No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN SEXTON
Petitioner,

v.

STATE OF FLORIDA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

During John Sexton's capital penalty phase trial, after he presented his mitgation and rested, the trial court called the defense team's mitigation specialist as a court witness to elicit information that Sexton intentionally chose to omit from his presentation of mitigating evidence. The Florida Supreme Court found that the trial court violated Sexton's Sixth Amendment right by commandeering his mitigation specialist and compelling her to testify to facts that he had intentionally omitted from his case, but it affirmed the death sentence on the basis that the constitutional violation was harmless error. The question presented is:

Did the state trial court commit structural error by violating the Defendant's Sixth Amendment-secured right to autonomy in his capital penalty proceeding?

RELATED PROCEEDINGS

Sexton v. State, -- So. 3d --, No. SC2023-0079, 2024 WL 4156989 (Fla. Sept. 12, 2024) (appeal after resentencing; death sentence affirmed); order denying rehearing issued on January 9, 2025; mandate issued on January 27, 2025.

Sexton v. State, No. SC14-62, 221 So. 3d 547 (Fla. June 29, 2017) (conviction affirmed, sentence vacated; remanded for new penalty phase trial).

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a). The Florida Supreme Court issued its judgment affirming Petitioner's death sentence on September 12, 2024, and denied Petitioner's motion for rehearing on January 9, 2025.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

This case involves a capital resentencing proceeding that occurred after the Florida Supreme Court vacated John Sexton's death sentence and remanded for a new penalty phase in *Sexton v. State*, 221 So. 3d 547 (Fla. 2017). On remand, the trial court granted Sexton's motion for the appointment of a mitigation specialist, ordering that "Kathleen O'Shea shall be appointed as mitigation specialist for the Defense, and the State of Florida shall pay for necessary costs." R26

Over a month before the penalty phase trial was to start, Sexton's counsel filed a Notice to the Court indicating that Sexton "will only permit counsel to present selective mitigation during the penalty phase trial." R721 At a pretrial hearing, the court wanted to know what potential mitigation Sexton was choosing not to present. Sexton told the court that he considered mitigation to be concessionary and he did not want anything presented that would be an excuse for a crime he did not commit. The court directed counsel to prepare a document outlining what mitigation evidence Sexton was choosing not to present. R1237

Sexton elected to waive a jury. At the start of the bench trial, Sexton's counsel informed the court again that Sexton intended to present selective mitigation. Sexton acknowledged that his attorneys had amassed an incredible amount of potential mitigation but expressed his intention to control the content of the mitigation that would be offered by his attorneys. He said, "I have case law to back this up – that those are my decisions to make, what my attorneys present." The court responded, "I completely agree with you." T22 The court recognized Sexton's right under Florida law to present selective mitigation, and it differentiated between the lawyer's role whose job was to find all the mitigation and the defendant's right to present whatever mitigation he wants to present. The court reaffirmed that Sexton had the right to limit the mitigation in the same way that he had the right to waive the jury and have a bench trial. T26-29

The court again directed Sexton's counsel to prepare a memo detailing the potential mitigation evidence that would not be presented. Sexton challenged that procedure on the grounds that there were things he wanted to keep from the record. He said, "the idea of not presenting something, for me, is keeping things from the record, and if they submit a memo that says we have this information, this information, this information, it goes in the record." T34

The court said it would not consider any information that was in the memo. It was only to be used for post-conviction. T34-36 The defense attorney said he had prepared a list of the mitigation the defense team had accumulated,

but Sexton really did not want that list to be filed. T41 (In fact, the list was not filed.)

The penalty phase trial began with the State's case to prove aggravating circumstances. The State called three witnesses before resting its case: (1) the Medical Examiner; (2) a police sergeant who was involved in the murder investigation; and (3) the deceased's friend who discovered the body.

Then, the defense put on its case for mitigation. The defense presented four witnesses: (1) a former prison warden; (2) Sexton's sister; (3) his daughter; and (4) his former partner. T140-143; 147-156; 160-170; 177-185. It also admitted two of Sexton's paintings and his inmate record. The mitigation evidence focused on Sexton's good deeds, work ethic, artistic talent, and positive attributes as a loving brother, father, and partner. Sexton's attorney announced that "[a]t the behest of Mr. Sexton, we rest." T186 Sexton reaffirmed that he did not want the "full mitigation that his lawyers might have wanted to present to the Court." T186 He was quite satisfied with what was done.

