No. 22-

In the Supreme Court of the United States

RAUL ALVAREZ,
PETITIONER
v.
PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Must a client object in open court to invoke their Sixth Amendment right to maintain actual innocence as the objective of their defense?

LIST OF PARTIES & PROCEEDINGS

Raul Alvarez, petitioner on review, was the movant-appellant below.

The State of New York, respondent on review, was the respondent-appellee below.

No party is a corporation.

The proceedings that are directly related to the case are as follows:

- *People* v. *Alvarez*, 38 N.Y.3d 1131 (N.Y. 2022)
- *People* v. *Alvarez*, 166 N.Y.S.3d 852 (N.Y. App. Div. 2022)
- *People* v. *Alvarez*, No. 2018-1139 (N.Y. Sup. Ct. March 24, 2017)

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PETITION FOR WRIT OF CERTIORARI

Raul Alvarez seeks a writ of certiorari to review the judgment and opinion of the New York Supreme Court, Appellate Division (First Department).

OPINIONS BELOW

The decision of the New York Court of Appeals denying a certificate for leave to appeal issued on July 21, 2022 and is reported at 38 N.Y.3d 1131. The New York Supreme Court, Appellate Division's opinion is reported at 166 N.Y.S.3d 852. The Supreme Court's opinion is unreported.

JURISDICTION

The New York Court of Appeals denied leave to appeal on July 21, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> 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 the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

"[I]t is the [individual's] prerogative, not counsel's, to decide on the objective of his defense." *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1505 (2018). And when "[p]resented with express statements of the client's will to maintain innocence," "counsel may not steer the ship the other way." *Id.* at 1509.

In proceedings over the alleged assault of Evelyn Rivera, Raul Alvarez presented many such express statements. He said to the grand jury, point blank, that he "never assaulted Ms. Rivera." Pet. App. 224a. He testified at trial that he "did not assault Ms. Rivera" and "never hit Ms. Rivera." *Id.* at 172a. And at sentencing he maintained he "never assaulted Ms. Evelyn Rivera" and "never threatened her." *Id.* at 104a. All told, Mr. Alvarez asserted his innocence more than thirty times. Not once did he admit guilt.

Despite all that, counsel for Mr. Alvarez "steer[ed] the ship the other way" anyway. *McCoy*, 138 S. Ct. at 1509. Never informing Mr. Alvarez of his plan, counsel "conced[ed]" in closings "that [the State] did prove assault in the third degree beyond a reasonable doubt," and "ask[ed]" the jury "to return a . . . guilty verdict of assault in the third degree." Pet. App. 121a–22a.

Had Mr. Alvarez been tried in California, Texas, or Wisconsin, he would have been entitled to (or secured) relief—it would be hard to find a clearer example of counsel "disregard[ing]" an "objective" to "maintain . . . innocence" by *literally* "conceding guilt" before the jury. *People* v. *Eddy*, 244 Cal. Rptr. 3d 872, 879 (Ct. App. 2019). Had he, indeed, been tried just a mile away, in federal court, Mr. Alvarez would likely have been able to show a constitutional violation. *United States* v. *Abboud*, 2022

WL 3595055, at *3 (E.D.N.Y. Aug. 23, 2022). But the New York Appellate Division rejected Mr. Alvarez's *McCoy* claim because he never "made an express objection," in open court before the jury at the time of "concession." Pet. App. 3a (internal quotation marks omitted).

In so doing, New York joined several other jurisdictions which have—*contra* California, Texas, and *McCoy* itself—applied an "express objection" requirement. *See, e.g.*, *Harvey* v. *State*, 318 So. 3d 1238, 1239 (Fla. 2021); *Epperson* v. *Commonwealth*, 645 S.W.3d 405, 410 (Ky. 2021). But it also went further, becoming the first to reject a *McCoy* claim, on no-record-objection grounds, despite a client's direct testimony at trial and before trial maintaining innocence on all charges. It became, too, the first to require a client to object contemporaneously—even though, when defendant tried to do the very same thing in *McCoy*, he was "told" by the court that it "would not permit any other [such] outbursts." 138 S. Ct. at 1507 (internal quotation marks omitted). The New York Appellate Division's holding, in short, does more than deepen a split in authority. Instead of "protect[ing]" Mr. Alvarez's "autonomy right" to "decide . . . the objective of [his] defense," it flouts it. *Id.* at 1508, 1511.

STATEMENT OF THE CASE

A. Factual background

On January 4, 2016, a grand jury returned an indictment charging Raul Alvarez with assault of Evelyn Rivera, his intimate partner. The indictment charged second-degree assault (striking with a hard object, causing physical injury) and contempt for violating two protective orders barring him from contacting Ms. Rivera. The State's theory was that, inside Mr. Alvarez's motorhome, Mr. Alvarez and Ms. Rivera had argued, and Mr. Alvarez struck her with a bottle, chipping her tooth and causing injury.

From the outset, and during at least eight separate occasions in proceedings, Mr. Alvarez "repeatedly and adamantly insisted on maintaining his factual innocence." *McCoy*, 138 S. Ct. at 1510.

