No. 2018 - 6701

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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Counsel for the Commonwealth ignores the Court's directly relevant, recent *McCoy* related GVR in *Hashimi v. United States*, No. 18-5184 (2018), which post-dates the Kentucky Supreme Court's decision addressing Epperson's claim that trial counsel conceding guilt without first informing Epperson violated *McCoy*.[1] A GVR is therefore appropriate so the Kentucky courts can determine in the first instance how the *Hashimi* GVR should impact their rulings, and in light of the Court's holding in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), and the similarities between the cases and timing of the rulings.

This Court GVR'd *Hashimi* even though the record in Hashimi did not contain the defendant objecting intransigently or unambiguously to trial counsel conceding guilt and thus left unclear whether Hashimi had disagreed with the defense and had communicated that to his trial attorney. *Petition App.* at 73 (Hashimi's Petition for a Writ of Certiorari, laying out his argument and conceding no objection was made on the record). This makes clear that, as *McCoy* ruled, the defendant need not adamantly and repeatedly declare his innocence and object on the record to counsel conceding guilt of any of the charged offenses for a claim to exist. Rather, as *McCoy* makes clear, and as Hashimi pointed out in his Petitioner for a Writ of Certiorari, the claim must fail only "when the defendant, *informed by counsel*, neither consents nor objects.

[1] The Kentucky Supreme Court granted Epperson's post-conviction appeal rehearing petition in order to address the impact of *McCoy*, and more specifically, to address Epperson's argument that *McCoy* required reversal because trial counsel conceded guilt of some of the charged offenses without first informing Epperson that counsel intended to do so. The Kentucky Supreme Court addressed the claim on its federal constitutional merits in light of *McCoy*. Epperson seeks certiorari from that decision. Thus, although factually inaccurate, Kentucky's assertion that Epperson did not present his claim to the state post-conviction trial court is irrelevant since the Kentucky Supreme Court addressed the claim on its constitutional merits, thereby making clear the claim was exhausted and is properly before the Court for review on certiorari.

McCoy, 138 S. Ct. at 1505 (emphasis added). The prerequisite to the defendant's obligation to either consent (explicitly or implicitly) or to object is that counsel *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 in *Hashimi*, Epperson alleges that trial counsel never explained to him that counsel would concede guilt to some of the charged offenses and thus did not object beforehand for the sole reason that he was unaware that counsel would disregard his protestation of innocence and instead concede guilt of the charged offenses. The record does not refute this, but instead actually supports Epperson's argument.

Indeed, Kentucky's factual assertions (presented with no supporting citation) are refuted by actual evidence/testimony, as the attached transcripts prove. Trial counsel testified multiple times in post-conviction proceedings, first with regard to undisclosed DNA results in a case where police reports contained names of alternative suspects who had allegedly confessed to committing the murders, and then testified at a further proceeding with regard to the inconsistent defense claim and multiple other claims.[2] Rather than testify that they "had spoken to those [Epperson] wished [counsel] to interview and presented evidence at his direction," *Brief in Opposition* at 4, counsel testified to a complete lack of memory. Counsel

[2] Epperson's inconsistent defense claim regarding counsel telling the jury Epperson was entirely innocent of the charged offenses only to then concede guilt of some of those offenses subsumes the position that Epperson did not agree to the defense counsel presented to the jury. In other words, subsumed within that claim is that Epperson did not agree to counsel conceding guilt of some of the charged offenses after telling the jury as early as opening statements that Epperson was completely innocent of the charged offenses. Thus, the claim was before the post-conviction court. Nonetheless, as explained in footnote one, Kentucky's argument in this regard is irrelevant.

testified that they did not recall interviewing a number of witnesses and had no recollection of specific meetings with Epperson or what counsel discussed with Epperson. (Jackson Test., April 30, 2015 at 17, Reply App. at 19).[3]

