**IN THE SUPREME COURT OF FLORIDA**

BARRY A. NOETZEL,

Appellant, CASE NO. SC20-466
L.T. No. 342019CF000055CFAXMX

v.

STATE OF FLORIDA, DEATH PENALTY CASE

Appellee.
_____/



**RESPONSE TO MOTION TO DISCHARGE COUNSEL AND STOP ALL APPEALS**

In a *pro se* motion filed on October 18, 2021, Appellant moves this Court to "stop all appeals now and in the future." Appellant states that, as a competent individual, he "should be able to carry out his wishes."

**SUMMARY**

Throughout the proceedings below, Appellant clearly communicated his desire to end judicial proceedings as quickly as possible and accept the consequences for his actions. Unfortunately, things proved unnecessarily difficult for him.

By getting appointed quickly, court-appointed counsel blocked Appellant's initial attempts to plead guilty. Now, appellate counsel seeks to block Appellant's attempt to terminate this appeal. *See* "Appellate Counsel's Response to Motion to Discharge Counsel and Stop All Appeal",

p.3 (“[T]o ensure the legitimacy of the process that resulted in a death sentence, [Appellant] should not be permitted to waive appellate counsel or dismiss his appeal.”).

But just as trial counsel was appointed against Appellant’s wishes, so too it seems that a notice of appeal was filed without his consent. Because an appeal was forced on Appellant, he never got the chance to decide whether he wanted one. To fix this Constitutional error, this Court should honor Appellant’s request and dismiss the appeal. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018); *see also Garza v. Idaho*, 139 S. Ct. 738, 746 (2019).

**FACTS**

At a combined first appearance and arraignment on December 5, 2019, the trial court did not ask Appellant whether he wanted court-appointed counsel. He didn’t. But he got one anyway. *See* R-70 (“The Defendant was appointed counsel before his first appearance and Defendant never asked to be appointed counsel.”); *see also* R-72 (“[T]he Office of the Public Defender was… appointed to represent me against my wishes.”); R-68 (“Defendant claims that since he never asked to be appointed counsel and stated that he did not want appointed counsel…”); R-488:

> THE COURT: … Tell me, if you would, your understanding of how you received the appointment of the Public Defender's Office.
>
> THE DEFENDANT: I'm quite confused on the issue because I thought I would be asked if I wanted counsel and I never was.

*See also* R-489:

> THE COURT: Okay. Did you ever request the appointment of a court-appointed attorney?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: All right. So you position is that one was appointed over your objection?
>
> THE DEFENDANT: Yes, sir.

*See also* R-491:

> THE COURT: And your position is that you request that you proceed without an attorney, in other words have the Public Defender's Office discharged, that office that you never sought to have represent you; is that correct?
>
> THE DEFENDANT: Yes, sir.

Appellant tried to correct the situation, but he was ignored by both the trial court and court-appointed counsel. *See* R-488 ("And I tried to correct it then, but was ignored… [b]y the Court and my lawyer."); *see also* R-225:

> THE DEFENDANT: What I also want to enter is to state that I would like to represent myself and waive my right to counsel.
>
> THE COURT: … We're not doing that here today. Today is just a very quick hearing; the first appearance that we just did and the arraignment…

All Appellant wanted was to plead guilty. But he couldn't because court-appointed counsel ignored his wishes and entered a plea of not guilty on his behalf. In doing so, court-appointed counsel blocked Appellant's initial attempt to plead guilty.[1] *See* R-497-98:

> When I first came into it, I described exactly what I was trying to do. I wanted to plead guilty. I am guilty. There's no, if and buts about it. I did what I did. Got no problem with it.
>
> …
>
> When I explained this to my lawyer, before he was my lawyer, he advised me against it. And I understand that, but this is what I want to do, this is what I'm going to do. All right?
>
> Okay. They were aware of what I wanted to do, the plea that I wanted to enter. And when they came out here and basically lied and said that I'm putting in a plea of innocent when I'm trying to just state the fact that I want to represent myself and got railroaded out of here on my first appearance, I believe there's a large conflict of interest there.
>
> …
>
> [T]here's still the suggest of enter a plea. They suggest what I should do, but doing what I asked them not to do.

R-488 ("Well, I realize the judge said something, the Public Defender's Office jumped up, said, yes, we will be representing him and then they

[1] *See generally McCoy*, 138 S. Ct. at 1509 ("If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, *it was not open to English to override McCoy's objection*.") (emphasis added).

entered a plea of not guilty on my behalf, which I did not want in any form."); R-225 ("What I'd like to say is, I want to enter a plea of guilty right now."); *see also* R-72 ("I attempted to enter a plea of guilty on all charges at my December 5, 2019 arraignment date, which was denied…"); R-222 ("Your Honor, at this time, we'd enter a written plea of not guilty on behalf of our client and we'll follow it up with a written plea."); R-23 ("Defendant's Plea of Not Guilty.").

Counsel also blocked Appellant's expressly stated desire to end judicial proceedings as quickly as possible. *See* R-224 ("What I'd like to say is, I would like a speedy trial."); *see also* R-18 ("On December 5, the Defendant attempted to file a *pro se* demand for speedy trial. However, the Defendant is represented by the Office of the Public Defender, who does not adopt the *pro se* demand. Thus, the demand is void."); R-498 ("I tried to enter a plea for demand of speedy trial and I didn't realize it because, like I said, the inexperience I have in law, that they can block that, which they did, without notifying me."); R-68 ("[A]ppointed counsel's motion to nullify Defendant's Demand for Speedy Trial motion should [have] been void and that this Court's granting of appointed counsel's motion to nullify violated Defendant's right to a speedy trial.").

