CASE NO. 21-8243

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL SHANE BARGO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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CAPITAL CASE

QUESTION PRESENTED

Whether trial counsel violated Petitioner's Sixth Amendment right under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), when the question was never presented or passed upon by the Florida Supreme Court and Petitioner never objected to his counsel conceding guilt to a lesser charge.

PARTIES TO THE PROCEEDINGS

Petitioner, Michael Shane Bargo, was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent, State of Florida, was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14. l(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 Penaltv 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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The opinion of the Florida Supreme Court is reported at *Bargo v. State*, 331 So. 2d 653 (Fla. 2021).

JURISDICTION

Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257. Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this Court should decline review because Petitioner failed to properly present the constitutional issue in state court. *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983); *Webb v. Webb*, 451 U.S. 493, 496-97 (1981).

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF CASE AND FACTS

The evidence presented at trial established that on the night of April 17, 2011, at Bargo's request, codefendants Amber Wright, Kyle Hooper, Charlie Ely, and Justin Soto lured Seath Jackson to the home of codefendant, Charlie Ely, so that Bargo, codefendant Kyle Hooper and codefendant Justin Soto could ambush and kill Jackson. At the time of the crime, Bargo was eighteen years old, and the victim was fifteen years old. *Bargo v. State*, 221 So.3d 562, 563–64 (Fla. 2017). Wright and the victim began dating in December 2010 but broke up bitterly in March 2011. Wright became romantically involved with Bargo around the time of her breakup with the victim. According to William Samalot, the victim's friend, Bargo wrongly believed

that the victim had abused Wright. Nevertheless, Wright and the victim continued to send text messages to one another after their breakup. *Id.*

When Jackson arrived at Ely's home, Bargo shot Jackson to death with Bargo's .22 caliber handgun. Jackson's killers then burned and dismembered Jackson's body collected the majority of Jackson's remains into paint buckets and dumped the buckets into a pond located at a remote quarry in Ocala, Florida. Testimony adduced at trial revealed that Bargo planned the murder and directed his codefendants throughout the commission of the murder. *Id.* at 565.

Bargo confessed several times to shooting Jackson. Bargo told Kristen, an out-of-town girlfriend, that he and some friends had been in a fight with a kid, Bargo shot him, and they "t[ook] him apart and burn[ed] him and then took him to the rock quarry" near her home. Bargo told James Williams, Jr., Kristen's brother, that he had shot a boy eight times with a .22 caliber pistol and killed him. Bargo also told him that they busted his kneecaps in the bathtub, placed him in a sleeping bag, burned him, put his remains in paint buckets, and took the paint buckets to a rock quarry. Bargo told Crystal Anderson, James Williams, Sr.'s girlfriend, that he killed a guy who raped his little sister. Bargo described beating him, chasing him outside, shooting him outside, placing him in a bathtub, beating him some more, and shooting him twice in the face, which killed him. Bargo also told her that the body was put in a sleeping bag and then burned. However, because the body did not burn completely, Bargo used pliers to pull the remaining teeth out of the skull one by one. Bargo told James Williams, Sr., that he shot and killed someone who raped his sister. Bargo also

told Joshua Padgett, a neighbor of the Williamses, that he shot a guy, dragged him into a home, shot him again, burned him, and carried him into the woods. *Id* at 565–66.

Bargo made additional incriminating statements and confessions while in custody pending trial. Shortly after his arrest, while in a holding cell, Bargo told a fellow inmate that he killed a kid who raped his girlfriend. Bargo described shooting him in a chair, placing him in a bathtub, shooting him in the bathtub when he awoke to make sure he was completely dead, and accidentally burning his own face while trying to burn the body. In addition, David Smith, a retired corrections officer, overheard Bargo tell another inmate that "[t]here were only two witnesses that saw me shoot him." *Id.*

Crime scene investigators found blood evidence on the bathroom floor, kitchen floor, living room floor, bathroom wall, and kitchen ceiling of Ely's home. Lee testified that she was unable to obtain any DNA evidence from the blood found on the bathroom floor or the kitchen floor but found Ely's DNA in a mixture in the blood found on the bathroom wall, Hooper and the victim's DNA in a mixture in the blood found on the living room floor, and Bargo's DNA in the blood found on the kitchen ceiling. *Id.* at 567.

