No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

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ISIAH LAMONTE BROWN, *Petitioner*

vs.

THE STATE OF CALIFORNIA, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What standard of prejudice, if any, must be satisfied to reverse a conviction because trial counsel violated the defendant's fundamental autonomous right to testify?

2. Must waiver of the right to testify be clearly established as knowing and voluntary? If so, how might such waiver be established, and who bears that burden?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the California Supreme Court and the California Court of Appeal were the State of California and Petitioner Isiah Lamonte Brown, as stated in the caption.

RELATED PROCEEDINGS

The following proceedings are directly related to the instant case:

- *People of California v. Brown*, Solano County Superior Court No. VCR228826, judgment entered on October 27, 2017;
- *People of California v. Brown*, California Court of Appeal, First Appellate District, Division Two, No. A152905, unreported opinion filed on September 29, 2020.
- *People of California v. Brown*, California Supreme Court No. S265439, Petition for Review denied on December 30, 2020.

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Petitioner Isiah Lamonte Brown respectfully prays that a Writ of Certiorari issue to review the decision of the California Court of Appeal, First District, Division Two, affirming the judgment of the Solano County Superior Court, convicting Petitioner of robbery and domestic violence felonies, with a sentence of probation. As set forth in his accompanying motion, Petitioner requests leave to proceed *in forma pauperis*, as he is indigent and counsel was appointed to represent him in the California courts.

OPINION BELOW

The unreported Opinion of the Court of Appeal of the State of California, First District, Division Two, affirming the judgment, appears as

Appendix A, and its unreported Order Modifying the Opinion and Denying Rehearing appears as Appendix B. The unreported Order of the California Supreme Court denying review appears as Appendix C.

JURISDICTION

This Petition arises from a final judgment rendered by the Court of Appeal of the State of California, First District, Division Two, regarding Petitioner's appeal of his conviction and sentence. An unreported Opinion affirming the judgment was filed by that court on September 29, 2020, and then modified pursuant to a petition for rehearing on October 28, 2020. App. B & C. The California Supreme Court denied Brown's Petition for Review of the Opinion on December 30, 2020. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This Petition is timely pursuant to Supreme Court Rules 13 and 30.1, and the Miscellaneous Order of March 19, 2020.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> 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.

The Fourteenth Amendment to the United States Constitution, section 1, 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 laws.

STATEMENT OF THE CASE

Petitioner Isiah Lamonte Brown was charged with felony violations of California Penal Code section 273.5 subdivision (a) (corporal injury to child's parent), and section 211 (second-degree robbery). CT 11-12.[1]

At a jury trial commencing on September 11, 2017, the mother of Mr. Brown's daughter testified that he injured her finger while grabbing her keys from her hand, and that she pepper-sprayed him and called 911 as he drove off with the keys to her house to obtain a copy of the lease. 5RT 464, 468-469. The defense presented the responding officer who reported observing no injuries. 6RT 617-19. After the jury returned guilty verdicts on both counts, the Court directed Brown to report to probation, and he responded that he had a

[1] "CT" refers to the Clerk's Transcript of the trial proceedings and "RT" refers to the Reporter's Transcript, both lodged with the Court of Appeal.

question. 7RT 821, 825-26. The court told Brown to talk to his attorney and concluded the proceedings. 7RT 826.

Prior to sentencing on October 27, 2017, the court cleared the courtroom of everyone except Mr. Brown and his counsel for a hearing to address "some concerns about his representation." Sealed RT 3. Brown asserted his right to effective assistance of counsel and explained his claims were that his attorney "declined and advised me not to testify. [¶] So I actually wanted to testify on my behalf, and he told me not to." Sealed RT 3[2] (citing *Strickland v. Washington*, 466 U.S. 668 (1984).)

When the court asked counsel about these concerns, counsel responded, "I did advise him not to testify. I made that decision based on my discussions with him and my belief that his testimony would not be beneficial based on some practiced testimony we did previously." Sealed RT 7. When the court asked, "how did that discussion end? Did he take your advice?" Counsel responded, "I think he took my advice." Sealed RT 7. After discussing other issues, the court began to indicate it would be denying the motion, when Mr. Brown asked if he could say one more thing:

> I just want to say, for the record, in my defense, when it comes to my life and my freedom, I should have a right … to have my input heard and my defense in the way that I feel that's best for me.
> …

[2] The cited redacted portions of the sealed transcripts were provided to the Attorney General. In addition, Petitioner requested and received permission from the Court of Appeal to publicly discuss the redacted portions.

> There's 12 people up there, Your Honor. 12 minds, 12 different personalities, 12 different people from walks of life and all they get to hear when they come in the courtroom is one side of the spectrum, which is the woman saying I did this to her. It's always two sides to every story, and the jury, these 12 people, did not get to hear my side of the story because he told me not to go up there and testify on my behalf.

Sealed RT 12-14. When the court indicated Brown disagreed with counsel strategy in "hindsight," Brown responded:

> It's not a hindsight here. I told him this prior to the trial start. I did not agree in no way, shape, or form, sir, with me not testifying. I never once said, "Okay. I don't want to testify." I've always told him that I want to testify.

Sealed RT 14. As the court was stating, "[counsel] acknowledges that and he says that he talked you out of it because you shouldn't want to…," Brown interjected:

> No, sir. Sir, he didn't talk me out of it. I always wanted to testify. *He didn't allow me to.* He did not talk me out of it. I did not agree in any way, shape, or form that I did not want to testify.
> …
> How can you only just let one person speak on their behalf on their situation? How do you not give me an opportunity to say what happened and speak on my behalf? How is that right? I don't understand how that is fair.