In order to get to the point where he could plead guilty, Appellant filed a "Motion to Proceed *Pro Se*" on December 19, 2019, a "Demand for Speedy Trial" on December 19, 2019, a "Notice of Inquiry" on January 9, 2020, a "Motion to Discharge Appointed Counsel" on January 21, 2020, a "Motion to Compel" rulings on January 21, 2020, and a letter to the trial court on January 21, 2020. *See* R-49-52, 45-48, 57, 70-71, 68-69, 72; *see also* R-72 ("After conferring with [court-appointed counsel], we have irreconcilable differences regarding the final disposition of this case, and as such, I wish to remove counsel from my case and proceed *pro se* from that point forward."); *see also* R-516 ("[The demand for speedy trial] was to try to get me back into court as fast as possible. As soon as I render the plea of guilty, it negates that.").

During a court hearing on January 21, 2020, Appellant "reiterated his desire to waive counsel and proceed *pro se* and to plead guilty." R-192; *see also* R-486 ("I would like to remove counsel… Represent myself… I would like to enter a plea of guilty on all charges."). Appellant also stated "that he wanted to waive his right to a jury and proceed to sentencing..." R-192; *see also* R-487 ("I would also like to waive all my rights to a jury by trial and I would like to be sentenced by you.").

But things still took time. Even though it expressly stated that it did not believe Appellant to be incompetent[2], the trial court ordered a competency evaluation "out of the abundance of caution because of the severity of the possible sentences." R-512. The Appellant passed the evaluation with flying colors. *See* R-90-96. After reviewing the report, the trial court found that "there's no indication of any sort of mental infirmity or defect that would prevent you from [being competent to proceed or competent to represent yourself.]" R-300-01. And in the final sentencing order the trial court commented that Appellant "was remarkably articulate, eloquent, and polite." *See* R-206:

> During every court hearing, the Defendant exhibited good courtroom behavior. It was not necessary to ask the Defendant to be quiet or to abide by courtroom decorum or rules. He treated this Court, opposing counsel, and all witnesses with dignity and respect. He was remarkably articulate, eloquent, and polite.

As for his reasons for pleading guilty, Appellant admitted what he had done and did not see any need to disrupt lives any further. *See* R-206:

> The Defendant was very cooperative and forthcoming during both interviews [with law enforcement]: he admitted that he and

[2] *But see Godinez v. Moran*, 509 U.S. 389, 402 n.13 (1993) ("We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence.") (citations omitted).

> his codefendant meticulously planned the attack on [the victim] and then lured [the victim] to their cell; then, according to the Defendant, he stabbed [the victim] in the left eye and then the right eye with the intent of killing him. He provided a tremendous amount of detail regarding the killing, the planning, and his intent and motivation. This aided law enforcement and the State in its investigation and prosecution, respectively, of the Defendant.

S*ee also* R-72 ("I will be entering a plea of guilty to preserve judicial resources and bring closure to all parties concerned with the outcome of this case."); R-94 ("I'm guilty, why bother someone else's life.").

Given the life sentence he received back in 2009[3], Appellant was well aware of the fact that he was most likely going to die in prison. *See* R-500-01:

> I've already received a life sentence. I'm dying in prison. I got a 20-year mandatory, followed by 15, followed by another 15. It doesn't really matter what you do, it's just a slap on the wrist.
>
> …
>
> That's what I'm saying, it's just going through the motions. I'm just trying to save a little time here because it's one or the other.
>
> …
>
> Well, it's still I'm dying in prison. We're all going to die eventually, you know what I mean? To me, like I said, it's one or the other, either I'm going to go to death row for a while and, you know, the State is going to kill me or I'm going to stay in

[3] *See* R-128.

DOC for a while and one of them is going to kill me. Sooner or later I'm going to die, sir.

When asked by the trial court why he wanted to waive a jury for the penalty phase, Appellant responded:

It's hard to explain. For all the things that -- in my past and where I'm at right now. I duly realize that this is a serious offense in front of this Court and y'all are doing your utmost to give me every right that I can do.

Why mess somebody else's life up? I've already said I'm guilty. Every investigator that I've sat in front of, I've walked them through step by step how I killed that child molester and the reasons that I wanted to kill that officer. Plain and simple, walked them step by step. I have not wavered from what I've done.

There's no sense in bringing a Jury involved and messing their lives up, having to spend money to pay people to come in here and uproot their lives when I can just sit here with you and we can streamline this and be done with it.

I understand the seriousness of it, but my mind's set, Your Honor, because I'm a walking dead man anyway. If I'm going to die in prison, I'm going to die on my terms. Why should I sit here and let some child molester get back on the street and sodomize a nine-year-old little boy again while he's bragging about it and I have a death sentence because I robbed a grocery store. Armed robbery, shots fired. Nobody was hurt, but I threw myself on the mercy of the Court. Didn't receive any. What I received was a natural life sentence.

I'm going to die in prison. I've got no family. I've got no way to support myself inside DOC. The mental and physical torture that I've been going through.

