CASE NO. 21-8243

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL SHANE BARGO, JR.

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

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IN THE SUPREME COURT OF THE UNITED STATES

REPLY TO BRIEF IN OPPOSITION

Mr. Bargo maintains that this Court should grant certiorari. He replies below to the State's Brief in Opposition filed on July 26, 2022, as necessary. No arguments in his initial petition are waived.

REPLY TO STATEMENT OF THE CASE

I. THE QUESTION PRESENTED IS PROPERLY BEFORE THE COURT AS MR. BARGO'S INITIAL GUILT PHASE TRIAL PREDATED THIS COURT'S DECISION IN *MCCOY.*

The question presented is properly before the Court. Mr. Bargo was originally convicted and sentenced to death in 2013. A direct appeal followed and the issue was presented as a *Strickland*[1] claim for ineffective assistance of counsel as that was the appropriately requested relief at that time, given that Mr. Bargo's first trial predated *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Thus, the issue was raised, but never ruled on prior to Mr. Bargo's resentencing. In 2017, Mr. Bargo was granted *Hurst* relief and his case was remanded for a new penalty phase.[2] In 2019, Mr. Bargo was again sentenced to death and a second direct appeal followed; at no time did Mr. Bargo waive the issues raised in his first direct appeal.

The Respondent incorrectly places the burden of demonstrating that "the Petitioner bears the burden of demonstrating that the issue was raised and decided below and that both requirements appear on the record" (BIO 7-8). *Street v. New York*,

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] 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).

394 U.S. 576, 583 (1969). Rather, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this [c]ourt is not bound by the decision of the state courts." *Id.* at 583. Thus, this Court is within its discretion to review and answer the question presented.

II. MR. BARGO HAS STATED A SIXTH AMENDMENT VIOLATION UNDER MCCOY.

A. The Brief in Opposition neglects the true character of the facts that were presented to the Florida Supreme Court and on which the Court decided Mr. Bargo's case.

Under Florida law, a summary denial without an evidentiary hearing is reviewed based on the assumption that the allegations must be accepted as true to the extent that they are not refuted by the record. *See Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). The Respondent, aware of the presumption of correctness created by claims without an evidentiary hearing, opposed a hearing at all stages at which it could have disputed the facts they are now disputing. Allegations from the respondent that trial counsel informed Mr. Bargo of their intended defense strategy or that Mr. Bargo failed to object to such strategy are not only refuted by the record, but are also inconsistent with Mr. Bargo's presumption of innocence.

Thus, taking Mr. Bargo's objections as true, and despite not yet receiving an evidentiary hearing, Mr. Bargo presented unrefuted facts that show he is entitled to relief under *McCoy*. Mr. Bargo explicitly pleaded not guilty and never wavered on this decision. Mr. Bargo maintained his innocence throughout the duration of his case and up until the point that trial counsel caught him by surprise with the admission of

guilt to a lesser included offense. Whatever this "concession strategy" was, it was not discussed previously with Mr. Bargo, nor was his permission given to implement this strategy. Mr. Bargo informed the trial court of both his innocence and objections to the trial attorney's strategy at the first appropriate opportunity – his *Spencer* hearing.

B. Mr. Bargo never agreed to waive his constitutional rights.

The Respondent's arguments are simply wrong. Mr. Bargo never agreed to waive his constitutional right by accepting a concession strategy at trial. Mr. Bargo told the entire court system that he wished to hold the State to its burden of proof by entering a plea of not guilty. Mr. Bargo continually maintained his innocence throughout the duration of his case and throughout trial.

What trial counsel did to Mr. Bargo is far worse than the violation seen by counsel in *McCoy*. Mr. McCoy at least had the benefit of learning the trial strategy prior to trial. Mr. Bargo, who affirmatively told counsel he was not guilty and wanted to go to trial, was simply blindsided. The Respondent's distinction between Mr. Bargo maintaining his innocence before versus during trial is a gross misunderstanding of trials under the United States Constitution. Mr. Bargo never conceded guilt and he had the right to have his trial counsel hold the State to its burden of proof beyond all reasonable doubt.

