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IN THE SUPREME COURT OF FLORIDA

Case No. SC18-245

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

MARK ANTHONY POOLE,

Appellee/Cross-Appellant.

On Appeal From The Tenth Judicial Circuit,
In And For Polk County, State of Florida

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INTRODUCTION

At the evidentiary hearing in this postconviction proceeding, Howard Dimmig—defense counsel at trial for Appellee/Cross-Appellant Mark Anthony Poole—repeatedly and unequivocally testified that he conceded Poole's guilt to the non-homicide offenses over Poole's unceasing opposition. The U.S. Supreme Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), requires nothing more to find a Sixth Amendment violation. And the State does not dispute that if a new trial is granted as to the non-homicide counts, a new trial must also be granted as to the inextricably intertwined homicide counts.

Resisting that straightforward analysis, the State claims that this case falls under *Florida v. Nixon*, 543 U.S. 175 (2004). But unlike a defendant who fails to lodge an objection when counsel proposes a concession-of-guilt strategy, Poole conveyed his disapproval to Dimmig on half-a-dozen occasions before and during trial. The fact that Poole had no chance to respond to Dimmig's decree that guilt would be conceded after all—a development communicated at counsel's table split seconds before Dimmig walked to the podium to deliver closing argument—cannot be twisted to fit *Nixon*'s rule for defendants who decline to participate in their defense.

The State's three procedural arguments are equally off base. *First*, although *McCoy* would meet this Court's retroactivity test (notwithstanding the State's

denigration of the Sixth Amendment autonomy right at issue as insignificant, inconsistent with the truth-seeking function of trials, and unwise), this Court need not reach that question. Under precedent the State completely ignores, *McCoy* applies to this case *regardless of retroactivity* because Poole's postconviction proceeding is not yet final.

Second, with respect to waiver, Poole, the State, and the trial court were well aware throughout the postconviction proceeding that Poole was challenging the concession of guilt as incompatible with the Sixth Amendment. Indeed, the parties readily and without objection engaged on the question of whether Dimmig had authority to take such an action over Poole's objection—including in light of an impending decision in *McCoy*—and the trial court answered that question directly. There is no legal or logical reason to avoid reviewing the trial court's explicit (and erroneous) holding that *Nixon* provided such authority.

Third, the State's reliance on *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), is misplaced. That case holds, in the particular context of a public-trial violation, that a defendant who shoehorns that unpreserved structural error into an ineffective-assistance-of-counsel claim on collateral review must meet the two-prong test (*i.e.*, deficiency and prejudice) for such claims. *Weaver*'s ineffective-assistance reasoning has no bearing here. *McCoy* not only spells out as a general matter that ineffective-assistance jurisprudence (including *Nixon*) does not govern

claims in which a concession of guilt was proffered *over a defendant's objection*, but also vindicates Poole's core argument in this postconviction proceeding that prejudice is irrelevant when those facts are present.

ARGUMENT

THE STATE CANNOT SIDESTEP *McCOY*

A. *McCoy* Is Not Legally Distinguishable

Far more than being "generally opposed to a concession strategy after repeated discussions," State Cross-Answer Br. 38, Poole "consistent[ly]" instructed his counsel—"at least five or six times, including during the course of the trial"—"that he did not want [the non-homicide charges] conceded." ROA Vol. VII, at 1303-1304. Poole never "abandon[ed] his objection." ROA Vol. VIII, at 1548; *see also* Poole Initial Br. 13-14. Those facts place this case squarely within *McCoy*'s unqualified holding that a "counsel's admission of a client's guilt over the client's express objection is error structural in kind." 138 S. Ct. at 1511-1512.

There is no "stark contrast" (State Cross-Answer Br. 34-39) to be drawn with *McCoy*. Here, no less than in *McCoy*, counsel's "admission of [his client's] guilt despite [the client's] insistent objections was incompatible with the Sixth Amendment." 138 S. Ct. at 1512; *see also State v. Horn*, 251 So. 3d 1069, 1075 (La. 2018) ("[W]e reject the state's argument and decline to restrict application of the holding of *McCoy* solely to those cases where a defendant maintains his absolute

innocence to any crime. *McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense.").

Straining to invoke *Nixon*, the State argues that "what takes this case out of the parameters of *McCoy* *** is that Poole was unresponsive after counsel explained the tactical decision to concede guilt on some of the charges." Cross-Answer Br. 39-40. But it takes no "speculat[ion]" to reject the pretense that Poole engaged in a "discussion immediately prior to closing argument where [Dimmig] explained once again the partial concession strategy as the best course of action," much less that Poole "failed to respond to counsel" thereafter. *Id.* at 39.

