the Florida procedural rule Petitioner invoked as a basis for filing yet another successive motion for state postconviction relief. *See* R. 6–7. In addition, nothing prevented Petitioner from raising his Sixth Amendment claim in his first five motions for postconviction relief. Indeed, Petitioner *did* raise that claim in earlier proceedings, Pet. App. 26–30; the state courts properly rejected it on the merits, *id.*; the federal courts did as well, *Atwater*, 451 F.3d at 808–09; and this Court denied review, *Atwater*, 549 U.S. 1124. Simply recasting the same essential claim under *McCoy* does not give Petitioner a right, under state law, to relitigate the issue.

Because Petitioner does not qualify for a timeliness exception, the state postconviction court correctly concluded that his fifth successive motion for state postconviction relief is time-barred under Florida law.

II. The decision below does not create a split of authority.

Petitioner does not allege that the decision below breaks with decisions from other state courts of last resort or from the federal courts of appeals. *See* Sup. Ct. R. 10(b). And there is no split. Courts routinely hold—as the state courts did below—that there is no Sixth Amendment violation under *McCoy* when the defendant does not object to conceding guilt before the concession is made. *See, e.g.*, *United States v. Wilson*, 960 F.3d 136, 143–44 (3d Cir. 2020), *cert. denied sub nom. Moore v. United States*, 2021 WL 78297 (U.S. Jan. 11, 2021), and *cert. denied sub nom. Wilson v. United States*, 2021 WL 78300 (U.S. Jan. 11, 2021); *United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019); *Saunders v. Warden*, 803 F. App'x 343, 346 n.4 (11th Cir. 2020); *State v. Froman*, 2020 WL 5665728, at *21 (Ohio Sept. 24, 2020); *Flores v. Williams*, 478 P.3d 689, at *2 (Nev. Jan. 15, 2021) (table); *Epperson v. Commonwealth*, 2018 WL 3920226, at *12 (Ky. Aug. 16, 2018); *People v. Lopez*, 242 Cal. Rptr. 3d 451, 459–60 (Cal. App. 2019); *Broadnax v. State*, 2019 WL 1450399, at *6 (Crim. App. Tenn. Mar. 29, 2019).

To be sure, Petitioner argues that his case is different because counsel allegedly failed to consult with him before conceding guilt to a lesser charge. Pet. 22–28. But even if the record supported that

allegation—and it does not, *see supra* Statement at 3–5—such an argument fails to establish a conflict between the decision below and this Court's decision in *McCoy*, which addressed "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *See* 138 S. Ct. at 1507.

Nor does Petitioner establish a split of authority among the state courts of last resort and the federal courts of appeals. No other state court of last resort and just one federal court of appeals has decided whether an attorney's failure to consult with the client about conceding guilt violates *McCoy*. *See Wilson*, 960 F.3d at 143–44. The sole federal appellate court said no. *See id.* And the few other courts to consider the issue have echoed that court, holding, as the state courts did below, that an attorney's failure to consult does not give rise to a *McCoy* violation. *See, e.g.*, *Pennebaker v. Rewerts*, 2020 WL 4284060, at *4 (E.D. Mich. July 27, 2020); *Ex parte Barbee*, 2021 WL 476477, at *7 (Tex. Crim. App. Feb. 10, 2021); *People v. Santana*, 2019 WL 3425294, at *9 (Cal. Ct. App. July 30, 2019); *In re Somerville*, 2020 WL 6281524, at *4 (Wash. App. Oct. 27, 2020).[4] *A fortiori*, those cases did not accept Petitioner's view that an alleged failure to consult about a strategy of conceding guilt to a lesser offense violates *McCoy*.

[4] The Florida Supreme Court also reaffirmed this conclusion recently, citing the decision below. *See Harvey v. State*, 2021 WL 386575, at *2 (Fla. Feb. 4, 2021).

Since Petitioner identifies no split of authority, and since there in fact is no split, this Court should deny review.

III. The decision below correctly held that Petitioner failed to state a Sixth Amendment violation under *McCoy*.

Petitioner claims that his counsel "violated his sacred right to autonomy," "as articulated by this Court in *McCoy*," when counsel conceded his guilt to a lesser offense. Pet. 20. Not so. As this Court explained in *McCoy*, counsel violates the client's Sixth Amendment right to autonomy—more specifically, his right to choose the objective of his defense—only when counsel overrules the client's express objection to conceding guilt. Petitioner admits that he never objected to his counsel conceding his guilt to a lesser charge in hopes of saving his life. So counsel did not override his expressed objective and thus did not violate the Sixth Amendment right described in *McCoy*.

