CAPITAL CASE

No. 20-1686

IN THE

Supreme Court of the United States

BOBBY LEE HAMPTON,

Petitioner,

v.

DARREL VANNOY, WARDEN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIRST JUDICIAL DISTRICT COURT OF CADDO PARISH, LOUISIANA

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court held in *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), "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," *id.* at 1505. At Bobby Hampton's trial, defense counsel disregarded Hampton's "right to make the fundamental choices about his own defense," *id.* at 1511, and—over Hampton's strenuous objection—admitted Hampton's guilt to the jury. According to Louisiana (Opp. 3), Hampton has "no avenue for relief." That startling assertion is incorrect.

With one exception, Louisiana does not attempt to argue that Hampton's trial complied with *McCoy*. Nor does Louisiana dispute that *McCoy*'s retroactivity is an important, and frequently recurring, issue, *see* Pet. 26. Instead, the State primarily relies (Opp. 2) on the proposition that this Court's recent decision in *Edwards* v. *Vannoy*, 141 S. Ct. 1547 (2021), "resolved" "all of the important legal issues that Hampton's petition implicates." But *Edwards* did not address, let alone resolve, *McCoy*'s status as a substantive rule of constitutional law. And under this Court's precedent, *McCoy* is substantive. The State's contrary arguments, as well as the purported non-merits obstacles Louisiana says inhibit this Court's review, are all unavailing.

At the very least, if this Court does not grant certiorari and resolve the merits of Hampton's petition, it should grant certiorari, vacate the decision below, and remand for the Louisiana state court to decide the retroactivity of *McCoy* given the new jurisprudential development that, with no exceptions whatsoever, "new procedural rules do not apply retroactively on collateral review," *Edwards*, 141 S. Ct. at 1562. The limitations on retroactive application of new rules of constitutional law adopted by this Court in *Teague* v. *Lane*, 489 U.S. 288 (1989), do not "constrain[] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion." *Danforth* v. *Minnesota*, 552 U.S. 264, 266 (2008). Louisiana has, up until this point, aligned its state-law retroactivity doctrine with *Teague*. But that alignment was undertaken when the possibility existed that certain watershed procedural rules might retroactively be applicable. Now that *Teague*'s exception for new rules of criminal procedure has been held to be illusory, there is reason to believe that Louisiana will adopt a more robust

framework for retroactivity. A grant, vacatur, and remand will allow Louisiana courts the opportunity to consider this case under a revised retroactivity standard.[1]

ARGUMENT

I. *McCoy* IS A SUBSTANTIVE RULE

Hampton's petition explained (at 15-20) that *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), announced a substantive rule of constitutional law because it removed an entire class of individuals—namely, criminal defendants whose lawyers admit the defendant's guilt to the jury over the defendant's strenuous objection to that strategy—from the State's ability to punish. Louisiana does not dispute that, following *McCoy*, States lack authority to punish such individuals. Instead, it principally asserts (Opp. 11) that treating *McCoy* as a substantive rule "would collapse" "the distinction between substantive and procedural rules," rendering "all new constitutional rules … appli[cable] retroactively." That fear is unfounded.

To start, *McCoy* is relatively unique among constitutional holdings in removing an entire class of individuals from the State's authority to punish. "As this Court has repeatedly made clear, … 'the general rule' is that 'a constitutional error does not automatically require reversal of a conviction.'" *Greer* v. *United States*, 141 S. Ct. 2090, 2099 (2021). Thus, ordinarily, the State may convict an individual falling within the class of people protected by a constitutional guarantee so long as "the government can show 'beyond a reasonable

[1] Hampton acknowledges that *Edwards* forecloses his argument (Pet. 20-25) that *McCoy* is a watershed rule of criminal procedure retroactive on collateral review.

doubt that the error complained of did not contribute to the verdict obtained.'" *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1907 (2017). This harmless-error doctrine can explain, for example, why the Confrontation Clause holding in *Crawford* v. *Washington*, 541 U.S. 36 (2004), does not apply retroactively, *Whorton* v. *Bockting*, 549 U.S. 406, 409 (2007). *See Coy* v. *Iowa*, 487 U.S. 1012, 1021 (1988) ("violations of the Confrontation Clause are subject to … harmless-error analysis").

