CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ZACHARY HOLLY,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Arkansas

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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Dated: October 29, 2026

CAPITAL CASE

QUESTION PRESENTED

In *Florida v. Nixon*, 543 U.S. 175 (2004), the Court held that the Sixth Amendment does not require counsel to obtain a defendant's "express consent" to a strategic concession of guilt at a capital trial when that strategy has been "adequately disclosed to and discussed with the defendant" and the defendant does not object to it. *Id.* at 179.

In *McCoy v. Louisiana*, 584 U.S. 414 (2018), the Court held that counsel usurped his client's autonomy by conceding guilt over the defendant's "adamant" objections. *Id.* at 417. Those objections began with McCoy's "furious" rejection of a concession strategy that counsel discussed with his client two weeks before trial. *Id.* at 418–19.

In this Arkansas death penalty case, defense counsel conceded the guilt of his cognitively impaired client without first disclosing that strategy to him. The lower courts are divided over whether *McCoy* or *Nixon* controls when, as here, a defendant is surprised by counsel's concession of guilt but does not affirmatively object to counsel or the court.

The question presented is:

When trial counsel concedes a defendant's guilt without first consulting the defendant about that strategy, and the defendant does not object at the time of trial, does the lack of an objection prevent the defendant from showing that trial counsel usurped his autonomy under the Sixth Amendment as enforced by *McCoy*?

PARTIES TO THE PROCEEDING BELOW

Petitioner Zachary Holly was the Appellant in the court below and is an indigent death-sentenced prisoner within the Arkansas Division of Correction. The State of Arkansas is the Respondent and was the Appellee below. No party is a corporation.

RELATED PROCEEDINGS

Circuit Court of Benton County, Arkansas

State of Arkansas v. Zachary Holly, No. 04CR-13-1 (Benton Cnty. Cir. Ct. May 29, 2015) (entry of judgment after trial)

State of Arkansas v. Zachary Holly, No 04CR-13-1 (Benton Cnty. Cir. Ct. July 9, 2024) (entry of judgment on postconviction petition)

Arkansas Supreme Court

Zachary Holly v. State of Arkansas, No. CR-15-899, 520 S.W.3d 677 (Ark. 2017) (affirmance on direct appeal; opinion issued June 1, 2017; mandate and judgment issued Mar. 8, 2018)

Zachary Holly v. State of Arkansas, No. CR-24-703, 732 S.W.3d 351 (Ark. 2026) (affirmance of denial of postconviction relief; opinion issued Apr. 16, 2026; mandate and judgment issued June 4, 2026)

United States Supreme Court

Zachary Holly v. Arkansas, 583 U.S. 1169 (2018) (denial of certiorari on direct appeal)

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PETITION FOR WRIT OF CERTIORARI

Zachary Holly respectfully petitions that a writ of certiorari issue to review the decision of the Arkansas Supreme Court in this case**.**

OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming the denial of postconviction relief is reported at 732 S.W.3d 351 and appears in the Appendix at A1. The order of the Circuit Court of Benton County denying postconviction relief is unreported and appears in the Appendix at A26.

JURISDICTION

The Arkansas Supreme Court issued its opinion affirming the circuit court's denial of postconviction relief on April 16, 2026, and it denied Holly's petition for rehearing on June 4, 2026. A1, 41. On August 27, 2026, Justice Kavanaugh granted an extension of time to petition for the writ of certiorari to November 1, 2026. *See Holly v. Arkansas*, No. 26A251. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fourteenth Amendment provides, in relevant part: "No State shall . . .

deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Zachary Holly pleaded not guilty to charges of capital murder, rape, kidnapping, and residential burglary in the Circuit Court of Benton County. The court described the parties' positions at the beginning of voir dire:

> The State alleges that on or about November 20th, 2012, in Bentonville, Arkansas, that the defendant entered the home of [JB], a six-year-old girl, without permission, for the purpose of kidnapping and/or raping her, that the defendant kidnapped [JB] and removed her to a nearby abandoned house with the purpose of engaging in sexual intercourse with her. That the defendant raped [JB] and that the defendant murdered [JB]. The State is seeking the death penalty in this case. *The defendant has denied these allegations*.

1RT 1297–98 (emphasis added).[1] Lead defense counsel agreed to that summary before the jury. 1RT 1298.

