

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

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**Steven Nelson Murray,**

Petitioner,

**v.**

**Jerry Howell, et al.,**

Respondents.

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On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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**Petition for a Writ of Certiorari**

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## QUESTION PRESENTED

Mr. Murray is a state prisoner litigating a federal habeas petition under 28 U.S.C. §2254. During the state proceedings, the parties waived Mr. Murray's right to a jury trial on one of three charges. The parties did so without Mr. Murray's informed consent. There's no dispute in this appeal that the invalid jury trial waiver amounted to a Sixth Amendment violation.

This jury trial waiver claim is procedurally defaulted. See generally *Coleman v. Thompson*, 501 U.S. 722, 744-54 (1991). The only dispute in this appeal is whether Mr. Murray can show cause to excuse the procedural default. Mr. Murray can show cause because his trial attorney provided constitutionally ineffective assistance. The Constitution assigns certain critical decisions in a criminal case to a defendant personally, including whether to waive a jury trial, and an attorney may not make those decisions unilaterally on a client's behalf. Here, Mr. Murray's attorney provided deficient performance by agreeing to the waiver without first getting Mr. Murray's informed consent. But the Ninth Circuit rejected this position. In its view, a defense attorney may reasonably choose to waive a client's right to a jury trial—even without the client's informed consent—so long as the attorney has a legitimate strategic basis for approving the waiver. In contrast, at least four circuit courts of appeals and four state appellate courts of last resort would find deficient performance here.

The question presented is:

When a criminal defendant must make a personal decision whether to waive a fundamental constitutional right, does an attorney provide deficient performance by waiving the right without first receiving the defendant's informed consent?

## **LIST OF PARTIES**

Steven Nelson Murray is the petitioner. (Former) Warden Jerry Howell and the Attorney General of the State of Nevada are the respondents. No party is a corporate entity.

## LIST OF PRIOR PROCEEDINGS

This is a federal habeas case challenging a state court judgment of conviction. The underlying trial took place in *State v. Murray*, Case No. 08C246302 (Nev. Eighth Jud. Dist. Ct.) (judgment of conviction issued June 15, 2009). The direct appeal took place in *Murray v. Nevada*, Case No. 54115 (Nev. Sup. Ct.) (order of affirmance issued Feb. 3, 2011).

Initial state collateral review proceedings took place in *Murray v. Nevada*, Case No. 08C246302 (Nev. Eighth Jud. Dist. Ct.), and Case No. 59067 (Nev. Sup. Ct.) (order of affirmance issued Mar. 7, 2012).

Second state collateral review proceedings took place in *Murray v. Nevada*, Case No. 08C246302 (Nev. Eighth Jud. Dist. Ct.), and Case No. 68221 (Nev. Sup. Ct.) (order of affirmance issued Dec. 10, 2015).

Third state collateral review proceedings took place in *Murray v. Nevada*, Case No. 08C246302 (Nev. Eighth Jud. Dist. Ct.), and Case No. 80392 (Nev. Sup. Ct.) (order of affirmance issued Dec. 14, 2020).

There are no related federal proceedings besides the proceedings in the district court and the Ninth Circuit below.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Steven Nelson Murray respectfully requests the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## **OPINIONS BELOW**

The Ninth Circuit issued an unpublished memorandum decision reversing the district court's grant of Mr. Murray's petition for a writ of habeas corpus. Pet. App. 1-8. The federal district court's order is likewise unpublished. Pet. App. 13-56.

## **JURISDICTION**

Mr. Murray sought habeas relief under 28 U.S.C. §2254. Pet. App. 57-58. The Ninth Circuit reversed the district court's grant of habeas relief on May 24, 2022. Pet. App. 9-12. Following a timely rehearing petition, the Ninth Circuit issued an amended decision on July 8, 2022. Pet. App. 1-8. This Court has jurisdiction under 28 U.S.C. §1254.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment provides in part as follows: "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."

## INTRODUCTION

After a tragic and fatal car crash, the State charged Mr. Murray with three crimes, including DUI causing death and vehicular homicide. Those two crimes are similar, but vehicular homicide includes as an element that the defendant has three prior DUI convictions.