Before breaking for the day, the judge went over the procedure for the next day where the defense attorneys were to put in writing the items of mitigation that were found but not presented based on Sexton's directions. The judge said, "we will put that into the record for appellate purposes only, but it's not going to be part of the Court's ruling." T187 Sexton questioned whether he could stop the procedure from occurring by firing his attorneys,

but the court said no, he could not. The court also said that the information was not to be used for the direct appeal. Instead, it was only for post-conviction, in the event that Sexton were to someday raise an issue that his attorneys were ineffective. T188-190 The judge said that the document would be sealed, "and I won't even look at it." T190-191

But the next day, the court's position changed completely on Sexton's right to control the presentation of mitigation. The court began the proceeding by noting that the State had rested its case. The court asked Sexton whether he wished to present additional mitigation. He said, "I felt like we were done yesterday." T197 As for whether Sexton wanted his lawyers to present any additional mitigation, he said, "If they make that attempt, I will dismiss them." He did not want any additional mitigation presented. T198

The court said that under the cases she reviewed overnight, it was *not* Sexton's right to limit the mitigation that the court would consider. The defense had prepared a list of the mitigation, as had been discussed. However, instead of receiving it, the court elected to call the defense team's mitigation specialist as a court witness over Sexton's objection.

> THE COURT: Okay. I think yesterday we had some discussions on whether that I would review [other potential mitigation] or I would just put it into the record. I think I have an obligation under the case law to review it.
>
> So instead of ordering a Presentence Investigation, I don't think it's necessary since we already had the person testify for mitigation on

DOC records, his DRs, all that kind of stuff. We already had that part, so the only other part of that would be any other mitigation.

State, do you have any position on this matter?

[PROSECUTOR]: We do not, Judge.

THE COURT: Okay. So what I could have is -- it's Ms. O'Shea, correct?

MS. O'SHEA: Yes.

[DEFENSE COUNSEL]: Correct.

THE COURT: I could have Ms. O'Shea -- I could swear her in and put her on the stand, and then she can outline for me all of the mitigation that was found, read the names, what the mitigation would be in a small summary, and then present that list to me that I can put it into the record.

This is a witness that I would call. This is not a witness that the Defense has called. I understand Mr. Sexton's position. He does not wish to have any of this presented. However, I'm going to do it one of two ways, I'm either going to call – order the PSI, and I'm going to get it that way, or I'll just have Ms. O'Shea, I'll call her as the Court's witness, and have her present whatever other mitigation applies.

T203-204

The court acknowledged and overruled Sexton's objection that the court was violating his Sixth Amendment rights.

THE COURT: So if Ms. O'Shea feels that she has the information with her today, I can call her as a Court witness, and then I could have her testify to all of the other mitigation that may be out there.

Mr. Sexton, I'm sure you want to object to this on the record.

THE DEFENDANT: Absolutely, I want to object to this part of the proceeding. I still contend that mitigation is concessionary by nature.

THE COURT: Okay.

> THE DEFENDANT: And anything they present that I did not approve goes towards conceding the guilt of the crime that I did not commit.
>
> THE COURT: Okay. I completely understand your position.
>
> THE DEFENDANT: To have them make that concession, I, again, contend that it's a violation of my Sixth Amendment rights and very similar to as the Supreme Court cited in *McCoy vs. Louisiana*. And the decision states clearly that the Sixth Amendment guaranteed a criminal defendant the right to choose the objective of his defense and who insists that his counsel refrain from admitting guilt.
>
> THE COURT: Okay. I'll have that on the record. The Court, at this time, is going to call Ms. O'Shea. She's ready to go. I will have you sworn in, then I will have you testify of everything you've got. Come on up.