Sealed RT 14 (emphasis added). When the court asked counsel, "as to the idea of him taking your advice as opposed to you denying him his right to testify," counsel responded, "I think he took my advice, and I think that … was the right decision." Sealed RT 15. The trial court denied the motion and sentenced Petitioner to three years of probation. Sealed RT 15; 8RT 10-11; CT 153-154.

In an Opening Brief filed on August 14, 2018, Mr. Brown argued to the California Court of Appeal, First District, Division Two, that his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution were violated because his counsel prevented him from testifying, rendering the proceedings fundamentally unfair, as contemplated by this Court in *Strickland*, 466 U.S. 668, and *Weaver v. Massachusetts*, ___ U.S. ____, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). AOB 36-54. In his Reply Brief, Brown included discussion of a subsequent decision of the Third District Court of Appeal, *People v. Eddy*, 33 Cal.App.5th 472 (2019), and its reliance on *McCoy v. Louisiana*, __ U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018), to reverse the convictions of a defendant who had asserted his rights to testify and maintain innocence for the first time at a post-conviction hearing. Reply at 16-30. Brown additionally cited this Court's recent decision, *Garza v. Idaho*, ___ U.S. ____, 139 S.Ct. 738, 746, 203 L.Ed.2d 77 (2019), which presumed prejudice in a trial counsel's failure to file a notice of appeal, despite the defendant's signing a broad appellate waiver. Reply at 28-30.

In an unreported Opinion filed on September 29, 2020, the Court of Appeal found Brown had waived his right to testify by not personally raising the issue during any court hearings before his conviction, and distinguishing *Eddy* as "inapposite for multiple reasons, including because it involved a defendant's right to maintain his innocence, not any desire to testify, and did not address" two California Supreme Court opinions. App. A., Opn. at 19-21 &

fn.10. On October 28, 2020, it issued an Order modifying the Opinion pursuant to Brown's Petition for Rehearing, by inserting language in its footnote 10, noting Brown's citation to this Court's analysis in *McCoy* and *Garza*. App. B. Specifically, the modified footnote inserts *McCoy* within its prior distinction of *Eddy*, while adding they "did not involve a circumstance where the defendant could have cured his counsel's purported failure by raising it to the trial court;" and it distinguishes *Garza* for addressing "a different matter, that being the presumed prejudice resulting from a defense attorney's deficient performance in failing to file an appeal that the defendant wanted to pursue, regardless of whether the defendant had signed an appeal waiver." App. B., Order at 2.

Mr. Brown's petition for review was denied by the California Supreme Court on December 30, 2020. App. C.

REASONS FOR GRANTING THE PETITION

CERTIORARI IS NECESSARY TO PROVIDE COURTS WITH UNIFORM, CONSTITUTIONALLY-APPROPRIATE, MECHANISMS FOR PREVENTING AND REMEDYING COUNSELS' VIOLATIONS OF DEFENDANTS' FUNDAMENTAL AUTONOMOUS RIGHT TO TESTIFY.

A. Introduction

In its recent terms, this Court has highlighted a class of fundamental trial decisions belonging solely to the defendant, including whether to plead guilty, to maintain innocence, to testify, or to pursue an appeal. *McCoy v. Louisiana*, __ U.S. ___, 138 S.Ct. 1500, 1508, 200 L.Ed.2d 821 (2018) (distinguishing these fundamental autonomous decisions from the evidentiary and argumentative decisions belonging to counsel); *id.* at 1516 (Alito, J.,

dissenting); *Garza v. Idaho*, ___ U.S. ____, 139 S.Ct. 738, 746, 203 L.Ed.2d 77 (2019). Mr. Brown's attempts to have the California courts apply these cases' analyses to his counsel's violation of his autonomous right to testify were rejected pursuant to jurisprudential inconsistencies, which only this Court can remedy.

First, this Court has not yet identified the prejudice lens which should apply to a violation of the right to testify by trial counsel, rather than the court. Its analysis of an attorney's violation of a distinct fundamental right in *Weaver v. Massachusetts*, ___ U.S. ____, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017), suggests an outcome-determinative application of *Strickland* prejudice is inappropriate, as the violation necessarily renders the proceedings fundamentally unfair, and its effect on the outcome would be impossible to assess. Its structural treatment of an attorney's violation of an analogous fundamental autonomous right in *McCoy*, 138 S.Ct. 1500, appears applicable; however, many courts are limiting *McCoy's* analysis to violations that are condoned by the trial court.

Second, while courts have long recognized the fundamental nature of the right to testify, some have been associating it with the strategic decisions allocated to counsel; and many presume waiver from a defendant's silence in not taking the stand, while others require an affirmative waiver be obtained. This Court's recognition that waiver of a fundamental right must be clearly-established, and its placing the right to testify firmly within the category of

fundamental autonomous decisions belonging solely to the defendant, rather than counsel, suggest silence is insufficient to support waiver. *See Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *McCoy*, 138 S.Ct. at 1508. However, absent more-direct guidance from this Court, lower courts' hands are tied in addressing these violations post-conviction. *See*, *e.g., Hartsfield v. Dorethy*, 949 F.3d 307, 316 (7th Cir. 2020).

