Capital Case

Case No. _____

In the Supreme Court of the United States

RAYMOND EUGENE JOHNSON,
Petitioner,
v.

STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Oklahoma

PETITION FOR WRIT OF CERTIORARI

THOMAS D. HIRD, OBA # 13580*
MICHAEL W. LIEBERMAN, OBA # 32694
Assistant Federal Public Defenders
Capital Habeas Unit
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
405-609-5975 (phone)
405-609-5976 (fax)
Tom_Hird@fd.org
Michael_Lieberman@fd.org

BEVERLY A. ATTEBERRY, OBA #14856
P.O. Box 420
Tulsa, Oklahoma 74101
(918)605-1913
BeverlyAtteberry@aol.com
COUNSEL FOR PETITIONER

Dated this 5th of March, 2021

*Counsel of Record

No. _____

CAPITAL CASE

QUESTIONS PRESENTED

In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), this Court held the Sixth Amendment grants a right of autonomy that precludes criminal defendants' lawyers from overrriding their clients' express desire to maintain innocence. Raymond Johnson's charges included two counts of arson felony-murder, and one count of first degree arson of a building/structure. Johnson 1) alleged he was coerced into making his confession, 2) told his lawyers at all times that he did not commit the crimes, and 3) insisted expressly on going forward and fully contesting guilt. In his opening statement, counsel presented an argument pointedly concluding that Johnson did not intend to kill *one* of the two victims of the fire. On post-conviction, the Oklahoma Court of Criminal Appeals (OCCA) considered the three bases for retroactivity in *Teague v. Lane*, 489 U.S. 288 (1989), determined *McCoy* is not retroactive, and also held *McCoy* inapplicable because counsel's concession of guilt was not overt or complete.

The questions presented are:

1. Does *McCoy* apply retroactively? Specifically:

    a. Did *McCoy* establish a new rule of constitutional law under the

framework of *Teague v. Lane*,? And if so,

b. Is the rule of *McCoy* retroactively applicable to cases on collateral review as a "substantive rule" under the framework of *Teague*?

c. Is the rule of *McCoy* retroactively applicable to cases on collateral review as a "watershed rule" under the framework of *Teague*?

2. How overt and complete must a concession of guilt be under *McCoy*?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

No corporate entities are parties.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

DOCKETED CASES

PETITION FOR WRIT OF CERTIORARI

Petitioner Raymond Eugene Johnson respectfully petitions this Court for a writ of certiorari to review the opinion rendered by the Oklahoma Court of Criminal Appeals (OCCA) in *Johnson v. State*, No. PCD-2018-718 (October 8, 2020).

PROCEEDINGS/OPINIONS AND ORDERS

The decision of the OCCA denying Mr. Johnson's *McCoy* state post-conviction action is found at *Johnson v. State*, No. PCD-2018-718 (October 8, 2020). *See* Appendix A. The decision of the OCCA denying Mr. Johnson's state direct appeal is reported at *Johnson v. State*, 272 P.3d 720 (Okla. Crim. App. 2012), No. D-2009-702 (March 2, 2012). *See* Appendix B. The decision of this Court denying certiorari to the OCCA is found at *Johnson v. Oklahoma*, No. 11-1465, 568 U.S. 822 (2012) (October 1, 2012). The decision of the OCCA denying Mr. Johnson's first state post-conviction action is found at *Johnson v. State,* Case No. PCD-2009-1025 (December 14, 2012). The decision of the OCCA denying Mr. Johnson's second state post-conviction action is found at *Johnson v. State,* Case No. PCD-2014-123 (May 21, 2014). The decision of this Court denying

certiorari to the United States Court of Appeals for the Tenth Circuit is found at *Johnson v. Sharp*, Case No. 19-6101, 140 S. Ct. 559 (November 25, 2019). The decision of the United States Court of Appeals for the Tenth Circuit affirming the denial of habeas relief is found at *Johnson v. Carpenter,* 918 F.3d 895 (10th Cir. 2019), No. 16-5165 (March 19, 2019). The order of the United States Court of Appeals for the Tenth Circuit denying rehearing is found at *Johnson v. Carpenter*, No. 16-5165 (April 29, 2019). The federal district court decision denying Mr. Johnson's petition for writ of habeas corpus is found at *Johnson v. Royal*, No. 13-CV-0016-CVE-FHM (N.D. Okla. October 11, 2016) (unpublished).

