No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BURTON,
Petitioner

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER,
Respondent

and

ATTORNEY GENERAL DELAWARE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX VOLUME IV (A460-565)

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William Burton

Dated: May 7, 2024

N THE UN TED STATE COURT O APPE LS
FOR THE THIRD CIRCUIT

No. 22-3256

WILLIAM BURTON,
APPELLANT,

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER,
APPELLEE,

and

ATTORNEY GENERAL OF THE STATE OF DELAWARE,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE (D. Del. No. 1:19-cv-01475-MN)

BRIEF OF APPELLANT AND APPENDIX VOLUME I
(Pages 1-34)

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Dated: July 24, 2023

ABLE OF CON EN
BRIEF

ABLE OF A ORITIES

FEDERAL CASES

STATE CASES

UNITED STATES CONSTITUTION

DELAWARE CONSTITUTION

FEDERAL STATUTES

STATE STATUTE

STATE COURT RULES

OTHER

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

On August 7, 2019, William Burton timely filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Delaware ("District Court"). (Appendix[1] 35; Docket Entry[2] 2). An amended habeas petition was filed on December 24, 2019. (A36; DE8; A327-65). Following briefing, the District Court dismissed Mr. Burton's habeas petition on October 27, 2022. (A3-33; A38; DE27; DE28). Mr. Burton timely filed a notice of appeal on November 28, 2022. (A1-2; A38; DE29). The District Court had underlying jurisdiction over Mr. Burton's habeas petition pursuant to 28 U.S.C. § 2254(a). This Court has jurisdiction to review the District Court's order and memorandum opinion denying Mr. Burton's habeas petition pursuant to 28 U.S.C. § 2253(a).

[1] Hereinafter "A_."
[2] Hereinafter "DE_."

STATEMENT OF THE ISSUES FOR REVIEW

Whether the District Court erred in finding that the Delaware state courts did not unreasonably apply the facts of Mr. Burtons' case to the clearly established federal law of *Strickland v. Washington* and its progeny and did not erroneously fail to apply the clearly established federal law of *McCoy v. Louisiana* in order to deny Mr. Burton relief from the prejudice incurred when defense counsel ineffectively violated his Sixth and Fourteenth Amendment rights to a fair trial and to meaningfully oppose the prosecution's case by stipulating to the prosecution's evidence without Mr. Burton's consent and despite Mr. Burton's plea of not guilty. This issue was exhausted in the Delaware state courts as it was raised in Mr. Burton's postconviction filings[3] and denied by the Delaware state courts[4] and raised and ruled upon by the District Court. (A3; A10-24; A36; DE8; A37-38; DE22; DE 26-28; A345-53; A392-00; A457-62).

[3] A50; DE63-68; A51; DE73; A178-98; A225-30; A283-93; A312-19,
[4] A51; DE74, 78; A239-44 ; A321-26.

TATEMENT OF RE ATED CA ES AND P OCEEDING

This case has not previously been before this Court. This case is not related to any pending matters before this Court.

TATEMENT OF THE CASE

On March 18, 2013, Mr. Burton was charged by indictment with one count of dru dealing cocaine, one count of aggravated possession of cocaine, one count of possession of drug paraphernalia, and two counts of possession of marijuana. (A40).

On June 3, 2013, Trial Counsel filed a motion to suppress, challenging the search and seizure of the alleged drug evidence. (A41). A hearing on the motion to suppress was held on August 16, 2013 and August 21, 2013. (A41-42). On September 9, 2013, the Delaware Superior Court denied Mr. Burton's motion to suppress. (A42).

A stipulated bench trial was held on September 24, 2013, and Mr. Burton was found guilty of all counts. (A43). Thereafter, Mr. Burton was sentenced to life in prison pursuant to Delaware's habitual offender statute. (A43).

Mr. Burton timely appealed his sentence to the Delaware Supreme Court and on June 8, 2016, the Delaware Supreme Court affirmed the judgment of the Superior Court. (A43; A48).

On August 11, 2016, Mr. Burton timely filed a *pro se* Rule 61 motion for postconviction relief with the Delaware Superior Court. (A48). Undersigned Counsel was appointed on June 23, 2017 to represent Mr. Burton during his state postconviction proceedings. (A49).

On August 17, 2017, Mr. Burton, through Counsel, filed an amended Rule 61 motion. (A50). The Delaware Superior Court denied Mr. Burton's amended motion on April 30, 2018. (A51).

On May 30, 2018, Mr. Burton timely appealed the denial of his amended Rule 61 motion to the Delaware Supreme Court. (A51). The Delaware Supreme Court affirmed the judgment of the Superior Court on December 26, 2018. (A51).

On March 22, 2019, Mr. Burton timely filed a petition for writ of certiorari to the United States Supreme Court. The Supreme Court declined to hear the case on April 22, 2019.[5]

On August 7, 2019, Mr. Burton timely filed a *pro se* petition for a Writ of Habeas Corpus in the District Court and Undersigned Counsel filed an amended habeas petition on December 24, 2019. (A35; DE2; A36; DE8). Following briefing, the District Court dismissed Mr. Burton's habeas petition on October 27, 2022. (A3-33; DE27-28; A37-38; DE22; A366-472; DE25-28). Thereafter, Mr. Burton timely filed a notice of appeal on December 1, 2022. (A38; DE32).

[5] No. 18-8574.

STATEMENT OF FACTS

During the pre-trial stage, Trial Counsel filed a motion to suppress, challenging the constitutionality of the administrative search of Mr. Burton's residence and seeking to exclude all of the evidence seized as a result of the administrative search. (A41; A55-56). Following a two-day hearing, the Delaware Superior Court denied Mr. Burton's motion to suppress. (A41-42; A54-96).

On September 24, 2013, Mr. Burton signed a stipulation of waiver of jury trial[6] and then engaged in the following colloquy with the Trial Court:

> THE COURT: Okay. Mr. Burton, I'm informed that you desire to waiver your right to a jury trial. Is that correct?
> THE DEFENDANT: Yes.
> THE COURT: Before accepting your waiver, there are a number of questions I'm going to ask you to ensure that it's a valid waiver. If you do not understand any of the questions at any time and you wish to interrupt the proceedings to consult further with your attorney, please say so.
> Can you tell me what your full name is?
> THE DEFENDANT: William David Burton.
> THE COURT: And how old are you?
> THE DEFENDANT: 57 years old.
> THE COURT: Okay. And how far did you go in school?
> THE DEFENDANT: 12th grade, Your Honor.
> THE COURT: Okay. Have you taken any drugs, medicine, or any alcoholic beverages within the last 24 hours?
> THE DEFENDANT: Just my diabetic medication.
> THE COURT: Okay. Do you understand that you're entitled to a trial by jury on the charges filed against you?

[6] A43; A56.

HE DEFENDAN Yes.
THE COURT: Do you further understand that you would hav th opportunity to take part along with your lawyer in the selection of th jurors?
THE DEFENDANT: Yes.
THE COURT: Do you understand that a jury trial means that you would be tried by a jury consisting of 12 people and all 12 jurors must agree on your guilt or innocence or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Do you understand that if I approve your waiver of a jury trial the Court alone, and that would be me, would try the case and determine your innocence or guilt or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Have you discussed this decision with your lawyer?
THE DEFENDANT: Yes.
THE COURT: Has he discussed with you the advantages and disadvantages of a jury trial?
THE DEFENDANT: Yes.
THE COURT: Do you want to discuss the issue further with your attorney?
THE DEFENDANT: No.
THE COURT: Although your attorney may advise you, the final decision is yours. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: What is your decision?
THE DEFENDANT: To waive.

(A99-00).

Based upon the colloquy, the Trial Court held that Mr. Burton's waiver of his right to a trial by jury was knowingly, intelligently and voluntarily made. (A100). Thereafter, Trial Counsel informed the Trial Court that a "pretty thorough record" had been made during the suppression hearing and that the Defense was willing to rely

on that record for the purposes of appealing the Trial Court's suppression decision. (A99). Trial Counsel further advised that for purposes of trial, the defense was willing to rely on the suppression hearing record, as well as the record that the State would "make with respect to where the drugs were found and what they were and how much was found." (A99). As a result of the stipulation, Trial Counsel conceded that 28.45 grams of cocaine and 0.93 grams of marijuana were found inside Mr. Burton's bedroom and inside a jacket located in the bedroom at the address that Probation and Parole identified as Mr. Burton's residence and which Mr. Burton acknowledged as his place of residence. (A52; A58; A68; A90).

As evidenced in the transcript, the Trial Court's colloquy with Mr. Burton did not include any discussion regarding Mr. Burton's consent to a stipulated bench trial nor did the Trial Court ascertain whether Mr. Burton understood that Trial Counsel was conceding the weight and identity of the State's drug evidence and that the evidence had been found in his residence, and more specifically in his jacket. (A99-00).

An exceptionally short bench trial followed thereafter,[7] during which the State called only one witness. (A100-03). The State's witness testified that Mr. Burton identified his bedroom as the room where the drugs were found, as well as opined that

[7] The entire trial portion of the transcript spans only ten pages.

the weight of the cocaine recovered was not indicative of personal use. (A101-02). Defense counsel only asked a few simple questions during his cross examination, all of which pertained to whether Mr. Burton had access to a microwave, which would have been needed if he were cooking cocaine as the witness believed him to be. (A102). No opening or closing arguments were given by either party and Mr. Burton was quickly found guilty of all counts by the trial judge. (A103).

UMMARY OF THE ARGUMEN

The District Court erred in denying Mr. Burton's petition for habeas corpus pursuant to 28 U.S.C. § 2254. In doing so, the District Court erroneously found that: (1) it was reasonable for the Delaware state courts to determine that Mr. Burton knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence; (2) that the United States Supreme Court decision in *McCoy v. Louisiana* was inapplicable to Mr. Burton's case; and (3) that Mr. Burton failed to demonstrate a reasonable probability that the outcome of his bench trial would have been different, but for the stipulation.

ARGUMENT

I. The District Court erred when it determined that Mr. Burton was not deprived of his Sixth and/or Fourteenth Amendment rights to the effective assistance of counsel, to a fair trial, and to meaningfully oppose the prosecution's case.

A. Standard of Review.

When a district court does "not hold an evidentiary hearing and[/or] engage in independent factfinding," this Court's review of a district court's final judgment is plenary.[8] As such, this Court applies "'the same standard [of review] that the District Court was required to apply.'"[9] Therefore, this Court must determine whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[10]

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[8] *Hairston v. Hendricks*, 578 Fed. Appx. 122, 125 (3d Cir. 2014) (quoting *Hardcastle v. Horn*, 368 F.3d 246, 254 (3d Cir. 2004)); *see also Vazquez v. Wilson*, 550 F.3d 270, 276 (3d Cir. 2008) (citing *Lambert v. Blackwell*, 387 F.3d 210, 231 (3d Cir. 2004)).

[9] *Hairston,* 578 Fed. Appx. at 125 (quoting *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009)); *see also Vazquez*, 550 F.3d at 276 (quoting 28 U.S.C. § 2254(d)(1)) ("Under the AEDPA we must review the state court proceedings and affirm the denial of the petition unless we are satisfied that Vazquez has demonstrated that the Pennsylvania Superior Court, the highest-level state court . . . made a determination that 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'").

[10] 28 U.S.C. § 2254(d)(1); 28 U.S.C. § 2254(d)(2).

B. Argument.

Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Mr. Burton was guaranteed the right to the effective assistance of counsel,[11] the right to a fair trial,[12] the right to decide whether to plead guilty or not-guilty,[13] and to meaningfully oppose the prosecution's case.[14] However, those constitutionally protected rights were overridden when Trial Counsel stipulated to the prosecution's evidence without Mr. Burton's consent and despite Mr. Burton pleading not guilty.

Despite Mr. Burton's constitutional rights being violated by Trial Counsel's actions, the District Court, when evaluating Mr. Burton's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, concluded that the Delaware State Courts did not fail to apply the federal law of *McCoy v. Louisiana* finding it to be inapplicable

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[11] *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)) ("[T]he right to counsel is the right to the effective assistance of counsel.").

[12] U.S. Const. amend. XIV; Del. Const. art. I, § 7 (stating in relevant part, "nor shall he or she be deprived of life, liberty or property, unless by judgment of his or her peers or by the law of the land").

[13] *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966); *Gonzalez v. United States*, 553 U.S. 242, 250 (2008) (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citing *Strickland*, 466 U.S. at 688; *Taylor*, 484 U.S. at 417-18)); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes* 433 U.S. 72, 93 n.1 (1977).

[14] *See United States v. Cronic*, 466 U.S. 648, 659-62 (1984).

and that the State Courts reasonably reviewed and applied the *Strickland* standard when it found that Mr. Burton was not prejudiced by Trial Counsel's stipulation. As detailed below, the District Court failed to apply the correct legal standard and erroneously reached legal conclusions that were unsupported by the factual record and/or contrary to clearly established federal law.

1. Mr. Burton did not voluntarily, knowingly, or intelligently consent to Trial Counsel's stipulation to the State's drug evidence.

