ORIGINAL

No. 18-9546

IN THE

SUPREME COURT OF THE UNITED STATES

EVERETT CHARLES WILLS II
Petitioner

v.

DARREL VANNOY, WARDEN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EVERETT C. WILLS II, #391159
PRO SE PETITIONER
MAIN PRISON EAST, CYPRESS-3
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTIONS PRESENTED

(1) Whether, as the Court has thrice asked but never answered, States must apply a "watershed rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989) in post-conviction proceedings?[1]

(2) Whether the rule of *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), which bars defense counsel from conceding guilt over a client's objection, is retroactively applicable to cases on collateral review as a "watershed rule" under the framework of *Teague*?

1 *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 729 (2016); *Greene* v. *Fisher*, 565 U.S. 34, 41 n.* (2011); *Danforth* v. *Minnesota*, 552 U.S. 264, 277-78 (2008).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

U.S. Constitutional Provisions

Cases

Federal Rules

Federal Statutes

Treatises

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit denying a Certificate of Appealability (COA) on his claim under the Sixth Amendment to the United States Constitution, as interpreted by *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

OPINIONS BELOW

The order of the Court of Appeals, No. 18-30895, denying a COA appears at Appendix A to the petition and has not been designated for publication. The District Court's order and the Magistrate Judge's report and recommendation appear in Appendix B and have not been designated for publication. The various state court opinions underlying the federal proceedings appear in Appendix C.

JURISDICTION

The Court of Appeals entered final judgment against Petitioner on March 1, 2019. As such, this Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 13.1 of the Rules of the Supreme Court of the United States. *See Hohn v. United States*, 524 U.S. 236, 253 (1998) (holding denial of COA reviewable).

CONSTITUTIONAL PROVISION INVOLVED

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

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

STATEMENT OF THE CASE

The facts leading up to the death of Carlos Guster, the putative victim in this case, are critical because they provide the factual milieu in which the defendant Everett Wills acted in self-defense. It is trial counsel's refusal to present that defense, and his unilateral and protested decision to concede Wills' guilt in violation of the rule of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), that is the central substantive issue in this case.

Facts of the Event

On April 18, 2011, Carlos Guster was at his mother's ("Zina") home in the 3000 block of Lillian Street. There was an unspecified conflict between Guster and Zina that caused her to put him out of the house. R. 9. Guster's sister ("Evony") came home shortly after the trouble and saw him on the front porch. Guster left home angry after his sister refused to give him money. R. 608.

Dressed in all black, Guster went down the street to Wills' mother's ("Aleana") home, where he tried to gain uninvited access. R. 715.

Zina testified that Guster was never "diagnosed with any issues" and that he was never seen by a doctor for mental illness. R. 601. Zina said the last time she saw Guster "he was kind of agitated because he was saying that some of the people he did some yard work for owed him some money." R. 602. She further said Guster would say "inappropriate" things to her, and that she "went to the Coroner's office because she did not "want nobody to hurt him." R. 605.

Evony testified that "10 minutes, or 15 minutes" before the shooting was the last time she saw Guster. He had asked her "for some money," and she "told him, [she] have none." Evony testified that Guster then "got mad and walked down the street." R. 608.

Aleana testified that when Guster first started coming around her home he was a "sweet person." R. 734. She testified that Guster started calling Ellen and Emma Johnson inappropriate names. R. 731. Aleana testified that when she arrived at her house on the night of the incident, "Guster was on [her] porch." R. 739. She said when Guster observed them pull up, "he took out running and went behind a tree." R. 740.

Ellen testified that "at first [Guster] was alright," but "he can act up sometimes." R. 762. Ellen testified that they "probably should" have called the police but they did not. R. 765. Ellen testified that when they first heard the noise at the door, they "really didn't think nothing" of it because her "sister's baby daddy he play like that." R. 766. Ellen testified that when they looked out the door and saw Guster they were "kind of shocked because he ain't never did that." *Id.*

Emma testified that Guster threatened them, and his threats could be taken "as serious because about that last month, he was being out of control." R. 791. Emma testified that on the night of the incident, "[Guster] was on our porch messing with the door," and that "[h]e tried to get in." R. 792.

