No. 18-9546

In the Supreme Court of the United States

EVERETT CHARLES WILLS, II,

Petitioner,

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does the Constitution require state collateral review courts to give retroactive effect to new criminal procedural rules that this Court identifies as "watershed" under *Teague v. Lane*'s second exception?

(2) Did *McCoy v. Louisiana* announce a watershed rule of criminal procedure retroactively applicable under *Teague v. Lane*'s second exception?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Everett Charles Wills killed a man for disrespecting his mother's house. Wills shot his victim once before his gun jammed. Standing over his victim, Wills unjammed the gun and shot him several more times.

Wills confessed to the killing, but he implausibly maintained that he acted in self-defense. At trial, Wills' attorney advanced a manslaughter defense in light of Wills' confession. Wills claims he disagreed with his attorney's defense strategy—preferring a self-defense theory instead—but Wills never informed the trial judge of this alleged disagreement. Wills was convicted of second-degree murder and sentenced to life in prison.

While Wills was seeking habeas relief in a federal district court, this Court decided in *McCoy v. Louisiana* that "it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." 138 S. Ct. 1500, 1507 (2018). Wills asked the district court to apply *McCoy* to his case. Noting important factual differences between *McCoy* and Wills' case, the district court concluded that *McCoy* was inapposite. The Fifth Circuit denied Wills' request for a COA.

Wills petitions this Court for certiorari, asking (1) whether the Constitution requires state courts to retroactively apply rules this Court identifies as watershed rules of criminal procedure and (2) whether *McCoy* announced a watershed rule of criminal procedure. Answering Wills' first question is unnecessary because of the procedural posture of this action. Wills is a *federal* habeas petitioner, and so he is

without standing to ask whether the Constitution requires *state* courts to apply watershed procedural rules retroactively.

Nor should the Court address Wills' second question—whether *McCoy* is retroactive under *Teague*'s watershed exception. Wills failed to exhaust his "autonomy" argument in state court. And, in any event, his case is not on all fours factually with *McCoy*. The trial judge never learned of Wills' alleged disagreement with his counsel's defense strategy. And unlike Robert McCoy, Wills admitted to killing his victim.

Even if the Court could reach the question of whether *McCoy* announced the *first ever* watershed rule of criminal procedure satisfying *Teague*'s second exception (which it cannot), doing so is unnecessary here. *McCoy* broke little new ground and will apply only rarely. Thus, *McCoy* did not announce "a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 421 (2007). Wills has identified no disagreement on that score between any of the state courts of last resort or the federal circuit courts. The Court should deny Wills' petition.

STATEMENT OF THE CASE

The State charged Wills with second-degree murder after he admitted to killing Carlos Guster in a neighbor's front yard.[1] Wills killed Guster because he "disrespected his mom's house." *State v. Wills*, 48,469 (La. App. 2 Cir. 9/25/13), 125

[1] This was not Wills' first serious encounter with the law. Wills pleaded guilty to armed robbery and attempted second-degree murder in 1997 when he (or possibly his partner) shot a cab driver in the head. The driver "[m]iraculously" survived the shooting. *State v. Wills*, 32,073 (La. App. 2 Cir. 6/16/99), 740 So. 2d 741, 743. This is yet another reason why Wills' self-defense argument was implausible.

So. 3d 509, 515. After shooting Guster once, Wills' gun jammed. *Id.* at 516–17. Wills unjammed the gun, and then he shot Guster "four or five more times" while Guster was on the ground. *Id.* at 516. After the shooting, Wills' neighbor asked him if he was "going to leave the body in her yard." *Id.* In response, Wills picked up the body, walked across the street, and dumped it in a vacant lot before driving away. *Id.*

When questioned by officials, Wills admitted he killed Guster—but he claimed he acted in self-defense. *See id.* at 516. Wills contends he wanted his attorney to pursue that defense at trial. *See* Pet. App., Magistrate's R. & R. at 9. The attorney pursued a manslaughter defense instead, in light of overwhelming evidence that a self-defense argument was implausible. *See id.* at 9–12 & n.1. Wills never raised any objection with the trial judge about his attorney's decision. Ultimately, the jury convicted Wills of second-degree murder and he received a life sentence. R. & R. at 1. His conviction was affirmed on direct appeal. *Wills*, 125 So. 3d at 519. And the Louisiana Supreme Court denied his petition for review. *State ex rel. Wills v. State*, 2013-2563 (La. 6/13/14), 140 So. 3d 1184.

