No. 21-_____

IN THE

Supreme Court of the United States

STANLEY JOSEPH THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment permits criminal defense counsel to unilaterally concede his client's guilt before the jury at trial—over the defendant's objection—so long as counsel reserves at least one element of the offense, however innocuous and incontestable that element may be, thereby avoiding this Court's edict in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

2. Whether criminal defense counsel's unilateral concession of guilt to one or more key elements of a criminal offense at trial—over the defendant's objection—is a constitutionally and ethically permissible trial strategy within the meaning of the Court's ineffective assistance of counsel jurisprudence, and whether the prejudice flowing from such a concession can be measured.

RELATED PROCEEDINGS

United States v. Thompson et al.,
No. 1:07-CR-138-BBM-2 (N.D. Ga. filed Apr. 24, 2007)
United States v. Thompson et al.,
No. 08-13658-AA (11th Cir. filed June 25, 2008)
Thompson v. United States,
No. 14-15179-EE (11th Cir. filed Nov. 14, 2014)
Thompson v. United States,
No. 16-14482-J (11th Cir. filed June 27, 2016)
Thompson v. United States,
No. 20-12724-H (11th Cir. filed July 21, 2020)
Thompson v. United States,
No. 20-14404-BB (11th Cir. filed Nov. 24, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stanley Joseph Thompson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The original and amended opinions of the Eleventh Circuit denying Mr. Thompson's motion to vacate under 28 U.S.C. § 2255 are included in the appendix hereto. Pet. App. 2, 24. The district court's order denying Mr. Thompson's Section 2255 motion is included in the appendix hereto. Pet. App. 41, 43.

JURISDICTION

The Eleventh Circuit issued an order denying Mr. Thompson's Section 2255 motion on October 17, 2019. A divided panel of the Eleventh Circuit thereafter issued an amended order denying Mr. Thompson's Section 2255 motion on August 19, 2020. The Eleventh Circuit denied Mr. Thompson's petition for rehearing en banc on November 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil and criminal cases in the courts of appeals. Mr. Thompson's petition is timely filed under Supreme Court Rules 13.1 and 13.3 and the Court's March 19, 2020 General Order extending deadlines due to COVID-19 public health concerns (90 days and 150 days from the denial of rehearing, respectively).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1951, titled "Interference with commerce by threats or violence," and known as the Hobbs Act, provides in part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

INTRODUCTION

In the opening moments of Mr. Thompson's criminal trial, in which he faced what was tantamount to a life sentence upon conviction, Mr. Thompson's counsel unilaterally conceded—over Mr. Thompson's objection—that Mr. Thompson committed the lead charge in the indictment against him, the robbery of a Taco Bell restaurant. The impact on the jury was no doubt devastating. In only a few short breaths, Mr. Thompson's own lawyer eviscerated the presumption of innocence to which he was entitled, one of the most sacred principles in the American justice system. And it rendered Mr. Thompson's conviction on that charge—and an associated firearms charge—a forgone conclusion.

As would be expected, the government took full advantage of counsel's unauthorized concession. One of the last arguments jurors heard before their deliberations began was that of a federal prosecutor who stood before them and asked them to return a guilty verdict because even Mr. Thompson's own lawyer "*said he was guilty* of taking money from the Taco Bell." Pet. App. 104 (emphasis added). And following his conviction and the district court's imposition of an 819-month prison sentence for the Taco Bell robbery and other crimes, the government told the court of appeals that, at trial, Mr. Thompson's counsel "*admitted* that [Mr. Thompson] committed the Taco Bell robbery." Pet App. 100 (emphasis added).

Under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), trial counsel's unauthorized concession of guilt, over Mr. Thompson's objection, violated Mr. Thompson's Sixth Amendment-secured autonomy to assert his innocence,

constituted structural error, and mandated the reversal of Mr. Thompson's convictions.

But in a startling turn of events, contrary to what it told Mr. Thompson's trial jury, the government argued below that no such concession occurred. And even more remarkably, a divided panel of the court of appeals agreed. The divided panel concluded that *McCoy* did not apply to Mr. Thompson's case, and thus denied his claim, because although Mr. Thompson's counsel told the trial jury that Mr. Thompson had committed the Taco Bell robbery, counsel reserved one element of the offense: interference with interstate commerce. Pet. App. 13-14. The panel concluded that counsel instead "took a trial strategy," and that Mr. Thompson could not establish that he was prejudiced by the allegedly unprofessional error within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 13-14. A single judge acknowledged the panel's grievous mistake, issuing a powerful dissent recommending reversal and observing that the majority's reasoning had already been rejected by this Court in *McCoy* itself. Pet. App. 21-23 (Jordan, C.J., dissenting).