Nevertheless, one California appellate court applied *McCoy* to find an attorney violated the defendant's fundamental autonomous rights to maintain innocence and to testify, even when he brought the violations to the court's attention following conviction. *People v. Eddy*, 33 Cal.App.5th 472, 477-78, 481-83 (2019). Mr. Brown argued the same analysis should apply to his similar facts, but his appellate court disagreed, relying on California Supreme Court authority, which had treated the right to testify as one of the rights requiring "the direction of competent counsel," like the rights to "produce evidence and to confront and cross-examine adverse witnesses." Opn. at 18-20; *People v. Bradford*, 14 Cal.4th 1005, 1053 (1997); *People v. Alcala*, 4 Cal.4th 742, 805-06 (1992). Other appellate decisions have rejected application of *McCoy* where the defendant raised the violation after conviction. *See*, *e.g.*, *Hartsfield*, 949 F.3d at 314-16 (applying *Strickland* and upholding state court's waiver finding under AEDPA, absent clearly-established law from this Court); *People v. Palmer*, 49 Cal.App.5th 268, 281-82 (2020); *People v. Lopez*, 31 Cal.App.5th 55, 66 (2019);

In re Smith, 49 Cal.App.5th 377 (2020) (finding on-the-record protestations and cries of disbelief insufficient to preserve issue).

As discussed further below, a writ of certiorari is required to address this growing split of decisions struggling with the inconsistent authority regarding how and when defendants can be found to have waived their fundamental autonomous right to testify, and how they can remedy their counsels' violations of that right post-conviction.

B. This Court's Guidance Is Needed to Provide Lower Courts with a Meaningful Remedy for Counsels' Violations of Defendants' Fundamental Right to Testify.

The error Mr. Brown raised to both the trial and appellate courts was one attributed to his counsel, namely not allowing Brown to testify, over his express desire to do so. This Court has never specified the appropriate standard for addressing such claims, which courts have been reviewing as ineffective assistance of counsel under *Strickland*. *Hartsfield*, 949 F.3d at 312-13 (listing diverse circuits' decisions).

This Court's recent jurisprudence for other fundamental rights leave unanswered questions here: is this violation properly treated as ineffective assistance of counsel, perhaps with a presumptive prejudice lens as contemplated in *Weaver* and *Garza*; or as structural error, as when a trial court condoned counsel's violation of a Sixth-Amendment-secured autonomous right in *McCoy*? Either way, counsel's violation of his client's right to testify should not require an outcome-determinative assessment of prejudice, because

it renders the proceedings fundamentally unfair by usurping the defendant's right to make fundamental choices about his own defense, and its effect on the outcome "would be immeasurable." *See McCoy*, 138 S.Ct. at 1511; *Weaver,* 137 S.Ct. at 1908, 1911; *cf. Garza*, 139 S.Ct. at 744-47 (presuming prejudice where counsel did not file requested notice of appeal).

"To obtain relief on the basis of ineffective assistance of counsel, the defendant as a general rule bears the burden to meet two standards." *Weaver*, 137 S.Ct. at 1910. "First, the defendant must show deficient performance…" *Id.* (quoting *Strickland*, 466 U.S. at 687). "Second, the defendant must show that the attorney's error 'prejudiced the defense.'" *Id.*

An attorney's preventing a defendant who wants to testify from doing so constitutes deficient performance, without courts' needing to resolve whether counsel had a strategic basis for the decision. *United States v. Mullins*, 315 F.3d 449, 453 (5th Cir. 2002) ("It cannot be permissible trial strategy, regardless of its merits otherwise, for counsel to override the ultimate decision of a defendant to testify contrary to his advice."); *but see United States v. Teague,* 953 F.2d 1525, 1535 (11th Cir. 1992) (en banc) (upholding district court's finding counsel had not been unreasonable in not calling defendant who wanted to testify, because she believed he had assented at the time).

Likewise, determining prejudice should have a presumptive lens when the right to testify is violated by counsel. Though this Court described prejudice as being demonstrated where there is a "'reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different,'" and that is the test traditionally employed from *Strickland*; it also emphasized its principles were not meant to be treated as "mechanical rules." *Strickland*, 466 U.S. at 694-96. "For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Weaver*, 137 S.Ct. at 1911, quoting *Strickland*, 466 U.S. at 696.

In *Weaver*, this Court considered whether a defendant must show *Strickland* prejudice to obtain a new trial if "his attorney unreasonably failed to object to a structural error," namely, a violation of the defendant's right to a public trial. 137 S.Ct. at 1907. Finding that "not every public-trial violation will in fact lead to a fundamentally unfair trial" for the defendant, and it is the kind of error best addressed immediately through objection and on direct appeal, the majority concluded Weaver was required to show prejudice for his post-conviction claim of ineffective assistance of counsel by demonstrating how his trial was rendered fundamentally unfair by the violation. *Id.* at 1908-12 (placing burden on defendant "to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, … to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair"); *but see id.* at 1914-16 (Thomas, J., & Alito, J., concurring) (indicating concerns with assuming fundamental-fairness test in *Strickland*).

The right to testify has similarities and differences with the public-trial structural error in *Weaver*, which make an outcome-determinative assessment of prejudice particularly problematic here. First, it is highly personal to the defendant. *Compare Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (deeming right to testify "[e]ven more fundamental to a personal defense than the right of self-representation"); *with Weaver*, 137 S.Ct. at 1910 (recognizing "right to an open courtroom protects the rights of the public at large, and the press, as well as the rights of the accused"). Second, it is "one of the rights that 'are essential to due process of law in a fair adversary process.'" *Compare Rock*, 483 U.S. at 51, quoting *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975), *with Weaver*, 137 S.Ct. at 1909-10 ("while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint").