1. The Sixth Amendment violation described in *McCoy* is defined by its facts. Robert McCoy was facing a death sentence for three counts of first-degree murder. *McCoy*, 138 S. Ct. at 1506. Though he pleaded not guilty, *id.*, his counsel "concluded that the evidence against [him] was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid." *Id.*

With this in mind, counsel told McCoy "two weeks" beforehand that he planned to concede guilt at trial. *Id.* McCoy was "furious." *Id.* He "vociferously insisted

that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. He also ordered his counsel "'not to make that concession,' and [his counsel] knew of McCoy's 'complete opposition'" to the concession. *Id.* at 1506 (alterations accepted). McCoy instead "pressed [his counsel] to pursue acquittal." *Id.*

McCoy's counsel disobeyed his wishes, conceding at trial that McCoy committed the murders. *Id.* at 1506–07. McCoy immediately objected in open court. *Id.* at 1506. He also "testified in his own defense, maintaining his innocence." *Id.* at 1507. Even so, the jury "returned three death verdicts." *Id.* McCoy then moved for a new trial, arguing that his constitutional rights were violated when counsel conceded his guilt "over [his] objection." *Id.*

On certiorari review, this Court agreed. It recognized that "a defendant's choice in" exercising the right to defend himself "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* Applying this principle in the concession context, the Court held 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." *Id.* at 1509 (emphasis omitted). The Court also distinguished an earlier case—*Florida v. Nixon*—because "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective." *Id.* Rather, "Nixon complained about the admission of his guilt only after trial," while McCoy

"opposed [his counsel's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.*[5] Because McCoy presented his counsel "with express statements of [his] will to maintain innocence . . . counsel [could] not steer the ship the other way." *Id.* Doing so violated the Sixth Amendment. And because the violation turned on the "client's autonomy, not counsel's competence," the error was "structural," not governed by this Court's "ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510–11.

2. This Court's analysis makes clear that the violation found in *McCoy* arises in a "stark scenario," *id.* at 1510, in which the client expressly objects to conceding guilt and counsel "overrides" his wishes. *Id.* at 1509. Thus, *McCoy* describes a Sixth Amendment violation that flows not from the effects of "counsel's [in]competence," but from counsel's intrusion into the realm of "client[] autonomy." *Id.* at 1510. Said differently, the violation turns not on negligent conduct, but on intentional disregard for the client's stated objective. Counsel violates the right described in *McCoy* when he deliberately "usurp[s] control of an issue" within the client's "sole prerogative"—the

[5] This discussion of *Nixon* shows why Petitioner's first argument—that *McCoy* "precludes defense counsel from conceding guilt for strategic reasons without the defendant's *explicit permission*"—is wrong. Pet. 8 (emphasis added). *Nixon* held precisely the opposite, rejecting a "blanket rule demanding the defendant's explicit consent," and explaining that counsel sometimes need not obtain permission. 543 U.S. at 192. At no point did *McCoy* purport to overrule *Nixon*. Nor did it need to; the facts of *McCoy* required the Court to resolve whether defense counsel may "concede guilt over the defendant's intransigent and unambiguous objection." *See* 138 S. Ct. at 1507.

decision to maintain innocence at trial. *Id.* at 1511. But if the client does not express his desire to maintain innocence at trial, there is no asserted decision for counsel to "override," *id.* at 1509, and thus no *McCoy* violation.

Of course, counsel cannot simply bury her head in the sand to avoid a Sixth Amendment violation. Her failure to consult about the decision to concede guilt can still violate the Constitution. But that violation flows from "counsel's [in]competence" and sounds in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 1510–11; *see also Wilson*, 960 F.3d at 144 (rejecting a claim that counsel's failure to consult violated *McCoy* while noting that counsel still "retains the ethical responsibility to consult with the defendant" and citing "*Strickland*'s two-part test for effective assistance").[6] This Court recognized as much in *McCoy* when it cited *Nixon*—an ineffective-assistance case—for the idea that "[c]ounsel . . . must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option." *Id.* at 1509. And sure enough, courts have long applied *Strickland* to cases in which counsel failed to consult with the client before conceding guilt. *See, e.g.*, *Darden v. United States*, 708 F.3d 1225 (11th Cir. 2013); *United States v. Thomas*, 417 F.3d 1053 (9th Cir. 2005).

