No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL SHANE BARGO,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT.

On Petition for Writ of Certiorari to the Florida Supreme Court

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE
QUESTION PRESENTED

When an individual enters a plea of not guilty, the burden of proving every element of the charged offenses lies solely with the State. The accused is presumed innocent. The Sixth Amendment to the United States Constitution demands that counsel for the accused hold the State to its burden of proving every element of the charged offenses beyond a reasonable doubt. The petitioner, Michael Shane Bargo, Jr. exercised these rights when he entered a plea of not guilty and, in doing so, demanded the State meet its burden.

Mr. Bargo's trial counsel was well aware of his not guilty plea. Mr. Bargo never wavered from his initial plea, never conceded guilt to counsel, and never released the State from its burden. This was further reinforced by Mr. Bargo's choice to testify in his own defense, where he steadfastly maintained his innocence.

Unfortunately, Mr. Bargo's trial counsel, whom he trusted most, disregarded his plea and his testimony, and the State's burden to prove the guilt of an eighteen-year-old boy, for whom the State sought the death penalty. Mr. Bargo was completely surprised in the moments that his trusted counsel chose to concede his guilt, proclaiming that he was "guilty, guilty as hell," without so much as a discussion between this supposedly seasoned attorney and his eighteen-year-old client. Mr. Bargo did not know to make an appropriate objection or otherwise communicate to the jury that he was not admitting guilt. In fact, doing so would likely have drawn a contempt charge from the trial court in view of the jury. Mr. Bargo was not required to make a spectacle of himself to maintain his rights, nor was he aware of his ability to do so.

Mr. Bargo has not had the benefit of a Florida Supreme Court ruling on this issue as his first trial predated *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), as such, the issue was raised, but never ruled on prior to resentencing. Accordingly, Mr. Bargo presents the following question:

1. Did Mr. Bargo show that a violation of his rights occurred, pursuant to *McCoy*, when he explicitly entered a plea of not guilty and maintained his innocence throughout trial proceedings only to be undermined by veteran counsel who did not hold the State to its burden of proof of each and every element beyond and to the exclusion of all reasonable doubt?

LIST OF PARTIES

All Parties are listed in the caption.

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), these are the related cases:

Original Guilt and Penalty Phase Trial:
Circuit Court of Marion County, Florida
State of Florida v. Michael Shane Bargo, Jr., 2011-CF-1491-A-Z
Judgment Entered: December 13, 2013

Direct Appeal (*Bargo I*):
Florida Supreme Court
Michael Shane Bargo, Jr. v. State of Florida, 221 So.3d 562 (2017); SC14-125
Case Remanded: June 29, 2017

New Penalty Phase Trial:
Circuit Court of Marion County, Florida
State of Florida v. Michael Shane Bargo, Jr., 2011-CF-1491-A-Z
Judgment Entered: September 12, 2019

Second Direct Appeal (*Bargo II*):
Florida Supreme Court
Michael Shane Bargo, Jr. v. State of Florida, 331 So.3d 653 (2021); SC19-1744
Judgment Entered: June 24, 2021 (*rehearing* denied January 26, 2022)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

DECISIONS BELOW

The decision of the Florida Supreme Court (*Bargo II*) appears at Appendix II to the petition and is reported at *Bargo v. State*, 331 So.3d 653 (Fla. 2021).

JURISDICTION

The judgement of the Florida Supreme Court in *Bargo II* was entered on June 24, 2021. An extension of time to file the petition for writ of certiorari was granted by order of this Court on March 28, 2022, extending the time for seeking certiorari to June 25, 2022.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution, which states in relevant part, "[n]o person . . . shall be deprived of life, liberty or property, without due process of the law."

The Sixth Amendment to the United States Constitution also states in relevant part:

> 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 accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor; and to have Assistance of Counsel in his defense.

