No. 21-653

IN THE

Supreme Court of the United States

HAROLD LEE HARVEY, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

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

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STATEMENT

1. On February 23, 1985, Harold Lee Harvey met with Scott Stiteler, his codefendant at trial, and drove to the home of William and Ruby Boyd, intending to rob them. Stiteler knocked on the front door. In the meantime, Harvey grabbed Mrs. Boyd as she was walking around from the side of the house and took her into the house where Mr. Boyd was located. Harvey and Stiteler told the Boyds they needed money. After getting the money from the Boyds, Harvey and Stiteler discussed what they were going to do with the victims and decided they would have to kill them. The Boyds tried to run, but Harvey fired his gun, striking them both. Mr. Boyd apparently died instantly. Harvey left the Boyds' home but reentered to retrieve the gun shells. Upon hearing Mrs. Boyd moaning in pain, he shot her in the head at point blank range. Harvey and Stiteler then left and threw their weapons away along the roadway. *Harvey v. State*, 529 So. 2d 1083 (Fla. 1988), *abrogated on other grounds by Fenelon v. State*, 594 So. 2d 292 (Fla. 1992).

2. Harvey was arrested for the crimes and was immediately interviewed. Harvey did not request an attorney, waived his right to counsel in writing, and made a full and detailed confession. *Id*. At trial, Harvey's confession was admitted into evidence despite trial counsel's unsuccessful efforts at suppression. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995). Ultimately, Petitioner's counsel concluded that there was no chance of obtaining an acquittal. *Id*. With this understanding in mind, the strategy then focused on efforts to "fashion a defense around

Harvey's confession," which the jury would hear. *Harvey v. State*, 946 So. 2d 937, 943 (Fla. 2006). To that end, counsel's strategy was to concede that "Harvey committed second-degree murder and argue that he did not have the necessary intent for first-degree murder." *Id*. Petitioner did not object to this strategy either before or during trial. Pet. App. 8a.[1]

Despite these efforts, the jury found Petitioner guilty of two counts of first-degree murder. Pet. App. 1a. They recommended death by a vote of 11-1. Pet. App 18a. The trial judge agreed and entered the sentence. *Id*. The Florida Supreme Court affirmed, *Harvey*, 529 So. 2d 1083, and his conviction became final on February 21, 1989, when this Court denied his petition for a writ of certiorari. *Harvey v. Florida*, 489 U.S. 1040 (1989).

3. Petitioner later sought postconviction relief in state court. *Harvey*, 946 So. 2d 937. As relevant here, Petitioner claimed that his trial counsel's "concession of guilt constituted ineffective assistance of counsel." *Pet. 2*. Ultimately, an evidentiary hearing was held on this claim. Pet. App. 10a. There Petitioner testified that trial counsel did not discuss the concession strategy with him. *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228 (11th Cir. 2011) (reviewing the issue on review of a later 28 U.S.C. § 2254 petition).

Petitioner's trial counsel, Bob Watson, testified differently regarding trial preparation and strategy.

[1] The first time any discontent with the concession was expressed was during an evidentiary hearing related to a postconviction motion in an ineffective assistance of counsel claim. Pet. App. 8a.

Watson stated that initially there had been a discussion with Petitioner about a guilty plea if the state would waive the death penalty, but this potential resolution was rejected by the State Attorney. Pet. App. 14a. Next, Watson obtained a severance of the two defendants for trial. As noted, just before trial, Petitioner's motion to suppress his confession was denied. Because Watson believed the confession "was the case," during case preparation he had already discussed with Petitioner what the defense could be if the confession suppression failed. Watson told Petitioner they would likely admit to some degree of murder. Pet. App. 15a. More than once, Watson discussed with Petitioner what the opening statement would be if the confession were admitted, specifically that the opening statement would admit that Petitioner was guilty of murder. Petitioner indicated that he understood this tactic. *Id*. Watson testified that his overall strategy was driven by the confession, and when it was admitted, he believed conviction was certain. The focus then became how to save Petitioner's life. To do so, Watson believed he needed to preserve credibility with the jury. *Harvey*, 629 F.3d at 1246, 1248.