C. Counsel cannot do in the shadows what counsel cannot do in the light.

The Respondent's BIO misapprehends the role of counsel and this Court's findings in *McCoy*. While it is correct that *McCoy* is violated "when counsel overrules

the client's express objection to conceding guilt" (BIO p. 11), the Respondent misses the mark when applying the most important holding of *McCoy* – i.e. "it is the defendants prerogative, ***not counsel's***, to decide on the objective of his defense." *McCoy* 138 S. Ct. at 1505 (emphasis added). When Mr. Bargo entered his plea of not guilty and maintained his innocence throughout trial proceedings, that was his express objective.

Spontaneously conceding guilt to avoid any objection by the defendant whose rights are being forfeited is far worse than what occurred in *McCoy*. At least McCoy could listen to counsel's strategy, understand the reasons behind such a defense, and then lodge the appropriate objections. In this case, and in the absence of trial counsel undertaking the very basic task of discussing trial objectives and potential defenses with Mr. Bargo, Mr. Bargo nonetheless retains his protected autonomy right to determine the objective of his defense. And, as previously stated, trial counsel here was put on notice of Mr. Bargo's objectives through his not guilty plea and maintaining his innocence throughout pre-trial and trial proceedings.

D. While Counsel was certainly ineffective, the structural error violation goes far beyond a claim of ineffective assistance of counsel.

The Respondent attempts to reframe Mr. Bargo's case as one of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), rather than a structural error McCoy violation. The Respondent is incorrect in stating that a failure to consult the client can only be raised as a *Strickland* claim (BIO p. 14). Structural error can result from the actions of counsel as seen in *McCoy*. In *McCoy*,

this Court did not require the defendant to raise an ineffective assistance of counsel claim because even greater rights were at issue than a defendant's right to effective counsel.

Further, the Respondent and Florida Supreme Court's continued reliance on *Florida v. Nixon* is misplaced. In *Nixon*, this Court found 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*, 543 U.S. at 186. Thus, 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.

Nixon and an ineffective assistance of counsel standard are simply not controlling for Mr. Bargo's situation. *Nixon* only covers a scenario in which counsel *discusses* strategy with the client and the client stands silent. *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 pre-trial and trial proceedings, whereas in *Nixon*, the defendant declined to participate in his defense. *McCoy* at 1509. Mr. Bargo was never given the opportunity to object to his attorney's statements, as Mr. McCoy was, as counsel made the admission without first consulting Mr. Bargo.

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 does not apply and there is no need for the defendant to show prejudice. *McCoy*, 138 S. Ct. at 1510-11. Rather, the "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind [this Court's] decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *Id.* At 1511. The 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.* As in McCoy, the violation if mr. Bargo's protected autonomy right was complete when the trial attorneys "ursurp[ed] control of an issue within [Mr. Bargo's] sole prerogative." *McCoy*, 138 S. Ct. at 1511.

III. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE AS IS THIS COURT'S ANSWER.

Although this Court does not require that the petition for writ of certiorari claim exceptional importance, this issue before the Court, as well as the Court's answer, are exceptionally important. First, the issue is of exceptional importance to Mr. Bargo who has been sentenced to death for a crime he was alleged to have committed at the age of eighteen with essentially no adversarial proceedings regarding his guilt or innocence. Second, the issue is of exceptional importance to the individuals who have been, and will be, denied fundamental rights by trial counsel simply failing to inform them that counsel will concede guilt to avoid objection. This, at its core, is the fundamental flaw in the Respondent's argument. If the Respondent's argument is to be accepted as true, the State and the Florida Supreme Court have carved out a way for defense attorneys to usurp an individual's constitutional right to trial. Finally, this issue is of exceptional importance to this Court because its

authority is at stake in an area of extremely important constitutional rights. The Florida Supreme Court's decision in Mr. Bargo's case will infect the judicial determination of claims that prevent even worse violations than that which has occurred in Mr. Bargo's case.

CONCLUSION

For the reasons outlined in Mr. Bargo's petition for writ of certiorari, that his trial attorneys impermissibly conceded guilt against his desired and unwavering wish to maintain innocence in violation of his Sixth Amendment rights as articulated in *McCoy*, and based on the aforementioned arguments, Mr. Bargo's petition for writ of certiorari should be granted.

Respectfully submitted,

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