No. ____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

I. QUESTIONS PRESENTED

In this capital case, the Florida Supreme Court denied post-conviction relief by finding that counsel rendered effective assistance of counsel to petitioner Harold Lee Harvey, Jr. The questions presented are:

1. Does trial counsel violate the requirements of *Strickland v. Washington* by failing to remove a juror who repeatedly admits during voir dire that she cannot be fair and impartial as the Sixth Circuit has held, or can capital counsel make a strategic decision to accept a biased juror as the Florida Supreme Court concluded?

2. Did the Florida Supreme Court err by misinterpreting this Court's decision in *Florida v. Nixon* to permit trial counsel to concede a client's guilt to first-degree murder without consultation or authorization and vacating its order granting Mr. Harvey a new trial?

3. Does capital counsel violate *Strickland v. Washington* and its progeny by failing to investigate available mental health mitigation evidence that could have convinced a jury to impose a life sentence, as this Court concluded in *Wiggins v. Smith*, where (i) counsel's expert psychologist recommended retaining (and the trial court specifically approved) a forensic psychiatrist to investigate signs indicative of organic brain damage but counsel neglected to obtain or consider such evidence because he was following a pre-determined approach to present Mr. Harvey as a "good person"; and (ii) had counsel investigated such evidence, he would have discovered that Mr. Harvey suffered from organic brain damage and other mental illnesses at the time of the crime and impacted his capacity and established three statutory mitigators under Florida's law.

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II. PETITION FOR WRIT OF CERTIORARI.

Harold Lee Harvey, Jr. respectfully petitions for a writ of certiorari to review a decision of the Florida Supreme Court.

III. OPINIONS BELOW.

The Florida Supreme Court's opinions denying relief on the issues raised in this petition are reported at 656 So. 2d 1253 (Fla. 1995) (Pet. App. C, 39a-49a) and 946 So. 2d 937 (Fla. 2006) (Pet. App. A, 1a-24a).

IV. STATEMENT OF JURISDICTION.

On June 15, 2006, the Florida Supreme Court denied Mr. Harvey post-conviction relief. On January 8, 2007, the Florida Supreme Court denied Mr. Harvey's Motion for Rehearing. (Pet. App. F, 67a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

V. CONSTITUTIONAL PROVISION INVOLVED.

This case involves the Sixth Amendment to the United States Constitution reprinted at Pet. App. G, 69a.

VI. PROCEDURAL POSTURE.

A. Mr. Harvey's Trial and Direct Appeal.

On February 27, 1985, Harold Lee Harvey, Jr. was arrested and charged with second-degree murder and robbery in connection with the deaths of William and Ruby Boyd. On March 7, 1985, Mr. Harvey was indicted for two counts of first-degree murder.

The guilt phase of Mr. Harvey's trial began on June 9, 1986. The State's evidence of guilt went essentially

unchallenged. Mr. Harvey's trial counsel, Robert Watson ("Trial Counsel"), did not call any witnesses in his guilt-phase defense. Nor did he conduct any meaningful cross-examination of the State's witnesses. The jury deliberated less than one hour and on June 18, 1986, returned guilty verdicts on two counts of first-degree murder.

The jury subsequently voted eleven to one to recommend sentences of death on both counts. (R. 3046-47.)[1] The court followed the jury's recommendation, finding the State had established four statutory aggravating factors: (1) the murder was committed while engaged in a robbery or burglary; (2) it was heinous, atrocious, and cruel; (3) it was committed for the purpose of avoiding lawful arrest; and (4) it was committed in a cold, calculated, and premeditated manner. *Harvey v. State*, 529 So. 2d 1083, 1087 & n.4 (Fla. 1988). The only mitigating factors the court found were non-statutory factors of low IQ, poor educational skills and poor social skills. *Id.* at n.5.

On June 16, 1988, the Florida Supreme Court affirmed the trial court's judgment. *Id.* at 1088. This Court denied certiorari on February 21, 1989. *Harvey v. Florida*, 489 U.S. 1040 (1989).

B. State Post-Conviction Proceedings.

1. The post-conviction motion.

On August 27, 1990, Mr. Harvey filed a motion for post-conviction relief. (CR. 169-548.) On October 5, 1992, the

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[1] The record in this case comes from three sources: (1) the record from Mr. Harvey's direct appeal "(R._____)"; (2) the collateral record from Mr. Harvey's appeal from the first denial of his post-conviction motion "(CR.____)"; and (3) the post-conviction record from the 1998 evidentiary hearing on Mr. Harvey's motion "(PCR.___)".

trial court summarily denied all but one of Mr. Harvey's claims and denied the surviving claim on March 17, 1993 after an evidentiary hearing. (Pet. App. E, 65a-66a.)

Mr. Harvey timely appealed to the Florida Supreme Court. On February 23, 1995, the Florida Supreme Court remanded the case for an evidentiary hearing on Mr. Harvey's claims that Trial Counsel was ineffective by: (1) conceding Mr. Harvey's guilt to first-degree murder when counsel attempted to concede only second-degree murder; and (2) failing to discover compelling mental health mitigation evidence. (Pet. App. C, 44a-46a.) The Florida Supreme Court, however, held that Trial Counsel was not ineffective by leaving a biased juror on the jury.

After a six-day evidentiary hearing on remand, the Florida trial court again denied post-conviction relief.

2. The Florida Supreme Court's 2003 ruling granting Mr. Harvey a new trial.

Mr. Harvey appealed to the Florida Supreme Court, arguing that Trial Counsel was ineffective by: (1) conceding Mr. Harvey's guilt to first-degree murder even though he only intended to concede second-degree murder and did so without disclosing any concession strategy to Mr. Harvey; and (2) failing to investigate Mr. Harvey's mental health history even though there were "red flags" that strongly suggested Mr. Harvey suffered from several mental illnesses.