Ten days later, trial counsel said just the opposite in his opening statement. "We acknowledge that on November 20th of 2012, Zach Holly entered the house of [JB]," counsel said. 1RT 1891. "That he removed her from her home. That he had sexual contact with her and that he caused her death." *Id.* Counsel never informed Holly of this about-face or obtained his consent to it. 2RT 134, 319. Holly first learned that his lawyers had decided to concede his guilt in open court

[1] As he did in the court below, Petitioner cites the trial transcript as "1RT," the postconviction transcript as "2RT," and the postconviction pleadings as "2RP."

after his trial had begun.

Counsel later testified that he thought Holly's consent was unnecessary. 2RT 130–34. This belief was premised on the fact that about two weeks before opening statements, Holly had allowed counsel to proffer a guilty plea to the State in exchange for a life sentence. 2RT 130–33, 1781–84; *see also Holly v. State*, 520 S.W.3d 677, 682–85 (Ark. 2017) ("*Holly I*") (upholding trial court's exclusion of the plea proffer as mitigating evidence), *cert. denied*, 583 U.S. 1169 (2018). The State nevertheless rejected the proffer, and in light of that rejection, Holly's defense was that he denied the prosecution's allegations. *Holly I*, 520 S.W.3d at 682; 1RT 1297–98; *see also* Ark. R. Crim. P. 31.4(c) (requiring prosecution's consent to waive jury trial in capital felony cases).

Because Holly had agreed to the proffer two weeks earlier, counsel did not inform his client that he planned to concede guilt in open court. 2RT 134. "We never had any such discussion," counsel explained, because "I just didn't feel like we needed his permission." 2RT 134 (per lead counsel), 319 (per co-counsel). Holly did not share counsel's goal of avoiding a death sentence. 2RT 217–18. Although Holly did not wish to be executed, he believed that, in the event of conviction, death row would protect him from attacks by other prisoners who might target him for committing a sexual offense against a child. *Id.* at 218. Counsel's objective, by contrast, was to concede guilt in order to maintain

credibility with the jury, and then to urge at sentencing that Holly had accepted responsibility for the crimes. 2RT 336, 346–47; A36.

All the while, counsel knew that his client was "low functioning," and the defense developed mitigating evidence to that effect. 2RT 81, 93. Counsel knew that Holly had learning disabilities across subjects and functioned "way below" his grade level; that he repeated kindergarten and second grade and eventually dropped out of school after the tenth grade; that his IQ scores were seventy-six, eighty-two, and eight-three; that his mother drank alcohol during the early stages of her pregnancy, or until she was "showing"; and that his listening-comprehension skills were those of a seventh grader even though Holly was thirty years old at the time of trial. A42, 44–46, 53–55, 58–59, 62, 81–82, 92–93, 95; 2RT 44–45, 249, 275, 354. Counsel knew that his client could barely read or write as an adult. 1RT 2683, 2689, 2796–97; A96 (pretrial letter from Holly to his mother). Counsel knew that Holly began using marijuana on a daily basis at the age of ten after being introduced to it by his mother, and methamphetamine at the age of thirteen after being introduced to it by his stepfather. 2RT 89–90, 1061–62; A59, 80.

Ultimately, the guilt-phase evidence was consistent with the description Holly's lawyers had approved on voir dire. Police found JB's body in a closet of the abandoned house where Holly had taken her, and pajama pants were tied around her neck. *Holly I*, 520 S.W.3d at 680. A medical examiner testified that JB

died from ligature strangulation. *Id.* Holly confessed his guilt to police during the last of his three interrogations. *Id.*; 1RT 2168–78. The jury convicted Holly of capital murder, kidnapping, rape, and residential burglary. *Holly I*, 520 S.W.3d at 679. At the penalty phase, the jury found aggravating circumstances that the capital murder was committed to avoid arrest, that it was "especially cruel and depraved," and that the victim was "especially vulnerable" because she was "12 years of age or younger." 2RT 1249. The jury reached a death verdict, finding that the aggravating circumstances justified a sentence of death and outweighed the mitigating circumstances credited by one or more jurors—including Holly's learning disability, his history of special education, his childhood drug abuse, and various aspects of the abuse and neglect he suffered as a child. 2RT 1250–59.

On May 29, 2015, the trial court imposed the death penalty for capital murder, life sentences for rape and kidnapping, and twenty years' imprisonment for burglary. The Arkansas Supreme Court affirmed Holly's convictions and sentences on direct appeal two years later. *Holly I*, 520 S.W.3d at 679–92.

