NO. 21-6871

IN THE
SUPREME COURT OF THE UNITED STATES

ALAN PRICE
Petitioner

v.

STATE OF FLORIDA
Respondent

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

PETITION FOR WRIT OF CERTIORARI

Alan Price DC# 096348
Petitioner, *pro se*
South Bay Correctional Facility
P.O. Box 7171
South Bay, FL 33493

QUESTIONS PRESENTED FOR REVIEW

I. Whether *McCoy v. Louisiana*, 138 S. Ct 1500 (2018), adopts a new substantive rule that applies retroactively to cases on collateral review?

II. Whether *McCoy* is implicated where a defense attorney admits the defendant's guilt pursuant to an affirmative defense theory, but then urges the jury to find the defendant *guilty* rather than *not guilty* under the affirmative defense, in direct contravention of the express agreement between counsel and the defendant to pursue an acquittal under the affirmative defense theory?

INTERESTED PARTIES

There are no interested parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Alan Price, *pro* se, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the denial of his motion for post-conviction relief filed in the state trial court in the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. The denial of his motion was rendered on May 19, 2020, and affirmed on appeal by the Third District Court of Appeal on June 23, 2021. The Florida Supreme Court then declined to accept jurisdiction on October 14, 2021.

OPINIONS BELOW

The unpublished decision of the highest state court to review Price's motion for post-conviction relief, *i.e.*, the Florida Supreme Court, appears in Appendix A-1. The order of the Miami-Dade County Circuit Court summarily denying Price's

motion appears in Appendix A-2 and the denial of rehearing appears in Appendix A-3. The Third District Court of Appeal's decision *per curiam* affirming the denial of the motion appears in Appendix A-4.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Part III of the Rules of the Supreme Court of the United States. The decision of the Third District Court of Appeal, affirming the state trial court's denial of Price's motion for post-conviction relief, was rendered on June 23, 2021, and the Florida Supreme Court declined to accept jurisdiction in Price's case on October 14, 2021. This petition is therefore timely filed under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Price's question involves the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment provides, in part, that:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides, in part, that:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 13, 1984, Petitioner, Alan Price, was indicted with first degree murder, Count 1; Armed Burglary, Count 2; armed kidnapping, Counts 3-8; armed robbery, Counts 9-14; and grand theft, Counts 15 & 16.

A jury found Price guilty as charged as to all sixteen counts. On February 15, 1990, the trial court sentenced Price as follows:

- Count 1: life imprisonment without the possibility of parole for 25 years;
- Count 2: life imprisonment consecutive to Count 1;
- Counts 3: life imprisonment consecutive to Counts 1 & 2;
- Counts 4-14: one hundred thirty-four years imprisonment consecutive to each other and consecutive to Counts 1-3;
- Counts 15 & 16: five years imprisonment consecutive to each other and consecutive to all other sentences.

The Third District Court of Appeal affirmed his convictions and sentences. *See Price v. State*, 602 So. 2d 994 (Fla. 3d DCA1992).

Thereafter, Price filed a motion for post-conviction relief, which the trial court denied and the Third District affirmed on appeal. *See Price v. State*, 630 So. 2d 191 (Fla. 3d DCA1993).

On April 28, 2020, Price filed a successive motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850(b)(2). Appendix B-1. He asserted that this Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), created a newly established constitutional right and should be applied retroactively. *Id.* He contended he was entitled to a new trial under *McCoy* because his counsel violated his autonomy and

conceded his guilt during closing arguments despite his express intent to maintain innocence of the charged criminal acts under the voluntary intoxication defense. *Id.* Specifically, Price and counsel expressly agreed to pursue an acquittal under the voluntary intoxication defense; yet counsel urged the jury to find him guilty on all offenses, except for the first degree murder offense, and never once mentioned voluntary intoxication.