Although the District Court correctly acknowledged that it must determine "whether the Delaware state courts' factual determination that Petitioner knowing[ly], intelligently, and voluntarily agreed to stipulate to the State's drug evidence is presumptively correct," the District Court incorrectly, and unreasonably, answered that question in the affirmative. (A14). Contrary to the District Court's findings, Mr. Burton presented "clear and convincing evidence to rebut [the] presumption" of correctness. (A14).

In its memorandum opinion, the District Court noted that on the day of trial, Trial Counsel informed the trial court that Mr. Burton was electing to waive his constitutional right to a jury trial and had executed a waiver of jury trial form. (A14). The District Court also acknowledged that there was no mention of the drug evidence stipulation during the trial court's colloquy with Mr. Burton. (A14). Additionally,

the District Court recognized Mr. Burton's assertion that he never discussed the possibility of stipulating to the State's drug evidence with Trial Counsel. (A16). Nevertheless, the District Court found that Trial Counsel's wholly speculative assertion that he "probably" discussed an evidentiary stipulation with Mr. Burton prior to trial constituted sufficient evidence that Mr. Burton was aware of and consented to Trial Counsel's stipulation of drug evidence. (A16-17).

As noted by the District Court, Trial Counsel averred in his affidavit that he "can only assume" that he discussed an evidentiary stipulation with Mr. Burton and that it "would have been [his] practice" to explain to Mr. Burton that the State's evidence would largely go unchallenged as a result of the stipulation. (A17). As such, Trial Counsel noted that he "probably conducted some explanation as to how the trial would proceed." (A17). Despite being presented with a wholly speculative affidavit from the trial lawyer in relation to Mr. Burton's knowledge and/or consent to stipulating to the State's drug evidence,[15] a trial record that demonstrates that the evidentiary stipulation was never discussed on the record,[16] and Mr. Burton's postconviction assertion that Trial Counsel never discussed an evidentiary stipulation with him,[17] the District Court erroneously concluded that the Delaware state courts

[15] A193-95.
[16] A99-00.
[17] A178-89; A225-30; A283-93; 312-19; A345-48; A392-95; A457-60.

easonabl ete ned that M . Burton know ngly, ntelligently, and voluntarily consented to the drug evidence stipulation. (A17-18).

Similarly, the District Court found that it was reasonable for the Delaware State Courts to find "defense counsel's Rule 61 response to be more credible than Petitioner's unsubstantiated assertion that there was no discussion of stipulating to the State's record." (A18). The District Court's conclusion is unfathomable in light of the record. As evidenced by his affidavit, Trial Counsel had no independent recollection of discussing the evidentiary stipulation with Mr. Burton and could only guess that he "probably" discussed the evidentiary stipulation with Mr. Burton as it "would have been [his] practice" to do so. (A194-95). Trial Counsel provided no file notes or any other record or documentation to substantiate his speculative belief.

Whereas, Mr. Burton asserted that he never discussed the evidentiary stipulation with Trial Counsel and that the trial court's waiver of jury trial colloquy demonstrated that Mr. Burton only consented to a bench trial as the stipulation was never discussed with him.[18] Additionally, Mr. Burton noted the lack of any substantiating paperwork in Trial Counsel's file that would have provided any meaningful support to Trial Counsel's speculative belief that he discussed the stipulation with Mr. Burton. (A178-79; A182-83; A225-29; A285; A313-17; A346-

[18] A178-86; A225-30; A283-93; A312-19; A345-53; A392-00; A457-61.

48; A393-94; A457-61). The District Court's reliance on this scant and contradictory record to conclude that it was reasonable for the Delaware State Court's to find that Trial Counsel's affidavit was "more credible than Petitioner['s]" postconviction assertion was in error. (A18).

Although the District Court correctly concluded that the lack of discussion of the stipulation during the colloquy "on its own" does not establish that Mr. Burton did not knowingly, intelligently and voluntarily consent to the drug evidence stipulation,[19] the lack of discussion coupled along with the other factors noted by Mr. Burton does just that. This included Mr. Burton's constant denial of consenting to the drug evidence stipulation,[20] Trial Counsel's inability to recall discussing the stipulation with Mr. Burton,[21] and a lack of any other evidence to support a finding that Mr. Burton consented to the stipulation, such as file notes, correspondence between Trial Counsel and Mr. Burton discussing the stipulation, or an affidavit from Trial Counsel definitively confirming his recollection of discussing the issue with Mr. Burton and Mr. Burton giving his consent. As such, the District Court erred when it found that the Delaware state's court's factual determination that Mr. Burton

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[19] A19.

[20] A179; A181-83; A225-28; A289; A313-14; A318; A345-48, A392-94; A457-59.

[21] A193-95.

knowingly, intelligently, and voluntarily consented to the stipulation was presumptively correct. (A17-18).

It is also important to note that the District Court appears to be incorporating a burden shifting component into its opinion. The District Court posits, as part of its factual reasoning as to whether he consented to the evidentiary stipulation, that if he did not want to consent to the stipulation, then he should have raised the issue during the bench trial. (A18). In doing so, the District Court did not cite to any case law to support the concept that a defendant's un-counseled objection to the lawyer's error during a trial is somehow a factor to be considered when analyzing all relevant facts as to whether Mr. Burton consented to the evidentiary stipulation. (A18). A component of this District Court error is that it presupposes that Mr. Burton understood that he had the right to make the evidentiary stipulation and that it was not one of the vast majority of trial decisions made by the trial attorney even if the client disagrees. However, it was Trial Counsel's obligation, as established under the federal and state constitutions, to provide Mr. Burton with effective assistance of counsel and to not make decisions that the federal and state constitutions, and the United States Supreme Court, have determined belong to Mr. Burton–namely, to

plead guilty or not guilty.[22] By stipulating to the State's evidence without Mr. Burton's consent, Trial Counsel effectively overrode Mr. Burton's constitutionally guaranteed right to plead not guilty.

Despite Mr. Burton's constitutionally guaranteed rights, the District Court, without any legal support, appears to be shifting the burden from Trial Counsel to Mr. Burton thereby, requiring Mr. Burton to oversee Trial Counsel's decisions and actions to ensure his attorney is not violating his constitutional rights and is providing effective assistance of counsel. Not only is this improper burden shifting, but reviewing an attorney's actions for ineffective assistance of counsel is predominantly an after-the-fact determination made with hindsight, and typically made by another attorney during a procedure such as postconviction review.[23] Thus, the District Court improperly faults Mr. Burton for not preemptively, and without the assistance of independent counsel, understanding that Trial Counsel was violating his constitutional rights and for raising it during the postconviction process, which is the

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[22] U.S. Const. amend. VI; U.S. Const. amend. XIV; Del. Const. Art. I, § 7; *McCoy v. Louisiana*, 138 S.Ct. 1500, 1504 (2018); *Nixon*, 543 U.S. at 187; *Taylor*, 484 U.S. at 417-18; *Cronic*, 466 U.S. at 659-62; *Strickland*, 466 U.S. at 686; *Faretta v. California*, 422 U.S. 806, 819-20 (1975); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Brookhart*, 384 U.S. at 1; *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

[23] *See* Del. Super. Ct. Crim. R. 61(a)(1); Del. Super. Ct. Crim. R. 61(e).

proper time for raising ineffective assistance of counsel claims.

2. Mr. Burton's right to autonomy under *McCoy v. Louisiana* was violated.

Although the Delaware State Courts failed to address Mr. Burton's claim that his right to autonomy under *McCoy v. Louisiana* was violated,[24] the District Court nevertheless determined that *McCoy* was inapplicable to Mr. Burton's claim finding that "the facts of his case are distinguishable from those in *McCoy*." (A20). The District Court is wrong.

The United States Supreme Court has long held that defense attorneys have the authority to manage the day-to-day conduct of the defense and have "the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop".[25] It is similarly well settled that some

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[24] Mr. Burton noted in his reply to the State's response to his amended motion for postconviction that the United States Supreme Court's decision *McCoy* was pending during his postconviction proceeding in the Delaware Superior Court. (A225). Once the United States Supreme Court issued its opinion in *McCoy,* Mr. Burton argued in his opening and reply briefs to the Delaware Supreme Court that his right to autonomy was violated by Trial Counsel stipulating, without his consent, to the State's evidence. (A287-89; A318-19). However, an analysis of the Delaware Superior Court's order denying postconviction relief and the Delaware Supreme Court's order affirming the Superior Court's denial demonstrates that the raised issue was ruled upon by the State Courts. (A239-44; A324-26).

[25] *See, e.g.*, *New York v. Hill*, 528 U.S. 110, 114-15 (2000); *Taylor*, 484 U.S. at 418.

decisions belong solely to the defendant, such as whether to exercise or waive basic trial and appellate rights, because they are so personal to the defendant "that they cannot be made for the defendant by a surrogate."[26] As federal constitutional precedent mandates that a criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal",[27] and such fundamental decisions cannot be waived by counsel "without the fully informed and publicly acknowledged consent of the client."[28] Thus, even though a defense attorney is not required to obtain the defendant's consent to "every tactical decision",[29] "some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right."[30]

Additionally, the United States Supreme Court in *McCoy v. Louisiana* recently decided a federal constitutional issue akin to the issue raised by Mr. Burton. In *McCoy*, the Supreme Court was presented with the question of "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's

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[26] *Nixon*, 543 U.S. at 187.

[27] *Jones*, 463 U.S. at 751; *see also Nixon*, 543 U.S. at 187.

[28] *See Taylor*, 484 U.S. at 417-18; *Brookhart*, 384 U.S. at 7-8.

[29] *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688; *Taylor*, 484 U.S. at 417-18).

[30] *Gonzalez*, 553 U.S. at 250 (citing *Nixon*, 543 U.S. at 187).

ntrans gent an nam guo s objection" and grante certiorari e to the r being a split between state co rts of last resort on the issue.[31] The Supreme Court definitively held in *McCoy* that "a defendant has the right to insist that c unsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."[32] As the Supreme Court noted, "a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her",[33] because "[t]hese are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*."[34]

In sum, *McCoy* directs that "[w]hen a client expressly asserts that the objective of '*his* defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt."[35] Significantly, the Supreme Court concluded that a violation of this constitutional principle results

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[31] *McCoy*, 138 S.Ct. at 1507 (citing *Cooke v. State*, 977 A.2d 803, 842-46 (Del. 2009)).

[32] *Id*. at 1505.

[33] *Id*. at 1508.

[34] *Id*. (citing *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017)); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000)).

[35] *Id*. (citing U.S. Const. VI; ABA Model Rules of Professional Conduct 1.2(a) (2016)). Conversely, the United States Supreme Court has held that "[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy he/she believes to be in the defendant's best interest." *Id*. at 9.

in a structural error for which no demonstration of prejudice is required.[36] The holding in *McCoy* is entirely consistent with clearly established federal law regarding the objectives of the representation and the requirement that an attorney "must both consult with the defendant and obtain consent to the recommended courts of action."[37] Likewise, *McCoy* emphasizes that which has been long established – that although counsel may be able to better make such fundamental strategic choices, the defendant retains full autonomy to make these decisions because he or she alone experiences the consequences of them.[38] As such, the holding of *McCoy* is retroactively applicable to Mr. Burton's case, as it merely makes unambiguously clear that which was also established by United States Supreme Court precedent.

Although Trial Counsel violated Mr. Burton's right to autonomy when he essentially conceded Mr. Burton's guilt by stipulating to the State's drug evidence without Mr. Burton's consent, the District Court erroneously concluded that *McCoy* was inapplicable to Mr. Burton's case. (A20). This conclusion was based on the District Court's finding that the stipulation was an issue of defense strategy, which falls within Trial Counsel's purview rather than an issue of pleading guilty versus not

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[36] *McCoy*, 138 S.Ct. at 1511.

[37] *Nixon*, 543 U.S. at 187.

[38] *See Faretta*, 422 U.S. at 819-20; *Boykin*, 395 U.S. at 243; *Duncan*, 391 U.S. at 149; *Brookhart*, 384 U.S. at 7-8; *Pointer*, 380 U.S. at 403; *Malloy*, 378 U.S. at 6.

guilty, which falls squarely within Mr. Burton's purview. (A20-21).

As Mr. Burton articulated to both the state courts and the District Court, Mr. Burton steadfastly refused to plead guilty, and Trial Counsel impermissibly overrode Mr. Burton's objective of maintaining his innocence when Trial Counsel conceded, without Mr. Burton's consent, the majority of the elements of the charged offenses. Based on the offenses that Mr. Burton was charged with and the statutory elements required to be proven beyond a reasonable doubt,[39] by stipulating to the State's evidence, Trial Counsel conceded all of the required elements except for possession and possession with intent to manufacture or distribute. However, by failing to conduct any cross examination of the State's witness on his opinion that the weight of the cocaine was not indicative of personal use,[40] Trial Counsel similarly offered no opposition to the State's evidence of possession with intent to manufacture or distribute.