Concerned with the comprehensive nature of the confession, Watson did not believe that his second-degree murder argument would persuade the jury. Without any real hope of a not guilty verdict, Watson believed he needed to establish and maintain credibility with the jury who would not only decide guilt, but also recommend a sentence. Watson believed that if the jury found him insincere in the guilt phase, it would impact the likelihood of any

mercy being shown to Petitioner during the penalty phase. *Id*.

After the hearing, the postconviction court denied relief. The court found that Petitioner's lawyer discussed the concession strategy with him and that the strategy included admitting to "some degree of murder if [Petitioner's] confession was not suppressed," and that Petitioner understood this strategy. Pet. App. 15a. The court's conclusions of law included the finding that "[t]he 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 [Petitioner] before the statement was made to the jury." Pet App. 22a.

The Florida Supreme Court affirmed. *Harvey*, 946 So. 2d 937. Declining to address any factual dispute surrounding the discussion to concede guilt, the court did reference the evidentiary hearing and trial counsel's testimony regarding the defense strategy being fashioned around the confession. *Id*. at 943–44. The Florida Supreme Court held that trial counsel disclosed nothing more than what was contained in Harvey's confession, noting the "evidence against Harvey was overwhelming even without counsel's admission that Harvey committed first-degree murder." *Id*. at 944. In any event, the court held that given all of the evidence at trial, there was no reasonable probability the proceeding would have reached a different result. *Id*.

Petitioner later filed the same habeas claim under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida. *Harvey v. McNeil*,

No. 08-14036-CIV-WPD (S.D. Fla. 2008). The district court denied relief, and the Eleventh Circuit affirmed, holding that the Florida Supreme Court did not act contrary to, or unreasonably apply, clearly established federal law. *Harvey*, 629 F.3d at 1253. This Court denied review. *Harvey v. Reddish*, 565 U.S. 1035 (2011).

4. Petitioner followed his first state postconviction motion with another on December 20, 2016, which was denied and affirmed on appeal. *Harvey v. State*, 260 So. 3d 906 (Fla. 2018); *Harvey v. State*, No. SC 17-790, 2018 WL 7137366 (Fla. Dec. 20, 2018), *cert. denied*, *Harvey v. Florida*, 140 S. Ct. 117 (2019).

Then, in 2019, Petitioner filed his third state postconviction motion—the motion at issue here. In it, Petitioner alleged that his trial counsel conceded guilt without notice which violated his right to autonomy under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Pet. App. 4–5. (Petitioner's sole testimony on this issue occurred at an evidentiary hearing which took place on August 24, 1999, and was related to Petitioner's claim of ineffective assistance of counsel.[2] At that time Petitioner claimed that he and his counsel had no discussion about the nature of the defense and that he did not consent to counsel conceding his guilt. PCR 930–31.)

The trial court denied the successive postconviction motion for three reasons. Pet. App. 8a.

[2] Citations to "PCR __" reference the Postconviction Record on Appeal associated with *Harvey*, 946 So. 2d 937, and the related evidentiary hearing conducted by the circuit court in *State v. Harvey*, No. 86-322 CF (Fla. Cir. Ct. Jan. 26, 1999).

"First, the motion is untimely." *Id.* Acknowledging that Florida Rule of Criminal Procedure 3.851(d)(1) generally requires postconviction motions in capital cases to be filed within one year of the judgment and sentence becoming final, the court based its ruling on the fact that "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." *Id.* Petitioner had sought to avail himself of rule 3.851(d)(2)(B), which creates an exception for motions that allege that "the fundamental constitutional right asserted was not established" within a year of the challenged conviction and sentence becoming final and that the right "has been held to apply retroactively." The court went on to hold that Petitioner's claim of retroactivity "fails to satisfy the last prong of *Witt*." *Id.*

"Second, unlike McCoy, the Defendant did not insist that he was innocent nor adamantly object to trial counsel's concession of guilt." Pet. App. 8a. 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." *Id.*

Finally, the court recognized that this issue had already been litigated in a previous claim. "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." *Id.* As a result, the trial court held that Petitioner's *McCoy* claim was without merit and denied his motion. Pet. App. 8a.