JURISDICTION

The OCCA rendered its opinion denying post-conviction relief on October 8, 2020. On March 19, 2020, this Court entered an order relating to the COVID-19 pandemic that extends Mr. Johnson's deadline to file his petition for certiorari to 150 days from the date of the order denying post-conviction relief, i.e., until March 7, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 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.

The Fourteenth Amendment to the United States Constitution provides the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Raymond Johnson was charged with first-degree arson for setting fire to girlfriend Brooke Whitaker's house, and alternative malice aforethought/arson felony-murder for the deaths of girlfriend Brooke Whitaker and their seven-month-old daughter Kya. O.R. 54-55. It was

undisputed Brooke Whitaker died from blunt trauma to the head and smoke inhalation and Kya Whitaker died from thermal injury, the effect of heat and flames. Appendix A, 272 P.3d at 725.

Johnson asserted he had been physically assaulted, threatened, and coerced into confessing he hit Brooke multiple times in the head with a hammer, doused the house with gasoline, and set Brooke on fire. *See, e.g., Defendant's Motion to Quash Arrest and Suppress Statement,* O.R. 476-543. The trial judge instructed the jurors to disregard Johnson's confession unless they were convinced beyond a reasonable doubt it was voluntary. O.R. 1036.

Johnson always told his lawyers he did not kill Brooke and Kya. Appendix C, post-conviction affidavit of Raymond Johnson, at ¶4; *see also* Appendix D, post-conviction affidavit of Gregg L. Graves, at ¶3. When it became clear no plea deal would be forthcoming, Johnson expressly insisted on going forward and contesting his guilt. Appendix C at ¶4.

Tulsa County Public Defender Pete Silva was Johnson's primary lawyer. He and Johnson did not get along and Silva hardly spoke to Johnson during the course of his representation of Johnson. Appendix C

at ¶¶2, 5.

In Silva's opening statement to the jury, he told the jury the evidence would show that 1) after the gasoline-soaked Brooke was set on fire she picked up Kya; 2) by doing so Brooke Whitaker rather than Mr. Johnson transferred gasoline onto Kya; so 3) Raymond Johnson did not intend to kill Kya. Tr. VI 1199-1201. Neither Raymond Johnson nor Silva's co-counsel Gregg Graves had any idea Silva would make this concession. Appendix C at ¶5; Appendix D at ¶4. The argument and assertion Johnson did not *intend* to kill Kya necessarily was a concession he *did* intend to kill Brooke and *did* kill both Brooke and Kya (not to mention a concession of guilt of first degree arson and two arson felony-murders). Mr. Johnson never consented to this, was highly surprised by it, and thought there was nothing he could do about it because the damage had already been done and he had been expressly warned against outbursts in court. Appendix C at ¶¶5-7.

Mr. Silva's concession of guilt (and the question of whether Mr. Johnson acquiesced in it) so concerned the trial judge that she asked for a sidebar with Mr. Silva about it. Mr. Silva started to vaguely state they

had discussed "this," but quickly changed tacks and contradicted himself. Tr. VII at 1572. Silva said the defense was not conceding at all, and rather than having previously discussed the argument with Johnson, it was an argument Silva had never intended to make and one he only did so "at the last minute" in response to the State's opening argument. Tr. VII at 1572-73. The "last minute" explanation tracks with the fact Silva's co-counsel Gregg Graves and Mr. Johnson had no idea Silva would make this concession. Appendix C at ¶5; Appendix D at ¶4. In addition, Silva's opening argument proceeded immediately after the State's opening argument with no break in between, thus negating the possibility that Silva could have discussed "this" with Johnson. Tr. VI 1198-99; Tr. VII 1572-73. Mr. Silva effectively talked the trial judge out of making a record on whether Mr. Johnson acquiesced to Mr. Silva's concessions. Tr. VII 1572-73.

Back at counsel table, Mr. Johnson could not hear the sidebar conversation between the trial judge and Mr. Silva. Appendix C at ¶7. Had the trial judge queried Mr. Johnson, he would have told her he did not consent or acquiesce to Mr. Silva's concessions, and strongly objected to them. Appendix C at ¶7.

The jury found Johnson fully guilty of two counts of First Degree Murder and one count of First Degree Arson. Tr. IX at 1871-1872. In second stage, the jury found four aggravating circumstances, and sentenced Johnson to death. O.R. 1004-08.

