No.

IN THE
Supreme Court of the United States

HAROLD LEE HARVEY, JR.,
Petitioner,

v.

FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

This Court held in *McCoy v. Louisiana* that a defendant's Sixth Amendment autonomy right is violated when a defendant "expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts" and counsel "override[s]" this objective by conceding guilt. 138 S. Ct. 1500, 1509 (2018) (quoting U.S. Const. amend. VI) (emphasis omitted).

The Question Presented is:

Is the Sixth Amendment autonomy right established in *McCoy* violated where counsel overrode an express agreement with the defendant to not concede guilt to first-degree murder, and did so without any notice to the defendant, leaving the defendant no realistic opportunity to object?

RELATED PROCEEDINGS

Harvey v. State, No. SC19-1275 (Fla.) (denial of second successive postconviction motion affirmed Feb. 4, 2021; motion for rehearing denied June 1, 2021).

Harvey v. State, No. 471985CF000075A (Fla. Cir. Ct.) (second successive postconviction motion denied July 3, 2019).

Harvey v. Florida, No. 18-1449 (U.S.) (petition for writ of certiorari denied Oct. 7, 2019).

Harvey v. State, No. SC17-790 (Fla.) (denial of successive postconviction motion affirmed Nov. 15, 2018; motion for rehearing denied Dec. 20, 2018).

Harvey v. State, No. 471985CF000075A (Fla. Cir. Ct.) (successive postconviction motion denied Mar. 29, 2017).

Harvey v. Warden, Union Corr. Inst., No. 08-15868 (11th Cir.) (denial of petition for a writ of habeas corpus affirmed Jan. 6, 2011).

Harvey v. McNeil, No. 08-14036 (S.D. Fla.) (petition for a writ of habeas corpus denied Sept. 5, 2008).

Harvey v. Florida, No. 06-1368 (U.S.) (petition for writ of certiorari denied Oct. 1, 2007).

Harvey v. State, No. SC95075 (Fla.) (denial of initial postconviction motion affirmed and July 3, 2003 decision withdrawn June 15, 2006; motion for rehearing denied Jan. 8, 2007).

Harvey v. State, No. SC95075 (Fla.) (denial of initial postconviction motion reversed and case remanded to trial court with directions that convictions be vacated July 3, 2003; State's motion for rehearing granted June 15, 2006).

State v. Harvey, No. 85-75 CF (Fla. Cir. Ct.) (initial postconviction motion denied on remand Jan. 28, 1999).

Harvey v. Dugger, Nos. 75841, 81836 (Fla.) (petition for writ of habeas corpus denied; denial of initial postconviction motion reversed; case remanded to trial court for evidentiary hearing Feb. 23, 1995).

State v. Harvey, No. 86-322B (Fla. Cir. Ct.) (initial postconviction motion denied Mar. 17, 1993).

Harvey v. Florida, No. 88-6136 (U.S.) (petition for writ of certiorari denied Feb. 21, 1989).

Harvey v. State, No. 69101 (Fla.) (conviction and death sentence affirmed June 16, 1988; motion for rehearing denied Sept. 16, 1988).

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PETITION FOR A WRIT OF CERTIORARI

Harold Lee Harvey, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 318 So. 3d 1238 (Fla. 2021) (per curiam). Pet. App. 1a–5a. The Order of the Florida Supreme Court denying rehearing or reconsideration is not reported. Pet. App. 26a–27a. The decision of the Circuit Court of the Nineteenth Judicial Circuit in and for Okeechobee County, Florida is also unreported. Pet. App. 7a–9a.

JURISDICTION

The judgment of the Florida Supreme Court was issued on February 4, 2021. Pet. App. 1a–5a. Mr. Harvey filed a motion for rehearing or reconsideration on March 12, 2021, after the Florida Supreme Court granted him an extension of time for that motion to be filed. The Florida Supreme Court denied Mr. Harvey's motion for rehearing or reconsideration on June 1, 2021, Pet. App. 26a–27a, and issued a mandate to the circuit court on June 17, 2021. Pet. App. 6a. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1257(a) and 2101(d).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment 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." U.S. Const. amend. VI.

INTRODUCTION

Mr. Harvey's case presents an important, unsettled question of constitutional law arising from the scenario in which a capital defendant's trial counsel concedes the defendant's guilt in violation of the express wishes and understanding of the defendant.

This Court's prior decisions on attorney concessions of guilt have focused on two contrasting factual circumstances. At one end of the spectrum is *Florida v. Nixon*, 543 U.S. 175 (2004). There, the defendant's attorney repeatedly informed the defendant of his plan to concede the defendant's guilt but the defendant was "unresponsive," neither approving nor protesting his counsel's proposed concession. *Id.* at 181. In that situation, this Court held, any claim regarding the propriety of counsel's concession must satisfy the *Strickland* test for ineffective assistance of counsel, including the required showing of prejudice. *Nixon*, 543 U.S. at 178–79, 192.

On the other end of the spectrum is *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). In *McCoy*, the defendant's attorney, as in *Nixon*, repeatedly informed his client of his plan to concede the defendant's guilt, but, unlike *Nixon*, the defendant "strenuously object[ed] to [the attorney]'s proposed strategy," protesting the concession both to counsel and to the trial court. *Id.* at 1512. Because McCoy, unlike Nixon, "asserted" his

"objective. . . . to maintain innocence," this Court held that *Nixon* did not control. *Id.* at 1509–10. The Sixth Amendment prohibits counsel from "usurp[ing] control of" a defendant's decision to concede or contest guilt. *Id.* at 1505, 1511. Thus, the Court held, once a defendant "expressly asserts" that the objective of his defense is to "maintain innocence of the criminal acts," as McCoy did, counsel "must abide by that objective and may not override it by conceding guilt." *Id.* at 1509. If counsel does so, counsel has violated the defendant's Sixth Amendment "autonomy right"—a "structural" error, which automatically requires a new trial without any showing of prejudice. *Id.* at 1509–11.

Mr. Harvey's case differs from, and is more egregious than, both *Nixon* and *McCoy*. In those cases, the defense attorneys informed their clients of the concessions the attorneys went on to make at trial, thereby affording their clients an opportunity to object to the concession (as in *McCoy*) or to remain silent (as in *Nixon*). Yet how does the Sixth Amendment apply where counsel and the defendant agreed on a defense objective to *not* concede guilt to first-degree murder but counsel then abruptly reverses course at trial and makes exactly that concession of guilt to the jury, without any warning or notice to the defendant, leaving the defendant no realistic opportunity to object?

That is what happened to Mr. Harvey. The binding factual record shows that Mr. Harvey and his trial counsel *affirmatively agreed* on a defense objective to maintain Mr. Harvey's innocence of first-degree murder but counsel then conceded that very charge to the jury, without ever informing Mr. Harvey. By conceding Mr.

Harvey's guilt to first-degree murder over his express wishes to the contrary, Mr. Harvey's trial counsel usurped his "Sixth Amendment-secured autonomy," as established in *McCoy*. 138 S. Ct. at 1511. *McCoy*'s application here is straightforward: Mr. Harvey "asserted" his "objective. . . . to maintain innocence" of first-degree murder, and then counsel "overr[o]de" his objective by conceding his guilt to that charge during trial. *Id.* at 1509.

The Florida Supreme Court, however, determined there was no Sixth Amendment violation. Hewing closely to the specific facts of *McCoy*, it reasoned that Mr. Harvey is not entitled to relief because, unlike McCoy, Mr. Harvey did not make an "express objection" to counsel's concession of guilt, Pet. App. 4a, and instead, as the Florida Circuit Court noted, "sat silent at trial." Pet. App. 8a.

The Florida Supreme Court's decision cannot be left to stand. Its objection requirement contradicts this Court's core holding in *McCoy*. An express objection rule is fundamentally inconsistent with the substantive autonomy right *McCoy* articulated and creates an additional prerequisite for relief that this Court did not impose. This Court made clear in *McCoy* that a defendant's autonomy right is violated the moment counsel concedes guilt against the defendant's express wishes to maintain innocence. 138 S. Ct. at 1509, 1511. As courts since *McCoy* have repeatedly recognized, once the defendant has made clear that his objective is to maintain innocence of the charged crime, an objection is not necessary to show an autonomy violation because counsel has *already* usurped the defendant's autonomy

by conceding guilt in the face of the defendant's expressed desire to maintain innocence. Furthermore, requiring a defendant untrained in the law to lodge objections to their own counsel's in-court statements is a completely unworkable standard. It presumes an unrealistic level of legal knowledge and acumen by criminal defendants; it incentivizes defendants to disrupt court proceedings; and it places defendants in the no-win position of having to contradict their attorney in front of the judge or jury in order to preserve their constitutionally-protected defense objective.

Given the absurd consequences that would result from an objection requirement, it is not surprising that other state supreme and intermediate appellate courts have rejected it. Parting ways with the Florida Supreme Court, these courts have correctly ruled that a defendant need not contemporaneously object in order to establish a violation of the Sixth Amendment autonomy right if the defendant has already expressed to counsel his objective of maintaining innocence. Mr. Harvey's case presents an ideal opportunity to resolve this split over *McCoy*'s application.

Because the Florida Supreme Court grafted an unsound additional requirement onto *McCoy* and failed to recognize that Mr. Harvey's counsel overrode his express defense objective, Florida stands poised to execute a person whose conviction and sentence were infected with the structural error of a Sixth Amendment autonomy violation.