Although Trial Counsel never admitted that Mr. Burton was guilty of the charged offenses, his actions and non-actions: 1) conceded Mr. Burton's guilt without obtaining his "fully informed and publicly acknowledged consent",[41] thereby overriding Mr. Burton's Sixth Amendment right to decide whether or not to plead

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[39] 16 *Del. C.* § 4752 (2012).
[40] A102.
[41] *Taylor*, 484 U.S. at 417-18; *Brookhart*, 384 U.S. at 7-8.

uilty;[42] waived Mr. Burton's Sixth Amendment right to me nin fully oppose the prosecution's case;[4] 3) denied Mr. Burton's Fourteenth Amendment Due Process Right to a fair trial;[44] and 4) deprived Mr. Burton of his Sixth Amendment right to the effective assistance of counsel.[45]

There is no question that the constitutional right to plead guilty or not-guilty rests solely and unconditionally with the criminal defendant. Although Mr. Burton pleaded not-guilty, Trial Counsel's act of stipulating to the State's evidence without Mr. Burton's consent and by allowing the State's evidence, presented during the short bench trial, to go unchallenged, Trial Counsel conceded Mr. Burton's guilt and thereby overrode the most important constitutional right to a criminal defendant–the right to plead not guilty. Trial Counsel's actions cannot be reasonably construed as defense strategy when it eliminates a defendant's choice to plead not guilty. As such, pursuant to *McCoy*, Trial Counsel's actions caused a structural error for which no

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[42] *Gonzalez*, 553 U.S. at 250 (citing *Nixon*, 543 U.S. at 187 (citing *Strickland*, 466 U.S. at 688; *Taylor*, 484 U.S. at 417-18)); *Jones*, 463 U.S. at 751; *Wainwright*, 433 U.S. at 93 n.1; *Brookhart*, 384 U.S. at 7-8.

[43] *See Cronic*, 466 U.S. at 659-62.

[44] U.S. Const. amend. XIV; Del. Const. art. I, § 7 (stating in relevant part, "nor shall he or she be deprived of life, liberty or property, unless by judgment of his or her peers or by the law of the land").

[45] *Strickland*, 466 U.S. at 686 (quoting *McMann*, 397 U.S. at 771 n.14) ("[T]he right to counsel is the right to the effective assistance of counsel.").

demonstration of prejudice is required.[46] Therefore, the District Court unreasonably, and in contradiction of clearly established federal law, assessed Mr. Burton's claim "a standard ineffective assistance of counsel claim under *Strickland* rather than as a violation of autonomy claim under *McCoy*". (A21; A24).

3. Mr. Burton's trial counsel was constitutionally ineffective.

Having concluded that the United States Supreme Court's decision in *McCoy* to be inapplicable to Mr. Burton's case, the District Court turned to and denied Mr. Burton's alternative ineffective assistance counsel argument, finding that Mr. Burton failed "to show a reasonable probability that, but for the stipulation, the outcome of this bench trial would have been different." (A24). In support of its holding, the District Court asserted that the evidence against Mr. Burton was overwhelming because it included Mr. Burton's "confession to flushing cocaine down the toilet and the fact that the drugs were seized from [Mr. Burton's] room while he was present" all of which "would have been admissible without the stipulation. . . ." (A23). The District Court erred and Mr. Burton sufficiently demonstrated prejudice from Trial Counsel's ineffectiveness, although not required to do so.

In *Strickland v. Washington*, the United States Supreme Court set forth the two

[46] *McCoy*, 138 S.Ct. at 1511.

part analysis to govern all claims of ineffective assistance of counsel.[47] "First, the defendant must show that counsel's performance was deficient."[48] In other words, the defendant must "show[] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment."[49] The defendant must overcome the presumption that "under the circumstances, the challenged action might be considered sound trial strategy."[50]

Under the second prong, "the defendant must show that the deficient performance prejudiced the defense."[51] This prong "requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[52] In other words, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[53] A reasonable probability exists when there "is a probability sufficient to undermine confidence in the outcome."[54]

However, when assessing ineffective assistance of counsel claims under

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[47] *Strickland*, 466 U.S. at 687.
[48] *Id*.
[49] *Id*.
[50] *Id*. at 689 (citing *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)).
[51] *Id*. at 687.
[52] *Strickland*, 466 U.S. at 687.
[53] *Id*. at 694.
[54] *Id*.

AEDPA, the United States Supreme Court recognized that:

> The pivotal question is whether the state court's application of *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law. A state court must be granted deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.[55]

By holding that there could be no prejudice due to overwhelming evidence, the District Court unreasonably applied the *Strickland* standard to the facts of Mr. Burton's case. (A23). As argued in the opening brief in support of the amended petition for a writ of habeas corpus,[56] the District Court and State Courts failed to appreciate that the stipulation included consent to rely on the lengthy suppression hearing record for purposes of determining Mr. Burton's guilt which included numerous pages of factual testimony that would have been otherwise inadmissible at trial, such as the fact that Mr. Burton was on probation and that he was identified by a confidential informant alleging that Mr. Burton was selling crack cocaine from his residence. (A57-58; A65; A67-69; A75-76). As such, unless the State would have

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[55] *Harrington v. Richter*, 562 U.S. 86, 101 (2011).
[56] A352-53.

aken the unusual s ep of evealing the iden ity of the confidential informant and having that individual testify, the State would have been unable to rely on these facts to prove the elements of possession and intent to manufacture or distribute.[57]

In addition to suffering prejudice during his trial, Mr. Burton suffered further prejudice when the State Courts denied Mr. Burton's motion for a new trial and/or re-testing of the alleged drug evidence due to the discovery of misconduct at the OCME because Trial Counsel stipulated to the drug evidence and chain of custody.[58] As such, Mr. Burton clearly suffered prejudice from Trial Counsel's actions, regardless of how allegedly overwhelming the evidence against him was.

The District Court further erred when it found that because "defense counsel was unaware of the OCME misconduct at the time of the stipulation, the fact that the Delaware state courts relied, in part, on the existence of the stipulated facts to deny Petitioner's motion for new trial, re-testing cannot be factored into the prejudice." (A23). By reaching this conclusion, the District Court misconstrued Mr. Burton's argument. Mr. Burton did not assert that Trial Counsel was constitutionally ineffective for failing to contest the chain of custody and testing of the admitted drug evidence for which it would be relevant that Trial Counsel was unaware of the

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[57] 16 *Del. C.* § 4752 (2012).

[58] *Burton v. State*, 142 A.3d 504, 504 (Del. 2016); *State v. Burton*, 2015 Del. Super. LEXIS 1068, *9 (Del. Super. Ct. Nov. 30, 2015).

OCME's misconduct at the time that he declined to challenge the drug evidence. Rather, the OCME issue was a by-product of Trial Counsel's ineffectiveness as Mr. Burton would have been granted a new trial and/or re-testing of the drug evidence once the OCME misconduct was discovered, but for Trial Counsel ineffectiveness in stipulating to the State's evidence without Mr. Burton's consent. As such, the District Court erred when it did not, but should have considered the denial of Mr. Burton's motion for new trial and re-testing in the prejudice analysis.

CONCLUSION

WHEREFORE, William Burton respectfully requests that this Honorable Court overturn the District Court's denial order and opinion and remand this case to the District Court with instructions that the District Court grant Mr. Burton a writ of habeas corpus.

Respectfully Submitted,
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Dated: July 24, 2023

No. 22-3256

NIT D S ATES COURT OF APP ALS
FOR THE THIRD CIRCUIT

WILLIAM BURTON

Appellant,

vs.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPELLEES' ANSWERING BRIEF

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TABLE OF C NTENTS

AGE

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

COUNTERSTATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

The District Court had jurisdiction over this matter under 28 U.S.C. § 2254. The District Court entered a memorandum and order denying Appellant William Burton's ("Burton") petition for habeas corpus relief on October 27, 2022. A3–33.[1] This Court has jurisdiction over this habeas petition under 28 U.S.C. § 1291 and under 28 U.S.C. § 2253(c)(1), as Burton appeals from a final order denying habeas relief of the United States District Court for the District of Delaware, and he has received a certificate of appealability from this Court (A34).

[1] "A#" refers to pages in Burton's Appendix to the Opening Brief in this case.

COUNTERSTATEMENT OF THE ISSUES PRESENTED ON APPEAL

Whether the Delaware courts applied the proper United States Supreme Court precedent in denying Burton's claim that trial counsel provided ineffective assistance by stipulating to the State's evidence without his consent, and, if so whether that decision was not objectively unreasonable.

RELATED CASES AND PRO EEDING

Appellees are unaware of any related proceedings in this matter.

COUNTE TATEMENT OF THE C E

. Nature of the Proceedings

On January 31, 2013, an Operation Safe Streets Task Force consisting of police and probation and parole officers, following up on a tip from a past-proven reliable confidential informant that a man named "David" was selling crack cocaine from a residence in Wilmington, Delaware, conducted an administrative search of Burton's residence. A57-59 (Suppression Hr'g Tr.). Burton, whose middle name is David, was on probation at the time. A58. Among other things, the police found approximately 29 grams of cocaine and one gram of marijuana in Burton's room. A101 (Trial Tr.).

On March 18, 2013, a grand jury indicted Burton for drug dealing 20 grams or more of cocaine (16 *Del. C.* § 4752(1)), aggravated possession of 25 grams or more of cocaine (16 *Del. C.* § 4752(3)), two counts of illegal possession of marijuana (16 *Del. C.* § 4764(b)), and possession of drug paraphernalia (16 *Del. C.* § 4771). A40 (Crim. D.I. 2)[2]; D.I. 17-5 at 7–9 of 104.[3] On June 3, 2013, Burton filed a motion to suppress. A41 (Crim. D.I. 7). After a hearing (A54–87), on September 9, 2013,

[2] "Crim. D.I. #" refers to docket item numbers in the Superior Court Criminal case of *State v. William Burton*, I.D. No. 1301022871 (A40–51).

[3] "D.I. #" refers to items on the District Court docket that are not included in Burton's Appendix.

the Superior Court denied Burton's suppression motion. A42 (Crim. D.I. 16); *State v. Burton*, 2013 WL 4852342, at *4 (Del. Super. Ct. Sept. 9, 2013) (A88–96).

On September 24, 2013, Burton waived his right to a jury trial and elected to have a "stipulated" bench trial.[4] A43 (Crim. D.I. 19, 20); A97, 99–100. In so doing, he executed a written "Stipulation of Waiver of Jury," and the Superior Court conducted a colloquy with him. A97, 99–100. Prior to the colloquy, trial counsel informed the court

> I also met with [Burton] on two occasions and discussed with him the nature of a stipulated trial in that in this case it's our belief that the suppression issue is really the most important issue . . . and that there was a pretty thorough record made before [the judge] that we're willing to rely upon for suppression purpose [sic]. And that for purposes of a trial today, we'll rely upon that record, plus the additional record that the State will make with respect to where the drugs were found and what they were and how much was found.

A99. The court then explained to Burton his jury trial rights and made sure he understood them, confirmed that he had discussed the waiver with his attorney, and asked Burton if he wished to discuss the issue further with his counsel. A100. Burton responded, "No." *Id*. The court found that Burton's waiver of his right to a

[4] Just before the discussion about the stipulated trial, the court conducted a colloquy with Burton to confirm his rejection of the State's plea offer. A99. Trial counsel explained to the court that the State had offered to cap its sentence recommendation at 15 years of incarceration, but that because of a prior conviction for which Burton was still on parole, a conviction in this case was likely to result in additional time for a parole violation that would be "almost like a life sentence anyway." *Id.*

jury trial s k owing, intellige t, a d volu tary. *Id.* The court did not sep rately engage Burton on whether he understood the consequences of stipulating to the State's evidence. *Id.*

At trial, the State presented evidence from a police detective who had been present during the search of Burton's room. A100. The detective identified Burton and testified that during the search of a room, which Burton had confirmed was his, another officer located a plate with an off-white chunky substance and a razor blade, two Ziploc bags containing a green plant-like substance, a grinder, Top smoking papers, and $150 in a small dresser. A101. The officer also found a digital scale and a cooler that contained baking soda and a glass jar, "which contained an off-white chunky substance." *Id.* In a jacket in Burton's closet, the officer found a bag of a white powder substance. *Id.*

The State admitted three exhibits into evidence, without objection—(1) the drug evidence; (2) the Controlled Substances Laboratory Report prepared by a forensic chemist with the Office of the Chief Medical Examiner ("OCME"), which confirmed that the substances found in Burton's room were cocaine, weighing 28.45 grams, and marijuana, weighing .93 grams; and (3) the paraphernalia evidence. *Id.* Burton did not raise any objections to the chain of custody or the results of the Controlled Substances Laboratory Report. *Id.* The detective further testified that it appeared the glass jar and baking soda were being used to "popcorn," or mix the

cocaine with the baking soda by cooking them together in a microwave. *Id.* The razor blade and the plate would have been used to chop the mixture up into smaller quantities for sale. A102. The detective also briefly testified about his experience as a drug investigator and he opined that the amount of cocaine found in Burton's room was not a "possession weight," and that the weight combined with the other paraphernalia indicated the cocaine was being used for dealing. *Id.*

Trial counsel briefly cross-examined the detective. *Id.* After the State rested, defense counsel informed the court: "I have discussed with Mr. Burton his right to testify. In this situation, he is sufficient to rely upon the record made at the suppression hearing and he waives his right to testify." *Id.* Neither side made opening or closing arguments. *See* A100, 102. At no point during the trial was any testimony or evidence from the suppression hearing introduced, admitted into evidence, or otherwise substantively referenced. *See* A100–02.

