No. 06-1368

IN THE

Supreme Court of the United States

HAROLD LEE HARVEY, JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In his Petition for Certiorari ("Petition") in this capital case, Mr. Harvey asked this Court to grant review for three reasons. The State of Florida's ("State") response brief ("Resp. Br.") raises several new arguments but either concedes or fails to dispute the key factual and legal points supporting a grant of review.

First, Mr. Harvey demonstrated that a true three-way split of authority currently exists in the lower courts as to how *Strickland v. Washington,* 466 U.S. 668 (1984) should be applied in cases where trial counsel fails to strike a juror who describes herself as intractably biased against the defendant. The State's response fails to rebut that showing.

Second, Mr. Harvey showed that the Florida Supreme Court misinterpreted this Court's holding in *Florida v. Nixon* as providing capital trial counsel with unfettered discretion to concede a defendant's guilt without first disclosing that strategy. The State alarmingly misconstrues *Nixon* by arguing that failure to disclose a concession strategy is a mere "factor" to be considered by courts assessing the reasonableness of counsel's actions. *Nixon*, however, held that counsel may implement a concession strategy only when counsel consults with his client about that strategy and the client does not object. The State's misinterpretation of *Nixon* only amplifies the need to clarify that decision.

Finally, Mr. Harvey demonstrated that the Florida Supreme Court did not follow this Court's holdings in *Wiggins v. Smith* and *Rompilla v. Beard*, among others, when it failed to determine whether trial counsel made a reasonable investigation into mitigating circumstances *before* adopting a penalty phase strategy. The State's response does not dispute

Mr. Harvey's showings that (i) there was a plethora of mitigation readily available to trial counsel that he neither investigated nor presented at trial; (ii) red flags existed such that trial counsel had a duty to continue his investigation; or (iii) that had the mitigation evidence been introduced, the balance of weighing mitigating factors versus aggravating factors would have tipped in Mr. Harvey's favor.

A. This Court Should Resolve A Lower Court Split On Whether Counsel's Failure To Strike A Self-Described Biased Juror Constitutes Ineffective Assistance.

In his Petition, Mr. Harvey demonstrated that trial counsel was ineffective for failing to remove an admittedly biased juror from the jury and that there is a split among lower courts as to how *Strickland* should be applied in cases like this one. In its response, the State makes two arguments, both of which are wrong.

1. A lower court split exists.

The State principally argues that the Sixth Circuit did not presume prejudice in *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001). The State is wrong. In *Hughes*, the Sixth Circuit found counsel's decision to seat a juror who admitted "she did not think she could be fair" was objectively unreasonable because "[t]he question of whether to seat a biased juror is not a discretionary or strategic decision." *Id.* at 463. On the issue of prejudice, the Sixth Circuit unequivocally explained: "The presence of a biased juror . . . requires a new trial *without a showing of actual prejudice. . . . [P]rejudice under Strickland is presumed . . . .*" *Id.* at 463 (citations and quotations omitted; emphasis added).

Other than misconstruing *Hughes*, the State makes no other effort to dispute that there is a three-way split among lower courts. As we showed in our Petition, some courts have held that under the first prong of *Strickland*, counsel can make a reasonable strategic decision to leave a biased juror on the jury. *People v. Metcalfe*, 782 N.E.2d 263, 274-75 (Ill. 2002); *see also* Pet. at 19. Other courts have held that counsel is deficient but that the petitioner must show prejudice. *Virgil v. Dretke*, 446 F.3d 598, 612 (5th Cir. 2006); *see also* Pet. at 19. Still other courts have held that prejudice should be presumed where counsel fails to remove a biased juror. *State v. King*, 144 P.3d 222, 225 (Utah Ct. App. 2006); *Hughes*, 258 F.3d at 463; *see also* Pet. at 18. This Court should resolve the lower court split and find that prejudice should be presumed.

2. The issue of failure to strike a biased juror is not limited to this case.

The State also argues that the presence of a biased juror has "little significance" except for the parties to this litigation. (Resp. Br. at 13.) That argument is untenable because the Sixth Amendment right to an impartial jury is one of the bedrock principles of the criminal justice system. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact-'a jury capable and willing to decide the case solely on the evidence before it.'"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *In re Oliver*, 333 U.S. 257, 278 (1948); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Murphy v. Florida*, 421 U.S. 794, 799 (1975). The Florida Supreme Court's opinion erodes the constitutional protections afforded by the Sixth Amendment by holding that trial counsel, without consent, can waive a defendant's right to a fair and impartial jury. *See Uttecht v. Brown*, 127 S.Ct. 2218, 2231 (2007).