The Fourteenth Amendment to the United States Constitution, Section 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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 May 4, 2011, Michael Shane Bargo, Jr. (Mr. Bargo), was indicted for First-Degree Murder with a Firearm in the Fifth Judicial Circuit, in Marion County, Florida. Mr. Bargo entered a written plea of not guilty. Charles R. Holloman and Candace A. Hawthorne (trial counsel) represented Mr. Bargo at his first trial (guilt and penalty phase). During closing argument following testimony by Mr. Bargo during the guilt phase, Mr. Holloman shouted at the jury that Mr. Bargo was "***GUILTY, GUILTY AS HELL***" of second-degree murder:

> MR. HOLLOMAN: Does that convince you that he didn't premeditate? Probably not because I'd never be able to convince you of that in that type of weather, so to speak. What it does is, shows a reasonable doubt that he was involved in the premeditation of this. And because of that reasonable doubt, that third element is not met because it's not met beyond and to the exclusion of every, single reasonable doubt. What would be met? *What would your verdict have to be,* ***guilty, guilty as hell*** *of second-degree murder.* There's no question about that. Why? Because that

> has been proven beyond and to the exclusion of every, single reasonable doubt.

R40/1406-1408.[1] Emphasis added. He added:

> I am not going to stand up here and tell you that Michael Bargo is innocent because he's not innocent. He's guilty, but he's not guilty as charged because of that reasonable doubt and only because of that reasonable doubt. He's guilty of murder in the second degree. I'd ask you to return a verdict of guilty of murder in the second degree. Thank you.

R40/1410-11.

This concession of guilt was done without permission and after a lengthy direct and cross examination in which Mr. Bargo maintained his innocence. Mr. Bargo was not only shocked by this concession, but naïve as to his recourse in that moment. Mr. Bargo was found guilty of First-Degree Murder with a Firearm.

After the jury retired, trial counsel told the trial court that Mr. Bargo "acquiesced" to arguing the lesser included offenses during closing in front of trial counsel Holloman, trial counsel Hawthorne, investigator Gary Roger, and investigator Dawn Mahler. R40/1436. Without hearing from Mr. Bargo or Ms. Hawthorne on the record, the trial court found that it was appropriate for trial counsel to argue the lesser included offense under the circumstances and that Mr. Bargo acquiesced to the argument. R40/1436.

After the verdict, Mr. Bargo, still reeling from the ultimate betrayal of Mr. Holloman, wrote a letter to the trial judge complaining about what had happened

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[1] References to the record on appeal from the direct appeal of the guilt phase trial are in the form R[volume number]/[page number].

during the guilt phase of his trial. This was Mr. Bargo's first opportunity to bring this issue to the trial court's attention. The trial judge advised the parties that he had received a letter and intended to address it prior to the *Spencer* hearing.[2] During an exchange regarding the letter, Mr. Holloman chose to diminish Mr. Bargo's rightfully placed objection by advising the trial court:

> MR. HOLLOMAN: We all know the purposes of why we're here today. We're not here to argue any sort of ineffective assistance of counsel claim. This complaint in this letter is that he was – that he gave testimony in the narrative form. Okay.
>
> And that I, secondly, am not permitted under the rules of professional conduct to argue his perjury, which simply is what it is, as a defense. And what he claims as a result of that is basically I threw him under the bus. What we did was this: Based upon the available admissible evidence that was lawfully before the Court, even the Court ruled that my conduct beforehand – because we discussed this – we had a pretrial – off the record pretrial before and then we discussed it on the record several times.
>
> The case law was there – Ellis Rubin cases – we all had that case, so we were all very conversant in the rules of professional conduct. Now what he wants to do this morning is *he wants to get up there and engage in a diatribe of how he was thrown under the bus because of that* and how certain witnesses were not called that could have proven his innocence.

R46/5-6. Emphasis added.

At the *Spencer* hearing, Mr. Bargo chose to testify. At that time, he advised the trial court:

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[2] *Spencer v. State*, 615 So.2d 688 (Fla. 1993) (trial court should hold hearing to give defendant, counsel, and state opportunity to be heard; to afford state and defendant opportunity to present additional evidence; to allow both sides to comment on or rebut information in any presentence or medical report; and to afford defendant opportunity to be heard in person.)