Immediately after trial, the Superior Court judge found Burton guilty of drug dealing, aggravated possession of cocaine, possession of marijuana (one count),[5] and possession of drug paraphernalia. A43 (Crim. D.I. 20); A103. On December 11, 2013, the State filed a motion to declare Burton a habitual offender pursuant to 11 *Del. C.* § 4214(b), which the court granted. A43 (Crim. D.I. 21, 22). On December

[5] The State conceded that the two counts of possession of marijuana should merge. A102.

13, 2013, the Superior Court sentenced Burton as a habitual offender to an aggregate life term plus two years.[6] A43 (Crim. D.I. 23); A104–05. Burton appealed.

On April 30, 2014, while his appeal was pending in the Delaware Supreme Court, the Office of the Public Defender filed a motion for postconviction relief on Burton's behalf pursuant to Superior Court Criminal Rule 61 ("Rule 61") based upon misconduct discovered in February 2014 at the OCME.[7] A44 (Crim. D.I. 33). The

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[6] In 2016, the Delaware General Assembly significantly revised the habitual offender statute, 11 *Del. C.* § 4214. *See* 80 *Del. Laws*, c. 321. Among other things, the revisions removed drug offenses from the list of predicate violent offenses and made the effects of the statute retroactive, such that those affected by the changes can seek relief under 11 *Del. C.* § 4214(f) after they have served a portion of their sentence. *Id*. It is likely that Burton would be eligible under the new statute to seek a shorter sentence once he has served his required minimum sentence.

[7] *See Ira Brown v. State*, 108 A.3d 1201, 1204-05 (Del. 2015):

> In February 2014, the Delaware State Police ("DSP") and the Department of Justice ("DOJ") began an investigation into criminal misconduct occurring in the Controlled Substances Unit of the OCME. The investigation revealed that some drug evidence sent to the OCME for testing had been stolen by OCME employees in some cases and was unaccounted for in other cases. Oversight of the lab had been lacking, and security procedures had not been followed. One employee was accused of "dry labbing" (or declaring a test result without actually conducting a test of the evidence) in several cases. . . . Three OCME employees [were] suspended (two of those employees [were] criminally indicted), and the Chief Medical Examiner [was] fired.
>
> There is no evidence to suggest that OCME employees tampered with drug evidence by adding known controlled substances to the evidence they received for testing in order to achieve positive results and secure convictions. That is, there is no evidence that the OCME staff "planted" evidence to wrongly obtain convictions. Rather, the

Delaware reme C urt granted Burton's request to stay his appeal and remanded the case to the Superior Court for Burton to file motions to supplement the record and for a new trial. D.I. 22-4 at 26–27 of 215. On January 30, 2015, Burton moved for a new trial in the Superior Court, in which he argued he should be granted a new trial because the State had suppressed material impeachment evidence of OCME corruption. A46 (Crim. D.I. 39); D.I. 22-4 at 188–207 of 215.

The Superior Court denied Burton's motion on December 1, 2015. A48 (Crim. D.I. 49); *State v. Burton*, Del. Super. Ct., ID No. 1301022871, Op. & Order, Scott, J. (Nov. 30, 2015); D.I. 22-6 at 65–74 of 127. The court held that Burton had not established the necessity for a new trial because he was unable to provide specific evidence of a discrepancy in the weight, volume, or contents of the drugs seized and tested by the OCME, which was a threshold requirement set forth in another Superior Court case, *State v. Irwin*, 2014 WL 6734821 (Del. Super. Ct. Nov. 17, 2014).[8] D.I. 22-6 at 68–70 of 127 (*Burton* New Trial Op.). The court also held that "Burton waived his right to test the chain of custody of the drug evidence when he knowingly,

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employees who stole the evidence did so because it in fact consisted of illegal narcotics that they could resell or take for personal use.

[8] In *Irwin*, the court held that a defendant would only be permitted to question the State's witnesses about or present evidence of the OCME investigation if there was evidence that the packaging submitted by the police had been tampered with or "a discrepancy in weight, volume or contents from that described by the seizing officer." 2014 WL 6734821, at *12.

intelligently, and voluntarily agreed to a stipulated bench trial instead of a jury trial." *Id.* 72. Burton appealed. On June 8, 2016, the Delaware Supreme Court affirmed Burton's convictions and the Superior Court's denial of his motion for a new trial. *Burton v. State*, 2016 WL 3381847, at *1 (Del. Jun. 8, 2016).

On August 11, 2016, Burton, acting *pro se*, filed a motion for postconviction relief pursuant to Rule 61. A48 (Crim. D.I. 53). On September 27, 2016, the Superior Court denied Burton's April 2014 postconviction motion. A48–49 (Crim. D.I. 57). On October 21, 2016, at Burton's request, the Superior Court appointed counsel to assist Burton in postconviction. A48–49 (Crim. D.I. 54, 58). On August 17, 2017, appointed counsel filed an amended motion for postconviction relief and memorandum of law. A50 (Crim. D.I. 63, 64); A108–91. Thereafter, Burton's trial counsel submitted an affidavit addressing Burton's postconviction claim of ineffective assistance of counsel. A50 (Crim. D.I. 70); A192–96. The Superior Court denied Burton's postconviction motion on April 30, 2018. *State v. Burton*, 2018 WL 2077325, at *5 (Del. Super. Ct. Apr. 30, 2018). Burton appealed and the Delaware Supreme Court affirmed the lower court's decision denying relief on December 26, 2018. *Burton v. State*, 2018 WL 6824636 (Del. Dec. 26, 2018).

On August 7, 2019, Burton filed a Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody in the District Court for the District of Delaware. D.I. 2. He filed an amended petition on December 24, 2019 (A327–

65) and an opening brief in support of his amended petition on May 14, 2021 (A366–421). The District Court denied Burton's petition on October 27, 2022. *Burton v. May*, C.A. No. 19-1475, 2022 WL 15443680 (D. Del. Oct. 27, 2022); A3–33. The court declined to issue a certificate of appealability. A3, 33.

On November 28, 2022, Burton filed a notice of appeal from the District Court's denial of his habeas petition (A1–2) and, thereafter, filed an application for a certificate of appealability under 28 U.S.C. § 2253(c). On June 12, 2023, this Court granted a certificate of appealability "because jurists of reason could debate the merit of [Burton's] claim that trial counsel provided ineffective assistance by stipulating to the prosecution's evidence without Burton's consent." A34. On July 24, 2023, Burton, through appointed counsel, filed his Opening Brief and Appendix.

B. The Delaware Courts' Denial of Burton's Ineffective Assistance of Counsel Claim

In his amended motion for postconviction relief filed in the Delaware Superior Court, Burton claimed that trial counsel provided ineffective assistance by stipulating to the State's evidence without his knowledge or consent. A178. He asserted that when he waived his right to a jury trial, he did not know that trial counsel also intended to stipulate to the State's evidence, and denied that trial counsel ever discussed the stipulation with him. A179. Burton claimed that, in stipulating to the State's evidence, trial counsel conceded most of the elements for

the co ts o which he was convicted, d d n t p t the prosecution's case t a meaningful adversarial test, and permitted the inclusion of evidence that would have otherwise been inadmissible, all of which deprived him of his constitutional right to make fundamental decisions in his case. A180–82. Burton further alleged that he received no benefit in exchange for the stipulation, and trial counsel thus did not have a sound trial strategy for agreeing to it. A183–84. Burton also claimed that his counsel's failure to subject the State's case to meaningful adversarial testing amounted to structural error, or, in the alternative, he was prejudiced by trial counsel's stipulation to the evidence because counsel waived his right, without his knowledge, to meaningfully oppose the State's case against him or to later challenge the drug evidence after the issues at the OCME were revealed. A186–89.

The Superior Court denied Burton's claim, describing it as an assertion that "trial counsel was ineffective in failing to contest the evidence presented at trial thereby violating his constitutional rights." *Burton*, 2018 WL 2077325, at *3. The court found that trial counsel's "decision to rely on the record developed at the suppression hearing in order to preserve that issue for appeal by proceeding with a bench trial [was] a strategic one." *Id.* at *4. The court noted that trial counsel stated that he would have discussed the decision to agree to a bench trial and the consequences of doing so with Burton, and that information about the OCME scandal was not known until after Burton's trial. *Id*. Thus, viewing counsel's actions

from his perspective at the time, his decision to agree to the stipulated bench trial was reasonable. *Id*. Moreover, the court noted it had conducted a colloquy with Burton and found that his decision to waive his right to a jury trial was made knowingly, intelligently, and voluntarily. *Id.* And the decision was strategically made after Burton and his attorney discussed it. *Id*. The court held that Burton did not show prejudice from trial counsel's actions, noting Burton "failed to offer any evidence that a more favorable outcome was substantially likely but for the ineffective assistance of counsel." *Id*. The Superior Court did not address Burton's allegation of structural error, analyzing the claim instead under the traditional *Strickland v. Washington*, 466 U.S. 668 (1984) ("*Strickland*") two-prong test.

On appeal, Burton made the same claim, but he also cited a United States Supreme Court case, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) ("*McCoy*"), which was decided after the Superior Court denied his postconviction relief motion.[9] *See* A283–93. The Delaware Supreme Court affirmed the Superior Court's decision, finding that the Superior Court had correctly decided that Burton could not show prejudice and that, for that reason, it did not need to address the issue of whether

[9] In *McCoy*, the United States Supreme Court found structural error based on a violation of the defendant's right to autonomy when the defendant's trial counsel conceded guilt to three murders during the guilt phase of trial, over the defendant's vociferous insistence that he had not engaged in the charged acts and his adamant opposition to any concession of guilt. *McCoy*, 138 S. Ct. at 1505.

counsel's representation fell below an objective standard of reasonableness. *Burton*, 2018 WL 6824636, at *2. The Delaware Supreme Court did not address whether the *McCoy* decision applied to Burton's case.

C. The District Court's Denial of Burton's Ineffective Assistance of Counsel Claim.

Burton claimed in his habeas petition that the Delaware courts' factual determination that "Burton consented to the stipulated bench trial by waiving his right to a jury trial" and their legal determination that he was not prejudiced by the stipulation to the evidence were unreasonable because "they are refuted by both the factual record and a reasonable application of the *Strickland* standard and such conclusions ignore clearly established federal law." A345–46. Burton further asserted that the State courts erred in ignoring the clearly established precedent of *McCoy*, which would have made clear to them "that an unconstitutional violation of a defendant's autonomy constitutes a structural error not subject to *Strickland's* prejudice requirement." A350. In any case, Burton claimed, the State courts unreasonably applied *Strickland's* prejudice prong because they "failed to appreciate the fact that because defense counsel's stipulation included consent to rely upon the lengthy record made at the suppression hearing for purposes of trial, numerous pages of factual testimony would have been otherwise inadmissible at trial, such as the fact that [] Burton was on probation . . . , were in fact admitted." A355. In addition,

when the OCME misconduct was disclosed in 2012, "Burton was denied a new trial and/or re-testing of the alleged drug evidence, because trial counsel had stipulated to the drug evidence and chain of custody." *Id.* Burton argued that the State courts failed to address "whether counsel's objectively unreasonable stipulation to the State's evidence without [his] consent and in light of [his] plea of not guilty infringed on [his] constitutional right to a fair trial, to meaningfully oppose the prosecution's case and to make fundamental decisions concerning his case, in violation of the Sixth and Fourteenth Amendments to the United States Constitution." A356.

The District Court separately addressed Burton's ineffective assistance of counsel and *McCoy*/autonomy claims. *See Burton*, 2022 WL 15443680, at *6; A14, 20–21. However, the court first found that the State courts had "reasonably determined the facts in light of the evidence presented when concluding that [Burton] knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence," (*id.* at *8; A15–19), concluding:

> [t]he record reflects that [Burton] understood he was waiving his right to a jury trial and stipulating to the State's drug evidence, and that he only objected to defense counsel's strategy of stipulating to the State's evidence after the verdict. Given [Burton's] failure to provide clear and convincing evidence to the contrary, the Court defers to the Delaware state courts' factual findings that [Burton] consented to defense counsel's stipulation.

Id. at *9; A19.

The District Court reviewed Burton's *McCoy*/autonomy claim *de novo* because the Delaware courts had not addressed it. *Id.* The court concluded that, "assuming, *arguendo*, that the right of client autonomy acknowledged in *McCoy* is retroactively applicable," the facts of Burton's case were distinguishable from *McCoy* and, thus, Burton's case was not one of structural error, "but rather, a case where defense counsel's decision to stipulate to the State's evidence should be assessed under *Strickland*." *Id.* at *9–10; A20–21.

