Capital Case

Case No. 20-7357

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

REPLY TO RESPONSE TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner Raymond Eugene Johnson respectfully replies to the State's brief in opposition to his petition 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). Appendix A.

I. The State's procedural arguments are belied by *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

If certiorari could be granted in *McGirt*, it certainly can be granted here. Just as in the instant case, *McGirt* originated from the denial of a subsequent application for post-conviction relief (APCR) by the OCCA.[1] In both cases, the OCCA found the petitioners could have raised their claims on direct appeal:

> [the claim] "was not raised previously on direct appeal" . . . "[p]etitioner [had] not established any sufficient reason why his current grounds for relief were not previously raised."

McGirt, 140 S. Ct. at 2503 (Thomas, J., dissenting) (quoting the OCCA in *McGirt v. State*, 2018 OK CR 1057, ¶2 (withdrawn));

> In [*Florida v. Nixon*, 543 U.S. 175 (2004)],the Supreme Court established the parameters of a claim of ineffective assistance

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[1]As a capital case, the pertinent statute here is Okla. Stat. tit. 22, § 1089; in *McGirt* it was Okla. Stat. tit. 22, § 1086.

> of counsel where counsel makes a strategic decision to concede guilt and the defendant "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach.
>
> . . . The Court's ruling in *McCoy* was thus foreshadowed by *Nixon* and is not new law. Therefore, the legal basis of Johnson's claim here could have been reasonably formulated from *Nixon* and raised on direct appeal.

Appendix A at 7-8.

The denial of a *McCoy* claim cannot be rendered cert-proof by alleging it could have been raised prior to *McCoy*, and relying on a case under the Supreme Court's right to effective counsel jurisprudence in support. First, *McCoy* is not about the constitutional right to effective counsel. It is about the constitutional right to autonomy– a right not recognized prior to *McCoy*. Moreover, the entirety of the supposed statutory bar in Mr. Johnson's case (including the tie to a previous constitutional retroactivity determination) is clearly intertwined with federal law and *multiple* Supreme Court cases, *Teague v. Lane,* 489 U.S. 288 (1989) being just one among many, as can be seen from the OCCA opinion. *See* Appendix A at 7-10.

To be sure, this case is much more "interwoven with federal law"

than *McGirt* was. *McGirt*, 140 S. Ct. at 2503 (Thomas, J., dissenting) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). As such, while the cert-worthiness of *McGirt* was endorsed by eight of nine justices, all nine should agree that review of Mr. Johnson's case is appropriate.

II. There is no need for further percolation.

The State cannot deny the important and recurring nature of the issue of *McCoy*'s retroactivity. Indeed, the State did not deny the issue continues to be presented in numerous other state and federal cases, and will keep recurring until resolved by this Court.

The State also did not deny resolution by this Court is 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. Finally, the State did not deny that while *McCoy* errors occurred, and continue to occur, in state and federal non-capital cases, they are more likely to occur in the capital context, *see McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting). As such, the issue is more likely to arise in connection with emergency applications for stays of execution.

This Court deciding whether its own case should be applied

retroactively is not the type of issue that is benefitted by percolation in the lower courts, especially under these circumstances. At the same time, the splits and differences of opinion about the *scope* of *McCoy* become more complex and intractable by the day. The lower courts should not have to waste valuable time continuing to grapple with this issue that will only get bigger as time goes by. There is no reason to delay, and every reason to grant certiorari now.

III. This case is an ideal vehicle.

Mr. Johnson's counsel did not announce, in precise legal terms, that Raymond Johnson with malice aforethought caused the death of Brooke and Kya Whitaker, or that Brooke and Kya's death occurred as a result of Raymond Johnson's commission of first-degree arson, or even that Raymond Johnson committed each and every element of first-degree arson. For *McCoy* to have any meaning, such exact wording is not required.

As noted in Mr. Johnson's petition for writ of certiorari, the argument and assertion by Johnson's counsel that 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. Yet counsel's statements did not explicitly cover all of the elements of each offense– for example they do not explicitly or fully concede all of the elements of malice aforethought murder as to Kya or each element of first-degree arson. The wide array of differences in the overtness and scope of the concession for each offense provides a great tableau on which this Court could provide much-needed further guidance.

Counsel's concession has implications for each offense charged, and provides fertile ground for helping the lower courts understand the breadth of the *McCoy* right to autonomy and what is and isn't covered. The State's arguments do not indicate otherwise, demonstrating this case provides an ideal vehicle.

CONCLUSION

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). Mr. Johnson's petition for writ of certiorari should be granted.

Respectfully submitted,

s/Thomas D. Hird

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