> MR. BARGO, JR.: Your honor, I don't know what do to. *I never got a chance to put this on the record.* I tried talking to you last time when we did closing arguments. *I never got a chance to even talk to you.*
>
> THE COURT: This is your opportunity to address me in regards to what sentence should be imposed.
>
> MR. BARGO, JR.: I mean, Your Honor, I really – I don't know. I mean I think it is terrible what happened...But ***I didn't do*** this, *I know I didn't do this.*
>
> I shouldn't get the death penalty. I shouldn't get a life sentence. But I can't make that judgment. I didn't get a chance to even prove my innocence. I guess I can't really even argue what I should get. I never got a chance to prove I was innocent. I never got a chance to argue this.
>
> THE COURT: This is your right to make a statement in regards to what sentence should be imposed.
>
> MR. BARGO, JR.: I don't know. *You want me to ask for life in prison for* ***something I didn't do***?

R46/136-37. Emphasis added.

In response to this exchange Mr. Holloman interjected and asked the trial court if he might address Mr. Bargo. To "assist" Mr. Bargo in understanding that this allocution was for his input on sentencing, Mr. Holloman presented two options to Mr. Bargo regarding the choices for his life:

> MR. HOLLOMAN: There are two choices here, basically. *Regular or* ***extra crispy***, so to speak. Its either life without the eligibility of parole or death by lethal injection.

R46/137. Emphasis added.

Mr. Bargo never conceded guilt. Only Mr. Holloman, without consent, conceded guilt and then flagrantly disregarded Mr. Bargo's express wishes, as well as his testimony. The trial court sentenced Mr. Bargo to death.

Mr. Bargo appealed his conviction and sentence to the Florida Supreme Court. In his initial brief, Mr. Bargo raised several claims, including that defense counsel deprived Mr. Bargo of effective assistance of counsel when he argued to the jury that Mr. Bargo was "guilty, guilty as hell" after defense counsel argued Mr. Bargo's innocence in opening statements and Mr. Bargo testified to his innocence. This claim argued that Mr. Bargo was not informed, and certainly never conceded to trial counsel's plan to argue that he was "guilty, guilty as hell" during closing arguments. The claim argued that had Mr. Bargo been so informed he absolutely would not have agreed to trial counsel's concession strategy and that fact is evident throughout the remaining criminal proceedings. Appellate counsel argued that Mr. Bargo's Sixth Amendment right to competent trial counsel was violated when counsel not only conceded, but loudly proclaimed, Mr. Bargo's guilt during closing argument. Appellate counsel cited to *Florida v. Nixon*, 543 U.S. 175, 187 (2004), in tandem with *Strickland v. Washington*, 466 U.S. 668 (1984) to support this argument. On June 29, 2017, Mr. Bargo received *Hurst*[3] relief and his case was remanded for a new penalty phase.

[3] Bargo's conviction was affirmed but his death sentence was vacated and remanded for a new penalty phase based on *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *Bargo v. State*, 221 So.3d 562, 563 (2017).

Mr. Bargo was resentenced to death on September 12, 2019. Mr. Bargo appealed his second death sentence. The Florida Supreme Court affirmed the death sentence on June 24, 2021; rehearing was denied January 26, 2022. The second penalty phase and subsequent appeal did not address the instant claim. Mr. Bargo's claims regarding the concession of his guilt without his permission remain outstanding. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

MICHAEL SHANE BARGO, JR.'S TRIAL COUNSEL VIOLATED HIS SIXTH AMENDMENT RIGHT TO MAINTAIN HIS INNOCENCE BY IMPERMISSIBLY CONCEDING GUILT DURING HIS CAPITAL TRIAL IN DIRECT VIOLATION OF *MCCOY V. LOUISIANA*.

Mr. Bargo entered a written plea of not guilty on April 26, 2011, and at every stage of the criminal proceedings he maintained his innocence. Mr. Bargo's trial counsel violated his Sixth Amendment right to decide upon the objective of the defense and hold the State to its burden of proof, beyond all reasonable doubt, when counsel ignored his not guilty plea as well as his testimony, and conceded guilt at trial, in direct contravention of Mr. Bargo's unambiguous intention to maintain his innocence. Trial counsel's concession of Mr. Bargo's guilt during guilt phase closing arguments violated his constitutionally protected right to dictate the objective of his defense as articulated by this Court in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

I. *McCoy v. Louisiana* precludes defense counsel from conceding guilt for strategic reasons without defendant's explicit permission.