Trial counsel had, though, testified previously that Epperson had maintained his innocence and that the trial defense strategy was that Epperson had nothing to do with the murders. Lead counsel Jewell testified that "Roger [Epperson] had maintained that he had nothing do with the crime. Our argument was that he was completely innocent of the crime." (Jewell Test., Sept. 28, 2012 at 25, Reply App. at 92). Two years earlier, he testified that "Mr. Epperson denied involvement in this crime," and that "[o]ur defense at trial was to deny involvement in the criminal activity that was charged," Jewell Test., Sept. 27, 2010 at 3, 6, Reply App. at 121, 124, which included murder, burglary, and robbery both as a principal actor and by complicity (the prosecution charged both means of culpability and pursued both at trial). Second-chair counsel, Jackson, confirmed this, testifying that the trial strategy was that "Epperson was not involved with what he was accused of doing," and more specifically, "[o]bviously, our trial strategy was that he was not involved at all." *Jackson Test.*, Sept. 26, 2010 at 6, 8, 11, Reply App. at 135, 137, 140. Making that even clearer, he testified "that's right," the defense strategy was "that somebody else

[3] Both of Epperson's trial attorneys testified that counsel Jackson was responsible for communications with Epperson and his family, and Jackson testified that he did not remember the content of any communications he had with Epperson or his family. Counsel for Kentucky did not question lead counsel Jewell at all when he testified as to this matter, noting for the court that Jewell testified that he lacked recollection, and counsel for Kentucky's only questions for Jackson on the matter were about his lack of specific recollection of what documents he reviewed before trial, what investigation he had conducted, and whom he interviewed or otherwise spoke to. There was some testimony that Epperson did not want certain mitigation presented, although that was refuted through the testimony of many others and is not an issue before the Court in this certiorari petition.

committed these crimes and Epperson wasn't there and had absolutely nothing to do with it." *Id.* at 11 (Reply App. at 140). And, when he testified the final time, he reviewed his prior testimony and acknowledged that he had previously testified three times that the trial defense was Epperson had nothing to do with the murders and was entirely innocent. *Jackson Test.*, April 30, 2015 at 24, Reply App. at 26. With that being the defense theory, of course, Epperson understood and expected that counsel would pitch a complete innocence defense to the jury.

Counsel did so at first. During opening statements, counsel told the jury that Epperson was completely innocent of the charged offenses and that the prosecution would be unable to prove otherwise. Yet, as the trial proceeded, counsel suddenly changed course, in the words of the Kentucky Supreme Court, conceding, "involvement in the robbery and burglary," and telling the jury that "Epperson may have been or was the getaway driver during the commission of the crimes." *Epperson v. Commonwealth*, 2018 WL 3920226, *4, *12 (Petition for a Writ of Certiorari App. at 11-12, 29).

The record therefore indicates that (1) Epperson maintained his innocence; (2) trial counsel settled on an innocence defense and informed the jury that Epperson was innocent (3) trial counsel then conceded guilt of at least some of the charged offenses; and, (4) counsel had no recollection of discussing with, or even informing, Epperson that they would concede guilt. Together, this indicates Epperson did not consent to conceding guilt and was not aware that counsel would do so, until like in *Hashimi*, counsel did so in front of the jury. Certainly, the record does not refute

Epperson's claim, and any further question in this regard should lead the Court to request the record, which makes clear that Kentucky's statements as to the content of the post-conviction testimony are incorrect and misleading.

Finally, even if the record is construed in the most favorable light possible for Kentucky, we are left with the record being, at most, as equally unclear as it was in *Hashimi* on whether the defendant was informed by counsel that counsel would concede guilt. Accordingly, as in *Hashimi*, this Court should issue a GVR for further consideration, in light of *McCoy* interpreting the applicable legal standard to not be that of ineffective assistance of counsel (deficient performance and prejudice in conceding guilt), but to be instead whether defendant was informed and, if so, objected. Whether counsel otherwise performed reasonably by conceding guilt is not relevant. A GVR is even more particularly appropriate here because the Kentucky Supreme Court did not have the benefit of *Hashimi* and thus the opportunity to first interpret how that should impact its ruling, since *Hashimi* was decided after the state court rendered its decision.[4]

Epperson thus requests a GVR, a per curiam reversal, or as a final alternative, plenary review.

[4] The time for seeking further rehearing before the Kentucky Supreme Court expired before the grant of certiorari in *Hashimi*. Epperson therefore had no means to seek further review before the Kentucky Supreme Court in light of *Hashimi*. Certiorari is therefore the only means through which to effectuate this.

Respectfully submitted,

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