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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

MARK ANTHONY POOLE,

Appellee.
_____/

CASE NO. SC18-245
L.T. No. CF01-7078A-XX
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

REPLY/CROSS-ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE

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PRELIMINARY STATEMENT

References to the record on appeal from the direct appeal (Case No. SC05-1770) will be designated as "V" followed by the applicable volume and page numbers. Citations to the instant record in this post-conviction appeal (Case No. SC18-245) will be designated as "R." with the applicable page number.

STATEMENT OF THE CASE AND FACTS

The State generally relies upon the Statement of the Case and Facts set forth in its Initial Brief. However, since the parties apparently disagree with conclusions to be drawn from limited portions of the transcript regarding counsel's final discussion with Poole immediately prior to conceding Poole's guilt to some of the charged offenses, the State will cite those portions of the transcript here.

The following colloquy occurred on cross-examination between the State and trial counsel relating to a partial concession strategy during the evidentiary hearing:

> Q. And considered and discarded alternative courses of action in the process, didn't you?
>
> A. Yes.
>
> Q. The defendant may not have been in agreement, but he knew what you were going to do, didn't he?
>
> A. At the time I did it, yes. I mean, as I earlier had testified, he requested of me not to make the concessions at the beginning of the trial. That was consistent with my theory, so I did not. But by the time we got to closing arguments I informed him that I believed that to be the only strategy to go forward and that I was going to do it.
>
> Q. How did he feel about that?
>
> A. He did not respond, is my recollection. I just emphatically said to him, "Here's what I'm going to do." I said, "I tried to hold off. It's what's left. Here's what I'm going to do." And I do not

recall -- we were in open court at that time, and I do not recall – you know, certainly he did not get up, yell, scream, rant and rave. He was a very appropriate individual in the court.

Q. Right.

Well, let me -- let me make sure I understand this, because they spent a lot of time talking about Nixon and unresponsiveness and that kind of thing.

At the beginning of the trial you had been discussing the strategy with him. Correct?

A. yes.

Q. Before the trial and at the very beginning, And he'd manifested to you that he didn't want to go down that road. Right?

A. Yes.

Q. By the time you got to the end of the guilt phase and you were fixing to do your closing argument you basically tell him, look, this is what I need to do. Right?

A. Yes.

Q. And he said nothing. He was not responsive. Right?

A. I do not recall him responding, or frankly, that there was even an opportunity. I mean, like I said, we were my recollection, we were in open court. That jury was in the courtroom. I just looked at him and said, "Here's what I'm doing."

Q. Right.

And he didn't say don't do it. Right?

A. No, not that I recall.

Q. Okay. Fair enough.

(R. 1480-81).

On re-direct, the following colloquy occurred between collateral defense counsel and trial counsel Dimmig:

> Q. Okay. So the reason that Mr. Poole was unresponsive in that instance was because he didn't have time to respond, because you didn't give it to him?
>
> MS. AVALON: I'll object to that. It's speculation.
>
> JUDGE HARB: Overruled.
>
> A. I can't say why he didn't respond. I simply know that he did not have --
>
> BY MR. BROWN:
>
> Q. Well, let me ask you --
>
> A. -- very little time to do it.
>
> Q. Let me ask you this. You don't know why he didn't respond because you didn't stick around long enough to give him time to respond?
>
> A. I was not there long enough for him to -- to give him time to respond, yes.

(R. 1546-47).

The relevant rulings below by the Honorable Jalal Harb, applied Strickland v. Washington, 466 U.S. 668 (1984) to deny the defendant guilt phase relief on the allegations of ineffective assistance of counsel. On defense counsel's asserted comment on the defendant's silence, the court held:

> The Defendant alleges, "Trial counsel was ineffective for violating Mr. Poole's right to remain silent by testifying during closing arguments that Mr. Poole acknowledged his guilt to the non-homicide offenses. This violation prejudiced Mr. Poole, as there likely would have been a different outcome in its absence, and this Court should grant Mr. Poole relief." The Defendant notes that the trial court held a colloquy with Mr. Poole regarding whether or not he wanted to testify. Mr. Poole agreed during the colloquy that he had decided in consultation with his attorney not to testify. (ROA, Vol. XI Pgs. 2725-2726).
>
> The Court does not find that counsel violated the Defendant's Right to Remain Silent in his statements that Mr. Poole acknowledges his guilt for sexual battery, burglary and robbery. Defense Counsel was clearly making a reasonable tactical decision in light of the strong evidence the State had with regard to the non-homicide crimes to maintain some credibility with the jury with regard to challenging the actual murder charge.

(R. 1720-21).

As to the specific claim that counsel's concession to the non-homicide offenses in closing violated "attorney client" privilege, the court cited relevant portions of the evidentiary hearing transcript reflecting trial counsel's thought process before concluding that counsel had not been deficient and that Poole failed to establish any resulting prejudice. The court concluded:

> The focus of the Defense was to avoid a conviction for first degree murder. Mr. Dimmig made a tactical decision to divide the defense team between the two phases of the trial to maintain credibility with the jury. He made the State meet its burden with

> respect to proving the non-capital crimes prior to conceding to them in his closing argument. Mr. Dimmig thought the Nixon case gave him the authority to concede Guilt on the non-homicide cases, and he reasonably thought that by doing so he gave Mr. Poole the best chance of not being convicted of first degree murder. The Court does not find that counsel's performance fell below an objective standard of reasonableness. Additionally, the Court finds no reasonable basis to conclude that any deficiency by counsel with regard to this claim undermines confidence in the result of the proceedings.

(R. 1732).

Any additional facts necessary for disposition of the issues presently before this Court will be discussed in the argument, infra.

SUMMARY OF THE ARGUMENT

STATE APPEAL:

Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), was incorrectly decided. On remand from the Supreme Court, this Court should have simply determined the remaining issue left unanswered by the Court: Whether any underlying Hurst/Ring error was harmless. Instead, this Court articulated a new constitutional rule requiring findings on the weighing of aggravation and mitigation that was not contemplated by the Supreme Court in Hurst v. Florida, 136 S. Ct. 616 (2016). That expansive extension of Hurst cannot be reconciled with precedent from this Court or the Supreme Court. Hurst v. State reversed years of precedent from this Court which followed the Supreme Court's ruling in Ring v. Arizona, 536 U.S. 584 (2002). The State has presented compelling reasons to reverse this Court's ruling in Hurst v. State.