In *McCoy v. Louisiana*, the State of Louisiana charged McCoy with murdering three members of his family. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018).

Despite McCoy's express instruction not to concede guilt, his defense counsel told the jury that McCoy was the killer – in the hope that the jury would spare McCoy the death penalty. *Id.* At 1506-07.

This Court held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based review is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* At 1505. Although the Sixth Amendment guarantees a defendant the right to assistance of counsel for his defense, "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *Id.* This Court likened the right to maintain one's innocence at the guilt phase of a capital trial as the same as a defendant who "steadfastly refuse[s] to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications" because "[t]hese are not strategic choices about how best to *achieve* client's objectives; they are choices about what the client's objectives in fact *are*." *Id.* At 1508.

This Court further explained that *Florida v. Nixon*, 543 U.S. 175 (2004), did not command a contrary result. In *Nixon*, this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." *Nixon*, 543 U.S. at 178. In that case, there was no Sixth Amendment violation because defense

counsel had explained several times to the defendant a proposed guilt phase concession strategy and the defendant was unresponsive. *Nixon,* at 186. This Court held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, "[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." *Id.* at 192.

The *McCoy* Court stated that "[b]ecause a client's autonomy, not counsel's competence is in issue" the ineffective assistance of counsel standard under *Strickland v. Washington*, 466 U.S. 668 (1984) or *United States v. Cronic*, 466 U.S. 648 (1984) does not apply and there is no need for the defendant to show prejudice. *McCoy*, 138 S. Ct. at 1510-11. This violation of McCoy's "protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative." *Id.* "Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the 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.* For those reasons, this Court reversed the decision of Louisiana Supreme Court and remanded McCoy's case for further proceedings. *Id.*

II. It is uncontested that Michael Shane Bargo, Jr.'s trial counsel conceded his guilt for the first time during guilt phase closing arguments.

Mr. Bargo entered a written plea of not guilty on April 26, 2011, to the indictment for First-Degree Murder with a Firearm. His plea never changed.

Mr. Bargo's jury was sworn on August 13, 2013. Throughout the trial, no clear defense strategy emerged arguing that Mr. Bargo was guilty of a lesser included offense to the First-Degree Murder with a Firearm charge. Trial counsel did not concede guilt in any cross examination of State witnesses or argument to the court, nor did counsel call any defense witnesses to support such a theory. In addition, Mr. Bargo maintained his innocence as to First-Degree Murder with a Firearm throughout his direct and cross examination.

During closing arguments, unbeknownst to Mr. Bargo, and for the first time in open court, Mr. Holloman not only conceded Mr. Bargo's guilt as to a lesser included offense after Mr. Bargo took the stand in his defense and maintained his innocence as to the murder, he proclaimed it loudly:

> MR. HOLLOMAN: Does that convince you that he didn't premeditate? Probably not because I'd never be able to convince you of that in that type of weather, so to speak. What it does is, shows a reasonable doubt that he was involved in the premeditation of this. And because of that reasonable doubt, that third element is not met because it's not met beyond and to the exclusion of every, single reasonable doubt. What would be met? *What would your verdict have to be,* ***guilty, guilty as hell*** *of second-degree murder*. There's no question about that. Why? Because that has been proven beyond and to the exclusion of every, single reasonable doubt.

(R40/1406-1408. Emphasis added.)

He added:

> I am not going to stand up here and tell you that Michael Bargo is innocent because he's not innocent. He's guilty, but he's not guilty as charged because of that reasonable doubt and only because of that reasonable doubt. He's guilty of murder in the second degree. I'd ask you to return

> a verdict of guilty of murder in the second degree. Thank you.

(R40/1410-11).