Events at Trial

Wills' trial counsel, Kurt Goins, Esq., conceded his guilt to the jury without informing Wills that he was going to do so; neither did he have Wills' consent to do so, and in fact knew of Wills' consistently expressed desire to pursue a self-defense defense. Yet Goins began trial by presenting a theory of manslaughter in opposition to Wills' affirmative defense of justifiable homicide. In his opening statement, Goins told the jury, "[t]he State mentions guilt. I would also add another word for you, regret, even remorse." R. 598. Goins also

told the jury that they "heard the State's allegation of murder," and that they will hear Wills' "claim of self-defense through his statement." *Id.* Goins destroyed Wills' credibility with the jury when he told them that the "evidence won't support that. This is a case of Manslaughter. And at the end, that is what I will argue that you find." *Id.*

Goins also adopted and bolstered the state's unsubstantiated theory that Guster suffered from a debilitating mental condition, and thereby portrayed him in a light detrimental to Wills' defense. He spoke of Guster as if he were representing him. He made excuses for Guster's actions by telling the jury that the things he did and said were "probably tied into the mental illness you heard about." R. 595. Goins went on to say that "this is a case where you have combustible elements. Carlos, flirtatious and afflicted with a mental illness," and Wills "overly protective." R. 597.

Goins began his closing argument by telling the jury that this case was a "collision between a young man who is mentally ill and won't take no for an answer, another man, [Wills], whose motive is to be protective of his sisters and his mother and goes to the level of being overprotective." R. 988. He told the jury, "[w]hat we're arguing about is what offense was committed, what was proven, and what was not proven. And as I told you in my opening statement,

this is a case of Manslaughter." R. 988. Later in his argument, Goins told the jury, "we know that Carlos had this mental illness that's undiagnosed. Ms. Guster couldn't get him help. Is it getting worse, and is it going to lead to something worse?" R. 991. Goins again addressed the jury as if he were representing Guster, and not Wills. When he did mention Wills' emotional state and actions, he said:

> That's what I refer to when I mention that anger [sic] of self-defense that turns out to be an anvil. Many times when a person thinks they are acting in a way to protect their loved ones and they overreact, they try to justify it in their minds. Well, I was right to do it. Well, no, you weren't right to do it. That's the fact of the matter. And you try to cling to this anchor of self-defense.

R. 996. Goins went on to tell the jury:

> But as you see, ladies and gentlemen, from the evidence in the case, it's not an anchor, its an anvil that drags him down. That's why quite literally, right now as you sit here, when you get through hearing from me and Mr. Edwards again, and Judge Emanuel charges you, when you go back to the jury room, what you're going to decide literally is how far down that anvil carries him. That's the bottom line.

Id.

It was not an anchor, or an anvil that pulled Wills or his defense down in the minds of the jury. It was Goins who asked the jury "[w]hat happen[ed] to

the gun?" It was Goins who told them that, "[n]o doubt it's disposed of by [Wills] somewhere, sometime." R. 997.

Goins asked the jury if getting "rid of the gun was evidence of guilt?" He then told them yes, "it can be construed that way." *Id.* He told the jury that they could "still see [Wills] clinging to that anvil of self-defense with Officer Entrekin when he's in the car." *Id.* Goins told the jury that "a person who has not acted in self defense has a responsibility for the killing. And [Wills] has done that. I'm sorry to say that, but that's what happened." R. 998. Goins concluded with, "given all of the facts in the case and the evidence, I ask that you return a verdict of Manslaughter." R. 1000.