This Court decided *McCoy* on May 14, 2018. Sixty days later Mr. Johnson filed an application for post-conviction relief (APCR) raising a *McCoy* claim. Case No. PCD-2018-718. On October 8, 2020, the OCCA denied that APCR. Appendix A. In so ruling, the OCCA held *McCoy* 1) is not a new rule, 2) "did not establish a new substantive rule of constitutional law in the *Teague* sense," and 3) is not a new "watershed" rule of criminal procedure. Appendix A at 7-10. The OCCA further held *McCoy* was inapposite because counsel's concession of guilt was not overt or complete. Appendix A at 11.

REASONS THE PETITION SHOULD BE GRANTED

I. *McCoy* applies retroactively under *Teague*

A. Introduction

Teague governs the retroactivity of rules of constitutional law to cases on collateral review. Under *Teague*, a rule will apply retroactively

if it is not a "new" rule– in other words, if it was "dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (plurality opinion); *cf. id.* (a new rule is one that "breaks new ground or imposes a new obligation on the States").

"New" rules apply retroactively if they fall into one of two exceptions. The first exception encompasses rules that "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe,'" *Teague*, 489 U.S. at 311, as well as those that "prohibi[t] a certain category of punishment for a class of defendants because of their status or offense," *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). Subsequent decisions have characterized these rules collectively as "substantive" rules. *See, e.g., Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

The second exception encompasses new "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311). This exception extends to rules that "not only improve accuracy, but also "'alter our understanding of the *bedrock*

procedural elements'" essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague*, 489 U.S. at 311) (emphasis in original); *see also Whorton v. Bockting*, 549 U.S. 406, 421 (2007).

The question of whether *McCoy* applies retroactively presents an important issue of federal law that will recur until resolved by this Court. The Court should determine that *McCoy* applies retroactively, and in so doing may consider the aforementioned three alternative bases for retroactivity set out in *Teague*: a) whether *McCoy* established a new rule; b) if so, whether the rule of *McCoy* is "substantive"; and c) if the rule is new and not substantive, whether it is a "watershed" procedural rule.

B. *Teague* basis one

The first basis for *Teague* retroactivity is where a case does not announce a "new" rule because it was dictated by precedent existing at the time a conviction became final. The basic argument is that *McCoy* was dictated by precedent such as *Florida v. Nixon*, 543 U.S. 175 (2004). On its way to concluding Johnson's claim was barred because it could have been raised on direct appeal, the OCCA necessarily concluded *McCoy* was

not a "new" rule and merely "extended" and "clarif[ied] the boundary of trial counsel's strategic decision making authority to concede his or her client's guilt" under *Nixon*. Appendix A at 7-8. However, *McCoy* may be seen to represent a "newly discovered fundamental right." *McCoy*, 138 S. Ct. at 1512 (Alito, J, dissenting).

C. *Teague* basis two

If *McCoy's* rule is new, it applies retroactively because the right it protects is a substantive Sixth Amendment right, not a procedural right. Under *Welch v. United States*, 136 S. Ct. 1257 (2016), "the function of the rule" dictates whether it is substantive or procedural, *id*. at 1265-1266, and *McCoy's* function is to protect the defendant's autonomy, not to regulate the niceties of his trial, *see McCoy*, 138 S. Ct. at 1508. Put differently, *McCoy's* holding that a defendant has the "right to make the fundamental choices about his own defense," *id*. at 1511, cannot be reframed as merely "regulat[ing]" trial procedure, *see Welch*, 136 S. Ct. at 1265, because the autonomy to make those fundamental choices stands apart from the conduct of the trial itself. As with the decision at issue in *Welch*, *McCoy* "did not, for example, 'allocate decisionmaking authority'

between judge and jury, or regulate the evidence that the court could consider in making its decision." *Id.* (citations omitted). And "even the use of impeccable fact-finding procedures could not legitimate'" a conviction or sentence rendered on an individual whose counsel conceded guilt against her wishes. *Id.; see McCoy*, 138 S. Ct. at 1510-1511. A violation of "the defendant's right to make the fundamental choices about his own defense," is not "simply an error in the trial process itself." *McCoy*, 138 S. Ct. at 1511.

Those who suffer a *McCoy* violation therefore suffer a harm different in kind from the harm occasioned by a procedural violation, and they, as a class, cannot be subject to criminal punishment unless granted a new trial in which their right to decide the "fundamental objective of [their] representation" is respected. *See* 138 S. Ct. at 1510. Accordingly, *McCoy* is retroactive under this exception.