Before trial, the defense filed a motion to sever the vehicular homicide charge to avoid the jury learning about the prior convictions. Rather than litigate the severance motion, the parties ultimately agreed to waive Mr. Murray's right to a jury trial on the vehicular homicide charge. Instead, the jury would consider the DUI causing death charge, and if the jury convicted on that charge, the judge would consider Mr. Murray's prior convictions at sentencing and decide whether to adjudicate him guilty of vehicular homicide. Mr. Murray didn't provide informed consent to this waiver. The jury found him guilty of DUI causing death, and the court adjudicated him guilty of vehicular homicide. This arrangement was an invalid jury trial waiver under the Sixth Amendment, as the State now appears to agree.

While Mr. Murray procedurally defaulted this jury trial waiver claim in state court, he demonstrated cause and prejudice to excuse the default in federal court. Specifically, he established cause because his trial attorney provided ineffective assistance by authorizing the jury trial waiver without Mr. Murray's informed consent. The Ninth Circuit disagreed. In its view, the attorney had a reasonable strategic basis for waiving Mr. Murray's jury trial right, so the attorney didn't provide deficient performance.



This Court should grant certiorari. Although a defense attorney enjoys wide latitude to make reasonable strategic decisions on a client’s behalf, the Constitution assigns certain key decisions—including the decision whether to waive a jury trial—to the defendant personally. See *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018). As at least four circuit courts of appeals and four state appellate courts of last resort have recognized, if a defense attorney waives one of these rights unilaterally, without the client’s informed consent, the attorney provides deficient performance—even if the attorney has a legitimate strategic reason for waiving the right. In other words, the attorney has a professional obligation to discuss the issue with the client first and allow the client to make the final decision. See, e.g., *Vickers v. Superintendent*, 858 F.3d 841, 850 (3d Cir. 2017). The Ninth Circuit’s contrary rule creates a circuit split on this issue and fundamentally undermines core constitutional rights. This Court granted certiorari in *McCoy* to protect those rights, and it should grant certiorari again here.

#### STATEMENT OF THE CASE

1. The State prosecuted Mr. Murray for alleged DUI offenses after a tragic and fatal car crash. The crash occurred early in the morning, while Mr. Murray was driving to work as an electrician. Mr. Murray had a longstanding prescription for pain medication stemming from a back injury and had taken his lawfully prescribed medication the night before the crash. The State alleged the lawfully prescribed medication impaired Mr. Murray’s ability to drive safely.

The State charged Mr. Murray with three counts. Count One alleged DUI causing death. Count Three alleged vehicular homicide. The charges are similar, but vehicular homicide requires proof of three prior DUI convictions. Mr. Murray's prior DUI convictions were nine years old or greater and involved alcohol or cannabis, not pain medication.

Before trial, the defense filed a motion to sever the vehicular homicide charge from the remaining two counts. As the motion explained, the vehicular homicide charge required proof of prior DUI convictions, and evidence of Mr. Murray's prior convictions would unduly prejudice the jury.

The prosecution opposed severance. It asserted the vehicular homicide charge wasn't an independent offense but instead a "sentencing enhancement" to which the Sixth Amendment wouldn't apply. Thus, the prosecution claimed, the parties could litigate the DUI causing death charge at trial, and if the jury convicted on that charge, the court could consider at sentencing whether to apply the enhanced penalties under the vehicular homicide statute. The State has abandoned this position on appeal and now appears to agree the vehicular homicide charge was an independent offense.

Mr. Murray's attorney accepted the State's proposal. The parties prepared and signed a written stipulation. Mr. Murray didn't sign the stipulation personally.

At the start of trial, the court addressed the stipulation, saying it "didn't make much sense." The parties had a lengthy and complicated colloquy with the court about the stipulation. The court then turned to Mr. Murray and asked him whether he understood the colloquy and had discussed the issue with his attorney. Mr.

Murray said yes. The court asked whether he had any questions. Mr. Murray said no. At no point did the court inform Mr. Murray that the stipulation would waive his Sixth Amendment right to a jury trial on the vehicular homicide charge.

The parties proceeded to trial. The jury found Mr. Murray guilty of DUI causing death. At sentencing, the court adjudicated Mr. Murray guilty of vehicular homicide and imposed a total sentence of 10 years to life on that charge.

2. After an unsuccessful direct appeal, Mr. Murray pursued pro se state post-conviction litigation and raised claims challenging the stipulation. As he explained, he didn't understand the stipulation's effect at trial. He also argued his trial attorney provided ineffective assistance by authorizing the stipulation without his informed consent. The Nevada courts rejected this claim.