POOLE'S CROSS-APPEAL:

Since this claim comes to this Court on post-conviction review, Poole faces significant procedural hurdles to obtain relief. To the extent Poole suggests the Supreme Court articulated a new structural error that defies review under Strickland applicable to trial counsel's concession of any degree of guilt over a defendant's objection, that rule is not

retroactive. In any case, Florida v. Nixon, 543 U.S. 175 (2004), not McCoy v. Louisiana, 138 S. Ct. 1500 (2018) governs the outcome of this case.

Significantly, unlike McCoy, trial counsel pursued an absolute acquittal to the charged murder and attempted murder, arguing that the crimes could be separated into two criminal episodes, with Poole being innocent of the most serious charge. However, in McCoy, Defense counsel did little more than plead his client guilty during the trial. But, ultimately, what takes this case out of the parameters of McCoy and within the confines of Nixon is that Poole was unresponsive after counsel explained again the tactical decision to concede guilt on some of the charges based upon the very strong case presented by the State. Poole failed to establish either deficient performance or resulting prejudice from his attorney's tactical decision.

APPELLANT/CROSS-APPELLEE'S REPLY ARGUMENT

THIS COURT SHOULD REVERSE THE DECISION OF THE POST-CONVICTION COURT BELOW GRANTING A NEW PENALTY PHASE BECAUSE POOLE BECAME DEATH ELIGIBLE BY VIRTUE OF THE JURY FINDING HIM GUILTY OF CONTEMPORANEOUS VIOLENT FELONIES. THIS COURT'S INCLUSION OF THE WEIGHING PROCESS AS A "FACT" THAT MUST BE FOUND BY THE JURY BEFORE A DEFENDANT BECOMES ELIGIBLE FOR A DEATH SENTENCE SHOULD BE REEVALUATED IN LIGHT OF THE NEAR UNIVERSAL REJECTION OF THAT REQUIREMENT BY COURTS APPLYING AND INTERPRETING HURST V. FLORIDA.

Contrary to Poole's argument, the State is fully aware of the value of *stare decisis*, particularly in the context of capital cases. The State does not give "short shrift" to the concept as he argues in his brief. (Appellant's Brief at 8). Indeed, *stare decisis* principles should have been important to this Court following remand from the Supreme Court in Hurst. Instead, this Honorable Court jettisoned more than a decade of precedent in finding that weighing of aggravating and mitigating circumstances was a "fact" that must be decided by a jury before a death sentence may be imposed. See Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under Ring if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string citations omitted). As reflected in the State's initial brief,

subsequent precedent has rendered this Court's decision, already legally unsound at the time that decision was made, intolerable. See Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31, 138 S. Ct. 2448, 2479 (2018) (While recognizing the importance of stare decisis, the Court nonetheless, reversed its prior precedent, observing, in part: "An important factor in determining whether a precedent should be overruled is the quality of its reasoning[.]") (citations omitted).

The State is mindful of justice Lawson's concurring opinion in Okafor v. State, 225 So. 3d 768, 776 (Fla. 2017), observing that this Court incorrectly decided Hurst, but also recognizing that precedent as final and binding on the Court. However, the force of subsequent precedent establishing that this Court erred is more clear now, and, adherence to that precedent only serves to perpetuate a clear error in the law.

When decisions are "unworkable" or "badly reasoned," the United States Supreme Court "has never felt constrained to follow precedent." Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Smith v. Allwright, 321 U.S. 649, 665 (1944)). The Court has also recognized that *stare decisis* does not demand adherence to the more recent precedent, particularly where the recent case collides with more intrinsically sound prior precedent. In Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995),

the Court explained:

> "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case. (emphasis added)

That is precisely the case here. The prior precedent of this Court properly recognized the scope of a Ring/Apprendi fact finding error under the Sixth Amendment.

Notably, following Ring, the Nevada Supreme Court initially determined that "weighing" was a fact that needed to be found by the jury in order to satisfy the Sixth Amendment. However, it subsequently reversed that decision, pointing to the clear majority of courts that held otherwise, and the more persuasive reasoning that demanded reconsideration of that precedent. The

court concluded: "The weighing determination does not involve the finding of any facts; instead, weighing asks the sentencing body to balance facts that have already been found (aggravating and mitigating circumstances) in order to reach a conclusion or judgment. See Webster's Ninth New Collegial Dictionary 1337 (1983) (defining "weigh" as "to consider carefully esp. by balancing opposing factors or aspects in order to reach a choice or conclusion")." The State is respectfully asking this Court to reconsider this Court's precedent in a similar manner, in light of the much better reasoned and clearly expressed majority view.

Perhaps recognizing the rather large amount of precedent that rejects the weighing process as a necessary fact subject to the Sixth Amendment dictates of Ring/Hurst, Poole argues the state ignored the state constitutional underpinnings of this Court's decision in Hurst and Perry and, instead, focused on the United States Constitution. (Cross-Appellant's Brief at 29). However, the state constitution, exactly like the United States Constitution, provides for "trial" by jury, not sentencing by a jury. Art. I, § 16, Fla. Const; Art. I, § 22.[1] This Court should not read words into the state constitution that are simply not

[1] State v. Webb, 335 So. 2d 826, 828 (Fla. 1976) ("It has long been established that this provision guarantees the right to trial by jury in only those cases in which the right was recognized at the time of the adoption of the State's first constitution.").

present. Indeed, if the state constitution provides for sentencing by a jury as Poole implies, that right would not be restricted to capital defendants.