In fact, the autonomy violation that occurred here is even more egregious than in *McCoy*. As the dissenting Justices there observed, McCoy's attorney "did not

admit that [he] was guilty of first-degree murder." 138 S. Ct. at 1512 (Alito, J., dissenting). Rather, McCoy's counsel conceded only "one element of th[e] offense, *i.e.*, that [McCoy] killed the victims," while still "strenuously argu[ing] that [McCoy] was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense." *Id.* Here, in contrast, it is law of the case that Mr. Harvey's counsel conceded his guilt to first-degree murder by conceding *both* the *actus reus* and *mens rea* elements of that capital offense. In so doing, counsel automatically exposed Mr. Harvey to the death penalty—in direct violation of his prior agreement with Mr. Harvey. This grievous error in a capital case cannot be allowed to stand.[1]

This petition for a writ of certiorari should be granted, and the opinion below should be vacated.

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[1] In addition to the structural error of the Sixth Amendment autonomy violation, Mr. Harvey's trial proceedings were replete with other constitutional violations, as set forth in detail in Mr. Harvey's prior postconviction petitions, such as defense counsel adopting a theory of defense without first or ever investigating Mr. Harvey's background and intellectual impairment, as required under *Wiggins v. Smith*, 539 U.S. 510 (2003); defense counsel's failure to obtain a psychiatric examination of Mr. Harvey despite court authorization and funds to do so; and defense counsel's failure to discover and present mitigating evidence of Mr. Harvey's organic brain dysfunction and severe cognitive deficits. Pro bono counsel respectfully submits that a new trial, without the myriad constitutional deficiencies and failures that beset trial counsel, would result in a different outcome.

STATEMENT OF THE CASE

A. Legal Framework And Relevant Case Law

This Court's jurisprudence distinguishes between the tactical, "[t]rial management" decisions that are the "lawyer's province"—decisions an attorney can pursue without the client's advance knowledge or consent—and the fundamental decisions that are "reserved for the client," such as whether to plead guilty or testify in one's own behalf. *McCoy*, 138 S. Ct. at 1508. In *McCoy*, this Court held that the decision to concede or contest guilt at trial "belongs in this latter category." *Id.* Even "in the face of overwhelming evidence against her," the defendant may "insist on maintaining her innocence" at trial. *Id.*

McCoy established a new, fundamental Sixth Amendment right: the right "to decide that the objective of the defense is to assert innocence" and to not have counsel "usurp control" of that decision. *Id.* at 1508, 1511. This Court held that this "ability to decide whether to maintain [one's] innocence" is protected under the Sixth Amendment "autonomy right," not the Sixth Amendment right to effective assistance of counsel. *Id.* at 1509–11. Thus, *Strickland*'s prejudice requirement for ineffective-assistance claims does not apply to claims that trial counsel violated a defendant's autonomy right by wrongly conceding guilt. *Id.* at 1511. Rather, a violation of this autonomy right constitutes a "structural" error, requiring a new trial "without any need first to show prejudice." *Id.* at 1511–12. This Court held that the violation of this right is "complete" when counsel "usurp[s] control of an issue within [the defendant]'s sole prerogative." *Id.* at 1511.

B. Proceedings In Mr. Harvey's Case

On February 27, 1985, Mr. Harvey was arrested for the murders of William and Ruby Boyd. His codefendant, Scott Stiteler, was also charged with murdering the Boyds. Mr. Harvey was taken to the Sheriff's Department, where he was interrogated at length. *Harvey v. State*, 529 So. 2d 1083, 1084 (Fla. 1988) ("*Harvey I*"). While at the Sheriff's Department, a public defender requested and was denied access to Mr. Harvey, but was allowed to speak to Mr. Stiteler and others held at the facility. *Id.* at 1085. During his interrogation, Mr. Harvey gave a recorded statement without counsel present and admitted to his involvement in the murders. *Id.* at 1084. Mr. Harvey first spoke with counsel more than three hours after beginning his recorded statement. *Id.* at 1085.

Mr. Harvey pled not guilty to the murders. His codefendant, Mr. Stiteler, accepted a plea deal in which he admitted his guilt in exchange for a sentence of life imprisonment. Mr. Harvey's case proceeded to trial.

Mr. Harvey's trial counsel testified in prior postconviction proceedings that, before trial, he discussed with Mr. Harvey a strategic plan to concede guilt *only* to second-degree murder. Specifically, counsel testified that his plan was to argue "that this was *second* degree murder *as opposed to* first degree murder." R. Vol. 10, Evid. Hr'g Tr. at 100–01, *State v. Harvey*, No. 86-322 CF (Fla. Cir. Ct. Aug. 17, 1998) (emphases added).[2] Counsel testified that Mr. Harvey "nodd[ed]" to

[2] Citations to "R. Vol._" are to the Record on Appeal filed in *Harvey v. State*, No. SC95075 (Fla.), which includes lower court filings in *State v. Harvey*, No. 86-322 CF (Fla. Cir. Ct. June 22, 1999).

indicate that he understood the strategy of conceding only *second*-degree murder and never "express[ed] any disagreement" with counsel's plan. *Id.* at 100–01, 117.

Thus, according to trial counsel's testimony—which the Florida Supreme Court and the Florida Circuit Court credited and the State has embraced—Mr. Harvey expressly "adopted" and "agreed with the strategy to concede guilt to second-degree murder." State's Answer Br. at 28, 42, *Harvey v. State*, No. SC19-1275 (Fla. Oct. 14, 2019). The circuit court's undisturbed evidentiary finding was that counsel "specifically discussed" with Mr. Harvey that he "would make an opening statement that Harvey was guilty of murder, but that it was *second* degree murder and not either premeditated or felony murder," and "*Mr. Harvey said he understood* this defense tactic." Pet. App. 15a (Am. Order on Mot. for Postconviction Relief at 5, *State v. Harvey*, No. 85-75 CF (Fla. Cir. Ct. Jan. 28, 1999) ("*Harvey II*") (emphases added).) Pet. App. 10a–25a.

At his capital trial, Mr. Harvey's defense counsel began his opening statement by declaring: "Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder." *Harvey v. State*, 946 So. 2d 937, 942 (Fla. 2006) ("*Harvey IV*"). He then told the jury that Mr. Harvey and his co-defendant discussed the plan to commit the murders before carrying them out. Counsel stated that Mr. Harvey and his co-defendant "had this conversation" before shooting Mr. and Mrs. Boyd, "and without question what was discussed during this conversation was whether or not to kill these two people." *Id.* at 943 (emphasis omitted).

During closing argument, counsel again emphasized the conversation that Mr. Harvey and his co-defendant had before carrying out the murders:

> [Mr. Harvey and Mr. Stiteler] went inside and then they did commit the robbery, an armed robbery. There is no question about that. Subsequent to the robbery . . . they discussed: What are we going to do? Mrs. Boyd has seen us, seen me, what are we going to do? . . . At that point [Mr. Stiteler] said to [Mr. Harvey], "Well, we're going to have to kill them because they have seen you. They know you." And at that time Mr. and Mrs. Boyd got up to run and [Mr. Harvey] depressed the trigger[.]

See R. Vol. 1, Mot. to Vacate J. and Death Sentences at 87.

In making these statements, counsel conceded that Mr. Harvey acted with premeditation—the legal element that separates first-degree murder from second-degree murder. As the Florida Supreme Court would later conclude, Mr. Harvey's trial counsel "conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder." *Harvey IV*, 946 So. 2d at 943. By conceding guilt to first-degree murder, Mr. Harvey's counsel made him eligible for the death penalty—which a concession to second-degree murder would not have done. *See Shere v. Moore*, 830 So. 2d 56, 62 (Fla. 2002) ("Only in situations where the defendant's blameworthiness for the murder reaches the first-degree level do we proceed to the next step in determining if the circumstances warrant the punishment of death."); Fla. Stat. § 921.141(1).

Trial counsel's concessions did not end there. He also told the jury "that Harvey and his codefendant were in the process of robbing the victims when the murders were committed." *Harvey v. State*, 2003 Fla. LEXIS 1140, at *13–14 (Fla. July 3, 2003) ("*Harvey III*") (emphases added), *withdrawn and superseded on reh'g*, *Harvey IV*, 946 So. 2d 937 (Fla. 2006). As the Florida Supreme Court would later recognize, counsel "thereby conced[ed] Harvey's guilt to felony murder." *Id.* What's more, counsel gratuitously described the murders as "occurr[ing] during the course of a kidnapping," thereby conceding offenses that were not even charged. *Supra* p. 10, R. Vol. 2 at 239, 240–41; *Harvey IV*, 946 So. 2d at 940.

The guilt phase of Mr. Harvey's trial concluded with the jury returning guilty verdicts against him on both first-degree murder counts. *Harvey IV*, 946 So. 2d at 941.

On June 20, 1986, the trial judge made written findings of fact concerning the propriety of the death penalty. After weighing aggravating factors and mitigating circumstances, the judge imposed a sentence of death. The trial court used the very concessions that Mr. Harvey's counsel had made during trial to find the aggravating factors on which the death sentence was based. *See id.* at 941 n.1 ("The murders were found to be . . . committed during the commission of or the attempt to commit robbery or burglary.").

Mr. Harvey appealed his conviction, and the Florida Supreme Court affirmed on June 16, 1988. *Harvey I*, 529 So. 2d 1083, 1088 (Fla. 1988). This Court denied

certiorari on February 21, 1989. *Harvey v. Florida*, 489 U.S. 1040 (1989).

