No. 2018 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER EPPERSON
Petitioner

v.

COMMONWEALTH OF KENTUCKY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

DAVID M. BARRON
(*Counsel of Record*)
Assistant Public Advocate
Capital Post Conviction Unit
Kentucky Department of Public Advocacy
5 Mill Creek Park, Section 101
Frankfort, Kentucky 40601
502-564-3948
david.barron@ky.gov

BRIAN M. POMERANTZ
Law Offices of Brian M. Pomerantz
P.O. Box 853
Carrboro, NC 27510
323-630-0049
habeas@protonmail.com

CAPITAL CASE

QUESTION PRESENTED

Roger Epperson has always maintained his innocence, desired an innocence defense, and understood trial counsel would present an innocence defense. Counsel, however, conceded guilt on some of the charged offenses, as the lower court expressly recognized, after telling the jury during opening statements that Epperson was innocent of all charges (two murders, robbery, and burglary, all as either a principal or an accomplice) and that the defense would ask the jury to render a not guilty verdict on all charges.

Without first informing or consulting Epperson, during cross-examination of a prosecution witness the day before the trial ended, trial counsel asked the witness, "now the plan was for Roger [Epperson] to wait in the automobile, right?" She answered affirmatively, only for trial counsel to then elicit from her that she had heard Epperson say after the crime that he could see his codefendants enter the victims' home. The next day, also without first consulting Epperson or even informing Epperson that counsel had unilaterally decided to abandon the innocence defense Epperson had informed counsel he wanted presented, trial counsel told the jury that Epperson had waited in the getaway car while his codefendants committed the robbery, burglary, and murders. Not only does that concede guilt of burglary and robbery, it was also sufficient to find Epperson guilty of murder by complicity, as the jury found.

In post-conviction proceedings, Epperson argued that trial counsel presented inconsistent theories when he began by telling the jury Epperson was innocent, but then conceded guilt. The post-conviction court rejected the claim, finding, as the lower court did in *Hashimi v. United States*, which the Court recently granted, vacated, and remanded in light of *McCoy v. Louisiana*, that trial counsel made a strategic decision to concede guilt of some of the charged offenses, and the strategic decision was reasonable.

While Epperson's case was pending on appeal, this Court decided *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), holding that counsel cannot concede guilt when the defendant desires an innocence defense. In light of *McCoy*, Epperson argued that his constitutional rights were violated when counsel conceded guilt over his request that counsel present an innocence defense, and requested remand to further develop the facts in this regard. The Kentucky Supreme Court found that trial counsel "concede[d] involvement in the robbery and burglary." *Epperson v. Commonwealth*, 2018 WL 3920226, *4 (Ky.). Yet, the court denied a remand and rejected the *McCoy* claim because "[t]his concession does not appear to be the type of concession upon which *McCoy*'s holding is predicated," and Epperson "has not evidenced intransigent

or vociferous objection to trial counsel's strategy . . . at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.* at *10-12.

This gives rise to the following question presented, for which a summary grant, vacate, and remand for further proceedings in light of *McCoy* would be appropriate. This is particularly so because that is exactly what the Court did in *Hashimi v. United States*, where counsel also conceded guilt during closing argument without first informing Hashimi, and where the record was not entirely clear that Hashimi requested counsel refrain from admitting guilt.

> Is a defendant's Sixth Amendment right to counsel, and the right to control the objective of the defense, violated, under the Court's recent decision of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), when, after settling on an innocence defense the client desired, and after informing the jury that the client is innocent, counsel concedes, during closing argument, guilt of some of the charged offenses without first informing and consulting the client?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES CASES

UNITED STATES COURT OF APPEALS CASES

STATE CASES

STATUTES

No. 2018 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER EPPERSON

Petitioner

v.

COMMONWEALTH OF KENTUCKY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Court held, with regard to conceding guilt, that "[c]ounsel, in any case, must still develop a trial strategy and discuss it with her client, explaining, why, in her view, conceding guilt would be the best option," and "[w]hen a client expressly asserts that the objective of '*his* defence' [*sic*] is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (internal citation omitted). Epperson informed counsel that he desired an innocence defense, only for counsel to then elicit evidence of guilt at trial, and to then, as the Kentucky Supreme Court recognized, concede "involvement in the robbery and burglary."