The court then determined that, under 28 U.S.C. § 2254(d)(1), the Delaware courts reasonably viewed Burton's claim as a standard ineffective assistance of trial counsel claim under *Strickland* rather than as a violation of autonomy under *McCoy* and that they "reasonably applied *Strickland* in concluding that [Burton] was not prejudiced by trial counsel's stipulation and, therefore, defense counsel did not provide constitutionally ineffective assistance." *Id.* at *11.

SUMMAR F THE ARGUMEN

The Delaware courts' denial of Burton's claim that trial counsel was ineffective for stipulating to the State's evidence without his consent was not contrary to nor an unreasonable determination of clearly established federal law. Nor was it based on an unreasonable determination of the facts. *Strickland* was the appropriate clearly established federal law applicable to Burton's claim, not *McCoy* because the facts and circumstances of *McCoy* are materially distinguishable from Burton's case, and *McCoy*, decided after Burton's conviction, is not retroactively applicable. Furthermore, the courts' factual conclusions were supported by the record and their determination that Burton consented to the stipulated trial was reasonable. Burton presented no clear and convincing evidence to rebut the presumption of correctness to which those determinations are entitled. Because he provided no credible evidence that he did not consent to the stipulated trial, Burton could not show that trial counsel's decision to stipulate to the State's evidence without his consent or knowledge was objectively unreasonable. The Delaware courts' determination that Burton could not show prejudice was also not objectively unreasonable. The courts appropriately applied *Strickland* in finding Burton had not shown that, but for trial counsel's alleged deficient performance, the outcome of the proceedings would have been different.

ARGUM

Standard and Scope of Review

This Court's review of the District Court's decision is plenary because no evidentiary hearing was held. *Lewis v. Horn,* 581 F.3d 92, 100 (3d Cir. 2009). Thus, this Court reviews the Delaware courts' decisions under "the same standard that the District Court was required to apply," namely the AEDPA. *Id.* (quotation omitted). This Court exercises plenary review over a district court's legal conclusions, including determinations of procedural default. *Hull v. Kyler*, 190 F.3d 88, 97 (3d Cir. 1999); *Tillery v. Horn*, 142 F. App'x 66, 67 (3d Cir. 2005). A district court's factual findings are reviewed for clear error. *Ross v. Varano*, 712 F.3d 784, 795 (3d Cir. 2013) (citations omitted). Where, however, the facts are not in dispute, "[the Court] review[s] the application of the equitable principles implicated on the appeal on a de novo standard." *Id.* (citing *Muchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012)).

A. Deferential Standard of Review of State Court's Decision on the Merits

AEDPA imposes a "highly deferential standard for evaluating state-court rulings" on *habeas* review, which "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett,* 559 U.S. 766, 773 (2010) (quotations omitted). AEDPA's "difficult to meet" standard, *Harrington v. Richter,* 562 U.S. 86, 102

(2011), e tablish "a substantially higher threshold for obtaining relief than *de novo* review," *Renico,* 559 U.S. at 773 (quotation omitted). Thus, AEDPA "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter,* 562 U.S. at 102–03 (quotation omitted).

AEDPA prohibits federal courts from granting habeas relief unless the state court's decision "was contrary to" federal law then clearly established in the holdings of the United States Supreme Court, or "involved an unreasonable application of" such law, or "was based on an unreasonable determination of the facts" in light of the record before the state court. 28 U.S.C. § 2254(d)(1), (2); *see Richter,* 562 U.S. at 100 (citing *Williams v. Taylor,* 529 U.S. 362, 412 (2000)). Where a State's highest court affirms a lower court decision without explanation, this Court analyzes, or "looks through" to, the last-reasoned decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1193, 1195 (2018) (noting federal habeas law employs a "look through presumption" "to "look through" the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision").

A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth" in Supreme Court precedent, *Williams,* 529 U.S. at 405, or if it "confronts a set of facts that are

materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different" from that reached by the Supreme Court, *id.* at 406.

A state court decision is "an unreasonable application of" clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id*. at 407–08. This Court may not grant habeas relief merely because it believes that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Renico,* 559 U.S. at 773 (quotation omitted). "Rather, that application must be objectively unreasonable." *Id.* (quotation omitted). Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter,* 562 U.S. at 102 (citation omitted).

A state court decision is based on "an unreasonable determination of the facts" only if the state court's factual findings are "'objectively unreasonable in light of the evidence presented in the state-court proceeding.'" *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003) (quoting 28 U.S.C. § 2254(d)(2)). Moreover, the factual determinations of state trial and appellate courts are presumed to be correct. *Duncan v. Morton,* 256 F.3d 189, 196 (3d Cir. 2001). This presumption applies to implicit factual findings as well. *Washington v. Sobina*, 509 F.3d 613, 621 (3d Cir. 2007). The petitioner bears the burden of "rebutting the presumption by 'clear and

convincing evidence.'" *Rice v. Collins,* 546 U.S. 333, 339 (2006) (quoting 28 U.S.C. § 2254(e)(1)).

The Court's analysis under AEDPA first requires a determination of "what arguments or theories supported or ... could have supported, the state court's decision." *Richter,* 562 U.S. at 102. The Court must then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* The Court may only grant habeas relief if the petitioner demonstrates that the state court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103.

B. Clearly Established Law Governing Claims of Ineffective Assistance of Counsel

The clearly established federal law that governs ineffective assistance of counsel claims is the two-prong test enunciated by *Strickland*, 466 U.S. 668, and its progeny. *See Wiggins v. Smith*, 539 U.S. 510 (2003). First, a petitioner must demonstrate that counsel's performance at trial or on appeal fell below "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In evaluating whether counsel performed reasonably, a court "must be highly deferential." *Id*. at 689. Therefore, a petitioner "must overcome the presumption that, under the

circumstances, the challenged action might be considered sound trial strategy." *Id*. (quotation omitted). Second, a petitioner must illustrate that counsel's ineffective performance caused prejudice. *See id.* at 687. This Court has stated that prejudice occurs where "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (citing *Strickland*, 466 U.S. at 668). *See also Hill v. Lockhart*, 474 U.S. 52, 58 (1985). A court can choose to address the prejudice prong before the deficient performance prong and reject an ineffective assistance of counsel claim solely on the ground that the defendant was not prejudiced. *See Strickland*, 466 U.S. at 698.

When the claim concerns ineffective assistance of counsel, AEDPA's review is "doubly deferential." *Cullen v. Pinholster,* 563 U.S. 170, 190 (2011). Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow,* 571 U.S. 12, 22 (2013) (quoting *Strickland,* 466 U.S. at 690 (internal quotation marks omitted)). The relevant question when analyzing counsel's performance under the "doubly deferential lens" "is not whether counsel's actions were reasonable, [but rather] whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105. In turn, when assessing prejudice under *Strickland*, the question is "whether it is reasonably likely the result would

have been different" but for counsel's performance, and the "likelihood of a different result must be substantial, not just conceivable." *Id.* Finally, when viewing a state court's determination that a *Strickland* claim lacks merit through the lens of § 2254(d), federal habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 101. In such circumstances, federal courts are to afford "both the state court and the defense attorney the benefit of the doubt." *Titlow*, 571 U.S. at 15 (citing *Pinholster*, 563 U.S. at 189).

C. *Florida v. Nixon*

In *Florida v. Nixon*, 543 U.S. 175, 178 (2004) ("*Nixon*"), the United States Supreme Court addressed a situation in which defense counsel in a capital case made a strategic decision at the guilt phase of trial to concede that the defendant committed the alleged murder so that counsel could instead focus on sparing the defendant's life during the penalty phase. Defense counsel conferred with his client about the strategy, but the defendant neither consented nor objected to it. *Id.* at 189. In a postconviction relief motion, Nixon claimed his trial counsel had rendered ineffective assistance of counsel by conceding his guilt without obtaining his express consent and that prejudice must be presumed under the standard enunciated in *United States v. Cronic*, 466 U.S. 648 (1984) ("*Cronic*"), because counsel's strategy "left the prosecution's case unexposed to 'meaningful adversarial testing.'" *Nixon*,

543 U.S. 85 itation omitted). The United S es Supreme Court held that rial counsel's strategy was not the functional equivalent of a guilty plea and, thus, did not require Nixon's affirmative, explicit acceptance. *Id.* at 188. Therefore, the appropriate standard to apply was not *Cronic*, but instead *Strickland*'s traditional standard. *Id.*

D. *McCoy v. Louisiana*

On May 14, 2018, after the Delaware Superior Court had denied Burton's postconviction relief motion but before Burton had filed his opening brief on appeal, the United States Supreme Court decided *McCoy v. Louisiana*, 138 S. Ct. 1500. In *McCoy*, another capital case, the Court sought to answer the question "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.* at 1507. There, the trial court permitted defense counsel to concede that McCoy had committed the three alleged murders over McCoy's vociferous and adamant objections. *Id.* at 1505. Defense counsel believed that, because the evidence of guilt was so overwhelming, the only way to avoid a death sentence was to concede guilt. *Id.* at 1506. The Supreme Court held:

> A defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the *Assistance* of counsel for *his* defence," the Sixth Amendment so demands. With individual

> liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

Id. at 1505 (emphasis in original). The Court further concluded that "counsel's admission of a client's guilt over the client's express objection is error structural in kind." *Id.* at 1511.

II. The Delaware Courts' Denial of Burton's Ineffective Assistance Claim Under *Strickland* Was Not Contrary to or an Unreasonable Determination of Clearly Established Federal Law and it Was Based on a Reasonable Determination of the Facts.

Here, Burton argued in the State courts that trial counsel was ineffective for stipulating to the State's evidence without his consent. The crux of Burton's argument was that he was not aware of and did not consent to trial counsel's stipulation to that evidence. *See* A179. In so stipulating, Burton claimed, counsel had deprived him of his constitutional right to make the fundamental decisions concerning his case. A181. Although both the Delaware Superior and Supreme Courts interpreted Burton's claim as one of ineffectiveness for failing to contest the State's evidence, they also found that Burton had consented to the stipulated trial. The State courts' factual findings underlying that conclusion are entitled to a presumption of correctness. Moreover, the courts' conclusions that Burton consented to the stipulated trial and that Burton could not show prejudice from the

alleged deficient performance were not objectively unreasonable. The courts' failure to separately address whether trial counsel violated Burton's right to the Sixth Amendment right to assistance of counsel as it pertains to a defendant's right to insist that counsel refrain from admitting guilt, as discussed in *McCoy*, did not amount to a contradiction to nor an unreasonable application of clearly established federal law.

A. *Strickland* Was the Clearly Established Federal Law Applicable to Burton's Claim, Not *McCoy*.

A state court decision is contrary to clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases," *Williams*, 529 U.S. at 405, or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different" from that reached by the Supreme Court, *id.* at 406. A state court decision is "an unreasonable application of" clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id*. at 407–08.

1. The Facts and Circumstances of *McCoy* are Materially Distinguishable From Burton's Case.

Burton is incorrect that the clearly established federal law applicable to his case is the United States Supreme Court's jurisprudence on the violation of a defendant's autonomy under *McCoy* as opposed to its precedent governing ineffective assistance of counsel claims under *Strickland* and its progeny. The

United States Supreme Court has held that while an attorney "has a duty to consult with a client regarding 'important decisions,' including questions of overarching defense strategy," "[t]hat obligation does not require counsel to obtain a defendant's consent to 'every tactical decision.'" *Nixon*, 543 U.S. at 187–88 (quoting *Strickland*, 466 U.S. at 688; *Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988)). Some decisions including whether to plead guilty, waive a jury, testify on one's behalf, or take an appeal, must be made by the defendant himself. *Id*. (citing *Jones v. Barnes,* 463 U.S. 745, 751 (1983); *Wainwright v. Sykes,* 433 U.S. 72, 93, n. 1 (1977)). For those decisions, "an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Id.*

It appears that the United States Supreme Court's recent *McCoy* decision added a defendant's autonomy to determine the overarching objective of his defense to the list of decisions reserved for the client. *McCoy*, 138 S. Ct. at 1508 (noting that the category of decisions reserved for the client—whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal—includes the "[a]utonomy to decide that the objective of the defense is to assert innocence"). What the *McCoy* Court did not decide, however, is whether a defendant's tacit acquiescence to a "stipulated trial"[10] violates his constitutional rights or if explicit

[10] Although Respondents and the parties below referred to what occurred here as a stipulated trial, there is no definition of what that means. In this case, the State

consent is required for a defendant to waive his right to decide that the objective of his defense is to assert innocence. Indeed, the *McCoy* decision did not overturn *Nixon.*

In *Nixon*, the United States Supreme Court held that "when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, no blanket rule demands the defendant's explicit consent to implementation of that strategy." 543 U.S. at 181, 192. In *McCoy*, the Court pointed out that "in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." 138 S. Ct. at 1505. Thus, *McCoy* did not create a new rule that anytime defense counsel agrees to a trial based on stipulated evidence without obtaining the defendant's affirmative, explicit consent that counsel has, therefore, violated the defendant's Sixth Amendment right to autonomy. And this is not a case in which the defendant objected to trial counsel's strategy of stipulating to the evidence. Burton claims that he did not know of or agree to the strategy. But the

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presented evidence sufficient to prove the elements of each of the charges beyond a reasonable doubt. In reality, trial counsel did not actually stipulate to that evidence; however, he did not object to the admission of the exhibits, otherwise object to the evidence, or present any argument to suggest that the State had failed to meet its burden of proof. This Court noted in *United States v. Wilson*, 960 F.3d 136, 143 (3d Cir. 2020), that the *McCoy* Court did not explain what kinds of concessions count as "conceding guilt."