The Florida Supreme Court affirmed. Pet. App. 1a. It agreed with the trial court that, "even accepting all of [Petitioner's] factual allegations as true, *McCoy* would not entitle [Petitioner] to relief." Pet. App. 4a. Emphasizing the similarity to a recent decision where a *McCoy* claim was rejected, the court noted "Like [Petitioner], the defendant in *Atwater* sought relief under *McCoy*.[3] Like [Petitioner], the defendant in *Atwater* faulted trial counsel for failing to obtain consent to the trial strategy of conceding guilt." Pet. App. 3a. "And like [Petitioner], the defendant in *Atwater* did not allege that trial counsel conceded guilt over the [Petitioner's] express objection." *Id*. "We held in *Atwater* that claims of this nature are facially insufficient to warrant relief under *McCoy*." *Id*.

"[Petitioner's] claim is not a *McCoy* claim, because [Petitioner] does not allege that trial counsel conceded guilt over [Petitioner's] express objection. Rather, [Petitioner] simply alleges that trial counsel failed to consult with him in advance." *Id*. [B]ut, as we also explained in *Atwater*," the court emphasized, "counsel's duty to discuss trial strategy with the [Petitioner] was established long before the Supreme Court's decision in *McCoy*." *Id*.

REASONS FOR DENYING THE PETITION

I. This case is a poor vehicle.

Petitioner fails to address two antecedent issues that make the question presented "academic" and his case a poor vehicle. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not

[3] The reference is to *Atwater v. State*, 300 So. 3d 589 (Fla. 2020), *cert. denied*, *Atwater v. Florida*, 141 S. Ct. 1700 (2021).

be granted when the "problem" is only "academic"). First, Petitioner cannot benefit from *McCoy* because it is not retroactive. And second, his claim is time-barred under Florida law.

1. Petitioner's conviction became final in 1989, *Harvey*, 489 U.S. 1040, meaning that he cannot obtain relief unless *McCoy* applies retroactively on collateral review. Yet Petitioner says nothing of this threshold issue. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply [a retroactivity analysis] before considering the merits of the claim."); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (refusing to reach the merits when petitioner asked for a new rule to be applied to his case on habeas because any decision would not have been retroactive). And indeed, *McCoy* is not retroactive under either federal law or state law.

a. From a federal-law standpoint, Petitioner can only benefit from *McCoy* on collateral review if this Court announced a new substantive rule.[4] *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (eliminating the watershed rule exception). *McCoy* did not.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). In *McCoy*, "the defendant vociferously insisted that he did not engage in the charged acts and

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

adamantly objected to any admission of guilt." 138 S. Ct. at 1505. Even though the defendant "repeatedly and adamantly insisted on maintaining his factual innocence," defense counsel told the jury that the evidence unambiguously established that McCoy committed the three murders and purported to take the burden of proof off the prosecution. *Id.* at 1507, 1510. The Court held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 1505; *see infra* Part III.

That is not a new substantive rule; it does not change "the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. Especially considering that the concept of a "watershed rule" is no longer applicable, it is no surprise, then, that courts have uniformly held that *McCoy* does not apply retroactively on collateral review. *See, e.g.*, *Smith v. Stein*, 982 F.3d 229, 235 (4th Cir. 2020); *Christian v. Thomas*, 982 F.3d 1215, 1224–25 (9th Cir. 2020); *United States v. Allen*, 2020 WL 3865094, at *5–6 (E.D. Ky. Feb. 28, 2020), *report and recommendation adopted*, 2020 WL 1623988 (E.D. Ky. Apr. 2, 2020); *Elmore v. Shoop*, 2019 WL 3423200, at *10 (S.D. Ohio July 30, 2019); *Johnson v. Ryan*, 2019 WL 1227179, at *2 (D. Ariz. Mar. 15, 2019); *Commonwealth v. Gonzalez*, 242 A.3d 416 (Pa. Super. Ct. 2020) (table).

b. *McCoy* is not retroactive under Florida law either. In Florida, a change in law applies retroactively only if the change, among other things,