The Court should grant the petition for a writ of certiorari for several reasons:

First, the divided panel decided several important federal questions in a way that is in direct conflict with a relevant decision of this Court, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Indeed, as the dissenting judge recognized below, in *McCoy* itself, this Court rejected the very argument the court of appeals adopted here: that only an element-by-element concession of guilt is sufficient to violate a criminal defendant's Sixth Amendment-secured

autonomy to assert his innocence, and that such a concession is a matter of trial strategy to be evaluated under the Court's ineffective-assistance-of-counsel jurisprudence.

Second, the questions raised here are a source of fractured conflict in the lower state and federal courts, resulting in inconsistent outcomes. It is critical that the Sixth Amendment apply equally in every criminal trial in America, but uniformity will remain elusive until this Court resolves the questions presented.

Third, the questions raised here are of exceptional importance and arise frequently in criminal cases throughout the nation, state and federal. Hundreds of decisions have cited to *McCoy* since its issuance just over two years ago, and questions about its scope, meaning, and application are likely to recur.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

On March 29, 2007, local Atlanta-area law enforcement officers arrested Mr. Thompson in connection with a string of robberies: the robbery of a Taco Bell restaurant by two men on February 8, 2007, and seven bank robberies committed by a lone robber between February 12 and March 26, 2007. On April 24, 2007, a Northern District of Georgia grand jury returned a twelve-count indictment against the alleged robber, Leary Robinson, and Mr. Thompson, his alleged accomplice, charging them with one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count One); seven counts of bank robbery, in violation of 18 U.S.C. § 2113 (Counts Three, Four, Six, Eight, Ten, Eleven, Twelve); and four counts of using or carrying a firearm in connection with the robberies, in violation of 18 U.S.C. § 924(c) (Counts Two, Five, Seven, Nine). For all the robbery charges except for Count One, Mr. Thompson was charged as an aider and abettor on the theory that he was the getaway driver.

Robinson and Mr. Thompson entered not guilty pleas and proceeded to trial. In his opening statements to the jury, Mr. Thompson's counsel unilaterally conceded—over Mr. Thompson's objection—that Mr. Thompson committed the lead charge in the indictment against him:

> And the evidence that we expect to come before you today during the trial of this case will show you this: that Mr. Thompson was at the Taco Bell on February the 8th of 2007. You will see a video and it's going to show that Mr. Thompson did in fact take the money from the Taco Bell on February the 8th of 2007.

> There's no dispute in that. But where the dispute comes is that the government wants you to believe that Mr. Thompson participated in seven other bank robberies. Mr. Thompson did not participate in any bank robbery . . . And at the end of the evidence and at the end of this case we ask that you come back and find him not guilty on all of the gun charges, not guilty on each one of those bank robberies. Thank you.

Pet. App. 177-78. In the government's closing argument, a federal prosecutor stood before Mr. Thompson's jury, asked for a guilty verdict, and reminded the jury that in Mr. Thompson's opening statement, his lawyer "*said he was guilty* of taking money from the Taco Bell." *Id.* at 104 (emphasis added).

In his own closing argument to the jury, Mr. Thompson's counsel reiterated his unauthorized concession of guilt as to Count One: "[w]hen I met you earlier *I told you that Mr. Thompson was involved in a Taco Bell robbery*," "*We admitted*," and "*We also said it happened.*" Pet. App. 140-41 (emphasis added). But counsel nevertheless asked the jury to find Mr. Thompson not guilty on all charges—including Count One—on grounds that the government had failed to prove an element of Hobbs Act robbery: interference with interstate commerce. *Id.* Although the government's proof of this element was overwhelming, counsel argued that "[w]e also said it happened, but they charged him with the wrong thing. An armed robbery, possibly a robbery of some sort . . . but not a robbery that's interfering with commerce." *Id.* at 140; *id.* at 141 ("There is nothing to show interference with

commerce, and as a result of that, as a result of the wrong charge, you have to find him not guilty of robbery by interfering with commerce.").