In addition, requiring defendants to establish how their trials might have gone differently had they been permitted to testify imposes a "nearly impossible burden" to overcome. *Weaver*, 137 S.Ct. at 1916-17 (Breyer, J., dissenting) ("we should not require defendants to take on a task that is normally impossible to perform," which "would be precisely the sort of 'mechanical' application that *Strickland* tells us to avoid"). Consequently, courts considering a violation by counsel of the right to testify routinely find the defendant could not establish a reasonable probability of a different outcome. *See, e.g., Mullins*, 315 F.3d at 456-57; *White v. Kelley*, 824 F.3d 753,

757-58 (8th Cir. 2016); *United States v. Ailemen*, 710 F.Supp.2d 960, 970 (N.D. Cal. 2008); *People v. Hayes*, 229 Cal.App.3d 1226, 1234-35 (1991).[3] However, the right to testify is particularly susceptible to violation by one's counsel, who determines which witnesses to call and is permitted to address the court. *See Mullins*, 315 F.3d at 455. Placing the burden on the defendant to establish a reasonable probability of a different outcome, when his right to testify is violated by his counsel rather than the court, effectively renders most violations of the right to testify immune from review.

Thus, this Court might hold such claims should be treated as ineffective assistance of counsel, where defendants demonstrate counsel unreasonably overrode their desire to testify, and this rendered the proceedings fundamentally unfair, without needing to demonstrate an effect on the outcome of the proceedings. It also might address them like counsel's failure to file a notice of appeal, which it found presumptively prejudicial in *Garza*. 139

[3] A panel of the Eleventh Circuit managed to find *Strickland* prejudice satisfied for an attorney's violation of her client's right to testify; however, a subsequent en banc opinion vacated that decision and upheld the district court's finding the *first* prong unmet, despite the extraordinary circumstance of the attorney's express concerns at a post-conviction evidentiary hearing that her client may not have understood it was his choice. *See United States v. Teague,* 908 F.2d 752, 760-61 (11th Cir.1990), *vacated en banc*, 953 F.2d 1525, 1534-35 (11th Cir. 1992). By contrast, when considering the *court's* violation of a defendant's right to testify at a competency hearing, the Ninth Circuit found the Government failed to show the error was harmless beyond a reasonable doubt, without needing to determine if it was structural error. *United States v. Gillenwater*, 717 F.3d 1070, 1083-85 (2013) (finding Gillenwater's testimony could have countered an inference of incompetency and even "revealed him to be an intelligent and articulate person").

S.Ct. at 744-47 (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984)).

Alternatively, it might address these claims as violations of defendants' Sixth-Amendment-secured autonomous rights, which it treated as a structural error requiring automatic reversal in *McCoy*. 138 S.Ct. at 1510-11 ("[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence").

> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error *of the kind* our decisions have called "structural" .... An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." … An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness….

Id. at 1511 (internal citations omitted). As with the defense-defining right in *McCoy*, the right to testify is a fundamental autonomous right requiring protection even beyond the substantial concerns of an erroneous conviction, and its effects are impossible to measure. *See id.* at 1508, 1511

Indeed, the right to testify is a more-firmly established fundamental autonomous right, grounded in several parts of the Constitution. *See, e.g.*, *Rock*, 483 U.S. at 49-52 (citing U.S. Const. amend. V, VI, XIV.) The *McCoy* majority aligned the defense-defining right with the right to testify, 138 S.Ct. at 1508; and the dissenters kept the right to testify firmly within the established class of absolute autonomous rights, while balking at removing the

defense-defining right from "the decisions that counsel is free to make unilaterally," including "moving to suppress evidence, … cross-examining witnesses, offering evidence and calling defense witnesses," *id.* at 1516 (Alito, J., dissenting). Mr. Brown's impassioned description of his rights foreshadowed Justice Ginsburg's description in *McCoy*. *Compare* Sealed RT 13 ("when it comes to my life and my freedom, I should have a right … to have my input heard and my defense in the way that I feel that's best for me"), *with* 138 S.Ct. at 1505 ("With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense.")

Nevertheless, some courts are limiting *McCoy's* structural-error analysis to cases where the court condones counsel's usurpation of the defendant's autonomous decision, thereby treating it as court error, rather than counsel's. For example, the Seventh Circuit found *McCoy* applied structural-error analysis, rather than *Strickland*, because the violation had been permitted by the trial court. *Hartsfield*, 949 F.3d at 314. However, *McCoy's* description is less clearly about causation than correlation:

> Because a client's *autonomy*, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence…. To gain redress for attorney error, a defendant ordinarily must show [*Strickland*] prejudice. … Here, however, the violation of McCoy's protected autonomy right was complete *when* the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.