Wills sought post-conviction relief in state court, contending that his attorney deprived him of effective assistance of counsel. The state court denied relief, and that decision was affirmed on appeal.

Wills sought habeas relief in a federal district court, again arguing he received ineffective assistance of counsel because his attorney failed to pursue his preferred defense. *See* R. & R. at 9. The magistrate judge's report and recommendation rejected that argument. *Id.* at 12.

A few days before the magistrate judge issued the report, this Court explained in *McCoy* that it is "unconstitutional to allow defense counsel to concede guilt over [a] defendant's intransigent and unambiguous objection." 138 S. Ct. at 1507. In his objection to the magistrate judge's report, Wills contended that *McCoy* demonstrated that the state courts' denial of his ineffective assistance of counsel claim was contrary to and involved an unreasonable application of clearly established federal law. *See Objections to Magistrate R. & R.* at 3, No. 17-cv-753 (W.D. La. May 29, 2018). But the district court adopted the magistrate judge's report and recommendation and distinguished *McCoy*—explaining that, although Robert McCoy maintained he did not commit the murder, "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." Pet. App., Mem. Ruling at 1–2 & n.1.

The Fifth Circuit denied his request for a COA. Pet. App., Order at 1–2. Wills timely petitioned this Court for certiorari, and this Court requested a response from the State. Before the State could respond, Wills obtained counsel and moved to amend his petition many months after his filing deadline passed. The State opposed the motion to amend, and this Court denied leave on January 13, 2020. The State now files its brief in opposition to Wills' original petition from May 30, 2019.

REASONS FOR DENYING THE PETITION

I. ANSWERING WILLS' FIRST QUESTION IN HIS FAVOR WOULD NOT REDRESS HIS INJURY BECAUSE HE IS A FEDERAL HABEAS PETITIONER.

Wills' first question asks what would happen if (1) this Court identified a watershed procedural rule and (2) a state court refused to apply it retroactively. Pet.

at i. In effect, Wills seeks an extension of *Montgomery v. Louisiana*—where the Court held that, "when a new *substantive* rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. 718, 729 (2016), as revised (Jan. 27, 2016) (emphasis added). Wills wants to know whether the Constitution requires state courts to give retroactive effect to a rule that this Court identifies as a watershed rule of criminal *procedure*.

As Wills notes, this Court has never found it necessary to answer the question he presents. Pet. at i. n.1 (citing *Montgomery v. Louisiana*, 136 S. Ct. at 729; *Greene v. Fisher*, 565 U.S. 34, 41 n.* (2011); *Danforth v. Minnesota*, 552 U.S. 264, 277–78 (2008)). Nor is it necessary to answer Wills' question here. In his amended petition for certiorari, Wills conceded that answering this question was "not strictly necessary for a decision in Wills' favor . . . since he is proceeding here in federal habeas corpus." Am. Pet. at 28 n.11. That is correct. Even if the Court answered Wills' first question affirmatively—and declared that the Constitution requires state courts to apply retroactively rules that this Court identifies as watershed—that decision would not aid Wills, who is a *federal* habeas petitioner. Thus, Wills is without standing to raise his first question because a favorable decision would not redress his injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Moreover, even assuming a favorable decision would redress Wills' injury and the *McCoy* rule applies to his case[2]—Wills' question is unripe because answering it would require this Court to speculate about contingent future events. *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks omitted)). This Court has not declared the *McCoy* rule retroactive under *Teague*'s second exception.[3] And the Louisiana Supreme Court has not yet ruled on the question of whether *McCoy* is retroactive.[4] This Court could answer Wills' first question only after hazarding a guess about how the state supreme court will rule.

Because Wills is without standing to raise his first question and the Court could not address the question without engaging in inappropriate speculation, the Court should not grant certiorari to answer Wills' first question.

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[2] As explained below, *McCoy*'s holding is distinguishable from Wills' case and Wills failed to exhaust this claim. These are, of course, additional important reasons why the Court should not grant certiorari to answer Wills' first question.

[3] Indeed, this Court has never identified a "watershed" rule of criminal satisfying *Teague v. Lane*'s second exception to the general retroactivity bar. *See Beard v. Banks*, 542 U.S. 406, 417 (2004); *see also Teague v. Lane*, 489 U.S. 288, 311 (1989).

[4] The Louisiana Supreme Court recently remanded a capital case for consideration of whether *McCoy* applies retroactively on state collateral review. *State v. Magee*, __ So. 3d __, 2018 WL 6647250 (La. Dec. 17, 2018).