There's some good officers that work in DOC, they're not all bad. The problem is they're not paying what they should. They

> don't have the manpower to take over. They're overworking their staff. You've got people that are miserable and that misery goes downhill and I catch it.
>
> Good or bad, I'm going to start earning my punishment, so I've started. There's no sense in bringing other people into this misery. I'm quite capable of saying that I want you to sentence me and we just move along.

R-531-33.

During a later stage of the proceedings, Appellant's co-defendant expressed a similar sentiment. *See* R-461-62:

> And everybody has thought it's crazy that me and my codefendant wanted to plead guilty and waive the jury and represent ourselves, but I think society's gone crazy because they've created such political correctness that you can't even take responsibility for yourself anymore without jumping through a whole bunch of hoops. And I think it's a shame we cost the taxpayers extra money and stuff like this when we should be able to plead guilty, get our sentence and go on with whatever we're sentenced to.
>
> It has nothing to do with being crazy or anything like that, doing what me and him did. We' re men and we've always taken responsibility for what we did.
>
> …
>
> I didn't want to call any witnesses because I don't think it's right to -- I ain't from Florida, I'm from Kansas. None of my relatives live anywhere close to here, so it ain't right to pull -- grab them out of their life to come say they love me when I know they do. And to put them through this, you know, that's kind of crazy. That ain't being a man, you understand?

Eventually, the trial court determined that Appellant "knowingly and intelligently waived his right to counsel." R-192-93, 284, 490-518. Appellant agreed to standby counsel "[a]s long as he doesn't get to make any direct decisions against my case…" R-509. On February 14, 2020, *nunc pro tunc* to January 21, 2020, the trial court issued an "Order Removing the Office of the Public Defender as Attorney of Record and Appointing the Office of Public Defender as Standby Counsel Only." R-88.

Next, Appellant entered a guilty plea that the trial court determined "was knowing, intelligent, and voluntary." R-193, 284, 530. Appellant stated he was pleading guilty "Because I am guilty." R-522.

During penalty phase proceedings, Appellant confirmed that he still wanted to proceed *pro se*. R-296-97. Appellant "asked that his competency evaluation be admitted." R-193, 465. Additionally, Appellant stated why he did not seek to introduce any additional mitigation. *See* R-464-65:

> The only thing that's for mitigation that we've already gone through that I've explained to you when you were asking about my competency and I answered all your questions.
>
> Everything is stated quite plainly. There's nothing more to say, you know.
>
> I have no regrets for anything I've done.

> Talking about my childhood or my family or any of those things, I don't think they have any bearing.
>
> Everything -- if you have a question, I'll answer it. I've got no problem with it.
>
> And I was quite, you know, happy to say I'm guilty for what I did.
>
> Other than that, I don't understand the mitigating part and other. You know, talking about regrets, problems in childhood, you know, those things are in the past, you know. People who use things, oh, I was beat up as a child. That's not a mitigating circumstance as far as I'm concerned, it's an excuse. You know, you did what you did. You knew what you were doing, right or wrong. We all know it.

At the conclusion of the hearing, Appellant asked: "There's no chance of closing this out today, Your Honor?" R-477. The trial court responded: "Unfortunately no. The law prohibits such." R-477.

When the sentence was announced on March 13, 2020, the trial court informed Appellant that an appeal would be automatic in his case. *See* R-288 ("I do advise you that you have the absolute right to appeal, and because Florida Statute 921.141(5) does authorize and mandate a mandatory appeal, that the automatic appeal will take effect as well.").

Without acknowledging Appellant's *pro se* status[4] or asking Appellant whether he wanted an appeal, the trial court ordered the Public Defender to

[4] *See generally Faretta v. California*, 422 U.S. 806, 833 (1975) ("But it is one thing to hold that every defendant, rich or poor, has the right to the

represent Appellant for the purposes of an appeal. *See* R-289 ("The Court does appoint the Office of the Public Defender to represent the defendant on appeal…"); *see also* R-210 ("Order Finding Defendant Indigent for Appellate Proceedings and Appointing Public Defendant as Counsel on Appeal."). At the conclusion of proceedings, Appellant stated: "I couldn't ask for a better sentence." R-289.

On March 19, 2020, court appointed counsel filed a "Notice of Appeal" on behalf of Appellant. R-214.

**LAW**

***Barnes***

In 1983, the Supreme Court identified four, "fundamental decisions" that a competent defendant has "the ultimate authority" to make: (1) whether to plead guilty; (2) whether to waive a jury trial; (3) whether to testify on one's own behalf; and, (4) whether to take an appeal. *See Barnes*, 463 U.S. at 751.

***Klokoc***

In 1991, this Court addressed a motion to dismiss filed by an assistant public defender appointed to represent a capital defendant on

---

assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want.").

direct appeal. *See Klokoc v. State*, 589 So. 2d 219 (Fla. 1991). The assistant public defender filed the motion at the defendant's "insistence," as the defendant wanted to forgo an appeal. *See id*. at 221.

Of note, *Klokoc* does not indicate whether the defendant objected to the filing of a notice of appeal in the trial court (or whether he understood he should have had a choice). Nevertheless, the Court's opinion does mention that the defendant pleaded guilty, waived a penalty phase jury, prevented trial counsel from presenting mitigation, and sought to have his direct appeal dismissed as soon as appellate counsel was appointed. *See Klokoc*, 589 So. 2d at 219-20.