138 S.Ct. at 1510-12 (citations omitted, emphasis added) (also stating "trial court's allowance of [counsel's violation] was incompatible with the Sixth Amendment. Because the error was structural, a new trial is the required corrective.") Given that *McCoy* had cited *Weaver's* discussion of the same prejudice-establishing pitfalls in applying *Strickland* prejudice to counsel's failure to object to a structural error, it should not be assumed it was the trial court's condoning the violation, rather than the autonomous nature of the violated right, which rendered prejudice analysis unnecessary to *McCoy's* majority. *See id.* at 1511; *Weaver*, 137 S.Ct. 1908. Both likely influenced the result in *McCoy*, and the existence of either in right-to-testify cases should require automatic reversal under a thorough analysis of this Court's constitutional precedents.[4]

If *McCoy's* structural-error analysis is meant to be limited to only those violations condoned by trial courts, then presumably ineffective-assistance-of-counsel analysis would only apply to violations which are not immediately brought to the trial court's attention. As discussed further in Part C, given that attorneys may be the sole source of information regarding rights with as complex a legal history as the right to testify, defendants may not discover that they *can* override their attorneys' decisions until the trial has completed.

[4] As discussed in Part C, *McCoy's* need to distinguish the contrary treatment of counsel's violation of a defense-defining decision in *Florida v. Nixon*, 543 U.S. 175 (2004), likely influenced its discussion in a manner not implicated by the right to testify.

Yet without direct guidance by this Court, those defendants face a double Catch-22 in remedying violations of their right to testify on appeal, as reviewing courts have been reluctant to find such claims preserved *or* to find an outcome-determinative application of *Strickland* prejudice satisfied. *See Hartsfield*, 949 F.3d at 314-16.

When counsel's violation of Mr. Eddy's right to maintain evidence *and* to testify was first brought to the trial court's attention post-conviction, the Third Appellate District of California solved this problem by applying *McCoy*:

> while defendant did not object during closing argument after his counsel conceded his guilt of voluntary manslaughter, we do not think preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction. Rather, the record must show (1) that defendant's plain objective is to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt.

Eddy, 33 Cal.App.5th at 477-78, 482. However, other appellate decisions, including the challenged Opinion, have interpreted this as ineffective assistance with a waiver problem. *See*, *e.g.*, *Hartsfield*, 949 F.3d at 314-16; App. A, Opn. at 19-21; App. B, Order at 2.

Regardless of who caused the error, defendants whose fundamental rights to testify have been violated are entitled to a meaningful remedy on appeal. That remedy may be ineffective assistance of counsel, with an understanding that a trial without the right to testify is fundamentally unfair within the non-mechanistic definition contemplated by *Strickland*. *See Weaver*, 137 S.Ct. at 1911; *id.* at 1916-17 (Breyer, J. dissenting). Or, it may find a

presumption of prejudice, as in *Garza*. *See* 139 S.Ct. at 744-47. Or, it could simply be deemed structural error. *See McCoy*, 138 S.Ct. at 1511-12; *Weaver*, 137 S.Ct. at 1916-17 (Breyer, J. dissenting). This Court's guidance is required for lower courts to know which, if any of these, to apply to remedy counsels' violations of defendants' right to testify.

C. Certiorari Is Required to Remedy Splits of Authority in the State and Federal Courts, Regarding How Waiver of the Right to Testify May Be Established.

The Opinion below declined to apply *McCoy* or *Strickland*, finding Mr. Brown had forfeited his Sixth Amendment claim by failing to alert the court of his counsel's violation of his right to testify before conviction. App. A, Opn. at 19-21; App. B, Order at 2. Petitioner had explained in his briefs that he should not have been presumed to understand he could have overridden his attorney's decision or interrupted contentious proceedings to alert the court of the violation. When he was finally permitted to address the court at sentencing, he adamantly maintained he had asserted his desire to testify, but his counsel had prohibited it. Presented with these facts, the appellate court should have found Brown's knowing waiver had not been clearly established. *Brookhart*, 384 U.S. at 4. Instead, it relied on California Supreme Court decisions treating defendants' silence as waiver, which had cited inconsistent understandings of the right to testify as one of the many strategic decisions afforded to counsel. App. A, Opn. at 19-21.

This Court has long recognized "a presumption against the waiver of

constitutional rights, … and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart*, 384 U.S. at 4; *cf. Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (record must show waiver of guilty plea, like right to counsel, was made intelligently and understandingly). To ensure waivers are knowing and voluntary, this Court has found courts must obtain defendants' express waivers of some fundamental rights, including the rights to plead innocent, to be tried by jury, and to file an appeal. *Florida v. Nixon*, 543 U.S. 175, 187 (2004). However, it has not directly addressed how the right to testify may be deemed waived. *See Hartsfield*, 949 F.3d at 316. Given its recognition of the right to testify as a fundamental autonomous decision of the defendant, which cannot be usurped by counsel and is grounded in the same three constitutional amendments which it found required affirmative waiver of the right to plead innocent, this Court should grant a writ of certiorari to provide courts a uniform standard for ensuring a defendant has knowingly waived his or her right to testify and voluntarily assented to counsel's strategy. *See McCoy*, 138 S.Ct. at 1508; *Rock*, 483 U.S. at 51-52; *Boykin*, 395 U.S. at 242-43.

As discussed in Part B, *McCoy's* structural-error analysis has been interpreted as attaching because the trial court had observed and condoned counsel's usurpation of the defendant's right to maintain innocence. *See*, *e.g.,* *Hartsfield*, 949 F.3d at 314. However, the relevance of this fact to *McCoy's* analysis was dependent on the particular precedential history of the right to

maintain innocence, which would not attach to the already-established fundamental autonomous right to testify. Specifically, *McCoy* needed to distinguish the contrary result in *Florida v. Nixon*, wherein this Court had cited Nixon's silence in the face of his counsel's open-court decision to admit guilt. *McCoy*, 138 S.Ct. at 1505, 1509-10. *Nixon*, however, had treated the decision to maintain innocence as trial strategy, in distinguishing it from the decision to forego a full trial requiring an affirmative waiver in *Brookhart* and *Boykin*. *Nixon*, 543 U.S. at 187-88.