Dimmig's recollection of "what happened" establishes that Poole simply had no "opportunity" to respond in the "split seconds" between Dimmig "sa[ying] I'm going to do it and st[anding] up and walk[ing] to the podium" to present closing argument. ROA Vol. VIII, at 1546; *see also id.* at 1481 ("I do not recall *** that there was even an opportunity. *** I just looked at him and said, 'Here's what I'm doing.'"); *id.* at 1545 ("I do not recall *** there being time for a response. I just looked at him and said I'm go[ing] to do it."); *id.* at 1546-1547 ("I was not there long enough for him to—to give him time to respond, yes."). That is not the fact pattern to which *Nixon* applies—*i.e.*, where a counsel acts "after *consultation* with the defendant yields no response." *Nixon*, 543 U.S. at 178 (emphasis added); *see McCoy*, 138 S. Ct. at 1505 (reiterating that *Nixon*'s holding concerns situation where

"counsel *confers* with the defendant and the defendant remains silent") (emphasis added); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) ("We employ the term 'consult' to convey a specific meaning—advising the defendant about the advantages and disadvantages *** , *and making a reasonable effort to discover the defendant's wishes*.") (emphasis added).

Nor does it invite "speculation" to conclude that Poole's (supposed) "silence" was really "a reflection of his acquiescence to counsel's intended strategy," rather than "merely a function of lack of time to respond." State Cross-Answer Br. 40. Once again, the record is unmistakably clear that Dimmig overrode Poole's "consistent *** position that he did not want [the charges] conceded." ROA Vol. VII, at 1303-1304.

> Q. Let me rephrase it this way. *At any time* did Mr. Poole abandon his objection to you conceding guilt to the non-homicide offenses?
>
> A. Not that I recall.

ROA Vol. VIII, at 1548 (emphasis added); *see also* ROA Vol. VII, at 1299 (agreeing that there was never "a time that [Poole] refused to participate in the defense"); *id.* at 1311-1312 (agreeing that Poole "never consented to concession at all"). "[A]ny time" plainly includes the moment before closing argument. In light of that conclusive evidence, this case must be governed by *McCoy*, not *Nixon*. *See McCoy*, 138 S. Ct. at 1509 (holding that *Nixon* governs "[i]f a client declines to participate

in his defense," but that, "[p]resented with express statements of the client's will to maintain innocence, *** counsel may not steer the ship the other way").

B. The State's Procedural Arguments Are Unavailing

Apart from attempting to distinguish *McCoy* on its facts, the State conceives of three procedural hurdles to avoid *McCoy*. None stands in the way of a new trial on both the homicide and non-homicide counts.

1. Retroactivity is irrelevant to Poole's pending postconviction proceeding.

a. According to the State, *McCoy* does not govern this appeal because "[n]ew rules of law articulated by either the Supreme Court or a state supreme court do not usually apply to cases that are final." Cross-Answer Br. 21. The fatal defect in that argument, however, is that Poole's postconviction proceeding is not "final."

As Poole's initial cross-appeal brief (at 19-21) explains, this Court unanimously held in *Castano v. State* that if a postconviction proceeding is pending when the U.S. Supreme Court issues a relevant decision, that decision "*does* apply to [the] pending case," even though it does not apply retroactively to a postconviction proceeding that has already run its course. 119 So. 3d 1208, 1208 (Fla. 2012) (per curiam) (emphasis added). That is because a pending postconviction claim creates "in effect a 'pipeline' case for purposes of whether [the decision] applies." *Id.* at 1210 (Pariente, J., concurring); *see id.* at 1210-1211 (citing example in which Florida court applied "*Nelson v. State*—which established new law

regarding the requirements for an ineffective assistance of counsel claim for failing to call a witness—to the appeal from the denial of a postconviction motion, because the appeal was in the pipeline at the time *Nelson* became final") (citations and internal quotation marks omitted).