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

McCoy did not announce a new rule of fundamental significance. As explained above, it does not change the State's power to regulate conduct or impose penalties; it regulates the procedural relationship between counsel and client. Nor is it a "jurisprudential upheaval" on par with *Gideon*. The right to autonomy described in *McCoy* has long been a bedrock of American law. *See McCoy*, 138 S. Ct. at 1507. And *McCoy*'s precise holding—that counsel in that case violated the Sixth Amendment by admitting, "over the defendant's intransigent and unambiguous objection," that the defendant killed the victims, while arguing that he was not guilty of the crimes charged because he lacked the requisite *mens rea*—is merely an "evolutionary refinement" applying that bedrock

principle to a specific factual scenario. *Id*. at 1507, 1512; *see also id*. at 1512 (Alito, J., dissenting) (noting that defense counsel's predicament at McCoy's trial "was the result of a freakish confluence of factors that is unlikely to recur").

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

2. As the state postconviction court acknowledged, Petitioner's claim is also time barred under Florida law. Pet. App. 3–4, 8–9.[5] Under Florida Rule of Criminal Procedure 3.851(d), a defendant seeking collateral relief more than a year after his judgment and sentence have become final must fall within a timeliness exception. Petitioner contends that his claim falls within subsection (d)(2)(B), which excepts claims alleging that (a) "the fundamental constitutional right asserted was not established" within one year of the challenged conviction and sentence becoming final and (b) the right "has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). The postconviction court held that this exception did not apply, as "neither the United States Supreme Court nor the Florida Supreme Court have held *McCoy* to apply retroactively to the [Petitioner's] conviction and sentence that became final in 1989." Pet. App. 8a.

The postconviction court was right to conclude that Petitioner's motion was both "successive" and

[5] The Florida Supreme Court affirmed the trial court's order denying postconviction relief but deemed it unnecessary to "address the alternative grounds that the postconviction offered" regarding the timeliness ruling because it held that Petitioner's claim failed on the merits. Pet. App. 4a.

"untimely" under Florida law. *Id*. Petitioner filed his third successive postconviction motion on May 13, 2019, more than thirty years after his conviction and sentence became final. Pet. App. 7a. His motion cited not one case holding that *McCoy*—the authority purportedly establishing a new and fundamental constitutional right—"*has been held* to apply retroactively," Fla. R. Crim. P. 3.851(d)(2)(B) (emphasis added), as required by the plain text of the Florida procedural rule Petitioner invoked as a basis for filing his third successive motion for state postconviction relief. *See* R. 6. In addition, nothing prevented Petitioner from raising his Sixth Amendment claim in his previous motion for postconviction relief. Indeed, Petitioner *did* raise that claim in earlier proceedings, Pet. App. 10a–25a; the state courts properly rejected it on the merits, *Harvey*, 946 So. 2d 937; the federal courts did as well, *Harvey*, 629 F.3d at 1251–52; and this Court denied review, *Harvey*, 565 U.S. 1035. Simply recasting the same essential claim under *McCoy* does not give Petitioner a right, under state law, to relitigate the issue.

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

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

Petitioner does not allege that the decision below breaks with decisions from other state courts of last resort or from the federal courts of appeals regarding a concession of guilt over a defendant's desire to

maintain innocence to the charged crime. *See* Sup. Ct. R. 10(b). And there is no split. Courts routinely hold—as the state courts did below—that there is no Sixth Amendment violation under *McCoy* when the defendant does not object to conceding guilt before the concession is made. *See, e.g.*, *United States v. Wilson*, 960 F.3d 136, 143–44 (3d Cir. 2020), *cert. denied sub nom. Moore v. United States*, 2021 WL 78297 (U.S. Jan. 11, 2021), and *cert. denied sub nom. Wilson v. United States*, 2021 WL 78300 (U.S. Jan. 11, 2021); *United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019); *Saunders v. Warden*, 803 F. App'x 343, 346 n.4 (11th Cir. 2020); *State v. Froman*, 2020 WL 5665728, at *21 (Ohio Sept. 24, 2020); *Flores v. Williams*, 478 P.3d 869, at *2 (Nev. Jan. 15, 2021) (table); *Epperson v. Commonwealth*, 2018 WL 3920226, at *12 (Ky. Aug. 16, 2018); *People v. Lopez*, 242 Cal. Rptr. 3d 451, 459–60 (Cal. App. 2019); *Broadnax v. State*, 2019 WL 1450399, at *6 (Tenn. Crim. App. Mar. 29, 2019).

