**No. 18-8070**
**No. 18A845**

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# In the Supreme Court of the United States

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BILLIE WAYNE COBLE,
*Petitioner,*

v.

LORIE DAVIS , Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
*Respondent.*

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

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## REPLY BRIEF OF PETITIONER

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**CAPITAL CASE**

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Respondent's Brief In Opposition ("BIO") is based on assertions regarding the record, Petitioner's arguments, and the law that do not withstand scrutiny. Respondent argues that this matter involves no compelling reason for review worthy of this Court's attention; that certiorari review and a stay of execution are foreclosed by the Texas Court's application of an independent and adequate state procedural bar; that the claim is barred by the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989); and that Coble's facts do not clearly fall within the ambit of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). These arguments are all unavailing.

In attempting to establish that Mr. Coble's claim "lacks merit," Respondent underscores the need for this Court to bring greater clarity to *McCoy*'s meaning and reach. (BIO at 15; *id.* at 27.) Despite Respondent's best efforts to recast the holding in *McCoy*, obvious questions remain unresolved. These very questions—the questions presented—provide compelling reasons for this Court to grant the petition and order briefing on the merits.

**I. This Issue Is Worthy Of The Court's Attention. (BIO at 8-10).**

Initially, in Section I, Respondent mis-characterizes this case as involving only "error correction" not worthy of this Court's attention. (BIO at 10-12). Yet Mr. Coble has presented two questions regarding *McCoy* that go well beyond the significance of the facts of his case, as they are questions that will undoubtedly re-appear before this Court in the near future and have already appeared in the courts below:

(1) Whether *McCoy* applies in a situation where a defendant expresses his innocence and his desire to present his case for innocence to his attorneys but not to the court. (*See* Pet. at 4-9).

Petitioner's argument that *McCoy* extends beyond those situations where a defendant expresses his desire to maintain his innocence to his attorneys but not to the Court finds support in the plain language of *McCoy* itself, where this Court explained that "[p]resented with express statements of the client's will to maintain innocence . . counsel may not steer the ship the other way," 138 S. Ct. at 1509. Further, a rule artificially limiting *McCoy* to situations where the defendant vocalizes his case for innocence to the

Court would make little sense, either in terms of fairness, practicality or policy. It would hardly be practical to insist that a defendant untutored in the law be so knowledgeable about his rights that he could be expected to frame an adequate and coherent objection to the court at the appropriate time, or that he would even know or be allowed to voice such an objection, possibly disrupting the proceedings in the process.[1] In terms of policy, Courts should not interpret *McCoy* so narrowly as to apply only to those defendants whose attorneys fully informed their clients beforehand of their intent to concede guilt to the jury, and denying the application of *McCoy* to those defendants who were not afforded that notice. Client autonomy is violated at least as much in situations when the attorneys fail to inform the defendant of their plans as when they do.

Mr. Coble has shown (Pet. at 6-8) that this question has been a developing source of controversy in the courts in the short time since *McCoy* was handed down. *See, e.g.*, *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) (requiring an objection to be made on the record); *Thompson v. Cain*, 295 Or. App. 433, 441 (2018) (*McCoy* claim is preserved if the client makes his objective known only to his lawyer); *People v. Taylor*, No. C084200, 2018 WL 4063587, at *5 (Cal. App. 3d Dist. Aug. 27, 2018), *review denied* (Nov. 28, 2018) (observing that it is vital to know "what counsel discussed with defendant" and whether "defendant

[1] Mr. McCoy himself was admonished when he interrupted his counsel's closing argument: the Court told McCoy that he was represented by counsel and that the Court "would not permit 'any other outbursts.'" *McCoy* at 1506, cited in BIO at 20.

objected to the tactical concession"); *Turner v. State*, 2018 WL 5932241, at *20 (Tex. Crim. App. Nov. 14, 2018) ("[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.").

(2) Whether *McCoy* applies in situations involving a defendant's insistence on a defense that is less than a declaration of actual innocence. (*See* Pet. at 9-11).