First, he told the arresting officer he did not assault Ms. Rivera. Pet. App. 220–21a.

Second, he gave a videotaped statement to the District Attorney stating the same. *Id.*

Third, despite being advised of the risks of doing so, Mr. Alvarez insisted on testifying before the grand jury. *Id.* at 21a. There, his statements of innocence were unequivocal. In his first moments on the stand, he recounted the facts of the incident, and stated he "never assaulted Ms. Rivera." *Id.* at 224a. His story did not change following continued examination. *Id.* at 243a ("I didn't touch Ms. Rivera, people of the jury. I did not touch Ms. Rivera . . . I want to let you know these are false allegations. I never touched Ms. Rivera."). And when asked about injuries Ms. Rivera purportedly sustained, Mr. Alvarez stated

he didn't "have any idea how [Ms. Rivera] got those injuries, if she has injuries. I doubt [she has any] because I didn't touch her." *Id.* at 249a–50a.

Fourth, Mr. Alvarez insisted, "repeatedly and adamantly" "in conference with his lawyer" that he was innocent. *McCoy*, 138 S. Ct. at 1509–10.

Mr. Alvarez was so adamant regarding his innocence that he fired his first attorney, Timothy Pruitt, when Mr. Pruitt suggested a plea deal. Pet. App. 17a–38a. Mr. Pruitt was concerned because Mr. Alvarez's criminal history created "massive" exposure for him—a possible life sentence—and thus negotiated a "nonviolent" plea. *Id.* at 16a–17a. But Mr. Alvarez would have none of it.

Fifth, in October 2016, Mr. Alvarez requested and was assigned new counsel, Theodore Herlich. At their first meeting, Mr. Alvarez made clear that he "never assaulted Ms. Rivera." *Id.* at 28a–29a. He "told Mr. Herlich the same thing I told the officer, the same thing I told the grand jury, the same thing I told Mr. Pruitt, same thing I told the judge, everybody else": that he was innocent. *Id* at 29a.

Although Mr. Herlich informed Mr. Alvarez he was "looking at a life sentence," "after one or more conversations it was crystal clear" to Mr. Herlich that "Mr. Alvarez wanted to go to trial." *Id.* at 54a.

Even so, the State offered a plea to attempted assault, for a "one and a half to three" year prison term. *Id.* Mr. Alvarez, consistent with his earlier positions, "rejected" the offer and "wanted to go to trial." *Id.* He was "not interested in" a "plea bargain[]" because he "was innocent" and "was not even willing to take time served." *Id.* at 40a, 48a.

Sixth, Mr. Alvarez took the stand in his own defense at trial. He did not waver. Right away, he stated that he "never assaulted Evelyn Rivera." *Id.* at 160a. According to Mr. Alvarez, Ms. Rivera "walked into [his] truck without permission," while Mr. Alvarez was "under the truck" and "could not see her." *Id.* at 171a. Once Mr. Alvarez saw her, the two started arguing. 172a–73a.

Their argument escalated. Ms. Rivera "grabbed me by my neck, to snap my chain." *Id.* at 172a. "I was holding her hands . . . . And then she tried to bite me . . . . That's possibl[y] how she chipped her tooth." *Id.* Over repeated questioning, Mr. Alvarez's story stayed the same: he "never hit Ms. Rivera," "did not punch Ms. Rivera," "did not kick Ms. Rivera," "did not bite Ms. Rivera," and "did not assault Ms. Rivera." *Id.*

After presenting his case in chief, Mr. Herlich asked during a charge conference that an instruction on the "lesser included offense of Assault in the Third Degree" be added. *Id.* at 123a. The State objected, insisting that "when the defendant testified, he testified he did not touch her at all; that he never assaulted her; he never hit her; he never punched her. He denied hitting her, entirely." *Id.* The trial court overruled the State's objection and agreed to charge the lesser offense.

Seventh, at sentencing, Mr. Alvarez continued to maintain his innocence. When invited to address the court, he again insisted that he "never assaulted Ms. Evelyn Rivera," "never threatened her," and "would not hit her." *Id.* at 104a. He refused to acknowledge guilt, even though doing so might have mitigated his sentence. To the contrary, he elaborated: "I am not guilty. I should never have been found guilty of assault. . . . There was no violence." *Id.* at 105a.

Eighth, at a post-sentencing hearing, Mr. Alvarez again testified to his innocence: "I was innocent, and I wanted to prove I was innocent. I never assaulted Ms. Rivera." *Id.* at 48a.

From start to finish, Mr. Alvarez repeatedly asserted his innocence on the record. He made his objective clear when invited by the court or on the stand. He was adamant about his innocence, and spoke when given the opportunity. Not once, in nearly one thousand transcript pages, did he even entertain—much less acknowledge—that he assaulted Ms. Rivera.