Nowhere does the State grapple with the fact that *Castano* obviates the need to resolve whether *McCoy* applies retroactively. Indeed, the State does not even acknowledge *Castano*'s existence. In the absence of any disagreement regarding *Castano*'s application to this case, this Court can leave for another day whether *McCoy* should be given retroactive effect. *See* Poole Initial Br. 21 n.2.

b. In any event, the State's (needless) retroactivity analysis is deeply flawed. The State builds its argument (Cross-Answer Br. 20-26, 28) principally around federal-court case law that undertakes a retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989). But *Teague* does not control the inquiry under Florida law. Over a decade ago, the U.S. Supreme Court eliminated any doubt that *Teague* "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*." *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008). Even before *Danforth*, this Court had made the considered decision to "continue to apply [its] longstanding *Witt* [*v. State*, 387 So. 2d 922 (Fla. 1980) (per curiam)] analysis, which provides more expansive retroactivity standards than those adopted

in *Teague*"—notwithstanding calls to "abandon *Witt* in favor of *** *Teague*." *Johnson v. State*, 904 So. 2d 400, 407-409 (Fla. 2005) (per curiam); *see also Asay v. State*, 210 So. 3d 1, 15 & n.15 (Fla. 2016) (per curiam) (analyzing retroactivity question under *Witt* instead of *Teague*, and noting that "a *Teague* analysis is very narrow, particularly if a court considers the new rule to be procedural").

With respect to *Witt*, the State recognizes (Cross-Answer Br. 26-27) that a constitutional decision emanating from the U.S. Supreme Court, which is a "development of fundamental significance," should be made retroactive. Its rationalization for depriving *McCoy* of development-of-fundamental-significance status, however, reduces "a defendant's Sixth Amendment-secured autonomy," *McCoy*, 138 S. Ct. at 1511, to an empty letter. It is specious to portray the unqualified constitutional right at issue as only "*perhaps* important" or "simply a matter of who makes the decision" whether to concede guilt. Cross-Answer Br. 27 (emphasis added). The "[a]utonomy to decide that the objective of the defense is to assert innocence" is "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *McCoy*, 138 S. Ct. at 1508 (citation and quotation marks omitted). That principle "must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* at 1507 (citation and internal quotation marks omitted).

Furthermore, it strains credulity for the State to maintain that *McCoy*'s rule "has nothing to do with accuracy or fairness in the outcome of a judicial proceeding"—and even "runs directly counter to the truth-seeking function of a trial." Cross-Answer Br. 27. The reason that "the effects of the admission [of guilt] [are] immeasurable" is "because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *McCoy*, 138 S. Ct. at 1511. More generally, the entire point of the Sixth Amendment is "to assure fairness in the adversary criminal process," *United States v. Cronic*, 466 U.S. 648, 655-656 (1984), and "advance the public interest in truth," *Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

Although in the State's view (Cross-Answer Br. 27) it may not be a "wise strategy" to allow a defendant to dictate the objective of his defense, *McCoy* flatly rejects that rationale for dispossessing a defendant of the right "to make the fundamental choices about his own defense," 138 S. Ct. at 1511. "[H]owever counterproductive [it] may be" for "an accused [to] insist upon representing herself," because "self-representation will often increase the likelihood of an unfavorable outcome," the Framers "[p]reserv[ed] for the defendant the ability to decide whether to maintain *** innocence." *Id.* at 1507-1509. The State cannot diminish the significance of *McCoy* by re-litigating its merits, particularly based on positions that run headlong into *McCoy* itself.

Nor can the State avert retroactivity by relying on the "goal of finality." Cross-Answer Br. 28-29. The State submits that if *McCoy* is made retroactive, the number of affected cases "will no doubt be large." *Id.* But to support that sweeping statement, the State relies exclusively on a passage from Justice Alito's *McCoy* dissent that raises a number of hypothetical concessions of guilt before concluding with the following remark that the State omits: "These are not easy questions, and the fact that they have not come up in this Court for more than two centuries suggests that they will arise *infrequently* in the future." 138 S. Ct. at 1517 (emphasis added). Similarly, Justice Alito elsewhere describes the fact pattern at issue as "a rare plant that blooms every decade or so," "unlikely to figure in another case for many years to come," and "unlikely to make another appearance for quite some time" because (among other reasons) an "attorney and client will generally part ways" if they "cannot agree on a basic trial strategy." *Id.* at 1514-1516. For its part, the majority opinion could point to only three other State Supreme Courts to have addressed the issue in the past 20 years. *Id.* at 1510.