Epperson, 2018 WL 3920226 at *4 (App. at 11-12). Despite this concession and the intervening decision of *McCoy*, the Supreme Court of Kentucky denied relief, noting that trial counsel had made a strategic decision to concede guilt, Epperson did not vociferously object on the record to the concession of guilt, and the concession of guilt did not appear to the court to be the same "type" of concession of guilt upon which *McCoy* was predicated. *Id.* at *4, *10-12, App. at 10-11, 26-29. This clear violation of *McCoy* warrants summary reversal, particularly in light of the GVR the Court granted in *Hashimi v. United States* (which the government agreed to) because trial counsel conceded guilt during closing argument without first informing the client. No. 18-5184 (U.S.) (App. at 64-78). Alternatively, this Court should grant certiorari, vacate the Supreme Court of Kentucky's decision, and remand for further consideration in light of *McCoy*. If this Court decides to not utilize either of these procedures, which would conserve this Court's scarce resources while correcting a clear error, this Court should grant plenary review.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Kentucky, *Epperson v. Commonwealth*, is unpublished but appears on Westlaw at 2018 WL 3920226. It is attached in its slip opinion format as part of the appendix at App. 1-32. The trial level court order denying post-conviction relief and holding trial counsel made a strategic decision to concede guilt, which the Supreme Court of Kentucky affirmed, is also attached. (Appendix at 33-63).

JURISDICTION

This Court's jurisdiction to review the decision of the Supreme Court of Kentucky is invoked pursuant to 28 U.S.C. § 1257(a), which allows this Court to review, by writ of certiorari, federal constitutional issues decided by the highest court of a state. The Supreme Court of Kentucky issued its decision on August 16, 2018. This petition for a writ of certiorari is being filed within ninety days of that decision.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees the right to counsel in criminal proceedings.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Roger Epperson, along with codefendants Benny Hodge and Donald Bartley, were charged with the burglary, robbery, and murders of Ed and Bessie Morris. Bartley turned state's evidence in return for a deal and Hodge was tried separately. The prosecution pursued both principal and accomplice theories of guilt against Epperson. Epperson maintained his innocence upon arrest, to his trial attorneys, and continuously to this day. Epperson desired an innocence defense. He "clearly" communicated that to trial counsel, and as he later testified, they developed a

strategy that Epperson was not at all involved with the crimes for which he stood trial. Epperson expected that defense at his trial.

Trial counsel began the trial by telling the jury during opening statements that Epperson was innocent and that they would ask at the end of trial for the only verdict the evidence would support – not guilty on all charges.[1] Trial counsel then started an effort to poke holes in the prosecution's case. That changed suddenly and unexpectedly, without counsel consulting, or otherwise informing, Epperson.

During cross-examination of Sherri Hodge in the prosecution's case-in-chief, trial counsel asked Hodge, "now the plan was for Roger [Epperson] to wait in the automobile, right." She answered that she was told that was the plan because Epperson knew the victims. Trial counsel then elicited from her that Epperson later told her that he could see Bartley and Benny Hodge enter the victims' home. Epperson first learned of this the same time the jury did – when his own attorneys elicited the testimony. Epperson did not then object on the record, but he also did not expect his attorneys to continue to undermine the innocence defense, or to concede guilt directly. After all, trial counsel began closing arguments by reminding the jury what was said in opening statements, that Epperson was innocent and was now saying it again. Yet, counsel then told the jury that Epperson waited in the getaway vehicle while Hodge and Bartley committed the murders, and did not enter the house because he knew the victims. While that statement operates as a denial of guilt as a

[1] The official record of the trial is a video record.

principal, it is a concession of guilt by complicity, a theory of liability for which Epperson had been charged.[2] Counsel did not consult, or even inform, Epperson before making this concession, and Epperson did not expect counsel to make this concession. Shortly after trial counsel conceded Epperson's guilt of burglary and robbery and involvement with the murders as a non-triggerman, the jury convicted Epperson of burglary and robbery as a principal and of murder by complicity. The jury then promptly voted to recommend the judge impose a death sentence.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

To the trial level court in state post-conviction proceedings, Epperson asserted that he had maintained his innocence to his attorneys and was surprised when they conceded guilt of some of the charges. He argued that trial counsel conceded guilt and presented inconsistent defenses of innocence and guilt, undermining the innocence defense.