Maria Pagan, an FDLE expert in firearms examination and identification, testified that the projectile found in the human tissue was a .22 caliber bullet. Pagan compared a bullet she fired from Bargo's .22 caliber Heritage revolver with the projectile from the victim's tissue and found that they both had the same class

characteristics—six grooves with a right twist and correct dimensions—as Bargo's revolver. *Id.*

Bargo vacillated regarding his decision to testify at trial. Ultimately Bargo testified, but at the request of his attorney, Charles Halloman, Bargo testified in the narrative.[1] Bargo denied participating in the murder, but he admitted his involvement in disposing of the victim's remains. *Id.* Amid Bargo's narrative testimony, the following discussion occurred after the trial court took a recess:

> MR. HOLLOMAN: I could push him along in the timetable, but I'm reluctant to do so because of the rules of professional conduct, I don't want it to be seen as I'm, you know what I'm talking about.
>
> THE COURT: Based on the nature of the case, I'm reluctant to do so.
>
> MR. HOLLOWMAN: So, we're okay with that procedure?
>
> THE COURT: Yes, sir.

(V38, R1246). Prior to closing arguments, another discussion relevant to counsel's dilemma occurred at the bench:

> THE COURT: Have you read that Mr. Holloman?
>
> Counsel, approach the bench.
>
> For review, the State has presented the case of *Sanborn S-A-N-B-O-R-N vs. State*, 474 So. 2d 309 Third District Court of Appeal 1985.
>
> It appears, Mr. Holloman, by this case, that you are prohibited to argue in closing argument what you believe to be perjured testimony.
>
> MR. HOLLOMAN: Well, gee, some of it is and some of it isn't.

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[1] Multiple discussions were held between counsel and the trial court regarding the way Bargo could testify in light of limitations placed on trial counsel pursuant to the Rules of Professional Conduct, which ultimately resulted in Bargo being permitted to testify in the narrative. (V46, R5-6).

. . .

MR. HOLLOMAN: Kind of puts me in a dilemma here.

(V40 R1376-7).

After the jury was excused for deliberations, defense counsel had the following conversation at the bench:

> 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, an opinion from the United States Supreme Court.
>
> 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).

The jury found Bargo guilty of first-degree murder with a firearm and recommended that Bargo be sentenced to death by a vote of ten to two. *Id.* at 568.

The trial court sentenced Bargo to death and Bargo appealed his conviction and sentence to the Florida Supreme Court.

On direct appeal of his first death sentence, Bargo raised seven issues: (1) trial counsel provided ineffective assistance that deprived Bargo of a fair trial; (2) the evidence is not sufficient to convict Bargo of first-degree murder; (3) the trial court erred by denying Bargo's motion for the appointment of a crime scene expert; (4) Florida's death penalty statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); (5) the trial court abused its discretion by excluding evidence of threats made by the victim proffered by Bargo during the penalty phase; (6) Bargo's death sentence is disproportionate; and (7) Florida's death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Bargo v. State*, 221 So.3d 562, 568 (Fla. 2017).

During the pendency of the direct appeal, this Court issued its opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court upheld Petitioner's conviction but remanded the case to the trial court for a new sentencing hearing in accordance with the ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. denied*, 141 S. Ct. 1051 (2021). *Bargo v. State*, 221 So.3d 562, 570 (Fla. 2017) (*Bargo I*).

At the new penalty phase, the judge, following the jury's unanimous recommendation, imposed a sentence of death, which was affirmed on appeal. *Bargo*

v. State, 331 So. 2d 653 (Fla. 2021), *reh'g denied*, No. SC19-1744, 2022 WL 223660 (Fla. Jan. 26, 2022).

The instant petition for writ of certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED IS NOT PROPERLY BEFORE THE COURT BECAUSE IT WAS NEITHER PRESENTED NOR PASSED UPON IN THE FLORIDA SUPREME COURT.