On August 27, 1990, Mr. Harvey filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. *See generally* R. Vol. 1, at 17–201; R. Vol. 2, at 202–396. Among his claims, Mr. Harvey asserted that his counsel's concession of guilt constituted ineffective assistance under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

The trial court ultimately denied all of his claims, and Mr. Harvey appealed to the Florida Supreme Court. On February 23, 1995, that court remanded the case to the trial court for an evidentiary hearing on Mr. Harvey's ineffective-assistance claims. *Harvey v. Dugger*, 656 So. 2d 1253, 1256–58 (Fla. 1995). The trial court again found against Mr. Harvey, and he again appealed to the Florida Supreme Court.

On July 3, 2003, the Florida Supreme Court reversed the trial court, finding that the performance of Mr. Harvey's trial counsel was *per se* ineffective due in part to his unilateral concession of Mr. Harvey's guilt to all elements of first-degree murder at trial. *Harvey III*, 2003 Fla. LEXIS 1140. The Florida Supreme Court relied on its application in *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000), of this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), to hold that Mr. Harvey need not demonstrate prejudice to obtain relief for his counsel's deficient performance because it was *per se* ineffective. *Harvey III*, 2003 Fla. LEXIS 1140, at *12–16. The Florida Supreme Court remanded the case with instructions to vacate Mr. Harvey's convictions and grant him a new trial. *Id.* at *1, *16.

The State then filed a routine motion for rehearing on July 18, 2003, and Mr. Harvey timely filed his response on August 5, 2003. For reasons that are not clear, the Florida Supreme Court did not dispose of the State's motion for rehearing in the usual course. Rather, the motion sat pending for well over a year without any activity. Meanwhile, this Court granted certiorari to review the Florida Supreme Court's decision in *Nixon v. State*, 857 So. 2d 172 (Fla. 2003), *rev'd and remanded sub nom Florida v. Nixon*, 543 U.S. 175 (2004). On December 6, 2004, nearly a year and a half after the State filed its motion for rehearing, the Florida Supreme Court issued an order in Mr. Harvey's case, directing the State to show cause as to why the court should not defer ruling on the State's rehearing motion until after this Court announced its decision in *Nixon*.

On December 13, 2004, this Court decided *Nixon*. In *Nixon*, trial counsel informed the defendant "at least three times" that he intended to strategically concede guilt to the jury, and the defendant was "unresponsive" —"[h]e never verbally approved or protested [counsel]'s proposed strategy." 543 U.S. at 181. The defendant not only "constant[ly] resist[ed]" answering counsel's inquires, but refused to even attend his trial, proclaiming "he had no interest." *Id.* at 182, 189. Reversing the Florida Supreme Court, this Court held that ineffective-assistance claims where counsel concedes the defendant's guilt after the defendant is "unresponsive" should not be evaluated under *Cronic*'s presumed-prejudice standard. *Id.* at 189–90, 192. Instead, a defendant must demonstrate prejudice under the two-pronged ineffective assistance of counsel test set forth in *Strickland*. *Id.* at 189–90.

Based on this Court's decision in *Nixon*, on June 15, 2006—nearly three years after the State filed its motion for rehearing—the Florida Supreme Court withdrew its 2003 decision vacating Mr. Harvey's convictions and allowed his death sentence to stand. *Harvey IV*, 946 So. 2d at 937.

On January 25, 2008, Mr. Harvey petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus. The district court denied his petition and the Eleventh Circuit affirmed. *See Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1236–37, 1263 (11th Cir. 2011).

On December 20, 2016, Mr. Harvey filed a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 based on this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Mr. Harvey's motion asserted that his death sentence should be vacated because the judge, not the jury, made the factual findings to impose his death sentence and because the sentence was not the result of a unanimous jury verdict.

On March 29, 2017, the Florida Circuit Court summarily denied Mr. Harvey's motion, and on November 15, 2018, the Florida Supreme Court affirmed the denial of relief. *Harvey v. State*, 260 So. 3d 906, 907 (Fla. 2018) ("*Harvey V*"). Mr. Harvey petitioned this Court for a writ of certiorari on May 17, 2019, but the petition was denied on October 7, 2019. *Harvey v. Florida*, 140 S. Ct. 117 (2019).

On May 14, 2018, this Court decided *McCoy v. Louisiana*. In light of that decision, on May 13, 2019, Mr. Harvey timely filed a second successive motion for

postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. Successive Mot. to Vacate, *State v. Harvey*, No. 471985CF000075A (Fla. Cir. Ct. May 13, 2019).

The Florida Circuit Court denied his motion on July 3, 2019. Pet. App. 7a–9a. The court held that Mr. Harvey is "not entitled to relief" under *McCoy* because, "unlike *McCoy*, [Mr. Harvey] did not insist that he was innocent nor adamantly object to trial counsel's concession of guilt" and instead "sat silent at trial" as counsel conceded Mr. Harvey's guilt to first-degree murder. Pet. App. 8a.

Mr. Harvey appealed to the Florida Supreme Court, which issued its opinion on February 4, 2021 affirming the circuit court's denial. Pet. App. 1a–5a. The Florida Supreme Court held that Mr. Harvey's case was "indistinguishable" from the *McCoy* claim it "rejected in *Atwater v. State*, 300 So. 3d 589 (Fla. 2020)," as both Mr. Atwater and Mr. Harvey "did not allege that trial counsel conceded guilt over [their] express objection." Pet. App. 3a. The Florida Supreme Court distinguished Mr. Harvey's case from *McCoy* on the basis that McCoy "vociferously . . . objected to any admission of guilt," while Mr. Harvey did not.[3] Pet. App. 4a (citation omitted).

On March 12, 2021, Mr. Harvey filed a motion for rehearing or reconsideration. He argued that the Florida Supreme Court overlooked the fact that he *did*

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[3] Because the Florida Supreme Court affirmed the denial of relief based on the merits of the *McCoy* claim, the court expressly declined to address the issue of retroactivity. *See* Pet. App. 2a–3a. This issue would be litigated on remand.

express to trial counsel that the objective of his defense was to maintain innocence of first-degree murder, as required to show a Sixth Amendment violation under *McCoy*. Further, Mr. Harvey argued that *McCoy* does not require defendants to make an express, in-court objection when counsel overrides their previously asserted desire to maintain innocence. Such a requirement, Mr. Harvey argued, is inconsistent with the broad autonomy right established in *McCoy* and defies the practical realities that criminal defendants face.

On June 1, 2021, the Florida Supreme Court summarily denied Mr. Harvey's motion without explanation. Pet. App. 26a–27a.

REASONS FOR GRANTING THE WRIT

This Court held in *McCoy* that under the Sixth Amendment "autonomy right," it is "the defendant's prerogative, not counsel's, to decide [whether] the objective of his defense [is] to admit guilt," and counsel commits a structural error by "usurp[ing] control of" that decision. 138 S. Ct. at 1505, 1511. The Florida Supreme Court's opinion imposes a new, erroneous requirement for showing a violation of this right: a defendant must have made an "express objection" to counsel's concession of guilt. Pet. App. 3a–4a.

Such a requirement cannot be squared with the autonomy right recognized in *McCoy*. This Court made clear that a violation of the autonomy right is "complete" as soon as counsel overrides the defendant's asserted objective to maintain innocence by conceding the defendant's guilt. *McCoy*, 138 S. Ct. at 1511. Because the

defendant's autonomy is *already* violated by a concession that negates a previously-expressed objective to maintain innocence, requiring defendants to also show an in-court objection to the concession is superfluous. It does nothing to further the defendant's Sixth Amendment-protected autonomy right. Moreover, as Mr. Harvey's case illustrates, an objection requirement will have absurd consequences for both defendants and trial courts. The rule would require that defendants not only have the legal acumen to recognize that their counsel has conceded an element of the criminal charge but also that they defy their own attorneys in open court, disrupt trial proceedings, and risk contempt of court or other adverse consequences.

Unsurprisingly, there are state supreme and intermediate appellate courts that have rejected an express objection requirement for Sixth Amendment autonomy claims under *McCoy*. Mr. Harvey's case presents an ideal opportunity for this Court to clarify the proper application of *McCoy*, head off the troubling consequences of the Florida Supreme Court's objection rule, and ensure that defendants in all jurisdictions are entitled to the same fundamental autonomy right.

Without review by this Court, Florida will remain poised to execute a man whose capital trial was riven with structural error from the very first words defense counsel spoke during opening statement.

The petition for a writ of certiorari should be granted.

I. THE FLORIDA SUPREME COURT'S MISGUIDED OBJECTION REQUIREMENT CONFLICTS WITH THE SIXTH AMENDMENT AUTONOMY RIGHT RECOGNIZED IN *MCCOY*.

In denying Mr. Harvey's *McCoy* claim, the Florida Supreme Court held that the Sixth Amendment autonomy right can only be violated if a defendant makes an express objection to counsel's concession. This narrowing of the autonomy right directly conflicts with the Sixth Amendment guarantee that this Court announced in *McCoy*.

A. An Express Objection Is Not Necessary To Establish A Violation Of *McCoy*'s Autonomy Right.

McCoy held that the Sixth Amendment protects a defendant's "[a]utonomy to decide [whether] the objective of the defense is to assert innocence" or concede guilt. 138 S. Ct. at 1508. This right is violated if—after a defendant "expressly asserts that the objective of 'his defence' is to maintain innocence"—his counsel fails to "abide by that objective" and "override[s] it by conceding guilt." *Id.* at 1509 (quoting U.S. Const. amend. VI) (emphasis omitted).

