No._____

In the Supreme Court of the United States

EX PARTE BILLIE WAYNE COBLE,
Applicant.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

MR. COBLE IS SCHEDULED TO BE EXECUTED ON FEBRUARY 28, 2019

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CAPITAL CASE

QUESTIONS PRESENTED

In the wake of this Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), two questions have emerged in the courts called on to apply that case.

The first is the manner in which a defendant must have objected to trial counsel's decision to forego a defense. Some courts have held that an objection to counsel alone is sufficient. Others have held that an objection must be made to both counsel and the trial court. In Mr. Coble's case, the objection was lodged only with counsel.

The second question is whether *McCoy* applies only in circumstances where the defendant seeks to assert his actual innocence or, more broadly, whenever the defendant seeks to have some defense asserted rather than have his guilt conceded. In Mr. Coble's case, he did not seek to assert innocence but did insist that a defense be presented and that guilt not be conceded. The conflicting answers courts have given in post-*McCoy* decisions call for this Court to provide more guidance, and give rise to the following questions presented:

1. Whether the Texas Court of Criminal Appeals improperly narrowed *McCoy* in light of unrefuted evidence that Petitioner expressed opposition to his lawyers concerning their decision to drop any defense and concede guilt?
2. Whether the Texas Court of Criminal Appeals improperly narrowed *McCoy* to circumstances in which the defendant's objective was to assert actual innocence rather than to assert some kind of defense?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Billie Wayne Coble was the Applicant before the Texas Court of Criminal Appeals in a subsequent application for a writ of habeas corpus. Pursuant to Sup. Ct. R. 14.1(b), the following list identifies all the parties in previous matters.

Mr. Coble was the petitioner before the United States District Court for the Western District of Texas, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit and this Court. Mr. Coble is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The district attorney of McLennan County, Texas and the Director and her predecessors, Rick Thaler, William Stephens, and Doug Dretke were the Respondents before the Texas Court of Criminal Appeals, the United States District Court for the Western District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit and this Court.

Mr. Coble asks that the Court issue a Writ of Certiorari to the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Applicant is not a corporate entity.

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In the
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EX PARTE BILLIE WAYNE COBLE,
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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Billie Wayne Coble respectfully petitions for a writ of certiorari to review the judgment and decision of the Texas Court of Criminal Appeals.

OPINION BELOW

The Texas Court of Criminal Appeals decision sought to be reviewed is reported as *Ex Parte Coble*, 2019 WL 640202 (Tex. Crim. App. Feb. 14, 2019), and is attached as Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1257. The opinion of the Texas Court of Criminal Appeals is the final judgment rendered by the state courts of Texas regarding Petitioner's effort to seek review of his judgment under this Court's ruling in *McCoy v. Louisiana*. The Texas Court of Criminal Appeals denied

Petitioner's subsequent writ application on February 14, 2019. This petition follows timely pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the following provisions of the United States Constitution:

AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Mr. Coble was convicted in 1990 for killing his wife's parents and brother. Several months before trial, his lawyers filed a notice of intent to raise an insanity defense. I Tr. 94.[1] In jury selection, defense counsel questioned prospective jurors about how they may respond to evidence tied to that defense. *See, e.g.*, II VD 125-29; V VD 382-87; VI VD 486-88. Then, after the State rested in the guilt phase, defense counsel abruptly changed course. They called no expert witnesses or lay witnesses. Instead, the entire guilt-phase presentation consisted of a defense investigator playing silent archival footage that depicted scenes from the Vietnam War—a war in which Mr. Coble fought extensively as a member of the Marine Corps some decades earlier. V SOF 712-22. In closing arguments—they did not make an

[1] The citations to the state court record take the following format: Vol. # [Tr. / SOF / VD] page #. "Tr." refers to the Transcript, "SOF" refers to the Statement of Facts, and "VD" refers to Voir Dire. "SH" refers to the State Habeas record.

opening statement—they conceded Mr. Coble's guilt. *See* VI SOF 757, 758. Nobody expected defense counsel to proceed in this feeble manner. The move stunned the prosecutors, the media, and the defendant himself. *See id.* at 725; Tommy Witherspoon, *Coble Attorneys Change Strategy: Lawyers for murder defendant abandon basis for insanity plea*, WACO TRIBUNE-HERALD, April 7, 1990, p. 1B. Mr. Coble did not agree with his lawyers' decision to drop altogether any semblance of a defense at the guilt phase and concede his guilt. II SH Tr. 593 (Exh. 29) (attached as Appendix B).