T205-206

The defense counsel asked for a short recess to prepare and the court recessed for 30 minutes, saying to Ms. O'Shea, "we'll come back, and I'm going to be calling you as the Court's witness in order to get all other mitigation that's outstanding for my decision, okay?" T206 The court said, "And Ms. O'Shea, you are going to be a Court witness, so I'm going to proceed with the questioning." T207

O'Shea testified that she was employed by the defense to prepare mitigation in Sexton's case. She is a licensed private investigator, who has worked on 75 cases as a mitigation specialist for the defense in death penalty cases in Florida. She has never testified in any of the cases. T208

O'Shea detailed what she had learned from a number of people that Mr. Sexton had chosen to exclude. The testimony of Sexton's sister was very

limited according to Sexton's wishes. But she could have testified about a dysfunctional family. They had an emotionally abusive mother and a physically and emotionally abusive father who fought often and could be violent. Sexton's former partner could have testified that Sexton would hide his drinking. She could have talked about him falling apart after losing custody of the children. T208-210 His daughter could have talked about his explosive episodes of anger that included throwing things at the wall. T212

His friend, who coached little league with him, would have described him as a devoted father who loved his children and was very involved in their coaching but who became unstable with drinking. He was not aware of Sexton ever lashing out physically at another person, but he ended their friendship because Sexton was so unstable. Once, when Sexton became incensed by an umpire's call, he started screaming and climbing the scoreboard. Afterward, the parents would not allow Sexton to continue coaching. The next day, the friend was told that Sexton was threatening to commit suicide because he was so distraught about not being able to coach his son's little league team. The friend felt bad for Sexton because he thought he had bipolar disorder. T210-212

Dr. Ouaou, a neuropsychologist, would have testified that Sexton's IQ scores were mostly in the high average to superior range except for his scores in memory and processing speed. Those scores were in average to low average ranges. Discrepancies in the scores could be related to impairment from long-

term alcohol exposure or the exposure to cleaning solvents and other chemicals that Sexton used working in construction. T212-213

Dr. Maher, a psychiatrist, would have expanded on those cognitive impairments with testimony about how those chemicals affect the brain and are absorbed through the skin or by inhalation. He would have talked about how Sexton's presentation is consistent with a person who has cognitive impairment. He would have said that those chemicals especially affect memory, and Sexton's memory scores are lower than his other scores. He would have testified about the process of a person blacking out from alcohol use. He would have said that Sexton is currently stable in spite of his memory impairments partly because he is in a structured environment without access to alcohol. T213-214

Dr. Holmes, a psychologist, diagnosed Sexton with bipolar disorder. She would have described a historical symptomatology of depression and symptoms of mania and hyperactivity, which include the rages discussed by his daughter, and other outrageous behaviors such as cutting, making suicidal threats, throwing things. There was a road rage incident in which Sexton hit another woman's car with his car in traffic. She would have said those things were all related to his bipolar disorder, as well as his drinking.

She would have talked about his history of psychiatric hospitalizations, including one several months before his arrest on this incident, and that during those episodes, he made suicidal threats but was not necessarily

suicidal. In treatment, he tended to lack insight into his issues, which was a hurdle to his treatment. She would have talked about the several months leading up to this arrest, during which Sexton was out of work due to a change in the economy. It caused him to move in with his in-laws, which cause him a great deal of shame, which led to fighting with his wife and escalating alcohol use.

Dr. Holmes would have testified about his historical diagnoses of adjustment disorder, major depressive disorder, ADHD, and alcohol abuse. When he drinks, because of the bipolar disorder and the other stressors, he does have these episodes that include impulsive lashing out behaviors. She would have agreed with Dr. Maher that Sexton is stable now in a structured environment. He was stabilized with medication for several years when he first arrived in prison, but he is currently psychologically stable without medication.

Dr. Holmes would have also talked about the importance of a maternal relationship and how having a damaged maternal relationship affects a person's relationships and ability to function throughout their lifetime. T214-216

When O'Shea finished answering the judge's questions, Sexton made another objection to the proceeding.

THE DEFENDANT: I would like to object to this proceeding.

THE COURT: Okay.

> THE DEFENDANT: I do not see any point how – how what we're doing here is not a direct violation to the Supreme Court decision of *Boyd vs. State*, where it says explicitly the defendant has the right to choose what evidence, if any, the Defense will present during the penalty phase.
>
> THE COURT: I agree.
>
> THE DEFENDANT: This is still part of the penalty phase. Ms. O'Shea is part of the Defense.
>
> THE COURT: Ms. O'Shea is part of the Defense, but she's a mitigation expert who has been hired by the Defense, and she has mitigation information.
>
> As I indicated, I have two ways to do it; PSI or have her go ahead and tell me it. I called her as a witness. Your Defense is not calling her. So your objection is noted.