Ignoring the defendant's wishes, this Court ordered the appeal to proceed for the Court's own benefit. *See Klokoc*, 589 So. 2d at 221-22 ("[C]ounsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, *the Court must have the benefit* of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence.") (emphasis added); *see also Robertson*, 143 So. 3d at 909 ("In *Klokoc . . .* we denied the defendant's request to dismiss the direct appeal, stating that *this Court required the benefit of an adversary proceeding* to provide a meaningful review of both the judgment and the sentence.") (emphasis added).

In reaching its decision, however, the Court never addressed language from *Barnes* clearly identifying the right to forgo an appeal as a "fundamental decision" that only a defendant has the "ultimate" authority to make. *Barnes*, 463 U.S. at 751.

***Ocha***

In 2002, this Court considered a challenge involving *Klokoc* — specifically that the holding of *Klokoc* conflicts with *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), and that the Court should therefore recede from *Hamblen*. *See Ocha v. State*, 826 So. 2d 956, 964 (Fla. 2002).

As with *Klokoc*, *Ocha* does not mention whether the defendant objected to the filing of a notice of appeal in the trial court; however, the decision does indicate that the defendant pleaded guilty, waived a penalty phase jury, and prevented trial counsel from presenting mitigation. *See Ocha*, 826 So. 2d at 959.

In reaching its decision, this Court recognized that "a competent defendant may direct his own defense at trial." *Ocha*, 826 So. 2d at 964, citing *Farr v. State*, 656 So. 2d 448, 449 (Fla. 1995). Indeed, the Court highlighted language from *Hamblen* stating that "all competent defendants have a right to control their own destinies." *Id.*, quoting *Hamblen*, 527 So. 2d at 804.

Without acknowledging binding U.S. Supreme Court caselaw — i.e. *Barnes* — this Court ultimately concluded "it is not inconsistent for Ocha to waive his right to present mitigating evidence at the trial level, *yet have appellate counsel appointed against his wishes*." *Ocha*, 826 So. 2d at 964 (emphasis added).

***Robertson***

In 2014, this Court considered a direct challenge to *Klokoc* and *Ocha*. *See Robertson*, 143 So. 3d at 910 ("[A]ppellate counsel urges that we should now recede from *Klokoc* and *Ocha*. . . ."). In that case, the defendant's appellate counsel filed a motion to withdraw because the defendant "wish[ed] to argue in favor of the death sentence." *Id*. at 908. Highlighting ethical concerns, appellate counsel cited rule 4-1.2(a) of the Rules Regulating the Florida Bar — specifically the provision that "requires a lawyer to abide by his or her client's decisions concerning the objectives of representation. . . ." *Id*.

Denying the motion, this Court concluded that "our mandatory review of both the validity of the judgment and the propriety of the death sentence is 'automatic' and *does not depend upon the acquiescence of the death-sentenced defendant*." *Robertson*, 143 So. 3d at 908 (emphasis added).

As with *Klokoc* and *Ocha*, the majority opinion did not acknowledge

conflicting caselaw form the Supreme Court — i.e. *Barnes*. The dissent, however, squarely addressed *Barnes* and expressly relied upon that decision to state: "Whether to 'take an appeal' is among the 'fundamental decisions' that 'the accused [in a criminal case] has the ultimate authority to make.'" *Robertson*, 143 So. 3d at 913 (Canady, J., dissenting), quoting *Barnes*, 463 U.S. at 751.

***McCoy***

In 2018, the Supreme Court confirmed the continued validity of *Barnes*. *See McCoy*, 138 S. Ct. at 1508. In a case involving a defendant sentenced the death, the Court cited the same passage quoted by the dissent in *Robertson* to iterate the four, fundamental decisions that only a defendant can make. *See id.*, citing *Barnes*, 463 U.S. at 751.

The Supreme Court relied upon a nautical analogy to explain the nature of the right — describing it as the ability of a competent defendant to serve as the captain of the ship for certain, fundamental decisions. *See McCoy*, 138 S. Ct. at 1509 ("Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way."); *see also Nixon v. Singletary*, 758 So. 2d 618, 625 (Fla. 2000), overruled on other grounds by *Florida v. Nixon*, 543 U.S. 175 (2004)

("[T]he Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship.").

The Court listed those four, fundamental decisions as whether to: (1) plead guilty; (2) waive a jury trial; (3) testify on one's own behalf; and (4) forgo an appeal. *See McCoy*, 138 S. Ct. at 1508, citing *Barnes*, 463 U.S. at 751.

Arguably, *McCoy* articulated a fifth fundamental decision: the right to decide the objective of the defense. However, *McCoy* suggests that the right to decide the objective of the defense might already be included within the four fundamental decisions announced in *Barnes*. *See McCoy*, 138 S. Ct. at 1508 ("Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category [of decisions].").

Because the Sixth Amendment right to autonomy is personal, the consequences of a defendant's fundamental decisions are irrelevant — even in a capital case. *See McCoy*, 138 S. Ct. at 1508:

> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial.

*See also United States v. Villa-Guillen* 2021 WL 5119131 *1 (D.P.R. Nov. 4, 2021) ("[In *McCoy*,] the Supreme Court clarified the right of criminal

defendants to determine the objective of their defense, and more specifically, to maintain their innocence *even if counsel views this approach as detrimental to avoiding the death penalty*.") (emphasis added).

