No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAMES R.W. MITCHELL—PETITIONER

VS.

MARCUS POLLARD, Warden of Richard J. Donovan Correctional Facility, an individual —RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

In *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, this Court held that a criminal defendant has a right of autonomy under the Sixth Amendment to dictate the ultimate goals of the representation. This includes the right to insist that defense counsel present a defense of complete innocence. (*Id.* at pp. 1507-1509.) In *McCoy*, defense counsel violated that right when, knowingly and over the defendant's objection, he conceded to the jury that the defendant committed the *actus reus* of a charged crime. (**cite**) This was structural error. (*Id.* at p. 1511.) In California, under California's own test for retroactivity, *McCoy* applies retroactively on collateral review to cases like petitioner's that are otherwise final. (*In re Smith* (2020) 49 Cal. App. 5th 377, 391-392.) It is undisputed that, in this murder case, defense counsel knew throughout the representation of petitioner's insistence on a defense of complete innocence and his refusal of a defense based on mental state.

1. Regardless of whether defense counsel's remarks amounted to a concession of the *actus reus* of homicide, did defense counsel's alternative argument for voluntary manslaughter in defiance of petitioner's wishes violate petitioner's Sixth Amendment right of client autonomy as set out in *McCoy*?

2. Under *McCoy*, does a concession of guilt require an explicit concession? Even though defense counsel never said, "I concede that petitioner killed the victim," did he nonetheless concede the *actus reus* of homicide when, after arguing for an acquittal grounded substantially in petitioner's testimony of third party culpability, he began his alternative argument for a manslaughter conviction by saying petitioner would not approve of it and by twice invoking his duties as an officer of the court to tell the jury the evidence suggested petitioner lied on the stand?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PRIOR PROCEEDINGS

- *People v. James R.W. Mitchell*, Marin County Superior Court No. SC165475A. (Original trial and conviction. Judgment entered October 16, 2011);
- *People v. James R.W. Mitchell*, California Court of Appeal, First Appellate District, No. A133094. (Direct appeal. Judgment affirmed July 28, 2014);
- *People v. James R.W. Mitchell*, California Supreme Court No. S220833. (Petition for discretionary review. Petition denied October 15, 2014);
- *In re James Mitchell*, California Court of Appeal, First Appellate District, No. A150765. (*Pro se* habeas petition on sentencing issue. Petition denied March 22, 2017);
- *Mitchell v. Davey*, U.S. District Court, Northern District of California No. 15-cv-04919-VC. (Federal habeas petition. Petition denied October 18, 2016);
- *Mitchell v. Davey*, U.S. Court of Appeals, Ninth Circuit No. 16-17057. (Federal habeas appeal following Ninth Circuit grant of certificate of

appealability on two issues. Case currently stayed to allow petitioner to litigate *McCoy* issues in state court);

- *In the Matter of James R.W. Mitchell*, on Habeas Corpus, Marin County Superior Court No. SC210551A. (State habeas petition on *McCoy* issues. Petition denied May 20, 2020);
- *In re James R.W. Mitchell*, on Habeas Corpus, California Court of Appeal, First Appellate District, No. A160759. (State habeas petition on *McCoy* issues. Petition denied November 18, 2020);
- *In re James R.W. Mitchell*, on Habeas Corpus, California Supreme Court No. S265812. (Petition for discretionary review of *McCoy* issues denied January 13, 2021).

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JURISDICTION

On November 18, 2020, the California First District Court of Appeal denied petitioner's habeas petition on the merits. (1 App. 1.) The petition alleged that defense counsel had violated his right to client autonomy under the Sixth Amendment as interpreted in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). (1 App. 82-157.) On January 13, 2021, the California Supreme Court denied petitioner's petition for discretionary review of that decision. (1 App. 3.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This petition is timely under Supreme Court rule 13.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Sixth Amendment

"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 defense."

STATEMENT OF THE CASE

A jury convicted petitioner of first-degree murder, kidnapping of a child, stalking, and related charges, with weapons use enhancements. He was acquitted of a special circumstance that the murder was committed for purposes of kidnapping. On August 16, 2011, petitioner was sentenced to 35 years to life in state prison. (1 App. 159.)

On direct appeal, the California Court of Appeal rejected his arguments that revolved around his entitlement to dictate a defense of complete innocence: 1) that because defense counsel concealed their intention to argue for voluntary manslaughter, petitioner lost the chance to replace them with counsel who would follow his instructions, effectively denying him counsel of his choice; 2) that the trial court violated his Sixth Amendment rights by, at points in the trial when petitioner had doubts that defense counsel would follow his instructions, denying his requests to replace them with the Public Defender, denying his request for self-representation, and denying counsel's requests to withdraw; and 3) that his Sixth Amendment right to counsel was violated when the trial court let counsel refuse to participate at sentencing

because he did not want to argue against petitioner's wishes again. As the issue arose, the Court rejected the view that petitioner was entitled to dictate a defense of complete innocence. The decision to concede guilt as appropriate was a strategic decision left to defense counsel, to be reviewed for ineffective assistance, which it was not. (1 App. 178-179, 181-182, 184, 188.) The California Supreme Court denied petitioner's petition for discretionary review of the same issues on October 15, 2014. (1 App. 203.)

Petitioner filed a *pro se* petition for writ of habeas corpus in the Northern District of California. *Mitchell v. Davey*, 15-cv-04919-VC. He pled all the claims from his state appeal. On October 18, 2016, the district court denied the petition and a certificate of appealability. (1 App. 202-211.)