But in closing arguments, his lawyer took a different path. He said in his "humble opinion" that his client had not told the truth. Pet. App. 113a. To the contrary, "in light of all of th[e] evidence," he "concede[d] that they did prove assault in the third degree beyond a reasonable doubt." *Id.* at 121a. And to bring the point home, Mr. Herlich's last words to the jury were: "I'm asking you to return a not guilty verdict on assault in the second degree and return a guilty verdict of assault in the third degree." *Id.* at 122a.[1]

Mr. Alvarez "couldn't believe" the words coming out of Mr. Herlich's mouth. *Id.* at 32a. He "put [his] head down," stunned that his "own lawyer" had conceded guilt without "even giv[ing] the jury a chance to deliberate." *Id.*; *see id.* ("I'm like, 'Wow, my own lawyer . . . [w]hy is he doing this to me.").

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[1] A finding of guilt on either assault charge would have also compelled a finding of guilt on the contempt charges. Pet. App. 80a.

B. Proceedings below

The jury, consistent with Mr. Herlich's request, returned a guilty verdict on all charges other than second-degree assault. Mr. Alvarez was sentenced to a prison term of between three-and-one-half to seven years—more than double the rejected plea bargain.

Mr. Alvarez thereafter moved to vacate the judgment under *McCoy* v. *Louisiana*, asserting that "what [Mr. Herlich] said in summation"—to "find him guilty of . . . third degree assault"—"was not the strategy that was discussed" and not the objective of Mr. Alvarez's defense. Pet. App. 88a–89a. To the contrary, because Mr. Alvarez had expressed to counsel his objective to maintain innocence, counsel erred by overriding that objective. The court ordered a hearing on the claim.

At the hearing, Mr. Alvarez, as noted above, reiterated that he had informed his attorney he was completely innocent and wanted to assert innocence as a defense to all charges. More tellingly, Mr. Herlich testified that he "understood that the crux of" his summation—conceding third degree assault, contesting second-degree assault—"was contrary to his [client's] adamant position that he had never assaulted her." *Id.* at 64a. He moreover never explicitly told Mr. Alvarez he would concede guilt. Instead, Mr. Herlich maintained that he was merely "arguing . . . in the alternative." *Id.* at 67a.

That is not what happened. Mr. Herlich did not "concede guilt as an alternative." *Id.* at 80a. He "purely conceded guilt." *Id.* Consider what Mr. Herlich *said* he said: "[E]ven *if* the jury accepts the People's evidence there's a viable argument that Mr. Alvarez committed assault third degree as an *alternative* way of viewing the evidence." *Id.* at 65a (emphasis added). Here is what he *actually* said:

"I submit to you that in light of all of th[e] evidence, . . . I *concede* that they did prove assault in the third degree beyond a reasonable doubt." *Id.* at 121a (emphasis added).

And in case there was any confusion, his final words to jurors were to "ask[] you to return a not guilty verdict on assault in the second degree and return a guilty verdict of assault in the third degree"—no ifs, ands, or buts. *Id.* at 122a. The word "alternative," or any variation, appears nowhere in Mr. Herlich's thirty-six-page summation.

This was plainly "not the strategy" Mr. Alvarez and Mr. Herlich had "discussed." *Id.* at 89a; *id.* at 45a–46a ("[Mr. Herlich] didn't give [the jury] a chance to deliberate. He just said I was guilty."). Had Mr. Alvarez known beforehand that Mr. Herlich had planned to concede guilt to an assault charge, Mr. Alvarez "would've asked [Mr. Herlich] to excuse himself. I would have told him no." *Id.* at 34a. As he put it: "Why would I go to trial and risk going to life [in prison] if that was the case? I would just take a plea bargain"—which would have resulted in a considerably more lenient sentence. *Id.* In fact, when previously presented with that very opportunity by his former counsel, Mr. Alvarez not only rejected the plea. He discharged counsel. *See also id.* ("Why would I go to trial? It doesn't make sense.").

The trial court found no Sixth Amendment violation, holding that it was "logical to conclude that Mr. Alvarez, even while proclaiming and maintaining his innocence, would not protest a tactical decision to concede guilt on a lesser charge to avoid the distinct possibility of a mandatory life sentence if convicted of the higher charge." *Id.* at 8a.

The Appellate Division affirmed. It held that Mr. Alvarez "did not establish a violation of *McCoy* v. *Louisiana*, because he . . . has not established that he ever made an 'express objection' to any concession of partial guilt." *Id.* at 3a. Citing *Florida* v. *Nixon*, 543 U.S. 175 (2004), the Appellate Division further averred that "counsel was not obligated to obtain defendant's express consent" to such a concession. Pet. App. 3a. The New York Court of Appeals denied leave to appeal. *People v. Alvarez*, 193 N.E. 3d 517 (N.Y. 2022). *Id.* at 1a

REASONS FOR GRANTING THE PETITION

It is a "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017). Like the decision of "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal," *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), the Court has long held that "the right to defend is personal," *Faretta* v. *California*, 422 U.S. 806, 834 (1975), belonging to the defendant. "[A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* (internal quotation marks omitted). Such decisions are so core to our system that when the right is invaded, its holder need not show prejudice. *Garza* v. *Idaho*, 139 S. Ct. 738, 743–44 (2019).