T219-220

In the court's sentencing order of January 12, 2023, it first recited the evidence it considered in reaching its decision to impose a death sentence. In addition to the witnesses who testified at the penalty phase, the court considered the testimony of O'Shea. R774-76, 779-780. In discussing mitigation, the court focused on the testimony of O'Shea that was taken by the court "despite the Defendant's objection." R781 The court made no mention of the favorable testimony of Sexton's loved ones he presented. Concluding that the aggravating factors outweighed the mitigating factors, the court sentenced Sexton to death. R786

On direct appeal to the Florida Supreme Court, Sexton argued that the trial court's calling O'Shea as a court witness was structural error that violated

his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. He asserted that he had a right to control the mitigating evidence presented in his capital penalty phase under established Florida law and the Sixth Amendment and he had made clear his intention to be selective about the mitigation presented. He cited *McCoy v. Louisiana*, 584 U.S. 414, 427 (2018), where this Court held that "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review."

In affirming the death sentence, the Florida Supreme Court agreed that the trial court violated Sexton's Sixth Amendment right to counsel and right to control his defense by calling Sexton's mitigation specialist as a court witness but affirmed on the basis that the violation was harmless error.

> Sexton next argues the trial court violated his Sixth Amendment right to counsel and to control his defense by calling his defense mitigation specialist as a court witness. We agree the trial court erred in calling O'Shea, who was part of the defense team, as a witness over Sexton's objection. But we find the error to have been harmless.

App. A17-A18 (footnote omitted). The court rejected the argument that the error was structural, distinguishing *McCoy* on the basis that it was limited to a situation where counsel admitted guilt, whereas the present situation involved a penalty phase where guilt was not an issue. It said:

> Sexton cites *McCoy v. Louisiana* for the proposition that this kind of error is structural and not subject to harmless error review. 584 U.S. 414, 427 (2018). But *McCoy* involved a defendant's "right

to insist that counsel refrain from admitting guilt, even when counsel's experience[]-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Id. at 417. Sexton's guilt was not at issue in the proceeding below, his conviction having already been affirmed by this Court. The mitigating evidence presented dealt with Sexton's bipolar disorder, excessive drinking, and explosive episodes of anger—most of which had been introduced into the record at his first sentencing proceeding—and not his guilt or innocence. And so, mindful that the trial court's error must have been harmful to be reversible, we proceed. See § 924.33, Fla. Stat. (2022); *see also Davis v. State*, 347 So. 3d 315, 324 (Fla. 2022) (describing "the plain language of section 924.33, Florida Statutes (2021), 'which provides that harmless error analysis is applicable to all judgments' " (footnote omitted) (quoting *State v. Schopp*, 653 So. 2d 1016, 1020 (Fla. 1995))); *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986) (finding the "harmless error analysis . . . applicable to all judgments").

It was error to call O'Shea as a court witness. O'Shea was not an independent, special counsel appointed by the trial court; she was a member of the defense team. Indeed, the trial judge recognized that "O'Shea is part of the Defense." While the court could have chosen to order a presentence investigation report (PSI) or considered mitigation from the original sentencing, it could not, against Sexton's wishes, commandeer his mitigation expert and compel her to testify about mitigation during the penalty phase.

But this error does not require reversal, because "there is no reasonable possibility that the error contributed to the death sentence." *Gaskin v. State*, 361 So. 3d 300, 309 (Fla. 2023). Although the court recounted O'Shea's testimony in its sentencing order, it did not rely on her testimony—or even cite it—when analyzing the specific mitigating factors that defense counsel was pursuing. Nor did the court consider O'Shea's testimony when establishing aggravating circumstances. Moreover, the trial court determined that Parlato's murder was highly aggravated, and gave that and two other aggravating factors great weight. *See Wells v. State*, 364 So. 3d 1005, 1014 (Fla. 2023) (finding harmless error where the court rejected statutory mitigators); *see also Sparre v. State*, 164 So. 3d 1183, 1197 (Fla. 2015) (finding the court's declination to call its own mitigation witnesses was not reversible error given "the two very weighty aggravators").

App. A18-A20 (footnote omitted).

Sexton moved for rehearing arguing the Florida Supreme Court's narrow reading of *McCoy* overlooked the constitutional foundation of that decision. He asserted that the larger point in *McCoy* is that defendants retain the right to control their objectives in the case, which means having autonomy to decide the objective of the defense. Violation of that autonomy is structural error. The Florida Supreme Court summarily denied the motion for rehearing on January 9, 2025.