On July 3, 2003, the Florida Supreme Court granted Mr. Harvey a new trial (both guilt and penalty phase), finding that Trial Counsel was ineffective by systematically conceding Mr. Harvey's guilt to first-degree murder without Mr. Harvey's consent. (Pet. App. B, 35a.) The court did not

reach any other issues raised by Mr. Harvey, including Trial Counsel's failure to investigate mental health mitigation.

3. The Florida Supreme Court's revised opinion denying Mr. Harvey post-conviction relief.

On July 18, 2003, the State moved for rehearing. While the State's motion was pending, this Court decided *Florida v. Nixon*. On June 15, 2006, the Florida Supreme Court, misinterpreting *Nixon*, issuing a revised ruling, reversing its decision granting Mr. Harvey a new trial. (Pet. App. A, 1a-24a.) The Florida court also, for the first time, considered Mr. Harvey's claim that Trial Counsel failed to investigate mitigation evidence, refusing to grant Mr. Harvey a new sentencing hearing even though Trial Counsel's lack of investigation was unreasonable under this Court's decisions in *Wiggins v. Smith* and *Rompilla v. Beard*.

On June 30, 2006, Mr. Harvey filed a motion for rehearing. On January 8, 2007, the Florida Supreme Court denied that motion. (Pet. App. F, 67a.)

VII. STATEMENT OF THE CASE.

Mr. Harvey's defense was the first capital case for Trial Counsel as first chair, and Trial Counsel made a series of errors that denied Mr. Harvey effective assistance of counsel.

A. Trial Counsel Failed To Excuse An Admittedly Biased Juror.

Because of the pre-trial publicity involving this case, the trial court permitted individual, sequestered voir dire of all potential jurors who indicated they had read or heard about the case. One potential alternate juror, Marlene Brunetti

("Juror Brunetti"), was called for voir dire. In voir dire, Juror Brunetti admitted that she had seen information about Mr. Harvey's case in the news, including that Mr. Harvey had confessed to his involvement. (Pet. App. H, 71a-77a.) When asked if she could be impartial, she candidly admitted, "I don't think I could be impartial after reading about it." (*Id.* at 74a-75a.) Juror Brunetti later affirmed that she could not be impartial because she felt "he committed the crime that he was charged for." (*Id.* at 78a.) She also admitted, "I can't honestly say that I could have an open mind after reading it and seeing it on the news. I have to be honest." (*Id.* at 79a.)

Trial Counsel did not move to strike Juror Brunetti, despite numerous invitations from the trial court to do so. (*Id.* at 80a.) For example, after voir dire, the court asked:

Court:	Just so I understand, there is not motions (sic) for cause that have been made at this time?
Defense Counsel:	No.

The following morning, the court excused a juror for medical reasons and Juror Brunetti was the first alternate. The court again asked if there was any objection to seating this admittedly biased juror. (*Id.* at 82a.) Trial Counsel did not object. As a result, Juror Brunetti, who testified she could not be fair and impartial, served on the jury that convicted and sentenced Mr. Harvey to death. There was no evidence in the record that Mr. Harvey waived his right to an impartial jury.

The Florida Supreme Court rejected Mr. Harvey's that Trial Counsel was ineffective in failing to strike Juror Brunetti. The court found that defense counsel could unilaterally make a strategic choice to have his client's cased

decided by a panel including a resolutely biased and partial juror. (Pet. App. C, 43a-44a.)

B. Trial Counsel Conceded Guilt To First-Degree Murder Without Consultation Or Consent.

Trial Counsel's strategy for the guilt phase of this case was to "tip-toe" through Florida case law and concede Mr. Harvey's guilt to second-degree murder, with the hope he could avoid a first-degree conviction, and convince the jury to spare Mr. Harvey's life. In making this decision, Trial Counsel did not advise Mr. Harvey of his plan to concede second-degree murder until seconds before he delivered his opening statement to the jury, while sitting at counsel table in the courtroom, in a whispered one-way exchange. (PCR. v. 10, pp. 105-06.) There was no opportunity for Mr. Harvey to reflect, discuss or evaluate Trial Counsel's plan to concede guilt.

Trial Counsel bungled his own approach and conceded all of the elements of first-degree, capital murder and admitted numerous aggravating factors that supported imposition of the death penalty. Trial began on June 13, 1986. The court instructed the jury that Mr. Harvey had entered a plea of "not guilty" and must be presumed innocent until proven guilty. The government opened its case. Trial Counsel then stood and addressed the jury. His first words were:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. (R. 1859.)

Trial Counsel continued his opening statement with more concessions. He conceded felony murder by telling the jury, "this case is the story of a robbery, a robbery that went very badly." (R.1861.) Trial Counsel conceded premeditation: "without question what was discussed during this conversation was whether or not to kill these two people." (R. 1864.) Trial Counsel made other inappropriate concessions and remarks:

> And then it [the murders] happened just about the way that Mr. Morgan [State's Attorney] said it did [in his opening statement]. (R. 1863.)
>
> * * *
>
> When evil gets set in motion one thing leads to another. (R. 1864.)
>
> * * *
>
> And then as part of the complete disintegration of this plan Lee went back inside to pick up the shells, the brass shells. (R. 1865.)