The day before the lawyers rested their case, the lead attorney requested that the jail medicate Mr. Coble for anxiety. II SH Tr. 583 (page from Exh. 26); IV SH SOF 209 (doctor's testimony); V SH Tr. 1221 (trial court's finding that defense counsel put their client on the medication). The defendant came to court the next day under the influence of Vistaril. Defense counsel met with Mr. Coble, informed him of their plans, and learned that he disagreed with their charted course. VI SOF 723; II SH Tr. 593 (Appendix B). They then prompted the court to question him about whether they had disclosed their plan. VI SOF 723. On the back of this exchange between the client and the court, counsel called no additional witnesses and rested their case. *See id.* at 725. The jury returned a guilty verdict on the capital charge.

Federal courts completed habeas review late last year, with this Court denying a petition for certiorari on October 9, 2018. *Coble v. Davis*, 139 S. Ct. 338 (2018). Petitioner then filed a subsequent state habeas application on the ground that *McCoy* provided a legal basis for guilt-phase relief that had been unavailable during the initial state habeas

proceedings. The Texas Court of Criminal Appeals dismissed that application on February 14, 2019. In reviewing the *McCoy* claim, the court—instead of recognizing the constitutional harm—employed a narrow interpretation of this Court's holding and found that Mr. Coble had not made "a *prima facie* showing" that *McCoy* applies. That court's inflexible view raises the critical questions presented that this Court should now resolve.

REASONS FOR GRANTING THE PETITION

I. This Court should make clear that *McCoy* protects a defendant's Sixth Amendment right to insist upon a defense when he expressly asserts that desire to his lawyers.

While defense counsel has the role and duty of making "strategic choices about how to best *achieve* a client's objectives," the client has the autonomy to decide what those "objectives in fact *are*." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (emphasis in original). Here, Mr. Coble's objective was to present a defense in the guilt phase and to not concede guilt for the crimes. Defense counsel overrode that objective—and their client's will—by instead presenting to the jury no defense at all and conceding his guilt. In *McCoy*, this Court held that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id.* at 1505. The Constitution protects Mr. Coble's right to insist on a defense and object to the lawyers' "proposal to concede [defendant] committed these murders." *Id.* at 1509. "[I]t was not open to [defense counsel] to override [his] objection." *Id.*

A. Courts have reached contrary conclusions about when and to whom the defendant must object to raise a possible *McCoy* violation.

This Court's Sixth Amendment case law indicates that to have a constitutional claim under *McCoy*, among other things a defendant: (1) must assert his objective before or during trial; and (2) must direct that assertion to his counsel, the court, or both.

The first requirement emerged from *Nixon*, where this Court found that the question of client "autonomy" was not at stake because the defendant "complained about the admission of his guilt only after trial." *McCoy*, 138 S. Ct. at 1509 (citing *Florida v. Nixon*, 543 U.S. 175, 185 (2004)).

The second requirement emerged from *McCoy* itself. There, this Court distinguished *Nixon* because Robert McCoy, unlike Joe Nixon, repeatedly expressed his trial objective "before and during trial." *Id.* Beyond that, McCoy's vocal assertions of innocence were contrasted with Nixon's "characteristic silence each time information was conveyed to him." *Nixon*, 543 U.S. at 189. McCoy made known his interests "both in conference with his lawyer *and* in open court." *McCoy*, 138 S. Ct. at 1509 (emphasis added). This observation, however, did not mean that a Sixth Amendment autonomy violation can only occur when the defendant objected *both* to defense counsel and to the court. Fairly read, *McCoy* simply confirms that the defendant must make his objection to defense counsel *or* the court. In *McCoy*, the defendant did both. In *Nixon*, the defendant did neither.

The fair reading of *McCoy* comes from a clear-eyed review of the majority opinion. This Court acknowledged that a defendant's objection to his lawyers' proposed course of

action may only occur off-the-record and outside the judge's presence, during private consultations with the client. It observed: "If, after consultations with [defense counsel] concerning the management of the defense, [the client] disagreed with [defense counsel's] proposal to concede [the client's guilt] . . . it was not open to [counsel] to override [the client's] objection." *Id.* The Court clarified that a client's assertion to counsel alone is enough to give rise to the constitutional question: "Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way." *Id.*

Placing a burden on the defendant to object to both counsel *and* to the court would make little sense given the "guiding hand" counsel is meant to provide in a role that positions her as a protector standing between the State and her client. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). In cases where defense counsel is reluctant to reveal an attorney-client disagreement to the court, this burden would enable only the most bold and outspoken defendants, who summoned the courage to speak directly to the judge, to raise a potential *McCoy* violation. In some cases, like Mr. Coble's, defense counsel may not communicate or express the client's objection to the court, thereby defeating what would otherwise be a constitutional violation.