The record is clear that these statements made during closing argument were a concession of guilt. It is also evident from the record that these statements occurred for the first time during Mr. Holloman's closing argument.

III. Michael Shane Bargo, Jr., sought to maintain his innocence at trial and any concession of guilt made by his trial counsel was done without his knowledge or permission. Michael Shane Bargo, Jr., never wavered from his plea of not guilty and articulated his dissatisfaction with trial counsel's surprise guilt concession at the first appropriate court proceeding.

Mr. Bargo sought to maintain his innocence throughout trial from the moment he was indicted and entered a written plea of not guilty, through his testimony at trial, the letter he wrote to the trial court judge, and statements made during his allocution.

On April 26, 2011, Mr. Bargo formally entered his written plea of not guilty for First Degree Murder with a Firearm. This plea was maintained throughout the entire criminal procedure. It never changed or wavered during status hearings, written motions, motion hearings, or pre-trial conference. Mr. Bargo maintained his innocence to the trial court as well as his trial counsel.

Mr. Bargo only learned of trial counsel's plan to concede guilt at the same time the jury did, during closing arguments on August 20, 2013, moments before the jury was to decide his fate. On November 13, 2013, the day of his *Spencer* hearing, the trial court advised they received a letter from Mr. Bargo pertaining to the concession

of guilt. Aside from the colloquy noted above, the letter was not addressed further on the record. Mr. Bargo presented allocution at his Spencer hearing and testified several times that he did not commit this crime:

> MR. BARGO, JR.: Your honor, I don't know what do to. *I never got a chance to put this on the record.* I tried talking to you last time when we did closing arguments. *I never got a chance to even talk to you.*
>
> THE COURT: This is your opportunity to address me in regards to what sentence should be imposed.
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> MR. BARGO, JR.: I mean, Your Honor, I really – I don't know. I mean I think it is terrible what happened...But ***I didn't do*** this, *I know I didn't do this.*
> I shouldn't get the death penalty. I shouldn't get a life sentence. But I can't make that judgment. I didn't get a chance to even prove my innocence. I guess I can't really even argue what I should get. I never got a chance to prove I was innocent. I never got a chance to argue this.
>
> THE COURT: This is your right to make a statement in regards to what sentence should be imposed.
>
> MR. BARGO, JR.: I don't know. *You want me to ask for life in prison for* ***something I didn't do***?

R46/136-37. Emphasis added.

IV. Michael Shane Bargo, Jr.'s trial counsel violated his Sixth Amendment right to decide upon the objective of the defense when they conceded his guilt at trial, in direct contravention of his unambiguous expressions of his desire to maintain his innocence and in violation of his constitutionally protected rights as articulated by this Court in McCoy v. Louisiana.

Mr. Bargo's trial counsel violated his right to autonomy and ability to maintain his innocence contrary to the holdings in *Nixon* and *McCoy*. Mr. Bargo must be

awarded a new trial based on this grave structural error without the need to show prejudice.

Mr. Bargo's trial counsel stated that he proclaimed Mr. Bargo's guilt in order to uphold his own professional obligations to the trial court.

> MR. HOLLOMAN: We all know the purposes of why we're here today. We're not here to argue any sort of ineffective assistance of counsel claim. This complaint in this letter is that he was – that he gave testimony in the narrative form. Okay.
>
> And that I, secondly, am not permitted under the rules of professional conduct to argue his perjury, which simply is what it is, as a defense. And what he claims as a result of that is basically I threw him under the bus. What we did was this: Based upon the available admissible evidence that was lawfully before the Court, even the Court ruled that my conduct beforehand – because we discussed this – we had a pretrial – off the record pretrial before and then we discussed it on the record several times.
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> The case law was there – Ellis Rubin cases – we all had that case, so we were all very conversant in the rules of professional conduct. Now what he wants to do this morning is he wants to get up there and engage in a diatribe of how he was thrown under the bus because of that and how certain witnesses were not called that could have proven his innocence.

R46/5-6.