Delaware urts found his laim f la k of consent lacked c edibility and hat finding is entitled to deference.

Furthermore, although, the United States Supreme Court has held that "a defendant's tacit acquiescence in the decision to plead [guilty] is insufficient to render the plea valid," *Nixon*, 543 U.S. at 187–88 (citing *Boykin v. Alabama*, 395 U.S. 238, 245 (1969)), it has not held that a factual situation "materially indistinguishable" from the one at issue in Burton's case is tantamount to a guilty plea.[11] *See*, *e.g.*, *Brown v. Coleman*, 2013 WL 3967558, at *10 (W.D. Pa. Aug. 1, 2013) ("Petitioner's stipulated non-jury trial was not the equivalent of a guilty plea."). In *Nixon*, for example, the Court held that defense counsel's concession was not the functional equivalent of a guilty plea because Nixon retained the rights accorded a defendant in a criminal trial. 543 U.S. at 188. Among other things, the State was still "obliged to present . . . competent, admissible evidence establishing the essential elements of the crimes," the defense reserved the right to cross-examine witnesses, and the concession of guilt would not hinder the defendant's right to appeal. *Id.* *See also Boykin*, 395 U.S. at 242–43 (noting a guilty plea is "more than

[11] "A state-court decision is 'contrary to' clearly established federal law if the state court . . . (2) confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result.'" *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004) (quoting *Williams*, 529 U.S. at 405–06).

a confession which admits that the accused did various acts," it is a "stipulation that no proof by the prosecution need be advanced"). So too, here. Trial counsel did not confess guilt to the charges. The State was still required to present sufficient evidence to prove each of the elements of the charges beyond a reasonable doubt and the court still had to find that the State had met that burden. Moreover, trial counsel reserved the right to cross-examine witnesses and Burton could have testified (although he chose not to). *See* A102 (trial counsel's cross-examination of State's witness and discussion of McCoy's decision not to testify). Most importantly, Burton reserved his right to appeal the Superior Court's decision denying his motion to suppress the drug evidence.

The United States Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [it]." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (internal quotations omitted); *see Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (internal quotations omitted)). Thus, even if an argument could be made that *McCoy* should retroactively apply to Burton's case, it is distinguishable and does not constitute "clearly

established Federal law" that would dictate a different conclusion than the one reached by the Delaware courts.

During McCoy's trial, his attorney conceded that McCoy had committed the murders for which he was on trial. 138 S. Ct. at 1506–07. McCoy objected and testified on his own behalf that he was innocent. *Id.* The United States Supreme Court held that when an attorney concedes guilt over his client's express objection, it amounts to structural error. *Id.* at 1511. Here, not only did trial counsel not "concede" Burton's guilt, but also Burton never voiced any opposition to his attorney's decision to stipulate to the State's evidence. *Cf. Wilson*, 960 F.3d at 143 (noting the *McCoy* Court did not explain what kinds of concessions count as "conceding guilt"); *see id.* at 144 (distinguishing *McCoy* because there was no evidence that the defendant either objected to the stipulation or demanded that counsel not concede the element of the crime). In contrast, the *McCoy* Court noted that McCoy "opposed [his attorney's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *McCoy*, 138 S. Ct. at 1509.

The record here established that trial counsel represented to the Superior Court, in Burton's presence, that he had met with Burton on two occasions and discussed with him the nature of a stipulated trial and that, for the purpose of trial, they were going to rely on the record from the suppression hearing, "plus the

additional record the State [would] make with respect to where the drugs were found and what they were and how much was found."[12] A99. Burton remained silent, at no point protesting counsel's stipulation to the evidence.

Finally, it should be noted that *McCoy* was heard on direct appeal, not on collateral review, and the court there was addressing a claim of whether counsel violated McCoy's constitutional rights by conceding guilt over McCoy's objection, not a claim of ineffective assistance of trial counsel. *See McCoy*, 138 S. Ct. at 1507. *McCoy* is factually and circumstantially distinguishable from Burton's case and, thus, the Delaware Supreme court did not unreasonably apply clearly established federal law in failing to address *McCoy* in denying Burton's ineffective assistance of counsel claim.

2. *McCoy* is Not Retroactively Applicable to Burton's Case.

Even if this Court were to find *McCoy* the relevant precedent to Burton's case, the Delaware courts did not err in failing to apply it because *McCoy* is not retroactively applicable. The *Teague* doctrine bars retroactive application on collateral review of any new constitutional rule of criminal procedure that had not been announced at the time the movant's conviction became final. *See Edwards v.*

[12] As noted above, although trial counsel indicated that they would be relying on the record from the suppression hearing, no such evidence was introduced at trial and there is no indication in the record that the Superior Court relied on the suppression hearing record in finding Burton guilty of the charges.

Vannoy, 141 S. Ct. 1547, 1551 (2021) ("This Court has repeatedly stated that a decision announcing a new rule of criminal procedure ordinarily does not apply retroactively on federal collateral review." (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)). This Court has the discretion to consider this issue despite the fact that it was not raised or addressed below. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (recognizing that nonretroactivity principle is non-jurisdictional, but that "a federal court may, but need not, decline to apply *Teague* if the State does not argue it," but it must do so if the State does argue it (citing *Collins v. Youngblood,* 497 U.S. 37, 41 (1990); *Schiro v. Farley,* 510 U.S. 222, 228–229 (1994); *Graham v. Collins,* 506 U.S. 461, 466–467 (1993)).

In *Edwards*, the United States Supreme Court recognized that where the new rule is one of criminal procedure, no exceptions apply. *See id.* at 1555, n.3 (distinguishing substantive from procedural rules and noting that new substantive rules usually apply retroactively on federal collateral review); *id.* at 1560 (recognizing that the "watershed exception" is moribund). A new rule is a rule that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final." *Teague,* 489 U.S. at 301. At least one other circuit has posited that *McCoy* recognized a new procedural rule. *See Smith v. Stein*, 982 F.3d 229, 233–34 (4th Cir. 2020). That court was swayed, in part, by the fact that the

McCoy m jority "placed c nceding guilt as am ng the types of decisions ese ved for clients under the Sixth Amendment." *Id.* at 234. In addition, the holding in *McCoy* did not seem to be dictated by any controlling precedent, nor was the holding previously apparent to all reasonable jurists, especially given *Nixon's* precedent. *See Smith*, 982 F.3d at 234 (noting that the *McCoy* majority did not cite any controlling precedent as dictating its holding and opining that the rule appeared to have been susceptible to debate among reasonable minds); *cf. Edwards*, 141 S.Ct. at 1555–56 (noting jury-unanimity requirement announced in *Ramos* was a new rule because it was not dictated by precedent or apparent to all reasonable jurists when Edwards' conviction became final).

The rule announced in *McCoy*, that a defendant has the right to insist that his counsel refrain from admitting guilt, was not dictated by federal precedent existing at the time of Burton's conviction in 2013. Thus, it was a new rule. The rule was also procedural, not substantive. A rule is substantive if it "alters the range of conduct or the class of persons that the law punishes" or "narrow[s] the scope of a criminal statute" or "place[s] particular conduct or persons covered by [a] statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, at 351–53 (2004). "Substantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery v. La.*, 577 U.S. 190, 201 (2016), *as revised* (Jan. 27, 2016).

In contrast, a rule is procedural if it affects "only the manner of determining the defendant's culpability." *Schriro*, 542 U.S. at 353. "Those rules 'merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.'" *Montgomery*, 577 U.S. at 201 (quoting *Summerlin*, 542 U.S. at 352). The rule in *McCoy* fit the latter category, a sort affecting only the manner of determining Burton's culpability. *See Smith*, 982 F.3d at 233 (noting that the parties recognized that the *McCoy* rule is not substantive). Because the rule in *McCoy* was both new, procedural, and did not exist at the time Burton was convicted in 2013, it cannot be applied retroactively to Burton's postconviction and habeas claims.

B. The Delaware Courts Did Not Unreasonably Apply *Strickland* in Denying Burton's Ineffective Assistance of Counsel Claim.

Burton argued in the State courts that his counsel was ineffective for stipulating to the State's evidence without his consent and that his counsel's decision to do so could not have been strategic. The Delaware courts disagreed and found trial counsel's decision to stipulate to the evidence strategic and that Burton had not shown prejudice. In so finding, the Delaware Supreme Court noted that Burton had knowingly, intelligently, and voluntarily consented to the stipulation. The Delaware

courts' application of *Strickland* to the facts of Burton's case was not objectively unreasonable.[13] Nor were their findings of fact objectively unreasonable.

1. The Delaware Courts' Finding that Burton Consented to the Stipulation of Facts Was Not Objectively Unreasonable.

On the day scheduled for trial, Burton's counsel advised the Superior Court that Burton had elected to waive his right to a jury trial. A99. Burton executed a waiver of jury trial form. A97. Trial counsel advised the court that Burton made this decision after meeting with him on two occasions and discussing the nature of a stipulated bench trial. A99. Counsel said that he and Burton believed that whether the evidence should have been suppressed was the most important issue in his case. *Id*. Counsel also advised that Burton would rely on the "pretty thorough record" made in the Superior Court regarding the suppression issue. *Id*. The court then engaged in a colloquy with Burton about his decision to waive his right to a jury trial. A99–100. Burton said he had consulted with his trial counsel regarding his decision and did not wish to discuss it any further with him. A100. Burton

[13] To the extent the Delaware Supreme Court relied on the Superior Court's reasoning, federal courts look to the last explained state court judgment on the claim. *See Johnson v. Pinchak*, 392 F.3d 551, 557 (3d Cir. 2004) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801–02, 805 (1991) (holding a federal court should look to the "last *explained* state-court judgment on the ... claim" to determine whether it "fairly appears to rest primarily on federal law" or instead relies upon a state procedural bar to deny relief)).

acknowledged that the final decision belonged to him. *Id*. Burton confirmed his decision, which the court found to be knowing, intelligent, and voluntary. *Id*.

Further, in his affidavit responding to Burton's ineffective assistance of counsel claim, trial counsel denied that he stipulated to the State's evidence without Burton's knowledge or consent:

> The [Public Defender's] database reflects that I went to the prison on September 23, 2013, and "discussed plea offer and prospects for appeal for suppression issue". Based on that data entry, I can only assume that I explained to Mr. Burton that the most expeditious way to preserve an appellate issue was to conduct a bench trial and allow the Court to rely upon much of the record developed at the client's suppression hearing in August [2013]. It would have been my practice to explain to the client that, at such a stipulated bench trial, the allegations of the police officers would largely go unchallenged in cross-examination, because the controlled substance at issue was clearly found in the living space of the defendant (which he shared with no one else) and I had no good faith reason, based on the record as I understood it, to challenge the findings of the Medical Examiner's Office concerning the type and amount of controlled substance involved in the case. Keep in mind that the OCME scandal with respect to stealing drugs and dry-labbing tests had not been exposed. Prior to going into court, I had the defendant execute a waiver of his right to a jury trial and probably conducted some explanation as to how the trial would proceed before [the trial judge].

A194–95.

The record reflects that Burton understood that he was waiving his right to a jury trial and stipulating to the State's drug evidence. At no time during the colloquy or trial did Burton indicate that he did not understand the stipulation, counsel had misinformed him, or counsel had misstated Burton's decision. Nor did he argue on

direct appeal or in his motion for a new trial that his stipulation to the State's evidence was involuntary. *See* D.I. 22; D.I. 22-4 at 188–207 of 215. Burton's bald assertions that, in hindsight, he did not consent to his attorney's stipulation to the State's evidence are not sufficient to rebut the presumption of correctness applied to the Delaware courts' factual findings. *Cf. Campbell v. Vaughn*, 209 F.3d 280, 291 (3d Cir. 2000) (finding that because a reasonable fact-finder could discount petitioner's testimony and credit trial counsel's, the state court did not make an unreasonable determination of the facts in light of the evidence presented when it implicitly reached that conclusion); *United States v. Williams*, 403 F. App'x 707, 708 (3d Cir. 2010) (noting there was no evidence in the record that the defendant dissented from his counsel's stipulation to the admissibility of the laboratory evidence before or during trial); *see Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 850 n.9 (3d Cir. 2017) (noting credibility findings are presumed correct absent clear and convincing evidence to the contrary).

