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 THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Wills asks this Court to determine whether *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), applies retroactively. Louisiana's opposition focuses primarily on purported "vehicle problems," devoting only cursory attention to the merits and saying nothing against the important and recurring nature of *McCoy*'s retroactivity. The principal asserted vehicle problem, however, only underscores why certiorari is warranted. If it grants Wills' petition, this Court will also need to resolve an antecedent question regarding *McCoy*'s scope—as Louisiana recognizes—and courts are split on that question. The ability to resolve that split makes this case an ideal

vehicle. Louisiana's other arguments are flawed. This Court should grant certiorari.[1]

ARGUMENT

I. THIS CASE IS AN IDEAL VEHICLE

Wills' petition allows the Court to resolve not only whether *McCoy* applies retroactively, but also the antecedent question of whether *McCoy* applies to a defendant asserting innocence of the charged crimes who acknowledges committing the actus reus. The Fifth Circuit disagrees with the Louisiana Supreme Court on that question. And Louisiana's assertion that Wills failed to exhaust his *McCoy* claim is belied by the record and, regardless, no bar to review.

A. This Case Allows The Court To Resolve An Antecedent Question, On Which Courts Are Divided, Regarding *McCoy*'s Scope

Louisiana argues (at 11) that Wills' petition is a bad vehicle because this Court could only grant Wills relief if it first resolves in his favor an antecedent question about *McCoy*'s scope: specifically, whether *McCoy* applies when a defendant admits the actus reus but asserts a defense that would, if accepted, produce a not-guilty verdict. This antecedent question is the subject of a square split of authority. In a single case, this Court could resolve two pressing questions warranting review.

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[1] Louisiana (*e.g.*, at 5, 10, 11) repeatedly relied on the Amended Petition. Accordingly, Wills likewise cites to that filing when appropriate, and, for convenience, cites the consecutively-paginated Appendix to the Amended Petition ("App.").

1. The district court held that *McCoy* was inapplicable to Wills' case because unlike McCoy, who consistently "maintained that he 'was not the murderer[,]' … Wills admitted that 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 (quoting *McCoy*, 138 S. Ct. at 1509). The Fifth Circuit, in denying a certificate of appealability, held that "jurists of reason" could not "disagree with the district court's resolution of [Wills'] constitutional claims." *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003). Under the Fifth Circuit's approach, therefore, a defendant is unprotected by *McCoy* unless he denies committing the actus reus.

The Louisiana Supreme Court has reached the opposite conclusion. In *State* v. *Horn*, 251 So. 3d 1069 (La. 2018), defense counsel repeatedly told the jury to find Horn not guilty of first-degree murder and convict him instead of second-degree murder or manslaughter, *id.* at 1074-1075—contrary to Horn's instructions only to argue "accidental killing via the negligent homicide statute," *id.* at 1075. The State argued that Horn's instruction to argue negligent homicide—as opposed to denying outright that he killed the victim—made *McCoy* inapplicable. *See id.* The court rejected that argument. It explained that "*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense," and that "Horn's objective … to assert a defense of innocence to the crime charged and the lesser-included offenses" fell within *McCoy's* scope. *Id.* at 1075-1076; *see also id.* at 1076 (Louisiana law required a not-guilty verdict if the jury had credited Horn's desired negligent-homicide defense).

2. Wills' *McCoy* claim would succeed under *Horn*. Like Horn, Wills acknowledged killing the victim, and

instructed his counsel not to admit guilt and instead to present a defense that would have, if accepted, resulted in a not-guilty verdict, *see, e.g.*, *State* v. *Curley*, 250 So. 3d 236, 243 (La. 2018) ("Self-defense is … 'a defense … which defeats culpability.'"). Instead, Wills' counsel, like Horn's, told the jury that his client was guilty of manslaughter.

The Fifth Circuit's decision therefore directly conflicts with the Louisiana Supreme Court's—a particularly important split given their overlapping jurisdictions. *See, e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 762 (1994) (certiorari granted to resolve conflict between Florida Supreme Court and Eleventh Circuit). Granting certiorari on Wills' petition will enable the Court to resolve that split.