On February 29, 2008, the jury convicted Mr. Thompson on Counts One and Two (the Hobbs Act robbery of the Taco Bell restaurant and its associated Section 924(c) charge), six counts of bank robbery, and two additional counts of violating Section 924(c). On June 19, 2008, the district court sentenced Mr. Thompson to serve 819 months of imprisonment. The sentence consisted of 135 months of imprisonment on the robbery counts; a mandatory minimum sentence of 7 years on the first Section 924(c) count (Count Two), to be served consecutive to the underlying robbery sentence; a mandatory minimum sentence of 25 years on the second Section 924(c) count (Count Five), to be served consecutive to the other two sentences; and a mandatory minimum sentence of 25 years on the third Section 924(c) count (Count Nine), to be served consecutive to the other three sentences.

As part of its effort to secure an affirmance on direct appeal, the government told the court of appeals that, at trial, Mr. Thompson's counsel "*admitted* that [Mr. Thompson] committed the Taco Bell robbery." Pet. App. 100 (emphasis added). The court of appeals affirmed Mr. Thompson's convictions on July 8, 2010. *United States v. Thompson*, 610 F.3d 1335 (11th Cir. 2010).

Mr. Thompson then filed a pro se Motion to Vacate, Set Aside or Correct his Sentence under 28 U.S.C. § 2255 in the district court, contending that his trial counsel violated his Sixth Amendment rights in a variety of ways, including for conceding Mr. Thompson's guilt at trial over his objection;

for failing to make obvious objections and to file necessary motions before and during trial; and for abandoning Mr. Thompson from the inception of the case. Mr. Thompson also requested an evidentiary hearing to prove his claims.

The district court denied Mr. Thompson's Section 2255 Motion and accompanying request for an evidentiary hearing on September 30, 2014 (Pet. App. 41, 43), a decision that the court of appeals affirmed on October 17, 2019. Pet. App. 24. The court of appeals thereafter granted Mr. Thompson's petition for panel rehearing and issued an amended opinion, but in a split decision, the court of appeals affirmed the denial of Mr. Thompson's Section 2255 motion and request for an evidentiary hearing on August 19, 2020. Pet. App. 2.

With respect to Mr. Thompson's Sixth Amendment claim based on his counsel's unauthorized concession of guilt, the divided panel held that because counsel reserved one element of the offense—interference with interstate commerce—and did not admit to every element of the crime, his decision was one of "trial strategy," rendering *McCoy* inapposite. Pet. App. 13-14 ("Instead, counsel took a trial strategy, arguing that the government could not prove the interstate commerce element of Hobbs Act robbery. That does not rise to the level of admitting guilt"). The court of appeals instead treated Mr. Thompson's claim as one of ineffective assistance of counsel under *Strickland*, ultimately concluding that even if Mr. Thompson's counsel misjudged that element because "[o]nly a small or minimal effect on commerce is needed to prove that element of the crime," Mr. Thompson could not establish prejudice due to other evidence of his involvement in the Taco Bell robbery. *Id*. at 14.

U.S. Circuit Judge Adalberto Jordan dissented from the amended panel opinion. Pet. App. 20. Judge Jordan agreed with Mr. Thompson that his trial counsel's unauthorized concession of guilt may have violated the Sixth Amendment and constituted structural error that deprived Mr. Thompson of a fair trial, opining, "I think we made a mistake in our original panel opinion," "I believe Mr. Thompson is correct in asserting in his petition for rehearing that our *McCoy* analysis was flawed[,]" and that Mr. Thompson was entitled to an evidentiary hearing to prove his claim. *Id*. at 20, 22-23 (Jordan, C.J., dissenting).

The court of appeals denied Mr. Thompson's petition for rehearing en banc on November 17, 2020. Pet. App. 1. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the divided panel opinion denying Mr. Thompson's claims is in direct conflict with biding precedent of this Court, as set forth below. Further, the issues raised herein are the subject of inconsistent opinions issued by state and federal courts across the country, they are of exceptional national importance, and they are likely to recur, showing that further guidance from this Court is sorely needed.

I. The divided panel's decision violates *McCoy*.

The divided panel's conclusion that no *McCoy* error occurred below because Mr. Thompson's trial counsel did not engage in an element-by-element concession of guilt, and instead reserved a single, virtually uncontestable element of the offense, is in direct conflict with *McCoy*. In

fact, this very argument was raised—and rejected—in *McCoy* itself.