Mr. Harvey's trial counsel committed exactly that kind of autonomy right violation. His counsel conceded his guilt to first-degree murder after reaching an express, prior agreement with Mr. Harvey to *not* concede guilt to first-degree murder. Despite this clear usurpation of Mr. Harvey's "Sixth Amendment-secured autonomy," *id.* at 1511, the Florida Supreme Court determined there was no Sixth Amendment violation.

According to the Florida Supreme Court, Mr. Harvey is not entitled to relief under *McCoy* because he did not make an "express objection" to counsel's concession of guilt. Pet. App. 3a–4a.

The Florida Supreme Court's express objection rule rests on a fundamental misreading of *McCoy* that erroneously makes certain *facts* in *McCoy* part of its holding. In *McCoy*, the defendant's attorney repeatedly informed the defendant, weeks before trial, of his plan to concede the defendant's guilt. The defendant then "strenuously object[ed]" to the attorney's proposed concession, protesting both to counsel and to the trial court. 138 S. Ct. at 1508, 1512. This Court held that because McCoy "asserted" his "objective . . . to maintain innocence," his Sixth Amendment autonomy right was violated when counsel "overr[o]de" his expressed objective "by conceding guilt." *Id.* at 1509–11.

In articulating the requirements for proving an autonomy violation, this Court set forth a clear two-part test: (1) the defendant must have "expressly assert[ed] that the objective of 'his defence' is to maintain innocence of the charged criminal acts," and (2) counsel must have "override[n] [that objective] by conceding guilt." *Id.* at 1509 (quoting U.S. Const. amend. VI) (emphasis omitted). As multiple courts have observed, a defendant can establish an autonomy violation under *McCoy* by satisfying these two elements. *See State v. Chambers*, 955 N.W.2d 144, 149 (Wis. 2021) ("[T]o succeed on a *McCoy* claim, the defendant must show [1] that he or she 'expressly assert[ed] that the objective of 'his defence' is to maintain innocence of the charged criminal acts' and [2] that the lawyer did not 'abide by

that objective and [overrode] it by conceding guilt.'") (citation omitted) (emphasis omitted); *People v. Eddy*, 33 Cal. App. 5th 472, 482 (Cal. Ct. App. 2019) (same); *Thompson v. Cain*, 433 P.3d 772, 777–78 (Or. Ct. App. 2018) (same).

The Florida Supreme Court erroneously added a third requirement to this test, holding that—in addition to making clear to counsel his objective to maintain innocence—a defendant must also make an "express objection" to counsel's wrongful concession. Pet. App. 4a. By grafting an express objection requirement onto autonomy-violation claims, the Florida Supreme Court misread the specific facts of *McCoy* as establishing a categorical perquisite to relief. The court confused a sufficient condition for a necessary condition. The fact that a defendant made an explicit on-the-record objection is certainly sufficient to show that he "asserted" his "objective" to maintain innocence, but such an objection is not necessary if the defendant has *already* asserted his defense objective to counsel, as Mr. Harvey did when he and his attorney agreed prior to trial that his attorney would not concede guilt to first-degree murder. *See Eddy*, 33 Cal. App. 5th at 482–83 (holding that the evidence of an autonomy violation "*may* come in the form of a defendant objecting during [trial]," but "we do not think preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court" (emphasis added)).

While the defendant in *McCoy* "protested" to his attorney and objected to the trial judge, 138 S. Ct. at 1506–07, this Court did not make the violation of a

defendant's Sixth Amendment autonomy right contingent on a defendant's contemporaneous, in-court objection. To the contrary, this Court expressly recognized that the violation of the "protected autonomy right [is] *complete*" when counsel "usurp[s] control of an issue within [the defendant]'s sole prerogative." *Id.* at 1511 (emphasis added). This usurpation happens the moment that counsel concedes guilt and "override[s]" the defendant's previously-expressed objective to maintain innocence. *Id.* at 1509. The defendant must show that he informed *his attorney* of his desire to maintain innocence—but whether the defendant also informed the court is not dispositive. *McCoy* was clear on this point. The Court held that once *counsel* is "[p]resented with express statements of the client's will to maintain innocence, [] counsel may not steer the ship the other way." *Id.* at 1509; *id.* ("[A]fter consultations with [counsel] concerning the management of the defense, [in which] McCoy disagreed with [counsel]'s proposal to concede McCoy committed three murders, it was not open to [counsel] to override McCoy[.]").

Given *McCoy*'s clear holding, it is not surprising that multiple courts have rejected an objection requirement. As the Wisconsin Supreme Court observed: "*McCoy* holds that in order to prove a Sixth Amendment violation, a defendant must have expressed *to his counsel* his clear opposition to an admission of his guilt. We read *McCoy* as not necessarily requiring a defendant to contemporaneously object on the record in order to preserve that claim." *Chambers*, 955 N.W.2d at 149 n.6 (emphasis added); *see also Eddy*, 33 Cal. App. 5th at 482–83 (finding *McCoy* violation where the defendant "instructed his counsel to maintain his innocence before

[trial]" yet "did not object during closing argument after his counsel conceded his guilt"); *Thompson*, 433 P.3d at 777–78 (explaining that, even though the defendant "did not object to [counsel's] proposed strategy," the "proper inquiry" is whether the defendant "expressed to defense counsel" that his "fundamental objective is to maintain innocence").

B. An Objection Requirement Will Have Absurd Consequences.

Requiring defendants to object to their own attorneys' statements during trial ignores the practical realities and will yield absurd, futile results. *See M'Culloch v. Maryland*, 17 U.S. 316, 355 (1819) ("[An] interpretation [of the Constitution] must be rejected" if it would yield "absurdity.").

To begin with, there are circumstances, like Mr. Harvey's, in which a defendant has no realistic opportunity to object. Mr. Harvey never had an opportunity or a reason to protest trial counsel's concession of his guilt to first-degree murder because counsel never told Mr. Harvey that such a concession was going to be made. To the contrary, counsel expressly assured Mr. Harvey he would *not* concede guilt to first-degree murder—and Mr. Harvey affirmatively agreed with that defense objective. *Supra* pp. 8–9. A categorical objection rule would require defendants to prophesy the ways their attorneys might fail to act as promised, and then prophylactically or instantaneously lodge objections to the very things their attorneys guaranteed they would not do. This is the height of absurdity.

Mr. Harvey is aware of no support for the proposition that a defendant in his position—who had every reason

to believe counsel would *not* concede the charged offense—should nevertheless be expected to protest that concession. There is certainly no support in *McCoy* or in *Nixon*. In *Nixon*, this Court repeated no less than seven times that counsel has a "duty" to "adequately disclose[] to and discuss[] with the defendant" the concession of guilt. 543 U.S. at 179, 189; *see also id.* at 178, 187, 192. The defense attorney in *Nixon* informed the defendant "at least three times" of the concession the attorney then went on to make. *Id.* at 181. Because the attorney "fulfilled his duty of consultation," the absence of any protest from the defendant was construed as permitting the attorney to proceed with the concession. *Id.* at 189, 192.

In *McCoy*, this Court reiterated that counsel "must . . . discuss" any concession of guilt "with her client." 138 S. Ct. at 1509. The attorney in *McCoy* did so two weeks before trial. *Id.* at 1506. Because the attorney informed McCoy of the concession well in advance of trial, McCoy (like Nixon) had an opportunity to form a decision and raise objections, and did so. But Mr. Harvey had no such chance. The fact that McCoy took advantage of the opportunities he was afforded—because his counsel complied with the duty of consultation—has no bearing on the circumstance here, where Mr. Harvey was caught completely unaware, hearing his attorney concede his guilt to first-degree murder for the first time *as it was being delivered* to the jury during counsel's opening statement. *See supra* pp. 8–9.

An objection rule is impractical for many other reasons as well. It requires defendants untrained in the law to scrutinize and analyze their attorney's

statements, which they have likely never heard before, on a real-time basis. As is well-documented, even lawyers with years of litigation experience have difficulty recognizing when to make trial objections.[4]

Mr. Harvey's case illustrates just how unworkable this requirement is, especially in light of his cognitive impairment[5]—a trait he shares with many capital defendants.[6] In order for Mr. Harvey to have been able to object to his counsel's concession of guilt to first-degree murder, he first would have had to comprehend that his attorney's statements conceded the element of premeditation. The initial postconviction proceedings in this case demonstrate just how difficult this would have

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[4] *See, e.g.*, Donald R. Pocock, *Planning for Objections*, Am. Bar Ass'n (Nov. 27, 2019) (remarking on the challenges of trial objections which "can sometimes feel like a series of roadblocks that make the trial attorney's life more difficult"); Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 Pepp. L. Rev. 243, 246 (2002) (describing the "reality of the burden a lawyer faces when objecting to evidence during trials" because of the few "second[s]" a lawyer has to state her objection).

[5] Dr. Michael Norko, a professor of psychiatry at Yale University and the principal forensic psychiatrist for the State of Connecticut, reached the undisputed conclusion that Mr. Harvey suffers from "organic brain dysfunction" and has "very poor . . . executive functions." *See* Initial Br. of Appellant at 9–10, *Harvey v. State*, No. SC19-1275 (Fla. Sept. 23, 2019); R. Vol. 11, Evid. Hr'g. Tr. at 280–81 (Aug. 18, 1998).