Trial Counsel made similar concessions during his guilt phase closing argument. For example, he conceded: "The evidence supports a shooting with premeditation, with a conscious decision to kill." (R. 3030-31.) He went so far as to tell the jury the Boyds' deaths occurred in the course of a kidnapping, an uncharged crime. (R. 1863, 3027.) He made numerous other inappropriate remarks, including:

> Lee shot Mr. and Mrs. Boyd and killed them. (R. 2460.)
>
> * * *
>
> I would say that burglary was committed there. (R. 2469-70.)
>
> * * *
>
> You may even say that they had decided to commit the murder at the time of the shooting. (R. 2472.)

Mr. Harvey did not consent privately or on the record to any strategy to concede to second-degree murder or even have the opportunity to do so. (PCR v. 15, p. 933.) Instead, Trial Counsel disclosed his approach in the seconds before opening statements. No discussion of any kind was had about conceding to first-degree murder, numerous aggravating factors or crimes not even charged.

In its 2003 opinion, the Florida Supreme Court found that Trial Counsel wrongfully conceded all the elements of guilt to first-degree murder and granted Mr. Harvey a new trial. (Pet. App. B, 35a.) On June 15, 2006, however, the court, relying on *Nixon*, reversed its initial decision, finding that Trial Counsel acted effectively by conceding Mr. Harvey's guilt to first-degree murder even though his stated goal was to concede second-degree murder only. (Pet. App. A, 9a.)

C. Trial Counsel Failed To Conduct A Reasonable Mitigation Investigation.

1. The "good person" mitigation strategy.

There was no mitigation investigation by Trial Counsel in this case. Trial Counsel made no effort to uncover potential nonstatutory mitigating factors, such as evidence of family health records, substance abuse, trauma, abuse, illness, and life history. (PCR. v. 12, pp. 411-12.) Trial Counsel also directed his investigator not to investigate Mr. Harvey's prenatal care, dysfunctional characteristics in Mr. Harvey's extended families, birth complications, childhood accidents, pediatric medical care, exposure to toxic substances, familial poverty, substance abuse, domestic abuse, mental health problems, suicide attempts or depression. (PCR. v. 13, pp. 763-66.)

Instead, Trial Counsel set upon a "good person" theory and directed his witnesses' efforts to supporting that theory. He told his investigator, for example, to obtain statements from individuals who had "nice" things to say about Mr. Harvey. (*Id.* at 759-63.) Trial Counsel's approach is best illustrated in the notes that Mr. Harvey's father kept, in Trial Counsel's own handwriting, reflecting that he wanted Mr. Harvey's father to state that the Harvey family was good and loving. (Def. Ex. 23; PCR. v. 14, pp. 789-90.)

2. Trial Counsel failed to retain a forensic psychiatrist.

Trial Counsel hired Dr. Fred Petrilla, a grammar school psychologist, to conduct a "personality assessment" of Mr. Harvey in preparation for trial. (PCR. v. 15, p. 959.) At the time, Dr. Petrilla's practice consisted exclusively of counseling teenagers and adolescents. (*Id.* at 963.) Dr.

Petrilla had no training in neuropsychology and had no experience in capital cases. (*Id.* at 964.) Mr. Harvey was only the second criminal defendant he had examined. (*Id.*)

A personality assessment is different from a forensic mental health evaluation. It is oriented towards understanding psychological issues in an individual's personal life and developing a suitable course of counseling. A personality assessment does not include neurological testing designed to determine whether the subject has brain damage or another neurological disorder. Nor does it attempt to relate the subject's mental health in any way to the crime at issue.

Dr. Petrilla conducted the personality assessment of Mr. Harvey over a few hours. (PCR. v. 15, p. 960-61.) He concluded that Mr. Harvey was insecure, suffered from low self-esteem, was anxious, depressed, had low intelligence and lacked social skills. (Def. Ex. 11.) Although Mr. Harvey was facing the possibility of a death sentence, Dr. Petrilla's recommended treatment was for Mr. Harvey to commence self-esteem counseling and assertiveness training. (*Id.*)

Dr. Petrilla recommended several specific psychiatrists to Trial Counsel because the preliminary tests given to Mr. Harvey indicated potential organic brain damage, and because he had no experience in neuropsychology and forensic examination. On February 22, 1986, following up on that recommendation, Trial Counsel prepared a "Memo to File" to remind himself to retain a psychiatrist: "I need to get a hold of a psychiatrist to examine Mr. Harvey." (Pet. App. I, 83a.) Dr. Petrilla also telephoned Trial Counsel with other recommendations of specific psychiatrists. (Pet. App. J, 84a; PCR. v. 10, pp. 81-82.)

Trial Counsel took some steps to retain a psychiatrist, but ultimately failed to do so. For example, Trial Counsel filed a Motion to Adopt the motion by Mr. Harvey's co-defendant requesting authorization to retain *both* a *psychiatrist and psychologist.* (Def. Ex. 2.) As Trial Counsel specifically adopted, "[i]t is necessary to have both the psychiatric examination and the psychological examination in order to receive a total picture of the defendant's total condition at the time of the alleged offense." (Def. Ex. 2; PCR. v. 10, pp. 76-77.)

The court granted Trial Counsel's motion. (PCR. v. 10, p. 80.) Trial Counsel thereafter represented to the court time and time again that he planned to retain a psychiatrist. For example, on January 16, 1986, Trial Counsel moved to postpone the penalty phase on grounds that he would move for a psychiatric evaluation prior to the penalty phase. (PCR. v. 10, pp. 78-79.) On February 18, 1986, Trial Counsel moved the court to increase professional mental health fees so that he could obtain a psychiatrist for Mr. Harvey. (*Id.* at 79-80.) The court approved the request. (*Id.* at 80.)