Florida v. *Nixon* recognized a narrow exception to this general rule. As *Nixon* notes, counsel "undoubtedly has a duty to discuss potential strategies with the defendant." 543 U.S. at 178. "But when a defendant . . . neither consents nor objects to the course counsel describes as the most promising . . . , counsel is not automatically barred from pursuing that course." *Id.*

McCoy v. *Louisiana* subsequently clarified that the "[a]utonomy to decide that the objective of the defense is to assert innocence" is "reserved for the client," and not counsel. 138 S. Ct. at 1508. *McCoy* distinguished *Nixon*, observing that defendant there "never asserted any such objective." *Id.* at 1509. He was instead "generally unresponsive during discussion of trial strategy." *Id.* (internal quotation marks omitted) (citing *Nixon*, 543 U.S. at 181). *McCoy*, "in contrast, opposed [the] assertion of his guilt at

every opportunity, before and during trial, both in conference with his lawyer and in open court." 138 S. Ct. at 1509 Accordingly, "[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense"—*Nixon*. *Id.* But if "[p]resented with express statements of the client's will," counsel must follow the client's lead—*McCoy*. *Id.*

I. COURTS ARE SPLIT ON WHAT *MCCOY* REQUIRES.

At the time it was decided, the dissent in *McCoy* described *McCoy* as a "rare" case, "in which a rational defendant prefers even a minuscule chance of acquittal over . . . an admission of guilt." *Id.* at 1515 n.2 (Alito, J., dissenting). But four years on, dozens of courts have confronted this exact scenario. And confusion abounds over how and when *McCoy* applies.

Although the opinion makes clear that a lawyer cannot override a defendant's "express statement" to maintain innocence, what constitutes an "express statement"? *Id.* at 1509. Must it be made in open court? Is it sufficient if a client tells his lawyer during private attorney-client discussions that he wants to maintain his innocence, and these communications are corroborated by in-court testimony?

These questions have divided courts post-*McCoy*. While in California, private discussions with counsel are enough to show a constitutional violation, in New York, thirty statements on the record in court are not. And in other jurisdictions—Ohio, Michigan, and Georgia—the parameters are unclear, requiring guidance.

A. Some courts find a *McCoy* violation when a client expresses to counsel an objective to maintain innocence.

Several jurisdictions do not require a client to object on the record in court, explicitly and contemporaneously, to maintain innocence. Instead, these jurisdictions consider whether the client expressed *to counsel* their intent to maintain innocence, including in private conversations with counsel.

In California, for example, courts look to see if "(1) th[e] defendant's plain objective [was] to maintain his innocence and pursue an acquittal, and (2) [if] trial counsel disregard[ed] that objective and over[ode] his client by conceding guilt." *Eddy*, 244 Cal. Rptr. at 879; *see also People* v. *Bloom*, 508 P.3d 737, 760 (Cal. 2022).

Eddy is instructive. There, the client sought to pursue a strategy of "factual innocence" to murder charges. 244 Cal. Rptr. 3d at 875. At openings, counsel followed that course, claiming that another assailant had committed the crime. But one day later—much like Mr. Herlich—counsel "conceded in his closing argument that defendant" had "committed the" lesser-included "crime of voluntary manslaughter." *Id.* (internal quotation marks and alteration omitted). At a post-conviction hearing, defendant—much like Mr. Alvarez—insisted that "[f]rom the get-go, I was arguing" innocence. *Id.* at 876. Still, at certain points, defendant appeared to be "waffling a little bit" on strategy, which counsel took as "acquies[cence]" to act. *Id.* at 878.

Of note, in prosecuting his *McCoy* claim, defendant in *Eddy* relied only on his out-of-court conferences with counsel. He did not testify at trial, and—critically—"did

not object during closing argument after his counsel conceded his guilt." *Id.* at 879. The court also acknowledged that defendant might even have at points "temporarily acquiesced" to counsel's strategy. *Id.* at 878. Still, in light of the client's internal discussions with counsel and statements from the post-trial hearing, the evidence "made clear that [the defendant] had instructed his counsel not to concede manslaughter and that counsel had overridden this directive." *Id.* at 879.

Eddy's test—determining a client's plain objective, based on a holistic review, and examining whether counsel overrode that objective—tracks the standard in Oregon. In *Thompson* v. *Cain*, 433 P.3d 772, 773 (Or. Ct. App. 2018), for instance, the Oregon Court of Appeals remanded when a "defendant neither affirmatively acquiesce[d] nor reject[ed] the proposed strategy, but, rather, simply maintain[ed] his innocence." As the court explained, "the proper inquiry is on the fundamental objective of the defendant, *as expressed to defense counsel.*" *Id.* at 777 (emphasis added). Counsel thus violates the Sixth Amendment when conceding guilt despite the client's "expressed fundamental objective" to maintain innocence or the client's "clear opposition to admission of guilt." *Id.*

Texas, too, charts a similar course. In *Turner* v. *State*, a capital case, counsel conceded that defendant killed the victims in both opening and closing statements, further stating that defendant could not "admit what he did, to himself or anybody else." 570 S.W.3d 250, 276 (Tex. Crim. App. 2018). This concession contradicted the defendant's own testimony—that he "didn't kill two women"—and statements he made before, during, and after trial consistently maintaining his innocence. *Id.* at 272.