[6] Estimates show that a significant portion of capital defendants suffer from severe mental illness. *See, e.g.*, Mental Health Am., *Position Statement 54: Death Penalty and People with Mental Illnesses* 3 (June 14, 2016), https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (estimating that 20% of death row inmates "have a serious mental illness").

been for Mr. Harvey to understand. The circuit court did not even recognize the concession of premeditation until it was reversed by the Florida Supreme Court. *See Harvey III*, 2003 Fla. LEXIS 1140; *Harvey IV*, 946 So. 2d at 943. Next, Mr. Harvey would have had to understand that premeditation is the element that separates second-degree murder from first-degree murder. *See* Fla. Stat. §§ 782.04(1)(a), (2) (defining first-degree murder as "perpetuated from a premeditated design" and second-degree murder as "without any premeditated design").

Even if a defendant were able to recognize that his attorney had conceded his guilt, an objection requirement puts the defendant in the untenable position of having to disrupt the judicial proceedings, rise up out of their chair at counsel table, publicly challenge their own attorney, and complain in front of the judge and potentially the jury, all while risking contempt of court or other sanctions. When criminal defendants who are represented by counsel speak out during court proceedings, they are often reprimanded by the trial judge, even held in contempt.[7] Indeed, in *McCoy*, when the defendant objected during opening

[7] *See, e.g.*, *State v. Fitzgerald*, -- P.3d --, 314 Or. App. 215, 217, 221 (Or. Ct. App. 2021) (affirming judgment of contempt where defendant disrupted court proceedings to assert his constitutional right to discharge his appointed counsel); *People v. Burch*, No. 352708, 2021 WL 2493957, at *2 (Mich. Ct. App. June 17, 2021) (noting that trial court threatened to hold defendant in contempt for addressing the court regarding confusion about his plea deal); *State v. K.M.B.*, No. A-1318-16T4, 2020 WL 1950507, at *2 (N.J. Super. Ct. App. Div. Apr. 23, 2020) ("The court strongly admonished defendant of the possibility of being held in contempt if he continued to intentionally disrupt the proceedings.").

statement to his attorney's concession of guilt, the trial court admonished the defendant and continued to reprimand him for his "outbursts" as the defendant objected to the wrongful concession. 138 S. Ct. at 1506–07. An objection requirement thus places criminal defendants in an unfair double bind: adhering to one's Sixth Amendment-protected autonomy right comes at the cost of judicial reproach, even potential contempt, or being seen by the jury as disruptive. And this Court does not tolerate rules or practices that impose a cost on the assertion of a constitutional right. *See, e.g.*, *Griffin v. California*, 380 U.S. 609, 614 (1965) (holding that the Fifth Amendment prohibits the prosecution from commenting on a defendant's invocation of his right to remain silent because "[i]t is a penalty imposed by courts for exercising a constitutional privilege" and "cuts down on the privilege by making its assertion costly"). Moreover, an objection requirement encourages needless disruption of trial proceedings, and places trial judges in the difficult position of having to police the line between improper disruptive behavior and legitimate "adamant[] object[ions]" of the sort made by the defendant in *McCoy*. 138 S. Ct. at 1505.

Mr. Harvey is not aware of any other rule in U.S. criminal procedure that requires a defendant to make objections to his own attorney's statements in the middle of trial. Such a requirement is completely contrary to the fundamental premise of the attorney-client relationship: the attorney speaks for her client. The express objection rule is all the more perverse because criminal defendants have a constitutional right not to speak *at all*. U.S. Const. amend. V. The Florida Supreme Court's unprecedented rule cannot be the

constitutional prerequisite for a defendant to vindicate his Sixth Amendment rights.

C. Mr. Harvey's Counsel Violated His Autonomy Right Under *McCoy*.

With respect to the *proper* requirements for relief under *McCoy*—that a defendant must have asserted the objective of his defense and that counsel must have subsequently overridden this objective—the prior factual findings of both the Florida Supreme Court and the Florida Circuit Court make clear that Mr. Harvey satisfies the rule of *McCoy*.

Like the defendant in *McCoy* and unlike the defendant in *Nixon*, Mr. Harvey "asserted" his objective to maintain innocence of first-degree murder. *See McCoy*, 138 S. Ct. at 1509. While Nixon was "unresponsive" during discussions of trial strategy, *Nixon*, 543 U.S. at 181, Mr. Harvey reached an affirmative agreement with counsel: an agreement not to concede guilt to first-degree murder, which would expose Mr. Harvey to a potential capital sentence. Specifically, when counsel told Mr. Harvey that he planned to concede guilt only to "second degree murder and *not* either premeditated or felony murder," Mr. Harvey "nodd[ed]" and "said he understood this defense tactic." *Supra* pp. 8–9. Those are the Florida Circuit Court's undisturbed evidentiary findings. *Supra id.* Indeed, the State has recognized that Mr. Harvey expressly "adopted" and "agreed with the strategy to concede guilt to *second*-degree murder"—and not to *first*-degree murder. *Supra* p. 9, State's Answer Br. at 28, 42 (emphasis added). Based on the prior factual findings and testimony, which the State does not

contest, there can be no question that when Mr. Harvey's counsel conceded his guilt to first-degree murder, the very charge counsel and Mr. Harvey agreed not to concede, counsel "usurp[ed] control of" Mr. Harvey's decision whether to admit guilt, in violation of the Sixth Amendment. *McCoy*, 138 S. Ct. at 1511.

If a defendant's autonomy right is not violated in a case such as Mr. Harvey's—where counsel defied an express promise not to concede guilt to first-degree murder—then the right to autonomy ceases to have any real meaning. This Court should grant certiorari and vacate the judgment below.

II. THIS CASE PRESENTS A RECURRING, IMPORTANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

Because the Florida Supreme Court's objection requirement contravenes *McCoy* and because the right to autonomy is a "fundamental right," the issue presented here is of the utmost importance. 138 S. Ct. at 1514 (Alito, J., dissenting). This issue potentially affects every defendant seeking to vindicate his Sixth Amendment right to determine the objective of his defense.

The Sixth Amendment autonomy right is especially important—and the lower-court split especially troubling—because this right "come[s] into play" primarily in "capital case[s]," where the jury must decide both guilt and punishment, thus creating the context in which a defense attorney may deem a concession of guilt to be strategically beneficial. *Id.* As many Justices have recognized, capital cases involve a "uniquely severe and irrevocable punishment," *Baze v.*

Rees, 553 U.S. 35, 79 (2008) (Stevens, J., concurring), which "necessitates safeguards not required for other punishments." *Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting).

Because the lower courts are split as to the requirements for relief under *McCoy*, a defendant's ability to vindicate his fundamental Sixth Amendment autonomy right currently hinges on the state in which he was convicted. While the Florida Supreme Court's ruling means that Mr. Harvey continues to serve a death sentence merely because he did not object to counsel's wrongful concession, a similarly-situated defendant in Wisconsin, Oregon, or California likely would have prevailed under *McCoy* and would have had his death sentence vacated. *See Chambers*, 955 N.W.2d at 149 n.6; *Thompson*, 433 P.3d at 777–78; *Eddy*, 33 Cal. App. 5th at 482–83. The Sixth Amendment autonomy right that *McCoy* protects must apply equally to all defendants in all states. *See Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility under current practice . . . and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions is to ensure the integrity and uniformity of federal law." (internal citation omitted)).

Without further instruction from this Court, the objection requirement will continue to burden defendants with the wholly unrealistic responsibility of having to supervise their own attorney's statements during trial on a real-time basis. These defendants will continue to have to make no-win decisions about whether to contradict their attorney in front of the judge

or jury, or remain faithful to the true objective of their defense. Requiring an express in-court objection will continue to invite the disruption of court proceedings as defendants seek to protect their fundamental autonomy rights at trial.

To ensure the uniform and correct application of *McCoy*, this Court should grant certiorari to clarify that a *McCoy* violation is established when a defendant "expressly asserts that the objective of 'his defence' is to maintain innocence" and counsel then "override[s]" that objective "by conceding guilt," regardless of whether the defendant makes an in-court objection. *McCoy*, 138 S. Ct. at 1509 (quoting U.S. Const. amend. VI) (emphasis omitted).

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Certiorari is also appropriate here because Mr. Harvey's case is an excellent vehicle for resolving the conflict over the objection requirement.

Mr. Harvey's case squarely presents the circumstance creating this conflict. Mr. Harvey reached an express agreement with trial counsel to maintain his innocence of first-degree murder, yet did not object in court when counsel directly overrode his expressed wishes. Thus, the success of Mr. Harvey's claim turns on whether *McCoy* requires an express objection *even after* the defendant has expressly asserted that his defense objective is to maintain innocence of the charged crime. This case therefore offers an ideal opportunity for this Court to make clear that a violation of the autonomy

right is complete upon counsel overriding a defendant's asserted objective to maintain innocence.

Further, unlike previous unsuccessful petitions for certiorari raising issues under *McCoy*,[8] there is no question in this case as to whether trial counsel in fact conceded the defendant's guilt. It is undisputed—and the law of the case—that counsel conceded Mr. Harvey's guilt to first-degree murder. *See Harvey IV*, 946 So. 2d at 943 ("[C]ounsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder."). Thus, there are no preliminary or collateral issues that would prevent this Court from addressing the dispositive legal question: whether a defendant's lack of objection precludes relief under *McCoy* even where counsel's concession of guilt directly overrode the defendant's already-expressed defense objective.