Trial Counsel, however, never retained a psychiatrist.

3. Mr. Harvey's mental illnesses.

At the hearing on his post-conviction motion, Mr. Harvey called Dr. Michael Norko, Dr. Brad Fisher and Dr. Petrilla. Their un-rebutted testimony demonstrated the mental health evidence Trial Counsel missed.

Dr. Norko has held positions as director and chief executive officer of the Whiting Forensic Institute in Connecticut, director of River Valley Mental Health Services in Connecticut, and as a private psychiatrist. Dr. Norko also has held a teaching position in psychiatry at the Yale

University School of Medicine for ten years. He is a Rappaport Fellow of the American Academy of Psychiatry & Law and a fellow of the American Psychiatric Association. (PCR. v. 11, pp. 261-68.)

Dr. Norko testified about the mitigating evidence a psychiatrist could have offered at Mr. Harvey's trial if Trial Counsel had retained a psychiatrist. Dr. Norko testified that Mr. Harvey suffered from four mental illnesses at the time of the 1985 crime: (1) Organic Brain Dysfunction, consistent with both frontal lobe and brain stem damage; (2) Major Depressive Disorder; (3) Post-Traumatic Stress Disorder; and (4) Substance Abuse Disorders related to Mr. Harvey's long-term drug and alcohol abuse. (*Id.* at 290.)

Clinically, Dr. Norko diagnosed Mr. Harvey with post-concussion syndrome and significant personality change. (*Id.* at 297-98, 304-05.) Mr. Harvey's post-concussion syndrome manifested itself through repeated head injuries that had a cumulative effect, including a 1979 car accident that claimed a girl's life and critically injured Mr. Harvey, loss of consciousness, amnesia, headaches, decreased attention, staring into space, memory problems, emotional changes, depression and insomnia. (*Id.* at 298-03.)

Dr. Norko also observed a significant personality change after Mr. Harvey's 1979 car accident. (*Id.* at 304.) Those personality changes included decreased attention, affective liability, irritability, a sudden changing of expressed emotion or mood for no apparent reason, depression, a reckless or apathetic attitude, staring into space, intolerance at being touched, excessive interpersonal withdrawal, hopelessness, and increased drug and alcohol use. (*Id.* at 304-08.) Mr. Harvey's organic brain damage could cause him to respond quickly and suddenly in an unprovoked manner to

stimulus around him, develop rages or irritability, and explode into sudden violent behavior. (PCR. v. 12, p. 437.)

Dr. Norko confirmed his clinical conclusions about Mr. Harvey's organic brain dysfunction with Mr. Harvey's psychological test results. For example, Mr. Harvey's scores on his IQ test showed a 12 point difference between his verbal and performance scores. (PCR. v. 11, p. 310.) A difference of 10 points or more indicates organic brain damage. (*Id.*) Dr. Norko also examined the raw data of Mr. Harvey's responses to the Halstead-Reitan trail making test and the WAIS-R test, both of which indicated organic brain damage. (*Id.* at 316-17.) Finally, Dr. Norko found that Mr. Harvey's psychological test responses indicated problems with abstract thinking and executive functions, which are higher level brain functions attributed to the frontal lobes. (*Id.* at 315-16.) Executive functions affect an individual's organization, insight, foresight into planning, decision making and behavior. (*Id.* at 316.)

Based on these findings, Dr. Norko testified that the following three statutory mitigating factors were present at the time of the offense: (1) Mr. Harvey lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law due to his organic brain dysfunction, impaired executive functions, depression, hyper arousal or impulse-control problems due to Post-Traumatic Stress Disorder, Dependent Personality Disorder, and intoxication at the time of the crime (PCR. v. 12, pp. 435-44); (2) Mr. Harvey acted under the substantial duress or domination of his co-defendant (*id.* at 444-51); and (3) Mr. Harvey committed the offense under the influence of an extreme mental or emotional disturbance, namely his Organic Brain Dysfunction, Major Depressive Disorder, Post-Traumatic Stress Disorder, and Substance Abuse Disorders (PCR. v. 11, p. 292, v. 12, pp. 434, 451-59).

Dr. Norko's psychiatric findings were confirmed by Dr. Brad Fisher, a forensic psychologist who has taught at Duke University and the University of North Carolina. Dr. Fisher testified that "any psychologist" would recognize head injury (such as Mr. Harvey's 1979 car accident and after being hit with a tire iron) as significant "red flags" of organic brain damage. (*Id.* at 663-64.) Among other things, Dr. Fisher found evidence of organic brain damage in Mr. Harvey's responses to two psychological tests (*id.* at 665-67), and confirmed Dr. Norko's conclusions that Mr. Harvey suffers from several mental illnesses, including organic brain damage and that Mr. Harvey's mental health would have established three statutory mitigators. (*Id.* at 659-61.)

Dr. Petrilla, the grammar school psychologist who testified at the initial trial, testified for a second time at the post-conviction hearing pursuant to subpoena. Since the initial trial, Dr. Petrilla has received training in neuropsychology and become board certified. At risk to his professional reputation and standing, Dr. Petrilla testified that he erred in his interpreting or scoring of Mr. Harvey's responses to the psychological tests he administered in 1986. Indeed, Dr. Petrilla further admited that his 1986 conclusion that Mr. Harvey did not suffer from organic brain damage was the product of his lack of "competence in that area." (PCR. v. 15, p. 972, 990.)