It is evident from the Delaware Courts' decisions that they at least implicitly held that Burton consented to trial counsel's stipulation to the State's evidence. "Implicit factual findings are presumed correct under [28 U.S.C.] § 2254(e)(1) to the same extent as express factual findings." *Taylor v. Horn*, 504 F.3d 416, 433 (3d Cir. 2007) (citing *Campbell,* 209 F.3d at 285–86; *accord Howell v. Superintendent Rockview SCI*, 939 F.3d 260, 266, n.3 (3d Cir. 2019). The Superior Court noted:

> The deci n to ely n the ecord developed at the uppre n hear ng in order to preserve that issue for appeal by proceeding with a bench trial is a strategic one. Counsel avers that as a matter of practice the decision to agree to a bench trial would have been clearly discussed with [Burton] and that the consequences of doing so would be evaluated.
> . . .
> Similarly, the Court conducted a colloquy with [Burton] and found that his decision to waive a trial by jury was knowing, intelligent, and voluntary. The colloquy included having discussed the decision with his attorney and understanding the benefits and potential repercussions of that decision. The decision to waive a jury trial was made strategically with the advice of counsel. To claim now that the decision to waive a trial by jury equates to ineffective assistance of counsel is to apply the "distorting effects of hindsight" to a less than favorable outcome.

Burton, 2018 WL 2077325, at *4. Although the Superior Court did not seem directly address the exact issue Burton raised[14]—whether trial counsel was ineffective for stipulating to the State's evidence without his knowledge or consent—the court's findings that trial counsel made a strategic decision to stipulate to the State's evidence and proceed with a bench trial, and that counsel would have discussed the consequences of so proceeding with Burton amounted to an objectively reasonable finding that Burton consented to the stipulated bench trial.

[14] The Superior Court couched Burton's claim as one of ineffectiveness "in failing to contest the evidence presented at trial" and also seemed to conflate the issue of whether Burton's waiver of his right to a trial by jury was voluntary with whether counsel's decision to rely on the record from the suppression hearing was reasonable. *See Burton*, 2018 WL 2077325, at *4.

The Delaware Supreme Court upheld the lower court's decision on the basis that Burton had failed to establish prejudice from trial counsel's stipulation to the State's drug evidence. *Burton*, 2018 WL 6824636, at *2. However, in so deciding, the court noted that "Burton knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence." *Id.* The Delaware courts' factual conclusions, even their implicit conclusions, are entitled to a presumption of correctness. Although Burton now claims he did not consent to or know about the stipulation to the State's evidence, he has presented no clear and convincing evidence to rebut those presumptions. Burton stood silent while his counsel discussed stipulating to the evidence with the court. Trial counsel stated that he would have discussed the consequences of having done so with Burton. At no point during trial or on direct appeal did Burton object to how the proceedings were being or had been conducted.

Even if a state court applies an improper analysis, "the state court still may have reached the correct result, and a federal court can only grant the Great Writ if it is 'firmly convinced that a federal constitutional right has been violated.'" *Vickers*, 858 F.3d at 848–49, *as amended* (July 18, 2017) (quoting *Williams*, 529 U.S. at 389). Thus, if the Delaware courts analyzed Burton's claim "in a manner that contravenes clearly established federal law," this Court must review the merits of the claim *de*

novo "to evaluate if a constitutional violation occurred." *Id.* (citing *Lafler v. Cooper*, 566 U.S. 156, 174 (2012)).

If this Court must review Burton's claim *de novo*, the Delaware courts' implicit findings of fact are still entitled to a presumption of correctness. *See Vickers*, 858 F.3d at 850 (noting that although the Court reviews the state court's legal conclusions *de novo*, "it still 'must presume that state-court factual findings'—including its credibility findings—'are correct unless the presumption is rebutted by clear and convincing evidence'" (quoting *Breakiron v. Horn*, 642 F.3d 126, 131 (3d Cir. 2011); *Jacobs v. Horn*, 395 F.3d 92, 100 (3d Cir. 2005))). And the Court would be limited to the record available in the State court proceedings. *See Pinholster*, 563 U.S. at 185 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state court."). Moreover, when a state court rejects a petitioner's claim in postconviction proceedings on the merits, but makes no express findings, "the district judge may . . . properly assume that the state trier of fact . . . found the facts against the petitioner. *Weeks v. Snyder*, 219 F.3d 245, 258 (3d Cir. 2000) (quoting *Townsend v. Said*, 372 U.S. 293, 314 (1963)).

Here, the State court record and the Delaware courts' factual findings dictate only one result—that Burton consented to trial counsel's stipulation to the State's evidence. Burton simply presented no evidence of lack of consent during the State

court proceedings, other than his after-the-fact bald assertions. More importantly, however, because Burton provided no credible evidence that he did not consent to the stipulated trial, he could not show that trial counsel's decision to stipulate to the State's evidence without his consent or knowledge was objectively unreasonable. *Cf. Richter*, 562 U.S. at 105 ("When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.").

2. The Delaware Courts' Finding that Burton Had Not Established Prejudice Was Not Objectively Unreasonable.

As a preliminary matter, although trial counsel stated prior to and during the trial proceedings that the parties would be relying on or stipulating to the evidence from the suppression hearing, no evidence from that hearing was admitted at trial. *See* A99–102. Instead, the State presented its case through a police officer witness, the OCME evidence, and the physical drug evidence. Nothing in the record indicates that the Superior Court relied on the facts developed at the suppression hearing in finding Burton guilty after trial.[15] *See* A102–03.

[15] The judge who presided over the suppression proceedings was different from the judge who presided over the trial. *See* A54, 71, 88, 98.

The Dela e S erior Co t found Bu ton failed to sho ejudice beca se he could not overcome the overwhelming evidence of his guilt. *Burton*, 2018 WL 2077325, at *5. The court held:

> Defendant has failed to offer any evidence that a more favorable outcome was substantially likely but for the ineffective assistance of counsel. Defendant claims that repercussions stemming from the OCME scandal might be sufficient to exculpate him, but fails to acknowledge that his motion for a new trial and subsequent appeal to the Delaware Supreme Court were reviewed in light of the Court's holding in *Irwin*. Defendant's proceedings after his trial are indicative of the fact that he suffered no prejudice as a result of ineffective assistance of counsel.

Id. at *4.

The Delaware Supreme Court agreed that Burton could not show prejudice, and held that, for that reason, it need not also decide if counsel's representation fell below an objective standard of reasonableness. *Burton*, 2018 WL 6824636, at *2. The court noted:

> As the Superior Court held, it is unlikely trial counsel would have achieved anything by contesting the drug evidence. Burton knowingly, intelligently, and voluntarily agreed to stipulate to the State's drug evidence. The evidence of Burton's guilt was also overwhelming. Burton confessed to flushing cocaine down the toilet, and the drugs were seized from his room while he was present.

Id.

The Delaware courts reasonably held that the evidence against Burton was overwhelming. The drugs were discovered in a room that Burton admitted was his

own.[16] amount of cocain was greater than w at would typically be needed for person l use, and paraphernalia found in Burton's room strongly suggested that Burton was making crack cocaine and dividing it up for resale. In the face of this overwhelming evidence, Burton gained a benefit from agreeing to a stipulated trial instead of entering a guilty plea: he would be able to appeal the Superior Court's denial of his motion to suppress. *See Scarborough v. State*, 2015 WL 4606519, at *3 (Del. Jul. 30, 2015) (finding that Scarborough's knowing, intelligent, and voluntary guilty plea waived his right to appeal the suppression ruling; noting that had he wished to retain that right, he could have negotiated an agreement to hold a stipulated trial). On the other hand, Burton cannot show that the result would have been any different had he gone through with a full trial. Even if trial counsel had objected to the State's evidence, his objections would have only concerned the weight, not admissibility, of that evidence. *See Brown v. State*, 117 A.3d 568, 579–80 (Del. 2015) ("[W]hen there is no clear abuse of discretion, any breaks in the chain of custody go only to the weight, not the admissibility, of the evidence"). And trial

[16] The Delaware Supreme Court cited to the fact that Burton also admitted that he had just flushed some cocaine down the toilet. *Burton*, 2018 WL 6824636, at *2. That fact was not established at trial or during the suppression hearing; however, it was available in the arrest incident report (*see* D.I. 17-16 at 3 of 12]), which was provided to trial counsel (*see* A67) and would have been relevant to trial counsel's and his client's assessment of the evidence they faced; it was an admission that would have been admissible at a trial.

counse ould not ave known about any issu s a OCME at at ime.[17] Furthermore, Burton claimed that, because of counsel's stipulation to the suppression hearing record, inadmissible evidence was used to convict him. But contrary to his argument, there is no indication in the record that the Superior Court convicted him based on the suppression hearing record. In fact, the State presented evidence in the "stipulated trial" that would have been admissible in a more complete trial and that was sufficient to prove Burton was guilty of each of the elements of the charges on which he was convicted beyond a reasonable doubt.

As discussed above, the Delaware courts applied the correct Supreme Court precedent in analyzing Burton's claim—*Strickland*. *See Burton*, 2018 WL 2077325, at *4 (concluding that Burton had not "offer[ed] any evidence that a more favorable outcome was substantially likely but for the ineffective assistance of counsel."); *Burton*, 2018 WL 6824636, at *2 (applying *Strickland* prejudice prong). And their application of *Strickland* in finding Burton had not shown prejudice was not unreasonable. Nor was the courts' failure to apply *Cronic*'s presumption of prejudice standard to Burton's claim unreasonable. *See Nixon*, 543 U.S. at 190–91

[17] It should also be noted that the Superior Court had also denied Burton's motion for a new trial on the alternate basis that he could not meet the threshold showing that there was evidence of tampering or discrepancies in the weight or amounts of the drugs in his case. Thus, holding a full trial would not have changed the results of that ruling.

(findin *onic* not applicable to trial counsel's concession of guilt in that case and discussing how infrequently circumstances justify a presumption of ineffectiveness).

CONCLU ON

For the eas ns set forth above, Appellees respectfully request that this C urt affirm the District Court's decision below.

Respectfully submitted,

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Counsel for Appellees

Dated: September 21, 2023

N THE UN TED STATE COURT O APPE LS
FOR THE THIRD CIRCUIT

No. 22-3256

WILLIAM BURTON,
APPELLANT,

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER,
APPELLEE,

and

ATTORNEY GENERAL OF THE STATE OF DELAWARE,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE (D. Del. No. 1:19-cv-01475-MN)

REPLY BRIEF OF APPELLANT

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(302) 762-5195
Attorney for William Burton

Dated: October 26, 2023

ABLE OF CON EN
BRIEF

TABLE OF AUTHORITIES

FEDERAL CASES

STATE STATUTE

ARGUMENT

I. The factual record does not support the Respondents' assertion that the Delaware State Courts reasonably applied *Strickland* to deny Mr. Burton's claim of ineffective assistance of counsel.

It is clear on the record that Mr. Burton's Trial Counsel was ineffective for stipulating, without his client's consent, to the suppression hearing record being admitted as part of the trial court record thereby allowing the Trial Court to consider the entirety of the suppression hearing record which included inadmissible and prejudicial evidence. Although the transcript is clear that at the start of the trial Mr. Burton's Trial Counsel stated "that for purposes of a trial today, we'll rely upon [the suppression] record",[1] the Respondents offer erroneous conjecture that there is nothing on the record indicating that the Trial Court relied on the suppression hearing record. Additionally, Respondents offer erroneous conjecture that Mr. Burton consented to the evidentiary stipulation.[2] As described below, there is no factual support for either of the Respondents contentions and therefore, the Respondents' arguments have no merit.

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[1] A99.

[2] The Respondents' September 21, 2023 Answering Brief at 36, 37, 40, 41, 42, 45. Hereinafter referenced as "Answer at __."

A. The record supports the conclusion that the Trial Court relied on the suppression hearing record when determining whether Mr. Burton was guilty, which is an argument that the Respondents are precluded from advancing at this stage.

The Respondents assert that the Delaware state courts' findings were not objectively reasonable when it found that Mr. Burton failed to establish prejudice. (Answer at 42). In support of this argument, the Respondents provide this Court with an inadequate summary of the record below. More specifically, the Respondents baldly assert that there is nothing in the factual record indicating "that the Superior Court relied on the facts developed at the suppression hearing in finding [Mr.] Burton guilty after trial." (Answer at 42; Answer at 45). However, this assertion has no merit as there is nothing on the record to support such an assertion.

Although the Trial Court never explicitly stated that it would consider the suppression record, the record supports that conclusion. Trial Counsel's stipulation included consent to rely on the lengthy suppression record:

> . . . it's our belief that the suppression issue is really the most important issue in this case and that there was a pretty thorough record made before Judge Rapposelli that we're willing to rely upon for suppression purpose. And that for purposes of a trial today, we'll rely upon that record, plus the additional record that the State will make with respect to where the drugs were found and what they were and how much was found.

(A99). This stipulation provided the Trial Court with the authority to rely on the

much more lengthier suppression hearing record which included numerous pages of factual testimony that would have been otherwise inadmissible at Mr. Burton's trial. (A57-58; A65; A67-69; A75-76).