The post-conviction court ruled that "[a]dmitting involvement to some of the charges, but denying involvement in others, is not an inconsistent defense, but rather serves to build credibility with the jury." App. at 44. The court therefore concluded that "[i]t was not unreasonable to strategically concede involvement in the robbery and burglary once the Commonwealth presented its case in chief." *Id.* The Kentucky Supreme Court affirmed.

[2] "Epperson was charged with both murder and complicity to commit murder, as well as robbery and burglary." *Epperson*, 2018 WL 3920226 at *4 (App. at 10).

While Epperson's petition for rehearing was pending before the Kentucky Supreme Court, the Court decided *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Epperson promptly sought to supplement the rehearing petition in light of *McCoy* and for a remand for further factual findings and conclusions of law in light of the intervening decision. In the motion to supplement, Epperson argued that *McCoy* changed the analysis from whether trial counsel made a reasonable strategic decision to concede guilt to any of the charges, to whether Epperson had first been informed of trial counsels' decision to concede guilt. In the motion to remand, Epperson asserted that whether trial counsel made a strategic decision to concede guilt of some of the charges and whether that strategy was reasonable no longer matters. Rather, in *McCoy*, that strategy was found reasonable, but a Sixth Amendment violation was still held to have occurred because whether to concede guilt of any charged offense remains the client's decision, one the facts would establish Epperson could not have made since trial counsel never informed him they would concede guilt.

Even though *McCoy* was decided while Epperson's case was on appeal, the Kentucky Supreme Court denied the motion to remand. It simultaneously granted the petition for rehearing, rescinded its prior ruling, and issued a new ruling. That ruling acknowledged that trial counsel "concede[d] involvement in the robbery and burglary." *Epperson*, 2018 WL 3920226 at *4, App. at 11-12. Yet, when discussing the *McCoy* claim, the court stated that trial counsel "suggested to the jury that Epperson's involvement in this case, if any, was driving the getaway car," and that trial counsel "stated that Epperson may have been or was the getaway driver during

the commission of the crimes." *Id.* at *12, App. at 29. The court then held that "[t]his concession does not appear to be the type of concession upon which *McCoy*'s holding is predicated," *id.*, and that Epperson could not prevail anyway because he has not shown "intransigent or vociferous objection to trial counsel's strategy, nor has he evidenced objection to trial counsel's strategy at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.* (internal quotation omitted).

Epperson did not attempt to seek rehearing from this opinion, but instead timely seeks certiorari.

REASONS FOR GRANTING THE WRIT

The combination of *McCoy* being decided while Epperson's case was on appeal and the fact that, during closing argument, trial counsel conceded guilt of some of the charged offenses when Epperson desired an innocence defense, merits granting certiorari, vacating the judgment, and remanding for further proceedings consistent with *McCoy*; alternatively, the Court should issue a summary opinion reversing.

Four crucial facts are beyond dispute:

1) Trial counsel conceded guilt of robbery and burglary, along with facts that were sufficient to establish guilt of murder by complicity, while denying guilt of murder as a principal;

2) Epperson maintained to trial counsel that he is innocent of all charges;

3) Epperson alleged that trial counsel never informed him they would concede guilt of any of the charged offenses;

4) Epperson alleged that he desired an innocence defense, so informed counsel, and would have directed counsel to not concede guilt if counsel had informed him that they intended to concede guilt to any of the charged offenses.