Drs. Norko, Fisher and Petrilla's testimony is unrebutted. It shows unequivocally that Mr. Harvey has organic brain damage, a disability that should have been discovered and considered by Trial Counsel before any decisions were made about an approach to Mr. Harvey's defense. Trial Counsel failed to do so, and that failure impacted every phase of the initial trial from the pre-trial arguments used to challenge Mr. Harvey's statements to police and other evidence, any decision to forfeit

constitutional rights, the approach used in addressing the jury, and in all other phases of the trial.

Nevertheless, the Florida Supreme Court found that Trial Counsel was not ineffective for failing to investigate because the mental health evidence was inconsistent with Trial Counsel's uninformed "good person" approach. (Pet. App. A, 16a-17a.)

VIII. REASONS FOR GRANTING THE WRIT.

This Court should grant review for three reasons. *First*, a significant split in authority exists amongst lower courts on whether a trial counsel's failure to strike a self-described biased juror can ever be a reasonable strategic decision under *Strickland v. Washington*, and if not, whether prejudice should be presumed in such cases of error. *Second*, the Florida Supreme Court has misinterpreted this Court's recent decision in *Florida v. Nixon* as providing capital trial counsel the unfettered discretion to concede a defendant's guilt without obtaining a defendant's consent to that strategy. *Finally*, the Florida Supreme Court has failed to apply this Court's recent holdings in *Wiggins v. Smith* and *Rompilla v. Beard* by failing to determine whether Trial Counsel first made a reasonable investigation into mitigating circumstances before adopting a penalty phase strategy.

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

Although Mr. Harvey never waived his right to an impartial jury, Trial Counsel repeatedly failed to excuse a juror who candidly admitted she could not be impartial or keep an open mind. (Pet. App. H, 80a, 82a.) On Mr. Harvey's claim for post-conviction relief, the Florida

Supreme Court incorrectly concluded that Trial Counsel made a strategic decision to accept that juror. (Pet. App. C, 43a-44a.)

The Florida Supreme Court's incorrect ruling conflicts with the Sixth Amendment as well as this Court's holdings in *Strickland* and *United States v. Cronic*. That decision also is contrary to the holdings of other state and federal courts and part of an increasing split in authority as to whether counsel (rather than the client) can decide to accept a biased juror.

1. Counsel was deficient by failing to strike an admittedly biased juror.

The Sixth Amendment guarantees an accused the right to the assistance of counsel and trial by an impartial jury. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (reversing conviction where widespread and inflammatory publicity had preceded the trial even though jurors insisted they would remain impartial); *see also Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988).

Counsel cannot waive a client's Sixth Amendment right to an impartial jury without consent. *Taylor v. Illinois*, 484 U.S. 400, 417-18 n.24 (1988) ("there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client" including the right to a jury trial). Voir dire is an essential part of guaranteeing a criminal defendant's right to a fair and impartial jury. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be

impartial and follow the court's instructions cannot be fulfilled. *Id.*

An impartial tribunal is an indispensable element of a fair criminal trial. *Id.* at 196 (Stevens, J. dissenting). In the language of Lord Coke, a juror must be "indifferent as he stands unsworne." *See Smith v. Phillips*, 455 U.S. 209, 225 n.2 (1982) (Marshall, J. dissenting). The failure to accord an accused a fair and impartial jury violates even the minimal standards of due process. *Irvin*, 366 U.S. at 722; *In re Oliver*, 333 U.S. 257, 278 (1948); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

A defendant's right to an impartial jury is primarily implemented through the system of challenges exercised during the voir dire of prospective jurors. *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976). "Challenges for cause are the means by which partial or biased jurors should be eliminated." *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). The right to challenge a juror for bias dates back to the days of Blackstone. *See* 3 W. Blackstone, Commentaries 480-81 (W. Hammond ed. 1890).

As the Sixth Circuit has held, the "question of whether to seat a biased juror is not a discretionary or strategic decision." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). "If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury." *Id.*

Although Trial Counsel utterly failed to preserve Mr. Harvey's right to an impartial jury, the Florida Supreme Court concluded that his decision to accept a juror who admitted she could not be impartial was a reasonable strategic decision. That decision is wrong and deprives Mr.

Harvey of his right to a trial by a fair and impartial jury, a fundamental Constitutional right that was never waived by him in this case.

2. Prejudice should be presumed because the presence of the biased juror rendered the trial presumptively unreliable.

While a defendant claiming ineffective assistance typically must show prejudice, this Court has held there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). For example, this Court has held that prejudice should be presumed where a defendant was "denied the right of effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (internal quotation omitted).

The mere presence of a biased juror taints a trial's outcome to the point that a court must find prejudice exists. Indeed, several federal courts of appeal and state courts have correctly concluded that counsel's failure to strike a biased juror is an unreasonable "strategic decision" and have held that the outcome of the trial is presumptively unreliable. *Hughes*, 258 F.3d at 463; *Gonzalez*, 214 F.3d at 1111 (same); *Miller v. Webb*, 385 F.3d 666, 676 (6th Cir. 2004) (presuming prejudice when counsel leaves a partial juror on the jury); *State v. King*, 144 P.3d 222, 225 (Utah Ct. App. 2006) (same).

This Court's guidance is necessary, not just to correct the Florida Supreme Court's unconstitutional decision, but also to resolve an existing split amongst lower courts.