Unless defense attorneys in Florida courts have made a habit of overriding their clients' express objections to conceding guilt, there is good reason to doubt that making *McCoy* retroactive would open the floodgates. But even if the practice were commonplace, contrary to the State's own authority, the fundamental nature of the Sixth Amendment right at issue makes this case one in which "[t]he concern for

fairness *** outweighs any adverse impact that retroactive application of [a] rule might have on decisional finality." *State v. Callaway*, 658 So. 2d 983, 987 (Fla. 1995). Thus, even though this Court need not address the question of retroactivity at all, there is a firm basis for treating *McCoy* as such under Florida law.[1]

2. Poole presented, and the trial court resolved, the claim that counsel lacked authority to concede guilt.

a. The State's pinched view (Cross-Answer Br. 17-20) that Poole's claim was never presented to the trial court is refuted as to both fact and law.

From the inception of the postconviction proceeding, Poole asserted that "trial counsel was ineffective for stating during closing arguments that Mr. Poole 'acknowledges' his guilt *** , thus denying Mr. Poole his rights under the Fifth Sixth, Eighth, and Fourteenth Amendments." ROA Vol. III, at 414 (capitalization omitted). In fleshing out that claim, Poole explained that the upshot of the attorney-

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[1] The rule that, "under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)], claims of ineffective assistance of counsel are assessed under the law in effect at the time of the trial," does not aid the State's retroactivity argument. Cross-Answer Br. 29 (quoting *Lynch v. State*, 254 So. 3d 312, 323 (Fla. 2018) (per curiam)). To begin with, under *McCoy*, a court "do[es] not apply [the] ineffective-assistance-of-counsel jurisprudence." 138 S. Ct. at 1510-1511. The State's reliance on *Lynch* also confuses the question of how to evaluate a *Strickland* claim on its merits with the question of whether a U.S. Supreme Court decision should be made retroactive. *Lynch* itself concerned new law—*i.e.*, *Hurst v. Florida*, 136 S. Ct. 616 (2016)—that had already been made retroactive. For these reasons, whether Poole's counsel was "required to 'anticipate changes in the law' in order to provide effective legal representation," Cross-Answer Br. 29 (quoting *Lynch*, 254 So. 3d at 323), is immaterial.

client privilege violation was a further "violation [of his] 'fundamental personal right' under the *** Sixth Amendment[]"—namely, "the [S]ixth [A]mendment right to legal representation"—and "a total failure of the adversarial process." *Id.* at 418 (citation and quotation marks omitted). Poole even cited *Nixon*—the U.S. Supreme Court's seminal treatment of concession-of-guilt claims to that point—for the proposition that such actions can lead to the "grant *** [of] a new trial," *id.*, and the State in response painted the issue as "implicating a defense attorney's tactical decisions" under *Nixon*, *id.* at 529-531.

Tracking their initial pleadings, *both* parties at the evidentiary hearing focused sharply on Dimmig's concession of Poole's guilt, creating a fulsome record on all aspects of the claim. Most relevant here, Dimmig shared his view that a counsel "ha[s] the authority to concede guilt," based on "essentially [a] line-by-line" explication of *Nixon*. ROA Vol. VII-VIII, at 1315-1348, 1470-1478, 1480-1481, 1543-1547. Notably, the State did not resist questioning on that subject as falling outside the scope of Poole's claim.

Armed with that evidence, Poole's written closing argument urged the trial court to hold "[t]h[e] admission on the part of trial counsel [to be] sufficient grounds for vacating [the] conviction for [the] distinct *** reason[]" that "trial counsel did not have the authority to concede guilt." ROA Vol. VIII, at 1587-1597. In addition to emphasizing that Dimmig's contrary understanding "was based on [a]

misapprehension of the facts and holding of the United States Supreme Court's ruling in *Florida v. Nixon*," Poole alerted the trial court to the fact that "the United States Supreme Court has granted certiorari in *McCoy*"—a development that Poole suggested "should give [the trial court] pause in accepting either [Dimmig's] or the State's assertion that the defendant's unresponsiveness to the strategy of admission was not a critical factor in *Nixon*." *Id.* at 1589-1590 & n.2. Not once declaring that the nature of Poole's claim had shifted, the State responded that *Nixon* relieved Dimmig of any "obligat[ion] to obtain a defendant's express consent before pursuing this strategy" and that it "d[id] not matter" that "Poole did not agree." ROA Vol. IX, at 1651-1652. After traversing the voluminous testimony pertaining to the concession of guilt and the import of *Nixon*, and without mentioning any procedural impediment, the trial court agreed with the State: "the *Nixon* case gave [Dimmig] the authority to concede [g]uilt." *Id.* at 1721-1732.

