No. 18-9546

IN THE SUPREME COURT OF THE UNITED STATES

EVERETT CHARLES WILLS, II,
Petitioner,

v.

DARREL VANNOY, WARDEN,
Respondent.

MOTION TO FILE AMENDED PETITION FOR A WRIT OF CERTIORARI

Petitioner Everett Charles Wills, II, hereby moves to file the attached amended petition for a writ of certiorari.

BACKGROUND

Wills was convicted in 2012 of second-degree murder and sentenced to life without parole. He had instructed his appointed attorney to argue that he acted in self-defense. If accepted, that argument would have resulted in his acquittal. *See* Amended Pet. 18. Instead, and over Wills' vociferous objection, his attorney told the jury that Wills was guilty of manslaughter. *See id.* at 6-7.

Unsuccessful on direct appeal and in state postconviction proceedings, Wills sought federal habeas relief. The magistrate judge recommended denying his petition in a report issued two days after this Court announced *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018). In his objections to that report, Wills argued that *McCoy* confirmed his entitlement to habeas relief. The district court rejected that argument, holding that "the instant matter is distinguishable from *McCoy*." App. 6a. Whereas "McCoy

maintained he 'was not the murderer,' the district court observed, "Wills admitted he shot the victim and instead challenges counsel's decision to pursue a manslaughter defense over a defense of self or defense of others defense." App. 6a n.1 (internal citation omitted). The district court and the Fifth Circuit each denied a certificate of appealability.

On May 30, 2019, Wills filed a petition for certiorari in this Court. As filed, his petition presented the following questions:

> (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 postconviction 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*?

Pet. i.

At the time he filed his petition, Wills was unrepresented. He had limited knowledge of the factors this Court considers in deciding whether to grant certiorari. Only after obtaining and conferring with counsel did Wills appreciate that, with an amended petition and reframed or supplemented questions presented, his petition might enhance judicial efficiency and more clearly present a lower court conflict.

Wills now moves to file an amended petition for certiorari. The amended petition articulates additional questions that were either necessarily included within, or closely related to, those set out in the original petition. First, it asks whether Wills'

[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).

case falls within the scope of *McCoy* at all—specifically, "[w]hether *McCoy* forbids defense counsel's admission of guilt over a client's express objection where the client does not deny the *actus reus* but instructs counsel to present a defense that would negate criminal liability." Amended Pet. i (QP1). Second, it articulates two predicate questions to the question whether *McCoy* set out a "watershed" rule under *Teague*—specifically, "[w]hether the State has waived any argument that *McCoy* does not apply retroactively to already-final cases, and if the Court chooses to review the issue despite that waiver, whether … *McCoy* established a new rule of constitutional law under the framework of *Teague*[.]" *Id.* (QP2, QP2(a)). Third, it asks whether, if *McCoy* did establish a new rule, that rule "is retroactively applicable to cases on collateral review as a 'substantive rule' under the framework of *Teague*." *Id.* (QP2(b)). Fourth, it asks "[w]hether the Fifth Circuit's misapplication of the standard for issuing a certificate of appealability warrants summary reversal or vacatur." *Id.* (QP3). The amended petition also includes the questions presented in the original petition. *See id.* (QP2(c), QP2(d)).

ARGUMENT

Amending a petition for certiorari, including amending or adding to the questions presented, is permissible where the failure to include arguments or questions in the original petition is excusable and amendment is in the interests of

justice. *See* Shapiro et al., *Supreme Court Practice* § 6.27, at 427 (10th ed. 2013).[2] The shortcomings in the original petition are excusable because Wills was unrepresented and incarcerated, with no expertise in Supreme Court practice and very limited access to legal materials.

Amendment is also in the interests of justice. This Court's evaluation of the certworthiness of Wills' case will be served by a more complete presentation of the issues involved, including important issues anterior to those set out in the original petition.

1. Amending the petition is in the interests of justice because it will enable this Court to consider an important split between the Fifth Circuit and the Louisiana Supreme Court. As set out in the amended petition, the Fifth Circuit's rejection of Wills' *McCoy* claim conflicts with *State* v. *Horn*, 251 So. 3d 1069 (La. 2018), in which the Louisiana Supreme Court granted relief under *McCoy* to an individual who claimed that he had killed the victim negligently, and whose attorney admitted his guilt of manslaughter over his express objection. *See* Amended Pet. 16-18. Moreover, because the conflict is between the highest court of a State and the federal court of appeals for the circuit in which that State lies, it is a serious one that warrants prompt resolution. *See id.* at 18-19.

[2] No jurisdictional problem is posed by the fact that this motion is filed outside the original 90-day period for filing a petition for certiorari. 28 U.S.C. § 2101(c) requires that "any writ of certiorari … shall be … applied for within ninety days after the entry of … judgment." Wills "applied for" a writ of certiorari on May 30, 2019, well within that deadline, and this motion seeks only to amend the petition through which he sought the writ, not to make a new application for a writ. Moreover, this Court's practice belies any jurisdictional bar to consideration of constitutional issues first raised outside the 90-day period. *See Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 176-177 (1985).

2. Amending the petition is also in the interests of justice because the original petition did not identify all issues pertinent to retroactivity and, if granted in that form, would leave key issues concerning *McCoy*'s retroactivity unresolved. To begin with, the State waived any argument under *Teague* by failing to oppose Wills' *McCoy*-based arguments on that ground. But even if this Court were to exercise its discretion to reach the issue despite that waiver, the interests of justice will be best served if it considers *all* of the ways in which *McCoy* may apply retroactively.