Indeed, some courts, like the Fifth, Tenth and Eighth Circuits, have held that counsel is deficient when he leaves a biased juror on the jury, but require a showing of actual prejudice. *Virgil v. Dretke*, 446 F.3d 598, 612 (5th Cir. 2006); *Hale v. Gibson*, 227 F.3d 1298, 1319 (10th Cir. 2000); *Johnson v. Armontrout*, 961 F.2d 748, 755-56 (8th Cir. 1992); *see also State v. Terry*, 601 So. 2d 161, 164 (Ala. Crim. App. 1992). Other courts have held that counsel can make a reasonable strategic decision to leave a biased juror on the jury. *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992) (counsel made strategic decision to accept biased juror); *Hightower v. State*, 43 S.W.3d 472, 477 (Mo. App. 2001) (same); *People v. Metcalfe*, 782 N.E.2d 263, 274-75 (Ill. 2002) (same).

Lower state and federal courts are divided. This Court should resolve this split, hold that counsel alone cannot decide to accept a biased juror, instruct lower courts that prejudice should be presumed where counsel fails to remove a biased juror and grant Mr. Harvey a new trial.

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

In its original ruling, the Florida Supreme Court found that Trial Counsel was *per se* ineffective under *Cronic* because he failed to obtain Mr. Harvey's consent to admit guilt at trial and had undermined his own strategy to concede second-degree murder only and consequently, ordered a new trial. (Pet. App. B, 35a.) In its revised opinion, the court again agreed that Trial Counsel botched his strategy and inadvertently conceded Mr. Harvey's guilt to first-degree murder. (Pet. App. A, 7a.) Nevertheless, the court reversed itself and concluded that this Court's decision in *Nixon* stands for the proposition 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.* (Pet. App. A,. 4a.)

This Court should correct the Florida Supreme Court's fundamental misapplication of *Nixon* for two reasons. First, this Court should clarify that *Nixon* does not allow counsel to concede guilt without first consulting his client. Second, this Court should clarify that *Nixon* does not preclude a court from presuming prejudice where (as here) counsel spectacularly undermines his own strategy.

1. This Court should dispel the myth that counsel can concede guilt without first consulting the client.

Nixon involved a set of circumstances that were far different from those here. In *Nixon*, trial counsel met with the defendant at least three times to discuss counsel's strategy to concede guilt and focus instead on convincing the jury not to impose death. *Florida v. Nixon*, 543 U.S. 175, 189 (2004). Nixon was unresponsive during those discussions and never verbally approved or rejected counsel's proposed strategy. *Id.* Faced with Nixon's unresponsiveness, counsel concluded that the best strategy was to concede guilt and preserve his credibility in urging leniency during the penalty phase. *Id.*

After reaffirming that defense counsel "undoubtedly has a duty to consult with the client," this Court held that "when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." *Id.* at 178. However, this Court made clear that a defendant's right to

decide whether to concede guilt was not completely eviscerated and that counsel indisputably has a duty to consult his client as to any concession strategy. *Id.* at 187. This Court re-emphasized that its holding was limited to the particular facts of the case before it: "[w]hen 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." *Id.* at 192.

Mr. Harvey's case is fundamentally different from *Nixon* because Trial Counsel deprived Mr. Harvey of his right to consent or object to counsel's strategy. Mr. Harvey never had the opportunity to consent to Trial Counsel's approach to conceding guilt. By failing to disclose his strategy to Mr. Harvey, Trial Counsel completely deprived Mr. Harvey of the opportunity to consider that strategy, and consequently, Trial Counsel was deficient. *Nixon*, 543 U.S. at 189; *Strickland*, 466 U.S. at 688. *See also* JESSICA M. TANNER, Note, Florida v. Nixon 125 S. Ct. 551 (2004), 17 Cap. Def. J. 421, 426-27 (2005) (*Nixon* did not reach the issue of whether counsel is ineffective under *Strickland* or *Cronic* if counsel did not consult with the client before conceding guilt).

This Court should grant review and hold that where (as here) counsel does not disclose a concession strategy to his client, *Cronic* applies and prejudice should be presumed.

2. This Court should hold that where counsel undermines his own strategy and concedes guilt, prejudice should be presumed.

As the Florida Supreme Court conceded, Trial Counsel spectacularly botched his strategy to argue for second-degree murder. (Pet. App. A, 7a.) Although Trial Counsel believed he could "tiptoe through Florida case law" and make an

argument for second-degree murder while still conceding Mr. Harvey's guilt, Trial Counsel stepped on a landmine with his very first step and conceded Mr. Harvey's guilt to first-degree murder in his opening statement.

In *Nixon*, this Court rejected Nixon's argument that counsel's strategy to concede guilt was the "functional equivalent" of a guilty plea because "Nixon retained the rights accorded a defendant in a criminal trial." 543 U.S. at 188. This Court reasoned that the State still was obliged to present competent, admissible evidence to prove the essential elements of first-degree murder, the defense reserved the right to cross-examine witnesses and could endeavor to exclude prejudicial evidence. *Id.*

This Court did not reach the issue of whether Nixon was prejudiced by counsel's strategy. Nor did this Court hold that prejudice could not be presumed in cases where counsel "fail[s] to function in any meaningful sense" as the State's adversary. *Id.* at 190. Indeed, *Nixon* necessarily suggests that prejudice still must be presumed when counsel fails to act as an adversary of the government because the "trial" then becomes closer to a "functional equivalent" of a guilty plea. *Id.* That is precisely what happened here.

This case is significantly different from *Nixon* in at least one critical respect. In *Nixon*, counsel's strategy was to concede first-degree murder (not argue for second-degree) and focus his efforts on persuading the jury to spare Nixon's life, and counsel consistently implemented that strategy throughout the trial. For example, Nixon's counsel urged the jury to focus on the penalty phase: "I'm suggesting to you that . . . there are going to be reasons why you should recommend that his life be spared." *Nixon*, 543 U.S. at 183. That is not what happened here where Trial Counsel

undermined his own strategy and failed to function as the government's adversary.

