No. 21-653

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

As explained in the Petition, the Florida Supreme Court's requirement that defendants must lodge an "express objection" to their counsel's concession of guilt in order to qualify for relief under *McCoy v. Louisiana*—even when the defendant had no notice of the concession and no opportunity to object—is incompatible with the broad Sixth Amendment autonomy right this Court announced in *McCoy*. *See* Pet. App. 4a. Remarkably, Florida's brief in opposition does not attempt to defend the Florida Supreme Court's objection requirement. *See* BIO 15–16. Nor could it. 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 of the charged crime. 138 S. Ct. 1500, 1509, 1511 (2018). And that is exactly what happened to Mr. Harvey.

In lieu of defending a rule that requires criminal defendants "to stand up in the middle of trial and make a record of [their] displeasure," BIO 16, the brief in opposition presents a litany of other inapt arguments in an effort to salvage the decision below. Florida argues, for example, that the Florida Supreme Court's opinion does not actually create an objection requirement. BIO 14–15. But the State's fanciful reading of the opinion below cannot be squared with the Florida Supreme Court's plain language or its denial of relief to Mr. Harvey. Next, Florida contends that Mr. Harvey's *McCoy* claim fails because relief under *McCoy* is available only where counsel "intentional[ly]" disregarded a defendant's wishes and only where the

defendant asserted "factual innocence." BIO 15, 18. But there is no support in *McCoy*—or any other authority—for either of these supposed restrictions on the Sixth Amendment autonomy right.

Then there is Florida's spurious insistence that this capital case does not raise an important question. It certainly does. Not only is Florida poised to execute a man whose conviction and sentence were infected with the structural error of a Sixth Amendment autonomy violation, but the Florida Supreme Court has created an unsound rule that is fundamentally at odds with this Court's constitutional holding in *McCoy*—a rule that multiple state supreme and intermediate appellate courts have rejected. In its bid to avoid this Court's review, the State wrongly seeks to minimize a baseless limitation on a fundamental constitutional right—an argument which flatly contradicts this Court's precedent and erroneously precludes Mr. Harvey and other capital defendants from receiving a new trial after a structural error. This case presents an ideal opportunity to resolve the split over *McCoy*'s application and correct this structural error in a capital case.[1]

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[1] As noted in the Petition, in addition to the structural error of the Sixth Amendment autonomy violation, Mr. Harvey's trial and sentencing proceedings were riven with other constitutional violations, including defense counsel adopting a defense theory without ever investigating Mr. Harvey's intellectual impairment, as required under *Wiggins v. Smith*, 539 U.S. 510 (2003), and defense counsel's failure to obtain any psychiatric examination of Mr. Harvey. *See* Pet. 6 n.1.

ARGUMENT

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

This Court held in *McCoy* 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 Sixth Amendment "autonomy 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).

The Florida Supreme Court has imposed a new, erroneous requirement for showing a violation of this right: a defendant must make an "express objection" to counsel's concession of guilt. Pet. App. 3a–4a. As explained in the Petition, such a requirement cannot be squared with the autonomy right set forth in *McCoy*. This Court made clear that a violation of the autonomy right is "complete" as soon as counsel "override[s]" a defendant's asserted objective to maintain innocence by conceding the defendant's guilt. *McCoy*, 138 S. Ct. at 1509, 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. Furthermore, as detailed in the Petition, an objection requirement would have

absurd consequences. *See* Pet. 22–27. The rule would require that defendants untrained in the law not only have the legal acumen to recognize that their counsel has conceded an element of the criminal charge, but also that they challenge their own attorneys in open court, complain in front of the judge and potentially the jury, and disrupt trial proceedings—all while risking judicial reproach, being seen by the judge or jury as disruptive, or even being held in contempt of court. *See* Pet. 25 n.7 (collecting cases).