Specifically, dissenting in *McCoy*, Justice Alito criticized the majority on grounds that McCoy's trial counsel "did not admit that petitioner was guilty of first-degree murder," rather he conceded only "one element of that offense, i.e., that [the defendant] killed the victims." 138 S. Ct. at 1512 (Alito, J., dissenting); *id*. at 1512 (noting that trial counsel "strenuously argued that petitioner was not guilty of first-degree murder because he lacked the intent . . . required for the offense"). The *McCoy* majority rejected the argument that an element-by-element concession of guilt is necessary to violate a defendant's Sixth Amendment-secured autonomy to assert his innocence.

Judge Jordan correctly recognized this principle below, opining that the *McCoy* court "reached [its] conclusion even though counsel had not conceded guilt as to all of the elements necessary for murder," and only "admitted that the defendant committed one element of the offense, i.e., that he "shot and killed the three victims . . . ." Pet. App. 21 (Jordan, C.J., dissenting). "Like the lawyer in *McCoy*," Judge Jordan wrote, "Mr. Thompson's counsel admitted several elements of the offense while challenging another element . . . [s]o the factual and procedural context here is just like *McCoy*, and I do not believe we can reject Mr. Thompson's argument by saying that trial counsel only admitted guilt on some elements of the crime." *Id*. at 21-22.

The divided panel thus misstated and misapplied binding precedent of this Court, mandating reversal. The Constitution entitles Mr. Thompson to an evidentiary

hearing to prove his claims because, if Mr. Thompson's allegation is true, "then counsel's unilateral choice was likely structural error that violated Mr. Thompson's autonomy as guaranteed by the Sixth Amendment." *Id*. at 23.

Not only does the panel's decision violate *McCoy*, it also directly contradicts contemporaneous accounts of what actually transpired in Mr. Thompson's trial. Even the federal prosecutors who tried Mr. Thompson's case believed that his lawyer had admitted his guilt and used that admission to their advantage at trial and on appeal, telling the trial jury that "Defendant Thompson's counsel in his opening statement said he was guilty of taking money from the Taco Bell" and telling the court of appeals that, at trial, Mr. Thompson's counsel "admitted that [Mr. Thompson] committed the Taco Bell robbery." Pet. App. 100, 104.

Further, if the divided panel's decision remains intact, it will perpetuate a grave injustice not only against Mr. Thompson, who is serving what is tantamount to a life sentence, but also against untold numbers of individuals facing criminal charges in state and federal courts across the country. Specifically, because the panel opinion is one of the few federal appeals court decisions to address the merits of a *McCoy* claim, other state and federal courts will invariably rely on it. Yet, the panel decision cannot be permitted to stand because it purports to authorize a wholesale end-run around *McCoy* and the Sixth Amendment-secured right to maintain one's innocence. Indeed, the divided panel decision renders *McCoy* inapplicable so long as trial counsel preserves the fiction

that he is challenging at least one element of the offense, however frivolous that challenge may be.

This problem is particularly acute where, as here, the offense element that was reserved—interference with interstate commerce—was not genuinely in dispute. Though the government need only prove a "minimal effect on commerce" to prove a Hobbs Act violation (*United States v. Gray*, 260 F.3d 1267, 1272 (11th Cir. 2001)), the evidence that the Taco Bell robbery obstructed, delayed, or affected interstate commerce was overwhelming. The government presented evidence that the Taco Bell sold goods manufactured out of state, was part of a national franchise, paid franchise fees to an out-of-state entity, suffered several hundred dollars in actual losses, and had to be shut down for several hours due to the robbery investigation, losing revenue.[1] Accordingly, no competent defense counsel could have predicated his trial strategy—much less a concession of guilt—on such grounds, and the jury was not reasonably likely to credit such an argument. Pretending otherwise to try to excuse a *McCoy* violation makes a mockery of the Sixth Amendment.

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[1] Numerous Eleventh Circuit decisions predating Mr. Thompson's trial found the evidence on this element to be sufficient where a defendant robbed a business that sold items manufactured out of state (*United States v. Paredes*, 139 F.3d 840, 844-45 (11th Cir. 1998)), that served out-of-state customers (*United States v. Dean*, 517 F.3d 1224, 1228 (11th Cir. 2008)), or that was part of a nationwide franchise. *United States v. Guerra*, 164 F.3d 1358, 1360-61 (11th Cir. 1999).