Accordingly, how well or how poorly a fundamental decision impacted the trial does not matter so long as the defendant enjoyed the opportunity to make that decision. *See McCoy*, 138 S. Ct. at 1508 ("These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.") (emphases in original); *cf. Faretta*, 422 U.S. at 834, quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring) ("And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"); *cf. also Martinez v. Ct. of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment):

> That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is no more remarkable-and no more a basis for withdrawing the right-than is the fact that proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage.

Hence, if a usurpation of the right occurs, then the outcome of the trial remains irrelevant when examining for error. *See McCoy*, 138 S. Ct. at 1511:

> [T]he violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. . . . Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review.

*See also Pass v. State*, No. A21A0756, 2021 WL 4621279, at *3 (Ga. Ct. App. Oct. 7, 2021) ("The Court further held [in *McCoy*] that a violation of a defendant's right to determine the objective of his defense constitutes a structural error requiring a new trial regardless of whether the defendant suffered prejudice.").

***Garza***

One year after deciding *McCoy*, the Supreme Court reaffirmed that the decision whether to take an appeal is a fundamental decision that a defendant has the "ultimate authority" to make. *See Garza*, 139 S. Ct. at 746:

> A notice of appeal also fits within a broader division of labor between defendants and their attorneys. While "the accused has the ultimate authority" to decide whether to "take an appeal," the choice of what specific arguments to make within that appeal belongs to appellate counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also McCoy v. Louisiana*, 138 S.Ct. 1500, 1507–08 (2018). In other words, filing a notice of appeal

> is, generally speaking, a simple, nonsubstantive act that is within the defendant's prerogative.

As the language quoted above demonstrates, the Supreme Court in *Garza* – just like in *McCoy* and just like the dissenting opinion in this Court's decision in *Robertson* – cited *Barnes* for the exact same proposition: a competent defendant enjoys the ultimate authority to make four, fundamental decisions at trial. And as the dissenting opinion in *Robertson* and the majority opinion in *Garza* expressly point out, choosing whether to pursue an appeal is one of those fundamental decisions. *See Robertson*, 143 So. 3d at 914–15 (Canady, J., dissenting) ("In this case, it is Mr. Robertson's right that is at issue, and his decision concerning whether to pursue an appeal to vindicate that right—as well as his right to a lawyer who will support that decision—should not be annulled."); *see also Garza*, 139 S. Ct. at 746, citing *McCoy*, 138 S. Ct. at 1507–08, also citing *Barnes*, 463 U.S. at 751 ("[T]he bare decision whether to appeal is ultimately the defendant's, not counsel's, to make.").

**ANALYSIS**

In this case, the lower court followed this Court's precedent when it ordered trial counsel to file a notice of appeal without ever asking Appellant whether he wanted either an appeal or a lawyer. *See Robertson v. State*, 143 So. 3d 907, 908 (Fla. 2014) ("[O]ur mandatory review of both the

validity of the judgment and the propriety of the death sentence is 'automatic' and *does not depend upon the acquiescence of the death-sentenced defendant*.") (emphasis added),

That precedent clearly conflicts with binding United States Supreme Court caselaw. *See Barnes*, 463 U.S. at 751, citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); ABA Standards for Criminal Justice 4–5.2, 21–2.2 (2d ed. 1980); *see also McCoy*, 138 S. Ct. at 1508, citing *Barnes*, 463 U.S. at 751; *Garza*, 139 S. Ct. at 746, citing *McCoy*, 138 S.Ct., at 1507–08, also citing *Barnes*, 463 U.S. at 751.

**Continuing with the Nautical Analogy**

Under *McCoy*, trial counsel holds the helm and can make certain navigational decisions while steering the ship along the course charted by the defendant – i.e. counsel can make objections, examine witnesses, and present argument. *See McCoy*, 138 S. Ct. at 1509, quoting *Gonzalez v. United States*, 553 U.S. 242, 249 (2008) ("'[n]umerous choices affecting conduct of the trial' do not require client consent, including 'the objections to make, the witnesses to call, and the arguments to advance'").

However, the defendant has the conn and sets the course. *See McCoy*, 138 S. Ct. at 1508. Once the trial is over and the appeal has gotten underway, however, appellate counsel can take command of the

ship consistent with the rules of professional conduct. *See generally Martinez,* 528 U.S. at 163-64. Nevertheless, the decision whether to shove off — i.e. file a notice of appeal — still belongs to the competent defendant. *See McCoy*, 138 S. Ct. at 1508. Protected by the Sixth Amendment right to autonomy, a defendant has the final authority over that fundamental decision; no one can make it for him. *Cf. McCoy*, 138 S. Ct. at 1509 ("Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles.").

**Forgo v. Take an Appeal**

In *McCoy*, the Court recharacterized the fourth fundamental decision as the right to forgo an appeal as opposed to the right to take an appeal. *Compare Barnes*, 463 U.S. at 751 ("take and appeal") with *McCoy*, 138 S. Ct. at 1508 ("forgo an appeal"). One year later, *Garza* cited to both *Barnes* and *McCoy* for the statement that a defendant has the "prerogative" to decide "whether to appeal." *Garza*, 139 S. Ct. at 746:

> [F]iling a notice of appeal is, generally speaking, a simple, nonsubstantive act that is within the defendant's *prerogative*.
>
> …
>
> [T]he bare decision *whether to appeal* is ultimately the defendant's, not counsel's, to make.

(emphases added).