This Court's decision on remand in Hurst was unjustified and plainly incorrect in light of the Supreme Court's opinion and past precedent from this Court. See Hurst v. Florida, 136 S. Ct. 616, 624 (2016) ("Florida's sentencing scheme, which required the judge alone to find the existence of **an aggravating circumstance**, is therefore unconstitutional.") (emphasis added); State v. Lotter, 301 Neb. 125, 144, 917 N.W.2d 850, 864 (2018) ("The plain language of Hurst reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances."); State v. Goff, 154 Ohio St. 3d 218, 225, 113 N.E.3d 490, 497 (2018) (rejecting the defendant's argument that "for Sixth Amendment purposes, the weighing of aggravating circumstances and mitigating factors is itself a factual finding necessary to impose a death sentence."). The complete abrogation of more than a decade of this Court's prior precedent was clearly unjustified. Accordingly, the State asks this Court to correct the error here and reverse the lower court's order vacating Poole's death sentence. See Citizens United v. Fed. Election Com'n, 558 U.S. 310, 378-79 (2010) ("Abrogating the errant precedent, rather

than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.").

Poole argues that many defendants have now received Hurst relief and that it would now be unfair to deny Poole the same relief. (Cross Appellant's Brief at 26). While it may be impossible now to ameliorate many of the costs already borne by the State, that is no reason to allow incorrectly decided precedent to stand. All of the financial and emotional costs of this Court's expansion of Hurst have been borne by the State and the victims' family members. Murderers, and Poole in particular, whose crimes preceded this Court's decision in Hurst, cannot have had any detrimental reliance on this Court's decision. As explained in the State's initial brief, Poole is not entitled to resentencing under Hurst. Properly understood, in the context of past precedent from this Court and the Supreme Court, Hurst would have had a negligible impact upon the system of justice in Florida.[2] Instead, the prior expressed fears of former Justice

[2] Indeed, the State certainly, to its detriment, relied upon this Court's prior determination of the limited scope of a Sixth Amendment error under Ring. See Rigterink v. State, 66 So. 3d 866, 896 (Fla. 2011) (noting that this Court has repeatedly relied upon the presence of the prior violent felony aggravator in rejecting Ring claims); Duest v. State, 855 So. 2d 33, 51 (Fla. 2003) (Pariente, Specially concurring) ("I continue to believe that the strict holding of Ring is satisfied where the

Harding have come to pass, with incalculable costs to the State:

> ...These challenges could possibly result in entitlements to entire repeats of penalty phase trials, in turn leading to repeats of postconviction proceedings, and then new federal habeas proceedings. Evidence will clearly have grown stale or have been lost or destroyed, witnesses will be unavailable, and memories will surely have faded. Importantly, all of those involved in these human tragedies will have to relive horrid experiences in order to reestablish the factual bases of these cases, many which are undeniably heinous.

King v. Moore, 831 So. 2d 143, 148 (Fla. 2002) (Harding, concurring).

The lower court's order vacating Poole's death sentence should be reversed.

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trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty."). As argued in the State's initial brief, Hurst should have been viewed as a straight forward application of Ring to Florida's hybrid system, not an opportunity for this Court to rewrite Florida's capital sentencing law.

CROSS-APPEAL ARGUMENT

WHETHER POOLE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS PROPERLY DENIED BELOW BASED UPON POOLE'S CLAIM THAT DEFENSE COUNSEL IN CLOSING ARGUMENT CONCEDED POOLE'S GUILT OF THE NON-HOMICIDE OFFENSES FOLLOWING A POST-CONVICTION HEARING IN WHICH POOLE FAILED TO ESTABLISH EITHER DEFICIENT PERFORMANCE OR RESULTING PREJUDICE FROM COUNSEL'S ARGUMENT?

Poole contends that his convictions must be vacated in light of the Supreme Court's recent decision in McCoy v. Louisiana, 138 S. Ct. 1500 (2018). However, before even reaching the underlying application of McCoy in this appeal under the very different facts of this case, Poole needs to overcome the failure to specifically raise and preserve his claim in this post-conviction case. Further, assuming for moment this claim is properly presented for review, Poole would have to overcome the retroactivity hurdle to obtain relief under McCoy. Finally, this case is much more like Nixon than McCoy and therefore governed by the ineffective assistance of counsel standard of Strickland.[3] As found by the post-conviction court below, trial counsel's comments conceding guilt to the lesser charged offenses established by absolutely overwhelming evidence was not

[3] When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

deficient. Nor does Poole make so much as make an argument that he suffered any prejudice as a result of his defense counsel's concession, much less present actual evidence to undermine confidence in the outcome of his trial. Accordingly, the denial of post-conviction relief should be affirmed.

During the evidentiary hearing below, only lead counsel Dimmig was called to testify regarding his tactical decision to concede guilt on the non-murder charges. In 2005, having reviewed the Nixon case, Dimmig believed that he did not need Poole's consent to concede guilt for the non-capital offenses. ". . .I believe that the holding of Nixon was that it was my decision as a trial lawyer in a capital case to decide whether or not to concede guilt of non-death penalty eligible offenses." (R. 1474). His primary focus was to maintain some credibility on the first phase, arguing that the homicide occurred hours after Poole committed the non-capital crimes.[4] He believed that if the jury did not accept that theory as it related to the homicide,

[4] In closing argument, Dimmig conceded that Poole was guilty of burglary, sexual battery, and robbery, but Poole denied that he inflicted the severe injuries on Loretta White or killed Noah Scott. (V21/2795). Defense counsel argued that the investigators ignored evidence that two people were involved in the crimes committed against White and Scott because it did not fit their theory that Poole was solely responsible. He argued that there was evidence suggesting White's next-door neighbor, Trevor Campbell, had a motive and opportunity to enter the trailer and attack Scott and White after Poole had departed to sell the stolen video games. (V21/2795-2824).

other attorneys on the defense team would "maintain a degree of credibility with the jury as it relates to the penalty phase." (R. 1347).

A. Preservation and Retroactivity

(i) The claim Poole raises here was not properly presented below.

The circuit court denied Poole's guilt-phase post-conviction claims on January 9, 2018. On January 24, 2018, Poole filed a Motion for Rehearing asking the court to stay the proceedings, pending the decision in McCoy v. Louisiana, ___ U.S. ___, 138 S. Ct. 1500 (2018). The motion for rehearing was denied on February 9, 2018.