D. *Teague* basis three

Finally, if this Court were to conclude that *McCoy's* rule is both new and not substantive, it should hold that it is retroactive as a "watershed" rule, "implicating the fundamental fairness and accuracy of criminal

proceedings." *Whorton*, 549 U.S. at 416 (quotation marks omitted). New procedural rules must "meet two requirements" to apply retroactively. *Id.* at 418. "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bed-rock procedural elements essential to the fairness of a proceeding." *Id.* (quotation marks and citations omitted).

McCoy's rule meets both requirements. First, when a defendant maintains innocence but her counsel admits guilt, there is no meaningful testing of the prosecution's case. It is a foundational principle of our system of criminal justice that adversarial testing is necessary to prevent an impermissibly large risk of inaccurate conviction. "The very premise of our adversary system . . . is 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.

Second, if in theory *McCoy* established a new procedural rule, then

that rule so altered our understanding of "bedrock" elements of fairness to be on the same plane as *Gideon v. Wainwright*, 372 U.S. 335 (1963), the benchmark case for *Teague's* second exception. *Gideon* held that the "noble idea" of defendants receiving "fair trials before impartial tribunals 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." *Id.* at 344-345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). On a fundamental level, that "noble idea" cannot be realized if defense counsel tells the jury that the defendant is guilty even though the defendant maintains innocence. Such a defendant is worse off than one who has no lawyer at all.

In holding that *McCoy* satisfies the second, "watershed" exception, this Court should confirm that this exception remains a basis for retroactive application of new rules. Although this Court has not yet applied the watershed exception articulated in *Teague* to hold retroactive a newly-announced rule, it likewise has not proposed eliminating the exception.

II. *McCoy's* retroactivity is a cert-worthy issue

Courts around the country are considering *McCoy's* retroactivity. In Texas, for example, the Court of Criminal Appeals 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*, __ So. 3d __, 2018 WL 6647250 (La. Dec. 17, 2018) (per curiam).[1] The issue is presented in numerous other state and federal cases, and is likely to recur until definitively resolved by this Court. *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); *Howard v. Baker*, 2019 WL 4346573, at *1-2 (D. Nev. Sept.

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

12, 2019) (unpublished).

Resolution by this Court is also important because some States permit a successive petition for post-conviction relief based on a new decision like *McCoy* only after this Court has first ruled it retroactive. *See, e.g., Commonwealth v. Manus*, 2019 WL 2598179 at *3 (Pa. Super. June 25, 2019) (discussing *McCoy* claim under 42 Pa. Stat. § 9545(b)(1)(iii)); *State v. Lewis*, 2014 WL 2192147, at *2-3 (Ohio Ct. App. May 27, 2014) (discussing *Alleyne v. United States*, 570 U.S. 99 (2013), claim under Ohio Rev. Code § 2953.23(A)(1)(a)). Presiding Judge Lewis in the instant case tangentially touched on this issue in his concurrence. Appendix A at 1-2 (Lewis, J., concurring in result).

Finally, as Justice Alito noted, *McCoy* errors are more likely to occur in the capital context, *see McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting), and so are more 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 cert-worthiness repeatedly and on an emergency basis.

III. This case provides a great vehicle for determining the breadth of the Sixth Amendment right to autonomy

Numerous courts have struggled to determine where the *McCoy* right to autonomy starts and where it ends. For example, they have disagreed about what elements of a charged offense must be conceded, whether *McCoy* applies to individual elements, and how overt the concessions of guilt must be to bring *McCoy* into play. The multi-faceted splits and differences of opinion become more complex and intractable by the day. The Court should resolve it.

With his client charged with arson and two counts of arson felony-murder/malice aforethought murder, Mr. Johnson's counsel presented an argument concluding Mr. Johnson did not intend to kill *one* of the two victims. The concession has implications for each offense charged, and provides fertile ground for helping the lower courts understand the breadth of the right to autonomy and what is and isn't covered.