Holly then petitioned for postconviction relief under Ark. R. Crim. P. 37.5 in the Circuit Court of Benton County. Relevant here, Holly claimed that trial counsel usurped his autonomy under the Sixth Amendment by conceding Holly's guilt without his knowledge or consent—as condemned by *McCoy v. Louisiana*, 584 U.S. 414 (2018). 2RP 95–96, 172–76. The circuit court rejected the claim. A36.

Citing *Florida v. Nixon*, 543 U.S. 175, 191 (2004), the court found that counsel strategically decided to concede Holly's guilt in the face of "overwhelming evidence," and in the hope that the sentencing jury would credit Holly's acceptance of responsibility. *Id.*

Holly brought the same claim to the Arkansas Supreme Court on his postconviction appeal. *See* Appellant's Br. (filed Mar. 20, 2025), at 55–57; Reply Br. (filed Aug. 28, 2025), at 16–17; Pet'n for Reh'g (filed May 1, 2026), at 1–5. The court affirmed the circuit court's ruling. A18–21; *Holly v. State*, 732 S.W.3d 351, 364–65 (Ark. 2026) ("*Holly II*"). Rejecting Holly's invocation of *McCoy*, the Arkansas Supreme Court observed that the defendant in *McCoy* "strenuously and consistently objected to counsel's strategy of admitting guilt." A20; *Holly II*, 732 S.W.3d at 365. The present case is "clearly distinguishable from *McCoy*," the court reasoned, because Holly did not object once it "became clear" that trial counsel's strategy was to "concede guilt in an attempt to avoid the death penalty." A20; *Holly II*, 732 S.W.3d at 365. The court concluded that this case "more closely resembles" *Nixon*, under which "trial counsel's failure to obtain the defendant's express consent to the strategy of conceding guilt during the guilt phase of the trial does not automatically render counsel's performance ineffective." A19–20; *Holly II*, 732 S.W.3d at 365. Holly sought rehearing on the *McCoy* claim, which the Arkansas Supreme Court denied. A41. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court Should Clarify that *McCoy* Does Not Invariably Require a Criminal Defendant to Voice an "Intransigent and Unambiguous" Objection to Counsel's Concession of Guilt when Counsel Has Never Discussed That Strategy with the Client.

The Sixth Amendment entitles a defendant to "insist on maintaining her innocence at the guilt phase of a capital trial," even when "counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 584 U.S. at 417, 422. An objected-to concession of guilt violates the defendant's autonomy and is a structural error. *Id.* at 426–28. The defendant need not demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), because the violation is complete when a court allows counsel to "usurp control of an issue within [the defendant's] sole prerogative." *Id.* at 427. The *McCoy* framework does not apply, however, when a defendant does not object to a concession strategy that "counsel has adequately disclosed to and discussed with the defendant." *Nixon*, 543 U.S. at 179. Counsel who has consulted the defendant need not obtain the client's express consent to the strategy, which is itself governed by *Strickland*. *Id.* at 192.

Both *Nixon* and *McCoy* recognize an attorney's duty to consult with the defendant. "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Id.* at 187 (quoting *Strickland*, 466 U.S. at 688). Counsel must "develop a strategy and

discuss it with her client." *McCoy*, 584 U.S. at 323. And counsel is "obliged," *Nixon*, 543 U.S. at 189, to "explain[] why, in her view, conceding guilt would be the best option." *McCoy*, 584 U.S at 323.

Trial counsel in both *Nixon* and *McCoy* satisfied that antecedent obligation. Nixon's counsel tried to explain his concession strategy to his client "at least three times." *Nixon*, 543 U.S. at 181. Nixon was unresponsive to these attempts, voiced no opposition to the proposed strategy, and did not object when counsel followed it at trial (during which Nixon was mostly absent). *Id.* at 181–83, 189. Like Nixon, McCoy knew of his attorney's concession strategy, which counsel explained to him two weeks before trial. *McCoy*, 584 U.S. at 418–19. McCoy "vociferously" and "adamantly" opposed counsel's plan, told counsel to seek an acquittal, and objected when counsel conceded his guilt on opening statement. *Id.* 417–20, 426.

The question presented in *McCoy* was "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.* at 420. The question presented here, by contrast, is whether *McCoy* applies when guilt-conceding counsel fails to consult the client in advance, thereby impeding the "intransigent and unambiguous objection" described in *McCoy*. *See United States v. Schaffer*, 731 F. Supp. 3d 382, 390–91 (N.D.N.Y. 2024) ("[C]ounsel cannot affirmatively concede guilt on a charged crime without putting the client on notice of the plan and giving them some kind of

opportunity to raise an objection.").