Here too, since *McCoy* was handed down, the courts are at variance with the unanswered question of the scope of the decision. *See, e.g.*, *United States v. Rosemond*, 322 F. Supp. 3d 482, 486 (S.D.N.Y. 2018) (the objective of the client does not relate to "anything other than the defendant's decision to maintain innocence or concede guilt"); *State v. Horn*, 251 So. 3d 1069, 1075 (La. 2018) ("*McCoy* is broadly written" and client autonomy to choose the objective of the defense is not limited to assertions of actual innocence.)

Hence, this case raises issues more far-reaching than mere "error correction." Respondent's assertions that the matter has limited applicability is at odds with her argument in Section III, which asserts that Coble's case does not fall within the ambit of *McCoy* yet acknowledges that the contours of that case have not yet been determined.

**II. Certiorari Review Is Not Foreclosed By An Independent and Adequate State Procedural Bar. (BIO at 10-14).**

In Section II, Respondent argues that this Court has "no jurisdictional basis for granting certiorari review in this case" (BIO at 14) because the decision of the Texas Court of Criminal Appeals (App. A) denying Mr. Coble's subsequent application as an

abuse of the writ is "an independent and adequate state-law ground for disposing of an applicant's claims." (BIO at 11).

Mr. Coble's case involves a decision by the Texas Court of Criminal Appeals ("CCA") applying § 5 of article 11.071 of the Texas Code of Criminal Procedure, which governs subsequent state habeas applications. Section 5 allows a subsequent habeas application that satisfies any one of the three requirements of § 5(a) by presenting a claim based on: (1) a previously unavailable factual or legal basis (the "unavailability requirement"); (2) a constitutional error that affected the guilt/innocence phase of the trial; or (3) a constitutional error that affected the sentencing phase of the trial. Tex. Code Crim. Proc. art. 11.071 § 5(c). In order to dismiss such an application, § 5 requires the CCA to determine that the application has failed to satisfy *all* of the requirements of § 5(a), including § 5(a)(1). *Id.*

In 2005, the CCA added a judicial gloss, holding that to satisfy the requirements of § 5(a)(1), an applicant must also make a *prima facie* showing of a federal constitutional claim that requires relief from the conviction or sentence (the "*prima facie* showing requirement"). *See Ex Parte Campbell,* 226 S.W.3d 418, 422 (Tex. Crim. App. 2007); *Ex parte Staley,* 160 S.W.3d 56, 63, 66 (Tex. Crim. App. 2005) (per curiam). There is no dispute that the *prima facie* showing requirement is not independent of federal law. *See, e.g., Rivera v. Quarterman,* 505 F.3d 349, 359-360 (5th Cir. 2007).

As Respondent concedes, the CCA's holdings were threefold, 1) that Coble failed to make a *prima facie* showing that *McCoy* "applies to him in his situation"; 2) that he

failed to show that the claims otherwise met the requirements of Sec. 5; and 3) that his claims should be dismissed as "an abuse of the writ without reviewing the merits." *Ex parte Coble*, 2019 WL 640202. (App. A). (BIO at 13.)

Respondent's argument that this Court lacks jurisdiction to grant certiorari in Petitioner's case runs directly contrary to this Court's holding in the case upon which Respondent primarily relies, *Michigan v. Long*, 463 U.S. 1032 (1983) (BIO at 12, 14.) This Court in *Long* announced the standard for determining "whether various forms of references to state law [by state courts] constitute adequate and independent state grounds." 463 U.S. at 1038. That standard is:

> [W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it do so."

*Id.* at 1040-41. *Long* expressly disapproved of the practice of denying federal court review "if the ground of the [state court] decision was at all unclear." *Id*. at 1038.

More recently, this Court has affirmed the *Long* standard, holding that "ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Florida v. Powell*, 559 U.S. 50, 56 (2010) (internal citation omitted). This Court has also held that

> [A]mbiguous or obscure adjudications by state courts [should] not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers [and habeas review by the federal courts] compels us to ask for the elimination

> of the obscurities and ambiguities from the opinions in such cases.... For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states." [ ] We therefore adhere to the standard adopted in *Michigan v. Long* ....
> *Arizona v. Evans*, 514 U.S. 1 at 8–9, (1995).