The Supreme court is a court of review, not of first view. *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022). Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where any ... right ... is *specially set up or claimed* under the Constitution or the treaties or statutes of ... the United States." 28 U.S.C. § 1257(a) (emphasis added). For that reason, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.' *Hemphill v. New York*, 142 S. Ct. 681, 689, (2022); quoting *Howell v. Mississippi*, 543 U.S. 440, 443, (2005) (*per curiam*). Indeed, it is "unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

The Court thus "affords state courts 'an opportunity to consider the constitutionality of the actions of state officials, and equally important, proposed changes' that could obviate any challenges to state action in federal court." *Id.* The Petitioner bears the burden of demonstrating that the issue was raised and decided

below and that both requirements appear on the record. *Street v. New York*, 394 U.S. 576, 583 (1969); *see Gates,* 462 U.S. at 218; *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969). Petitioner concedes that the Florida Supreme Court has not had the opportunity to rule on the issue presented. (Pet. 7). Petitioner does not identify any "rare exceptions" to avoid the rule that this Court will not review an issue neither presented nor passed upon below. *See Adams*, 520 U.S. at 86.

In his direct appeal following the first trial, Petitioner raised a Sixth Amendment denial of effective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1994). Petitioner argued:

> After the jury began deliberations, defense counsel Holloman told the trial court that Appellant "acquiesced" to arguing the lesser included offense during closing in front of defense counsel Holloman, defense counsel Hawthorne, investigator Gary Roger, and Dawn Mahler. (R40.1436) Without hearing from the defendant or Hawthorne on the record, the trial court found that it was appropriate for defense counsel to argue the lesser included offense under the circumstances and that Appellant acquiesced to the argument. (R40.1436) But during allocution, Appellant told the court that he never agreed to defense counsel arguing second-degree murder. (R46.132) Ultimately, defense counsel Holloman deprived Appellant of effective assistance because it is inconceivable that Appellant would "acquiesce" to defense counsel arguing to the jury that Appellant was "guilty, guilty as hell", "he's not innocent" and "[h]e's guilty of murder in the second degree" when Appellant testified that he was innocent of all charges.

(IB at 57-58).

As relevant here, in its opinion, the Florida Supreme Court declined to address the ineffective assistance of counsel claims:

> In the first issue raised in this appeal, Bargo raises four claims[2] of ineffective assistance of counsel. We decline to address these claims on direct appeal because ineffective assistance of counsel does not appear on the face of the record. *See Gore v. State*, 784 So. 2d 418, 437-38 (Fla. 2001) ("**A claim of ineffective assistance of counsel may be raised on direct appeal only where the ineffectiveness is apparent on the face of the record.**").[3] Bargo is free to raise them in an appropriate postconviction motion.

Bargo v. State, 221 So.3d 562, 568–70 (Fla. 2017) (emphasis added). Bargo did not raise a claim that counsel's concession violated his right to autonomy and control the objective of his defense under the Sixth Amendment.

Petitioner's direct appeal following the second trial raised five claims, none of which invoked their current structural error claim under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).[4] Nor did Petitioner raise the argument in a petition for rehearing.

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[2] Bargo alleged that trial counsel provided ineffective assistance by: (1) failing to refresh Hooper's recollection and impeach Hooper at the guilt phase with his statement that "[t]he only thing we have left is to blame this all on Mike"; (2) arguing to the guilt phase jury that Bargo was "guilty, guilty as hell" of second-degree murder; (3) urging Bargo during allocution at the *Spencer* hearing that he should tell the trial court whether he wanted "[r]egular or extra crispy"; and (4) failing to argue at the guilt phase that the projectile found in the victim's remains did not match the bullets recovered from Bargo's revolver. *Bargo v. State*, 221 So. 3d 562, 568 (Fla. 2017).

[3] While appellate courts in Florida will entertain claims of ineffective assistance of counsel on direct appeal, a finding of such will only be made when "the ineffectiveness is **obvious** on the face of the appellate record, the prejudice caused by the conduct is **indisputable**, and a tactical explanation for the conduct is **inconceivable.**" *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002) (emphasis added). The ineffectiveness must be so clear that "it would be a waste of judicial resources to require the trial court to address the issue." *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987).