The lower courts are divided over whether *McCoy* or *Nixon* controls when, as here, a defendant is surprised by counsel's concession of guilt but does not affirmatively object to counsel or the court. Both the Fourth Circuit Court of Appeals and the Michigan Supreme Court have applied *McCoy* without requiring a personal objection from the defendant. *See United States v. Hashimi*, 110 F.4th 621, 627–31 (4th Cir. 2024); *People v. Klungle*, --- N.W.3d ---, Nos. 168010, 168011, 2026 WL 1954616, at *6–8 (Mich. July 6, 2026).

Under this view, *McCoy* puts the onus on the lawyer to consult the client, rather than on the client to object once surprised. *Klungle*, 2026 WL 1954616, at *6 (citing *McCoy*, 584 U.S. at 417). "The right of autonomy to maintain innocence is not lost . . . where the attorney never discusses a concession strategy with their client and therefore deprives the client of an adequate opportunity to object." *Id.* at *7. An objection requirement "would swallow the *McCoy* rule, transferring the concession decision from client to lawyer so long as the lawyer never asks the client's permission." *Hashimi*, 110 F.4th at 630. Such a requirement is also unrealistic, because "trial courts generally do not allow the represented defendant to speak whenever they may choose." *Klungle*, 2026 WL 1954616, at *8.

The Tenth Circuit Court of Appeals and the Supreme Court of Florida take the opposite view. *See United States v. Sago*, 179 F.4th 1267, 1275–76 (10th Cir.

2026); *Atwater v. State*, 300 So. 3d 589, 590–91 (Fla. 2020); *Harvey v. State*, 318 So. 3d 1238, 1239–40 (Fla. 2021) (following *Atwater*); *Randolph v. State*, 422 So. 3d 166, 174–75 (Fla. 2025) (same). Both courts point to *McCoy*'s observation that the defendant in that case "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Sago*, 179 F.4th at 1275 (quoting *McCoy*, 584 U.S. at 417); *Atwater*, 300 So. 3d at 590–91.

From that feature of *McCoy*, the two courts conclude that it is impossible for a concession to usurp the defendant's autonomy when counsel does not know whether the defendant opposes the concession in the first place. *See Atwater*, 300 So. 3d at 591; *Sago*, 179 F.4th at 1275–76. Counsel's failure of communication might suggest deficient performance under *Strickland*, but these courts will not presume prejudice under *McCoy*. *See Atwater*, 300 So. 3d at 591 ("Atwater's claim is not a *McCoy* claim; Atwater has not alleged that counsel conceded guilt over Atwater's objection."); *Sago*, 179 F.4th at 1276 (even though defendant was surprised by counsel's concession, *McCoy* requires "at least some contemporaneous indication of [the defendant's] disagreement in the record").

The Arkansas Supreme Court adopted the latter view in the ruling below. *McCoy* does not govern Holly's case, the court explained, because Holly did not object once it "became clear" what counsel's previously undisclosed strategy actually was. A20; *Holly II*, 732 S.W.3d at 365. The Arkansas court took this

position despite the fact that Holly learned about this strategy only in open court, in front of the jury, after his trial had begun. The court below also noted that Holly's attorneys "believed" that they had his "permission to concede guilt in an attempt to avoid the death penalty," because Holly had allowed them to proffer a guilty plea before trial. A20; *Holly II*, 732 S.W.2d at 365; *accord Sago*, 179 F.4th at 1276 (defendant's failed attempts to plead guilty before trial "at least signal that his mindset regarding the goals of his defense was not to assert absolute innocence").

The opinion below and those like it read *McCoy* too narrowly and *Nixon* too broadly. *McCoy* expressly requires counsel to consult the defendant before conceding guilt. 584 U.S. at 423. It is true enough that the defendant in *McCoy* registered an "intransigent and unambiguous objection." *McCoy*, 584 U.S. at 420. But nothing in *McCoy* suggests that a defendant's failure to object "is fatal in all other cases." *Klungle*, 2026 WL 1954616, at *7. Counsel usurps the defendant's autonomy not only by overriding the client's objection, but also by preventing the client from objecting by failing to consult him—at least when, as here, counsel knew or should have known that the client did not share counsel's objective. *Id.*; *Hashimi*, 110 F.4th at 630.