A. The courts are split on what criminal elements implicate the right to autonomy

A case where counsel argued a lack of intent as Mr. Silva did in the instant case is *People v. Flores*, 34 Cal. App. 5th 270 (2019). In *Flores*, the

defendant was charged with attempted murder for hitting a police officer with a car. *Id.* at 274-75. Over the defendant's objection, his lawyer conceded he was driving the car that injured the officer, but argued that he "never formed the premeditated intent to kill." *Id.* at 272. The defendant appealed based on *McCoy*, and the government contended *McCoy* merely "confirmed that a defendant had the right to insist that counsel refrain from admitting guilt" to the charged crimes. *Id.* at 281 (emphasis and quotation marks omitted). California's Court of Appeal disagreed: "Under *McCoy*, defense lawyers . . . must not concede the acts alleged as the actus reus of a charged crime over a client's objection." *Id.* at 277. That is because the "Sixth Amendment afford[s] criminal defendants the right to tell their own story." *Id.* at 272. The State's argument "disregard[ed] *McCoy's* discussion of plausible objectives that a defendant might have at trial," including "the avoidance of the 'opprobrium that comes with admitting'" unlawful acts. *Id.* at 281 (quoting *McCoy*, 138 S. Ct. at 1508-09).

A completely different view was presented in *Thompson v. United States*, 791 F. App'x 20 (11th Cir. 2019). In *Thompson*, the defendant's

attorney unilaterally conceded the actus reus of a charged crime– the robbery of a Taco Bell– while arguing that the government was unable to prove "the interstate commerce element." *Id*. at 23, 27. The court held this concession did *not* implicate *McCoy* because "counsel did not admit guilt" and "denied an essential element of the crime." *Id*.[2]

The Third Circuit has recognized *McCoy* is implicated by a defense lawyer's unilateral concession to certain elements of a charged crime. In *United States v. Wilson*, 960 F.3d 136 (3d Cir. 2020), a lawyer declined to ask for his clients' consent before stipulating that a bank was federally insured, thereby supplying the jurisdictional hook required for the offense of *federal* bank robbery. *Id*. at 142. The court found *McCoy* distinguishable because there was "no evidence that either defendant objected to the stipulation," and because "jurisdictional elements trigger no 'opprobrium' or stigma." *Id*. at 144 (quoting *McCoy*, 138 S. Ct. at 1508). But the court made clear the situation would have been different if counsel had

[2]On panel rehearing, one judge contended further fact-finding was needed and that if the defendant "rejected counsel's advice and continued to insist that there be no concessions as to the Taco Bell robbery, then counsel's unilateral choice was likely structural error that violated [the defendant's] autonomy." *Thompson v. United States*, 2020 WL 4811363, at *7-8 (11th Cir. Aug. 19, 2020) (Jordan, J., dissenting in part).

conceded the defendants' "conduct, mental states, or involvement in the robberies." *Id.* (emphasis added).

The Fourth Circuit has reached a similar conclusion (in the context of a prosecutorial omission rather than an attorney concession). In *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), the defendant was charged with being a felon in possession of a firearm. *Id.* at 199. The defendant pleaded guilty, and during his plea colloquy, the prosecution recited the four elements of the charge that it believed it would have to prove at trial. *Id.* But the prosecution neglected to inform the defendant of an additional element it would need to prove: that "he knew he had the relevant status when he possessed the firearm." *Id.* (alteration omitted). The Fourth Circuit relied on *McCoy* in holding the "error violated [the defendant's] right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest." *Id.* at 205 (citing *McCoy*, 138 S. Ct. at 1508). The omission of a single element of the charged crime "deprived him of his right to determine the best way to protect his liberty." *Id.* at 206.

The Ninth Circuit has also held that the right to autonomy does not

depend on a concession of factual guilt to the charged crime. In *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), an attorney pursued an insanity defense against his client's wishes. *Id*. at 716-17. When the defendant appealed the resulting conviction based on *McCoy*, the government argued the case did not "implicate the *McCoy* 'objectives' because [the defendant] and his counsel agreed on the fundamental objective of the defense"– namely, acquittal. *Id*. at 721 (quotation marks omitted). The Ninth Circuit disagreed, explaining that the defendant's goal was not "merely to persuade the jury, in the best way possible, that he was not responsible for the alleged assaults." *Id*. His objective was also "to avoid contradicting his own deeply personal belief that he [was] sane." *Id*. "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." *Id*. at 720 (quotation marks and citation omitted) (quoting *McCoy*, 138 S. Ct. at 1508).

A Minnesota case further illustrates the conflicting approaches to the "elements vs. guilt" question. In *State v. Huisman*, 2019 WL 4594082 (Minn. Ct. App. Sept. 23, 2019), the defendant's counsel conceded three

elements of each charged offense– the ages of the two victims, and the location of the crime– in a written closing argument, and the record did not indicate that the defendant consented to the concessions. *Id*. at *1-2. Citing *McCoy*, Minnesota's Court of Appeals held that this was a Sixth Amendment violation. *Id*. at *2-4. But the Supreme Court of Minnesota overruled that decision, finding that "defense counsel's concessions of fewer than all of the elements was not a concession of guilt." *State v. Huisman*, 944 N.W.2d 464, 468 (Minn. 2020).