[4] Petitioner's Initial Brief was filed on July 16, 2020, and raised the following five claims:

> (1) the 2016 amendment to section 782.04(1)(b), Florida Statutes, retroactively precluded the State from seeking the death penalty at resentencing; (2) the circuit court erred in the application of the HAC

See Fla. R. App. P. 9.330. Petitioner chose instead to seek relief immediately in this Court before seeking relief in state court. The Florida Supreme Court, in turn, never discussed the federal constitutional issue presented here. It follows that this Court should not reach the merits of petitioners' current constitutional claim. *E.g., Heath v. Alabama,* 474 U.S. 82, 87 (1985).

Because Petitioner failed to raise his Sixth Amendment autonomy claim before the state trial court, and because that court did not pass upon the question presented, this Court should refuse initial review.[5] Granting certiorari at this premature stage would be a stark departure from this Court's practice.

> aggravator; (3) the circuit court abused its discretion in giving "little or no weight" to the mental mitigation presented by Bargo; (4) the circuit court abused its discretion by failing to adequately consider Bargo's age and ten other mitigating circumstances; and (5) Bargo's death sentence is disproportionate.

Bargo v. State, 331 So.3d 653, 658 (Fla. 2021), *reh'g denied*, No. SC19-1744, 2022 WL 223660 (Fla. Jan. 26, 2022).

[5] In addition to the absence of a lower court ruling on the question presented, another vehicle problem this case presents is the question of retroactivity. Bargo's initial direct appeal – where he raised a *Strickland* claim – was resolved in 2017. Bargo's conviction was affirmed but his death sentence vacated, and his case remanded for resentencing. No certiorari petition was filed by Bargo following the affirmance of his conviction. This Court did not issue *McCoy* until 2019. While perhaps not a straightforward delineation from the date the judgment and sentence became final, the convictions at least were final before *McCoy* issued. Therefore, this Court would first have to answer the antecedent question of retroactivity under these facts and where finality for the purpose of retroactivity begins. C.f. *Beard v. Banks*, 542 U.S. 406, 411 (2004) (determining that a state conviction is normally final, for retroactivity purposes, when a state direct appeal is over and a petition for certiorari has either been decided or the time to file has elapsed). Answering the actual retroactivity question itself, however, would be easy. The new rule articulated in *McCoy* is not retroactive. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) (holding that, without exception, "new procedural rules do not apply retroactively on federal collateral

II. Petitioner failed to state a Sixth Amendment violation under *McCoy*.

Although the question is not properly before the Court, Petitioner erroneously claims that his counsel violated his right to autonomy and ability to maintain his innocence contrary to the holdings in *Nixon*[6] and *McCoy* when counsel conceded his guilt to a lesser offense. (Pet. 12). 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. Therefore, counsel did not override his expressed objective and thus did not violate the Sixth Amendment right described in *McCoy*.

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

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review"). Even before Vannoy, courts had little difficulty finding the new rule announced in *McCoy* is not retroactive. *See Smith v. Stein*, 982 F.3d 229, 235 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2532 (2021); *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).

[6] *Florida v. Nixon*, 543 U.S. 175 (2004).

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.* 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*—because "Nixon's attorney did not negate Nixon's autonomy by overriding

Nixon's desired defense objective, for Nixon never asserted any such objective." *Id.* 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.*[7] 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.

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.

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[7] This discussion of *Nixon* shows why Petitioner's first argument—that *McCoy* "precludes defense counsel from conceding guilt for strategic reasons without the defendant's *explicit permission*"—is wrong. Pet. 7 (emphasis added). *Nixon* held precisely the opposite, rejecting a "blanket rule demanding the defendant's explicit consent," and explaining that counsel sometimes need not obtain permission. 543 U.S. at 192. At no point did *McCoy* purport to overrule *Nixon*. Nor did it need to; the facts of *McCoy* required the Court to resolve whether defense counsel may "concede guilt over the defendant's intransigent and unambiguous objection." *See* 138 S. Ct. at 1507.

Of course, counsel cannot simply bury their head in the sand to avoid a Sixth Amendment violation. Counsel's 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). *Id.* 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").[8] 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." *Id.* at 1509. And sure enough, courts have long applied *Strickland* to cases in which counsel failed to consult with the client before conceding guilt. *See, e.g., Darden v. United States*, 708 F.3d 1225 (11th Cir. 2013); *United States v. Thomas*, 417 F.3d 1053 (9th Cir. 2005).