To be sure, Petitioner argues that his case is different because "the objective of his defense was to maintain innocence of first-degree murder." Pet. 16. But even if the record supported that allegation—and it does not, *see supra* Statement at 3–5—such an argument fails to establish a conflict between the decision below and this Court's decision in *McCoy*, which addressed "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." 138 S. Ct. at 1507.

Nor does Petitioner establish a split of authority among the state courts of last resort and the federal

courts of appeals. No other state court of last resort and just one federal court of appeals has decided whether an attorney's failure to consult with the client about conceding guilt violates *McCoy*. *See Wilson*, 960 F.3d at 143–44. The sole federal appellate court said no. *See id.* And the few other courts to consider the issue have echoed that court, holding, as the state courts did below, that an attorney's failure to consult does not give rise to a *McCoy* violation. *See, e.g.*, *Pennebaker v. Rewerts*, 2020 WL 4284060, at *4 (E.D. Mich. July 27, 2020); *Ex parte Barbee*, 616 S.W.3d 836, 843-44 (Tex. Crim. App. 2021); *People v. Santana*, 2019 WL 3425294, at *9 (Cal. Ct. App. July 30, 2019); *In re Somerville*, 2020 WL 6281524, at *4 (Wash. App. Oct. 27, 2020).[6] *A fortiori*, those cases did not accept Petitioner's view that an alleged failure to consult about a strategy of conceding guilt violates *McCoy*.

Petitioner attempts to manufacture a split by claiming that the Florida Supreme Court "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. 16. Petitioner claims that the court's use of this verbiage—"express objection"—somehow translates to the requirement of an in-court and on the record objection while trial is in session. Pet. 22–23. This is an extreme mischaracterization of the holding. While the Florida Supreme Court did indeed use the words "express objection," they were used in the context of

[6] Prior to its decision in the current case, the Florida Supreme Court also reached the same conclusion in a prior matter. *See Atwater*, 300 So. 3d 589.

the *McCoy* decision while discussing a defendant who "expressly asserts" the desire to maintain innocence. Pet. App. 4a.

While addressing Petitioner's claim, the Florida Supreme Court noted that *Atwater* and Petitioner share "indistinguishable" facts. Pet. App. 3a. Referencing its own language in *Atwater*, the Florida Supreme Court included certain phrases including "express objection" and "express consent" in Petitioner's holding. *Id*. The court went on to note, "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*. The court concluded with the statement, "[Petitioner's] claim is not a *McCoy* claim, because [Petitioner] does not allege that trial counsel conceded guilt over "[Petitioner's] express objection." Pet. App. 4a.

If analyzed in the proper context, it is clear the court's focus was on the word "express." Meaning, of course, in proper context, that a defendant articulated to his counsel that his ultimate objective was to maintain factual innocence of the charged crimes. In the proper context, the use of the word "objection" does not mean that a criminal defendant is now required to stand up in the middle of trial and make a record of his displeasure. Instead, it means that if a criminal defendant wishes to maintain innocence, that intention must be made known to his counsel.

Because Petitioner identifies no legitimate split of authority, and because in fact there is no split, this Court should deny review.

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

Petitioner claims that his counsel "usurped' his Sixth Amendment autonomy "as established" by this Court in *McCoy*," when counsel conceded his guilt. Pet. 4. Not so. As this Court explained in *McCoy*, counsel violates the client's Sixth Amendment right to autonomy—more specifically, his right to choose the objective of his defense—only when counsel overrules the client's express objection to conceding guilt. Petitioner admits that he never objected to his counsel conceding his guilt to a lesser charge in hopes of saving his life, thus counsel did not override his expressed objective and thus did not violate the Sixth Amendment right described in *McCoy*.