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[6] *Accord Santana*, 2019 WL 3425294, at *9 ("[Counsel's] failure to consult with Santana before conceding his guilt may well implicate his competence as counsel. But Santana's claim here is not that [counsel] performed incompetently; his claim is that [counsel's] concession violated his own autonomy to pursue his desired objectives. That issue is distinct from the effectiveness of counsel's performance." (citation omitted)).

In short, a defendant claiming that counsel failed to consult about a planned concession is asserting that counsel violated a professional duty to "consult with the client as to the means" to pursue his desired objectives. *See* Model Rules of Prof. Conduct R.1.2(a) (2016). That, "[a]t its heart" is a *Strickland* claim, "not a *McCoy* claim." Pet. App. 13; *see also id.* (citing *Nixon* and *Strickland* for the idea that an attorney "has a duty to consult with the client regarding 'important decisions'").

3. With these principles in mind, Petitioner fails to state a *McCoy* claim. Taking his allegations as true,[7] he does not claim that he objected pre-concession to his counsel's strategy to concede guilt to a lesser charge. In fact, Petitioner admits that he did not object. *See* Pet. 22 ("[I]t is true [Petitioner] never explicitly expressed his objection to a guilt concession defense for the purpose of obtaining a second-degree murder verdict."). And without an express objection to conceding guilt, there is no *McCoy* violation.

Nevertheless, Petitioner argues that it is "implicit from the record that [he] intended to maintain his innocence throughout the trial proceedings." *Id.* This argument fails for several reasons. First, the holding of *McCoy* does not apply when a defendant alleges that he "implicitly" conveyed an objection to conceding guilt. *McCoy* recognized a Sixth Amendment right that applies when the client "expressly asserts that the objective of 'his defence' is to maintain innocence."

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[7] When, as here, the trial court does not hold an evidentiary hearing, Florida courts accept the defendant's factual allegations as true so long as they are not refuted by the record. *See* Pet. App. 13; *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999).

138 S. Ct. at 1509 (emphasis omitted). Petitioner cites not one case extending *McCoy* to circumstances in which the client "implicitly" communicates this decision.[8]

Second, even if a *McCoy* violation may be shown by proving that a defendant implicitly told defense counsel that he wished to maintain his innocence at trial, Petitioner's claim still would not qualify, because that is not what he claims to have done. He does not claim that he told counsel that he wished to maintain innocence at trial; he claims only that he "maintained his innocence with his attorneys during private consultations and insisted that he did not kill

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[8] And even if Petitioner could express this decision implicitly, his allegations do not establish that he did so. *See* Pet. 22. His not-guilty plea, for instance, is not enough. The client in *Nixon* pleaded not guilty and that did not suffice as a statement of the client's objective. No doubt, "defendants enter pleas of not guilty and go to trial for many reasons, not just to prove their factual innocence." *Santana*, 2019 WL 3425294, at *9 n.4.

Petitioner's claim that he declined a total guilty plea the night before trial is not enough either. To start, his most recent affidavit does not allege that his counsel asked him to plead guilty, let alone allege that he expressly declined. Pet. App. 218. His attorneys also refuted this claim. Pet. App. 141, 166. And even if his counsel did ask him to plead guilty to all charges the night before trial, refusing to plead guilty to first-degree murder is not an express objection to conceding guilt to a lesser charge like second-degree murder, which is not punishable by death.

Finally, Petitioner's oral motion at sentencing falls short. At the gate, it is unclear if this motion even referenced the concession; Petitioner objected to his counsel's alleged failure to present certain evidence, not to his counsel conceding guilt to a lesser charge. *See* Pet. 4. But even if the motion were related, this objection—raised after he had lost at trial—does little to reveal his pre-concession defense objectives and whether he made those objectives known to counsel.

the victim." Pet. 22; *see also* Pet. App. 219 ("I continually maintained my innocence to my attorneys."). But telling your lawyer that you are innocent differs from telling your lawyer to maintain innocence at trial. One is a statement of fact; the other is a client command. Nowhere does Petitioner "allege that he expressed to counsel that his objective was to maintain his innocence" at trial. Pet. App. 13; *see also Ex parte Barbee*, 2021 WL 476477, at *7 ("These facts demonstrate that Applicant told his attorneys that he was innocent; they do not demonstrate that he told them that his defensive objective was to maintain his innocence at trial."). Nor did he object when counsel allegedly foiled this silent goal by conceding guilt to a lesser charge. Because he did not inform his counsel that it was his will that they maintain his innocence to the jury, Petitioner did not raise a pre-concession objection that his counsel overruled, and thus cannot state a *McCoy* claim. *See, e.g.*, *Morgan v. State*, 2020 WL 2820172, at *4 (Ala. Crim. App. May 29, 2020) ("Because there is nothing in the record showing that Morgan told his counsel, before trial, that he wanted to pursue a theory of absolute innocence rather than a theory of self-defense, Morgan's counsel's statements . . . did not, as Morgan argues, violate *McCoy* or Morgan's Sixth Amendment right to determine the objective of his own defense.").