In short, a defendant claiming that counsel failed to consult about a planned concession is asserting that counsel violated a professional duty to "consult with the client as to the means" to pursue his desired objectives. *See* Model Rules of Prof. Conduct R.1.2(a) (2016). That, "[a]t its heart" is a *Strickland* claim, "not a *McCoy*

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[8] *People v. Santana*, 2019 WL 3425294, at *9 (Cal. Ct. App. July 30, 2019 ("[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." (citation omitted)).

claim." (citing *Nixon* and *Strickland* for the idea that an attorney "has a duty to consult with the client regarding 'important decisions'").

With these principles in mind, Petitioner fails to state a *McCoy* claim. Petitioner does not claim that he objected pre-concession to his counsel's strategy to concede guilt to a lesser charge. In fact, Petitioner claims that he learned of the concession at the same time as the jury and that his counsel purportedly did not consult him before conceding to a lesser charge. (*See* Pet. 15). It is the same *Strickland* claim he raised in his first Direct Appeal. As before, he alleges a Sixth Amendment violation "because counsel conceded guilt" to a lesser charge "without [Petitioner's] consent." And without an express objection to conceding guilt, there is no *McCoy* violation.[9] While *McCoy* safeguards the client's authority to determine the "objective of the defense," this Court made sure to state that its holding did not displace counsel's trial management role, including in deciding "what arguments to pursue." *Id.* at 1508 (citations omitted).

Nevertheless, Petitioner argues that it is "implicit from the record that [he] intended to maintain his innocence throughout the trial proceedings. (Pet. 13). This

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[9] Courts have generally been consistent in rejecting *McCoy* claims where the record does not reflect an open and direct objection to the concession. *See* e,g, *Atwater v. State*, 300 So.3d 589, 591 (Fla. 2020) (dismissing a *McCoy* claim because the defendant did not "express[ ] to counsel that his objective was to maintain his innocence or that he expressly objected to any admission of guilt"), petition for cert. filed, (U.S. Jan. 13, 2021) (No. 20-6851); *United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019) (analyzing the record to determine the defendant did not maintain absolute innocence), cert. denied, —— U.S. ——, 140 S. Ct. 2644, 206 L.Ed.2d 715 (2020).

argument fails for several reasons. First, the holding of *McCoy* does not apply when a defendant alleges that he "implicitly" conveyed an objection to conceding 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. Petitioner's not guilty plea does not equate to an "intransigent and unambiguous objection" to conceding guilt. *McCoy*, 138 S. Ct. at 1507. [10] The only appearance of a disagreement from Bargo appears during the *Spencer*[11] hearing, after Bargo was convicted. A defendant cannot withhold an objection to counsel's strategy at the time of trial only to raise it after counsel's chosen strategy (arguing for a lesser included offense) was unsuccessful.

III. 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.

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[10] And even if Petitioner could express this decision implicitly, his allegations do not establish that he did so. 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."); *People v. Santana*, 2019 WL 3425294, at *9 n.4. (Cal. Ct. App. July 30, 2019).

[11] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993)(providing capital defendants a hearing following the penalty phase jury recommendation in which the defendant can present additional evidence and argument before the judge).

at 1513–17 (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. So, *McCoy* claims typically arise only "in cases involving irrational capital defendants." *Id.* Second, if counsel and client unflinchingly disagree on trial strategy, they generally part ways rather than continue course with divergent views. *Id.* And third, even if all these circumstances are met, the violation occurs only if "the defendant expressly protests counsel's strategy of admitting guilt." *Id.*

The fact Petitioner claims makes a difference—that his counsel purportedly did not consult him before conceding to a lesser charge—only makes his case more remote. 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 a lesser charge, all while his client fails to make his objection known before the concession and fails to object at trial when the concession is made.

In sum, the Petition raises a claim that was not presented or passed upon in state court below, fails to state a *McCoy* violation, and does not raise an issue of exceptional importance.

CONCLUSION

Accordingly, this premature petition should be denied.

Respectfully submitted,

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