Thus, *McCoy* cited two distinct findings in reaching a different outcome from *Nixon*: it found the decision to maintain innocence, like the right to testify, was a fundamental autonomous right which could not be usurped by counsel's strategy; and it found no waiver problem because McCoy had adamantly sought ownership of that decision "both in conference with his lawyer and in open court." 138 S.Ct. at 1505, 1508-10. That second distinction is superfluous here, as there is no prior decision of this Court finding in-court silence sufficient to clearly establish knowing waiver of the fundamental right to testify that would need distinguishing.

A close look reveals how centrally *Nixon's* perception of the right to maintain innocence as "strategic" shaped its analysis. 543 U.S. at 178. First, it distinguished the attorney's concession of guilt in a two-phase capital trial from the kinds of fundamental decisions requiring affirmative consent:

> An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of

> overarching defense strategy. … That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." … But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, *testify* in his or her own behalf, or take an appeal." … Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

Nixon, 543 U.S. at 187 (citations omitted, emphasis added). Having determined express waiver was not required for the strategic decision and the violation was not the equivalent of no representation at all, as had permitted presumptive prejudice in *Cronic*, 466 U.S. 648, *Nixon* applied *Strickland* and determined counsel was not deficient, because it is reasonable to concede guilt in a dual-phase capital trial. *Id.* at 187-92. In addition, Nixon was verbally unresponsive during the three times counsel had explained his strategy to him, and he was eventually removed from the proceedings for disruptive behavior. *Id.* at 181-82. Under this particular combination of facts, economically distinguished in *McCoy*, this Court rejected Nixon's argument that his affirmative assent to conceding guilt was required in the same way defendants must affirmatively waive their right to plead innocence. *See Nixon*, 543 U.S. at 192; *McCoy*, 138 S.Ct. at 1505, 1510.

Thus, two applicable conclusions follow from this Court's jurisprudence: 1) the right to testify is the defendant's fundamental autonomous decision; and 2) since it is *not* the kind of trial strategy that could be silently waived in

Nixon, the affirmative waiver called for in *Brookhart* and *Boykin* must be obtained before a trial can end without the defendant's testimony.

Nevertheless, because this Court has never directly addressed whether an affirmative waiver of the right to testify should be taken in court in order to ensure such waiver was clearly established should the issue be disputed later, appellate courts have been left to their own devices with varying results. While some courts *have* required affirmative waiver, *see*, *e.g.*, *Mullins*, 315 F.3d at 455; *Chang v. United States*, 250 F.3d 79, 83-84 (2nd Cir.2001) (discussing circuit split); others have rejected the need for an affirmative waiver by emphasizing the "strategic" nature of the decision, *see*, *e.g.*, *United States v. Joelson*, 7 F.3d 174, 177-78 (9th Cir. 1993) (describing right to testify as "essentially … a strategic trial decision with constitutional implications"); *Bradford*, 14 Cal.4th at 1053. If the issue reaches a federal court on habeas, the court must deny the writ for lack of clearly-established Supreme Court law. *See*, *e.g.*, *Hartsfield*, 949 F.3d at 316; *Jenkins v. Bergeron,* 824 F.3d 148, 153 (1st Cir. 2016). Certiorari should be granted to guide courts in both preventing and remedying violations of the right to testify in a uniform and constitutionally-appropriate manner.

For example, in reconciling courts' decisions regarding the vehicles for asserting a violation of the right to testify and whether an affirmative waiver should be obtained, a recent Seventh Circuit decision stated, "we have described '[t]he decision not to place the defendant on the stand [as] a classic

example' of a strategic trial decision." *Hartsfield*, 949 F.3d at 313. It noted that even within the Seventh Circuit, courts differed as to whether they required defendants to assert the right to testify in order to preserve it. *Id.* at 315-16. "'The variety in practice among the state courts and the various federal courts shows ... that there is no standard clearly established by the Supreme Court of the United States that is binding on all'," and thus, "we cannot say the Illinois Appellate Court unreasonably decided that Hartsfield did not meet his burden of proving that his attorney in fact prohibited his testimony." *Id.* (quoting *Thompson v. Battaglia*, 458 F.3d 614, 619 (2004)); *see also Jenkins,* 824 F.3d at 153 ("the Supreme Court has never articulated the standard for assessing whether a criminal defendant has validly waived his right to testify or determined who has the burden of production and proof under particular circumstances").

The Ninth Circuit has frequently reapplied a vacated opinion's finding defendant's silence can constitute waiver, while describing the decision to testify as more strategic than the rights for which affirmative waiver is required and noting the defendants' opportunities to assert objections. *See*, *e.g.*, *Joelson*, 7 F.3d at 177-78 (citing *United States v. Martinez*, 883 F.2d 750, 759-61 (9th Cir. 1989), *vacated by United States v. Martinez*, 928 F.2d 1470 (1991)); *United States v. Edwards,* 897 F.2d 445, 446-47 (9th Cir. 1990) (same). Recently in *Carter v. Davis*, 946 F.3d 489, 509-10 (9th Cir. 2019), where there had been several hearings discussing Carter's disputes with his attorney's

decision to not call witnesses, including himself, the Ninth Circuit noted the lack of decisions by this Court "establishing that a client has a right to testify under these circumstances," in finding the California Supreme Court's conclusion the defendant had "acceded" to his counsel's "trial strategy" not unreasonable. *Id.* at 510-11 (citing *Nixon*, 543 U.S. at 190-91; *United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999); *Joelson*, 7 F.3d at 177)).