The State does not even attempt to defend "the requirement of an in-court and on the record objection." BIO 15. Indeed, Florida concedes the absurdity of this rule, explaining that it would require defendants "to stand up in the middle of trial and make a record of [their] displeasure." BIO 16. Rather than defend the objection requirement, Florida argues that the Florida Supreme Court's opinion does not establish one, and that Mr. Harvey is "mischaracteriz[ing]" the opinion below. BIO 14–16. This is incorrect. The Florida Supreme Court explicitly held that Mr. Harvey's lack of an "express objection" to his counsel's in-court concession of guilt precluded him from relief under *McCoy*. Specifically, the court concluded: "Harvey's claim is not a *McCoy* claim, because Harvey does not allege that trial counsel conceded guilt *over Harvey's express objection*." Pet. App. 4a (emphasis added).

According to Florida, the Florida Supreme Court's references to "express objection" means something entirely different: that "if a criminal defendant wishes to maintain innocence, that intention must be made known to his counsel." BIO 15–16. But nowhere does the Florida

Supreme Court's opinion say this. Moreover, the court's denial of relief to Mr. Harvey makes clear the court did *not* hold that a defendant who "ma[k]e[s] known to his counsel" that he "wishes to maintain innocence" can show a *McCoy* violation regardless of whether he objected, because Mr. Harvey did *exactly that*. Mr. Harvey made his intention known to trial counsel that he wished to maintain his innocence of first-degree murder—the very charge the Florida Supreme Court has held counsel conceded in his opening statement. *Harvey v. State*, 946 So. 2d 937, 942–43 (Fla. 2006). It is undisputed that Mr. Harvey "adopted" the plan he "specifically discussed" with trial counsel: to argue he was guilty of at most only second-degree murder, "*and not either premeditated or felony murder*."[2] Pet. App. 15a (emphasis added); State's Br. 28, 42 (Oct. 14, 2019); *see generally* Pet. 8–9, 27–28. In short, Mr. Harvey *did* "ma[k]e known to his counsel" his wish to maintain innocence of first-degree murder, BIO 16, yet the court below rejected his *McCoy* claim for lack of an "express objection." Pet. App. 4a. Much as the State may wish to rewrite that opinion to avoid this Court's review, it cannot escape the fact that the Florida Supreme Court grafted an objection prerequisite onto *McCoy*.

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[2] Florida asserts that Mr. Harvey did not previously raise the argument that "[he] and counsel had an express, prior agreement to not concede guilt to first-degree murder." BIO 21 (quotation marks omitted). This is false. Mr. Harvey presented this argument to the Florida Supreme Court in his merits briefs and in his motion for reconsideration. *See* Appellant's Br. 21–32 (Sept. 23, 2019); Reply Br. 4–14 (Nov. 4, 2019); Appellant's Reh'g Mot. 5–7 (Mar. 12, 2021). Unless otherwise noted, citations to the record are to *Harvey v. State*, No. SC2019-1275 (Fla.).

Because Florida essentially confesses that a lack of an express objection should not foreclose Mr. Harvey's right to relief under *McCoy*, Florida gins up two other reasons why Mr. Harvey's *McCoy* claim supposedly fails. Neither are persuasive.

First, Florida argues that *McCoy* is limited to cases where trial counsel's "disregard" for his client's desire to maintain innocence was "intentional" rather than "negligent." BIO 18. As an initial matter, this supposed intent requirement has no relevance here because Florida never suggests that Mr. Harvey's counsel's concession of guilt to first-degree murder was *un*intentional. But even assuming counsel's concession was "negligent" (rather than "intentional"), nowhere in *McCoy* did this Court state that counsel's mental state bears on the autonomy-right inquiry. Florida does not cite a single case in support of its novel *mens rea* requirement. It offers no reason why a "negligent" usurpation of a defendant's decision to concede guilt would injure the defendant's autonomy any less than an "intentional" usurpation. In both instances, counsel has "overrid[den]" the defendant's expressed desire to maintain innocence "by conceding guilt." *McCoy*, 138 S. Ct. at 1509. That is all *McCoy* requires to show a Sixth Amendment autonomy violation. And that is what occurred in Mr. Harvey's case.