In the instant case Mr. Johnson's counsel told the jury Mr. Johnson did not *intend* to kill Kya Whitaker (just as the counsel in *Flores* told the jury that Mr. Flores did not intend to kill the police officer). Mr. Johnson's counsel thus did not concede all of the elements of malice aforethought murder in regard to Kya Whitaker. As previously noted, the assertion Mr. Johnson did not *intend* to kill Kya Whitaker necessarily acted as a concession he *did* intend to kill Brooke Whitaker and *did* kill both Brooke and Kya Whitaker. It also served as a concession of guilt to first degree arson and two counts of arson felony-murder. Petitioner contends the concession was more than enough to violate *McCoy* in regard to all of the

charges. Upon hearing counsel's concession the jurors could only conclude Johnson was the perpetrator of these crimes, but did not intend for the fire to kill Kya Whitaker, violating *McCoy* on a fundamental level. It also violated *McCoy* in bringing opprobrium on Mr. Johnson, another topic of dispute in the lower courts, as discussed below.

B. The courts are split on the importance of "opprobrium" and its relationship to the question of whether counsel must fully and overtly concede the elements of an offense

Courts have taken varying stances on the kind of opprobrium that matters under the Sixth Amendment. As discussed above, the Third Circuit has explained *McCoy* covers a defendant's "conduct, mental state[], or involvement in the [offense]," but not "jurisdictional elements." *Wilson*, 960 F.3d at 144. The Fourth Circuit, by contrast, has suggested that any element counts– not only the question of whether a defendant "knew he possessed a firearm," but also the (arguably more technical) question of whether "he knew he belonged to a class of persons barred from possessing a firearm." *Gary*, 954 F.3d at 198. The California Court of Appeals has gone a step further, broadly interpreting *McCoy* to protect defendants' "right to tell their own story"– which most likely implicates

allegations that do not even necessarily resolve an element of a charge. *Flores*, 34 Cal. App. 5th at 272. And the Ninth Circuit has held that *McCoy's* conception of "opprobrium" extends to any concession that would "contradict[]" the defendant's "deeply personal belief[s]" and carry a "social stigma." *Read*, 918 F.3d at 721.[3]

These cases in essence grapple with the question of how overtly and fully a concession of guilt must be to violate the right to autonomy. Petitioner contends the answer must be grounded on the governing principle in *McCoy* that led the Court to say a defendant "may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members." *McCoy*, 138 S. Ct. at 1508. That principle precisely describes why *McCoy* applies in Mr. Johnson's case. Counsel starkly told the jury "the evidence will show Raymond Johnson did not intend to kill Kya," thus informing the jury, among other things, that he *did* kill Kya (and Brooke) and was guilty of murder. Tr. VI at 1201. Counsel's

[3]The court found that "pleading insanity has grave, personal implications" that "go beyond mere trial tactics and so must be left with the defendant." *Id*. That was the case, moreover, even though the defendant wanted to pursue a defense of "demonic possession" that was "certain to fail," and even though the government had presented evidence that the defendant "stabbed his cellmate thirteen times." *Id*. at 716, 719.

concession qualified as a *McCoy* violation, and this Court should grant certiorari and help the lower courts that are hopelessly split on the proper scope of the right of autonomy articulated in *McCoy*.

CONCLUSION

Petitioner's case presents an important opportunity to address questions dogging the lower courts in relation to *McCoy*. And the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). This Court should grant certiorari to address the questions presented, provide the guidance requested, and additionally assure the Constitution is enforced in this capital case and others throughout the country.

Respectfully submitted,

s/Thomas D. Hird
THOMAS D. HIRD, OBA # 13580*
MICHAEL W. LIEBERMAN, OBA # 32694
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, Oklahoma 73102
(405) 609-5975 Phone
(405) 609-5976 Fax

Tom_Hird@fd.org
Michael_Lieberman@fd.org

Beverly A. Atteberry, OBA # 14856
P.O. Box 420
Tulsa, Oklahoma 74101
(918)605-1913
BeverlyAtteberry@aol.com

ATTORNEYS FOR PETITIONER,
RAYMOND EUGENE JOHNSON

*Counsel of Record