II. WILLS' CASE MAKES A POOR VEHICLE TO ADDRESS *MCCOY*'S RETROACTIVITY UNDER *TEAGUE*'S SECOND EXCEPTION.

A. Wills failed to exhaust his *McCoy* autonomy claim in state court.

Wills' second question asks whether the rule announced in *McCoy* is a watershed rule of criminal procedure retroactively applicable under *Teague*'s second exception. The Court does not need to address that question because Wills failed to exhaust his "autonomy" claim in state court.[5] 28 U.S.C. § 2254(b)(1)(A) (requiring state prisoners to exhaust all available remedies in state court before benefiting from a federal writ of habeas corpus); *see Gray v. Netherland*, 518 U.S. 152, 162–63 (1996) ("[F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.").

The purpose of the exhaustion requirement is "to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Here, the state courts have not had an opportunity to address Wills' autonomy claim with the benefit of *McCoy*. It is true this Court handed down *McCoy* after the state post-conviction courts considered his arguments. But Wills did not ask the federal district court to stay his federal habeas proceedings to allow him to further develop

[5] The State cannot inadvertently waive any exhaustion argument. 28 U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.").

and exhaust any *McCoy* claim in state court.[6] *Rhines v. Weber*, 544 U.S. 269, 278 (2005) (acknowledging a district court's discretion to stay habeas proceedings to allow a petitioner to exhaust claims under some circumstances).

This Court has "put aside" the question of how the exhaustion doctrine operates when "an intervening change in federal law cast the legal issue in a fundamentally different light." *Picard v. Connor*, 404 U.S. 270, 276 (1971); *see Francisco v. Gathright*, 419 U.S. 59, 63 n.6 (1974); Federal Habeas Manual § 9C:8. But federal circuit courts generally have declined to consider a petitioner's claim when it is affected by a Supreme Court decision rendered after the state courts have last considered the claim. *See, e.g.*, *James v. Copinger*, 428 F.2d 235, 242 (4th Cir. 1970), *on reh'g*, 441 F.2d 23 (4th Cir. 1971) (collecting cases) ("When a petitioner asserts a claim in federal court and that claim is affected by a Supreme Court decision rendered after the state courts have last considered his case, the state courts should have an opportunity to apply the law as changed before the petitioner's remedies are considered exhausted."); *Com. of Pa. ex rel. Raymond v. Rundle*, 339 F.2d 598, 599 (3d Cir. 1964) (affirming dismissal to allow state court to consider habeas petitioner's claim in light of new law).

Because the state courts have not had a full and fair opportunity to resolve Wills' claim with the benefit of *McCoy*, dismissal is required under § 2254(b)(1)(A). Thus, there is no need to reach Wills' second question.

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[6] Under Louisiana law, a petitioner can reopen state post-conviction proceedings under limited circumstances. *See* La. C.Cr.P. arts. 930.3(1), 930.8(A)(2).

B. Wills' case is factually distinguishable from *McCoy*.

Even if the Court is interested as a general matter in considering whether *McCoy* announced a watershed rule of criminal procedure, Wills' case does not cleanly present the issue of *McCoy*'s retroactivity because it is factually distinguishable in two important respects. First, Wills *never objected to the trial judge about his defense or his lawyer at any time.* Even when his lawyer asked the jury to return a manslaughter verdict, he did not object. And second—as the federal district court explained—although the defendant in *McCoy* maintained that he was not the murderer, Wills admitted he killed his victim. Pet. App., Mem. Ruling at 1–2 & n.1; *see McCoy*, 138 S. Ct. at 1508.

In *McCoy*, the Court explained that "it is unconstitutional to allow defense counsel to concede guilt over the defendant's *intransigent* and *unambiguous* objection." 138 S. Ct. at 1507 (emphasis added). And "the violation of McCoy's protected autonomy right was complete *when the court allowed counsel to usurp control* of an issue within McCoy's sole prerogative." *Id.* at 1511 (emphasis added). When the dissenting opinion in *McCoy* objected that *McCoy*'s facts were "'rare' and 'unlikely to recur,'" the majority pointed to three state supreme court opinions that had "addressed this conflict." *Id.* at 1510 (citing *People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010); *Cooke v. State*, 977 A.2d 803 (Del. 2009); *State v. Carter*, 270 Kan. 426, 429, 14 P.3d 1138, 1141 (2000)). In each one of those cases, the defendant had complained *directly to the trial court* about his counsel's behavior. *Bergerud*, 223 P.3d at 691; *Cooke*, 977 A.2d at 850–51; *Carter*, 14 P.3d at 1141–42. This distinction is

critical because, in the absence of such a complaint, the trial court is powerless to remedy the injury. And so no "structural error" occurs. *See McCoy*, 138 S. Ct. at 1512 (explaining that structural error occurred when the trial court allowed counsel's admission despite McCoy's "insistent objections").