Procedural History

On December 7, 2012, after the above-described jury trial, Wills was convicted by a vote of 10-2 of second degree murder. On January 8, 2013, Wills was sentenced to life imprisonment at hard labor without benefits. Wills timely appealed his conviction and sentence without success. *State v. Wills*, 48,469 (La.App 2 Cir. 9/25/13), 125 So.3d 509, *writ denied*, 2013-2563 (La. 6/13/14), 140 So.3d 1184.

On August 17, 2015, Wills timely filed his application for post-conviction relief with memorandum. Wills filed motions for the production of documents,

and the production of the district attorney's files on August 20, 2015. On September 30, 2015, the trial court denied the motions. On October 14, 2015, Wills mailed his notice of intent to seek supervisory writs in the matter to the trial court, and also requested the trial court to stay the post-conviction proceedings in this case. Although the trial court did not stay the proceedings, it nevertheless gave Wills until December 7, 2015 to file his application for writs with the Second Circuit Court of Appeal. On October 20, 2015, Wills mailed his application for supervisory writ of review.

On December 17, 2015, the appellate court granted Wills' writ in part, reversed and remanded in part, and denied it in part. The appellate court instructed the trial court to give Wills a transcribed copy of the court proceeding for October 22, 2012. The trial court was further "ordered to issue a *per curiam* order within 30 days" of this appellate court's decision explaining why it denied Wills' request for the production of previously released grand jury testimonies of certain named witnesses. However, on December 18, 2015, the day after the court of appeal issued its ruling, the trial court denied Wills' application for post-conviction relief without following the appellate court's instructions. The trial court denial of Wills' application for post-conviction relief effectively prevented Wills from supplementing his claims in the trial court.

On January 11, 2016, Wills filed an application for supervisory writ of review to the Second Circuit of Appeal concerning the denial of his application for post-conviction relief. However, on January 15, 2016, the trial court, after having already denied Wills' application for post-conviction relief, issued another ruling as if Wills was granted the benefit of supplementing his application, and as if it had acted in conformity with the ruling of the court of appeal.

On March 24, 2016, the Second Circuit Court of Appeal denied Wills' application for supervisory writ on "the showing made." The court of appeal did so without addressing the trial court's failure to conform to the instructions of the court; the court of appeal also failed to address any of Wills' issues on the merits. The last reasoned opinion in this case comes from the First Judicial District Court, Caddo Parish, Louisiana.

Wills' timely pro se application for writs to the Supreme Court of Louisiana was denied on May 26, 2017. On June 8, 2017, Wills filed a petition for a writ of habeas corpus in the Western District of Louisiana. On May 16, 2018, the Magistrate Judge issued a report and recommendation that recommending that Wills' petition for a writ of habeas corpus be denied and dismissed with prejudice. On July 20, 2018, the District Court Judge specifically addressed Wills' objection

concerning his attorney's decision to change his affirmative defense from defense of self and others to manslaughter without Wills' consent in violation of *McCoy v. Louisiana*, 138 S. Ct. 1500, 1510 (2018), but denied relief on that as well as Wills' other claims.

After the District Court denied a COA, Wills' timely sought a COA from the United States Court of Appeals for the Fifth Circuit, which denied such on March 1, 2019. This timely petition for a writ of certiorari limited to Wills' *McCoy* claim follows.

REASONS FOR GRANTING THE PETITION

The state official tasked with defending Everett Wills, an indigent defender the state forced him to accept as counsel over his objection, did not defend him. Instead, that defense counsel conceded Wills' guilt over his repeated and express protestations of innocence. We now know that this kind of deliberate violence to the most basic element of the adversarial system contravenes the Sixth Amendment's guarantee of autonomy in the conduct of one's defense. *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1510 (2018). We also know that this kind of error is structural, meaning its violation entitles a defendant to an automatic reversal. The question this case presents is what to do

with the convictions obtained in violation of this rule that became final prior to the rule's announcement.