A review of the record reveals that Poole's McCoy argument raised on appeal is not the same legal argument presented to the circuit court. In fact, McCoy was decided on May 14, 2018, after the denial of the guilt-phase post-conviction claims. The claims Poole made in the post-conviction motion regarding counsel's admission of guilt to the sexual battery, burglary, and robbery, were that counsel's closing argument constituted (1) a violation of the right to remain silent and not to testify, and (2) a violation of the attorney-client privilege. (R. 414-417). A capital defendant may amend a post-conviction motion, upon a showing of good cause, no later than 45 days prior to the

evidentiary hearing. See Fla. R. Crim. P. 3.851(f)(4). Although Poole amended his post-conviction motion to add a Hurst claim, the motion was not amended to include a McCoy-type claim.

The issue in McCoy was whether counsel may make an argument of guilt contrary to a defendant's chosen defense theory, thereby overriding the defendant's "autonomy." In McCoy, the defendant testified that he was not guilty of the triple homicide and that he could establish an alibi. Id. at 1507. However, his counsel argued to the jury that McCoy had committed the murders, directly contradicting his client's testimony and theory of defense. Id. at 1506-07. As developed below, the factual scenario in McCoy is not similar to the facts in Poole's case. McCoy involved a situation where the defendant established a defense theory and trial counsel violated the defendant's autonomy to conduct his defense on that theory.

Here, Poole did not testify, he did not oppose counsel's strategy at trial when trial counsel informed him he was going to admit guilt, and he did not present a defense. The only "case" he presented was one witness: Dawn Campbell. Mrs. Campbell was not an eyewitness to any of the charged offenses, and she produced no evidence with regard to Poole: her testimony only concerned the whereabouts of her husband on the night of the murder. Mrs. Campbell's testimony in no way contradicted the

arguments made by trial counsel. (V21/2744-52). That McCoy is not factually similar to Poole explains why the substance of the issue raised in Poole's post-conviction motion was not the same as the issue litigated in McCoy.

Nevertheless, only after McCoy was granted certiorari review by the United States Supreme Court did Poole attempt to meld the McCoy issue into his own claims. The admission of guilt issue argued in Florida v. Nixon, 543 U.S. 175 (2004), was not argued or even mentioned in Poole's post-conviction motion, as it did not provide support for the actual arguments Poole raised in his motion. The first Poole argues Nixon is in the written closing arguments, after the evidentiary hearing, where Poole also mentions (in a footnote) that McCoy had been granted certiorari review.[5] (R. 1590). Using Nixon as a starting point, Poole then attempts to develop a "McCoy claim" in the motion for rehearing. However, neither presentation in closing arguments nor a motion for rehearing provide a sufficient basis for notice and preservation purposes. See Fla. R. Crim. P. 3.851(f)(5)(E);

[5] Nor does the fact that collateral counsel questioned trial counsel below regarding his understanding of Nixon serve to properly preserve his claim. See Doorbal v. State, 983 So. 2d 464, 484 (Fla. 2008) ("Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing and that specific facts and arguments need not be disclosed or presented until the evidentiary hearing.").

Fla. R. of App. P. 9.330(a) ("A motion for rehearing...shall not present issues not previously raised in the proceeding"); Cave v. State, 899 So. 2d 1042, 1052 (Fla. 2005) (finding claim barred because the claim was not raised "in his motion for postconviction relief, nor did he seek to amend his motion following the evidentiary hearing" and instead raised the "claim for the first time in his motion for rehearing following the circuit court's order denying relief[.]"). Therefore, the issue raised on appeal is not properly before this Court.

Moreover, Poole would be time barred from raising a new claim based on the holding in McCoy because McCoy created a new procedural rule that is not retroactive to Poole's case.[6] See Fla. R. Crim. P. 3.851(d). Even if this Court were to determine McCoy did not establish a new rule, as Poole suggests, there would still be no excuse for Poole's untimeliness, pursuant to 3.851(d).

(ii) To the extent that Mccoy announces a new rule, it is not retroactive.

To the extent McCoy announced a new rule, as Poole suggests, that under no factual scenario may a defense attorney concede guilt to any charge, including a lesser charged offense,

[6] The State does not concede that the new McCoy rule would be applicable under the facts of Poole's case even if the rule were determined to be retroactive.

against his client's wishes, that rule would not apply to Poole on post-conviction.[7] New rules of law articulated by either the Supreme Court or a state supreme court do not usually apply to cases that are final. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding the decision in Crawford v. Washington, 541 U.S. 36 (2004), was not retroactive); Teague v. Lane, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review). The Supreme Court in McCoy had no occasion to address retroactivity because the case came to the Court on direct appeal.

All parties below, including the experienced trial defense attorneys representing Poole, had read Nixon and believed that counsel's conduct was governed by that case. See Nixon, 543 U.S. at 190–91 ("Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus."). Indeed, the prosecutor mentioned defense counsel's concession of guilt to some of the charges on the record at trial. Defense

[7] Most certainly a prejudice per se error, obviating any need for a prejudice inquiry under Strickland, would constitute a new rule.

counsel responded to the prosecutor by asserting that Nixon gave him the authority to make that partial concession as a matter of strategy. See V21/2831-33. Had McCoy been issued at the time of trial, defense counsel, the State, and importantly, the trial court, would have been alerted that any concession by counsel might engender some type of "structural" error.

Significantly, this Court's reading of Nixon was very much in line with that of trial counsel's at the time of Poole's trial. In Harvey v. State, 946 So. 2d 937, 942 (Fla. 2006), this Court observed:

> ...We initially reviewed this issue under our earlier decision in *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000), which relied on the per se rule of ineffective assistance of counsel discussed in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). However, the United States Supreme Court held in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), that a defendant's claim of ineffective assistance of counsel based on counsel's concession of guilt to the crime charged, even without the defendant's consent, must be evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, in order to establish a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. As to the first or performance prong of *Strickland*, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* 466 U.S. at 687, 104 S.Ct. 2052. On the second or prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result

> of the proceeding would have been different. *See id.* at 694, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. 2052.