In addition, Mr. Harvey's case does not present the concern that three Justices voiced in dissent in *McCoy*. In *McCoy*, trial counsel conceded only that the defendant "committed one element of th[e] offense, *i.e.*, that he killed the victims." *McCoy*, 138 S. Ct. at 1512 (Alito, J., dissenting). Because McCoy's counsel still "strenuously argued that petitioner was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense," the dissenting opinion noted that "the Court's newly discovered

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[8] *See, e.g.*, Petition for a Writ of Certiorari, *Rosemond v. United States*, 2020 WL 5991229 (U.S. 2020) (No. 20-464); Petition for a Writ of Certiorari, *Bangiyev v. United States*, 2018 WL 3301880 (U.S. 2018) (No. 18-20).

fundamental right simply does not apply to the real facts of this case." *Id.*

Mr. Harvey's case does not have this problem. As mentioned, it is undisputed and law of the case that by conceding the element of premeditation, trial counsel conceded Mr. Harvey's guilt to every element of first-degree murder and made Mr. Harvey eligible for the death penalty. *Harvey IV*, 946 So. 2d at 943. Because counsel conceded the charged crime (and not just an element of the crime), Mr. Harvey's case is the ideal vehicle for this Court to rule on the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 29, 2021

APPENDIX

Appendix A

Supreme Court of Florida

No. SC19-1275

HAROLD LEE HARVEY, JR.,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

February 4, 2021

PER CURIAM.

Harold Lee Harvey, Jr., appeals an order of the circuit court denying his second successive postconviction motion filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

BACKGROUND

In 1986, a jury found Harvey guilty of two counts of first-degree murder, and Harvey was sentenced to death. This Court affirmed the judgment and sentence on direct appeal. *Harvey v. State*, 529 So. 2d 1083 (Fla. 1988). Harvey's sentence became final on February 21,

1989, when the United States Supreme Court denied certiorari review. *Harvey v. Florida*, 489 U.S. 1040 (1989). This Court subsequently affirmed the denial of Harvey's first two postconviction motions seeking relief under rule 3.851. *Harvey v. State*, 946 So. 2d 937 (Fla. 2006); *Harvey v. State*, 260 So. 3d 906 (Fla. 2018).

Now, in his second successive postconviction motion, Harvey argues that he is entitled to a new trial because counsel conceded guilt to first-degree murder without giving Harvey notice and the opportunity to object. Harvey bases this claim on the Supreme Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which we explain below. Harvey acknowledges that he raised a similar argument in his initial postconviction motion, where Harvey unsuccessfully alleged ineffective assistance of counsel. But Harvey distinguishes the claim here on the ground that a *McCoy* error is structural and not subject to analysis under the test of *Strickland v. Washington*, 466 U.S. 668 (1984).

The trial court denied the motion, finding *McCoy* distinguishable because counsel in that case conceded guilt over the defendant's adamant objection. The trial court also found two alternative grounds for denying the motion: first, that the motion was untimely; and second, that *McCoy* does not meet the test for retroactive application. As to the first alternative ground, the trial court held that the rule 3.851(d)(2)(B) exception to the one-year filing requirement does not apply because

McCoy has not yet been held to apply retroactively.[1] Harvey now appeals the denial of his motion.

ANALYSIS

Harvey's claim here is indistinguishable from the one that this Court recently rejected in *Atwater v. State*, 300 So. 3d 589 (Fla. 2020).[2] Like Harvey, the defendant in *Atwater* sought relief under *McCoy*. Like Harvey, the defendant in *Atwater* faulted trial counsel for failing to obtain consent to the trial strategy of conceding guilt. And like Harvey, the defendant in *Atwater* did not allege that trial counsel conceded guilt over the defendant's express objection. We held in *Atwater* that claims of this nature are facially insufficient to warrant relief under *McCoy*. *Id.* at 591.

In *Atwater*, we explained that "the Supreme Court in *McCoy* did not hold that counsel is required to obtain the express consent of a defendant prior to conceding guilt." *Id.* at 590. Instead, the holding of *McCoy* is that if a

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[1] Florida Rule of Criminal Procedure 3.851 requires that any postconviction motion challenging a judgment of conviction and sentence of death must be filed within one-year after the judgment and sentence become final, subject to certain exceptions including that "the fundamental constitutional right asserted was not established within the [1-year period] and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

[2] "We review a circuit court's summary rejection of a postconviction claim de novo, 'accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief.'" *Dailey v. State*, 279 So. 3d 1208, 1215 (Fla. 2019) (quoting *Pardo v. State*, 108 So. 3d 558, 561 (Fla. 2012)).

defendant "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." *McCoy*, 138 S. Ct. at 1509 (quoting U.S. Const. amend. VI). The defendant in *McCoy* "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. Given those facts, the Supreme Court found that counsel's concession of guilt violated McCoy's "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* at 1508.

Harvey's claim is not a *McCoy* claim, because Harvey does not allege that trial counsel conceded guilt over Harvey's express objection. Rather, Harvey simply alleges that trial counsel failed to consult with him in advance. But, as we also explained in *Atwater*, "counsel's duty to discuss trial strategy with the defendant was established long before the Supreme Court's decision in *McCoy*." *Atwater*, 300 So. 3d at 591.

Thus, even accepting all of Harvey's factual allegations as true, *McCoy* would not entitle Harvey to relief. In light of this conclusion, we need not address the alternative grounds that the postconviction court offered in support of its ruling, including the finding that Harvey's motion was untimely.

CONCLUSION

We affirm the denial of Harvey's second successive postconviction motion.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Okeechobee County, Michael Carlton Heisey, Judge - Case No. 471985CF000075CFAXMX

Ross B. Bricker of Jenner & Block LLP, Chicago, Illinois, for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Rhonda Giger, Assistant Attorney General, West Palm Beach, Florida, for Appellee

Appendix B

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Okeechobee County, Florida

WHEREAS, in that certain cause filed in this Court styled:

HAROLD LEE HARVEY, JR. vs. STATE OF FLORIDA

Case No.: **SC19-1275**

Your Case No.: **471985CF000075CFAXMX**

The attached opinion was rendered on: **02/04/2021**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS, The Honorable CHARLES T. CANADY, *Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 17th day of June 2021.*

/s/
Clerk of the Supreme Court of Florida

Appendix C

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE COUNTY, FLORIDA

STATE OF FLORIDA,	FELONY DIVISION CASE NO. 471985CF000075A

vs.

HAROLD LEE HARVEY, JR.,

ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CASE came before the court for a case management conference on July 2, 2019, on the Defendant's Successive Motion to Vacate Death Sentence filed on May 13, 2019; and the State's answer filed on June 3, 2019, in this capital postconviction case pursuant to Florida Rule of Criminal Procedure 3.851. The court finds and orders as follows.

The Defendant's judgment and death sentence became final on February 21, 1989, when the United States Supreme Court denied certiorari. *Harvey v. Florida*, 489 U.S. 1040 (1989). The court incorporates by reference the State's answer and adopts the State's postconviction procedural history.

In this successive motion, the Defendant seeks the retroactive application of his Sixth Amendment right to determine the objective of his own defense pursuant to *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). The Defendant does not claim ineffective assistance of counsel but asserts structural error in trial counsel's concession of the Defendant's guilt without affording the Defendant the opportunity to consent or object.

The court adopts the State's answer reasoning and hearing argument in finding the Defendant is not entitled to relief for the following reasons. First, the motion is untimely because neither the United States Supreme Court nor the Florida Supreme Court have held *McCoy* to apply retroactively to the Defendant's conviction and sentence that became final in 1989. Second, unlike McCoy, the Defendant did not insist that he was innocent nor adamantly object to trial counsel's concession of guilt; but instead the Defendant made a complete and thorough statement to police concerning his role in the homicides, and sat silent at trial when counsel conceded these facts. Third, in a prior postconviction proceeding counsel's concession of guilt was found not deficient after an opinion of the Florida Supreme Court was withdrawn. *Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006). Lastly, the Defendant's retroactively claim fails to satisfy the last prong of *Witt*. Therefore,

The Defendant's motion is denied.

DONE AND ORDERED in chambers in Okeechobee, Florida, on July 3, 2019.

/s/ Michael Heisey
MICHAEL C. HEISEY
Circuit Judge

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7/3/19

Appendix D

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NO. 85 75 CF

HAROLD LEE HARVEY, JR.,
_____/

AMENDED ORDER ON MOTION FOR POST CONVICTION RELIEF

THIS CAUSE is before the court on motion by Harold Lee Harvey, Jr., for post conviction relief, and the court having considered said motion and the state's response thereto, the remand opinion of *Harvey vs. Dugger*, 656 So. 2d 1253 (Fla. 1995), evidence presented, and argument and authorities cited, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

1. That the evidence proves the following facts:

a. Approximately 6:20 A.M. February 27, 1985 Harold Lee Harvey was arrested for two counts of second murder and one count of armed robbery.

He was transported to the Okeechobee County jail and arrived approximately 6:30 A.M. He was partially booked at that time. The booking officer only asked

Harvey his name and noted a $3,000,000 bond. Harvey was not asked if he wanted a lawyer.