Indeed, the fact that this issue needs this Court's guidance is evidenced by the three-way split among courts that each have considered this issue within the past six years and reached three different conclusions. *See Hughes*, 258 F.3d at 463 (presuming prejudice); *Virgil*, 446 F.3d at 612 (reasonable strategic decision); *Metcalfe*, 782 at 274-75 (finding reasonable strategic decision). While some courts have found that trial counsel can make a reasonable decision to leave a biased juror on the jury, others have not, and of those that have found that counsel's decision is unreasonable, some courts require the defendant to show actual prejudice while others hold that prejudice should be presumed.

B. This Court Should Grant Review To Correct The Florida Supreme Court's Fundamental Misapplication Of *Nixon.*

In his Petition, Mr. Harvey demonstrated that trial counsel conceded his guilt at trial, but failed to disclose that strategy to Mr. Harvey such that Mr. Harvey had no opportunity to object or comment on the strategy, or even to inquire about it. The Florida Supreme Court dangerously misapplied this Court's ruling in *Florida v. Nixon*, 543 U.S. 175, 189 (2004), by finding that trial counsel was not ineffective for failing to disclose that strategy.

Mr. Harvey also showed that, even if concession of guilt to second-degree murder was the "strategy" being attempted by trial counsel, trial counsel botched that strategy by conceding not only second-degree murder (which he intended to do) but also conceding first-degree murder and numerous aggravating factors (neither of which he intended to do). Mr. Harvey showed that under the facts of this case, the Florida Supreme Court should have found that counsel was ineffective and applied the presumed prejudice standard

annunciated by this Court in both *Nixon* and *United States v. Cronic*, 466 U.S. 648 (1984).

Both of these issues warrant review and reversal by this Court to correct the Florida Supreme Court's dangerous extension of *Nixon*.

1. Counsel cannot concede guilt without first consulting the client.

The State does not dispute that trial counsel failed to disclose his concession strategy, but argues that under *Nixon*, his failure to do so was merely "a factor" to be considered in determining whether he rendered ineffective representation under *Strickland*. The State's response demonstrates the danger of allowing the Florida Supreme Court's opinion in this case to stand. The State argues in its response:

> In Nixon this Court explicitly rejected the suggestion that Cronic should apply when counsel fails to discuss [a concession of guilt] strategy with a defendant. . . . *A failure to do so is a factor* to be considered when assessing the reasonableness of counsel's actions.

(Resp. Br. at 11-12, emphasis added.) That position is wholly inconsistent with *Nixon* and undermines a lawyer's professional obligation to his client.

In *Nixon*, this Court went to great lengths to reaffirm that an attorney has a duty to disclose any strategy to concede guilt except in the unusual situation where the client was unresponsive:

> [Counsel] attempted to explain this strategy to Nixon at least three times. . . . Nixon was

> generally unresponsive during their discussions. *Nixon*, 543 U.S. at 181.
>
> *Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant.* *Id.* at 178 (internal citations omitted; emphasis added).
>
> *[Counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon.* *Id.* at 189 (emphasis added).

Contrary to the State's argument, *Nixon* did not hold that *Strickland* applies in cases where counsel *fails to disclose* a concession strategy. *Nixon*, 543 U.S. at 189; *Strickland*, 466 U.S. at 688. Rather, the holding in *Nixon* must mean that *Cronic* (presumed prejudice) applies where there is a failure to consult with a client about conceding guilt.

Because Mr. Harvey's case is fundamentally different from *Nixon*, *Nixon* does not apply. Here, trial counsel failed to disclose his concession strategy and therefore deprived Mr. Harvey of his right to consent or object to that strategy. Although the State suggests that such consultation took place, the State fails to cite *any* evidence in the record establishing that trial counsel disclosed his concession strategy to Mr. Harvey even though the State attempted to elicit this information at the evidentiary hearing. At that hearing, trial counsel merely testified "he would be shocked to learn" that he did not consult with Mr. Harvey. (Resp. Br. at 11 n.5.) But "shocked to learn" is not evidence of disclosure or consultation, particularly where Mr. Harvey testified that he was not consulted.

By failing to disclose his strategy of conceding guilt to Mr. Harvey, trial counsel deprived Mr. Harvey of the

opportunity to consider, modify or reject that strategy. This Court should grant review and hold that where counsel does not disclose a concession strategy to his client, *Cronic* applies and prejudice should be presumed.

2. Prejudice should be presumed where counsel severely undermines his strategy.

Mr. Harvey also showed that counsel negligently failed to execute his strategy to argue for second-degree murder and instead, conceded Mr. Harvey's guilt to first-degree murder, including aggravating factors. (Pet. at 21-24.)