The court held that counsel's concession, which overrode the client's fundamental objective to maintain innocence, violated *McCoy*. *Id.* at 276. In so doing, it rejected the argument that defendant had "failed to object either before or during defense counsel's opening statement." *Id.* Though "a defendant cannot simply remain silent before and during a trial," nor should a defendant "be expected to object with the precision of an attorney." *Id.* Instead, "[a] defendant makes a *McCoy* complaint with sufficient clarity when he presents express statements of his will to maintain innocence." *Id.* (internal quotation marks and alteration omitted). Defendant's own testimony, among other things, "explicitly" checks that box. *Id.*

Federal courts in New York—unlike its state courts—appear to also embrace a broader reading of *McCoy*. *United States* v. *Abboud*, 2022 WL 3595055, at *3 (E.D.N.Y. Aug. 23, 2022), held that a client need only "show that she expressly asserted her decision not to concede guilt" to counsel and that counsel disregarded her intent during trial. Although there was in the end no *McCoy* violation in *Abboud* because a post-trial hearing revealed that defendant agreed with her counsel's choice to concede guilt, *id.* at *4, the decision nonetheless makes no mention of an express objection requirement. Other courts are in accord. *See, e.g.*, *State* v. *Chambers*, 955 N.W.2d 144, 149 n.6 (Wis. 2021) ("We read *McCoy* as not necessarily requiring a defendant to contemporaneously object on the record in order to preserve that claim.").

Finally, the Fourth and Eighth Circuits encourage appellants who cannot establish a *McCoy* violation on direct appeal to develop the record on collateral review, for "there may be facts not in the present record that might

demonstrate such a violation." *United States* v. *Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019); *accord United States* v. *Hashimi*, 768 F. App'x 159, 162 (4th Cir. 2019). Although not necessarily as plain as *Eddy* or *Turner*, the necessary implication of these decisions is that a contemporaneous express objection is unnecessary. Were it otherwise, there would be no need for further development, since the trial transcript would contain the necessary—and exclusive—form of "definitive evidence." *Hashimi*, 768 F. App'x at 163.

B. Some courts require a client to object on the record to maintain innocence.

By contrast, some jurisdictions read *McCoy* as requiring an individual to (1) object (2) at trial (3) in open court to counsel's concession of guilt.

Louisiana's federal and state courts, for example, require "an explicit objection by a defendant, on the record or in the presence of the trial judge." *United States* v. *Perry*, 2022 WL 3273279, at *6 (M.D. La. Aug. 10, 2022). Consequently, in *Perry*, the court denied a *McCoy* claim because the defendant did not lodge a contemporaneous objection to his own lawyer's concession of guilt. *Id.* at *9. *Perry* observed that other "[f]ederal district courts within the Fifth Circuit have interpreted *McCoy* to require an explicit objection on the record to sustain a *McCoy* claim." *Id.* at *6; *see also id.* at *7–8 (citing district court decisions from Central District of California, Eastern District of Michigan, and Northern District of Ohio).[2]

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[2] As *Perry* also noted, the government had acknowledged in briefing "a split amongst" "various state courts" and "federal circuit courts of appeal" on what *McCoy* requires. 2022 WL 3273279, at *8 n.93.

In *State v. Brown*, 2022 WL 266603, at *44 (La. Jan. 28, 2022), the Louisiana Supreme Court applied this same standard in a capital case, denying a claim that counsel's concession to second-degree murder abrogated *McCoy*. The court acknowledged that, before the trial, defendant had written a letter to the court, criticizing counsel because "[m]y lawyer was selling me out." *Id.* at *42. During an ex parte hearing at trial, defendant reiterated that he "had never discussed the case" with counsel and "did not know where [counsel was] going with anything." *Id.* at *43 (internal quotation marks omitted). But the Louisiana Supreme Court chalked up these disagreements to "a lack of communication." *Id.* at *44. "Ultimately, without defendant's *explicit objection* to an admission of guilt," the Louisiana Supreme Court held that a *McCoy* claim fails. *Id.* (emphasis added).

Somewhat similarly, in *Commonwealth* v. *Alemany*, 174 N.E.3d 649, 665–66 (Mass. 2021), the Supreme Judicial Court of Massachusetts denied defendant's motion for a new trial because, in advancing an insanity defense, counsel conceded guilt. The court "discredit[ed]" an affidavit from defendant "stating that he had objected to his counsel's use of the insanity defense on multiple occasions." *Id.* at 667. As it observed, this affidavit "does not explain why he did not object upon hearing argument and testimony regarding his concession of guilt." *Id.* at n.11.