Under the appropriate standard of review, counsel's concession in Harvey, did not merit any post-conviction relief because the defendant failed to meet the requirements of Strickland. This was true even though this Court viewed trial counsel as having effectively conceded the defendant's guilt to the highest charged crime. "By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder." Harvey, 946 So. 2d at 943. Nonetheless, this Court decided the claim on the absence of prejudice. This Court stated that in light of the "overwhelming" evidence of the defendant's guilt, the court could not conclude "there is a reasonable probability that, but for any errors by counsel, the result of the proceeding would have been different, i.e., that our confidence in the outcome has been undermined." Harvey, 946 So. 2d at 944.

Defense counsel reasonably believed that the law existing at the time of Poole's trial allowed him to make a tactical

decision to concede guilt on claims supported, and, proved, by overwhelming evidence. See Diaz v. State, 132 So. 3d 93, 117 (Fla. 2013) ("Counsel does not provide ineffective assistance by conceding facts that are supported by overwhelming evidence.") (citing Patton v. State, 784 So. 2d 380, 390 (Fla.2000)); McCoy v. State, 113 So. 3d 701, 716 (Fla. 2013) ("Because counsel will not be deemed deficient for making a strategic decision to maintain credibility with a jury, this claim of ineffectiveness fails."). Precedent existing at the time of Poole's trial certainly supported this conclusion. See Teague, 489 U.S. at 301 (acknowledging that whether a case announces a new rule can be a difficult question, but that in general, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.") (citations omitted).

To the extent Poole now claims McCoy broadly prohibits the type of tactical decision made by counsel in this case over the defendant's objection [as noted below, the State believes Poole was non-responsive like Nixon immediately prior to making any concession] that would constitute a new rule and is subject to the general presumption of non-retroactivity. Indeed, if McCoy is broadly read to prohibit an attorney's tactical decision to concede some, but not all charged offenses, over a defendant's

objection, and, that this "error" defies a Strickland analysis, and engenders structural error, it most certainly is a new rule.[8] See Gonzalez-Gonzalez v. United States, 49 Fed. Appx. 322, 324 (1st Cir. 2002) (unpublished) ("Doctrinally speaking, however, prejudice per se is hen's-teeth rare."). The Supreme Court has recognized that when it articulates a new obligation on an attorney, such as a requirement that the attorney advise a defendant of the collateral consequences of a guilty plea under the Sixth Amendment, that rule is subject to the general non-retroactivity bar. See Chaidez v. United States, 568 U.S. 342, 358 (2013) ("This Court announced a new rule in Padilla. Under Teague, defendants whose convictions became final prior to Padilla therefore cannot benefit from its holding."). See also Barajas v. United States, 877 F.3d 378, 384 (8th Cir. 2017) ("We hold that Teague's bar applies to federal petitioners raising ineffective assistance of counsel claims."); Curtis v. Duval, 124 F.3d 1, 6 (1st Cir. 1997) ("Since the Cronic principle does not fall into either of the Teague exceptions, the petitioner's position erodes. The principle does not place any conduct beyond the power of the state to regulate, and it does not implicate the fundamental fairness or accuracy of a criminal proceeding.

[8] Of course, McCoy presented a rather extreme case on its facts and therefore its holding may be much more limited than Poole now suggests.

Thus, under Teague, the petitioner is not entitled to rely on the principle announced in Cronic.”).

This Court has recognized that often retroactivity decisions present difficult issues, particularly in capital cases. See Witt v. State, 387 So. 2d 922, 924-25 (Fla. 1980) (“The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post-conviction relief from a sentence of death.”). However, this case, and the McCoy issue, in particular, does not present a difficult decision. In Asay v. State, 210 So. 3d 1, 16-17 (Fla. 2016), this Court explained:

> Under Witt, a change in the law does not apply retroactively “unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.” Id. at 931. To be a “development of fundamental significance,” the change in law must “place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,” or, alternatively, be “of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter.” Id. at 929. The Stovall/Linkletter test requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. Id. at 926; Johnson, 904 So.2d at 408.

McCoy does not place beyond the power of the State the right to punish any defendant. The rule is clearly not substantive. Nor, is the rule in McCoy a development of fundamental significance. The purpose of McCoy is to allow the defendant personal autonomy in conducting his or her own defense. Such a rule, while perhaps important, has nothing to do with accuracy or fairness in the outcome of a judicial proceeding. If anything, providing a defendant an absolute right to veto his attorney's tactical decision to concede to some of the charges, even in the face of overwhelming evidence, runs directly counter to the truth-seeking function of a trial. Moreover, providing the defendant the right to pursue a defense to the indefensible, is not a wise strategy, particularly in a capital case where the jury will be called upon to make a recommendation for the defendant's sentence. To the extent McCoy suggests the defendant has a near absolute right to over-ride his defense attorney's tactical advice, it is simply a matter of who makes the decision. It would seem obvious that the defense attorney, not the capital defendant, is in a much better position to make this decision in light of his or her skill, training and experience. Cf. Schriro v. Summerlin, 542 U.S. 348, 356 (2004) (in finding Ring was not retroactive, the Supreme Court observed that "for every argument why juries are more

accurate factfinders, there is another why they are less accurate.”).

Indeed, there is not a scintilla of evidence presented by Poole in his post-conviction proceeding to suggest, much less establish a viable defense to the charges conceded by defense counsel in closing argument. Moreover, those cases already final on direct appeal, like Poole, still have recourse under the Strickland standard. A defendant would simply have to establish some reasonable probability of a different result before a new trial is granted.

The balance between the very important goal of finality and the purpose of the new rule weighs very heavily against any retroactive application. See Teague, 489 U.S. at 309-10 (“Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.”). The impact on the justice system of the McCoy structural error rule could well be significant. We simply cannot know how many cases will be impacted by McCoy. However, if McCoy is read broadly rather than on the extreme facts of that particular case, the numbers will

no doubt be large.[9] See McCoy, 138 S. Ct. at 1517 ("Is admitting guilt of a lesser included offense over the defendant's objection always unconstitutional? Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter? What about simple assault?") (Alito, J., dissenting).