Unlike most constitutional errors, "[v]iolation of a defendant's Sixth Amendment-secured autonomy … is not subject to harmless-error review." *McCoy*, 138 S. Ct. at 1511. Instead, *McCoy* error is "structural." *Id.* Such structural errors are "'subject to automatic reversal' on appeal." *Greer*, 141 S. Ct. at 2099. A defendant subject to *McCoy* error therefore has a qualitatively more categorical—or "substantive"—prohibition on criminal punishment than a defendant whose trial was infected by a constitutional defect subject to harmless-error review. And because "this Court [has only] held that an error is structural, and thus requires automatic reversal," "in rare cases," *Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006), there is no risk of Louisiana's prediction (Opp. 11) that "all new constitutional rules would apply retroactively" ever materializing.

Louisiana also posits (Opp. 12) that if Hampton's understanding of substantive rules is correct, the holding in *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), that "the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction … in state court," *id.* at 1397, would be substantive, even though this Court characterized "the rule announced in *Ramos* [a]s procedural," *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1555 n.3 (2021). To the contrary, the rights protected in *McCoy* and *Ramos* are different, making the retroac-

tivity analyses in those cases distinguishable. *See Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016) ("the function of the rule" "determine[s] whether [it] is substantive or procedural"), *quoted in* Pet. 16.

Even assuming truly categorical constitutional rights may nonetheless be procedural, Louisiana acknowledges that in order to be procedural, a right must "affect 'only the manner of determining the defendant's culpability.'" Opp. 10 (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004)). *Ramos* implicated "the manner of determining the defendant's culpability" by allocating the responsibility of reaching a verdict to a unanimous jury. *McCoy*, by contrast, left the mechanism for determining a defendant's culpability unaltered. "It did not, for example, 'allocate decisionmaking authority' between judge and jury, or regulate the evidence that the court could consider in making its decision." *Welch*, 136 S. Ct. at 1265 (citation omitted). Instead, *McCoy* implicated a defendant's "[a]utonomy to decide … the objective of the defense." *McCoy*, 138 S. Ct. at 1508. This consideration is separate from the process through which a defendant's guilt is adjudicated. *See id.* at 1511 (*McCoy* error is structural because it "'is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty'"). As such, *McCoy* qualifies as a substantive rule, and is therefore retroactively applicable on collateral review.

II. THIS PETITION IS A GOOD VEHICLE TO RESOLVE *McCOY*'S RETROACTIVITY

Louisiana raises two non-merits arguments against certiorari, one jurisdictional and the other prudential. Neither purported weakness of this petition holds water.

A. On jurisdiction, Louisiana asserts (Opp. 14-15) that "whether to provide retroactive relief in a state collateral proceeding is a question of state law," and that "this Court does not have jurisdiction to consider the State's retroactivity rulings for the purposes of state law." This is true as far as it goes, but it does not go very far. In rejecting Hampton's successive application for post-conviction relief, the Louisiana district court relied on the *federal* retroactivity standard promulgated in *Teague* v. *Lane*, 489 U.S. 288 (1989). *See* Pet. App. 2a. And this Court's precedent has long held that it "ha[s] jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *Ohio* v. *Reiner*, 532 U.S. 17, 20 (2001) (per curiam).[2]

Montgomery v. *Louisiana*, 577 U.S. 190 (2016), illustrates the weakness in the State's jurisdictional argument. Like this case, the petitioner in *Montgomery* filed an application for post-conviction relief in Louisiana state court. *Id.* at 195-196. Like this case, the peti-

[2] *See also Foster* v. *Chatman*, 136 S. Ct. 1737, 1746 (2016) ("When application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.'"); *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984) ("It is … well established … that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.").

tioner in *Montgomery* based his claim for state collateral relief on an argument that one of this Court's precedents applied retroactively. *Id.* And like this case, the Louisiana trial court in *Montgomery* denied relief on the ground that the precedent in question did not apply retroactively under *Teague*, and the Louisiana Supreme Court denied further review. *Id.* at 196.[3] Before reaching the merits in *Montgomery*, this Court held that it had jurisdiction to review the denial of state post-conviction relief because "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." *Id.* at 200; *see id.* at 197 ("If … the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court.").