But just like Mr. McCoy, Mr. Bargo did not agree to concede guilt. See *McCoy*, 138 S.Ct. at 1503 ("Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty . . . [b]ut the client may not share that objective."). Mr. Bargo pleaded not guilty to the charged crime and it is implicit from the record that he intended to maintain his innocence throughout the trial proceedings.

Finally, Mr. Bargo informed the trial court of both his innocence and objections to the concession of guilt at the first appropriate opportunity – his *Spencer* hearing. While it is true Mr. Bargo never explicitly expressed his objection in open court to a guilt concession defense for the purpose of obtaining a second-degree murder verdict, this is solely because he was never afforded the opportunity to do so. He did, however, make his dissatisfaction with his trial counsel's actions known at the time and trial counsel placed that complaint on the record after having an off-record conversation with the trial court:

> THE COURT: Will counsel approach the bench?
>
> I don't need this on the record.
>
> (Discussion off the record.)
>
> THE COURT: Lets go back on the record.
>
> MR. HOLLOMAN: Judge, the Defendant has argued for guilt of a lesser included offense. The Defendant specifically acquiesced in front of Candace Hawthorne, co-counsel; Gary, investigator; Roger, investigator and Dawn Mahler and myself. He's voiced the complaints that what you did is not my closing. No, it wasn't his closing, it was the lawyer's closing consistent with my ethical responsibilities in this case pursuant to the Rules of Professional Conduct, which he seems to think doesn't exist.
>
> THE COURT: And also, arguing for a lesser included offense I believe is authority the *Nixon* case,[4] an opinion from the United States Supreme Court.

[4] In *Nixon v. Singletary*, the Florida Supreme Court found that the presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of a defendant's affirmative, explicit acceptance of that strategy. *Nixon*, 758 So. 2d 618, 624 (Fla. 2000). After an evidentiary hearing and subsequent appeal, the case went to this Court in *Florida v. Nixon*, 543 U.S. 175 (2004). The Supreme Court reversed and held that counsel's failure to obtain defendant's express consent to a strategy of conceding guilt did not automatically render counsel's performance deficient.

> THE COURT: I don't have the cite in front of me but it is *Nixon*, N-I-X-O-N. it was a case that the Florida Supreme Court actually looked unfavorably upon such an argument. That was then applied to the United States Supreme Court which said that such argument was entirely proper under the appropriate circumstances.
>
> The Court finds in this case it was an appropriate circumstance, and *especially* if the Defendant acquiesced to the argument.

R40/1436-37. Emphasis added.

Mr. Bargo adamantly denies trial counsel's assertion that he acquiesced to the concession of guilt and maintains that he learned of the concession at the same time as the jury – during closing arguments. Prior to that moment trial counsel had not discussed conceding guilt with Mr. Bargo. Nor could Mr. Bargo speculate during trial that his counsel would employ such a tactic as the concession only occurred at the very last possible moment – during closing arguments – without any hint of such a defense throughout the case-in-chief.

Mr. Bargo acted as soon as he could by expressing his horror to trial counsel, who had an off-record discussion with the trial court and then advised the trial court that his client was not happy with his closing argument. Mr. Bargo also wrote a letter to the trial court attempting to inform the court of his shock and express his objection to what happened during closing arguments. The trial court did not read Mr. Bargo's

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Rather, when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy." *Florida v. Nixon*, 543 U.S. at 192.

letter, but did advise trial counsel that it was received and he would hear from Mr. Bargo on the record. Mr. Bargo expressed his innocence, yet again, to the trial court during allocution.

This Court's opinion in *McCoy* constitutes an important and clear pronouncement of a time-honored principle regarding the defendant's personal right to dictate the objective pursued at trial. This opinion should not be read narrowly. The *McCoy* opinion states that "[a]utonomy to decide that the objective of the defense is to assert innocence belongs" to the defendant. *McCoy*, 138 St. Ct. at 1508. The *McCoy* Court did not discuss the manner in which a defendant must express his objections to his attorneys nor the timing of when such objections must be lodged.