Finally, the non-retroactivity of McCoy would fit squarely within the well-established rule that trial counsel is not required to "anticipate changes in the law" in order to provide effective legal representation. See Lynch v. State, 254 So. 3d 312, 323 (Fla. 2018) ("Furthermore, under Strickland, claims of ineffective assistance of counsel are assessed under the law in effect at the time of the trial."). Poole is not entitled to a per se prejudice analysis due to the release of McCoy years after his trial. McCoy is not retroactive.

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[9] Certainly, potentially intrusive post-conviction proceedings will follow issuance of McCoy, particularly if it is deemed to have any retroactive effect. Do defendant's filing motions for post-conviction relief following McCoy always receive a post-conviction hearing on their motion even where counsel's decision to concede to a lesser offense would appear to be reasonable based upon the record? A per se reversal rule in this context would seem to invite costly and time-consuming post-conviction litigation.

B. This case is governed by the Supreme Court's decision in *Nixon*, not *McCoy*

The State acknowledges that the facts of this case do not squarely fall within the factual parameters of Nixon. However, contrary to Poole's argument, it does not fall within the specific factual confines of McCoy either. Upon close examination of the facts, this case is more closely aligned with Nixon, and therefore Nixon, not McCoy, governs its outcome. Moreover, it must be remembered that McCoy was decided on direct appeal, and, a different standard applies to a claim like this one, raised for the first time in post-conviction.

(i) McCoy was decided on Direct Appeal

The defendant in McCoy made his displeasure with trial counsel's concession strategy known to the trial court at the time of his trial. Indeed, the conflict between counsel's strategy and the defendant's was readily apparent, both before trial, and, notably, during trial, when the defendant took the stand and claimed his innocence. No such record appears here, and, unlike in McCoy, appellate counsel raised no such claim on direct appeal. Poole's acquiescence or opposition to counsel's chosen strategy was never made apparent during his trial. An error viewed as "structural" on direct appeal may not entitle a defendant to reversal if raised for the first time in post-

conviction.

In Weaver v. Massachusetts, 137 S. Ct. 1899, 1912 (2017) the Supreme Court rejected the notion that an error viewed as "structural" when a claim is raised on direct appeal, is entitled to the same treatment if raised for the first time in post-conviction. The Supreme Court noted that finality interests and the lapse of time justify making a defendant prove prejudice in the context of an error, if preserved and presented on appeal, would have entitled the defendant to automatic reversal. The Court reasoned:

> Furthermore, when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. For instance, in this case, the factors and circumstances that might justify a temporary closure are best considered in the regular appellate process and not in the context of a later proceeding, with its added time delays.
>
> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, *see Strickland*, 466 U.S., at 693–694, 104 S.Ct. 2052 (noting the "profound

> importance of finality in criminal proceedings"), and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.
>
> In sum, "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," thus undermining the finality of jury verdicts. *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). For this reason, the rules governing ineffective-assistance claims "must be applied with scrupulous care." *Premo*, 562 U.S., at 122, 131 S.Ct. 733.

Weaver, 137 S. Ct. at 1912.

While the State maintains that there are significant factual differences that render McCoy inapplicable in this case, Poole nonetheless should not be rewarded, and the State and victims penalized, for his silence on this matter at trial. Again, there are significant differences between a claim addressed in the trial court and raised on direct appeal, and a claim raised for the first time in post-conviction. The Supreme Court closed with the following appropriate observation in Weaver:

> In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be

> granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial. As explained above, he has not made the required showing. The judgment of the Massachusetts Supreme Judicial Court is affirmed.

137 S. Ct. 1899, 1913-14.

In United States v. Thomas, the Third Circuit cited Weaver in holding that denial of a defendant's counsel of choice, while a structural error requiring reversal on direct appeal, is subject to Strickland when raised for the first time in post-conviction. The court explained:

> As a preliminary matter, Thomas argues that he need not show prejudice on his ineffective assistance of counsel claim because the denial of a defendant's Sixth Amendment right to counsel of his choice is a structural error that is presumptively prejudicial. While it is true that the "erroneous deprivation of the right to counsel of choice ... unquestionably qualifies as structural error," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (internal quotation marks and citation omitted), the Supreme Court applies that rule to a preserved objection on direct review, *id.* at 142-44, 126 S.Ct. 2557. When a defendant on collateral review raises an ineffective assistance of counsel claim involving counsel's failure to raise a structural error, the defendant will typically bear the burden to show both deficient performance of counsel and prejudice under the familiar *Strickland* framework. The Supreme Court recently addressed a similar situation in *Weaver v. Massachusetts*, --- U.S. ----, 137 S.Ct. 1899, 1911, 198 L.Ed.2d 420 (2017) (plurality).

United States v. Thomas, 16-4069, 2018 WL 4846325, at *5 (3d Cir. Oct. 4, 2018) (unpublished). See also Yannai v. United States, 10-CR-594/17-CV-1738, 2018 WL 5818532, at *6 (E.D.N.Y. Nov. 6, 2018) (in denying habeas relief, the court observed that although the right to testify at trial is a fundamental right and may have been structural error, the court distinguished between a structural error raised and decided on direct appeal, and a structural error like "McCoy" decided "on direct appeal, allowing the Supreme Court to bypass the prejudice analysis and order a new trial[.]") (citing McCoy, 138 S. Ct. at 1507, 1512). As Poole raised this claim for the first time in post-conviction, it should be addressed under the standards announced in Strickland, and, not as if the claim had been presented to this Court on direct appeal as "structural error."

(ii) The facts of McCoy are readily distinguishable from this case.

Regardless of the procedural hurdles facing this claim, the facts of this case are far different from those in McCoy. In McCoy the defendant was indicted on three counts of first-degree murder and the State sought the death penalty. Id. at 1506. The defendant pleaded not guilty, and throughout the proceedings consistently maintained his innocence. McCoy claimed that he was out-of-state at the time of the murders and that corrupt police

officers killed the victims during a drug deal. Id. The defendant's counsel determined that the evidence against the defendant was overwhelming and that, absent a concession at the guilt stage, a death sentence would be impossible to avoid. Id.