3. Mr. Murray pursued federal habeas relief. He asserted the stipulation was an invalid waiver of his right to a jury trial on the vehicular homicide charge. He recognized the jury trial waiver claim was procedurally defaulted but insisted he could show cause and prejudice to excuse the default. He made two "cause" arguments: (1) his trial attorney provided ineffective assistance by authorizing the stipulation without his informed consent, and (2) his appellate attorney provided ineffective assistance by not raising the jury trial waiver claim on direct appeal.

The federal district court conducted an evidentiary hearing in part to determine whether Mr. Murray demonstrated cause to excuse the default. Mr. Murray's trial attorney testified. He maintained he discussed the stipulation with Mr. Murray before trial but was unable to answer whether he told Mr. Murray the stipulation

would waive his Sixth Amendment right to a jury trial on the vehicular homicide charge. Mr. Murray testified. He maintained he never discussed the stipulation with the attorney at all and wasn't aware of it before or during trial. He explained that when the court addressed him about the stipulation right before trial, he was unaware what the court was talking about; he looked to his attorney for guidance, and the attorney indicated they'd discussed the relevant topic, so Mr. Murray responded accordingly.

The district court granted Mr. Murray relief on the jury trial waiver claim. It concluded as a factual matter "Murray was not advised, and did not understand, that the stipulation entered by his counsel waived his constitutional jury trial right as to the vehicular homicide charge." Pet. App. 30. It addressed the canvass Mr. Murray had with the court and concluded "Murray relied upon his counsel in offering his responses to the trial court's canvass regarding the stipulation but [] he clearly did not understand its significance." *Ibid.* This so-called canvass never even mentioned Mr. Murray's constitutional right to a jury trial on the vehicular homicide charge, so the "exchange cannot be fairly characterized as a 'canvass.'" Pet. App. 31.

The district court acknowledged the jury trial waiver claim was procedurally defaulted, but it concluded Mr. Murray demonstrated cause to excuse the default based on appellate counsel ineffectiveness. It therefore considered the jury trial waiver claim on the merits and granted relief. It refrained from considering whether Mr. Murray separately demonstrated cause based on trial counsel ineffectiveness.

4. The State appealed the habeas grant, and the Ninth Circuit reversed. It rejected the cause argument involving appellate counsel ineffectiveness because in its view Mr. Murray had failed to exhaust the appellate counsel ineffectiveness claim in his first state post-conviction proceedings. See *Edwards v. Carpenter*, 529 U.S. 446, 450-53 (2000). It also rejected Mr. Murray’s argument that he could demonstrate cause based on trial counsel ineffectiveness.

Mr. Murray sought panel and en banc rehearing. The panel issued an amended memorandum decision that altered its reasoning regarding the trial counsel ineffectiveness argument. According to the Ninth Circuit, “trial counsel’s decision to enter into the agreed stipulation did not fall below an objective standard of reasonableness.” Pet. App. 7. “The stipulation prevented the jury from learning about Petitioner’s prior DUI convictions, which would have been devastating to Petitioner at trial.” *Ibid.* “Petitioner was personally canvassed about the stipulation and stated that he understood it and had discussed it with his attorneys.” *Ibid.* “Although the stipulation had the effect of waiving Petitioner’s right to jury trial on one charge, under the circumstances, the waiver could be sound trial strategy.” *Ibid.* The court otherwise denied rehearing.

#### **REASONS FOR GRANTING THE PETITION**

The Constitution allows a defense attorney to make most strategic decisions in a criminal case, but it requires the defendant’s consent on a few critical issues. See *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018). This petition raises a question *McCoy* leaves open: if a defense attorney waives one of those fundamental rights

without discussing the constitutional ramifications with the client beforehand, has the attorney provided deficient performance? This question has divided lower courts. The Court should grant certiorari to resolve this important issue involving core constitutional rights in criminal cases.

**I. Courts have split over a defense attorney’s authority to make decisions that the Constitution assigns to the defendant.**

At least four circuit courts of appeals and four state appellate courts of last resort agree that when the Constitution requires a defendant to make a personal choice whether to waive a right, a defense attorney provides objectively unreasonable representation if the attorney waives the right without first securing the defendant’s informed consent. The Ninth Circuit’s decision in this case disagrees with this rule and therefore creates a circuit split.