Trial Counsel completely failed to function as the government's adversary in defending Mr. Harvey by systematically conceding Mr. Harvey's guilt to first-degree murder, including aggravating factors that were found nowhere in Mr. Harvey's statements. Although he was trying to concede only second-degree murder, Trial Counsel argued that Mr. Harvey killed the Boyds both with premeditation and in the course of a burglary or robbery.

As to premeditation, he told the jury that Mr. Harvey and Mr. Stiteler "put together a plan . . . that [ ] was going to be foolproof" and they discussed "whether or not to kill these two people." (R. 1861-64.) He also conceded the two had formed the intent to kill when they "decided to commit the murder at the time of the shooting." (R. 2472.)

As to felony murder, he told the jury "this case is the story of a robbery, a robbery that went very badly" and that "I would say that burglary was committed there." (R. 1861, 2469-70.) He then emphasized to the jury that the commission of those crimes was important because "the judge will instruct you that for felony murder it must be proved beyond a reasonable doubt that the person was either engaged in one of the felonies that he will describe, robbery, burglary, and kidnapping is the third one -- either engaged in it or escaping from it." (*Id.*) For good measure, he even conceded that the State's description of how Mr. Harvey killed the Boyds was correct. (R. 3027.)

This case is not *Nixon*, where counsel's strategy was to concede guilt to first-degree murder and focus his efforts entirely on the penalty phase and implemented that strategy throughout the trial. Here, Trial Counsel implemented an

entirely different strategy -- to "tiptoe" through Florida case law and focus the jury on second-degree murder -- and conceded every element of first-degree murder and the aggravating factors needed to impose death. The government did not need to prove anything because counsel had already conceded, without authorization, every aspect of the government's case. By making these repeated concessions while arguing for second-degree murder, Trial Counsel fell into the very trap *Nixon* reasoned was a valid justification for conceding guilt -- to gain credibility with the jury. Trial Counsel failed to function as a meaningful adversary to the State, and prejudice should be presumed.

C. The Florida Supreme Court's Holding That Trial Counsel Conducted An Adequate Mitigation Investigation Conflicts With this Court's Decisions In *Strickland* And Its Progeny.

By adopting his "good person" mitigation strategy, Trial Counsel missed critical and persuasive mitigation evidence regarding Mr. Harvey's mental health. The unrebutted testimony of two psychiatrists, Dr. Norko and Dr. Fisher, showed that Mr. Harvey suffers from many mental illnesses, including organic brain damage and post-traumatic stress syndrome. (*See supra* at 11-15.) The evidence also showed that Trial Counsel's own expert, Dr. Fred Petrilla, recommended that Trial Counsel retain a forensic psychiatrist and provided him with multiple recommendations. (Pet. App. J, 84a.) Trial Counsel even wrote a note to file showing he understood the importance of retaining a psychiatrist: "I need to get a hold of a psychiatrist to examine Mr. Harvey." (*Id.*; PCR. v. 10, pp. 82.) Inexplicably, Trial Counsel never followed through.

The Florida Supreme Court, however, concluded that Trial Counsel's failure to investigate Mr. Harvey's mental

health was a strategic decision because the evidence of Mr. Harvey's mental illnesses was inconsistent with Trial Counsel's "good person" mitigation strategy. (Pet. App. A, 16a.) That holding is contrary to this Court's rulings in *Wiggins* and *Rompilla*, and although the Florida Supreme Court never reached the prejudice prong of *Strickland*, Mr. Harvey was undoubtedly prejudiced by Trial Counsel's decision to latch on to a good person mitigation strategy before even *beginning* his investigation.

1. Trial Counsel's investigation was deficient.

Criminal defense "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Rompilla v. Beard*, 545 U.S. 374, 375 (2005). Indeed, this Court has cautioned time and again: "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 528 (quoting *Strickland*, 466 U.S. at 690-91). "[C]ounsel has a duty to make *reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.*" *Strickland*, 466 U.S. at 691 (emphasis added). A strategic decision must flow from an informed decision. *Id.*

A court considering the reasonableness of an attorney's partial investigation 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. Thus, capital counsel cannot make a reasonable strategic decision about a mitigation case when counsel has not first made a reasonable investigation to determine his options for putting on that mitigation case. *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 691. Instead, counsel must make a thorough investigation before making any decision regarding the mitigation strategy. *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 691. A reviewing court should be especially critical of counsel's investigation if counsel's investigation adduced "red flags" that suggested counsel should continue his investigation. *Rompilla*, 545 U.S. at 392.

Following *Wiggins* and *Rompilla*, other lower courts have found that counsel's mitigation evidence investigation was deficient on circumstances that are virtually identical to those here. For example, the Ninth Circuit recently held that counsel "abandoned their [mental health] investigation at an unreasonable juncture" where (as here) the record revealed: (i) counsel believed defendant may have suffered from a mental illness; (ii) a preliminary mental health examination indicated a probability that defendant suffered from schizophrenia and paranoia; and (iii) counsel nevertheless did not "follow up on these important leads by seeking a comprehensive evaluation by more qualified and experienced practitioners." *Daniels v. Woodford*, 428 F.3d 1181, 1203-04 (9th Cir. 2005); *Commonwealth v. Gorby*, 909 A.2d 775, 791 (Pa. 2006) (counsel knew defendant suffered from a head injury and substance abuse).