McCoy was "furious" when advised that his attorney would concede guilt. Id. He told counsel "not to make that concession," and counsel was aware of McCoy's "complete opposition" to the concession. Id. Prior to trial, the defendant and counsel sought to end their relationship. However, the trial court refused. Id. The trial court stated, "You are the attorney," when told counsel expressed disagreement with the defendant's wish to put on a defense case, and additionally, "You have to make the trial decision of what you're going to proceed with." Id.

During the trial, defense counsel told the jury in opening statement that there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than [the defendant] was the cause of these individuals' death[s]." Id. The defendant protested in court, telling the trial court that counsel was "selling him out" by maintaining the defendant's guilt.[10] Id. The trial court reiterated that counsel was "representing" the defendant and

[10] The jury did not apparently hear this outburst.

that the court would not permit "any other outbursts" from the defendant. Id. at 1506-07. Continuing his opening statement, counsel told the jury the evidence is "unambiguous" and, "my client committed three murders." Id. at 1507.

The defendant testified in his own defense, maintaining his innocence and pressing an alibi [although not a particularly persuasive or credible one]. Id. In closing argument, counsel reiterated that the defendant was the killer and told the jury that he "took the burden off of the prosecutor." Id. The jury returned a verdict of guilty for all three counts and subsequently recommended a sentence of death. Id.

In its analysis, the Supreme Court contrasted its decision in Florida v. Nixon, 543 U.S. 175 (2004), with that of McCoy. 138 S.Ct. at 1509-10. The Court held in Nixon "that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." Id. at 1505 (citing Nixon, 543 U.S. at 181). Defense counsel in Nixon had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. McCoy, 138 S.Ct. at 1505 (citing Nixon, 543 U.S. at 186). Trial counsel did not negate Nixon's autonomy by overriding the defendant's

desired defense objective because Nixon never asserted any such objective. McCoy, 138 U.S. at 1509 (citing Nixon, 543 U.S. at 181).

Significantly, the defendant in Nixon complained about the admission of his guilt only after trial, McCoy, 138 U.S. at 1509 (citing Nixon, 543 U.S. at 185), unlike the defendant in McCoy, who "opposed [counsel'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. In contrast to Nixon, the defendant in McCoy "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505. "If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest." Id. at 1509.

The Supreme Court in McCoy held "that a defendant has the 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." The Court concluded in McCoy that counsel may not admit his or her client's guilt of a charged crime over the "client's intransigent objection to that admission." McCoy at 1510. "Violation 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." Id. at 1511.

The factual circumstances of this case stand in stark contrast to those of McCoy. Poole did not intractably or vehemently oppose defense counsel's strategy as did the defendant in McCoy. McCoy testified in his own defense and counsel's concession strategy directly contradicted the defendant's testimony. The conflict between counsel and the defendant in McCoy was readily apparent from the record.[11] In this case, unlike McCoy trial counsel did not concede Poole's guilt of any charges in opening statement. Here, Poole exercised his right not to testify at trial and trial counsel's strategy did not directly or indirectly undercut Poole's chosen defense or undercut his personal credibility. Indeed, the most that can be said in leading up to the trial is that Poole was generally opposed to a concession strategy after repeated discussions with his experienced trial counsel.

Significantly, trial counsel pursued an absolute acquittal to the charged murder and attempted murder, arguing that the

[11] Indeed, as noted, the record in McCoy was sufficient for the claim to be raised and addressed on direct appeal, unlike this case, where Poole remained silent and did not openly express any dissatisfaction with his attorney's strategy.

crimes could be separated into two criminal episodes with Poole being innocent of the most serious charge. However, in McCoy, Defense counsel did little more than plead his client guilty during the trial. But, ultimately, what takes this case out of the parameters of McCoy and within the confines of Nixon is that Poole was unresponsive after counsel explained the tactical decision to concede guilt on some of the charges based upon the very strong case presented by the State.

Appellate counsel argues that the record does not reflect Poole ever agreed to a concession strategy.[12] That is accurate. However, he largely ignores the discussion immediately prior to closing argument where counsel explained once again the partial concession strategy as the best course of action. Poole voiced no objection at that point and indeed, failed to respond to counsel. (R. 1480-81). While post-conviction counsel asks this Court to speculate that Poole did not have time to voice an objection, the record does not support this conclusion. Indeed, for that reason, the State took the somewhat unusual step of repeating the relevant cross-examination and redirect colloquy from the evidentiary hearing below. (R. 1480-81, 1546-47; see State's Cross-Answer Brief at pp. 1-3). The transcript from the hearing makes clear, that at the point it mattered most,

[12] Neither did the defendant in Nixon.

immediately before counsel applied his intended strategy in closing, Poole was silent or unresponsive, just like Nixon. See Florida v. Nixon, 543 U.S. 175, 192 (2004) ("When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent.").

While collateral counsel asks this Court to speculate that Poole's silence was merely a function of lack of time to respond, that is, at best speculation. Poole's silence can be, and, most likely was, a reflection of his acquiescence to counsel's intended strategy, informed by the State's presentation of overwhelming evidence during the course of the trial. In any case, it is well established that post-conviction relief cannot be based upon speculation. See McLean v. State, 147 So. 3d 504, 512 (Fla. 2014) (observing that "postconviction relief cannot be based on mere speculation."); Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility."). Accordingly, it is clear that Poole had to meet the requirements of Strickland in order to obtain post-conviction relief.

(iii) Under Strickland, Poole failed to show either deficient performance or resulting prejudice.