The same is true here; *McCoy* is a substantive rule, and the decision below refused to apply *McCoy* retroactively to Hampton's case. That refusal falls squarely within this Court's jurisdiction. Louisiana's only argument to the contrary (Opp. 15-16) is that *Montgomery*'s jurisdictional holding is "limited … to new substantive rules," and *McCoy*, in the State's view, "announced a procedural rule." As Part I explained, that second premise—that *McCoy* is procedural and not substantive—is wrong.

B. On a prudential level, Louisiana—relying heavily on the dissent in *McCoy*—contends (Opp. 6-8) that

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[3] The trial court decision in *Montgomery* applied the Louisiana Supreme Court's holding in *State* v. *Tate*, 130 So. 3d 829 (La. 2013), that "under the *Teague* analysis, … the [relevant] rule is not subject to retroactive application on collateral review," *id.* at 844. *See Montgomery*, 577 U.S. at 197.

this case is a poor vehicle to address the retroactivity of *McCoy* because, in the State's view, "there is no reason to believe that Hampton 'vociferously' objected" to his counsel's admission of guilt. This argument is unavailing on several levels.

For one, the Louisiana district court expressly assumed that Hampton had adequately objected to his counsel's strategy, and then went on to hold *McCoy* non-retroactive. Pet. App. 1a n.1. As the petition explained (at 26), that assumption makes this case an *ideal* vehicle, because—unlike other cases in which *McCoy*'s retroactivity has been raised—the district court here squarely addressed the issue of whether *McCoy* applies retroactively to cases on collateral review. It is hard to imagine how a case could do a better job of "unambiguously present[ing] that issue" than what happened here.

In any event, Louisiana's assertion to the contrary (Opp. 7) notwithstanding, the record contains significant evidence "that Hampton 'vociferously' objected." This evidence includes testimony from Hampton's trial counsel that Hampton was advised to plead guilty to second degree murder but instead rejected that advice and insisted on his innocence; testimony from Hampton's trial mitigation investigator that she and Hampton's mother both gave similar advice to Hampton, to no avail; and a colloquy between the judge, Hampton's trial counsel, and Hampton in which the judge himself was alerted to Hampton's refusal to plead guilty. *See* Pet. 4-5. This record belies Louisiana's position (Opp. 7) that the district court had no basis for its assumption that Hampton had adequately objected to his counsel's strategy of admitting guilt to second degree murder.

Louisiana tries to brush aside this evidence by pointing out (Opp. 7) that "[n]othing in Hampton's petition suggests that he alerted the trial judge of his disagreement with his attorney's approach." Putting aside the colloquy mentioned in the previous paragraph, the State cites no authority for the proposition that an objection to a strategy of admitting guilt must be made in the presence of a judge. Nothing in *McCoy* speaks to such a requirement and, if anything, this Court's decision suggests the opposite. *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"). In fact, at least one published appellate decision has expressly rejected the argument that "preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction." *See People* v. *Eddy*, 244 Cal. Rptr. 3d 872, 879 (Ct. App. 2019).