Additionally, *McCoy* was careful to distinguish *Florida v. Nixon*, 543 U.S. 175 (2004)—in which "this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial 'when [the] defendant, informed by counsel, neither consents nor objects.'" *McCoy*, 138 S. Ct. at 1505 (quoting *Nixon*, 542 U.S. at 178). In *Nixon*, the Court held that defense counsel did not violate the defendant's constitutional rights. *See id.* In *McCoy*, the Court distinguished *Nixon* by explaining that "[McCoy] vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. Yet the trial court permitted counsel . . . to tell the jury the defendant 'committed three murders. . . . [H]e's guilty.'" *Id.* (citations omitted).

Wills did not "vociferously" insist that he did not engage in the charged acts. Nor did he formally object in court to his counsel's strategy of seeking a manslaughter conviction in light of Wills' concession that he killed the victim. Wills conceded these facts in his amended petition. *See* Am. Pet. at 6 ("I wanted to stop the trial and speak to the Judge. However, this never happened."). That makes this case very different than *McCoy* or any of the three state supreme court cases *McCoy* discussed.

Allowing defendants to raise *McCoy*-based autonomy claims *after* trial opens the door for improper gamesmanship. For example, a defendant could allow counsel

to roll the dice at trial by conceding guilt. If the jury rejected that approach, the defendant could turn around in post-conviction proceedings and claim that counsel had conceded guilt despite his desire to pursue an outlandish innocence claim or other defense. The *McCoy* rule's sensible requirement that defendants must "vociferously" object to counsel's concession of guilt prevents defendants from disguising buyer's remorse as a *McCoy* "autonomy" claim.

Moreover, the federal habeas district court correctly distinguished *McCoy* on the ground that, although McCoy maintained he did not commit the murder, "Wills admitted he shot the victim and instead challenge[d] counsel's decision to pursue a manslaughter defense over a defense of self or defense of others defense." Pet. App., Mem. Ruling at 1–2 & n.1. This is no minor distinction. Under this Court's precedent, "[a]mong the decisions that counsel is free to make unilaterally . . . [is] choosing the basic line of defense." *McCoy*, 138 S. Ct. at 1516 (Alito, J., dissenting). Giving more power to defendants to dictate "bizarre defense[s]" is "extraordinarily unwise." *Id.* at 1515. In light of these factual differences, *McCoy* is inapposite here.

Wills implicitly conceded in question 1 of his amended petition that the Court would need to expand or clarify *McCoy* before it could address *McCoy*'s retroactivity here. Pet. App., Mem. Ruling at 1–2 & n.1; Am. Pet. at i, 16. Thus, the question of *McCoy*'s retroactivity is off the table. Importantly, Wills did not ask for an expansion of *McCoy* in his original petition; he simply assumed *McCoy* applied (an assumption the State hotly contests). Thus, he waived any request for the Court to expand *McCoy* on the merits. Even if the Court disagrees with the State's waiver argument, the

Court should not expand *McCoy* on the merits in a federal habeas proceeding because that would violate the relitigation bar of the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254. When a state court has ruled on the merits of a petitioner's claim, AEDPA sharply restricts the scope of review of federal habeas courts. A habeas application must be dismissed unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). By recommending that the Court clarify or expand *McCoy* in his amended petition, Wills conceded the law was not clearly established when the state post-conviction court ruled on his claim.

In sum, Wills cannot benefit from a declaration by this Court that *McCoy* satisfies *Teague*'s second exception to the retroactivity bar because his case is factually inapposite. And Wills cannot expand *McCoy* without tripping over AEDPA's relitigation bar. And so Wills' case presents only garden variety ineffective assistance of counsel claims that require analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). Wills raised his *Strickland* arguments before the magistrate judge. But he has not raised them here, and so they are waived. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The Court should not address Wills' second question.