As background, the Constitution assigns certain decisions in a criminal case to defendants personally. Although defense attorneys make many important strategic decisions on their own, “a defendant need not surrender control entirely to counsel.” *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018). “Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.” *Ibid.* (cleaned up). “Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.” *Ibid.*

Given this allocation of authority, courts have considered whether an attorney provides deficient performance within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), by waiving one of these critical rights (like the right to a jury trial) without the client’s informed consent. Aside from the Ninth Circuit, courts have uniformly agreed an attorney who acts in this manner provides deficient performance.

In *Vickers v. Superintendent*, 858 F.3d 841 (3d Cir. 2017), the Third Circuit considered a claim alleging defense counsel provided ineffective assistance regarding a jury trial waiver. The court agreed the “attorney’s failure to ensure that [the petitioner] properly waived his right to a jury trial was not within the range of competence demanded of attorneys in criminal cases.” *Id.* at 850 (cleaned up). Courts have adopted formal rules to ensure jury trial waivers are valid; in turn, “prevailing professional norms required and continue to require counsel in this circumstance to verify . . . that the client formally waived his jury trial right.” *Id.* at 851. “Because counsel failed to do so here, his conduct fell below an objective standard of reasonableness.” *Ibid.* (cleaned up). See also *Lewis v. Johnson*, 359 F.3d 646, 656 (3d Cir. 2004) (“Thus, though the accused has the ultimately authority to make certain fundamental decisions regarding the case, including whether to . . . waive a jury . . . counsel was constitutionally obligated to advise the defendant respecting those decisions to allow for intelligent exercise of the particular right.”) (cleaned up).

In *Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008), the Sixth Circuit considered a claim alleging defense counsel provided ineffective assistance regarding a jury trial waiver. The court agreed the petitioner’s “counsel had a professional duty to inform

him of the nature of his right to a jury trial and the consequences of waiving it so that he could make an intelligent and informed waiver decision.” *Id.* at 509. If the petitioner could prove “counsel failed to inform him of the fundamental nature of the choice confronting him,” the court suggested, the petitioner could establish deficient performance. *Id.* at 510.

In *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998), the Eighth Circuit considered a claim alleging defense counsel provided ineffective assistance by failing to advise the petitioner he had a right to a jury trial on a DUI charge and by allowing the petitioner to proceed to a bench trial. The court agreed the attorney’s “failure to discover that [the petitioner] . . . [had] a right to a trial by jury, and the resultant failure to inform [him] of that right at the time of trial . . . constituted ineffective performance.” *Id.* at 473. See also *Miller v. Dormire*, 310 F.3d 600, 603-04 (8th Cir. 2002).

In *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992), the Eleventh Circuit considered a claim alleging defense counsel provided ineffective assistance by failing to call the defendant as a witness even though the defendant wanted to testify. As the court explained, “defendants possess essentially two categories of constitutional rights: those which are waivable by defense counsel on the defendant’s behalf, and those which are considered ‘fundamental’ and personal to the defendant, waivable only by the defendant.” *Id.* at 1531. “Examples of fundamental decisions which only the defendant is empowered to waive are entry of a guilty plea, waiver of a jury trial, and whether to pursue an appeal.” *Ibid.* (cleaned up). The court concluded the



right to testify is a fundamental right. *Id.* at 1531-34. Meanwhile, defense attorneys have a professional obligation to ensure their clients make informed decisions about fundamental rights. *Id.* at 1534. “[I]f defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant’s right to testify is protected and that any waiver of that right is knowing and voluntary.” *Ibid.* Such an error would amount to deficient performance. *Ibid.*

In *State v. Keller*, 760 N.W.2d 451 (Iowa 2009), the Iowa Supreme Court agreed the defendant’s attorney “failed to perform an essential duty when he did not challenge her defective waiver of a jury trial.” *Id.* at 452.

In *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011), the Nebraska Supreme Court explained “[t]he decision to waive a jury trial is ultimately and solely the defendant’s, and, therefore, the defendant must bear the responsibility for that decision.” 281 Neb. at 370, 796 N.W.2d at 208. “Counsel’s advice to waive a jury trial can be the source of a valid claim of ineffective assistance . . . [if] counsel interferes with his or her client’s freedom to decide to waive a jury trial.” *Ibid.* The Pennsylvania Supreme Court has stated the law in a materially identical fashion. See *Commonwealth v. Mallory*, 596 Pa. 172, 196, 941 A.2d 686, 701 (2008). Hawai’i law is in accord. See *Domingo v. State*, 76 Hawai’i 237, 241, 873 P.2d 775, 779 (1994) (“[T]he right to a trial by jury is a personal right that cannot be waived by anyone other than the defendant, and [a petitioner] could claim that his attorney rendered ineffective assistance by usurping [the petitioner’s] opportunity to demand a jury trial.”). See

also *Jones v. State*, 79 Hawai'i 330, 335 n. 5, 902 P.2d 965, 970 n. 5 (1995) (citing *Domingo* for this proposition).

