

NO. 18-6701
SUPREME COURT OF THE UNITED STATES

CAPITAL CASE

ROGER EPPERSON

PETITIONER

versus

On Petition For Writ Of Certiorari To
The Supreme Court of Kentucky

COMMONWEALTH OF KENTUCKY

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

ANDY BESHEAR
Attorney General of Kentucky

/s/Julie Scott Jernigan
JULIE SCOTT JERNIGAN
Assistant Attorney General 1024
Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CAPITAL CASE

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. IS SUMMARY REVERAL OR REMAND OF THE STATE COURT'S RULING REQUIRED BY THE NTERVENING DECISION IN MCCOY V. LOUISIANA, 138 S. ct. 1500, 1504, 200 L. Ed. 2d 821 (2018).

OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the certiorari petition, as well as in the appendix thereto.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254. The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the certiorari petition.

COUNTERSTATEMENT OF THE CASE

On the morning of June 17, 1985, Jerry Morris went visit his parents, Edwin and Bessie Morris. He found them in different rooms of the house, tied up, dead. (Tape 2, 07/14/03,11:37:09-11:39:02). Items of jewelry, cash and a pistol had been taken from the home. (11:39:10-11:40:35, 10:54:44-10:59:55-11:00:12, 11:10:22-11:11:30).

Petitioner Epperson, together with his friends and codefendants, Benny Lee Hodge, and Donald Bartley were subsequently arrested and charged with robbery, burglary and murder. Epperson was first tried and convicted in 1987 for the murder, robbery and burglary. Those convictions were set aside because the trial court did not conduct individual voir dire on pretrial publicity. At a retrial in 2003, a jury convicted Epperson of complicity to commit murder, robbery and burglary and sentenced him to death. On direct appeal, the Kentucky Supreme Court affirmed his convictions. His post-conviction motions were denied in 2016; the Kentucky Supreme Court affirmed those actions in 2018. Epperson v. Commonwealth, 2017-SC-000044-MR, 2018 WL 3920226, at 1 (Ky. Aug. 16, 2018).

In October 2018, Epperson filed additional motions for post-conviction relief in the state court and this Petition for Writ of Certiorari, both arguing similar grounds.

REASONS TO DENY THE WRIT

1. MCCOY v. LOUISIANA, 138 S. ct. 1500, 1504, 200 L. Ed. 2d 821 (2018) IS NOT APPLICABLE TO THE INSTANT CASE .

Petitioner alleges that he maintained his innocence throughout the trial, that trial counsel did not discuss the defense with him and conceded his guilt over his objections. The record in the trial court contradicts his assertions, as did the testimony of his trial

attorneys at evidentiary hearings held in the state court. There is no factual support for his petition. Additionally, the case he cites as controlling this issue is factually dissimilar to the extent that it does not apply.

Epperson argued in the state courts that his counsel were ineffective because they presented an inconsistent defense to the jury, arguing that he was wholly uninvolved in the murders, but also admitting his guilt to robbery and burglary because he drove the van to and from the Morris home. At no point during the trial, his direct appeal or his first set of post-conviction motion did Epperson allege that he disagreed with the defense that was presented, except to the extent he claimed it was inconsistent. He did not indicate that he was wholly uninvolved, but seemed content to attempt to convince the jury that he was not a principle actor in the murders.

Petitioner cites to McCoy v. Louisiana, 138 S. Ct. 1500, 1504, 200 L. Ed. 2d 821 (2018) as the basis for this writ. He claims it to be controlling, but overlooks the obvious factual distinctions that render it inapplicable herein. McCoy repeatedly and adamantly declared his innocence and counsel advised the jury that he was guilty in direct contradiction of McCoy's stated wishes and McCoy's own testimony. This court "granted certiorari in view of a division of opinion among the state courts of last resort on the question of whether it is unconstitutional to allow defense counsel to concede guilt over defendant's intransigent and unambiguous objections". No such objections were made by Epperson.

Petitioner Epperson, unlike McCoy, did not object to counsels' trial strategy at the time of trial, or at any other point prior to filing his post-conviction pleadings. He did not

testify to his innocence at trial, nor did he testify at the post-conviction hearings. Epperson was present in court when both of his trial attorneys testified and denied, among other claims, that they had presented an inconsistent defense. The testimony of counsel, far from indicating that they had acted contrary to Epperson's wishes, was that they had spoken to those he wished them to interview and presented evidence at his direction. At the close of that testimony, the trial court advised Epperson of his right to testify, and that its post-conviction review of the evidence was limited to those matters presented in court. Epperson still declined to testify even after asserting his understanding. (VR 4/30/15 4:09:03). The argument he now makes, that the defense presented was contrary to his stated wishes is factually unsupported. The factual disparity between Epperson's situation and that of McCoy is such that the holding in McCoy, supra, is not in any way applicable to Epperson. .

CONCLUSION

WHEREFORE, the Attorney General of the Commonwealth of Kentucky requests that Epperson's petition for writ of certiorari be denied.

Respectfully submitted, .

ANDY BESHEAR
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502)696-5342
Counsel for Respondent