Price's motion outlined trial counsel's closing argument as follows:

> It's never easy judging anyone. But, if you follow the law, as you must, you will judge Allan Price. And, what you're going to do is *you're going to judge him guilty, as I suggest you must, of certain crimes for which he has been charged* because Alan Price got up on that witness stand and he admitted to some of those crimes. He admitted to them because he told you what occurred because he told you the truth.
>
> Alan Price said I robbed the County Seat. Therefore, ladies and gentlemen, *find him guilty of robbery of the County Seat.*
>
> Alan Price told you that he took the police car. Therefore, ladies and gentlemen, *find him guilty of taking the police car.*
>
> Alan Price told you he took Robert Zore's gun. Therefore, *find him guilty of taking the gun.*

Appendix B-1 at 4-5 (citing T. Vol. II, pg. 171-72) (emphasis added).

> And burglary – you need to find whether the law says this is a burglary because trespass is also entering. And he did enter without permission. Express or implied, of the Super Value Store or Gary Narvid? *The answer of course is yes.*

Appendix B-1 at 5 (citing T. Vol. II, pg. 289) (emphasis added).

> And if you find during the trespass the defendant was armed or armed himself with firearm or other dangerous weapon, *you should find him guilty of trespass in a structure while armed. That's correct. That's what he did.*
>
> There are a number of other counts, *some of which you can dispose of easily.*
>
> As to Count XIV, grand theft, *the defendant should be found guilty.*
>
> As to Count XV, grand theft, *the defendant should be found guilty.*
>
> As to the robbery of Gary Narvid and/or County Seat – cause Gary Narvid said they didn't take any of his money, so that would have to be County Seat because he didn't have any money – *he should be found guilty.*
>
> The only question in your mind is should it be with a firearm, with a deadly weapon or without a deadly weapon, *and I submit to you the answer is mark it robbery with a deadly weapon because that's what occurred.*
>
> *Ladies and gentlemen as to the robbery you should find him guilty of each and every robbery.*

Appendix B-1 at 5 (citing T. Vol. II, pg. 290) (emphasis added).

> *You should find him guilty of each and every robbery and mark it so, and mark him guilty of robbery with a deadly weapon.*
>
> There is also a robbery. *Again all robbery each count he should be found guilty.*

Appendix B-1 at 5 (citing T. Vol. II, pg. 291) (emphasis added).

> Your responsibility, ladies and gentlemen, is to be true to your word, true to the law, and true to yourselves.
>
> *If you are true to the law and true to your promise and true to yourselves, then you will find the verdicts that I have discussed with you as being the correct verdicts*, and

> you will find that Alan Price did not commit first degree murder.
>
> *Find him guilty of other crimes as he should be*, but let's not convict him of a crime he did not commit.

Appendix B-1 at 5-6 (citing T. Vol. II, pg. 295) (emphasis added).

At no point did trial counsel advocate for an acquittal under the affirmative defense of voluntary intoxication, despite the express agreement between counsel and Price to do so. Appendix B-1 at 4-6.

On May 19, 2020, the trial court denied Price's motion as untimely, refusing to give *McCoy* retroactive effect. Appendix A-2. Price filed for rehearing. Appendix B-2. The court denied rehearing, concluding that, like the defendant in *Atwater v. State*, 300 So. 3d 589 (Fla. 2020), Price did not allege that "he expressed to counsel that his objective was to maintain innocence or that he expressly objected to any admission of guilt." The court then refused to address the retroactivity of *McCoy*. Appendix A-3.

On June 23, 2021, the Third District Court of Appeal *per curiam* affirmed the denial of Price's motion with a citation to *Atwater*, along with a detailed explanation of *Atwater's* holding. Appendix A-1.

