No. 21-6734

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER EPPERSON

Petitioner

v.

COMMONWEALTH OF KENTUCKY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

SUPPLEMENTAL APPENDIX

CAPITAL CASE

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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 (denial of initial postconviction motion affirmed and July 3, 2003 decision withdrawn June 15, 2006; motion for rehearing denied Jan. 8, 2007).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*

[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

[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

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).

[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.

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

[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).

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. "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*.

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

REASONS FOR DENYING THE PETITION

I. This case is a poor vehicle.

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

1. Petitioner's conviction became final in 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.*

[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).

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 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.

[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.

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 "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

[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.

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 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).

[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)).

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 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

[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.

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 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

[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.

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 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 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.*

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[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.

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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