McCoy does not require the defendant to act out in court, interrupting closing arguments to assert an objection to the concession of guilt in real time. In fact, such a tactic would be looked down upon by the trial judge and Mr. Bargo would have lost favor with the jury. Nor does *McCoy* require Mr. Bargo to anticipate every possible defense his attorneys may assert during trial so that he can lodge a preemptory objection prior to such unknown strategy being employed. Such a requirement would put an undue burden on the defendant who is not nearly as familiar with the criminal justice system as his attorney. Although Mr. Bargo had a limited prior criminal record, this was his first criminal trial. Absent the attorneys sharing trial strategy with him, Mr. Bargo simply expressed his trial objectives the only way he knew how - by continually maintaining his innocence to his attorneys. He further shared his

objections with the trial court at the first appropriate opportunity given to him – his Spencer hearing.

The *McCoy* Court corrected a misunderstanding of *Nixon*. *Nixon* was not applicable in *McCoy* because McCoy insisted on his innocence and objected to the admission of guilt. *McCoy*, at 1505, 1509. Here, Mr. Bargo insisted on his innocence throughout the entire criminal proceeding, whereas in *Nixon*, the defendant declined to participate in his defense. *McCoy* at 1509. Unlike *McCoy*, Mr. Bargo was never given the opportunity to object to his attorney's statements, as counsel made the admission without consulting Mr. Bargo first and then proceeded with an off-record discussion with the trial court regarding Mr. Bargo's alleged "concession."

The *McCoy* court stated that "[b]ecause a client's autonomy, not counsel's competence, is in issue," the ineffective assistance of counsel standard under *Strickland* or *Chronic* does not apply and there is no need by *McCoy* to show prejudice. *McCoy*, 138 S. Ct. at 1510-11. Rather, "[v]iolation of a defendant's Sixth Amendment secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless error review." *Id.* The *McCoy* court held that an admission of guilt "blocks the defendant's right to make the fundamental choices about his own defense" thus, "the 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* at 1511. McCoy was granted a new trial without any need to first show prejudice. *Id.*

Similar to Mr. McCoy, Mr. Bargo was entitled to be in control of his own defense. The right to be master of his defense is a right that he holds alone. *See Faretta v. California*, 422 U.S. 806, 834 ("The right to defend is personal... and although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'respect for the individual which is the lifeblood of the law.'" (*quoting Illinois v. Allen*, 397 U.S. 337, 350-1 (1970) (Brennan, J., concurring)). Trial counsel's actions in Mr. Bargo's case violated his most sacred right to autonomy and ability to maintain his innocence. Mr. Bargo's case is on point with *McCoy* and as such, Mr. Bargo should be granted a new guilt phase trial.

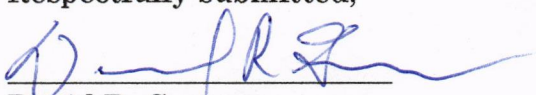
V. The *McCoy* violation in Michael Shane Bargo, Jr.'s case was a structural error that invalidates his entire trial.

Trial counsel committed a structural error that can only result in the invalidation of Mr. Bargo's guilt phase trial. See *McCoy*, 138 S. Ct. at 1510-11; *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)(stating that structural error "will always invalidate the conviction"). As in *McCoy*, the violation of Mr. Bargo's protected autonomy right was complete when trial counsel "usurp[ed] control of an issue within [Mr. Bargo's] sole prerogative." *McCoy*, 138 S. Ct. at 1511. A new trial is necessary. The very nature of a structural error is that it 'pervades the entire trial." *Kaley v. United States*, 571 U.S. 320, 336 (2014), and "undermine[s] the fairness of a criminal proceeding as a whole." *United States v. Davila*, 569 U.S. 597, 611 (2013). In the face of a structural error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991).

CONCLUSION

Mr. Bargo's trial counsel impermissibly conceded guilt against his desired an unwavering with to maintain his innocence. This concession violated his Sixth Amendment rights as articulated by this Court in *McCoy*. Mr. Bargo did not have the benefit of *McCoy* at the time his first guilt and penalty phase were appealed, but because this claim has never been ruled on and, based on the foregoing, Mr. Bargo prays that this Court grant a writ of certiorari to review.

Respectfully submitted,



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