In sum, Poole presented, the State readily opposed, and the trial court resolved the claim that Dimmig violated the Sixth Amendment in contravening Poole's explicit directive not to admit guilt. No more is required to preserve a claim for appellate review. *See* § 924.051(1)(b), FLA. STAT. (defining "[p]reserved" to mean that "issue" or "legal argument *** was timely raised before, and ruled on by, the trial court," such that trial court was "fairly apprised *** of the relief sought and the grounds thereof"); *Rhodes v. State*, 986 So. 2d 501, 513 (Fla. 2008) (per curiam)

("To be preserved, the issue or legal argument must be raised and ruled on by the trial court.") (emphasis omitted); *see also Murray v. State*, 3 So. 3d 1108, 1117 (Fla. 2009) (per curiam) ("[N]o magic words are needed to make a proper objection[.]"). The trial court had "notice that an error may have been committed" and "an opportunity to rectify the error prior to any appellate review." *Charles v. State*, 258 So. 3d 549, 552 (Fla. 3d DCA 2018); *see Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) (explaining purpose of preservation rule).

Moreover, that Poole's explicit directive should have mattered, and removed this case from *Nixon*'s ambit, is precisely the claim that Poole continues to press in this Court. And because this Court cannot determine the propriety of the trial court's "authority" ruling without giving heed to *McCoy*—which by its terms precludes reliance on *Nixon* when there are "express statements of the client's will to maintain innocence," 138 S. Ct. at 1509—the State has no choice but to face that precedent. *See* FLA. R. APP. P. 9.140(*i*) ("The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal.").

b. The State's argument falters principally in insisting (Cross-Answer Br. 19) that, to raise a "*McCoy* claim," Poole had to "meld" it to another. Although *Nixon* and *McCoy* differ insofar as the former falls within the ineffective-assistance framework, while the latter does not, when it comes to preservation, they are largely two sides of the same concession-of-guilt coin. After all, when a concession of guilt

forms the basis of a claim, the development of the evidentiary record will generally proceed along a common path, and the critical question will be whether the claim falls on the *Nixon* or *McCoy* side of the line. Tellingly, as a factual matter, Poole created a tailor-made record for distinguishing this case from *Nixon* well before *McCoy* issued. And as a legal matter, the Louisiana Supreme Court decided *McCoy* strictly as an ineffective-assistance case under *Nixon*, before the U.S. Supreme Court held that *Nixon* did not control. *See State v. McCoy*, 218 So. 3d 535, 568-572 (La. 2016) ("[T]he argument is essentially one of ineffective assistance of counsel, which this court has consistently reviewed under the *Strickland* standard.").

Poole simply seeks the same relief: a ruling that the trial court erred because the admission of guilt in the face of Poole's express opposition was incompatible with the Sixth Amendment, no matter how reasonable that strategy may have been under *Nixon*. Requiring Poole to preserve that claim by anticipating *McCoy*'s exact rationale is neither the law nor consistent with the "interest of justice." FLA. R. APP. P. 9.140(*i*) ("In the interest of justice, the court may grant any relief to which any party is entitled."); *cf. Maddox v. State*, 760 So. 2d 89, 98 (Fla. 2000) ("[F]or those defendants who did not have the benefit of our recently promulgated amendment *** , during this window period the appellate courts should continue to correct unpreserved sentencing errors that constitute fundamental error. To hold otherwise would neither advance judicial efficiency nor further the interests of justice."); *Perez*

v. State, 717 So. 2d 605, 606 (Fla. 3d DCA 1998) ("[A] general practice [of declining to hear arguments made on rehearing] does not deter us from considering such an argument where recent developments in the law or the justice of the cause persuade us to do so.").[2]

Beyond ignoring that legal backdrop, the State gets the record wrong in several respects. As already noted (p. 12, *supra*), the concession-of-guilt issue and *Nixon* made their first appearance in the postconviction motion (and featured thereafter at the evidentiary hearing), not "in the written closing arguments," Cross-Answer Br. 19. That is why the State's pre-evidentiary-hearing answer to the postconviction motion defends Dimmig as having made a tactical decision under *Nixon*, and the parties were fully prepared to delve into *Nixon*'s relevance to this case at the evidentiary hearing.

It is also incorrect to say that a "*McCoy* claim" was developed for the first time in the motion for rehearing. That motion was necessary because "the [trial court] overlooked *** previously argued issues of law and fact." ROA Vol. IX, at

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[2] Denying review in this case would not avert resolution of the issue. If the State is correct that for preservation purposes a "*McCoy* claim" is wholly distinct from a "*Nixon* claim," Poole can—and, out of an abundance of caution, intends to—file a protective postconviction motion within one year of the May 2018 issuance of *McCoy*. *See* FLA. R. CRIM. P. 3.851(d)(2)(B). That no evidentiary hearing would be necessary, because Poole has already elicited testimony from Dimmig regarding Poole's unambiguous objection to the concession of guilt, reinforces the conclusion that Poole has already presented his claim to the trial court.