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

With this in mind, counsel told McCoy "two weeks" beforehand that he planned to concede guilt at trial. *Id.* McCoy was "furious." *Id.* He "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. He also ordered his counsel "'not to make that concession,' and [his counsel] knew of McCoy's 'complete opposition'" to the concession. *Id.* at 1506

(alterations accepted). McCoy instead "pressed [his counsel] to pursue acquittal." *Id.*

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

On certiorari review, this Court agreed. It recognized that "a defendant's choice in" exercising the right to defend himself "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* (citations omitted). Applying this principle in the concession context, the Court held that "[w]hen a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (emphasis omitted). The Court also distinguished an earlier case—*Florida v. Nixon*, 543 U.S. 175 (2004)—because "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective." *McCoy*, 138 S. Ct. at 1509. Rather, "Nixon complained about the admission of his guilt only after trial," while McCoy "opposed [his counsel's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.*

Because McCoy presented his counsel "with express statements of [his] will to maintain innocence . . . counsel [could] not steer the ship the other way." *Id.* Doing so violated the Sixth Amendment. And because the violation turned on the "client's autonomy, not counsel's competence," the error was "structural," not governed by this Court's "ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510–11.

2. This Court's analysis makes clear that the violation found in *McCoy* arises in a "stark scenario," *id.* at 1510, in which the client expressly objects to conceding guilt and counsel "overrides" his wishes. *Id.* at 1509. Thus, *McCoy* describes a Sixth Amendment violation that flows not from the effects of "counsel's [in]competence," but from counsel's intrusion into the realm of "client[] autonomy." *Id.* at 1510. Said differently, the violation turns not on negligent conduct, but on intentional disregard for the client's stated objective. Counsel violates the right described in *McCoy* when he deliberately "usurp[s] control of an issue" within the client's "sole prerogative"—the decision to maintain innocence at trial. *Id.* at 1511. But if the client does not express his desire to maintain innocence at trial, there is no asserted decision for counsel to "override," *id.* at 1509, and thus no *McCoy* violation.

Of course, counsel cannot simply bury her head in the sand to avoid a Sixth Amendment violation. Her failure to consult about the decision to concede guilt can still violate the Constitution. But that violation flows from "counsel's [in]competence" and sounds in *Strickland v. Washington*, 466 U.S. 668 (1984). *McCoy*, 138 S. Ct. at 1510–11; *see also Wilson*, 960

F.3d at 144 (rejecting a claim that counsel's failure to consult violated *McCoy* while noting that counsel still "retains the ethical responsibility to consult with the defendant" and citing "*Strickland*'s two-part test for effective assistance").[7] This Court recognized as much in *McCoy* when it cited *Nixon*—an ineffective-assistance case—for the idea that "[c]ounsel . . . must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option." *McCoy*, 138 S. Ct. at 1509. And sure enough, courts have long applied *Strickland* to cases in which counsel failed to consult with the client before conceding guilt. *See, e.g.*, *Darden v. United States*, 708 F.3d 1225 (11th Cir. 2013); *United States v. Thomas*, 417 F.3d 1053 (9th Cir. 2005).

In short, a defendant claiming that counsel failed to consult about a concession is asserting that counsel violated a professional duty to "consult with the client as to the means" to pursue his desired objectives. Model Rules of Prof. Conduct R.1.2(a) (2016). But that is a *Strickland* claim, not a *McCoy* claim. "Counsel's duty to discuss trial strategy with a defendant was established long before the Supreme Court's decision in *McCoy*." Pet. App. 4a; *see also Atwater v. State*, 300 So. 3d 589, 591 (Fla. 2020) (citing *Nixon* and *Strickland* for the idea that an attorney "has a duty to

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

consult with the client regarding 'important decisions'").