At the close of evidence and after neither party offered closing argument, the Trial Court concluded, without any further explanation, that "the State has met their burden beyond a reasonable doubt; that the defendant is guilty of Count I, Drug Dealing; Count II, Aggravated Possession; Count III, Possession of Marijuana; Count IV merges into Count III; and Count V Possession of Drug Paraphernalia." (A103). Notably, the Trial Court did not make any statement that it was in any way limiting its scope of consideration to contradict Trial Counsel's introductory statement that "we're willing to rely upon" the suppression hearing record. (A99). Thus, the Respondents position that there is nothing indicating that the Trial Court relied on the suppression hearing is erroneous as the argument is rebutted by the actual statements made in court during Mr. Burton's trial as is demonstrated in the trial transcript. (A99; A103).

Even assuming *arguendo* that the Respondents argument was factually accurate, the Respondents are nevertheless precluded from making this argument as they have forfeited that right. It is well recognized that this Court will not consider

issues that are raised for the first time on appeal[3] and that when "an argument is not raised in the district court, [the argument] is waived on appeal."[4]

In Mr. Burton's case, the Respondents have never claimed that there is nothing in the factual record indicating "that the Superior Court relied on the facts developed at the suppression hearing in finding [Mr.] Burton guilty after trial." (Answer at 42; Answer at 45). As such, this argument is being raised for the first time. As the Respondents did not raise this argument in the District Court, or in any of the other lower courts, the Respondents have forfeited the right to raise this argument and are therefore, precluded from asserting the forfeited argument.

The Respondents also assert that it was not objectively reasonable for the District Court to find that Mr. Burton failed to establish prejudice because there was overwhelming evidence and Mr. Burton could not "show that the result would have

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[3] *See, e.g.*, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1115 (3d Cir. 1993); *In re American Biomaterials Corp.*, 954 F.2d 919, 927-28 (3d Cir. 1992); *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 100 (3d Cir. 1990); *Flick v. Borg-Warner Corp.*, 892 F.2d 285, 287-88 (3d Cir. 1989); *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976).

[4] *Steagold v. United States*, 451 U.S. 204, 209 (1981) ("The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation."); *United States v. Stearn*, 597 F.3d 540, 551 n.11 (3d Cir. 2010) (citing *Steagold*, 451 U.S. at 209) (nothing that the government's argument "is also subject to the ordinary rule that an argument not raised in the district court is waived on appeal.").

been any different. . . ." (Answer at 42-44). The Respondents are incorrect.

The Respondents improperly discount the impact of the stipulation on Mr. Burton's trial. In particular, the Respondents fail to give proper consideration to that fact that the stipulation granted the Trial Court unlimited discretion as to what information it could consider from the suppression hearing record. As such, the Trial Court was free to consider inadmissible factual testimony that included the fact that Mr. Burton was a probationer and that he was identified by a confidential informant as being someone who was selling crack cocaine from his residence. (A57-58; A99-00). Unless the State was willing to disclose the identity of the confidential informant by calling them as a witness against Mr. Burton, the State would not have been able to rely on these facts to prove the elements of possession and intent to manufacture or distribute.[5] Furthermore, once the OCME misconduct was disclosed by the State, Mr. Burton was denied a new trial and/or re-testing of the alleged drug evidence in his case, because of Trial Counsel's stipulation. (A97; A99-00; A238-39; A324-25). Thus, contrary to the Respondents' assertion and the District Court's findings, Mr. Burton was clearly prejudiced by Trial Counsel's stipulation.

[5] 16 *Del. C.* § 4752(1) (2012); 16 *Del. C.* § 4752(3) (2012); 16 *Del. C.* § 4764(b) (2012).

B. The record does not support the conclusion that Mr. Burton consented to Trial Counsel's stipulation that the Trial Court could rely on the suppression hearing record to convict Mr. Burton at trial.

The Respondents assert that "[t]he record reflects that Burton understood that he was waiving his right to a jury trial and stipulating to the State's evidence." (Answer at 37). However, contrary to the Respondents' assertion, the Trial Court's colloquy refutes the conclusion that Mr. Burton consented to Trial Counsel's evidentiary stipulation.

The transcript of the Trial Court's colloquy with Mr. Burton clearly demonstrates that Mr. Burton only waived his right to a jury trial, consenting to a bench trial, but did not agree that stipulated evidence could be considered at the bench trial. (A97; A99-00). At the start of trial, the following colloquy with Mr. Burton took place:

> THE COURT: Okay. Mr. Burton, I'm informed that you desire to waiver your right to a jury trial. Is that correct?
> THE DEFENDANT: Yes.
> THE COURT: Before accepting your waiver, there are a number of questions I'm going to ask you to ensure that it's a valid waiver. If you do not understand any of the questions at any time and you wish to interrupt the proceedings to consult further with your attorney, please say so.
> Can you tell me what your full name is?
> THE DEFENDANT: William David Burton.
> THE COURT: And how old are you?
> THE DEFENDANT: 57 years old.

THE COURT: Okay. And how far did you go in school?
THE DEFENDANT: 12th grade, Your Honor.
THE COURT: Okay. Have you taken any drugs, medicine, or any alcoholic beverages within the last 24 hours?
THE DEFENDANT: Just my diabetic medication.
THE COURT: Okay. Do you understand that you're entitled to a trial by jury on the charges filed against you?
THE DEFENDANT: Yes.
THE COURT: Do you further understand that you would have the opportunity to take part along with your lawyer in the selection of the jurors?
THE DEFENDANT: Yes.
THE COURT: Do you understand that a jury trial means that you would be tried by a jury consisting of 12 people and all 12 jurors must agree on your guilt or innocence or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Do you understand that if I approve your waiver of a jury trial the Court alone, and that would be me, would try the case and determine your innocence or guilt or level of guilt?
THE DEFENDANT: Yes.
THE COURT: Have you discussed this decision with your lawyer?
THE DEFENDANT: Yes.
THE COURT: Has he discussed with you the advantages and disadvantages of a jury trial?
THE DEFENDANT: Yes.
THE COURT: Do you want to discuss the issue further with your attorney?
THE DEFENDANT: No.
THE COURT: Although your attorney may advise you, the final decision is yours. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: What is your decision?
THE DEFENDANT: To waive.

(A99-00).

The above colloquy demonstrates that the Trial Court engaged in a discussion

with Mr. Burton to determine if he was knowingly, intelligently and voluntarily waiving his right to a jury trial and consenting to a bench trial. (A99-00). However, the Trial Court never discussed with Mr. Burton whether or not he consented to the evidentiary stipulation which would result in Trial Counsel not subjecting the State's evidence to any meaningful adversarial testing. (A99-00). Nor was there any discussion with Mr. Burton to determine whether he was aware that a stipulation to the suppression hearing record would allow the Trial Court to consider all portions of the suppression hearing to convict Mr. Burton. (A99-00). Thus, the record does not support the conclusion that Mr. Burton consented to the evidentiary stipulation and there is no rational basis to assume that because Mr. Burton consented to a bench trial, he also consented to the evidentiary stipulation, especially in light of Mr. Burton's refusal to plead guilty. (A99).

Additionally, Trial Counsel's affidavit does not lend any meaningful support to the Respondents' assertion as it is solely speculative. It is clear from the language of the affidavit that Trial Counsel had no independent recollection of whether or not he discussed the evidentiary stipulation with Mr. Burton. As such, Trial Counsel could "only assume" that he had done so because it "would have been [his] practice" to explain to Mr. Burton that the State's evidence would largely go unchallenged as a result of the stipulation. (A17).

In light of the fact that there was no discussion of the evidentiary stipulation with Mr. Burton in open court and there being no affirmative statement from Trial Counsel that the stipulation was explained to Mr. Burton, it can not be said that Mr. Burton consented to something that was never explained to him. To find otherwise would be objectively unreasonable. Thus, the Respondents' assertion that Mr. Burton understood and consented to the evidentiary stipulation has no merit. (Answer at 36, 37, 40, 41).

In support of their assertion, the Respondents cite and reference this Court's decision in *Campbell v. Vaughn*, 209 F.3d 280 (3d Cir. 2000) and *United States v. Williams*, 403 Fed. Appx. 707 (3d Cir. 2010). (Answer at 38). However, the Respondents reliance on these two cases are misplaced as each case is distinguishable from the present matter.

In *Campbell*, the defendant, during his postconviction proceedings, argued that his attorney was ineffective for failing to properly inform him of his right to testify at trial.[6] In response to the defendant's argument, defense counsel, during an evidentiary hearing, testified that he "cautioned Campbell against testifying, but insisted that he 'absolutely' told Campbell that it was Campbell's decision to take the

[6] 209 F.3d at 281.

stand."[7] Thereafter, the Pennsylvania state courts concluded that the defendant failed to establish ineffectiveness.[8]

On habeas review, this Court concluded that the Pennsylvania state court decision was not an unreasonable determination of the facts.[9] In support of that conclusion, this Court noted that "Campbell's trial counsel testified unequivocally that he informed Campbell of his right to testify and that he assured him it was Campbell's ultimate decision, alone, whether to testify."[10]

Unlike in *Campbell*, the Delaware State Courts did not conduct an evidentiary hearing and Trial Counsel could only speculate as to what he did in Mr. Burton's case. In particular, Trial Counsel averred that he could "only assume" that he discussed the stipulation with Mr. Burton and that it was his practice to explain to Mr. Burton that the trial evidence would largely go unchallenged as a result of the stipulation. (A17). Trial Counsel further stated that he "probably conducted some explanation as to how the trial would proceed." (A17). As there was not an unequivocal statement from Trial Counsel that he explained the stipulation to Mr. Burton, the record in this matter is materially different from the record in *Campbell*

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[7] *Id*. at 283.
[8] *Id*. at 284.
[9] *Id*. at 291.
[10] *Id*.

and therefore, *Campbell* does not provide any meaningful support for the Respondents' contention.

Similarly, Mr. Burton's case is distinguishable from this Court's decision in *United States v. Williams*. In *Williams*, the defendant appealed his conviction arguing that his attorney's stipulation violated his confrontation rights.[11] The stipulation in question concerned only the admissibility of drug lab results.[12] In this matter, Trial Counsel's stipulation did not simply govern the admissibility of a single piece of evidence. Rather, Trial Counsel's stipulation provided the Trial Court with unfettered authority to consider and rely upon the entirety of the suppression hearing record, including evidence that would have been otherwise inadmissible, to convict Mr. Burton after the incredibly short bench trial. (A57-58; A65; A67-69; A75-76). And it is this fact that distinguishes Mr. Burton's case from *Williams*. Thus, this Court's decision in *Williams* does not provide any meaningful support for the Respondents' assertion that Mr. Burton consented to the evidentiary stipulation.

The record is clear that Trial Counsel's decision to stipulate that the suppression record could be considered by the Trial Court enabled the Trial Court to rely on the suppression hearing record to convict Mr. Burton at trial. However, but

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[11] 403 Fed. Appx. at 708.
[12] *Id*.

for Trial Counsel's stipulation, the Trial Court would not have considered inadmissible and extremely prejudicial evidence in order to convict Mr. Burton. As such, Mr. Burton presented a clear instance of ineffective assistance of counsel and the District Court's conclusion otherwise was an unreasonable application of the facts in Mr. Burton's case to the clearly established federal law set forth in *Strickland v. Washington.*

This Court's confidence in the outcome of Mr. Burton's trial must be shaken due to the multitude of deficient actions taken by Trial Counsel. Trial Counsel offered no opening statement or closing argument, did not conduct any meaningful cross examination, and stipulated to evidence that would have otherwise been inadmissible without the consent of Mr. Burton. (A99-00; A102). Such deficient actions should result in this Court finding that Mr. Burton is entitled to a new trial.

CONCLUSION

WHEREFORE, William Burton respectfully requests that this Honorable Court overturn the District Court's denial order and opinion and remand this case to the District Court with instructions that the District Court grant Mr. Burton a writ of habeas corpus.

Respectfully Submitted,
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Counsel for William Burton

Dated: October 26, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM D. BURTON, III,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 19-1475 (MN)
	)	
ROBERT MAY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE,	)	
	)	
Respondent.	)	

ORDER APPOINTING COUNSEL

At Wilmington, this 3rd day of February 2021, having determined that Petitioner William D. Burton, III is unable to afford legal representation (D.I. 1) and that the issues presented in his federal habeas petition merit the appointment of counsel pursuant to the provisions of 18 U.S.C. 3006A *et. seq*.;

IT IS HEREBY ORDERED that Petitioner's Motion For Appointment of Counsel (D.I. 10) is **GRANTED**. Christopher S. Koyste, Esquire[1] is appointed as counsel for Petitioner, and he shall be compensated in accordance with 18 U.S.C. § 3006A(d).

The Honorable Maryellen Noreika
United States District Court Judge

[1] In 2016, Mr. Koyste was assigned to represent Petitioner in his state postconviction proceeding. (D.I. 8-1 at 11; D.I. 10 at 2) Given these circumstances, it makes sense for Mr. Koyste to continue to represent Petitioner in the instant federal habeas proceeding.