Louisiana contends (at 11) that this Court may not resolve this antecedent question because Wills "waived any request … to expand *McCoy*." This is mistaken, for two reasons. First, Wills seeks not to expand *McCoy*, but to vindicate a right *McCoy* already recognizes. *Infra* pp.6-8. Second, whether Wills' claim falls within *McCoy's* scope is "'predicate to an intelligent resolution' of the question presented," because the retroactivity of *McCoy* is only pertinent if Wills has a claim under *McCoy*—and is "therefore 'fairly included therein.'" *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (quoting S. Ct. R. 14.1(a)). A question "fairly included" is not waived. *See* S. Ct. R. 14.1(a).

B. The Exhaustion Requirement Does Not Bar Review

Louisiana also argues (at 7) that this case is a poor vehicle "because Wills failed to exhaust his 'autonomy' claim in state court." This is wrong.

Wills' application for state post-conviction relief argued that his Sixth and Fourteenth Amendment rights were violated when his public defender, Kurt Goins, "re-wrote [Wills'] defense theory without his consent [and] conceded guilt in his opening statement[] and in his closing argument" and "[f]ailed to subject the state's case to meaningful adversarial testing." Dkt. 1-4 at 111.[2] Wills explained that Goins presented his manslaughter theory to the jury "in opposition to [Wills'] affirmative defense of justifiable homicide"—a defense Wills had "consistently maintained"—and without notifying Wills, let alone obtaining his consent. *Id.* In making this argument, Wills invoked the autonomy-based principles that became the analytical framework of *McCoy*. *Compare id.* (in arguing that Goins' admission of guilt over Wills' objection violated his constitutional rights, relying on principle that "'such basic decisions as … whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make'"), *with McCoy*, 138 S. Ct. at 1508 ("Some decisions … are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category." (citation omitted)). Wills also relied on *Wiley* v. *Sowders*, 647 F.2d 642 (6th Cir. 1981), which held that defense counsel's admitting guilt deprived the defendant of the "constitutional right to have his guilt or innocence decided by the jury" and "nullified the adversarial quality of this fundamental issue." *Id.* at 650 (quoted in Dkt. 1-4 at 113); *see also id.* at 649.

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[2] "Dkt." refers to *Wills* v. *Vannoy*, No. 5:17-cv-753 (W.D. La.).

A petitioner satisfies 28 U.S.C. § 2254(b)(1)(A)'s exhaustion requirement if he "refers to provisions of the Federal Constitution in respect to" the particular claim, cites to a "case that might have alerted the court to the alleged federal nature of the claim," or provides "a factual description" supporting the claim. *Baldwin* v. *Reese*, 541 U.S. 27, 33 (2004). Wills' state post-conviction petition satisfied all three requirements. He specifically invoked his Sixth Amendment right to "make basic decisions" about his case; cited a federal appellate case applying these principles; and explained how, factually, Goins abrogated his autonomy. As such, Wills gave Louisiana "the 'opportunity to pass upon and correct' alleged violations of [Wills'] federal rights.'" *Id.* at 29.

Regardless, the courts below did not dismiss Wills' *McCoy* claim as unexhausted; they rejected it on the merits. *See* App. 6a. That merits determination is incorrect and properly subject to this Court's review.[3]

II. WILLS IS ENTITLED TO RELIEF UNDER *MCCOY*

Wills has a meritorious *McCoy* claim. His case falls within the scope of *McCoy*; *McCoy* should apply retroactively; and the Antiterrorism and Effective Death Penalty Act ("AEDPA") does not bar relief.

A. This Case Falls Within The Scope Of *McCoy*

Contrary to Louisiana's assertion (at 11) that Wills requires "an expansion of *McCoy*," this case fits square-

[3] It is unclear whether the courts below concluded that Wills had exhausted his claim but decided that it was meritless, or bypassed exhaustion, pursuant to *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005), on the ground that Wills' claim was "plainly meritless." Either way, their merits determinations were erroneous.

ly within *McCoy*. As *Horn* correctly recognized, *McCoy* does not turn on whether the defendant denies any involvement in the charged conduct.

McCoy held that "[a]utonomy to decide that the objective of the defense is to assert innocence" belongs in the "category" of "decisions … reserved for the client." 138 S. Ct. at 1508. "[M]aintaining … innocence," it explained, is not a "strategic choice[] about how best to *achieve* the client's objectives; … [it is a] choice[] about what the client's objectives in fact *are*." *Id.* Accordingly, *McCoy* "h[e]ld that a defendant has the right to insist that counsel refrain from admitting guilt." *Id.* at 1505.