These facts lead to the conclusion that Epperson's Sixth Amendment right to control the objective of his defense, under *McCoy*, was violated. At a minimum, sufficient evidence exists to require reversal to hold an evidentiary hearing to ascertain the facts necessary to decide the claim since *McCoy* was decided after the state court evidentiary hearing was held.

Perhaps the most fundamental obligation of counsel in a criminal case is to discuss potential defenses with the defendant and to consult with the defendant before making a concession at trial. In *McCoy*, the Court ruled that "[w]hen a client expressly asserts that the objective of '*his* defence' [*sic*] is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy*, 138 S. Ct. at 1509 (emphasis in original). This does not give the defendant a free pass to sit by idly when counsel violates this edict by conceding guilt and then argue he is entitled to a new trial. But, it also does not mean conceding guilt automatically becomes permissible if the defendant did not "vociferously insist[] that he did not engage in the charged acts and adamantly object[] to any admission of guilt," such as *McCoy* did on the record at the trial of his case. *Id.* at 1505. Rather, as the Court pointed out in *McCoy*, *Florida v. Nixon*, 543 U.S. 175, 178, 181 (2005), holds that the claim must fail only "when the defendant, informed by counsel, neither consents nor objects." *McCoy*, 138 S. Ct. at 1505. "When counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, 'no blanket rule

demand[s] the defendant's explicit consent' to implementation of that strategy." *Id.* at 1505, *quoting Nixon*, 543 U.S. at 192 (internal citation omitted). But, *"[c]ounsel, in any case, must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option." Id.* at 1509 (internal citation omitted) (emphasis added). As *McCoy* makes clear, counsel can neither concede guilt to any charged offense against the client's wishes, nor do so without first informing the client of counsel's intent and explaining why, in counsel's opinion, it would be beneficial to concede guilt. *Id.* at 1505, 1508-10; *Nixon*, 543 U.S. at 178, 181, 192. Counsel conceding guilt against the client's wishes, or without first informing the client of the intent to concede guilt at trial and the benefits of doing so, is structural error that automatically requires reversal without any showing of prejudice. *Id.* at 1510-12.

In *Hashimi v. United States*, during closing argument and without first consulting Hashimi, trial counsel argued innocence of some of the charges but conceded guilt of other charged offenses. App. at 69 (Hashimi petition for a writ of certiorari).[3] The United States Court of Appeals for the Fourth Circuit rejected Hashimi's ineffective assistance of counsel claim because trial counsel's decision to concede guilt "may have been a strategic decision, counsel's ineffectiveness does not appear on the face of the record and thus Hashimi should raise this claim, if at all, in

[3] In *Hashimi*, it was also alleged that trial counsel had few communications with Hashimi prior to trial. Likewise, the testimony at Epperson's post-conviction evidentiary hearing established that trial counsel met with Epperson rarely before trial, and that second-chair trial counsel conducted almost all the communications with Epperson.

a 28 U.S.C. §2255 (2012) motion." *Hashimi v. United States*, 718 Fed. Appx. 178, 181 (4th Cir. 2018). In a petition for a writ of certiorari, Hashimi argued that "[a]n admission of guilt is a decision that must be made by the client, and Hashimi was not given the opportunity to make that decision," as counsel conceded guilt without "formally ask[ing] [Hashimi] whether he approved of [counsel's] strategy to concede guilt to [some of the charged offenses]." App. at 72-73. Hashimi then argued that "[t]he *McCoy* opinion makes it very clear that a client cannot complain about counsel's admission of guilt only after trial, but this assumes a client who was aware of counsel's trial strategy prior to its use." App. at 73. Finally, he argued that "the fact that the admission was entered during closing argument . . . meant that there was effectively no moment where Hashimi could have contested this admission openly in court." App. at 74. Thus, he requested a grant of certiorari and reversal in light of *McCoy* and alternatively a remand to further develop the relevant facts in light of *McCoy*. *Id.*

In response to the petition for a writ of certiorari, the United States Solicitor General asserted "[t]he record in [Hashimi's] case does not reveal whether petitioner did, in fact, insist that his trial attorney refrain from admitting guilt," and that the lower court addressed the claim only in terms of whether trial counsel made a strategic decision to concede guilt. App. at 76-78. The Solicitor therefore conceded that "the appropriate course in light of *McCoy* is to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand the case for further

consideration of petitioner's challenge to this attorney's concession of guilt during closing argument." App. at 77-78.