Second, Florida argues that relief under *McCoy* is limited to defendants who assert "*factual* innocence of the charged crimes." BIO 15 (emphasis added). According to Florida, this requirement forecloses Mr. Harvey's claim because he agreed to "concede guilt of *some* degree." BIO 21 (emphasis added). This argument

fails for a host of reasons. To begin with, Florida yet again invents a novel limitation on *McCoy* that this Court did not impose. Nowhere does *McCoy* state that a defendant must assert "factual" innocence in order to show an autonomy violation. On the contrary, *McCoy* specifically held that an autonomy violation occurs when a defendant's lawyer concedes the defendant's guilt after he asserts his desire "to maintain innocence of the *charged* criminal acts"—regardless of what the *basis* for the innocence claim may be. 138 S. Ct. at 1509 (emphasis added). Here, there is no question that Mr. Harvey expressly asserted his desire to maintain innocence of "the charged criminal act[]"—first-degree murder. *Id.*; *see* Pet. 8–11, 27–28. Nor is there any dispute that counsel conceded Mr. Harvey's guilt to that same "charged criminal act[]." Indeed, that is law of the case. *See Harvey*, 946 So. 2d at 943 ("[C]ounsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder."). These undisputed facts establish an autonomy violation under *McCoy*. Florida cites no authority for its "factual innocence" limitation, nor is Mr. Harvey aware of any.

Moreover, Florida's argument rests on the absurd proposition that a defendant need only agree to concede "guilt of *some* degree" to permit counsel to concede guilt of *any* degree. BIO 21 (emphasis added). Again, Florida offers no authority for this proposition. This is no surprise. The rule urged by the State—that a capital defendant's consent to a strategic concession of second-degree murder licenses counsel to concede guilt to *first*-degree murder—would vitiate the autonomy right recognized in *McCoy*. By conceding premeditation against Mr. Harvey's wishes, counsel directly

"usurp[ed]" Mr. Harvey's intention to contest the very element that could expose him to a capital sentence. *McCoy*, 138 S. Ct. at 1511. In conceding first-degree murder, counsel automatically exposed Mr. Harvey to the death penalty—in direct violation of his prior agreement with Mr. Harvey. *See Shere v. Moore*, 830 So. 2d 56, 62 (Fla. 2002). That the State has resorted to arguments that collapse the life-and-death distinction between first- and second-degree murder—without citation to any authority for so outlandish a proposition—shows only how indefensible the "express objection" rule and the outcome below are.

II. THIS CASE IS AN EXEMPLARY VEHICLE TO RESOLVE THE QUESTION PRESENTED CONCERNING A FUNDAMENTAL SIXTH AMENDMENT RIGHT.

Florida attempts to create two vehicle problems. Neither has merit.

First, Florida seeks to avoid review of the erroneous objection requirement by asserting there is an "antecedent issue[]" of whether *McCoy* applies retroactively. BIO 8–11. Not so. The Florida Supreme Court decided Mr. Harvey's *McCoy* claim on the merits and the merits alone. It explicitly *declined* to address any of the alternative grounds Florida raised to deny relief, including that *McCoy* is not retroactive. *See* Pet. App. 2a–3a, 3a n.1. Thus, the merits issue on which Mr. Harvey was denied relief—his lack of an "express

objection" to the concession of guilt—is properly before this Court.[3] Pet. App. 4a.

Mr. Harvey demonstrated before the Florida Supreme Court that *McCoy* applies retroactively. *See* Appellant's Br. 36–43; Reply Br. 14–21. While the State argued against retroactivity below, *see* State's Br. 6–21, the Florida Supreme Court reached and ruled on the merits of Mr. Harvey's *McCoy* claim. In doing so, the court implicitly acknowledged that *McCoy* applies retroactively and that Mr. Harvey was entitled to a decision on the merits.