Unfortunately, some courts have confused the holding of *McCoy* and erected unsanctioned barriers to Sixth Amendment relief. The Kentucky Supreme Court recently denied a defendant's *McCoy* claim in part because the client's assertion that he desired an innocence defense did not mirror the objections present in *McCoy*. In its words, "Epperson has not evidenced '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.'" *Epperson v. Commonwealth*, No. 2017-SC-000044-MR, 2018 WL 3920226, at *12 (Ky. Aug. 16, 2018), *cert. denied sub nom. Epperson v. Kentucky*, No. 18-6701, 2019 WL 177659 (U.S. Jan. 14, 2019) (internal citation omitted). This constrained reading of *McCoy* effectively requires the defendant to object on the record before trial to make out an autonomy-based claim. It thus conflates issue-preservation with the existence of an underlying constitutional claim.

Other courts see *McCoy* more clearly. Instead of demanding that the defendant assert his objective in open court, the Oregon Court of Appeals recently held that the claim is preserved if the client makes his objective known only to his lawyer: "As we read *McCoy* . . . the proper inquiry is on the fundamental objective of the defendant, as expressed to defense counsel." *Thompson v. Cain*, 295 Or. App. 433, 441 (2018).

A California appellate court reached a similar conclusion. Whereas *Epperson* effectively renders *McCoy* claims uncognizable in habeas proceedings,[2] the California court held on direct appeal that autonomy-based claims involving a non-record *McCoy* objection can still be reviewed and remedied in the habeas context. *See People v. Taylor*, No. C084200, 2018 WL 4063587, at *5 (Cal. App. 3d Dist. Aug. 27, 2018), *review denied* (Nov. 28, 2018); *see also id.* (observing that it is vital to know "what counsel discussed with defendant" and

[2] *Epperson* requires an objection to be made on the record. And, unlike other constitutional violations that are not identified by counsel during trial, *McCoy* violations are not susceptible to post-conviction review through an allegation of ineffective assistance of counsel. The Court in *McCoy* explicitly held that the autonomy-based violations are distinct from ineffectiveness claims. *See McCoy*, 138 S. Ct. at 1511.

whether "defendant objected to the tactical concession").

Some courts have issued opinions that muddle *McCoy*'s requirements. Consider a recent ruling from the Texas Court of Criminal Appeals. In *Turner v. State*, that court responded to the prosecution's twin arguments that the defendant did not preserve his *McCoy* claim and that the record was insufficient to support the claim. It held, "[w]e agree that a defendant cannot simply remain silent before and during trial and raise a *McCoy* complaint for the first time after trial." 2018 WL 5932241, at *20 (Tex. Crim. App. Nov. 14, 2018). However, it did not clarify whether a defendant who lodges his complaint before or during trial only with his counsel—and not the court—has done enough to raise a *McCoy* issue. (In other words, whether objecting only to counsel is the equivalent of "remain[ing] silent" from the court's perspective.) Because Mr. Turner, like Mr. McCoy, had expressed his will to both counsel and the trial court, the Texas Court of Criminal Appeals found that he had done enough to "timely . . . ma[k]e express statements of his will . . . ." *Id.*

This Court should grant certiorari because courts have reached inconsistent conclusions about when and to whom the defendant must object to raise a possible *McCoy* violation. The lingering uncertainty about a core Sixth Amendment right provides a "compelling reason" to warrant this Court's use of its power to provide discretionary review under Rule 10.

B. Petitioner's unrefuted evidence that he objected to counsel's proposal suffices to support a *McCoy* claim.

Unlike Robert McCoy, Mr. Coble asserted his objective—to present a defense and not

concede guilt—only to his lawyers before and during the trial. He did not raise his concerns to the trial court.[3] Mr. Coble presented unrefuted evidence[4] in his subsequent application for state habeas relief that he expressed his will and disagreed with his lawyers' plan to drop his defense. Therefore, the CCA's holding that he "has failed to make a *prima facie* showing that the recent case of...*McCoy*...applies to his situation" (App. A) likely turned on a reading of *McCoy* that approximates the Kentucky Supreme Court's rationale in *Epperson*. This case thus presents the Court with a timely opportunity to clarify that *McCoy* claims are viable in cases in which the defendant made his will known before or during trial only to defense counsel and not to the trial court.