As discussed in Part B, the Third Appellate District of California declined to find "preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction." *Eddy*, 33 Cal.App.5th at 482. However, in the challenged Opinion, the First Appellate District erroneously distinguished *Eddy* as not involving a right to testify and for not addressing prior decisions of the California Supreme Court addressing waiver of that right. App. A, Opn. at 20, fn.10; App. B, Order at 2 (citing *Bradford*, 14 Cal.4th 1005 & *Alcala*, 4 Cal.4th 742. Yet, Petitioner had explained those 30-year-old decisions declined to require courts obtain personal waivers of the right to testify, by placing it within the category of trial rights requiring "the direction of competent counsel," like the rights to "produce evidence and to confront and cross-examine adverse witnesses." *See* Pet. Reh. 7-9 (citing *Bradford*, 14 Cal.4th at 1053; *Alcala*, 4 Cal.4th at 805); Reply at 19, 30, fn. 3. Even the dissenters in *McCoy* distinguished the right to testify from "the decisions that counsel is free to make unilaterally," including "moving to suppress evidence, … cross-

examining witnesses, offering evidence and calling defense witnesses." 138 S.Ct. at at 1516 (Alito, J., dissenting). Thus, California courts are deferring to authority on defendants' constitutional right to testify from the California Supreme Court that is out of step with this Court's classification of that right.

Some federal defendants fare better on direct appeal. The Fifth Circuit refused to infer acquiescence from silence, explaining:

> the natural location for any burden to enlist the aid of the court is upon counsel, and that is no new burden. Careful defense counsel routinely advise the trial judge out of the jury's presence that the defendant will or will not testify, contrary to their advice. Even without its initiation by counsel, careful trial judges will similarly inquire if the defendant understands his right to testify. We think both these trial practices are better calculated to protect a defendant's right to testify. Declining to place upon the defendant the responsibility to address the court directly is consistent with the reality that routine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to do so. We agree with the Second Circuit's observation that "[a]t trial, defendants generally must speak only through counsel, and, absent something in the record suggesting a knowing waiver, silence alone cannot support an inference of such a waiver."

Mullins, 315 F.3d at 455 (citing *Chang*, 250 F.3d at 84); *see also United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (recognizing "the impracticability of placing a burden on the defendant to assert a right of which he might not be aware or to do so in contravention of the court's instructions that the defendant speak to the court through counsel").

Two decades ago, the Second Circuit described the disparate treatment defendants' trial "silence" receives, depending on the circuit wherein they raised their counsel's violation of their right to testify; with the Fourth, Eight,

and Ninth Circuits imposing waiver; and the District of Columbia, Seventh, and Eleventh Circuits finding it inappropriate to require defendants to preserve a right they may not know they have. *Chang*, 250 F.3d at 83 (citing *Martinez,* 883 F.2d at 760; *United States v. McMeans,* 927 F.2d 162, 163 (4th Cir. 1991); *United States v. Bernloehr,* 833 F.2d 749, 751–52 (8th Cir. 1987); *Ortiz,* 82 F.3d at 1069-72 (rejecting silent waiver *and* requirement that courts sua sponte consult defendants about waiver, absent appearance of conflict with counsel in record); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (same); *Teague,* 908 F.2d at 759-60, *vacated en banc*, 953 F.2d at 1534-35 (finding counsel had not been unreasonable, without addressing waiver)). Though the Second and Fifth Circuits have since joined in rejecting silent waiver of the right to testify, circuits are still hampered on AEDPA review by the lack of guidance from this Court, and in all cases by the impossible threshold for establishing *Strickland* prejudice for a violation of the right to testify. *See Hartsfield*, 949 F.3d at 315-16; *Mullins*, 315 F.3d at 455-56; *Jenkins,* 824 F.3d at 152-53 (dismissing for lack of Supreme Court guidance on waiver, without independently deciding who bears burden for establishing knowing waiver of right to testify); *cf. Weaver*, 137 S.Ct. at 1916-17 (Breyer, J., dissenting) (cautioning against imposing impossible prejudice standard).

The facts of this case demonstrate how a defendant may not understand if or how he could override his counsel to take the stand. The day before the defense rested, trial counsel agreed Brown could testify when the court

mentioned it. 5RT 537. The brief hearing held the next morning addressed the attorneys' contentious arguments regarding the defense's calling the arresting officer. *See* 6RT 608-10 (prosecutor stating, "if the Court is not accepting my representations, as an officer of the Court, and someone who has an ethical obligation to make representations, that's a totally different situation.") The hearing on jury instructions, held after counsel announced the defense had rested immediately following that officer's testimony, was derailed by intensified inter-attorney bickering, including allegations of racial bias and defenses thereto, and was quickly wrapped up by the court. 6RT 627-28, 654-58. After closing argument and later that day, during a brief hearing where the trial court put the contents of a side-bar discussion on the record, the prosecutor appeared to suggest the court had been unethical in a reportable manner, and the court abruptly closed the proceedings, stating "we're done for good." 6RT 727. The following day had two brief hearings to discuss juror questions, with the second one peppered with additional inter-attorney bickering. 7RT 807-10. After the jury announced the verdict later that day, the court directed Mr. Brown to contact probation. 7RT 825. Brown responded he had a question, but the court told him to talk to his counsel and terminated proceedings. 7RT 826. Trial counsel never indicated his client had any concerns about his representation until the sentencing hearing held a month later, at which point Petitioner unequivocally maintained he "did not agree in any way, shape, or form that [he] did not want to testify." Sealed RT 3, 14.