II. The divided panel's *Strickland* analysis violates *McCoy* and other binding precedent.

The divided panel's Sixth Amendment ineffective-assistance-of-counsel analysis also violates *McCoy* and other binding precedent, resolving Mr. Thompson's claim in a manner that will cause unnecessary confusion in the lower courts, both federal and state. The panel appears to have erroneously held, after it incorrectly determined that no *McCoy* error occurred, that a unilateral, unauthorized concession of guilt as to certain elements of a felony offense could constitute a permissible trial strategy within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). But under this Court's precedents, both before and after *McCoy*, it is not a constitutionally or ethically permissible trial strategy for counsel to unilaterally concede guilt as to a key element of an offense at trial over the defendant's objection. To the contrary, criminal trial counsel has a duty "to consult with the defendant on important decisions" (*Strickland*, 466 U.S. at 688), "a defendant must be allowed to make his own choices about the proper way to protect his liberty," and the right to "insist on maintaining [his] innocence" at trial is a fundamental right protected by the Sixth Amendment. *McCoy*, 138 S. Ct. at 1508 (citation omitted).

In fact, in modern federal criminal practice—as evidenced by conduct in this very case—trial counsel would not even stipulate to the admissibility of evidence, the applicability of a hearsay exception necessary to admit business records, or even a noncontroversial element of a charged offense, such as interference with interstate commerce, without obtaining client consent, typically in writing. By way of example, in this case, the government

and the defendants stipulated to the FDIC-insured status of the alleged victim financial institutions at trial via a written stipulation, signed by all counsel and each defendant personally. Pet. App. 180-83. It strains credulity to believe that it could be a constitutionally appropriate trial strategy to admit guilt to key elements of the lead charge in a federal criminal jury trial contrary to the defendant's instructions and without his permission. A criminal defense attorney's decision to do so falls well outside of the bounds of prevailing professional norms, yet the panel's decision appears to sanction such misconduct, potentially causing serious and unnecessary damage within the Eleventh Circuit and across the country.

In addition, the divided panel's analysis of whether such a "trial strategy"—even if constitutionally deficient—prejudiced Mr. Thompson in this case, was fundamentally flawed in several respects. First, the panel concluded that abundant evidence supported Mr. Thompson's conviction on Count One, indicating that he would have been convicted anyway, and that "nothing suggests that the jury would have reached a different outcome on the Taco Bell count or any other charge." Pet. App. 14. But under *McCoy*, the damage resulting from counsel's unauthorized concession is "immeasurable" because jurors are "almost certainly swayed by a lawyer's concessions" to facts that are critical to a conviction. *McCoy*, 138 S. Ct. at 1511. As a result, the unauthorized concession constituted structural error, eliminating *Strickland's* prejudice requirement, and the divided panel erred in holding otherwise. *Id.*

Second, even if it was appropriate to try to measure the "immeasurable," the divided panel failed to do so. The panel did not analyze the devastating impact of the

unilateral concession on the jurors' decision-making or the extent to which jurors were "swayed" by the concessions. It did not consider how the concession freed prosecutors to repeat and amplify counsel's concession to further sway the jury, causing additional prejudice. Instead, it appears to have narrowly focused its analysis on the government's proof on Count One, without considering how the unilateral concession impacted jurors' deliberations as to the firearms charge associated with that count or the eight other robbery and firearms charges at issue, for which the evidence was almost entirely circumstantial.

Third, in so holding, the divided panel appears to have reflexively and erroneously drew factual inferences *against* Mr. Thompson's claims, rather than in the light most favorable to Mr. Thompson as it was required to do. 28 U.S.C. § 2255(b) (mandating evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); *Martin v. United States*, 703 Fed. App'x 866, 870 (11th Cir. 2017) (the court must examine "whether the allegations, taken in the light most favorable to [petitioner], support his § 2255 motion"). This error is particularly problematic here, given that Mr. Thompson was denied an evidentiary hearing to prove his claims and thus there were no factual findings to which the court of appeals could defer. As part of an evidentiary hearing, Mr. Thompson would have been able to call expert psychologists and jury consultants, the trial judge, and other participants to prove the prejudicial impact of counsel's unauthorized concession, which to date Mr. Thompson has never been permitted to do. Accordingly, for these additional reasons, this Court's guidance is urgently needed, and certiorari should be granted.