REASONS FOR GRANTING THE PETITION

I.

This Court Should Grant Certiorari to Clarify that a State Trial Court Commits Structural Error by Violating a Defendant's Sixth Amendment-Secured Right to Autonomy in a Capital Penalty Proceeding

The Florida Supreme Court correctly recognized that Sexton's Sixth Amendment right was violated when the trial court usurped the presentation of mitigation and interferred with Sexton's right to counsel by calling his mitigation specialist as a court witness. But the Florida court's application of a harmless error analysis to affirm the acknowledged violation of Sexton's Sixth Amendment right to autonomy was an improper rejection of the holding of *McCoy v. Louisiana,* 584 U.S. 414 (2018), to avoid classifying the error as structural. This Court should grant this Petition to clarify that the trial court's

error in this case, infringement of the Defendant's Sixth Amendment-secured right to autonomy during the capital penalty phase, is structural, and akin to the error described in *McCoy*, necessitating reversal of the death sentence.

This Court recognized in *McCoy* that a defendant's objective may not be to avoid a death sentence at all costs. The defendant has the ultimate authority to make certain fundamental decisions regarding the case.

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty . . . But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.

Id. at 422-23.

Sexton had a right under Florida law to determine the mitigation evidence he wanted presented. The Florida Supreme Court has long held that a capital defendant has a right to decide the object of his defense during the penalty phase of a capital trial and can limit the mitigation that is presented, even when the defense counsel disagrees with the defendant's strategy. *See Figueroa-Sanabria v. State*, 366 So. 3d 1036, 1054 (Fla. 2023) ("Put plainly, 'a defendant cannot be forced to present mitigating evidence during the penalty phase of the trial.'"); *Bell v. State*, 336 So. 3d 211, 217 (Fla. 2022) (reaffirming that a competent capital defendant is afforded great control over the content of their mitigation *regardless* of whether they are represented by counsel); *Boyd v. State*, 910 So. 2d 167, 189-90 (Fla. 2005) ("Whether a defendant is represented

by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase.").

Sexton chose to present positive character evidence in mitigation. He explained to the court that he was maintaining his innocence and did not want to present mitigation that seemed to be an excuse for the crime he did not commit. He believed that mitigation was essentially a concession of guilt. The testimony of O'Shea brought out negative traits that undermined the positive traits accentuated by the mitigation evidence presented. In short, Sexton's defense was based on a reasonable strategic decision, which the trial court's intervention undermined. *See Burns v. State*, 944 So. 2d 234, 243 (Fla. 2006) (finding counsel was not inefffective for failing to adduce testimony that defendant suffered from a psychotic disturbance because it would have undermined the positive traits accentuated by the mitigation evidence presented).

The basic principle that the defense belongs to the defendant was not appreciated or respected by the trial court. Sexton made it absolutely clear to the trial court that he was intent on exercising his right to control the objective and content of the mitigation presented. He vociferously objected to the trial court's intervention that thwarted his right.

Ms. O'Shea was an integral part of the defense team who had never been called to testify in a case she worked on. During a pretrial hearing, defense counsel explained the importance of O'Shea's work product to the defense team,

saying:

> [A] mitigation specialist in any capital case is extremely important. Mitigation specialists have relationships with family members that the lawyers don't necessarily have; they have relationships with the expert, they work with the expert in providing references and so forth and so on; and the mitigation specialist in every case I try sits with us throughout the trial to assist us in the process.

R1312-1313

Court-ordered disclosure of potential witnesses and theories of mitigation after the decision had been made to exclude such evidence constitutes an impermissible intrusion on the attorney-client relationship in violation of defendant's right to counsel. *See Hickman v. Taylor*, 329 U.S. 495, 512 (1947) ("the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order").

The trial court's purpose was made clear at the end of the first day of trial when the court contemplated its goal of insulating its ruling from scrutiny in a post-conviction proceeding. The court's concern about Sexton later raising an ineffective assistance of counsel claim was not a valid reason to interfere in the presentation of mitigation. When a defendant directs his counsel specifically not to present mitigation evidence, he cannot later claim ineffective assistance of counsel. *See e.g., Sonnier v. Quarterman*, 476 F.3d 349, 361–62

(5th Cir. 2007).