As all these courts recognize, defense attorneys have a professional duty to consult with clients about certain fundamental decisions in a criminal case, including whether to waive a jury trial. If a defense attorney neglects to consult with a client about one of these decisions and waives the right anyway without the client's informed consent, the error may amount to deficient performance—even if the attorney has a reasonable strategic basis for waiving the right.

By contrast, the Ninth Circuit refrained from finding deficient performance in the analogous circumstances at issue in this case. As the district court's factual findings illustrate, Mr. Murray's attorney waived Mr. Murray's right to a jury trial on the vehicular homicide charge without first securing Mr. Murray's informed consent. But according to the Ninth Circuit, "trial counsel's decision to enter into the agreed stipulation did not fall below an objective standard of reasonableness." Pet. App. 7. "The stipulation prevented the jury from learning about Petitioner's prior DUI convictions, which would have been devastating to Petitioner at trial." *Ibid.* "Although the stipulation had the effect of waiving Petitioner's right to jury trial on one charge, under the circumstances, the waiver could be sound trial strategy." *Ibid.*

In other words, the Ninth Circuit concluded the defense attorney had a legitimate strategic basis for waiving Mr. Murray's jury trial right, so the attorney's choice wasn't objectively unreasonable. But as other courts have recognized, even if an attorney has a legitimate strategic reason for *recommending* a waiver, the attorney

nonetheless has a duty to consult with the client about the decision and secure the client's informed consent before formally waiving the right. The Ninth Circuit rejected this straightforward rule regarding deficient performance, and the ensuing split in authority calls out for the Court's review.

## **II. The issue is recurring and significant.**

This Court recently granted certiorari in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), a case involving a defendant's right to personally make critical decisions in a criminal case. The Court appropriately granted certiorari in *McCoy*, and it should grant certiorari here as well to further protect these rights.

In *McCoy*, the petitioner sought certiorari on the following question: "Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection?" Petition for Writ of Certiorari, *McCoy v. Louisiana*, 138 S.Ct. 1500, 2017 WL 4310769, at \*i (No. 16-8255). The petition argued that "the right to make a defense is personal to the accused." *Id.* at \*22. The Court had previously "rejected the idea that the personal character of the right to make a defense could be stripped away by transforming the counsel intended to be an assistant into the master." *Id.* The petition traced the history of the Sixth Amendment and explained how attorneys serve as agents for their clients. *Id.* at \*22-23. While an attorney has "implied authority to manage the conduct of the trial without needing to obtain the defendant's consent prior to each tactical decision," the attorney must still "act within the lawful instructions of the client-principal." *Id.* at \*23-24. Because the question presented implicated this critical allocation of decision-making power, and because "[t]he

constitutional rights at issue here are of fundamental importance,” the petition asserted it raised an issue worthy of certiorari. *Id.* at \*21 (cleaned up). The Court’s decision to grant the petition in *McCoy* indicates that these issues are significant and recurring enough to warrant its review.

The same considerations are present here. The right to a trial by jury is a “fundamental” constitutional protection. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). If a defense attorney may permissibly waive a jury trial without the client’s informed consent, this fundamental and personal Sixth Amendment right becomes illusory. As the petition for certiorari in *McCoy* successfully argued, the Court should grant certiorari in cases implicating this category of fundamental criminal defense rights, and the instant case is therefore worthy of this Court’s review.