Under *Teague*, determining whether a rule applies on collateral review requires three separate inquiries: (1) whether the rule is "new," and if so, whether the rule is (2) a "substantive rule of constitutional law" or (3) a "watershed rule[] of criminal procedure." *See, e.g.*, *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 728 (2016). The original petition asked the Court to consider only the third of those questions—whether *McCoy* is retroactive under the exception for "watershed" procedural rules. The amended petition asks the Court to consider all three.

If the Court were to grant certiorari based on the original petition, it would leave at least the second *Teague* inquiry—whether *McCoy*'s rule is substantive—unresolved. That question would generate numerous petitions for certiorari that would consume this Court's time and resources.

Respondent, too, would realize efficiencies from the complete, rather than piecemeal, resolution of *McCoy*'s retroactivity. If the Court ruled only on whether *McCoy* constitutes a watershed rule, litigants would continue to press retroactivity claims in Louisiana courts based on the second *Teague* exception, and Louisiana

would continue to expend resources litigating the issue. But if the Court ruled on whether *McCoy* satisfied either *Teague* exception, the question of retroactivity would be settled, and litigation over the issue would subside.

It is also in the interests of justice for the petition to spell out expressly the question whether *McCoy* established a "new" rule. To do so is not strictly necessary to this Court's consideration of that question. Under Rule 14.1(a), "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." An issue that is "'predicate to intelligent resolution of' [a] question presented … [is] 'fairly included therein.'" *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980)); *see also United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2006); *Supreme Court Practice* § 6.25(g), at 458 ("Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented" (internal quotation marks and citations omitted)). Resolution of whether *McCoy*'s rule is "new" is "predicate to intelligent resolution of" whether it applies retroactively under the "watershed" exception, because *Teague*'s exceptions govern whether *new* rules apply retroactively. *See, e.g.*, *Beard* v. *Banks*, 542 U.S. 406, 411 (2004) (in applying *Teague*, court must first ask "whether the rule is actually 'new,'" and, "*if* the rule is new, the court must consider whether it falls into either of the two exceptions to nonretroactivity" (emphasis added)). Accordingly, whether *McCoy*'s rule is new is an anterior question already

fairly included within the questions in the original petition.[3] Nevertheless, Respondent in answering the petition, as well as the parties and any *amici* preparing merits briefs in the event certiorari is granted, would benefit from express articulation of the question whether *McCoy*'s rule is new.

3. Finally, amending the petition is in the interests of justice because it will enable this Court to consider whether the decision below should be summarily reversed or vacated in light of the Fifth Circuit's manifest misapplication of the standard for issuing a certificate of appealability. In 2002, this Court granted a motion to amend a petition for certiorari, *see Hall* v. *Texas*, 122 S. Ct. 2655 (2002), and subsequently granted the petition, vacated the decision below, and remanded for further consideration in light of *Atkins* v. *Virginia*, 536 U.S. 304 (2002), *see Hall* v. *Texas*, 123 S. Ct. 70 (2002).[4] The most reasonable inference from the timing of the petitioner's motion is that he sought to amend the petition to request the relief he ultimately received under *Atkins*.[5] The Court's grant of the motion to amend in that case warrants the same treatment here. As explained in the amended petition, Wills easily satisfied the standard for a certificate of appealability, and the Fifth Circuit's

[3] For similar reasons, the question whether the State waived any argument that *McCoy* does not apply retroactively under *Teague* is fairly included within the questions presented in the original petition. Whether an issue has been waived is anterior to consideration of the substance of that issue.

[4] According to a search of the Court's online docket, the petition that was granted, vacated, and remanded in October 2002 (No. 02-5014) is the only one Hall had pending in June 2002, when his motion to amend (No. 01M73) was granted.

[5] Hall filed his petition on June 10, 2002. The Court announced *Atkins* on June 20, 2002, and granted Hall's motion to amend his petition on June 28, 2002. *See* 122 S. Ct. 2655. Efforts to locate a copy of Hall's motion and to identify the precise date of its filing, via calls to the Clerk's Office, the Public Information Office, the Library of Congress, and Hall's former counsel, were unsuccessful.

refusal to grant one disregarded this Court's mandates, set out most recently in *Buck* v. *Davis*, 137 S. Ct. 759 (2017). *See* Amended Pet. 30-33.

4. Granting the motion to amend would not cause Respondent any cognizable prejudice. As noted, Respondent would benefit from complete resolution of *McCoy*'s retroactivity. If this motion is granted, Wills will consent to any reasonable request Respondent makes for an extension of time or enlargement of the word limit for the Brief in Opposition. Respondent opposes this motion.

Respectfully submitted.

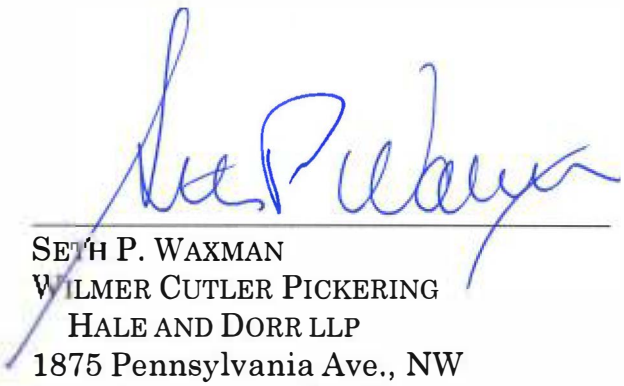
SETH P. WAXMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

NOVEMBER 22, 2019

CERTIFICATE OF SERVICE

I, Seth P. Waxman, a member of the bar of this Court, hereby certify that on this 22nd day of November, 2019, all parties required to be served have been served a copy of the Motion to File Amended Petition for a Writ of Certiorari in this matter by overnight courier at the address listed below:

ELIZABETH B. MURRILL
SOLICITOR GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
1885 N. Third Street
PO Box 94005
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov



SETH P. WAXMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com