Therefore, this Court, clearly and continuously, stands by the *Long* presumption.

Nor does it follow, as Respondent argues (BIO at 13-14) that simply because two of three essential requirements appear not to be based on federal law that the CCA *necessarily* did not base its decision on the other federal law requirement. *Cf., e.g., Harris v. Reed,* 489 U.S. 255, 258, 266 (1989) (reviewing a state court decision that had explicitly found the petitioner's claim waived but still considered and rejected the merits of the claim). And *Coleman v. Thompson*, 501 U.S. 722 (1991) recognized that "[a]fter *Long,* a state court that wishes to look to federal law for guidance *or as an alternative holding* while still relying on an independent and adequate state ground can avoid the presumption by stating clearly and expressly that its decision is based on bona fide separate, adequate, and independent grounds." 501 U.S. at 733. (internal quotation marks, brackets, and ellipsis omitted) (emphasis added); *see also Long,* 463 U.S. at 1039 n. 4 (recognizing that federal courts "may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied"). Therefore, we cannot presume that the CCA's *silence* means that it did not base its decision on the alternative, federal-law requirement of § 5(a)(1).

These principles make clear that the CCA's summary dismissal must be presumed to *not* rest on independent and adequate state grounds. It is ambiguous as to whether it was based on a determination that Coble's application did not satisfy the unavailability prong or the *prima facie* showing requirement of § 5(a)(1), or both. Because the *prima facie* showing requirement of § 5(a)(1) is a determination based on federal law, the CCA's unexplained determination that Coble's application did not satisfy § 5, and therefore did not satisfy the requirements of § 5(a)(1), is a decision interwoven with federal law. The CCA's holding does not clearly and explicitly state that the CCA only decided that Coble's application did not satisfy the state-law unavailability prong of § 5(a)(1). Therefore, under the *Long* standard, the CCA's decision is presumed not to rest on independent and adequate state grounds and this Court can review the merits of Coble's constitutional claims on a habeas petition.

## III. The Questions This Case Raises About *McCoy* Warrant Review On the Merits (BIO at 14-37).

### A. *Teague* does not prohibit this Court from granting review and deciding cases coming out of state post-conviction.

Respondent's *Teague v. Lane*, 489 U.S. 288 (1989) arguments consist ultimately of two claims: (1) Coble seeks a new constitutional rule (*see* BIO at 17); and (2) differences in state retroactivity doctrines would mean that this new rule "would not benefit all similarly situated petitioners." (BIO at 18.) Both claims miss the mark.

First, Mr. Coble does not ask this Court to create a new rule of constitutional law. Instead, his petition requests the clarification and application of *McCoy*. *See* Pet. at 4

("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."); *id.* at 9 ("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.").

Second, the notion that a ruling in Coble's favor would not benefit similarly-situated petitioners is both untrue and irrelevant. This Court need not concern itself with retroactivity doctrine should it determine—as Respondent argues—that *McCoy* was based upon the Court's 1975 decision in *Faretta v. California*, 422 U.S. 806 (1975). (*See* BIO at 31.) Alternatively, this Court could decide in this case that *McCoy* itself was a new rule of constitutional law that applies retroactively and ⁻thus resolve any dispute about its applicability to cases like Mr. Coble's.[2]

Respondent's BIO places undue emphasis on the procedural posture of this case. By the State's logic, this Court should never grant certiorari when a petition is filed at the conclusion of state post-conviction proceedings. However, this Court's practice leaves no doubt that it is entirely appropriate both for petitioners to file at this stage and for this Court to consider and decide such cases on the merits. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam); *Jackson v. Hobbs*, 567 U.S. 460 (2012) (decided with *Miller v.*

[2] Respondent's argument about varying state retroactivity doctrines demonstrates her confusion over the relevant jurisprudence. In *Danforth v. Minnesota*—cited in the BIO—the Court decided "whether *Teague* constrains the authority of state courts to give *broader effect* to new rules of criminal procedure than is required by that opinion." 552 US 264, 266 (2008) (emphasis added). If a state court gave narrower effect to a new rule than required by *Teague*, a petitioner would have recourse in federal review.