This case raises the issue in the context of an ineffective assistance of counsel claim, which adds to the significance of the question presented. If a defense attorney invalidly waives a defendant’s jury trial right, the defendant may in theory raise the jury trial waiver claim on direct appeal. But in many circumstances, the defendant’s direct appeal attorney will be the same attorney who handled the trial proceedings, and the attorney is unlikely to argue on appeal he or she was personally responsible for an invalid waiver below. Cf. *Massaro v. United States*, 538 U.S. 500, 502-03 (2003) (“[A]n attorney who handles both trial and appeal is unlikely to raise an ineffective-assistance claim against himself.”). Other times—as in this case—the direct appeal attorney will work in the same office as the trial attorney, and the appellate attorney may be reluctant to argue a colleague made a significant legal error. Cf. *id.* at 506

(“On direct appeal . . . counsel [would be in] an awkward position vis-à-vis trial counsel.”). Moreover, “[a]ppellate counsel often need trial counsel’s assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel’s own incompetence.” *Ibid.*

For these reasons, direct appeals are an insufficient safeguard for fundamental rights like the jury trial guarantee, and ineffectiveness allegations are often a necessary vehicle for litigating invalid waivers. But the Ninth Circuit’s rule forecloses this vehicle in the mine run of cases where the attorney had a purportedly strategic reason for authorizing the waiver. The Court should grant certiorari in this case to ensure criminal defendants can continue challenging invalid waivers when they occur at the trial attorney’s behest.

### **III. The decision below is incorrect.**

A defendant has the personal right to waive or invoke certain fundamental constitutional protections. If a defense attorney waives one of these rights for a purportedly strategic reason, but without first getting the client’s informed consent, then the attorney provides deficient performance, as many courts have recognized.

This Court’s decision in *McCoy* guides the way. As described above, “Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.” 138 S.Ct. at 1508 (cleaned up). “Some decisions, however, are reserved for the client—notably,

whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Ibid.* As *McCoy* ultimately concluded, these fundamental rights include the decision whether to concede guilt on a lesser-included offense, and an attorney cannot make that type of concession over the defendant's veto.

Because the defendant holds the authority to make these decisions, an attorney necessarily provides deficient performance if the attorney waives one of those rights without consulting with the client about the decision—a decision the client must make personally. This rule reflects a common sense understanding of how the Constitution allocates authority between attorneys and clients. If, as *McCoy* explains, a defendant has final say over whether to waive a jury trial, then an attorney cannot reasonably decide to waive that right without first consulting with the client; otherwise, there would be no purpose to the Constitution assigning that decision to the client in the first place.

The Eleventh Circuit's decision in *Teague* makes this point well. As the court explained, the defendant has the authority to waive or enforce the defendant's personal fundamental rights; "[t]he wisdom or unwisdom of the defendant's choice does not diminish his right to make it." 953 F.2d at 1533 (cleaned up). "By exercising his constitutional right to the *assistance* of counsel, a defendant does not relinquish his right to set the parameters of that representation. Any other conclusion would be to imprison a man in his privileges and call it the Constitution." *Ibid.* (cleaned up). Likewise, the American Bar Association's standards of practice and model rules of professional conduct—important reference points for evaluating deficient

performance—instruct defense attorneys to consult with their clients about fundamental decisions like “whether to waive jury trial.” *Ibid.* If a defense attorney violates a client’s right to make a personal choice, “the appropriate vehicle . . . is a claim of ineffective assistance of counsel.” *Ibid.* This persuasive analysis is a correct statement of the law governing deficient performance.

The Ninth Circuit’s contrary decision is unconvincing. According to the Ninth Circuit, “trial counsel’s decision to enter into the agreed stipulation did not fall below an objective standard of reasonableness.” Pet. App. 7. “The stipulation prevented the jury from learning about Petitioner’s prior DUI convictions, which would have been devastating to Petitioner at trial.” *Ibid.* “Although the stipulation had the effect of waiving Petitioner’s right to jury trial on one charge, under the circumstances, the waiver could be sound trial strategy.” *Ibid.* Put another way, the Ninth Circuit concluded the attorney had a reasonable strategic basis for waiving the jury trial right, so the waiver decision wasn’t deficient performance. The premise of that conclusion is correct, but the conclusion itself is wrong. It’s undisputed Mr. Murray’s attorney had a valid tactical reason for wanting Mr. Murray to waive his jury trial right. Nonetheless, the attorney had no license to unilaterally waive the right without Mr. Murray’s informed consent. The Ninth Circuit had no answer to this point, so its analysis fails to grapple with the critical question in this case.