The similarities between what transpired in Hashimi's case and what transpired in Epperson's case are many and are straightforward.

Like in *Hashimi*,

1) Epperson's proceedings before a state court that can take testimony had concluded before *McCoy* was decided;
2) Epperson had, by then, raised an ineffective assistance of counsel claim for conceding guilt of some of the charged offenses, pointing out that Epperson had maintained his innocence and informed trial counsel that he did not commit any of the charged offenses;[4]
3) trial counsel did not concede guilt of all of the charged offenses, instead denying guilt of some while conceding guilt of multiple others;
4) trial counsel conceded guilt during closing argument;
5) Epperson has alleged to the lower court, and before the Kentucky Supreme Court, that trial counsel did not first consult, or even inform, Epperson that they planned to concede guilt of some of the charged offenses; and,
6) the Kentucky courts ruled that trial counsel made a strategic decision to concede guilt, and rejected the claim, in part, in light of that.

[4] In Epperson's case, trial counsel has also testified that Epperson maintained to counsel that he is innocent.

In these regards, Epperson's case is materially indistinguishable from Hashimi's case, and therefore a grant, vacate, and remand (GVR) in light of *McCoy* should issue, as it did for Hashimi.

The Kentucky Supreme Court's only additional reasons for rejecting Epperson's claim changes nothing in this regard; indeed, it makes Epperson's case for a GVR or summary reversal even more compelling. The Kentucky Supreme Court attempted to distinguish *McCoy* on the basis that Epperson did not vociferously object as McCoy did, and that because the concession was only to some of the charged offenses instead of directly conceding guilt of all the charged offenses, that it did not appear to be the "type" of concession the Court was concerned about in *McCoy*. *Epperson*, 2018 WL 39202226 at *10-12, App. at 28-29 However, *McCoy* never drew a distinction between types of concessions of guilt, and did not require vociferous objection from the defendant. Rather, *McCoy* made clear that the defendant controls the objective of the defense and thus whether to concede guilt of any, or all, of the charged offenses, remains the defendant's decision. *McCoy* held that the defendant need not vociferously object when, as is the case here, trial counsel did not first inform the defendant that they would concede guilt of any charged offenses and explain to him the benefit of doing so, to enable the defendant to decide whether to permit counsel to do so. The GVR in *Hashimi* makes this even more evident since this Court reversed and remanded in light of *McCoy*, even though Hashimi did not vociferously object to counsel conceding guilt and even though counsel conceded guilt to only some of the charged offenses while maintaining innocence of the other charged offenses.

It is therefore clear that the Kentucky Supreme Court's additional reasons for rejecting Epperson's claim are entirely inconsistent with, and contrary to, *McCoy*. A GVR, or alternatively a summary reversal in light of *McCoy* should issue. *See Lawrence v. Chater*, 516 U.S. 163, 170 (1996) (noting the Court's willingness to "issue a GVR order in cases in which recent events have cast substantial doubt on the correctness of the lower court's summary disposition").

CONCLUSION

For the above reasons, Petitioner Epperson respectfully requests that this Court grant, vacate, and remand the decision of the Kentucky Supreme Court for further consideration in light of *McCoy*, just as it did in *Hashimi*. Alternatively, Epperson requests that this Court summarily reverse. If this Court chooses to do neither, Epperson then requests plenary review.

Respectfully submitted,

David M. Barron
(*Counsel of Record*)
Assistant Public Advocate
Capital Post Conviction Unit
5 Mill Creek Par, Section 101
Frankfort, KY 40601
(502) 564-3948 (office)
(502) 782-3601 (office – direct line)
david.barron@ky.gov

Brian M. Pomerantz
Law Offices of Brian M. Pomerantz
P.O. Box 853
Carrboro, NC 27510
323-630-0049
habeas@protonmail.com

November 9, 2018