These facts demonstrate the anomaly of expecting defendants to understand they have the right to override counsel and may interrupt the trial proceedings to do so, while simultaneously expecting them to speak only through counsel. *See Mullins*, 315 F.3d at 455; *Chang*, 250 F.3d at 84 ("A defendant who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right, and we see no reason to impose what would in effect be a penalty on such a defendant.") As the Eleventh Circuit explained in an opinion subsequently vacated en banc without addressing waiver:

> In affording a criminal defendant a fundamental right to counsel, the Constitution recognizes that criminal defendants are often unschooled in the intricacies of our criminal justice system, and that without the assistance of counsel, will likely suffer an overwhelming disadvantage in presenting their defense. The defendant relies on his counsel to understand the process of the trial itself and to recognize the proper time for the defendant to be called as a witness. The defendant may not realize until after the jury has retired to deliberate that the proper time for his testimony has passed. Furthermore, once a defendant elects to take advantage of his right to counsel, he is told that all further communications with the court and the prosecutor should be made through his attorney. Aside from any testimony he may give at pre-trial hearings or during trial, a defendant is not permitted to speak directly to the court. In fact, in the interests of decorum and the smooth administration of justice, defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom, by the court. It would be anomalous to consider the right to counsel of fundamental importance because of the common lack of understanding of the trial process by defendants, and to require a defendant to rely on his attorney to be his sole spokesperson in the courtroom, while at the same time holding that by failing to speak out at the proper time a defendant has made a knowing, voluntary and intelligent waiver of a personal right of

fundamental importance such as the right to testify.

Teague, 908 F.2d at 759-60, *vacated en banc*, 953 F.2d at 1534-35.

Mr. Brown may well have been intimidated to speak up during the contentious proceedings or risk appearing disrespectful to the court, but when he was directly addressed by the court and took that opportunity to indicate he had a question, the court directed him to speak to his counsel and terminated proceedings. *See Underwood*, 939 F.2d at 476 ("recognizing that the defendant might well feel too intimidated to speak out of turn"). This record fails to clearly establish petitioner understood he could bring disagreements with his counsel to the court's attention, or would have been permitted to do so until his counsel finally did it for him at the sentencing hearing. *See Brookhart*, 384 U.S. at 4 (waiver of fundamental right must be clearly established). Any contrary reading places a burden on the defendant to show the absence of knowing waiver, which appears to be the gray area in the intersection of this Court's jurisprudence on ineffective assistance of counsel, fundamental autonomous rights, and waiver.

This Court's recent analysis in *Weaver*, *McCoy*, and *Garza* demonstrate an increasing awareness of the vulnerability of defendants' fundamental autonomous decisions to usurpation by trial counsel and the difficulties of applying outcome-determinative prejudice to such violations. In *Garza*, this Court examined the record and presumed prejudice where a trial attorney overrode his client's desire to file a notice of appeal, even where the defendant

had signed a broad appellate waiver. *Garza*, 139 S.Ct. at 742-50. Much like the case at bar, Mr. Garza's communications to his attorney requesting the notice be filed were presented to the courts through after-the-fact attestations. *Id.* at 743. Nevertheless, this Court did not find Garza should have filed his own notice of appeal or otherwise alerted the court the moment his counsel indicated disagreement about the viability of such an appeal. Nor was Garza's formal waiver of appellate rights deemed to represent the waiver of all issues that could still be presented on appeal, including his eventual ineffective-assistance-of-counsel claim. *See id.* at 744-45.

Attorneys are understandably the source of knowledge regarding complex and evolving legal concepts, such as who owns which decisions regarding who takes the stand, and courts are understandably not privy to every discussion held between clients and their attorneys. *See Mullins*, 315 F.3d at 455. To ensure waiver of this fundamental right is clearly-established without placing an insurmountable burden on defendants or attempting to reconstruct privileged communications post-hoc, this Court could require the same on-the-record affirmative waiver of the right to testify that many courts already require, and which this Court requires for other fundamental autonomous rights. *See id.* While some courts have expressed concerns with judicial interference in attorney-client communications, *see, e.g., Underwood*, 939 F.2d 476, Petitioner is confident this Court can allay those concerns by outlining a simple procedure that adequately and equitably protects the

diverse constitutional rights implicated in the right to testify, as it has for others fundamental rights

* * * * *

In sum, this case presents a compelling forum for reconciling authority protecting fundamental autonomous rights from unknowing and involuntary waiver by court or counsel, while rectifying a longstanding split of lower-court decisions recognizing the absence of guidance from this Court on the right to testify. It also allows this Court to address questions left unresolved in *Weaver*, regarding how to remedy the violation of a fundamental personal right on appeal which necessarily implicates fundamental unfairness, where outcome-determinative prejudice is impossible to measure. The issues involve complex questions of burden allocation, fundamental rights, and seemingly-inconsistent authority, which nevertheless can and should be reconciled by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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Respectfully submitted,

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