There is considerable confusion evident in the Court's various pronouncements that bear on this question. No new rule of constitutional law has ever been held to meet the *Teague* exception at issue in this case—the "watershed rule" exception—as the only example given by the Court of such a rule, the right to counsel announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963), was not, in fact, applied to disturb the finality of prior convictions with any uniformity. And even if a rule such as that in *McCoy*, which has at least as strong a claim to watershed status as *Gideon*, were held to fall within this exception, concern whether the exception is applicable in state court—the only place that matters, as a practical matter, under AEDPA—casts further doubt on the survival of the *Teague* framework given subsequent statutory and jurisprudential developments in federal habeas law.

The Court would do a service to the lower courts, both state and federal, by clarifying whether the *Teague* inquiry has continuing relevance, or whether substantive rules "more accurately characterized as . . . not subject to the bar" of *Teague* are the only retroactively applicable new rules of constitutional law. *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004). This is the case in which to

do so in light of *McCoy*'s strong claim to watershed status, as well as the undisputed facts in this record that make out the *McCoy* claim.

I. The Court of Appeals has implicitly decided an important question of federal law that the Court has repeatedly raised and left open, causing considerable uncertainty in the nationwide administration of criminal justice. [Question 1]

As the Court is well aware, under the approach of Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989), subsequently adopted by the Court in *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989), "a new constitutional rule of criminal procedural does not apply, as a general matter, to convictions that were final when the new rule was announced." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 728 (2016).

A. It is unclear whether *Teague*'s "watershed rule" exception continues to exist as a practical matter.

That general rule of nonretroactivity is subject to two exceptions, the first for "substantive rules of constitutional law . . . . forbidding criminal punishment of certain primary conduct . . . [or] prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (internal quotation marks omitted). The second exception is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings." *Id.*

Several substantive rules have been held to meet the first *Teague* exception, including the rules against executing children, *Roper v. Simmons*, 543 U.S. 551 (2004), and imprisoning children for life based on nonhomicide offenses, *Graham v. Florida*, 560 U.S. 48 (2010). No new rule of constitutional law has been ever been held to satisfy *Teague*'s second exception for watershed rules of procedure.

Further, the applicability in state post-conviction proceedings of even rules satisfying *Teague*'s first exception was in doubt until *Montgomery*, where the Court summarized the state of its retroactivity jurisprudence thusly: "Neither *Teague* nor *Danforth* [v. *Minnesota*, 552 U.S. 264 (2008),] had reason to address whether States are required as a constitutional matter to give retroactive effect to new substantive or watershed procedural rules." 138 S. Ct.

In *Montgomery*, the Court resolved that question as to new substantive rules in the affirmative but addressed only "part of the question left open in *Danforth*" by again leaving open the question as to watershed procedural rules. *Id.* at 729. By focusing a portion of its analysis on the "differences from procedural rules" of substantive rules, the Court cast further doubt on the continuing vitality of "watershed rule" exception to *Teague*'s general rule of nonretroactivity.

Between *Danforth* and *Montgomery*, the Court questioned the continuing vitality of *Teague*'s exceptions more obliquely when it wrote: "Whether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague* is a question we need not address to resolve this case." *Greene v. Fisher*, 565 U.S. 34, 41 n.* (2011) (internal citations omitted).[2] If the Federal Constitution does not require state courts to apply a new watershed procedural rule in their own post-conviction proceedings, the class of cases where such a right could be vindicated in federal court would be narrow indeed. As implied by *Greene*, a state court can hardly be considered to have acted unreasonably based on a rule it is not required to apply, and therefore federal habeas relief would be limited to only those petitioners whose claims were not adjudicated on the merits by the state courts (and therefore not subject to AEDPA's deference provisions).[3]

While *Montgomery* settled the law as to the applicability of new substantive rules under *Teague*, the above history demonstrates that neither the

2 Of course, any new rule under *Teague* must have come down after the petitioner's direct appeal had concluded.

3 This would entail the perverse result that federal habeas petitioners from states unwilling to entertain new federal claims at all would be in a better position than those from states willing to adjudicate such claims on the merits, just under a retroactivity analysis different from *Teague*.

state nor the federal courts have guidance concerning the applicability of new procedural rules under *Teague*. This uncertainty casts a shadow over the finality of convictions, an interest of paramount importance to Congress in passing AEDPA and to the state and federal courts as a matter of federalism.