Several other states also require express objections on the record, referencing the "adamant" and "repeated" assertions made in open court by petitioner in *McCoy*. 138 S. Ct. at 1503, 1507. *See*, *e.g.*, *Epperson* v. *Commonwealth*, 645 S.W.3d 405, 410 (Ky. 2021) (examining whether "there is an 'intransigent objection' on the record"); *Harvey* v. *State*, 318 So. 3d 1238, 1239 (Fla. 2021)

("[C]ounsel in [*McCoy*] conceded guilt over the defendant's adamant objection."); *Harper* v. *State*, 2022 WL 1100280, at *6 (Iowa Ct. App. Apr. 13, 2022) ("[T]he pertinent inquiry . . . is whether the defendant 'adamantly objected' to the admission."); *Bowman* v. *Warden*, 2021 WL 1595635, at *7 (Conn. Super. Ct. Mar. 23, 2021) ("A critical component of *McCoy* was the defendant's repeated and consistent objections.").

The Eleventh Circuit has, in dicta, also suggested as much, noting that "[o]nly if a client objects to the concession is there structural error." *Saunders* v. *Warden*, 803 F. App'x 343, 346 n.4 (11th Cir. 2020).

C. Some courts do not yet have a clear standard for *McCoy* claims.

Finally, some jurisdictions have yet to issue a bright-line rule. The Ninth Circuit, for example, recognizes that a court "commits reversible error by permitting defense counsel to present a defense of insanity over a competent defendant's clear rejection of that defense." *United States* v. *Read*, 918 F.3d 712, 719 (9th Cir. 2019). But *Read* involved a "clear objection" at trial on the record, *id.*—leaving unanswered whether statements made pre- or post-trial or out-of-court would qualify.

In Michigan, there is no *McCoy* issue when a client disagrees with counsel's strategy *after* sentencing. *People* v. *Watson*, 2020 WL 7296979, at *6 (Mich. Ct. App. Dec. 10, 2020). It is unclear, however, whether an express objection at trial is required. *Id.*

The Ohio Supreme Court has noted only that a client must have objected before a concession by trial counsel, but has said little about how an individual should manifest such an objection. *State* v. *Froman*, 165 N.E.3d 1198,

1229–30 (Ohio 2020). And in Georgia, although courts examine whether the client opposed counsel's strategy, it is (like Ohio) unclear what, exactly, a client must do. *Harris* v. *State*, 856 S.E.2d 378, 383 (Ga. Ct. App. 2021); *see also Pass* v. *State*, 864 S.E.2d 464, 469 (Ga. Ct. App. 2021).

In sum, the split here is deep, cutting across the most populated states and busiest dockets. It is consequential since *McCoy* implicates structural error. 138 S. Ct. at 1511. Both circumstances make the case for additional direction from this Court.

II. THE DECISION BELOW IS WRONG.

Even among jurisdictions that require an express objection, the New York Appellate Division went one step further. In every other jurisdiction, there was little to no evidence to suggest, from the trial record, defendant's intention to maintain innocence. Almost all evidence came after the fact, during post-conviction proceedings. There is thus a possibility that, had the record evidence here been present in those cases, the outcome might have been different. *See Perry*, 2022 WL 3273279, at *9. Further, in *no* other jurisdiction has a court required a contemporaneous express objection *after* the defendant themselves takes the stand, asserting innocence, while also maintaining his disagreement with counsel's strategy of conceding guilt.

In other words, if Mr. Alvarez had made his thirty assertions of innocence on the record and taken the stand—twice—he might well have shown that counsel's "unambiguous concessions were made over the client's adamant and repeated objections," even in an express-objection jurisdiction like Indiana. *Isom* v. *State*, 170 N.E.3d 623, 639

(Ind. 2021). Not so in New York. More there is needed: a simultaneous, in-court objection, even if counsel waits until the very end of trial to concede guilt.

A. Defendants are often barred from speaking—much less expressly objecting—in court.

This demand—that Mr. Alvarez should have objected in open court, at the end of his counsel's closing argument—is neither workable nor prudent. In fact, it bucks *McCoy*.

There, after counsel conceded guilt in openings, the defendant "protested" and—"out of earshot of the jury"—"told the court that [counsel] was selling him out." *McCoy*, 138 S. Ct. at 1506 (internal quotation marks and alteration omitted). But "[t]he trial court reiterated that [counsel] was 'representing' [the defendant] and told [the defendant] that the court would not permit 'any other outbursts.'" *Id.* at 1506–07. In other words, when the defendant in *McCoy* tried to manifest a simultaneous, in-court objection, he was told to keep quiet.

So too here. Mr. Alvarez—operating under the traditional rule that attorneys, not their clients, speak in court—explained at his post-conviction hearing that he "never spoke" because "I was told I'm not allowed to speak in court." Pet. App. 44a. The record bears that out: Outside of testimony or in response to a specific question from the court, Mr. Alvarez did not speak at trial.

His course of conduct reflects the common sense understanding that "defendants are constantly encouraged to be quiet and to let their lawyers do the talking. And most do." Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1450 (2005). An express-objection requirement is thus inconsistent with the normal way of doing business in our courts.