II. This Court should also make clear that *McCoy* also protects a defendant's Sixth Amendment right even if he insists upon a defense that is not a declaration of outright innocence

In *McCoy*, this Court was confronted with a record in which the defendant "vociferously insisted" upon his absolute innocence for the crimes with which he had been charged. 138 S.Ct. at 1505. Given that case's particular facts, courts have struggled with deciding whether *McCoy* applies where the client's stated objective is not as straightforward.

[3] In a letter the District Attorney wrote in response to Mr. Coble's subsequent application, he argued "[t]he trial court held a colloquy with Applicant prior to the defense resting, wherein Applicant expressed agreement with his counsel's strategy . . . ." Letter at page 1. This argument mischaracterizes the exchange that defense counsel prompted between their client and the court. As Petitioner explained in his Application, he never actually expressed any agreement with counsel's decision. *See* Application at 35-37. Even if the exchange could be characterized as a waiver colloquy, the waiver was not knowing, intelligent, or voluntary.

[4] This support came from an affidavit the client executed in state habeas proceedings in 1997, over two decades before this Court decided *McCoy*. In it, Mr. Coble stated "I was not satisfied in with the decisions my attorney were making in not offering any defense," and "[w]hen they decided to rest . . . I did not agree with this decision, and I told my attorneys this." II SH Tr. 593. (Appendix B at *1).

This case underscores the need for guidance.

In recognizing that "[s]ome decisions [] are reserved for the client," this Court did not limit the defendant's decisional right to extend only to maintaining absolute innocence. *Id.* at 1508. Instead, it focused on the defendant's "[a]utonomy to decide [] the objective of the defense." *Id.* The opinion cited the American Bar Association's Model Rule of Professional Conduct 1.2(a), which provides that a "lawyer shall abide by a client's decisions concerning the objectives of the representation." *Id.* at 1509. The Sixth Amendment autonomy protection does not kick in exclusively upon a defendant's proclamation that he was entirely uninvolved in the charged criminal conduct.

However, for fear of engaging in complexities, some courts have reduced the Sixth Amendment autonomy right about the objectives of the representation to the question of whether the defendant wanted to maintain his innocence. *See, e.g.*, *United States v. Rosemond*, 322 F.Supp. 3d 482, 486 (S.D.N.Y. 2018) ("The Court does not read *McCoy* to suggest that the 'objective of the defendant' relates to anything other than the defendant's decision to maintain innocence or concede guilt."). On the other side—the correct one—the Louisiana Supreme Court recently articulated the understanding that *McCoy* cannot and should not be so limited. In *State v. Horn*, "the state suggest[ed] *McCoy* [was] not controlling . . . because defendant did not claim outright innocence and instructed his attorneys to make an argument for accidental killing under the negligent homicide statute." 251 So. 3d 1069, 1075 (La. 2018). The court declined the State's invitation to unduly narrow *McCoy*: "we reject the state's argument and decline to restrict application of the holding in *McCoy* solely

to those cases where a defendant maintains his absolute innocence to any crime." *Id.* It found that *"McCoy* is broadly written" and that the autonomy to choose the objective of the defense is not limited to assertions of actual innocence. *See id.*

In Mr. Coble's case, he did not insist that his lawyers present an innocence case. Petitioner does not deny that he bears responsibility for the victims' loss of life, but he nonetheless wanted his lawyers to present a defense on his behalf. They had planned for months to proceed with an insanity defense, and Petitioner did not agree with their decision to drop his defense and concede his guilt. These circumstances squarely present this Court the opportunity to clarify that *McCoy* is not simply about insisting upon one's innocence. The Sixth Amendment right does not require a defendant to choose one option—absolute innocence—or otherwise relinquish the constitutional protection. For this reason, the Court should grant certiorari in accordance with Rule 10. *See* Rule 10(c) (identifying a basis for certiorari where "a state court . . . has decided an important question that has not been, but should be, settled by this Court").

CONCLUSION

For the foregoing reasons, Mr. Coble respectfully requests that this Court grant the petition.

Respectfully Submitted,

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February 21, 2019.