Authorities have "no doubt that [the] delicate task" of striking the proper balance with judicial federalism "must be a central part of the [Supreme] Court's function." WRIGHT, MILLER & COOPER, 16B FEDERAL PRACTICE & PROCEDURE § 4021, at 59276 (West 2018). The Court's docket bears this out, and its lengthy roster of habeas cases each term reveals the Great Writ to enjoy special status among this already-privileged class of issues mediating the relationship between the state and federal courts. *Teague* and its proper interpretation and application can thus fairly be called "important" within the meaning of this Court's Rule 10(c). Although there is no circuit split on the issue, neither must there be. Nothing in federal habeas jurisprudence "limit[s] [the Court's] discretion to grant certiorari to cases in which the courts of appeals have reached divergent results." *Tyler v. Cain*, 533 U.S. 656, 663 n.5 (2001).

B. The Court should conclude that the second *Teague* exception continues to exist.

The history of federal habeas jurisprudence is the history of the expansion of procedural rights. Slowly at first, and then at an accelerating pace in the 1950s and 1960s, the Court held that safeguards afforded by the Bill of Rights are incorporated in the Due Process Clause of the Fourteenth Amendment and are therefore binding on the States. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation right). But originally, criminal defendants whose convictions were final were entitled to federal habeas relief only if the court that rendered the judgment supporting their conviction lacked jurisdiction to do so. *E.g.*, *Ex parte Watkins*, 7 L. Ed. 872 (1830); *Ex parte Lange*, 176 L. Ed. 872 (1874); *Ex parte Siebold*, 100 U.S. 371 (1880).

The fiction used to bridge those two eras of law was that a judgment entered in a manner violating the Constitution divested the issuing court of jurisdiction. Thus, by the early 1900s the realm of violations for which federal habeas relief would be available to state prisoners was expanded to include state proceedings that "deprived the accused of his life or liberty without due process of law." *Frank v. Mangum*, 237 U.S. 309, 335 (1915). But at the beginning,

such relief was only available when the constitutional violation was so serious that it effectively rendered the conviction void for lack of jurisdiction. *Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Waley v. Johnston*, 316 U.S. 101 (1942). Gradually, however, the serial incorporation of the Amendments in the Bill of Rights imposed more constitutional obligations on the States.

It was against the backdrop of the routine retroactive application of new rules of constitutional law that the Court worked its first foray into retroactivity jurisprudence. In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court expressly considered the issue for the first time. Adopting a flexible, practical approach, the Court concluded that the retroactive effect of each rule should be assessed on a case-by-case basis by examining the purpose of the rule, the reliance of the States on the prior law, and the effect on the administration of justice of retroactively applying the rule. *Id.* at 629. But *Linkletter*'s strength was also its weakness, as application of the case-by-case standard produced widely divergent results. This was the lay of the land when Justice O'Connor wrote *Teague*.

As this history makes clear, the core concern of federal habeas jurisprudence has always had a focus on procedure. While the Court concluded in *Linkletter* that universal retroactive application of new rules would be

unworkable, *Teague* was quite correct to recognize that when a new procedural rule is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), it must be applied retroactively. Doing so returns federal habeas jurisprudence to its modern roots in granting relief from judgments rendered in such serious violation of the Federal Constitution—a largely procedural document—as to deprive the issuing court of jurisdiction.