Finally, this Court need not fear the prospect of "improper gamesmanship" (Opp. 6) if *McCoy* claims may proceed without the defendant objecting in open court. Louisiana suggests (Opp. 6-7) that "a defendant could allow counsel to roll the dice at trial by conceding guilt," and then, if unhappy with the result of that strategy, "turn around in post-conviction proceedings and claim that counsel had conceded guilt despite his desire to pursue an outlandish innocence claim." A post-conviction court faced with such a scenario would (depending on what the evidence reflected) be within its rights to find that such testimony from a defendant is not credible, especially if contradicted by defense counsel. Courts routinely resolve post-conviction claims turning on determinations regarding what ad-

vice or conversations took place between a defendant and defense counsel. A defendant seeking relief under *McCoy* would be no different, and Louisiana has given no reason why *McCoy* claims would be uniquely challenging for courts to resolve.

III. Alternatively, This Court Should Grant Certiorari, Vacate The Decision Below, And Remand

If this Court decides not to consider the merits of Hampton's petition, it should instead grant certiorari, vacate the decision below, and remand the case to the Louisiana state courts to reconsider whether to apply *McCoy* retroactively now that *Edwards* has modified the *Teague* standard. This Court has "frequently held that in the exercise of [its] appellate jurisdiction [it has] power not only to correct error in the judgment under review but to make such disposition of the case as justice requires." *State Tax Comm'n of Utah* v. *Van Cott*, 306 U.S. 511, 515 (1939). "And in determining what justice requires, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Id.* *Edwards*'s vitiation of the watershed exception is such a change in law, and a grant, vacatur, and remand is necessary to ensure that a fluke of timing is not the only reason why Hampton winds up "caught in a procedural morass," *see* *Wellons* v. *Hall*, 558 U.S. 220, 221 (2010) (per curiam), facing a constitutionally defective capital sentence.

This Court has long held that "a state court, when reviewing its own state criminal convictions, [may] provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*." *Danforth* v. *Minnesota*, 552 U.S. 264, 282 (2008). Louisiana currently has not availed itself of this flexibility, instead "adopt[ing] the *Teague* standard for all cases on collateral review in

[its] state courts." *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292, 1296 (La. 1992). But following *Edwards*, there is reason to suspect this convergence will change.

Most importantly, the Louisiana Constitution provides that "every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person … or other rights." La. Const. art. I, § 22. Prior to *Edwards*, it was possible that a criminal defendant who suffered a violation of a constitutional right that was recognized after the defendant's conviction became final could still rectify that procedural wrong through the *Teague* watershed exception. Now that is impossible, and (assuming *McCoy* is not treated as a substantive rule, *but see supra* Part I), defendants such as Hampton—who were convicted at trials infected with *McCoy* error prior to this Court deciding *McCoy*—are categorically barred from any remedy for this violation. That impossibility of relief is incompatible with the Louisiana Constitution, and the state courts here should have an opportunity to resolve this tension.

Moreover, there is reason to believe Louisiana courts may adopt a more expansive retroactivity framework following *Edwards*, especially in capital cases. For one, the Louisiana Supreme Court—which has acknowledged "that the penalty of death is different in kind from any other punishment imposed under the American criminal justice system," *State* v. *Jones*, 639 So. 2d 1144, 1147 (La. 1994) (citing *Furman* v. *Georgia*, 408 U.S. 238 (1972))—has never actually applied *Teague* in a death penalty case. Additionally, the former Chief Justice of the Louisiana Supreme Court has recently noted that "there are good reasons to abandon our decision in *Taylor* that adopted" *Teague*.

State v. *Gipson*, 296 So. 3d 1051, 1054 (La. 2020) (Johnson, C.J., dissenting from denial of writ application). If Louisiana is to adopt the former Chief Justice's suggestion and expand the availability of retroactive relief on collateral review beyond what *Teague* requires, but do so in a later case, a quirk of timing would be the only thing denying Hampton the ability to benefit from such a ruling. A grant, vacatur, and remand of the decision below would avoid such an unjust outcome.

CONCLUSION

The petition for certiorari should be granted, and this Court should resolve whether *McCoy* announced a substantive rule of constitutional law retroactive on collateral review. Alternatively, this Court should grant certiorari, vacate the decision below, and remand for further proceedings.

Respectfully submitted.

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