1767. Specifically, "[a]t page 17 of [his] written closing argument," Poole had "argued that trial counsel '[] demonstrate[d] a fundamental misunderstanding of the facts and holding of *Nixon*, which led trial counsel to believe he had the authority to concede guilt, even without consent, which he did not.'" *Id.* (last two alterations in original). The possibility that the U.S. Supreme Court's grant of certiorari in *McCoy* would lead to dispositive *legal* support for Poole's effort to distinguish *Nixon* was already flagged in the written closing argument. *See id.* at 1768 n.1; *see also* ROA Vol. VIII, at 1590 n.2. In the motion for rehearing, Poole did nothing more than draw the trial court's attention (once again) to that argument and provide the trial court with a summary and copies of certain briefing in *McCoy*, which had since become available. *See* FLA. R. CRIM. P. 3.851(f)(7); ROA Vols. IX-X, at 1767-1769, 1773-1913.

3. The postconviction posture does not give rise to a requirement to satisfy Strickland.

Relying on *Weaver v. Massachusetts*, the State contends (Cross-Answer Br. 30-34) that, because Poole's Sixth Amendment claim arose on postconviction review rather than on direct review, he must satisfy *Strickland*'s two-prong ineffective-assistance test (*i.e.*, deficiency and prejudice) to secure a new trial. In *Weaver*, the Court framed the question presented as "whether a defendant must demonstrate prejudice in a case like this one—in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging

ineffective assistance of counsel." 137 S. Ct. at 1907. In answering that prejudice must be shown, the Court made clear that it "d[id] so specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Id.*; *see Krogmann v. State*, 914 N.W.2d 293, 323 (Iowa 2018) ("*Weaver* on its face is limited solely to postconviction claims alleging ineffective assistance for failure to assert a right to a public trial.").

The State does not provide any justification for extending that (narrow) holding regarding courtroom closures to Poole's case. But even if that qualification were absent, *Weaver* would still be far afield for three reasons.

a. For starters, this case does not present the critical element of *Weaver*: a "structural error [that] is raised *in the context of an ineffective-assistance-of-counsel claim*." 137 S. Ct. at 1905 (emphasis added); *see id.* at 1907 ("This case requires a discussion, and the proper application, of two doctrines: structural error and ineffective assistance of counsel."). *McCoy* clarified that, although a claim that counsel conceded guilt should be analyzed under the ineffective-assistance rubric when the defendant "declines to participate in his defense," a court is "*not* [to] apply *** ineffective-assistance-of-counsel jurisprudence" when the defendant expressly opposes that strategy—a mistake the Louisiana Supreme Court had made when it persisted in applying *Nixon*. 138 S. Ct. at 1509, 1510-1511 (emphasis added); *see* p. 15, *supra*. *McCoy* illuminates the proper legal foundation for Poole's claim as

well: despite being framed in reference to *Nixon*, Poole's claim that Dimmig lacked authority to concede guilt, such that prejudice should be immaterial, was (and is) not one under *Strickland*.

That *McCoy* envisions resolution of a concession-of-guilt claim without resort to *Strickland* is significant to the (potential) reach of *Weaver*. As all seven Justices in the majority agreed, "[t]he prejudice showing is in most cases a necessary part of a *Strickland* claim." 137 S. Ct. at 1910; *see id.* at 1915-1916 (Alito, J., joined by Gorsuch, J., concurring in the judgment) ("The prejudice prong of *Strickland* *** does not ask whether an error was harmless but whether there was an error at all, for unless counsel's deficient performance prejudiced the defense, there was no Sixth Amendment violation in the first place."); *id.* at 1914 (Thomas, J., concurring) (endorsing Justice Alito's opinion); *accord United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) ("[T]he requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*."). That is because "a violation of the Sixth Amendment right to *effective* representation" is "derived from the Sixth Amendment's purpose of ensuring a fair trial" and "is not 'complete' until the defendant is prejudiced." *Gonzalez-Lopez*, 548 U.S. at 147 (quoting *Strickland*, 466 U.S. at 685); *see Weaver*, 137 S. Ct. at 1910 (same).