C. *McCoy* did not announce the first ever watershed rule of criminal procedure.

If the Court reaches the question of *McCoy*'s retroactivity despite Wills' failure to exhaust and the important factual differences that take Wills' case outside the

ambit of *McCoy*,[7] the State submits that *McCoy* did not announce a watershed rule of criminal procedure.[8] It bears emphasis that this Court has *never* identified a watershed rule of criminal procedure satisfying *Teague*'s second exception to the general rule against retroactivity. *See, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348 (2004);[9] *Beard v. Banks*, 542 U.S. 406 (2004);[10] *O'Dell v. Maryland*, 521 U.S. 151 (1997);[11] *Gilmore v. Taylor*, 508 U.S. 333 (1993);[12] *Sawyer v. Smith*, 497 U.S. 227

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[7] In his amended petition, Wills contended the State waived its retroactivity argument. Am. Pet. at 21–22. The State was under no obligation to respond to Wills' objection to the magistrate report or his COA request in the Fifth Circuit. This Court has discretion to consider the State's retroactivity argument. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). The State's limited resources make it impossible to respond to every COA request and objection to a magistrate's report, and so this is a good case for the Court to exercise its discretion. In any event, raising the issue of retroactivity himself, Wills has waived his waiver argument. It would be strange for the Court to grant certiorari to address *McCoy*'s retroactivity while disallowing the State from raising *Teague*.

[8] Wills' original petition for certiorari does not argue that the rule announced in *McCoy* is *substantive* for the purposes of *Teague*'s first exception. And Wills' original petition implicitly assumes that *McCoy* announced a *new* rule. Whether the rule that *McCoy* announced was new or substantive is an issue not "fairly included" in Wills' second question. *Yee*, 503 U.S. at 535. Recognizing the deficiencies in his original petition for certiorari, Wills moved to amend it to include arguments that the *McCoy* rule was substantive and not new. *See* Am. Pet. at 23–27. But the Court denied Wills' motion, and so Wills has waived those arguments.

In any event, the *McCoy* rule is quintessentially a procedural rule because it does nothing other than regulate the manner of determining a defendant's culpability. *Montgomery*, 136 S. Ct. at 729–30. And the *McCoy* rule was "new" because it "broke new ground." *Beard*, 542 U.S. at 416 (cleaned up).

[9] Rejecting retroactivity for *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Court had held that a jury must determine that presence or absence of aggravating factors to impose the death penalty.

[10] Rejecting retroactivity for *Mills v. Maryland*, 486 U.S. 367 (1988), in which the Court held invalid capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously.

[11] Rejecting retroactivity for *Simmons v. South Carolina*, 512 U.S. 154 (1994), in which the Court held that a capital defendant must be allowed to inform the sentencer that he would be ineligible for parole if the prosecution argues future dangerousness.

[12] Rejecting retroactivity for *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), in which the Seventh Circuit held that an instruction which left jury with false impression that they could convict even if defendant possessed one of the mitigating states of mind violated due process.

(1990);[13] *Tyler v. Cain*, 533 U.S. 656 (2001);[14] *Whorton*, 549 U.S. at 406;[15] *Chaidez v. United States*, 568 U.S. 342 (2013);[16] *see also Tharpe v. Warden*, 898 F.3d 1342 (11th Cir. 2018), *cert. denied sub nom. Tharpe v. Ford*, 139 S. Ct. 911 (2019).[17] And it is "unlikely" that the Court will ever identify such a rule. *Beard*, 542 U.S. at 417 (cleaned up). The Court has "repeatedly emphasized the limited scope of the second *Teague* exception, explaining that it is clearly meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Id.* (cleaned up).

"In order to qualify as watershed, a new rule must meet two requirements." *Whorton*, 549 U.S. at 418. "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction." *Id.* (cleaned up). This is true because new rules of procedure "merely raise the *possibility* that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352. It is not enough to say that the rule is "aimed at

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[13] Rejecting retroactivity for *Caldwell v. Mississippi*, 472 U.S. 320 (1985), in which the Court held that the Eighth Amendment barred imposition of the death penalty by a jury that had been led to believe that responsibility for the ultimate decision rested elsewhere.

[14] Rejecting retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990), in which the Court held that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood it to allow conviction without proof beyond a reasonable doubt.

[15] Rejecting retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Court held that admission of certain hearsay evidence violated the Confrontation Clause.

[16] Rejecting retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010), in which the Court held that defense counsel is ineffective for not advising defendant about the risk of deportation arising from a guilty plea.