*Alabama*); *Hinton v. Alabama*, 571 U.S. 263 (2014) (per curiam) *Wearry v. Cain*, 136 S.Ct. 1002 (2016) (per curiam); *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

**B. The Brief in Opposition demonstrates the need for this Court to answer the Questions Presented**

The BIO argues at length that, under *McCoy*, Mr. Coble's claim fails on the merits. However, Respondent's reading of McCoy relies upon contested interpretations of particular aspects of the ruling that have generated inconsistent results in courts around the country. For example, Respondent cites *Florida v. Nixon,* 543 U.S. 175 (2004) for the proposition that a defendant cannot complain about defense counsel's concession of guilt only after trial. (BIO at 26.) However, Coble's entire argument is that he did not only complain after trial, but he had also told his lawyers during a consultation in the midst of trial that he did not want them to drop his defense and concede guilt. (*See* Petition at 8-9.) The dispositive question is whether a complaint to counsel alone suffices to make out a *McCoy* violation—the very question presented in the Petition. Respondent's reading is not the only plausible reading, nor is it the best one. This Court's opinion indicates that a client who tells his lawyer that his objective is to contest guilt and present a defense has done enough to raise a *McCoy* violation. (*See* Petition at 6, citing *McCoy*, 138 S. Ct. at 1509.)

In the portion of its briefing about the merits, Respondent also draws on Coble's acknowledgement that he did not insist on a defense of absolute innocence to claim that *McCoy* does not apply here. (BIO at 26-27.) While zeroing in on some language to

support its narrow reading of *McCoy*, Respondent ignores other portions that support Petitioner's broader reading. (*See* Petition at 9-10.)

Considering that Respondent effectively provided a full briefing on the merits,[3] Petitioner provides two observations. First, it is fair to say that Respondent's approach gives credence to Coble's view that the questions presented deserve a full briefing on the merits. Second, this Court should provide Mr. Coble an opportunity to meaningfully participate in the merits dispute by granting the petition.

**C. A *McCoy* violation can occur in the absence of trial court error.**

While this Court characterized the constitutional error in Robert McCoy's case as one "allow[ed]" by the trial court, Respondent's attempt to hinge the Sixth Amendment violation on the trial court's ruling is unavailing. (BIO at 30-31.) The central players in the Sixth Amendment story are defense counsel and the client. A constitutional violation occurs when a defense lawyer "override[s]" his client's "objective" and "conced[es] guilt." *McCoy*, 138 S. Ct. at 1509. Notice the trial court's absence from the holding: "If, after consultations with [defense counsel] concerning the management of the defense, [the client] disagreed with [counsel's] proposal to concede [the client] committed three murders, it was not open to [defense counsel] to override [the client's] objection." *Id.* In

[3] Respondent invokes the trial court's exchange with the defendant to argue that Coble purportedly *agreed* with trial counsel's decision to drop his defense. (BIO at 21-23, 26-27.) That reading of the record, however, is questionable at best. As Coble's subsequent application explains: (1) that exchange shows Coble was not expressing agreement with the decision counsel made, but instead agreed that counsel were the ones who made the decision; (2) the exchange did not constitute a valid waiver of his Sixth Amendment right under *McCoy*; and (3) counsel overrode Coble's will in part through the use of medication that rendered him compliant at the time they dropped his defense.

cases in which the defendant clearly notifies defense counsel of his objective, the trial court need not be implicated in the error for a defendant to later raise a valid constitutional claim for relief.

For the reasons discussed *supra*, Mr. Coble is entitled to a stay of execution. His petition presents questions vital to this Court's Sixth Amendment jurisprudence. In the wake of *McCoy*, these questions have already generated significant disagreement in both the state courts and the lower federal courts. These questions are highly likely to present themselves to this Court in the future and it is in the interests of justice to grant Mr. Coble's motion for a stay of execution and settle this confusion without further delay.

**IV. Conclusion.**

For the foregoing reasons, and for those discussed in the Petition, the Court should grant Mr. Coble's motion for a stay of his execution and his petition for writ of certiorari to consider the important questions presented, which merit review.

Respectfully Submitted,

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