The Florida Supreme Court ignored this Court's directives. Rather than focus on the reasonableness of Trial Counsel's investigation, the Florida Supreme Court focused solely on whether his decision to *not* investigate was consistent with his strategy to present Mr. Harvey as a "good person." (Pet. App. A, 16a); *compare Rompilla*, 545 U.S. at

391 ("The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts."). The Florida Supreme Court's improper focus on whether evidence of Mr. Harvey's mental health issues was consistent with Trial Counsel's "good person" strategy was a wholly unreasonable application of *Strickland*, *Wiggins* and *Rompilla* and can only be described as a *post-hoc* rationalization of Trial Counsel's inattentiveness. If the Florida Supreme Court *had* looked at whether Trial Counsel made a reasonable decision to stop his investigation into mitigating evidence, the court easily would have concluded that Trial Counsel's investigation was unreasonable for at least two reasons.

First, Trial Counsel adopted a "good person" strategy before conducting, much less completing, a reasonable mental health investigation under the circumstances, and in contravention of his own mental health expert advising him that a psychiatric evaluation was necessary. Not only did Dr. Petrilla tell Trial Counsel to hire a psychiatrist, the trial court authorized and approved funds for that purpose. (PCR. v. 10, p. 80.) Like the ineffective counsel in *Rompilla*, who failed, *inter alia*, to seek information that was "readily available for the asking," Trial Counsel failed to retain a psychiatrist obtainable to Mr. Harvey at no charge. *See Rompilla*, 545 U.S. at 384. Trial Counsel's decision to stop his investigation without psychiatric evaluation when he had funds available for the evaluation was unreasonable.

Trial Counsel failed to recognize other red flags that indicated a mental health investigation was necessary. For example, Trial Counsel knew Mr. Harvey had suffered head trauma in a car accident, knew Mr. Harvey was once hit in the head with a tire iron, and had Mr. Harvey's medical

records. (PCR. v. 13, p. 595.) In fact, Trial Counsel admitted at the evidentiary hearing that he had concerns about Mr. Harvey's competency. (PCR. v. 10, pp. 86-87.)

Second, had the Florida Supreme Court examined whether Trial Counsel's failure to investigate Mr. Harvey's mental health was reasonable, it would have found Trial Counsel's failure to investigate was the result of his own inattention. *See Wiggins*, 539 U.S. at 526. Trial Counsel prepared a "Memo to File" to remind himself to retain a psychiatrist. He asked the court for an extension of time to hire a psychiatrist. Trial Counsel's inattentiveness is underscored by his testimony that he would have presented evidence of organic brain dysfunction if he had known about it. Trial Counsel's failure to investigate because of his inattention is not a strategic decision. *See id.* at 526.

The Florida Supreme Court's finding that Trial Counsel fulfilled his duties under *Strickland*, *Wiggins* and *Rompilla* is patently unreasonable. This Court should grant certiorari review to correct the Florida Supreme Court's misguided analysis under *Strickland* and *Wiggins*.

2. Trial Counsel's deficient performance prejudiced Mr. Harvey.

Although the Florida Supreme Court never reached *Strickland*'s prejudice prong, the fact that Mr. Harvey was prejudiced by Trial Counsel's deficient performance is plainly apparent, and Trial Counsel's failure to conduct a mental health investigation infected Mr. Harvey's entire trial. Indeed, even Trial Counsel admitted he would have used this evidence if he knew it existed. (PCR. v. 12, p. 389.)

To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. *Wiggins*, 539 U.S. at 534, *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In assessing prejudice, a court reweighs the evidence in aggravation against the totality of available mitigating evidence. *Wiggins*, 539 U.S. at 534. Based on the powerful mitigation evidence discovered by post-conviction counsel, there is no question that the evidence of Mr. Harvey's psychiatric disorders would have led to a different sentencing result.

At the initial trial, the court balanced four aggravating factors, no statutory mitigating factors, and only two comparably weak non-statutory mitigators (low IQ and poor social/educational skills). Because of Trial Counsel's mistakes, the jury also heard *nonstatutory aggravating* evidence -- lack of remorse and post-crime criminal conduct -- along with a weak nonstatutory mitigating circumstance of low educational and social skills. That balance would have shifted markedly if Trial Counsel had done a proper investigation. Mr. Harvey could have established reasonable doubt on all but one statutory aggravating factor (murder committed during commission of a burglary).[2]

On the other hand, the jury would have found uncontroverted expert evidence of three statutory mitigating

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[2] As to the HAC aggravator, Mr. Harvey could present evidence that the victims were very hard of hearing and the conversation about them took place out of earshot and amidst a running car engine. (Def. Ex. 5.) As to the CCP aggravator, Dr. Norko's testimony shows the crimes were the product of a snap, accidental reaction caused by the confluence of Mr. Harvey's hyperarousal syndrome with the victims' sudden attempt to run. (PCR v. 12, p. 440.) Similarly, because the shooting was a reflexive act, Mr. Harvey could raise reasonable doubt on the factor that the murders were committed to prevent lawful arrest.

factors: Mr. Harvey lacked the ability to conform his conduct to the requirements of law, he acted under the substantial domination of another, and he committed the offense under the influence of extreme mental or emotional disturbance, namely his organic brain damage. The jury also would have found non-statutory mitigating factors of family dysfunction, poverty, abuse, head traumas, suicide attempts and substance abuse. Further, if this Court ordered a new penalty phase and Mr. Harvey's re-sentencing were held under today's law, Mr. Harvey could establish the statutory mitigator of "no significant history of prior criminal activity" because of the 1988 change in the Florida law announced in *Scull v. State*, 533 So. 2d 1137, 1139 (Fla. 1988). Accordingly, the new balance would be one statutory aggravating factor against four statutory mitigating factors and many non-statutory mitigating factors.

IX. CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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