The change in *McCoy* from "take" to "forgo" forecloses any argument that the Sixth Amendment does not preclude a State from forcing an appeal on a competent defendant. *See, e.g., Martinez*, 528 U.S. at 165–66 (Scalia, J., concurring in judgment) ("Since a State could, as far as the Federal Constitution is concerned, subject its trial-court determinations to no review whatever, it could *a fortiori* subject them to review which consists of a nonadversarial reexamination of convictions by a panel of government experts.") (emphasis in original).

**The Decision to Forgo an Appeal is a Trial Level Decision**

Ignoring the Sixth Amendment right to autonomy, *Klokoc*, *Ocha*, and *Robertson* put the cart before the horse – presuming the propriety of the appeal without acknowledging that the decision whether to pursue an appeal is a trial level decision that only a defendant can make. *See, e.g., Ocha*, 826 So. 2d at 964-65 ("However, on appeal, this Court must examine Ocha's death sentence to ensure the uniform application of law, evidentiary support, and proportionality. To facilitate the Court's duty, *Klokoc* requires that the defendant have appellate counsel.") (citation omitted); *but see Barnes*, 463 U.S. at 751; *but see also McCoy*, 138 S. Ct. at 1508; *Garza*, 139 S. Ct. at 746.

Any argument based on cases mentioning the lack of Sixth Amendment rights on appeal lack Constitutional support as those cases focus on the ability of a defendant to chart the course of an appeal already underway. *See, e.g., Robertson*, 143 So. 3d at 912 (Pariente, J., concurring), quoting *Martinez*, 528 U.S. at 162:

> I also find counsel's suggestion that the procedure articulated in *Klokoc* violates the defendant's "personal autonomy" to be equally unavailing. The United States Supreme Court has held, with respect to a defendant's right to self-determination, that the "status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when the jury returns a guilty verdict."

Because cases like *Martinez* do not involve a competent defendant's Sixth Amendment right to decide whether to shove off and set the appellate sails, those cases have no bearing in cases like this one, where the trial court never gave Appellant the opportunity to choose for himself whether he wanted an appeal.

Furthermore, nothing in *Martinez* suggests that appellate counsel can ignore a competent defendant's desire to voluntarily dismiss appellate proceedings. Indeed, *Garza* strongly suggests that a competent defendant retains that right. *Compare Garza*, 139 S. Ct. at 746 ("[T]he choice of what specific arguments to make within that appeal belongs to appellate counsel.") with *id.*, citing *McCoy*, 138 S.Ct., at 1507–08, also citing *Barnes*,

463 U.S. at 751. (“[T]he bare decision whether to appeal is ultimately the defendant's, not counsel's, to make.”).

If the defendant gets to make the “bare bones decision whether to [file an] appeal,” and if counsel only has the ability to choose what “specific arguments to make within that appeal,” then it seems to follow that the defendant gets to decide whether to dismiss an appeal. *See generally Robertson*, 143 So. 3d at 913 (Canady, J., dissenting):

> The majority unjustifiably infringes on Mr. Robertson's right to make the fundamental decision of whether to pursue the appeal of his death sentence as well as his right to a lawyer who will follow the ethical imperative to abide by Mr. Robertson's decision concerning the objectives of representation.

And if, as here, the defendant never had the opportunity to decide whether to pursue an appeal, then an appellate court should grant voluntary dismissal. *See generally Pino v. Bank of New York*, 76 So. 3d 927, 929 (Fla. 2011):

> The language of [Fla. R. App. P. 9.350] does not impose upon the appellate court a mandatory obligation to dismiss a case following the filing of a notice of dismissal before a decision on the merits has been rendered. Rather, this Court has long recognized its discretion to retain jurisdiction over a matter and proceed with an appeal notwithstanding a litigant's timely filing of a notice of dismissal pursuant to rule 9.350, especially when the matter involves one of great public importance and is likely to recur.

**Whose Appeal Is It, Anyway?**

At first glance, it may appear that *McCoy* involves the ability of counsel, not the court, to override a decision by the defendant. *See McCoy*, 138 S. Ct. at 1509 ("If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection."). However, the Supreme Court faulted the trial court for allowing counsel to usurp control. *See McCoy*, 138 S. Ct. at 1511 ("[T]he violation of McCoy's protected autonomy right was complete *when the court allowed counsel to usurp control* of an issue within McCoy's sole prerogative.") (emphasis added).

Furthermore, any distinction between counsel and court remains irrelevant as *McCoy* cites to *Barnes*, a decision in which the Supreme Court held that the defendant enjoys "the *ultimate authority*" to make certain fundamental decisions regarding the case. *Barnes*, 463 U.S. at 751 (emphasis added).

Words matter, and the Court clearly chose the word "ultimate" to describe the final authority of a competent defendant to decide. *See* https://dictionary.cambridge.org/us/dictionary/english/ultimate. Thus, for the purposes of the Sixth Amendment right to autonomy, it matters not

whether counsel or the trial court seeks to force a defendant to plead guilty, waive a jury, testify on his own behalf, or take an appeal. Whether forced by counsel or the court, the defendant's constitutional rights are interfered with either way.

To demonstrate this point: consider the possibility that a trial court would force a competent defendant to plead guilty, waive a jury trial, or testify on his own behalf. Such a prospect seems "absolutely, totally, and in all other ways inconceivable."[5] And yet, that is exactly what happens when a trial court forces a capital defendant to take an appeal. *See Boyd v. State*, 910 So. 2d 167, 190 (Fla. 2005) ("Boyd attempts to analogize the instant case to that of *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991), *where this Court held that a defendant cannot prevent his counsel from challenging a sentence on appeal*.") (emphasis added).