Price filed a timely notice to invoke the discretionary jurisdiction of the Florida Supreme Court and subsequently filed a brief on jurisdiction. Appendix B-3. On October 14, 2021, the Court declined to accept jurisdiction. Appendix A-4.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. Because *McCoy* Adopted a New Substantive Rule of Constitutional Law Which Controls the Outcome of a Case, the Constitution Requires Retroactive Effect to That Rule.

a. The *McCoy* Holding

In 2018, this Court held that criminal defendants "must be allowed to make [their] own choices about the proper way to protect [their] liberty." *McCoy*, 138 S. Ct at 1508. Ultimately, this Court reversed McCoy's conviction on the ground that his counsel violated his Sixth Amendment rights, namely the "[a]utonomy to decide that the objective of the defense [was] to assert innocence." *Id.* at 1508. The deprivation of this constitutional right, this Court explained, is a "structural error," not one falling within the purview of the Court's "ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510-11.

b. Retroactivity Analysis

In *McCoy*, this Court did not express whether the holding would apply retroactively to cases on collateral review because *McCoy* was decided in the context of a direct appeal. *See* 138 S. Ct. at 1505, 1507. Price submits that given the fundamental significance of *McCoy*, it should apply retroactively.

i. Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), This Court Has Jurisdiction to Decide Whether Florida Courts in This Case Correctly Refused to Give Retroactive Effect to *McCoy*

Price's procedural posture is similar to that of Henry Montgomery in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In *Montgomery*, some 50 years after Montgomery was first arrested, this Court decided *Miller v. Alabama*, 132 S.

Ct. 2455 (2012) (holding that "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" violates the Eighth Amendment). *Montgomery*, 136 S. Ct. at 725.

In the wake of *Miller*, Montgomery sought collateral review of his mandatory life-without-parole sentence in the state trial court. *Id.* at 726. Montgomery's motion argued that *Miller* rendered his mandatory life-without-parole sentence illegal. *Id.* at 727. The trial court denied Montgomery's motion on the ground that *Miller* is not retroactive on collateral review. *Id.* Montgomery then filed an application for a supervisory writ, and the Louisiana Supreme Court denied the application. *Id.*

This Court granted Montgomery's petition for certiorari. *Id.* Addressing the question left open in *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008), this Court held that *when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. Id.* at 728. This Court explained that its "precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that *the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.*" *Id.* (emphasis added).

Here, Price sought collateral review of his conviction in the state trial court. Appendix B-1. Price's motion argued that he suffered the same structural error the defendant in *McCoy* suffered and that *McCoy* should apply retroactively. *Id.* The

trial court denied Price's motion as untimely, refusing to give *McCoy* retroactive effect, *see* Appendix A-2, and then denied rehearing. Appendix A-3. Price then sought discretionary review in the Florida Supreme Court, *see* Appendix B-3, and the Supreme Court declined to accept jurisdiction. Appendix A-4.

Price now seeks certiorari review in this Court to determine whether Florida state courts in his case correctly refused to give retroactive effect to *McCoy*. As in *Montgomery*, this Court has the authority to determine whether *McCoy* applies retroactively to cases on collateral review.

i. *McCoy* Adopted a New Substantive Rule that, under the Constitution, Must Be Retroactive

In *McCoy*, this Court held that a "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural." 138 S. Ct. at 1511. "[W]hen present," this Court explained, "such an error is not subject to harmless-error review." *Id.* (citing *McKaskle v. Wiggins*, 465 104 S. Ct. 944 (1984) (holding that harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"). "Structural error 'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.'" *Id.* (quoting *Arizona v. Fulminante*, 499 U. S. 279, 310 (1991)).

"[C]ounsel's admission of a client's guilt over the client's express objection is error structural in kind." *McCoy*, 138 S. Ct. at 1511. "Such an admission," this Court explained, "blocks the defendant's right to make the fundamental choices

about his own defense." *Id.* "[T]he effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *Id.* Significantly, this Court held that McCoy "must therefore be accorded a new trial *without any need first to show prejudice.*" *Id.* (emphasis added).

Accordingly, because *McCoy* adopted "a new substantive rule of constitutional law [that] controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S. Ct. at 728.