To abolish this second of the *Teague* exceptions simply because some new rules of procedure do not rise to the level of fundamental due process violations and therefore the resulting conviction and sentence *may* still be accurate and therefore lawful would ignore the fact that there are rules which, while seemingly directed to the manner of determining a defendant's guilt or innocence, are so fundamental as to, by their contravention, deprive a court of jurisdiction. No other account explains the Court's early 20th-century habeas jurisprudence. And it would be anomalous indeed if federal habeas in the first quarter of the 21st-century were to become more retrograde than that of federal habeas in the first quarter of the 20th, before the further progress of law in the 1950s and 1960s so dramatically expanded the rights enjoyed by citizens in criminal proceedings.

II. The Court of Appeals has implicitly decided an important question of federal law that has not been but should be resolved by this Court. [Question 2]

Assuming, as addressed in Part I(B) above, that the second *Teague* exception continues to exist, which is to say that a state court post-conviction adjudication entered in violation of a new rule satisfying that exception can form the basis for federal habeas relief, there is the question whether the rule of *McCoy* falls within that second exception. This Court has not passed on the question but should, so as to settle this important question and either reassure states of the finality of their convictions or spur them to begin correcting convictions obtained in violation of the Constitution that they will, sooner or later, be required to redress.

A. The facts of this case make out a clear *McCoy* violation.

As explained in the Statement of the Case, Wills' attorney began trial by presenting a theory of manslaughter in opposition to Wills' affirmative defense of justifiable homicide. This was a clear violation of *McCoy,* as a brief tour through the precedential support for that decision shows.

First, Goins' action violated the longstanding rule that "such basic decisions as to whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make." *Wainwright v. Sykes*, 443 U.S.

72, 93 n. 1 (1977). Goins robbed Wills of his defense theory, and pled him guilty by utterly failing to advocate Wills' cause and allowing the jury to be the sole judges of the facts and the evidence. Goins insisted on telling the jury what it was they supposedly saw in the evidence, instead of allowing them to decide impartially as the law requires.

"[A]n attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty.'" *Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir. 1981). Even if Goins believed it "tactically wise to stipulate to a particular element of a charge or to issues of proof," he "[can] not stipulate to facts [that] amount to the 'functional equivalent' of a guilty plea." *Id.* at 650. When Wills pled not guilty, he retained the "constitutional rights fundamental to a fair trial," and thereby obligated Goins to "structure the trial of the case around" Wills' plea. *Id.* When Goins conceded guilt, he deprived Wills of his "constitutional right to have his guilt or innocence decided by the jury," and his concessions "nullified the adversarial quality of this fundamental issue." *Id.*

The District Court in this case noted that the defendant in *McCoy* maintained his innocence by insisting that he was not *the* murderer. The court failed, however, to see that Wills, through his affirmative defense—defense of self and others—also maintained his innocence by insisting that he was not *a*

murderer. In other words, Wills "justified his conduct" for the tragedy that ended in Guster's death.

According to the United States Supreme Court, Wills' claim of self defense is a "colorable constitutional claim" which *negates* the essential elements of criminal behavior. Moreover, as a matter of state law, once a defendant raises a justifiable homicide defense, the burden falls to the State to prove "beyond a reasonable doubt that the homicide was not committed in self-defense." *State v. Wells*, 2014-1701 (La. 12/8/15), 209 So.3d 709, 712. Thus, not only did counsel violate Wills' autonomy right, he also failed to hold the prosecution to its burden of proving guilt beyond a reasonable doubt.

In any event, there can be no question that Goins' conduct violated the central holding of *McCoy*:

> We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the *Assistance* of counsel for *his* defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

138 S. Ct. at 1505.

B. The *McCoy* rule should be considered a watershed rule of procedure.

The *McCoy* rule should be considered a watershed rule because it meets the twin necessary and, taken together, sufficient criteria of structural error and error causing a fundamental breakdown in the adversarial process.