Not only that, but such a requirement puts individuals at risk of sanctions or other discipline. As both this Court and New York's Court of Appeals have long held, judges may remove a defendant from court—despite his Sixth Amendment right to be present at his own trial—when the defendant behaves in a "disorderly, disruptive, and disrespectful" manner. *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970); *see also People* v. *Parker*, 440 N.E.2d 1313, 1315 (N.Y. 1982) ("[A] waiver of the right to be present at a criminal trial may be inferred from certain conduct engaged in by the defendant after the trial has commenced.").

Of course, "the same principles that warrant the trial court's exercise of its discretion to exclude a defendant from the courtroom in a proper case necessarily encompass the trial court's exercise of its discretion to order the less-harsh remedy of requiring that appellant remain 'quiet.'" *Burks* v. *State*, 227 S.W.3d 138, 146 (Tex. Crim. App. 2006). Moreover, had the trial court here exercised such discretion, its decision would have been all but unreviewable, given the "excessive deference" that appellate courts "grant" to "the trial court's decision to remove defendants from the courtroom." Sarah Podmaniczky, *Order in the Court: Decorum, Rambunctious Defendants, and the Right to Be Present at Trial*, 14 U. Pa. J. Const. L. 1283, 1285 (2012).

New York's rule, in other words, places defendants in a thorny predicament. A defendant who is removed from court before their counsel concedes guilt would have no opportunity to "expressly object." Pet. App. 3a. And the mere threat of expulsion for speaking in open court—a threat made clear by the trial court in *McCoy*—could chill defendants from expressly objecting to counsel's concession of guilt. In practice, asking defendants to expressly

object leaves them between a rock and a hard place: break the basic rules on speaking in court and risk being expelled, or stay silent and forfeit a *McCoy* claim.

B. Courts can enforce *McCoy* without an express objection.

McCoy includes no express objection requirement. The opinion's singular reference to an "express objection" comes not in its review of constitutional deficiency, but in the discussion of structural error. *See* 138 S. Ct. at 1511 ("[C]ounsel's admission of a client's guilt over the client's express objection is error structural in kind.").

Even then, this Court did not require an "express objection" be on the record, in court, and simultaneous. To the contrary, it referenced, throughout the opinion, defendant's assertions of innocence "before and during trial" as well as "in conference with his lawyer and in open court." *Id.* at 1509. It moreover explained that when *counsel*—not the court—is "[p]resented with express statements of the client's will," "counsel may not steer the ship the other way." *Id.* There would have been no need to reference such out-of-court statements, and whether said statements were conveyed to counsel, if an express objection were the sine qua non.

Requiring an express objection elevates form over function. A more sensible approach would allow defendants to develop their *McCoy* claims during postconviction proceedings. Here, for instance, Mr. Alvarez was able at his postconviction hearing to present undisputed evidence of (1) his wish to maintain innocence, (2) his counsel's failure to consult or discuss a concession strategy, and (3) his concern about objecting in open court at trial. This evi-

dence, combined with his actions before trial, his testimony before the grand jury and at trial, and his statements at sentencing, provide a strong case for a *McCoy* violation. It makes little sense given this evidence to force Mr. Alvarez, at the risk of forfeiting his right to be in the courtroom, to expressly object at trial.

More generally, imposing a contemporaneous-objection requirement on a represented defendant is inconsistent with settled rules for assessing Sixth Amendment violations, which allow for development of such claims as part of postconviction proceedings. Many federal and state courts (including New York) require defendants to bring ineffective assistance claims in such a manner. *See Martinez* v. *Ryan*, 566 U.S. 1 (2012); *People* v. *Maffei*, 150 N.E.3d 1169 (N.Y. 2020). And these proceedings "often require a[ ] hearing," where—just like the hearing in this case—the parties may call witnesses and present documentary or other evidence. *Osagiede* v. *United States*, 543 F.3d 399, 408 (7th Cir. 2008). Such proceedings offer defendants a meaningful opportunity to supplement the record, and are precisely when a defendant would typically raise ineffective-assistance claims.

If, for instance, counsel "promise[s] the jury that it [will] hear" a defendant "testify to his innocence," and "then fail[s] to deliver on that promise," defendant does not lose his right to press an ineffective-assistance claim because he does not contemporaneously object. *U.S. ex rel. Hampton* v. *Leibach*, 347 F.3d 219, 260 (7th Cir. 2003). To the contrary, such claims are properly pursued through post-conviction hearings, *id.* at 244–45, and can, if established, be "prejudicial as a matter of law," *Anderson* v. *Butler*, 858 F.2d 16, 19 (1st Cir. 1988).