II. *McCoy* Is Implicated Where, As Here, Trial Counsel Admits the Defendant's Guilt Pursuant to an Affirmative Defense Theory, But Then Urges the Jury to Find the Defendant *Guilty* Rather than *Not Guilty* under the Affirmative Defense, in Direct Contravention of the Express Agreement Between Counsel and the Defendant to Pursue an Acquittal under the Affirmative Defense Theory

As this Court explained in *McCoy*, "[p]resented with express statements of the client's will to maintain innocence... counsel may not steer the ship the other way." *McCoy*, 138 S. Ct. at 1509 (citing *Gonzalez v. United States*, 553 U.S. 242, 254, 128 S. Ct. 1765, 170 L. Ed. 2d 616 (2008) (Scalia, J., concurring in judgment)).

Yet here, Price's trial counsel completely disregarded Price's objective to maintain innocence and pursue an acquittal under the voluntary intoxication defense. Instead, counsel urged the jury to find Price *guilty* on all offenses (except for the first-degree murder offense). In so doing, counsel "steered the ship the other way," thus violating Price's "[a]utonomy to decide that the objective of the defense [was] to assert innocence." *McCoy*, 138 S. Ct. at 1505, 1508.

Had Price known that counsel would disregard his objective to maintain innocence under the affirmative defense, he would not have testified and conceded

to the facts as alleged by the State, but rather would have insisted that the prosecution prove its case beyond a reasonable doubt. As in *McCoy*, counsel's actions amount to an error structural in kind requiring reversal of Price's convictions.

Before trial, Price discussed the voluntary intoxication defense with trial counsel. Counsel advised Price that voluntary intoxication was an affirmative defense which would require him to testify and concede to the facts as alleged by the State on the robbery and kidnapping offenses; but that his actions would be excused because he was intoxicated to the extent he was incapable of forming the necessary intent to commit the crimes.[1]

Price and counsel came to an express agreement that pursuing the voluntary intoxication defense would be the best course of action. Consistent with the express agreement, Price testified that he was addicted to cocaine and that he had ingested a large amount of cocaine shortly before committing the robbery and kidnapping offenses, thus demonstrating that he was incapable of forming the necessary intent to commit the crimes. T. Vol. 1 at 22, 17-35. Price offered this testimony solely to

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[1] Standard Jury Instruction 3.04(g) – VOLUNTARY INTOXICATION – provides, in pertinent part:

> A defense asserted in this case is voluntary intoxication by use of [alcohol] [drugs]. The use of [alcohol] [drugs] to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act.
>
> However, where a certain mental state is an essential element of a crime, and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist and therefore the crime could not be committed.
>
> Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of [alcohol] [drugs] as to be incapable of forming [the intent to (specific intent charged)] [premeditated design to kill] [(other mental state)], or you have a reasonable doubt about it, you should find the defendant not guilty of (crime charged).

support his voluntary intoxication defense, and he believed that counsel would be seeking an acquittal on the robbery and kidnapping offenses.

Given the express agreement between Price and counsel before trial, counsel was well aware that Price's objective was to maintain innocence to all offenses under the voluntary intoxication defense. During closing arguments, however, trial counsel did nothing of the sort. Instead, counsel conceded Price's guilt to all offenses (except for the first-degree murder offense) and urged the jury to find him *guilty* of such offenses. T. Vol. 2 at 289-95. Not once did counsel ask for an acquittal under the voluntary intoxication defense. Consequently, rather than requiring the prosecution to prove Price's guilt beyond a reasonable doubt, counsel attested to his own client's culpability and effectively relieved the prosecution of its burden. Counsel was no longer acting as Price's agent, and the defense was "stripped of the personal character upon which the [Sixth] Amendment insists." *Faretta v. California*, 422 U.S. 806, 820 (1975). Simply put, counsel's actions stripped Price of his prerogative to determine the ultimate objective of his defense—to assert innocence under the affirmative defense of voluntary intoxication.