Harvey was immediately taken to an adjacent office and interviewed by Florida Department of Law Enforcement Officer Pete Lanier, Okeechobee County Chief Deputy O.L. Raulerson and Deputy Sheriff Gary Hargraves. During the interview, which lasted through the afternoon, Harvey made two incriminating statements, one at 3:07 P.M. At no time during the interview did Harvey ask for a lawyer.

b. Although Assistant Public Defender Clyde Killer came to the jail twice to see Harvey during the interview, one time at approximately 2:20 P.M., there is no indication that either Harvey or his family requested Mr. Killer's presence. Mr. Killer did see Mr. Harvey after he had made his statements.

c. A booking sheet was completed on Harvey by Corrections Officer Rose Marie Bennet at approximately 5:50 P.M. while Mr. Killer was present. On the sheet Harvey indicates he wishes to have a lawyer. (Ms. Bennet arrived for her shift that day at 3:40 P.M., and asked Mr. Harvey the question about counsel after that time.)

At 6:10 P.M. a First Appearance hearing was held before County Judge Burton Conner for both Harvey and co-defendant Stiteler.

Mr. Harvey was photographed and finger printed at approximately 7:15 P.M.

d. Later Mr. Harvey tried to cut his wrists with a sharpened coin and also tried to hang himself.

e. Anticipating that Mr. Harvey would be charged with one or more counts of first degree murder, the circuit judge assigned to criminal cases in Okeechobee County asked Attorney Robert J. Watson to represent him, and after interviewing Harvey he consented and was appointed counsel. Mr. Watson had previously participated in the defense of persons charged with potential death penalty crimes and attended "Life Over Death" seminars. This was his first case as lead counsel in a potential death penalty case.

Mr. Harvey and co-defendant Stiteler were both indicted for two counts of first degree murder; the State indicated it would seek the death penalty as to both.

f. Mr. Watson prepared the case for trial, including obtaining court authorization to employ a psychologist and psychiatrist if necessary. Mr. Watson felt that Harvey was worth saving and that the jury would recommend a life sentence if Harvey was convicted because of the circumstances of the killings and Harvey's life problems and the apparent out of character nature of the killings.

Mr. Watson applied for and received court permission to employ a private court investigator. He discharged the first investigator he hired after approximately five months because the investigator was unable or unwilling to comply with Mr. Watson's requests, although he did obtain statements from approximately 15 witnesses. A second investigator was employed, and this investigator assisted with interviewing of witnesses and concluding trial preparations.

Psychologist Fred Petrilla Ph.D., was retained after court permission and he examined Mr. Harvey. Dr. Petrilla was not given a psycho-social history of the defendant. Harvey also did not discuss the facts of the charges with Dr. Petrilla on advise of Mr. Watson because of a pending motion to suppress Harvey's statements. Dr. Petrilla performed a personality assessment and other psychological tests on Mr. Harvey. Dr. PetrilIa's findings and conclusions were that Harvey suffered from post traumatic stress syndrome and had a dependent personality. He did not do a forensic evaluation but did test Harvey's IQ. He recommended that Mr. Harvey be given anti-depressive medications and receive individual psychotherapy with assertiveness training. He did test Mr. Harvey for organic brain damage but did not diagnose Mr. Harvey as having such damage.

Mr. Watson met with Mr. Harvey's mother and father and siblings and ate dinner in their home on two occasions. He felt they were good, decent people. He also obtained Mr. Harvey's school records. He did not uncover any evidence that Harvey used or abused cocaine or marijuana or quaaludes, that he drove an automobile drunk, or that his parents abused him. He determined that Harvey was involved in a very serious automobile accident at age 16 where he lost consciousness and a female companion was killed. He determined that Harvey had never been institutionalized.

Dr. Petrilla also interviewed the Harvey family and Harvey's co-workers.

On May 22, I986 Mr. Watson and Dr. Petrilla conferred, and Dr. Petrilla recommended Carmen Ebalo, MD as an examining psychiatrist for Mr. Harvey so that the a expert could verify Dr. Petrilla's opinion and assure that it was comprehensive.

Mr. Watson decided not to employ a psychiatrist because he felt that if there were conflicts between two experts the jury might disregard all the mental health evidence. He also felt that the jury might see calling more than one mental health expert as trying too hard to make a bad excuse for bad behavior because Harvey had never been treated for mental illness.

Mr. Watson did before trial move the court to obtain a postponement between the guilt and penalty phases of the trial, alleging grounds that he wished to obtain a psychiatric evaluation of Harvey if Harvey was convicted. The motion was denied.

No claim was raised by Mr. Watson concerning the booking sheet in regard to suppression of Harvey's confession. Mr. Watson does not recall ever having a copy of the booking sheet, however a copy was found in his office file by a lawyer subsequently representing Mr. Harvey.

Mr. Harvey never told Mr. Watson that he had asked to talk with a lawyer before he made his confession, and he told Mr. Watson the same version of the events as he told the interrogating police officers.

Mr. Watson and Mr. Harvey discussed a guilty plea if the state would waive the death penalty, however State Attorney Bruce Colton rejected this potential deal, and no deal offer was ever made by the state.

g. Mr. Watson obtained a severance of the two defendants for trial, and Mr. Harvey's trial commenced in June 1986 with jury selection. The trial judge denied Harvey's motion to suppress his confession before the jury was sworn.

Because Mr. Watson felt the confession "was the case," he had discussed with Mr. Harvey during case preparation what his defense could be and that they probably would admit some degree of murder if the confession was not suppressed. They specifically discussed on more than one occasion that if the confession was ruled admissible, Watson would make an opening statement that Harvey was guilty of murder, but that it was second degree murder and not either premeditated or felony murder. Mr. Harvey said he understood this defense tactic.

Watson stated to the jury during his opening statement that the evidence would show a murder was caused by a frightened and confused young Mr. Harvey after he and his friend had robbed the victims. He stated that Harvey did not intend to kill.

h. Harvey's tape-recorded confession was admitted into evidence as was physical evidence of the crime scene and of the recovery of a murder weapon. The physical evidence and Harvey statement supported a factual finding that the two victims heard Mr. Harvey and Mr. Stiteler arguing concerning the necessity of killing them and then tried to flee. Harvey and Stiteler had brought masks but never put them on, and Mr. Harvey was recognized by the Boyds.

Mr. Watson was concerned about losing credibility with the jury. For this reason felt he should

not argue that Mrs. Boyd did not hear the Harvey-Stiteler conversation even though there was also evidence that she was hard of hearing and that the television was turned loud so she could hear it.

Evidence was introduced over Mr. Watson's objection of a death threat by Mr. Harvey toward another county jail inmate while Harvey was awaiting trial. In order then to molify the effect of this testimony, Watson examined the corrections officer witness concerning the mutual nature of the combat and that each of Harvey and the other inmate would have tried to kill the other if given the chance.

Evidence was also introduced that Harvey had escaped while awaiting trial. Mr. Watson's objection of improper prejudice outweighing relevancy was overruled. An escape note beginning with a phrase meaning "It's a good day to die," was admitted.

There was no evidence that Mr. Harvey was under the influence of alcohol or any other drugs the day of the killings.

i. During the jury instruction conference Mr. Harvey participated and personally waived instructions on excusable and justifiable homicide.

During final argument the prosecutor argued that the evidence had not shown everything Mr. Watson had said it would. Mr. Watson objected to this argument as striking at the defendant over the back of his lawyer because he intended to present the additional evidence during a penalty phase if there was a conviction.

Mr. Harvey was found guilty by the jury of two counts of first degree murder.

j. After the guilty verdict Harvey became less motivated to assist his lawyer, however he did not have any difficulty participating in the guilt phase of the trial, and he did appear to understand what occurred during the penalty phase.

During the penalty phase the defendant presented 16 witnesses including Dr. PetrilIa who testified that he had been a state's witness in earlier cases and that this was the first time he had testified in a death penalty case for a defendant.

The evidence including Dr. Petrilla's testimony showed that Harvey was depressed, had low self-esteem and a mental age of 18 and physical age of 23, did not have brain damage, and was impulsive. Evidence was also presented that he was hard-working, from a good, decent family who would be negatively effected if he would be executed, that he had been a loving brother to his disabled sister, that the crime was out of character, and that he was pressured by his wife to provide things he could not financially do. Evidence showed that he was involved in the fatal accident at age 16 and would be able to adapt to a life sentence in prison.

Harvey's parents and siblings testified to establish his history, and Mr. Watson provided each with a memorandum of the questions he would ask and the answer he thought they would give.

Harvey chose not to testify during the penalty phase, although he had indicated earlier that he would testify.

k. Mr. Watson did not waive the statutory mitigator of lack of prior significant criminal history even though

as of 1986 the existing law defined "prior" as meaning prior to sentence and not prior to offense. This was because the state had already introduced evidence during the guilt phase of Mr. Harvey's escape from jail and theft of a motor vehicle while he was awaiting trial.

Mr. Watson requested a jury instruction on substantial domination, and this was denied.

Mr. Watson then decided not to argue that Mr. Harvey was under substantial domination by another because the evidence showed that Harvey was older than Stiteler, they went to the crime scene in Harvey's car, Harvey was married with marital pressures, and Harvey was the trigger man and had immediately taken the AR-15 from Stiteler's hands immediately before shooting.

Mr. Watson argued that the killings were out of character for Mr. Harvey and emphasized that the killings occurred while Harvey was in a state of panic after the robberies were completed, that there was no intent to kill, and that Harvey's confession showed him to be a remorseful and regretful person, thus maintaining consistency between his guilt and penalty phase positions: The final argument was a well-organized plea for mercy.