1. As already established, a *McCoy* violation is a structural error.

"Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called structural." *McCoy*, 138 S. Ct. at 1511 (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Waller v. Georgia*, 467 U.S. 39 (1984)). While not all structural errors arise from violations of rights implicit in the concept of ordered liberty, the Court has strongly intimated that the reverse is true. *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007). *McCoy*'s holding that this species of error is structural meets this first inferred criterion.

This criterion also makes sense, as structural errors are so severe that they "affect the framework within which the trial proceeds," rather than merely constituting a flaw that is "an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). While some errors are structural because the right at issue is not designed to protect the defendant from erroneous

conviction but instead protects some other interest, that is but one species of such error. *McCoy*, 138 S. Ct. at 1511. Structural errors also include those "when its effects are too hard to measure, or where the error will inevitably signal fundamental unfairness." *Id.*

The Court has already concluded that *McCoy* violations should be ranked as structural based on just the first two criteria. But just as "the effects of [a lawyer's unauthorized] admission [of guilt] would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt," so too does such a concession signal fundamental unfairness. *Id.* What can be more unfair than a putative advocate, employed by the State no less, who concedes guilt?

If the right to counsel announced in *Gideon* is the archetype of a rule so fundamental as to fall within *Teague*'s second exception, then the *McCoy* rule has an even stronger claim to retroactivity. As counsel wrote in the Petition for Certiorari in *McCoy* itself, "[a] trial in which counsel concedes guilt over his client's protestations of innocence . . . contain[s] even less adversarial testing than a case in which a defendant is forced to proceed without counsel." Pet. for Cert. at 10, *McCoy v. Louisiana*, No. 16-8255, 138 S. Ct. 1500 (2018).

2. A *McCoy* violation causes a fundamental breakdown in the adversarial process, creating an impermissibly large risk of an inaccurate conviction and altering the understanding of bedrock procedural elements essential to the fairness of a proceeding.

Admittedly, the Court has rejected the argument that any number of new procedural rules fall within the second *Teague* exception. *Bockting*, 127 S. Ct. at 1183 (citing *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004); *Beard v. Banks*, 542 U.S. 406 (2004); *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Sawyer v. Smith*, 497 U.S. 227 (1990)). But in each of those instances, the rule was simply an improvement over a prior method, such as requiring a jury rather than a judge make the necessary factual determinations for imposition of the death penalty. The right to assert one's innocence is the most fundamental protection of the innocent, and its violation is correspondingly the most fundamental injury to the truth finding process one can envision. A bribed judge must still come up with a method of convicting an innocent man who protests his innocence, thereby creating opportunity for exposure of the reasoning as a lie. A silenced defendant, however, is an utterly helpless defendant.

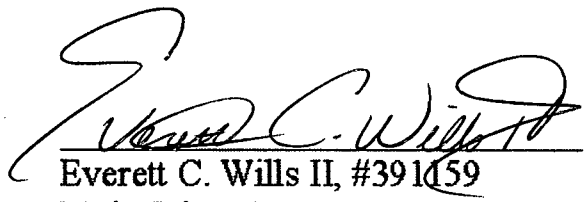
The *McCoy* rule also changes our understanding of a bedrock facet of due process. The rule is not so much a rule of procedure as it is a rule governing the very method by which trials are held in the Anglo-American tradition. Trials at

which guilt is conceded by the advocate belong to other cultures in another time, such as the Moscow Show Trials.

CONCLUSION

Louisiana has created a closed loop, whereby it can imprison at hard labor its indigent (and largely minority) citizens without those citizens ever being given the opportunity to assert their innocence. If the second *Teague* exception does not provide a remedy for such a circumstance, it has surely become a vestigial organ in federal habeas law. And like an appendix inflamed, the Court should remove it before the body of justice succumbs to an infection of dead letter.

Respectfully Submitted:



Everett C. Wills II, #391159
Main Prison East, Cypress-3
Louisiana State Penitentiary
Angola, LA 70712

Date: May 29, 2019