III. *McCoy*-related issues have led to conflicting and inconsistent decisions across the country.

The Court should also grant Mr. Thompson's petition because *McCoy*-related issues have led to conflicting and inconsistent outcomes in state and federal courts around the country. In *United States v. Wilson*, 960 F.3d 136 (3d Cir. 2020), for example, the Third Circuit held that counsel's unilateral concession of guilt to the jurisdictional element in a bank fraud prosecution—the FDIC-insured status of the alleged victim financial institution—did not violate *McCoy* because it was merely a jurisdictional element and thus the charges remained subject to "meaningful adversarial testing." *Id*. at 144. The Third Circuit reasoned that, as distinguished from *McCoy*, counsel had not conceded the defendant's "factual guilt." *Id*. The Third Circuit's decision is in direct conflict with the divided panel's decision in this case, in which counsel conceded the "meaningful" elements and, thus, Mr. Thompson's "factual guilt," but reserved the arguably inconsequential and unilaterally waivable jurisdictional element, interference with interstate commerce.

As a result, in the Third Circuit, Mr. Thompson would be entitled to reversal and an evidentiary hearing to prove his *McCoy* claim, while the law of the Eleventh Circuit affords him no relief. Mr. Thompson would also be more likely to obtain relief in the Second Circuit, where a *McCoy* claim will survive despite the absence of an element-by-element concession of guilt so long as the defendant "asserted his right to autonomy to prevent his attorney from conceding *any* crime because of the 'opprobrium' that accompanies such an admission," as Mr. Thompson did in

this case. *United States v. Rosemond*, 958 F.3d 111, 124 (2d Cir. 2020).

Other splits and inconsistencies abound. For example, Texas courts have indicated that *McCoy* may apply only to capital cases (*see, e.g., Thompson v. State*, No. 02-18-00230-CR, 2019 WL 1065925, at *5 (Tex. App. Mar. 7, 2019)), but California courts have indicated that *McCoy* may apply with even "greater force" in non-capital cases. *See, e.g., People v. Flores*, 34 Cal. App. 5th 270, 282 (2019). California courts have indicated that a *McCoy* claim may require an element-by-element concession of guilt akin to a guilty plea, whereas Oregon courts have opined to the contrary. *Compare, e.g., People v. Spurlock*, No. G055975, 2020 WL 5652223, at *4 (Cal. Ct. App. Sept. 23, 2020), *reh'g denied* (Oct. 14, 2020), *review denied* (Dec. 16, 2020)) ("Thus, defense counsel's actions were not the equivalent of a guilty plea"), *with*, *Thompson v. Cain*, 295 Or. App. 433, 442, 433 P.3d 772, 777 (2018) ("after *McCoy*, even if a concession is not tantamount to a plea for purposes of requiring counsel to obtain a petitioner's express consent, a petitioner's fundamental objective to assert innocence is reserved to the client in the same way as the right to plead guilty, and that autonomy to direct the defense cannot be usurped by defense counsel"). And the Ninth Circuit has found counsel's unilateral assertion of an insanity defense sufficient to trigger a *McCoy* error, absent any formal concession of guilt. *United States v. Read*, 918 F.3d 712, 720 (9th Cir. 2019) ("Just as conceding guilt might carry 'opprobrium' that a defendant might 'wish to avoid, above all else,' a defendant, with good reason, may choose to avoid the stigma of insanity.").

It is axiomatic that the Sixth Amendment should apply equally in every criminal trial in America. But uniformity will remain elusive until this Court resolves these questions, which it should take the opportunity to do in this case.

IV. The questions raised herein are of enormous national importance.

Review is also necessary because the questions raised herein are of enormous national significance, potentially impacting every criminal case in every court in the country, federal, state, county, military, and juvenile. The rights at stake apply to criminal prosecutions in virtually any jurisdiction and irrespective of whether the charges involve violent crimes, drug crimes, or non-violent financial or regulatory crimes. Moreover, in only a few short years since the Court issued its 2018 decision in *McCoy*, hundreds of courts have cited to the case, and it has been the subject of at least two recent petitions for certiorari. *United States v. Rosemond*, 958 F.3d 111 (2d Cir. 2020), *cert. denied*, No. 20-464, 2021 WL 78122 (U.S. Jan. 11, 2021; *United States v. Wilson*, 960 F.3d 136 (3d Cir. 2020), *cert. denied sub nom. Moore v. United States*, No. 20-6099, 2021 WL 78297 (U.S. Jan. 11, 2021), and *cert. denied*, No. 20-6427, 2021 WL 78300 (U.S. Jan. 11, 2021). This demonstrates that these issues will continue to recur, and that further guidance is sorely needed.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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