Of course, pursuant to Strickland v. Washington, 466 U.S. 668, 690 (1984), a defendant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined. In Harrington v. Richter, 562 U.S. 86, 105 (2011), the Supreme Court reiterated (emphasis added) how difficult it is to meet Strickland's ineffective assistance standard:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. **Even under de novo review, the standard for judging counsel's representation is a most deferential one.** Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart*

> *v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

"The Supreme Court has recognized that because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995) (citing Strickland, 466 U. S. at 689). "When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

Howard Dimmig was a very experienced capital litigator at the time of Poole's trial. Dimmig had tried capital cases as far back as the 1980's. (R. 1461). Over the course of his career Dimmig has handled some 20 to 25 capital cases. Six to eight of those went to trial and two resulted in death sentences. (R. 1295). He was appointed to represent Poole in 2001. He had the benefit of second chair counsel Julia Williamson with another attorney, Steve Fisher, assisting with the penalty phase. (R. 1296-97).

Since the evidence against Poole was simply incontrovertible and included scientific identification evidence, counsel pursued the only strategy he believed was professionally responsible. See Brown v. State, 846 So. 2d 1114, 1125 (Fla. 2003) ("Again, we emphasize that this Court will not second-guess counsel's strategic decisions on collateral attack."). Poole notably, fails to articulate a better theory of defense. See Jones v. State, 998 So. 2d 573, 584 (Fla. 2008) ("A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under Strickland; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different.") Indeed, even in post-conviction, Poole did not challenge any of the compelling evidence arrayed against him.

This was simply not a close case. The State presented absolutely overwhelming evidence of Poole's guilt. Poole was identified heading in the direction of the victims' trailer immediately prior to the attack. Poole sold video games like those taken from the victims [some stained with the victim's blood] immediately after the murder and attempted murder. One video game was left on the porch of Johnson's [Poole's on again, off again girlfriend] trailer where Poole had been living at the

time the victims were attacked and robbed.

In addition to eyewitness testimony connecting Poole with the charged offenses, the State presented compelling and uncontradicted physical evidence to link Poole to the crimes. This evidence included DNA found on Poole's shirt matching or consistent with victim [L.W.]'s DNA, and, DNA from the rape kit, matching Poole's genetic profile.[13] From the vaginal swab, FDLE analyst Robin Ragsdale found a mixture, with the male contributor matching Poole's profile at 8 loci. The possibility of anyone randomly matching this profile was 1 in 350 trillion Caucasians, 1 in 84 trillion African-Americans, and 1 in 550 trillion Southeastern Hispanics. (V21/2700-01). Ragsdale acknowledged that there are only about 6 billion people on the face of the earth. (V21/2701). DNA recovered from the vaginal

[13] The surviving victim's testimony established that her rapist, Poole, was the one who inflicted the devastating injuries upon her. [L.W.] kept telling the individual not to hurt her because she was pregnant. (V19/2409). The attacker put his weight on top of her, straddled her, and pulled her legs apart. This individual put his penis inside of her. She told him not to do it. (V19/2410). Her attacker was a lot larger than her, she could not tell his height, but "he was big." (V19/2411). She was face down on the mattress. (V19/2411). [L.W.] testified that her attacker hit her "repeatedly." She did not know how many times Noah was hit either, but testified: "Just repeatedly. Just solid. I didn't count." (V19/2412). [L.W.] testified that she was struck in the head after the rape. (V19/2416). During the rape, [L.W.] testified Noah continually kept getting up but that her attacker "would pick up whatever object he had and he would hit Noah across the face, and he would fall back down." (V19/2416-17). She heard Noah "moaning in pain." (V19/2419).

and cervical swabs were only consistent with Poole and [L.W.] or a mixture of the two. (V21/2701). Three of the games or game controllers linked to Poole after the offenses had blood on them matching victim Scott's DNA profile. In addition, a tire iron found in the vicinity of the victims' trailer had blood stains on it which were consistent with victim Scott's DNA profile. A footprint consistent with Poole's was found next to the bed where the attacks occurred.

Given the overwhelming weight of the evidence arrayed against Poole, he posits no theory, much less a plausible theory backed by evidence that counsel could have employed to change the outcome of his case. In the face of uncontested scientific evidence, which included DNA consistent with Poole's inside the surviving victim's vagina, Poole would have his counsel argue---**what**? Burt v. Titlow, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.") (quoting Strickland at 689). The law did not require counsel to engage in a useless charade or fabricate a defense in order to satisfy Strickland. See United States v. Thomas, 417 F.3d 1053, 1058 (9th Cir. 2005) (finding counsel not ineffective under Strickland where "[h]e had a sensible reason for not contesting

Thomas's participation in the UPS robbery: it was, for all practical purposes, incontestable, and he believed that doing so would enhance his credibility on counts where the evidence was somewhat less clear and the penalties significantly greater."); Mohanlal v. State, 162 So. 3d 1043, 1045 (Fla. 4th DCA 2015) ("A postconviction motion may be denied without a hearing when counsel concedes a defendant's guilt to lesser offenses, even without the defendant's consent, if the record shows this was a reasonable tactical decision of counsel in the face of overwhelming inculpatory evidence.") (citing Florida v. Nixon, 543 U.S. 175, 190-92 (2004) and Harris v. State, 768 So. 2d 1179, 1182-83 (Fla. 4th DCA 2000)).

In conclusion, properly analyzed under Strickland, Poole failed to establish his experienced trial counsel exercised unreasonable or unprofessional judgment in conceding the non-murder charges in closing argument. Moreover, the record is entirely devoid of any evidence upon which prejudice can be discerned. Confidence in the outcome of this trial has not been undermined. Accordingly, this Court should affirm the order denying guilt phase relief below.

CONCLUSION

In conclusion, Appellant/Cross-Appellee, the State of Florida, respectfully requests that this Honorable Court reverse the decision of the court below granting the Poole a new penalty phase, but affirm the lower court's denial of guilt phase relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: David D. Hendry, James L. Driscoll, Jr. and Rachel P. Roebuck, Assistants CCRC, Law Office of Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907 (hendry@ccmr.state.fl.us, driscoll@ccmr.state.fl.us, roebuck@ccmr.state.fl.us and support@ccmr.state.fl.us); and to Parvin Daphne Moyne, Mark J. MacDougall and Z.W. Julius Chen, Pro hac vice (pmoyne@akingump.com, mmacdougall@akingump.com and chenj@akingump.com).

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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