The State suggests that the merits issue presented here is merely "academic," implying that the Florida Supreme Court could rule that *McCoy* does not apply retroactively after this Court's review of the merits. BIO 8. But that conjecture ignores Florida's law of the case doctrine. Having ruled on the merits of Mr. Harvey's claim, Florida's law of the case doctrine prevents a subsequent decision that Mr. Harvey was never entitled to a ruling on the merits of his *McCoy* claim. *See State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). The Florida Supreme Court already determined that Mr. Harvey was entitled to a ruling on the merits of his claim, notwithstanding the Florida Circuit Court's incorrect finding that *McCoy* is not retroactive, Pet. App. 8a, or Florida's non-retroactivity arguments below. The Florida Supreme Court's merits ruling is now the law of the case. Certiorari is thus proper on the merits

[3] In the event the Court disagrees, Mr. Harvey respectfully requests that, as an alternative to granting certiorari at this time, this case be remanded to the Florida Supreme Court so it may address the issue of retroactivity in the first instance.

of the Sixth Amendment question presented, which was the sole basis of the decision below.

Second, Florida attempts to avoid review by erroneously asserting that there is an "antecedent" state-law time-bar issue. BIO 8, 11–13. As with retroactivity, the parties briefed the state-law time-bar issue before the Florida Supreme Court, yet the court expressly declined to reach that issue and ruled solely on the federal constitutional merits of Mr. Harvey's claim.[4] *See* Pet. App. 2a, 4a. Had the Florida Supreme Court believed Mr. Harvey's claim to be untimely, it could have ruled on that basis. The Florida Supreme Court is more than willing to dispose of claims on time-bar grounds. Indeed, the court has ruled that other *McCoy* claims are procedurally barred *without* reaching the merits. *E.g.*, *State v. Poole*, 297 So. 3d 487, 494–95 (Fla. 2020). Here, however, the court found no barrier to reaching the vital constitutional issue in Mr. Harvey's claim. That constitutional issue is the only question before this Court, and no vehicle issues complicate this Court's review.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OVER WHICH LOWER COURTS ARE SPLIT REGARDING A FUNDAMENTAL CONSTITUTIONAL RIGHT.

Florida's arguments that the Sixth Amendment question presented is "not of exceptional importance" are unpersuasive. BIO 25.

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[4] Florida's time-bar argument is meritless, as explained in Mr. Harvey's briefs below. *See* Appellant's Br. 18–21; Reply Br. 2–4.

Florida first contends that the Florida Supreme Court's objection requirement "does not create a split of authority." BIO 13. This is incorrect. As explained in the Petition, multiple state supreme and intermediate appellate courts have rejected an objection requirement in deciding *McCoy* claims. Parting ways with the Florida Supreme Court, these courts have correctly ruled that a defendant need *not* contemporaneously object to establish an autonomy violation if the defendant has already expressed to counsel his objective of maintaining innocence. *See* Pet. 20–22, 29. In particular, as the Wisconsin Supreme Court recognized: "*McCoy* holds that in order to prove a Sixth Amendment violation, a defendant must have expressed *to his counsel* his clear opposition to 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." *State v. Chambers*, 955 N.W.2d 144, 149 n.6 (Wis. 2021) (emphasis added); *see also People v. Eddy*, 33 Cal. App. 5th 472, 482 & n. 8 (Cal. Ct. App. 2019) (same); *Thompson v. Cain*, 433 P.3d 772, 777–78 (Or. Ct. App. 2018) (same).

Next, the State argues that the decision below presents an unimportant question because *McCoy* claims are rare. BIO 25–26. Yet, the brief in opposition itself demonstrates this is false. As Florida acknowledges, lower courts have "routinely" grappled with the "objection" question under *McCoy*. *See* BIO 13–14.

In any event, even if *McCoy* claims were relatively infrequent, frequency is not the only measure of importance. The Sixth Amendment autonomy right at

issue here is a "fundamental right" and, when violated, creates a "structural" error. 138 S. Ct. at 1511; *id.* at 1512, 1514, 1517 (Alito, J., dissenting). Furthermore, this autonomy right "come[s] into play" primarily in "capital case[s]," *id.* at 1514 (Alito, J., dissenting)—an additional measure of its importance. *See Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting). In short, the issue presented potentially affects every defendant seeking to vindicate his Sixth Amendment right to determine the objective of his defense, many of whom are facing death sentences.

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—like Mr. Harvey—"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).

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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December 21, 2021