In contrast, a "violation of *** [the Sixth Amendment] autonomy right [i]s complete when the court allow[s] counsel to usurp control of an issue within [the defendant's] sole prerogative." *McCoy*, 138 S. Ct. at 1511. In such circumstances, where the Sixth Amendment right is "regarded as the root meaning of the constitutional guarantee," "it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *Gonzalez-Lopez*, 548 U.S. at 147-148. Or in *McCoy* terms, "[b]ecause a client's autonomy, not counsel's competence, is in issue," the rule that "[t]o gain redress for attorney error *** a defendant ordinarily must show prejudice" does not apply. 138 S. Ct. at 1510-1511.

Given these discrete doctrinal constructs, it is one thing to hold, as *Weaver* does, that a defendant alleging ineffective-assistance in a postconviction proceeding might need to meet both the deficiency and prejudice prongs of *Strickland* in order to make out such a claim. But it is quite another thing to conclude, as the State does, that a defendant seeking postconviction vindication of a Sixth Amendment autonomy right—violated *regardless* of deficiency or prejudice—nonetheless must meet the requirements of *Strickland*. Doing so mixes apples and oranges. That is why the Iowa Supreme Court declined to extend *Weaver* to a "violation of [a defendant's] protected autonomy right," which became "complete irrespective of the quality of the representation." *Krogmann* 914 N.W. 2d at 324-325 ("*Strickland* has no bearing here.") (citation and quotation marks omitted); *see id.* at 318 ("At the

outset, it is important, as the Court emphasized in *Gonzalez-Lopez*, to distinguish between claims of ineffective assistance of counsel and other claims based on the Sixth Amendment *** right to counsel, such as the right to conduct one's own defense."). This Court should adopt the same conclusion.[3]

b. Next, *Weaver* does not stand for the proposition that *all* ineffective-assistance claims raised on postconviction review require a showing of prejudice. To the contrary, the Court's recognition that "the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error," and that "the concept of prejudice is defined in different ways depending on the context in which it appears," 137 S. Ct. at 1907, 1911, leads away from that conclusion. As does more recent U.S. Supreme Court authority.

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[3] Both of the State's post-*Weaver* authorities (Cross-Answer Br. 33-34) concern ineffective-assistance claims ordinarily subject to *Strickland*. *See United States v. Thomas*, 750 F. App'x 120, 127-128 (3d Cir. 2018) ("To prove such a claim [of ineffective assistance of counsel], the defendant must show that counsel's performance was deficient and that the defense was prejudiced as a result."); *Yannai v. United States*, 346 F. Supp. 3d 336, 344-347 (E.D.N.Y. 2018) ("[A]ny claim by the defendant that defense counsel has not discharged this responsibility—either by failing to inform the defendant of the right to testify or by overriding the defendant's desire to testify—must satisfy the two-prong test established in *Strickland*.") (citation and quotation marks omitted). In addition, *Yannai*'s statement that the direct-appeal posture of *McCoy* allowed the U.S. Supreme Court to "bypass the prejudice analysis," 346 F. Supp. 3d at 347, mistakes the Sixth Amendment claim in *McCoy* for an ineffective-assistance claim that would be subject to *Strickland* in the first instance.

In *Weaver*, "[t]he reason for placing the burden [of demonstrating prejudice] on the petitioner in th[e] case [of a public-trial violation] *** derive[d] *** from the nature of the error." 137 S. Ct. at 1912. Because "not every public-trial violation will in fact lead to a fundamentally unfair trial *** , when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically." *Id.* at 1911.

By comparison, in *Garza v. Idaho*, the Court held—also on postconviction review of an ineffective-assistance claim—that prejudice must be presumed where "Garza told his trial counsel that he wished to appeal," but counsel unilaterally declined to comply after forming the opinion that "an appeal was problematic." --- S. Ct. ----, No. 17-1026, 2019 WL 938523, at *1-2 (2019). Reiterating that "the bare decision whether to appeal is ultimately the defendant's, not counsel's, to make," and that "[c]ounsel's failure to [appeal] cannot be considered a strategic decision," *id.* at *5 (citing, *inter alia*, *McCoy*, 138 S. Ct. at 1507-1508), the Court explained "that past precedents call for a presumption of prejudice whenever the accused is denied counsel at a critical stage," *id.* at *6 (citation and internal quotation marks omitted). That "presumption-of-prejudice rule," the Court continued, "will not bend *** simply because a particular defendant seems to have had poor prospects." *Id.*