Petitioner next contends that the reason he did not "explicitly express[] his objection to a guilt concession defense" is that his counsel failed to consult with him before the concession. Pet. 22. But this, "[a]t its heart," is a *Strickland* claim, "not a *McCoy* claim." Pet. App. 13; *supra* Part III.2. In fact, it is the same *Strickland* claim he raised in his first state postconviction

motion. As before, he alleges a Sixth Amendment violation "because counsel conceded guilt" to a lesser charge "without [Petitioner's] consent." *Compare* Pet. App. 27 (making this argument in his first postconviction motion), *with* Pet. 20–28 (making the argument now). As before, he contends in support that "there was never a discussion of any such magnitude about conceding guilt. If there had been . . . I would have told them point blank, no, you are not to do it." *Compare* Pet. App. 189 (raising this point to support his first postconviction motion), *with* Pet. 15–17 (raising this point now). As before, he focuses heavily on his counsel's alleged incompetence, spending pages of his petition arguing that they failed to consult because they were unprepared for trial. *Compare Atwater*, 451 F.3d at 808–09 (describing Petitioner's efforts to establish his trial counsel's allegedly deficient performance in his first postconviction motion), *with* Pet. 15–16, 22–24 (highlighting his trial counsel's allegedly deficient performance now). And as before, his chief support is the transcript from the evidentiary hearing on his ineffective-assistance claim. *See* Pet. 14–17.

In truth, then, Petitioner has brought a *Strickland* claim—one that he already lost and that this Court already declined to consider, *Atwater*, 549 U.S. 1124—and recast it as a *McCoy* claim.[9] Because the lower

[9] And even if Petitioner could distinguish his prior *Strickland* claim and raise a new one claiming that his counsel was deficient for committing a structural *McCoy* error, he would still need to prove prejudice on collateral review. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Given the "overwhelming evidence of guilt" against him, Pet. App. 29, he cannot do so.

courts rightly held that his is not a *McCoy* claim, the Court should deny review.

IV. The question presented is not of exceptional importance.

Petitioner does not claim that this case is of exceptional importance. *See* Sup. Ct. R. 10(c). And it is not. To start, even if this were a true *McCoy* claim, *McCoy* claims involve a "freakish confluence of factors that is unlikely to recur." *McCoy*, 138 S. Ct. at 1513–17 (Alito, J., dissenting). First, "few rational defendants facing a possible death sentence are likely to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the chances of avoiding execution." *Id.* at 1514–15. "By the same token, an attorney is unlikely to insist on admitting guilt over the defendant's objection unless the attorney believes that contesting guilt would be futile." *Id.* at 1515. So *McCoy* claims typically arise only "in cases involving irrational capital defendants." *Id.* Second, if counsel and client unflinchingly disagree on trial strategy, they generally part ways rather than continue course with divergent views. *Id.* And third, even if all these circumstances are met, the violation occurs only if "the defendant expressly protests counsel's strategy of admitting guilt." *Id.*

The fact Petitioner claims makes a difference—that his counsel purportedly did not consult him before conceding to a lesser charge—only makes his case more remote. For in his bid to avoid *Strickland* and fit within *McCoy*, Petitioner has posited a once-in-a-blue-moon scenario. His proposed claim arises when an attorney—in dereliction of his professional

duty to consult with the client—concedes his client's guilt to a lesser charge, all while his client fails to make his objection known before the concession and fails to object at trial when the concession is made. The few cases considering this mixture of missteps underscores its infrequency. *See supra* Part II at 15. So even if this claim were a variant of *McCoy*—and it is not—its occurrences will be few and far between. Indeed, if *McCoy* claims are "like a rare plant that blooms every decade or so," 138 S. Ct. at 1514 (Alito, J., dissenting), Petitioner's claim is yet another shade rarer.

* * *

In sum, the petition is a poor vehicle to consider the question presented, identifies no split of authority, fails to state a *McCoy* violation, and does not raise an issue of exceptional importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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