All of these decisions belong to the same Constitutionally protected class of decisions that a defendant — and only a defendant — can make. *See Barnes*, 463 U.S. at 751; *see also McCoy*, 138 S. Ct. at 1508-09; *Garza*, 139 S. Ct. at 746. No one else can make any one of them for him. *Cf. United States v. Davis*, 285 F.3d 378, 384 (5th Cir. 2002) ("*Faretta* teaches us that the right to self-representation is a personal right. It cannot

[5] *The Princess Bride* (Act III Communications 1987).

be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty trial.").

Thus, if it would be unconstitutional for any court to order a defendant to plead guilty, waive a jury trial, or testify on one's own behalf, then it must be equally unconstitutional for a court to force a competent defendant to take an appeal. *Cf. Tornillo v. Miami Herald Pub. Co.*, 287 So. 2d 78, 89 (Fla. 1973) (Boyd, J., dissenting), rev'd, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974):

> The First Amendment to the Constitution of the United States provides that, 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . ..' Article I, Section 4 of the Constitution of the State of Florida similarly provides: 'No law shall be passed to restrain or abridge the liberty of speech or of the press.' Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be *equally unconstitutional* for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will.

(emphasis added); *cf. also Miami Herald Pub. Co.*, 418 U.S. at 256 ("The Florida statute operates as a command in the same sense as a statue or regulation forbidding appellant to publish specified matter.").

**The Eighth Amendment Does Not Trump the Sixth Amendment**

The fact that the outcome of the trial may involve a death sentence does not implicate abstract Eighth Amendment concerns sufficient to outweigh a competent defendant's Sixth Amendment right to forgo an appeal. *Cf. Robertson v. State*, 143 So. 3d 907, 914-15 (Fla. 2014) (Canady, J., dissenting):

> Indeed, the Supreme Court's death penalty jurisprudence rests on the recognition that "the Eighth Amendment *guarantees individuals* the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (emphasis added). It is not based on some abstract right of the state to ensure appropriate sentences but on the concrete right of individuals to be free of cruel and unusual punishments. In this case, it is Mr. Robertson's right that is at issue, and his decision concerning whether to pursue an appeal to vindicate that right—as well as his right to a lawyer who will support that decision—should not be annulled. Respect for the individual dignity of the defendant requires respect for his decision of whether to pursue an appeal and for his right to a lawyer who will not work against him.

*Cf. also Martinez*, 528 U.S. at 165 (Scalia, J., concurring in judgment):

> Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people. As Justice Frankfurter eloquently put it for the Court in *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call it the Constitution." *Id*., at 280, 63 S. Ct. 236.

*Cf. also Indiana v. Edwards*, 554 U.S. 164, 186-87 (2008) (Scalia, J., dissenting) ("[T]he dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice.").

In other words, Eighth Amendment "heightened reliability"[6] concerns do not trump a competent defendant's Sixth Amendment right to autonomy. *Cf. People v. Bloom*, 774 P.2d 698, 718 (Cal. 1989) ("[A] judgment of death may not be regarded as unreliable in a constitutional sense merely because a self-represented defendant chose not to present mitigating evidence at the penalty phase."); *cf. also State v. Hugueley*, No. W2004-00057-CCA-R3-CD, 2005 WL 645179, at *5 n.2 (Tenn. Crim. App. Mar. 17, 2005), *aff'd*, 185 S.W. 3d 356 (Tenn. 2006) ("[T]he decision of a competent capital defendant not to present mitigating evidence does not deprive the State of its interests in seeing that his sentence was imposed in a constitutionally acceptable manner.") (emphasis omitted); *People v. Coleman*, 660 N.E. 2d 919, 937 (Ill. 1995) ("We are not persuaded by

[6] *See generally Sumner v. Shuman*, 483 U.S. 66, 72 (1987) ("… the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case").

defendant's argument that the heightened need for reliability in capital cases justifies forcing the accused to accept representation by counsel.").

**Automatic Review Simply Means Non-Discretionary**

The phrase "automatic review" in section 921.141(5), Florida Statutes, simply refers to this Court's non-discretionary jurisdiction over death penalty cases; it does not require this Court to violate a competent defendant's Sixth Amendment right to autonomy by forcing an unwanted appeal. *See Robertson*, 143 So. 3d at 914 (Canady, J., dissenting), citing *Jones*, 463 U.S. at 751:

> The statutory provision regarding "automatic review by the Supreme Court of Florida" merely recognizes that death cases are directly appealable to this Court and that we have mandatory—that is, nondiscretionary—jurisdiction over such cases. The statute by no means expressly precludes a defendant from waiving the defendant's right of appeal, and the statutory context provides no basis for reading such a limitation on the rights of defendants into the statute. An automatic appeal is not equivalent to a non-waivable appeal. Our decisions precluding the waiver of appeal by a defendant under a sentence of death twists this statutory provision to reach a result that is at odds with the recognized ultimate authority of a criminal defendant to make the decision of whether to take an appeal.

*But see id*. at 908 ("[O]ur mandatory review of both the validity of the judgment and the propriety of the death sentence is 'automatic' and does not depend upon the acquiescence of the death-sentenced defendant.").