Nothing about that holding or its rationale turns on the grounds on which the defendant asserts innocence. A defendant who, like Wills, argues self-defense "maintain[s] innocence" just as much as one who asserts an alibi. *See, e.g.*, *State* v. *Sandiford*, 90 So. 261, 263 (La. 1921) (defendant's "guilt or innocence" depended on resolution of self-defense claim). Wills, just as much as McCoy, "ha[d] the right to insist that counsel refrain from admitting guilt." *McCoy*, 138 S. Ct. at 1505.

Louisiana also argues (at 9-11) that *McCoy* should be limited to cases where a defendant alerts the court that counsel's admission of guilt contravened her instructions. That proposed limitation is equally baseless. The violation occurs when the defendant insists on innocence and defense counsel instead admits guilt.[4]

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[4] Multiple passages in *McCoy* confirm this. *See, e.g.*, 138 S. Ct. at 1509 (lawyer "must abide by" objective to maintain innocence); *id.* ("it was not open to [McCoy's lawyer] to override McCoy's objection"); *id.* at 1510 ("counsel may not admit her client's guilt … over the client's intransigent objection"); *see also Cuyler* v. *Sullivan*, 446 U.S. 335, 343-344 (1980) ("[T]he right to

It does not require a defendant to breach courtroom protocol by addressing the judge directly. *See People* v. *Eddy*, 244 Cal. Rptr. 3d 872, 879 (Ct. App. 2019) (in-court objection not required under *McCoy*); *cf. United States* v. *Mullins*, 315 F.3d 449, 455 (5th Cir. 2002) ("[R]outine instructions to defendants … often include the admonition … to address the court only when asked to[.]").[5]

B. *McCoy* Applies Retroactively

If this Court grants certiorari to consider *McCoy*'s retroactivity, it should consider all three bases for retroactivity set out in *Teague* v. *Lane*, 489 U.S. 288 (1989): *McCoy* did not establish a new rule; if it did, its rule is "substantive"; and if the rule is new and not substantive, it is a "watershed" procedural rule. *See* Am. Pet. 22-28; *cf.* Opp. 13 n.8 (arguing that Petition "implicitly assumes that *McCoy* announced a *new* rule" and

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counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."). Louisiana focuses (at 9) on a sentence in the Court's structural-error analysis (138 S. Ct. at 1511 ("[T]he 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.")). But the Court was not considering whether court inaction was *necessary* for a Sixth Amendment violation; it was explaining that a showing of prejudice was *unnecessary*. *See id.* *McCoy* and *Cuyler* confirm that the State's conducting a criminal trial at which defense counsel abrogates the defendant's right to maintain innocence is sufficient to violate the Sixth Amendment.

[5] Moreover, Wills' affidavit details his efforts to bring his opposition to Goins' concession to the judge's attention, and Goins' notes show that Wills told Goins repeatedly to assert self-defense, and not admit guilt. *See* Am. Pet. 5 n.4, 6-7. Wills also asserted self-defense in a pro se filing. Dkt. 17-3 at 257.

arguing that *McCoy*'s rule is "quintessentially … procedural").

Louisiana asserts (at 15-16) that *McCoy* did not announce a watershed procedural rule because its rule "does not seek to enhance the *accuracy* of a conviction," "applies only rarely," and "breaks little new ground." Assuming the rule is new and not substantive, all three contentions are wrong.

McCoy enhances the accuracy of convictions because when a defendant maintains innocence but defense counsel admits guilt, there is no meaningful testing of the prosecution's case. It is a foundational principle of our system of justice "that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975). When counsel admits guilt against the defendant's express wishes, conviction is virtually guaranteed—irrespective of the defendant's actual guilt or innocence. Louisiana's reference (at 15) to a defendant maintaining innocence "in the face of overwhelming evidence" puts the cart before the horse, because that purportedly overwhelming evidence is never subjected to adversarial testing.

Moreover, if (*arguendo*) *McCoy* established a new procedural rule, that rule is on par with *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the benchmark case for watershed rules, *see Beard* v. *Banks*, 542 U.S. 406, 417 (2004). *Gideon* held that the "noble ideal" of "fair trials … in which every defendant stands equal before the law" "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." 372 U.S. at 344-345. Equally, that "noble ideal" cannot be realized if defense counsel tells the ju-

ry that the defendant is guilty even though the defendant maintains innocence. Such a defendant no more has "a lawyer to assist him" than one who has no lawyer at all. And, contrary to Louisiana's assertion (at 16) that *McCoy* "will apply only rarely," every criminal defendant has the "prerogative" to choose between "admit[ting] guilt in the hope of gaining mercy at the sentencing stage, or … maintain[ing] his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *McCoy*, 138 S. Ct. at 1505.