The jury recommended the death penalty by a vote of eleven-to-one. Neither the state nor Mr. Watson presented additional evidence to the judge before Mr. Harvey was sentenced.

l. Harold Lee Harvey, Jr., was sentenced to death for two counts of murder in the first degree.

m. During the time Mr. Watson knew Mr. Harvey while working on the trial case, Mr. Harvey's personality did not appear to change. He appeared to be normal and did not act unusual when in Mr. Watson's company. Mr. Watson describes him as a docile client.

n. After conviction and sentence Mr. Harvey was evaluated in 1990 and 1996 by psychiatrist Michael A. Norko, MD. Dr. Norko also interviewed Harvey's mother and two sisters. He states that the Harvey home was abusive and that both parents drank alcohol to excess as did Harvey and his siblings, and that Harvey's automobile accident at age 16 caused him to drink alcohol daily and receive failing grades in school. He relates that Mr. Harvey was in love with a woman who left him in 1982 and that he was a user of cocaine, quaaludes, and LSD. He further states that Harvey married in December 1984 and was unable to make enough money to please his wife. He relates that Harvey's wife made all of the family decisions and that Harvey could not develop a life plan and lacked insight and judgment, and that he exhibited bizarre behavior such as shooting out a street light with a gun. He opines that although Stiteler was the younger of the two, he dominated Harvey and could get him to do almost anything. He also opines that Harvey was suicidal because before the killings he drove a car into a bridge and exhibited "crazy" driving, and put a loaded pistol to his head, and after his arrest cut his wrists, attempted to hang himself, and escaped. He diagnoses Harvey as suffering from an organic brain dysfunction, a major depressive disorder, a dependant disorder, post traumatic stress syndrome and substance abuse and opines that these diagnoses tend to prove the mitigating factors of lack of capacity to

appreciate criminality, domination by another person and extreme mental disturbance.

PhD psychologist Brad Fischer also examined and evaluated Mr. Harvey after trial. He met with Mr. Harvey for seven hours in 1990 and conducted clinical testing on him. They discussed the crime. Dr. Fischer also reviewed affidavits of people who knew Harvey and Harvey's medical and school records. He retested Mr. Harvey in August 1998. He concludes that Mr. Harvey was a substance abuser from age 14, that he may have been the victim of pesticide poisoning as a child, and that Mr. Harvey's severe automobile accident resulted in behavior and memory changes. He opines that Mr. Harvey should have been evaluated by a psychiatrist and that the three statutory mitigators of lack of capacity to appreciate criminality, domination by another person and extreme mental disturbance were present at time of trial.

Evidence is now available that Mr. Harvey's mother and father both grew up in poverty-stricken alcoholic homes and married when the senior Mr. Harvey was 20 and Mrs. Harvey was 15. There is evidence that the family did not have enough money for food or routine medical care, that the parents and four children lived in a four bedroom house, that Harvey worked to help with family finances, and that as a child he played in agricultural canals which may have contained pesticides. There is evidence that Harvey's father was an alcoholic and struck him with a stick or belt to discipline him, was abusive to Harvey's mother and that the family was not loving. There is evidence that Harvey's wife was demanding and withheld sex

from him. There is evidence that Harvey repeated questions asked of him, played "chicken" with a semi-tractor while drunk and while his sister was in the car with him, that he wrecked two cars, and that he was depressed before his marriage after breaking up with another girlfriend. There is evidence that on one occasion Harvey choked his sister into unconsciousness and that the severe automobile accident left him a changed person - slower, appearing to "go blank," and having difficulty concentrating. There is evidence that Harvey was hit in the head with a tire iron but did not receive medical treatment and that he used cocaine, marijuana, and alcohol on a daily basis. There is evidence that Harvey's aunt suffers from some form of psychosis and that Harvey's head was "funny" shaped at birth.

Dr. Petrilla is now qualified as a neuropsychologist and testifies that he may not have correctly evaluated Mr. Harvey's testing concerning possible organic brain dysfunction and organic brain damage. He testifies that he did not know in 1985 and 1986 of his inadequacy to evaluate organic brain damage.

2. That based upon the above facts the following conclusions of law are reached:

Defendant's claim of ineffective assistance of counsel fails for want of proof that his trial counsel's performance was deficient (The second prong of the *Strickland v. Washington* test is thus not discussed.)

a. Because defendant's booking procedure question whether he wished a lawyer occurred after his confession, introduction of a copy of the booking sheet (which indicates he then wanted a lawyer) during the suppression hearing would have proven no relevant fact.

b. Defendant's trial counsel was not ineffective because of his opening statement to the jury. Key to whether the opening statement was ineffective is whether the strategy of conceding guilt of murder and arguing for a conviction of murder in the second degree had been discussed with Mr. Harvey. The argument for a second degree conviction is not *per se* ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of this strategy between counsel and defendant before the statement was made to the jury. The facts also show that the concession of guilt of murder was not of guilt of first degree murder and thus not an improper admission of guilty plea.

c. Of the sixteen witnesses called by defendant during the penalty phase, the facts show that none testified that Mr. Harvey used illicit drugs or alcohol, that he had brain damage, that he was violent, or that he was an abused child. (Many of these same witnessers now seek to prove these facts.) The trial strategy was to show defendant as a good person who had a positive family upbringing. This was done. Speculating now that another strategy may have produced a different result does not show ineffectiveness.

d. Mr. Watson proved that Harvey was depressed and unable to support his wife, suffered from low self esteem, was insecure, immature, anxious, guilt-ridden, suicidal, remorseful, possessed of a low IQ, the victim of a tragic automobile accident, and able to adapt to a prison environment. These establish that Mr. Watson effectively presented a valid sentencing hearing defense.

e. Mr. Watson was concerned about Harvey's mental health - both his competency to stand trial and whether there were mitigators that might be proven in a sentencing hearing. The expert who examined the defendant, Fred Petrilla, PhD, testified that Harvey did not have brain damage and that he suffered from a dependant personality disorder and proved the mental state of defendant referred to above. The experts who have later examined defendant concede that there is no expert proof of any particular cause of brain damage. Self-inflicted drug and alcohol use, an automobile accident, being hit in the head with a tire iron, swimming in drainage canals, and being born with a "funny" shaped head are seen only as possible causes of brain damage. There is not a showing of ineffective assistance of counsel for failure to ensure a competent mental health examination.

f. Also evidence of defendant's choking his sister, shooting out a streetlight, and playing "chicken" with another vehicle while his sister was a passenger in his car would have been placed before the jury if defendant's current mental health experts had testified. This evidence would certainly have undermined the "good person" defense.

g. Omission of evidence that was not discovered before trial (and which may not even have been available and which may have been detrimental to defendant) in this case does not show ineffective assistance.

h. The evidence available to and presented by defense counsel at trial, which included the defendant's statements, was not legally sufficient to require the court to give a jury instruction that defendant was under

the substantial domination of another. The instruction was requested and denied. The fact that there are now experts who state they would give opinions of substantial domination does not show ineffective assistance, particularly, as here, where the expert who examined the co-defendant opined that the co-defendant was under the substantial domination of Mr. Harvey.

i. The plea for mercy final argument was not ineffective assistance of counsel.

j. Evidence of Harvey's escape from jail was introduced during the guilt phase of the trial. The only crime for which defendant was convicted before the murders was a misdemeanor. Not waiving the mitigating factor of lack of prior record was not ineffective.

k. As noted above defense presented evidence at trial of remorse and that defendant would do well in prison. The state could validly argue whether these factors were proven, as in the case of any factor the defense was contending. This cannot be construed to be ineffective.

l. Failure to argue further before the judge alone prior to actual sentencing and failure to argue a matter that could result in loss of credibility with the jury are neither ineffective.

m. Mr. Watson objected on relevancy grounds to the introduction of evidence that Harvey threatened to kill a fellow jail inmate. When the objection was overruled, and he introduced evidence to prove that the incident was incited by the other inmate, this was not ineffective.

n. The overall and specific effects of Mr. Watson's efforts were effective assistance of counsel.

3. That the motion for post-conviction relief is denied.

4. That defendant has the right to appeal within 30 days of the rendition of this order.

DONE AND ORDERED this 26th day of January 1999 in chambers.

/s/ Dwight L. Geiger
DWIGHT L. GEIGER,
CIRCUIT JUDGE

cf: Lawrence Mirman, Esq.
Ross B. Bricker, Esq.

I hereby certify that a copy of the above order has been served upon the defendant by U.S. Mail this 4th day of February 1999.

SHARON ROBERTSON
CLERK OF CIRCUIT
COURT

By: /s/
as Deputy Clerk

Harold Lee Harvey, Jr. DC#102992
Union Correctional Institution
P.O. Box 221
Raiford, Florida 32083-0221
Attn: Mr. Cruz, Classification Officer

Appendix E

Supreme Court of Florida

TUESDAY, JUNE 1, 2021

CASE NO.: SC19-1275
Lower Tribunal No(s).:
471985CF000075CFAXMX

HAROLD LEE HARVEY, JR.	vs.	STATE OF FLORIDA
Appellant(s)		Appellee(s)

Appellant's "Motion for Rehearing or Reconsideration and Supporting Memorandum" is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

kc
Served:

LESLIE T. CAMPBELL
RHONDA GIGER
ROSS BENJAMIN BRICKER
RYAN LEWIS BUTLER
HON. MICHAEL CARLTON HEISEY, JUDGE
HON. JERALD DAVID BRYANT, CLERK