### *Klokoc* Was Never Good Law

The Supreme Court decided *Barnes* in 1983. Until the dissent in *Robertson*, however, this Court ignored that decision. But as noted above, *McCoy* and *Garza* reaffirmed *Barnes*. *See Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting), citing *McCoy*, 138 S. Ct. at 1508 ("*McCoy* acknowledges that some decisions are 'reserved for the client,' including the decision whether to 'forgo an appeal.'"). Thus, from 1983 to the present day, binding caselaw from the Supreme Court clearly states that a competent defendant enjoys the final authority to decide whether to take an appeal. *See Barnes*, 463 U.S. at 751; *see also McCoy*, 138 S. Ct. at 1508-09; *Garza*, 139 S. Ct. at 746.

Because the decisions clearly conflict with binding Supreme Court caselaw, neither *Klokoc* nor *Ocha* nor *Robertson* enjoy any continuing force as legal precedent. *Cf. Robertson*, 143 So. 3d at 914 (Canady, J., dissenting) ("Although prior decisions of this Court provide support for precluding the waiver of appeal by a defendant under a sentence of death, *none of those decisions rests on a reasoned basis*.") (emphasis added).

Stated somewhat differently, because *Klokoc* and its progeny conflict with *Barnes*, *McCoy*, and *Garza*, *stare decisis* cannot support the continued viability of the line of cases that prevent a competent defendant from

deciding whether to pursue an appeal. *See State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020):

> We believe that the proper approach to *stare decisis* is much more straightforward. In a case where we are bound by a higher legal authority — whether it be a constitutional provision, a statute, or a decision of the Supreme Court — our job is to apply that law correctly to the case before us. When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield.

*Cf. People v. Albanese*, 473 N.E. 2d 1246, 1269 (Ill. 1984) (Simon, J., concurring in part and dissenting in part) ("In this classic confrontation between the doctrine of *stare decisis* and constitutional principles, however, the supremacy clause of the United States Constitution requires that constitutional principles prevail.").

**Appellant Repeatedly and Adamantly Expressed His Desire to End Judicial Proceedings as Quickly as Possible**

In this case, Appellant never wavered in his desire to end judicial proceedings as quickly as possible. Just like demanding a speedy trial, waiving counsel, pleading guilty, waiving a penalty phase jury, and limiting the presentation of mitigation, forgoing an appeal clearly furthered that goal. *See, e.g.* R-532 ("There's no sense in bringing a Jury involved and messing their lives up, having to spend money to pay people to come in here and uproot their lives when I can just sit here with you and we can streamline this and be done with it.").

And as Appellant's co-defendant stated, accepting a death sentence as the consequence for committing murder should not automatically call into question a competent defendant's mental health. *See* R-461 ("It has nothing to do with being crazy or anything like that, doing what me and him did. We' re men and we've always taken responsibility for what we did."); *see also Deere v. Cullen*, 718 F.3d 1124, 1146 (9th Cir. 2013):

> It was apparent to Mr. Jones that Deere understood the proceedings and his various options but wanted to plead guilty for the reasons already stated: he wanted to spare his family; he wanted to minimize the trauma to the survivors; and he thought a guilty plea and possible death sentence was just under the circumstances. These are not irrational considerations.

To the extent this Court's caselaw suggests otherwise, that caselaw should be re-examined. *See, e.g. Muhammad v. State*, 782 So. 2d 343, 364 n.14 (Fla. 2001), citing *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991):

> During the trial in *Klokoc*, the defendant refused to allow his counsel to present mitigating evidence. 589 So.2d at 220. The trial court denied counsel's motion to withdraw "but, in view of Klokoc's lack of cooperation with his counsel, the court appointed special counsel to represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceedings." *Klokoc*, 589 So.2d at 220. As a result of the [mental health] mitigation presented by special counsel, this Court reduced Klokoc's sentence of death to life.

## The Trial Court Raised the Appellate Sails Without Checking the Captain's Orders

Returning to the nautical theme, the trial court in this case decided to shove off and directed counsel to raise the appellate sails — all without checking the captain's orders. *See McCoy*, 138 S. Ct. at 1508. With this unauthorized command, the lower court ignored Appellant's "ultimate authority" to decide whether to pursue an appeal. *Garza*, 139 S. Ct. at 746. By blocking Appellant's right to make a fundamental decision, the lower tribunal violated Appellant's Sixth Amendment right to autonomy. *See McCoy*, 138 S. Ct. at 1511.

## CONCLUSION

The trial court never gave Appellant the chance to decide whether he wanted an appeal. With his "Motion to Discharge Counsel and Stop All Appeals in the Above Styled Case," Appellant clearly indicated that he does not want one. Therefore, this Court should honor his wishes and dismiss the appeal.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Counsel for Appellant, this 9th day of November, 2021.

## CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that this document complies with the applicable font requirement (either Arial 14-point font or Bookman Old Style 14-point font double-spaced); it does not appear that a word count limit applies. *Compare* Fla. R. App. P. 9.300 with Fla. R. App. P. 9.210(a)(2)(C).

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/*Michael T. Kennett*
MICHAEL T. KENNETT
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 177008
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3595 (tel.)
(850) 487-0997 (fax)
Michael.Kennett@myfloridalegal.com
capapp@myfloridalegal.com
COUNSEL FOR APPELLEE