The decision below and similar rulings from the Tenth Circuit and the Florida Supreme Court overlook a key limitation of *Nixon*: counsel need not obtain the client's express consent to a concession "*when counsel confers with the*

defendant and the defendant remains silent." *McCoy*, 584 U.S. at 417 (citing *Nixon*, 543 U.S. at 181, 192) (emphasis added). In *Nixon*, this Court repeated no fewer than seven times that counsel has a "duty" to "adequately disclose[] to and discuss[] with the defendant" the concession of guilt. 543 U.S. at 178, 179, 187, 189, 192. Counsel in *Nixon* informed the defendant "at least three times" of the concession the attorney then went on to make. *Id.* at 181. Because counsel "fulfilled his duty of consultation," the absence of any protest from the defendant was construed as permitting counsel to proceed with the concession. *Id.* at 189, 192. But no such permission can be inferred when an unwarned defendant fails to interrupt his court-appointed lawyers. *See Hashimi*, 110 F.4th at 630 n.4 ("[W]e do not craft legal rules to encourage clients to speak out of turn in court.").

The ruling below is all the more misguided under the circumstances of Holly's case. *First*, Holly's proffer of a guilty plea cannot justify the Arkansas Supreme Court's departure from *McCoy*. *See* A20; *Holly II*, 732 S.W.3d at 365. The pretrial proffer was "conditioned on the State's removing the death penalty from the jury's consideration." *Holly I*, 520 S.W.3d at 684. In stark contrast, counsel at trial conceded guilt with no strings attached. 1RT 1891. It goes without saying that "consent to plead guilty is different in kind from consent to admit guilt to a jury." *Hashimi*, 110 F.4th 631; *see also McCoy*, 584 U.S. at 419 n.2 ("Encouraging a guilty plea pretrial, of course, is not equivalent to imparting to a

defendant counsel's strategic determination to concede guilt should trial occur."). With a guilty plea off the table, and with the jury having been informed that the defense was denying the State's allegations, 1RT 1298, Holly had no reason to doubt that his lawyers were contesting the case at the guilt-innocence phase unless his lawyers told him otherwise.

Second, even though counsel conceded guilt up front in an effort to spare Holly the death penalty later, A20; *Holly II*, 520 S.W.3d at 365, that was counsel's objective rather than Holly's. Holly's objective, by contrast, was avoiding general population in the event of a conviction, telling counsel that he would "be safer [on death row] than I would be in general population." 2RT 218. To that end, Holly accepted the initial guilt-phase defense, which was that "the defendant has denied [the State's] allegations." 1RT 1298. "[F]or some defendants, the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and death sentence." *McCoy*, 584 U.S. at 423 (quoting Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. REV. 1147, 1178 (2010)). Counsel thereby usurped Holly's autonomy on *McCoy*'s exact terms: "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 417–18 (emphasis added).

Third, counsel's failure to consult with Holly is all the more troubling in light of what counsel knew about his client. Counsel had gathered "a number of things which we believed indicated that Zach was functioning at a low level, including his handwritten letters from the jail, and it all kind of fit together." 2RT 81; A96 (handwritten letter). Counsel knew about Holly's cognitive impairments and poor communication skills. A42, 44–46, 53–55, 58–59, 62, 81–82, 92–93, 95–96; 1RT 2683, 2689, 2796–97. "[I]t should be obvious that Mr. Holly is not that sharp," co-counsel explained in his guilt-phase closing argument. 1RT 2482. "He can't spell his middle name. He doesn't know his address where he lives." *Id.* at 2482–83. Those limitations require more consultation rather than less. A lawyer, after all, "should as far as possible accord the represented person the status of client, particularly in maintaining communication." Ark. R. Prof. Cond. 1.14 ("Client with Diminished Capacity"), cmt. 2.

Holly's point is not that *McCoy* must always apply when a lawyer concedes guilt without first consulting the client. It is that *McCoy* does and should apply when a surprised defendant cannot reasonably be expected to object. The lower courts are divided over the relative scope of *McCoy* and *Nixon*. *Compare Hashimi*, 110 F.4th at 630 (*Nixon* "does not apply when a lawyer fails his initial duty of consultation, conceding guilt to a jury without first consulting with his client and

seeking the client's views"), *with Atwater*, 300 So. 3d at 591 (*McCoy* claim was facially insufficient because "Atwater has not alleged that counsel conceded guilt over Atwater's objection"). This Court should resolve that disagreement.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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