A criminal defendant enjoys the right to choose whether to remain silent or testify in his own defense—a decision to be made "in the unfettered exercise of his own will." *Brooks v. Tennessee,* 406 U.S. 605, 610 (1972). That decision was nothing short of self destruction for Price. Because of the express agreement between Price and counsel to pursue a voluntary intoxication defense, Price had no choice but to testify himself and concede to the facts, as alleged by the State. But then counsel

abandoned Price, reneged on the agreed-upon defense strategy, and urged the jury to find Price *guilty* of the robbery and kidnapping offenses.

As Justice Alito noted in his dissent in *McCoy*, in all non-capital cases, "guilt is almost always the only issue for the jury, *and therefore admitting guilt of all charged offenses will achieve nothing. It is hard to imagine a situation in which a competent attorney might take that approach.*" *McCoy*, 138 S. Ct. 1514 (Justice Alito dissenting) (emphasis added). "When guilt is the sole issue for the jury," Justice Alito continued, "*is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged*?" *Id.* at 1516 (emphasis added).

The answer is no.

Yet that is precisely what counsel did in this case: Counsel advised Price to pursue a voluntary intoxication defense and expressly agreed to pursue an acquittal under that theory. Then counsel failed to follow through. Instead, after Price conceded to the facts as alleged by the State on the robbery and kidnapping offenses, counsel urged the jury to find Price *guilty* on these offenses, never once mentioning voluntary intoxication, much less requesting an acquittal under that theory. Counsel thus conducted himself more as a prosecutor than as Price's advocate.

Accordingly, as in *McCoy*, counsel's actions violated Price's "[a]utonomy to decide that the objective of the defense [was] to assert innocence." *McCoy*, 138 S. Ct. at 1505, 1508. And "[b]ecause the error was structural, a new trial is the required corrective." *Id.* at 1512.

CONCLUSION

McCoy adopted a new substantive rule of constitutional law which controls the outcome of a case. Thus, the Constitution requires retroactive effect to that rule. Although *McCoy* is slightly distinguishable from Price's case, it is nonetheless implicated, where Price's counsel admitted his guilt pursuant to an affirmative defense theory, but then urged the jury to find him *guilty* rather than *not guilty* under the affirmative defense, in direct contravention of the express agreement between Price and counsel to pursue an acquittal under the affirmative defense theory. A new trial is required, notwithstanding the showing of prejudice.

South Bay, Florida
December 29th, 2021

Respectfully Submitted,

Alan Price DC# 096348
South Bay Corr. & Rehab. Facility
P.O. Box 7171
South Bay, FL 33493

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APPENDIX

RELEVANT COURT ORDERS

A-1

Order of the Florida Supreme Court declining to accept jurisdiction in Price's case, *Alan Price v. State of Florida*, SC21-1923.

A-2

Order of the state trial court, in and for Miami-Dade County, Florida, summarily denying Price's motion for post-conviction relief, *State of Florida v. Alan Price*, L.T. Case No. F83-29301.

A-3

Order of the state trial court, in and for Miami-Dade County, Florida, denying Price's motion for rehearing, *State of Florida v. Alan Price*, L.T. Case No. F83-29301.

A-4

Order of the Third District Court of Appeal affirming the state trial court's summary denial of Price's motion for post-conviction relief, *Alan Price v. State of Florida*, Case No. 3D21-83.

PRICE'S LOWER COURT FILINGS

B-1

Price's Rule 3.850 motion for post-conviction relief filed in the trial court, in and for Miami-Dade County, Florida, *State of Florida v. Alan Price*, Case No. 77-3909.

B-2

Price's motion for rehearing filed in the trial court, in and for Miami-Dade County, Florida, *State of Florida v. Alan Price*, Case No. 77-3909.

B-3

Price's brief on jurisdiction filed in the Florida Supreme Court, *Alan Price v. State of Florida*, SC21-1923.