In its decision, the Ninth Circuit stated that “Petitioner was personally canvassed about the stipulation and stated that he understood it and had discussed it with his attorneys.” Pet. App. 7. But the district court conducted a first-hand

evidentiary hearing and made express factual findings on this topic. “Murray was not advised, and did not understand, that the stipulation entered by his counsel waived his constitutional jury trial right as to the vehicular homicide charge.” *Id.* at 30. As for the canvass, “Murray relied upon his counsel in offering his responses to the trial court’s canvass regarding the stipulation but [] he clearly did not understand its significance.” *Ibid.* The canvass never mentioned Mr. Murray’s constitutional right to a jury trial on the vehicular homicide charge, so the “exchange cannot be fairly characterized as a ‘canvass.’” *Id.* at 31. In other words, even if Mr. Murray told the court he understood the stipulation, in truth he didn’t, because no one—neither his lawyer nor the court itself—told him it would waive his jury trial right. Meanwhile, the State has refrained from arguing in this appeal that the jury trial waiver was valid; presumably the State therefore agrees the canvass was constitutionally lacking. At bottom, even assuming for the sake of argument the canvass demonstrates the attorney and Mr. Murray discussed the stipulation as a *general* matter, the canvass provides no assurance the attorney *specifically* told Mr. Murray the stipulation had constitutional implications. That omission would still constitute deficient performance because the attorney was obligated to tell Mr. Murray he was waiving a core constitutional right.

In sum, a defendant’s Sixth Amendment right to effective assistance of counsel includes the right to consult with the attorney about fundamental decisions the defendant must personally make. The Ninth Circuit erred when it reached a contrary decision.



#### **IV. This case is an exceptional vehicle.**

This petition presents an excellent opportunity for the Court to reach this deficient performance issue.

First, Mr. Murray raised his ineffective assistance allegations as a cause argument to excuse a procedural default. See *Coleman v. Thompson*, 501 U.S. 722, 744-54 (1991). Thus, the deferential standard of review in §2254(d) is inapplicable: for the purpose of this appeal, Mr. Murray pursued his trial counsel ineffectiveness allegations as a procedural default argument, a context in which §2254(d) is irrelevant. See *Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2016). The Court may therefore review the question presented de novo.

Second, there's no dispute Mr. Murray exhausted his trial counsel ineffectiveness allegations in state court. Thus, Mr. Murray was free to present these allegations as an avenue for overcoming a procedural default in federal court. See *Edwards v. Carpenter*, 529 U.S. 446, 450-53 (2000). Meanwhile, there are no other procedural defenses at issue in this appeal and no procedural problems that would preclude this Court from considering the question presented.

Third, Mr. Murray fully litigated this trial counsel ineffectiveness argument in both the district court and the Ninth Circuit below, so he properly preserved the issue for this Court's review.

Fourth, in addition to demonstrating deficient performance, Mr. Murray also established prejudice, the other prong of *Strickland's* ineffective assistance analysis. Because the attorney's error undermined Mr. Murray's fundamental structural right

to a jury trial, prejudice is presumed. See *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1911 (2017) (assuming that if an attorney’s deficient performance caused a structural error, a presumption of prejudice applies when the error “rendered the trial fundamentally unfair”); *Duncan*, 391 U.S. at 149 (calling the jury trial right “fundamental”); *McGurk*, 163 F.3d at 474 (“[C]ounsel’s failure to inform McGurk of his right to a jury trial[] justifies a presumption of prejudice.”). In the alternative, Mr. Murray demonstrated “a reasonable probability that but for his counsel’s failure to ensure a proper waiver of his Sixth Amendment right to be tried before a jury, he would have exercised that right.” *Vickers*, 858 F.3d at 857; cf. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (applying a similar prejudice standard in the context of guilty pleas). The district court expressly concluded Mr. Murray “would not have entered the stipulation if he knew that it meant waiving his jury trial right.” Pet. App. 33. Under either legal framework, Mr. Murray can demonstrate prejudice. Were there any doubt, the Ninth Circuit could address the issue in the first instance on remand.

Fifth, this procedural default issue is outcome-determinative. Had the Ninth Circuit found trial counsel ineffectiveness, it would’ve found cause to excuse the procedural default of the jury trial waiver claim, and it would’ve reached the merits of that claim. The State neglected to challenge the merits of the jury trial waiver claim on appeal. Thus, had the Ninth Circuit reached the merits, it would’ve affirmed the district court’s grant of habeas relief on the jury trial waiver claim.

For all these reasons, this petition presents a clean vehicle for deciding the deficient performance question, and this Court should take the opportunity.

## CONCLUSION

The Court should issue a writ of certiorari.

Dated October 6, 2022.

Respectfully submitted,

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