3. With these principles in mind, Petitioner fails to state a *McCoy* claim. Taking his allegations as true, he does not claim that he objected pre-concession to his counsel's strategy to concede guilt. In fact, Petitioner claims that counsel had no conversation at all about pretrial strategy. PCR 934. Petitioner now attempts to avoid this fact by claiming that Petitioner and trial counsel "affirmatively agreed" to maintain Petitioner's "innocence of first-degree murder." Pet. 3. Even accepting that as accurate, which the record does not support, that would make this a *Strickland* claim and not a *McCoy* claim because without an express objection to conceding guilt, there is no *McCoy* violation.[8] At no point in his initial motion for relief under *McCoy* did Petitioner assert that he and trial counsel "affirmatively agreed" to "maintain [Petitioner's] innocence." Pet 3. Similarly, the claims that Petitioner and counsel agreed to "maintain [Petitioner's] innocence" were not present in his appeal to the Florida Supreme Court. It is also the first he has claimed that Petitioner "asserted" his "objective . . . to maintain innocence" of first-degree murder and that Petitioner and counsel "had an express, prior agreement" to "not concede guilt to first-degree murder." Pet. 18. These claims exist nowhere in Petitioner's postconviction filings.

Petitioner seeks to distinguish his *McCoy* claim from other such claims that have failed by

[8] In fact, at the evidentiary hearing, Watson testified that he had "specifically let [Petitioner] know that I was going to say that he was guilty of murder." PCR 106.

incorporating identical phrases used by this Court in that decision. Factually, however, this tack must fail largely because there is an inherent difference between a defense objective of maintaining innocence to the crime—meaning "I didn't do it"—and the understanding that your counsel is going to concede guilt of some degree in the hopes of developing a sympathetic jury that will ultimately spare your life. Petitioner cannot bend the reality that exists in the record to fit *McCoy* by inserting *McCoy*'s phrases and claiming a parallel. Petitioner further attempts to bolster his argument by incorporating alleged facts which have never before made an appearance and are unsupported by the record. An example is the assertion that there was an "express, prior agreement with [Petitioner] to *not* concede guilt to first-degree murder." Pet. 18. For this to be possible, however, it would first require a conversation between Petitioner and his counsel where Petitioner specifically insists that his counsel not take a particular course of action, and second that counsel specifically agree to it. There was no such exchange. Further, even if Petitioner had an implicit desire for this course of action, that is not sufficient to support a claim under *McCoy*.

Nevertheless, Petitioner argues that trial counsel "'usurp[ed] control' of [Petitioner's] decision to admit guilt." Pet. 8–9. Recognizing that at most all Petitioner did was nod when counsel explained the intent to concede guilt, this argument fails for several reasons. First, the holding of *McCoy* does not apply when there was no objection to the concession of guilt. *McCoy* recognized a Sixth Amendment right that applies when the client "expressly asserts that the objective of 'his defence' is to maintain innocence." 138

S. Ct. at 1509 (emphasis omitted). Petitioner cites not one case extending *McCoy* to circumstances in which the client implicitly communicates this decision.[9] In fact, this Court declined review of *Atwater*, the very case referenced by the Florida Supreme Court as having nearly identical facts as the ones here. *Atwater v. Florida*, 141 S. Ct. 1700 (2021).

Second, even if a *McCoy* violation may be shown by proving that a defendant implicitly wished to maintain his innocence at trial, Petitioner's claim still would not qualify, because that is not what he claims to have done. He does not claim that he told counsel that he wished to maintain innocence at trial; the facts support only that he "nodded to indicate he understood the strategy of conceding" to murder. Pet. 9; *see also* PCR 106. But acknowledging your lawyer's plan to concede guilt differs from telling your lawyer to maintain your innocence at trial. One is an indicator of understanding or agreement; the other is a client command. Nowhere can Petitioner provide any facts to support his claim that there was an affirmative agreement to "maintain Mr. Harvey's innocence of first-degree murder," let alone that he expressed to counsel that his objective was to maintain his innocence at trial. Pet. App. 3; *see also Ex parte Barbee*, 616 S.W.3d at 845 ("These facts

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

demonstrate that Applicant told his attorneys that he was innocent; they do not demonstrate that he told them that his defensive objective was to maintain his innocence at trial."). Nor did he object when counsel allegedly foiled this silent goal by conceding guilt during his opening statement. Because he did not inform his counsel that it was his will that they maintain his innocence to the jury, Petitioner did not raise a pre-concession objection that his counsel overruled, and thus cannot state a *McCoy* claim. *See, e.g.*, *Morgan v. State*, 2020 WL 2820172, at *4 (Ala. Crim. App. May 29, 2020) ("Because there is nothing in the record showing that Morgan told his counsel, before trial, that he wanted to pursue a theory of absolute innocence rather than a theory of self-defense, Morgan's counsel's statements . . . did not, as Morgan argues, violate *McCoy* or Morgan's Sixth Amendment right to determine the objective of his own defense.").