Nor, for that matter, would a client need to expressly object when counsel "fail[s] to . . . call" alibi "witnesses." *Commonwealth* v. *Stanley*, 632 A.2d 871, 872 (Pa. 1993). Such conduct, seemingly "incomprehensible" on its face, requires "a hearing" so that the trial court may "receive evidence on the matter." *Id.*

The Court has, furthermore, adopted a similar approach to rights, like the right to maintain innocence, which "are not strategic choices about how best to *achieve* a client's objectives," but "about what the client's objectives in fact *are*." *McCoy*, 138 S. Ct. at 1508 (emphasis in original). Under *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which concerns the right to decide whether to take an appeal, lower courts must "take into account *all* the information counsel knew or should have known," not just information presented in court on the record. *Id.* at 480 (emphasis added). That information, considered on the whole, informs the structural error calculus. *Garza*, 139 S. Ct. at 742. There is no reason, given *Flores-Ortega*, why courts should not conduct the same diligent search for a *McCoy* claim. Whether counsel moves unilaterally to concede guilt or to forfeit an appeal, both fall under an individual's "[a]utonomy." *McCoy*, 138 S. Ct. at 1508. Both should be zealously guarded.

III. THIS CASE IS AN IDEAL VEHICLE.

A. Questions surrounding application of *McCoy* are important and recurring.

More than seventy-eight million Americans live in states where the state courts do not require an express objection, such as California, Oregon, and Texas. Had Mr.

Alvarez been tried in *those* states, his repeated and consistent assertions of innocence, both in court and out of court, would have been enough. The Sixth Amendment, in these areas, does not require a defendant "to object with the precision of an attorney"; it rests, instead, on examining "the fundamental objective of the defendant, as expressed to defense counsel." *Turner*, 570 S.W.3d at 276; *Thompson*, 433 P.3d at 777.

On the other side of the ledger, states requiring an express objection—now including New York—are home to an almost equal number of eighty million Americans.

If federal courts are added to the mix, the varied approaches become even more dizzying. Pointedly, had Mr. Alvarez's case come up in New York federal court, the outcome might have been different. *See Abboud*, 2022 WL 3595055, at *4 (counsel "needed to discuss th[e] decision [to concede guilt] with [the defendant]."). Likely too if he had been proceeding in the Fourth or Eighth Circuits—but not the Fifth or Eleventh Circuits. Without further clarification, the protection "of a defendant's Sixth Amendment-secured autonomy" will turn on their state of residence and court of prosecution. *McCoy*, 138 S. Ct. at 1511.

B. The *McCoy* issue here is well-preserved, clear, and outcome-determinative.

This case provides the Court an appropriate and suitable vehicle to clarify *McCoy*. Unlike other matters, which might have been clouded with procedural issues or retroactivity questions, *see Harvey* v. *Florida*, No. 21-653, the question presented—whether *McCoy* requires a defendant to personally lodge a contemporaneous objection—was preserved and passed upon before the New

York Supreme Court and its Appellate Division. Pet. App. 3a. All motions were timely filed; no issues were waived or forfeited. Whether *McCoy* requires a contemporaneous on-the-record objection is thus outcome determinative. There is no dispute that defense counsel conceded guilt—he expressly did so in closings. Further, harmless error is not in play here as a *McCoy* violation is structural error. *McCoy*, 138 S. Ct. at 1511. Hence, any finding that no on-the-record objection was required would require reversal of the judgment.

This appeal also highlights the precise unfairness that this Court sought to prevent in *McCoy*. Not only did Mr. Alvarez repeatedly insist on his innocence and testify to that effect at trial, but—in order to assert his innocence at trial—he turned down a favorable plea deal (which would have resulted in a far-shorter sentence than the one he later received after counsel conceded guilt). After doing so, Mr. Herlich violated his autonomy and effectively pled guilty for him at trial. That is precisely the result *McCoy* sought to avoid.

One final note. That Mr. Herlich requested, without objection from Mr. Alvarez, inclusion of third-degree assault as a lesser-included offense, does not preclude review. If anything, it makes review all the more necessary. As a factual matter, Mr. Alvarez—corroborated by Mr. Herlich's own statements—understood that Mr. Herlich was doing so only as an "alternative argument." Pet. App. 57a. That is not what happened.

And as a legal matter, Justice Alito pinpointed just such a scenario as a question left open by *McCoy*: "What about conceding that a defendant is guilty, not of the offense charged, but of a lesser included offense?" 138 S. Ct. at 1516 (Alito, J., dissenting). "Where the evidence

strongly supports conviction" of a more onerous charge, "is it unconstitutional for defense counsel to make the decision to admit guilt" to "simple assault"? *Id.* at 1517. New York answered in the negative. But California and other jurisdictions have gone the other way, holding that "the decision whether to concede . . . even a lesser crime . . . is a decision that necessarily belongs to the defendant." *People* v. *Bloom*, 508 P.3d 737, 761 (Cal. 2022); *cf. State* v. *Horn*, 251 So. 3d 1069 (La. 2018) ("[T]hat defendant instructed his attorney to admit guilt to this different crime as part of his defense objective did not give defense counsel the authority to admit guilt to [other] lesser-included crimes.").

* * *

Mr. Alvarez maintained his innocence when he was arrested, before a grand jury, to his first and second lawyers, before the jury, and to the court during sentencing. He did everything *but* stand up in open court and expressly object at the time of concession. This case asks whether, under *McCoy* v. *Louisiana*, that last action is required. The Court should safeguard the Sixth Amendment rights of all defendants and make clear it is not.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 19, 2022