The court's focus on making a record to defeat a future post-conviction claim was necessarily premised on issuing a death sentence. If the court was contemplating a life sentence, it would have no reason to get all the mitigation collected by the defense lawyers into the record. There were only two possible outcomes to the proceeding, life without parole or death, and a life sentence would be a win that would not occasion a future post-conviction challenge. There would be no need for counsel to investigate all possible mitigation if the sentence were to be life in prison. So the court was not interested in collecting mitigation to benefit Sexton's defense. It was acting in a prosecutorial stance, in violation of its obligation to stay neutral until the close of the evidence.

The procedure invaded Sexton's attorney-client relationship and denied him the right to the autonomy that the Sixth Amendment affords all capital defendants. The error is structural, and therefore, it is not subject to a harmless error analysis because it affects the framework within which the trial proceeds. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (holding that the erroneous deprivation to right of counsel of choice is structural error because it has consequences that are necessarily unquantifiable and indeterminate). In *McCoy*, this Court said, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review."

The Florida Supreme Court acknowledged the trial court's violation of Sexton's rights under the Sixth Amendment but rejected the assertion that the violation was structural. The Florida Court's distinction between the violation it acknowledged here and the violation this Court recognized in *McCoy* rested on differentiating between the guilt and punishment stages of a capital trial. Under the Florida court's rationale, the structural error in *McCoy* is reserved for a guilt phase.

That rationale for distinguishing structural error cannot be squared with this Court's history of drawing no distinction between a guilt and penalty stage when constitutional rights are violated. This was made explicit in the context of a violation of the Fifth Amendment privilege. *See, e.g., Estelle v. Smith*, 451 U.S. 454, 462–63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."); *see also Mitchell v. United States,* 526 U.S. 314, 321 (1999) (holding that a guilty plea was not a waiver of the privilege against compelled self-incrimination with respect to crimes comprehended in the plea, and petitioner retained the privilege at her sentencing hearing).

In Sixth Amendment violation of counsel cases, this Court has found structural error when the violation involved the deprivation of counsel at a *critical* stage. Even pretrial deprivations of counsel have been considered to have occurred during a critical stage for which a showing of prejudice is not

required. *See Hamilton v. State of Ala.*, 368 U.S. 52, 55 (1961) ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."); *White v. State of Md.,* 373 U.S. 59, 60 (1963) ("We repeat what we said in *Hamilton* . . . that we do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.' "); *see also United States v. Hakim*, 30 F.4th 1310, 1327 (11th Cir. 2022) (citing *White* and holding deprivation of right to counsel at plea hearing was structural error). Even after sentencing, the Third Circuit recognized *McCoy*-type error regarding the defendant's decision to waive an appeal. *See Alexander-Mendoza v. Attorney Gen. United States*, 55 F.4th 197, 209 (3d Cir. 2022) (" Indeed, the decision to waive appeal is traditionally reserved for the party – not counsel." (citing *McCoy* and *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). The pretrial and appellate stages are not more critical than the sentencing stage when rights are denied.

But the stage of the proceeding has not been fully determinative of whether Sixth Amendment violations are considered structural. Rather, this Court has focused on the type of harm, asking, for instance, whether the denial of a Sixth Amendment right makes "the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659 (1984).

There is no legitimate reason to draw a distinction between guilt and sentencing for the purpose of applying *McCoy*, as the Florida Court did here.

Deprivation of the Sixth Amendment's right to autonomy, is equally unfair and renders the process equally unreliable, if not more so, when the violation occurs in a capital penalty phase, where the stakes are highest. So the determination of structural error should apply equally whether occurring in the guilt or penalty phase of a capital case. At least Judge Mendoza of the Ninth Circuit did not distinguish between guilt and sentencing, where *McCoy* was cited in his separate opinion regarding an aggravating sentencing factor: "Unlike trial management decisions, which are 'the lawyer's province,' the decision to admit or deny an aggravating sentencing factor is of the kind 'reserved for the client.'" *United States v. Torres-Giles*, 80 F.4th 934, 942 (9th Cir. 2023) (Mendoza, J., concurring in part and dissenting in part) (quoting *McCoy*), *cert. denied,* 144 S. Ct. 616 (2024).

The *type of error* should determine whether it is classified as structural, not which stage of the process the error occurs in. The criminal proceeding can be rendered unfair "as a whole" and therefore classified as structural at various points in the process.