Here, even assuming (contrary to *McCoy*) that the ineffective-assistance framework applies, the analysis would be markedly different from *Weaver* and more

akin to *Garza*. Consistent with *McCoy*'s statement that the nature of the Sixth Amendment-autonomy violation eliminates "any need *** to show prejudice," even where the evidence of guilt is "overwhelming" and a defense is "difficult to fathom," 138 S. Ct. at 1506-1507, 1511, courts have accepted that "counsel's concession of guilt over defendant's objection" necessarily results in a "fundamentally unfair trial"—to the point that it is "impossible *** to determine if there is sufficient evidence to support the conviction," *Horn*, 251 So. 3d at 1077 n.3; *see McCoy*, 138 S. Ct. at 1511 ("[T]he effects of the admission would be immeasurable[.]"); *United States v. Jose*, Criminal Action No. 14-652-10, 2018 WL 3747449, at *4 (E.D. Pa. Aug. 7, 2018) (distinguishing claim because "[t]here is no fundamental unfairness similar to *McCoy*"). It follows (under *Weaver*'s reasoning) that no prejudice inquiry would be necessary. *See Reams v. State*, 560 S.W.3d 441, 455 (Ark. 2018) ("Unlike the public-trial violation in *Weaver*, a fair-cross-section violation necessarily renders one's trial fundamentally unfair."); *cf. Cronic*, 466 U.S. at 658-659 (recognizing "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," and noting example where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing").

c. Finally, the policy interests animating *Weaver* are not pertinent to this case. Again, the facts of *Weaver* are instructive. There, "[d]efense counsel neither objected to the closure at trial nor raised the issue on direct review." 137 S. Ct. at

1905. Consequently, the trial court was "deprived of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure." *Id.* at 1912. And the defendant's ineffective-assistance claim "function[ed] as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." *Id.* (citation and quotation marks omitted).

The same cannot be said here. As the State admits (Cross-Answer Br. 30, 38 n.11), there was "[n]o *** record" upon which Poole could have raised the concession of guilt on direct appeal. That is hardly surprising: such issues usually require further record development at a postconviction evidentiary hearing to determine, for example, whether a defendant declined to participate in his defense or whether the defendant registered his opposition. *See, e.g.*, *Nixon v. State*, 932 So. 2d 1009, 1017 (Fla. 2006) (per curiam) ("This issue was first brought to this Court's attention during the direct appeal proceedings. *** We did not address the issue at that time, but invited the defendant to raise the issue in postconviction proceedings."); *Nixon v. Singletary*, 758 So. 2d 618, 625 (Fla. 2000) (per curiam) ("[W]e remand this case to the circuit court to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt."); *cf. Robards v. State*, 112 So. 3d 1256, 1266-1267 (Fla. 2013) (per curiam) ("This Court normally considers the merits of ineffective assistance of counsel claims after a postconviction motion has been *** ruled upon by the trial court following the

completion of any necessary evidentiary proceedings. Consequently, with only rare exception, ineffective assistance of counsel claims are not cognizable on direct appeal."). Thus, unlike in *Weaver*, Poole's claim was not one that typically would be "considered in the regular appellate process and not in the context of a later proceeding." 137 S. Ct. at 1912.

To be sure, there could be instances (as in *McCoy*) where the trial record contains those factual predicates. But there is no *obligation* for a defendant to manufacture a direct appeal by "protest[ing] in court" or making an "outburst." State Cross-Answer Br. 35 & n.10. For the State to propose (*id.* at 32) that Poole should have disrupted Dimmig's closing argument, and that Poole would now be "rewarded" for "his silence on this matter at trial" if the *Strickland* standard were not imposed, defies reason. The postconviction proceeding was not only Poole's first opportunity to challenge the concession of guilt and to introduce the fact of his opposition, but also the trial court's first opportunity to decide the merits of the claim. Poole could not have raised the issue on direct appeal and his postconviction motion is not being deployed as a means to end-run a failure to object at trial or a waiver on direct appeal. Thus, any analogy to *Weaver*—which contemplates a claim that should have been "preserved" at trial and "raised on direct review," 137 S. Ct. at 1907—is simply inapt.

CONCLUSION

With respect to the cross-appeal, this Court should vacate Poole's convictions on all counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, a true and correct copy of the foregoing was furnished via electronic service to all counsel of record.

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CERTIFICATE OF COMPLIANCE

This brief has been prepared using Microsoft Word and 14-point Times New Roman type style, and thus complies with the typeface and type-style requirements of Rule 9.210(a)(2).

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