[17] Rejecting retroactivity for *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), in which the Court held that proof of a juror's racial animus created a Sixth Amendment exception to the no-impeachment rule.

improving the accuracy of trial" or that the rule "is directed toward the enhancement of reliability and accuracy in some sense." *Sawyer*, 497 U.S. at 242–43. Rather, "the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Summerlin*, 542 U.S. at 352.

"Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418. This second requirement "cannot be met simply by showing that a new procedural rule is *based on* a 'bedrock' right." *Id.* at 420–21. Rather, the new rule "must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421 (citations omitted).

The *McCoy* rule satisfies neither of the two requirements to qualify as watershed. *See id.* at 418. In *McCoy*, the Court held only that "a defendant has the right to insist that counsel refrain from admitting guilt" even when (1) confronting "a strong government case" and (2) counsel believes that conceding guilt is the best way for his client to avoid the death penalty.[18] 138 S. Ct. at 1505, 1512. This rule does not seek to enhance the *accuracy* of a conviction. If anything, allowing defendants to maintain wildly fanciful stories in the face of overwhelming evidence and against the express advice of experienced counsel is likely to hurt the accuracy of the conviction. By adopting the *McCoy* rule, the Court prioritized autonomy over accuracy. *See id.* at 1508 (A defendant "may wish to avoid, *above all else*, the opprobrium that comes with admitting he [committed the crime]. Or he may hold life in prison not worth living

[18] *McCoy* and *Nixon* were both capital cases. The Court has not addressed the issue outside of the death penalty context. This demonstrates the narrowness of the *McCoy* rule.

and prefer to risk death for any hope, however small, of exoneration." (emphasis added)).

Moreover, the *McCoy* rule does not constitute a previously unrecognized bedrock procedural element essential to the fairness of a proceeding. The *McCoy* rule will apply only rarely. *See id.* at 1510 (identifying only three state supreme court cases in the past twenty years). For example, as explained above, it does not even apply to this case. And the *McCoy* rule is cut from the same cloth as several other rules that this Court has identified giving criminal defendants the final say over important trial/defense decisions. *See, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (allowing criminal defendants to seek a new attorney who will better effect their wishes); *Faretta v. California*, 422 U.S. 806, 819 (1975) (holding that a defendant can fire counsel and represent himself); *Harris v. New York*, 401 U.S. 222, 225 (1971) (explaining that a defendant has the right to insist on a jury trial and take the stand in his own defense); *Brookhart v. Janis*, 384 U.S. 1, 5–7 (1966) (holding that a defendant cannot be forced to enter a plea against his wishes); *see also McCoy*, 138 S. Ct. at 1516 (Alito, J., dissenting) (collecting cases).

A rule that applies only rarely and breaks little new ground cannot be "a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 421. Because *McCoy* did not announce a watershed rule of criminal procedure, it does not satisfy *Teague*'s second exception.[19]

[19] Even if, as a "threshold" matter, the Court found that *McCoy* satisfied *Teague*'s second exception, Wills' claim should still be required to survive the relitigation bar of AEDPA. *Horn v. Banks*, 536 U.S. 266, 272 (2002) ("[I]n addition to performing any analysis required by AEDPA, a federal court

As even Wills acknowledges, there is no disagreement about that conclusion between any of the state courts of last resort or the federal circuit courts. Pet. at 15. Even if the Court could reach Wills' second question, there simply is no need address that issue here.

CONCLUSION

The Court should deny Wills' petition.

Respectfully submitted,

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considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."). The Court has expressly reserved the question of whether a claim satisfying one of *Teague*'s exceptions will be required to survive AEDPA's relitigation bar. *Greene*, 565 U.S. at 39 n*.

Because the state post-conviction court ruled on the merits of Wills' claim, a federal habeas court cannot grant Wills' petition unless the state court issued a decision involving an unreasonable application of clearly established federal law. § 2254(d). There is no dispute that Wills' conviction became final (and the state post-conviction court ruled on the merits) before the Court handed down *McCoy*. Thus, the *McCoy* rule was not clearly established federal law for the purposes of § 2254(d).

The holding of *Montgomery v. Louisiana* is not to the contrary. 136 S. Ct. at 729. Although the Court held that new substantive rules have a constitutional dimension, that holding does not extend to procedural watershed rules. *See id.* Thus, even if the *McCoy* rule satisfies *Teague*'s second exception, Wills' claim should fail anyway under AEDPA's relitigation bar.