C. AEDPA Does Not Preclude Relief

Finally, Louisiana asserts (at 12) that awarding Wills relief "would violate the relitigation bar" of AEDPA because, by asking this Court to "clarify or expand *McCoy*," Wills has "conceded the law was not clearly established when the state post-conviction court ruled on his claim." *See* 28 U.S.C. § 2254(d)(1).

To the contrary, Wills asks this Court simply to apply *McCoy*, as the Louisiana Supreme Court did in *Horn*. But, more importantly, Louisiana's argument ignores that AEDPA allows relief when a state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *Brumfield* v. *Cain*, 135 S. Ct. 2269, 2277 (2015). The state court's finding that Wills based his Sixth Amendment claim on "mere assumptions with no factual or evidentiary basis," Dkt. 1-9 at 14, is just such an unreasonable determination.

Wills' affidavit described the key facts with specificity, including his adamant objection after Goins admitted guilt and his appeal to courtroom personnel. *See* Aff. 1-3, Dkt. 17-8 at 123-125. Goins' handwritten notes

recorded Wills' repeated "insist[ence]" on self-defense, his rejection of Goins' manslaughter argument, and their resulting "impas[s]e." *See* Dkt. 17-8 at 127-129, 131-133. In light of this detailed evidence, any reasonable observer would disagree with the determination that Wills based his claims on "mere assumptions" with "no factual or evidentiary basis." That error entitles Wills to relief under AEDPA.[6]

III. *McCoy*'s Retroactivity Is An Important And Recurring Question

Louisiana's opposition is notably silent as to the important and recurring nature of *McCoy*'s retroactivity. In Texas, for example, the Court of Criminal Appeals recently granted a stay of execution and ordered briefing on the question (among others), "Is *McCoy* retroactive to convictions that are already final upon direct review?" *Ex parte Barbee*, 2019 WL 4621237, at *2 (Tex. Crim. App. Sept. 23, 2019) (per curiam) (unpublished). The Louisiana Supreme Court, similarly, remanded a capital case for consideration of whether "*McCoy* v. *Louisiana* applies retroactively on state collateral review." *State* v. *Magee*, 2018 WL 6647250 (La. Dec. 17, 2018) (per curiam).[7] The issue is presented in

[6] It follows *a fortiori* that the Fifth Circuit erred in denying Wills a certificate of appealability, because "jurists of reason could disagree with the district court's resolution of his constitutional claims." *Miller-El*, 537 U.S. at 327. Indeed, this improper denial warrants summary reversal. *See* Am. Pet. 30-33.

[7] On remand, the district court ruled that *McCoy* does not apply retroactively. *See State* v. *Magee*, No. 430371J (22d Jud. Dist. Ct. St. Tammany Parish July 11, 2019), *writ pending*.

myriad other state and federal cases.[8] It is likely to recur until definitively resolved by this Court.[9]

Furthermore, although Wills' case illustrates that *McCoy* errors are not confined to capital cases, they will likely occur more frequently there, *see McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting), and so are likely to arise in connection with emergency applications for stays of execution, *see, e.g.*, *King* v. *Texas*, Nos. 18-8970 and 18A1091. Deciding *McCoy*'s retroactivity now will remove the need to resolve the issue's certworthiness repeatedly and on an emergency basis.

CONCLUSION

The petition should be granted.

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[8] *See, e.g.*, *State* v. *Weber*, 2019 WL 3430487, at *2-4 (Del. Super. Ct. July 29, 2019) (unpublished); *Smith* v. *Hooks*, 2018 WL 9815045, at *7-8 (E.D.N.C. Sept. 19, 2018) (unpublished); *Elmore* v. *Shoop*, 2019 WL 3423200, at *10 (S.D. Ohio July 30, 2019) (unpublished).

[9] Resolution by this Court is also important because some States permit a successive post-conviction petition based on a new decision only after *this Court* has ruled it retroactive. *See, e.g.*, *Commonwealth* v. *Manus*, 2019 WL 2598179, at *3 (Pa. Super. Ct. June 25, 2019) (unpublished).

Respectfully submitted.

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