> We have characterized as "structural" "a very limited class of errors" that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. *United States v. Marcus,* 560 U.S. 258, ——, 130 S.Ct. 2159, 2164, 176 L.Ed.2d 1012 (2010) (internal quotation marks omitted). Errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt. See, *e.g., United States v. Gonzalez–Lopez,* 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (ranking " deprivation of the right to counsel of choice" as " 'structural error' ").

United States v. Davila, 569 U.S. 597, 611 (2013). This Court's decision in *McCoy* focused on the same *kind* of error that occurred here, a violation of a defendant's Sixth Amendment-secured autonomy.

Sexton was denied his Sixth Amendment right by the intervention of *the trial court* when it compelled Ms. O'Shea to testify against Sexton's interests. The Florida Supreme Court did not distinguish *McCoy* on the basis that the trial court caused the violation, but at least one other court has questioned whether error perpetrated by a trial court can be considered a violation of the type recognized in *McCoy*. *See Stevenson v. Capra*, No. 21-2210, 2023 WL 4118631, at *3–4 (2d Cir. June 22, 2023) (holding it was not understood as clearly established whether a *trial court's* violation of the defendant's right to autonomy was protected by the Sixth Amendment), *cert. denied sub nom. Stevenson v. Lilley*, 144 S. Ct. 1039 (2024). But just as the stage of the proceeding when the error occurs should not determine whether it is structural, the actor that causes the error or deprivation of the defendant's right should not be a factor in distinguishing *McCoy*. For instance, in *Geders v. United States*, 425 U.S. 80 (1976), the trial court's order forbidding defendant's consultation with his attorney overnight resulted in a Sixth Amendment violation that required reversal without a showing of prejudice.

The instant case conflicts with a federal circuit court decision that followed *McCoy* in a situation that did not narrow the holding. In *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), the court found structural error and

reversed for a new trial where the defendant objected to the jury being instructed on an insanity defense. "*McCoy's* emphasis on the defendant's autonomy strongly suggests that counsel cannot impose an insanity defense on a non-consenting defendant." *Id.* at 720. The court likened this to a confession of guilt that could not be imposed against the defendant's will. And, significant to the present situation, the court also recognized that apart from conceding guilt, the defendant could have reasons to avoid an adjudication of insanity.

> True, *one* reason that an insanity defense should not be imposed on a defendant is that it can sometimes directly violate the *McCoy* right to maintain innocence. However, even where this concern is absent, the defendant's choice to avoid contradicting his own deeply personal belief that he is sane, as well as to avoid the risk of confinement in a mental institution and the social stigma associated with an assertion or adjudication of insanity, are still present. These considerations go beyond mere trial tactics and so must be left with the defendant.

Id. at 720–21. The court correctly recognized that imposing an unwanted defense on a defendant violated the larger holding of *McCoy*.

Here, by calling the mitigation specialist to testify, the judge not only interferred with Sexton's relationship with his counsel, the judge usurped a function that was the sole province of Sexton and his counsel. *E.g.*, *Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008) ("the decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney"). Sexton had the constitutional right to make the determination to rely on humanizing evidence of his positive attributes in mitigation. Although *McCoy* was not addressing a penalty phase, the broader principle is applicable to

Sexton's penalty phase where he continued to maintain his innocence and presented a case for mitigation that was, as he saw it, compatible with his innocence. "Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles." *McCoy*, 584 U.S. at 423. The specially selected mitigation that Sexton presented was humanizing and did not clash with maintaining his innocence. The error of overriding Sexton's objectives affected the framework within which the trial proceeded, and contrary to the Florida court's analysis, the effect of that error cannot be quantified; therefore, it cannot be subject to a harmless error analysis. *See Gonzalez-Lopez*, 548 U.S. at 148-49.

This Court should grant certiorari to clarify that *McCoy* was implicated and structural error occurred when the trial court called Sexton's mitgation specialist as a court witness to override Sexton's objective as to the mitigation that was to be considered for his capital sentencing trial. There was a violation of the Sixth Amendment right to the assistance of counsel for which no prejudice need be shown.

CONCLUSION

Wherefore, for the foregoing reasons, this Court should grant certiorari to review the decision of the Florida Supreme Court.

Respectfully submitted,

/s/ Karen M. Kinney

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