Petitioner next contends that the reason he did not protest or object to a guilt concession defense is that his counsel failed to consult with him before the concession. Pet. 23. But "counsel's duty to discuss trial strategy with the defendant was established long before the Supreme Court's decision in *McCoy*." Pet. App. 4a; *supra* Part III.2. In fact, it is the same *Strickland* claim he raised in his first state postconviction motion. As before, he alleges a Sixth Amendment violation because counsel conceded guilt without giving Petitioner opportunity to object. *Compare* Pet. App. 15a (making this argument in his first postconviction motion), *with* Pet. 27–28 (making the argument now). Although Petitioner has newly modified his argument by now claiming there was an

affirmative agreement to a defense objective, the conduct objected to is the same—that counsel conceded guilt to first-degree murder without first informing Petitioner. Pet. 3. As before, he includes information on his counsel's alleged incompetence, arguing deficiencies and failures "that beset trial counsel" which they claim would yield a different trial outcome. Pet. 5. *Compare Harvey*, 629 F.3d at 1239–63 (describing Petitioner's efforts to establish his trial counsel's allegedly deficient performance in his first postconviction motion), *with* Pet. 3–4; 18; 27–28.

In truth, then, Petitioner has brought a *Strickland* claim—one that he already lost and that this Court already declined to consider, *Harvey*, 565 U.S. 1035—and reworded it in an attempt to recast it as a *McCoy* claim.[10] Because the lower courts rightly held that his is not a *McCoy* claim, the Court should deny review.

IV. The question presented is not of exceptional importance.

Petitioner does not claim that this case is of exceptional importance. *See* Sup. Ct. R. 10(c). And it is not. To start, even if this were a true *McCoy* claim, *McCoy* claims involve a "freakish confluence of factors that is unlikely to recur." *McCoy*, 138 S. Ct. at 1512–17 (Alito, J., dissenting). First, "few rational defendants facing a possible death sentence are likely

[10] And even if Petitioner could distinguish his prior *Strickland* claim and raise a new one claiming that his counsel was deficient for committing a structural *McCoy* error, he would still need to prove prejudice on collateral review. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Given the "evidence against Harvey was overwhelming," *Harvey*, 946 So. 2d at 944, he cannot do so.

to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the chances of avoiding execution." *Id.* at 1514–15. "By the same token, an attorney is unlikely to insist on admitting guilt over the defendant's objection unless the attorney believes that contesting guilt would be futile." *Id.* at 1515. *McCoy* claims typically arise only "in cases involving irrational capital defendants." *Id.* Second, if counsel and client unflinchingly disagree on trial strategy, they generally part ways rather than continue course with divergent views. *Id.* And third, even if all these circumstances are met, the violation occurs only if "the defendant expressly protests counsel's strategy of admitting guilt." *Id.*

The facts Petitioner claim make a difference—that he and his counsel had "affirmatively agreed" to "maintain innocence of first-degree murder" and that counsel then made that concession without consultation, and that the Florida Supreme Court required him to "rise-up out of [his] chair at counsel table" and lodge an objection "during trial"—not only misconstrue the court's holding, but also make his case more remote. Pet. 25; 22. For in his bid to avoid *Strickland* and fit within *McCoy*, Petitioner has posited a once-in-a-blue-moon scenario. His proposed claim arises when an attorney—in dereliction of his professional duty to consult with the client—concedes his client's guilt to first-degree murder after agreeing to concede only to second-degree murder, all while the client, who accepted the original plan, then fails to object on the record, in the middle of the trial, when the concession is made. That there are no cases considering this mixture of missteps underscores its

infrequency. Even if this claim were a variant of *McCoy*—and it is not—its occurrences will be few and far between. Indeed, if *McCoy* claims are "like a rare plant that blooms every decade or so," 138 S. Ct. at 1514 (Alito, J., dissenting), Petitioner's claim is yet another shade rarer.

* * *

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

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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