The State does not dispute this showing. Unlike *Nixon*, where counsel intentionally conceded first-degree murder and tried to focus the jury on the penalty phase, trial counsel here attempted to "tiptoe" through Florida case law to concede only *second-degree*, non-capital murder and therefore avoid the death penalty. That delicate "strategy" backfired when trial counsel systematically conceded every element of first-degree murder and the aggravating factors needed to impose death. The State did not need to prove anything to make Mr. Harvey death-eligible because counsel had already conceded, without authorization or even basic consultation, every aspect of the State's case. Because trial counsel failed to function as a meaningful adversary to the State, prejudice should be presumed.

3. The Florida Supreme Court's ruling will have dangerous repercussions.

The State also argues that this case "has little significance" except to Mr. Harvey and the State. The opposite is true.

The Florida Supreme Court's interpretation of *Nixon* is careless and should not be permitted to stand uncorrected. The Florida Supreme Court's opinion expands the limited holding in *Nixon* to unintended, unconstitutional applications by holding that counsel was not ineffective by: (1) failing to disclose his concession strategy; and (2) conceding first-degree murder and aggravating factors when his "strategy" only called for him to concede second-degree murder.

Under the first part of the Florida Supreme Court's holding, counsel now has unfettered discretion to concede his client's guilt at trial (which is tantamount to pleading guilty) whenever he believes a defense to the charges is hopeless or too difficult to mount – even when the client rejects that strategy or never learns about that strategy. That holding, which is the only reasonable interpretation of the Florida Supreme Court's opinion below, plainly violates *Strickland* and *Nixon*, as well as the rules of professional responsibility governing lawyers. *Strickland*, 466 U.S. at 688; *Nixon*, 534 U.S. at 168.

As to the second part of the Florida Supreme Court's holding, it is impossible to imagine a case where trial counsel could have implemented a concession strategy more negligently and prejudicially than trial counsel did here. Even if *Nixon* permits a defense lawyer to concede his client's guilt (after consultation), it cannot permit counsel to concede guilt to a death-eligible crime when his strategy was limited to conceding guilt to a lesser offense. Profound, prejudicial negligence cannot be strategic. This Court should grant review and reverse in *toto*.

C. Trial Counsel's Mitigation Investigation Violated *Strickland* And Its Progeny.

In his Petition, Mr. Harvey showed that trial counsel failed to investigate substantial mitigation evidence that would have established numerous statutory and non-statutory mitigating factors. Notably, the State does not, and cannot, dispute that trial counsel missed valuable mitigation evidence, including that Mr. Harvey suffers from: (1) Organic Brain Dysfunction; (2) Major Depressive Disorder; (3) Post-Traumatic Stress Disorder; and (4) Substance Abuse Disorders. The State also does not dispute that trial counsel was on notice of "red flags" of significant mental illness that required him to continue his investigation. Indeed, trial counsel intended to have a psychiatric evaluation performed and even wrote himself a note so he would not forget, yet he failed to follow through. Again, profound negligence cannot be strategic

In an attempt to distract this Court from the unreasonableness of trial counsel's investigation, the State focuses on the cursory tasks trial counsel did, such as having dinner with Mr. Harvey's family and retaining a grammar school psychologist to evaluate Mr. Harvey.

The State's argument misses the point of *Wiggins*, *Rompilla*, and this Court's other cases on the appropriate scope of a mitigation investigation. The issue is not what counsel did or did not do; the issue is what he *should have done* based on the information available to him at the time he decided to stop investigating. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Rompilla v. Beard*, 545 U.S. 374, 375 (2005). A mitigation investigation is not a checklist duty that counsel can satisfy by "checking off" basic tasks. A court must consider "not only the quantum of evidence already

known to counsel, *but also whether the known evidence would lead a reasonable attorney to investigate further.*" *Wiggins*, 539 U.S. at 527 (emphasis added). Counsel is deficient if he chooses "to abandon [his] investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. Where red flags exist, counsel must continue his investigation rather than latch on to a mitigation strategy. *Rompilla*, 545 U.S. at 391.

The State does not deny that such red flags existed in this case, including:

- trial counsel's expert (a grammar school psychologist) advised him to hire a forensic psychiatrist to evaluate Mr. Harvey (PCR. v. 10, pp. 81-82.);

- trial counsel wrote himself a note to hire a forensic psychiatrist (Pet. App. I, 83a.);

- trial counsel requested funds from the court to retain a forensic psychiatrist, which was granted (PCR. v. 10, p. 80); and

- trial counsel admitted at the evidentiary hearing that he had concerns about Mr. Harvey's competency to stand trial. (PCR. v. 10, pp. 86-87).

In sum, trial counsel's failure to fully investigate Mr. Harvey's mental health was the result of his own inattention, which is not a strategic decision. *Wiggins*, 539 U.S. at 526.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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