The Ninth Circuit granted a certificate of appealability on the issues of "whether the state trial court violated appellant's constitutional rights when it (1) denied his request for self-representation under *Faretta v. California*, 422 U.S. 806 (1975); and (2) denied his motion to dismiss retained counsel at sentencing, including whether counsel rendered ineffective assistance at sentencing." (1 App. 214.) The undersigned was appointed to represent petitioner under the Criminal Justice Act. (1 App. 225.)

The undersigned also briefed two uncertified issues, as the Rules of Court permit. They were: "Mitchell's Sixth Amendment Right to Counsel Was

Violated by Defense Counsel's Overriding of His Decision Not to Concede Guilt of Any Form of Homicide" and "The State Court of Appeal's Conclusion That Mitchell's Request for New Counsel a Month Before His *Faretta* Request Was Properly Denied Was Unreasonable Because It Unreasonably Discounts Mitchell's Purpose of Seeking Counsel Who Would Limit His Defense to Complete Innocence." (1 App. 214.)

The unifying theme was petitioner's entitlement to insist on a defense of complete innocence. The opinion in *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 and predecessor cases from this Court figure prominently. (1 App. 214-215.) In its answering brief, respondent argued that *McCoy* was irrelevant because it post-dated petitioner's state court appeal and was unexhausted. Respondent also argued that *McCoy* was distinguishable because petitioner's defense counsel argued alternative theories of innocence and guilt of the lesser crime of voluntary manslaughter. (1 App. 215.)

On July 17, 2019, prior to the filing of a reply brief, the Ninth Circuit granted petitioner's motion to stay his appeal so that he could seek state habeas relief premised on *McCoy*. (1 App. 212-224.)

On October 3, 2019, petitioner, represented by the undersigned, filed a petition for writ of habeas corpus in Marin County Superior Court in California. The Superior Court issued an Order to Show Cause and appointed

counsel. On May 20, 2020, the Superior Court denied relief on the merits.[1] The Court found no procedural bars. (1 App. 4-39.)

On August 21, 2020, petitioner, represented by the undersigned, filed a new habeas petition in the California Court of Appeal. (1 App. 82-157.) On November 18, 2020, the Court denied relief on the merits. It did not interpret defense counsel's argument as conceding petitioner's guilt of the charged crime. It did not address petitioner's other argument that merely arguing for a manslaughter conviction against petitioner's wishes violated *McCoy*. It did not question retroactivity or impose procedural bars. (1 App. 1-2.)

On November 18, 2020, petitioner filed a petition for discretionary review in the California Supreme Court on the two issues presented here. (1 App. 40-81.) The Court denied the petition on January 13, 2021. (1 App. 3.)

STATEMENT OF FACTS

I. Statement of Facts from Trial[2]

The murder victim was petitioner's girlfriend, D.K. The kidnapping victim was his daughter with her. The relationship began in August 2007.

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[1] The Superior Court also ruled that *McCoy* was not retroactive, but this decision predated the higher court holding that *McCoy was* retroactive under California's test for retroactivity on collateral review. (*In re Smith* (2020) 49 Cal. App. 5th 377, 391-392.)

[2] This Statement of Facts is derived from the state court of appeal's opinion. (1 App. 159-163.)

They moved in together two weeks later. Petitioner used drugs and committed acts of domestic violence. Arrests led to charges and restraining orders. The couple reunited from time to time, sometimes at D.K.'s initiation.

Petitioner made many calls to D.K.'s phone in the weeks preceding her death. He also called her best friend and said that he knew he had messed up but would do anything to get back with D.K. and his daughter. Between June 26 and July 12, 2009, he called D.K. 78 times, but she never answered until July 12. Petitioner made no calls to her after 6:42 p.m. that day.

Shortly before 7:00 p.m. on July 12, 2009, D.K.'s elderly neighbors, Bessie and Nick, heard her scream. Nick saw a man hitting D.K. on the head with a baseball bat. He told Bessie to call the police "because he's here." Bessie told the 911 dispatcher that the child's father was beating D.K.

Bessie saw a white man run past with a screaming child. He had a shaved head and wore a black t-shirt and jeans. Other neighbors gave descriptions consistent with petitioner's—white, bald, heavy set. There were inconsistencies in the description of the clothing; one neighbor said the man wore a white t-shirt. The lineup process was inconclusive, but everyone said one person was involved in beating D.K. and carrying off the child.

D.K. was dead when police arrived. A baseball bat was found. It had petitioner's left index fingerprint on it near the grip. Petitioner is left-handed.

Petitioner's cousin and brother got word that D.K. was dead. Both called him that evening. Petitioner was crying, teary, and distraught. Both heard the child in the background. The cousin asked petitioner if he knew D.K. was dead. He said he did. He neither admitted nor denied killing her. Petitioner told both men that he would take the child to Mexico rather than surrender her. Alternatively, he might take her to his mother's house. Neither man knew petitioner to own a bat or play baseball or softball.

Petitioner's cell phone was tracked, and his car was found. The minor was unharmed, asleep in the front seat. D.K.'s blood was on her cheek. Petitioner's passport was in the center console. He was arrested nearby without incident. He wore a red and navy-blue striped shirt and jeans.

Petitioner's jeans had blood spatter that was determined to be D.K.'s blood. The spatter pattern was consistent with beating D.K. on the head from a few feet away while she was on the ground.

Trace DNA was found on the bat. D.K. was the primary contributor. Neither petitioner nor the child could be excluded. There were two low-level contributors. If petitioner was one, there was another unknown contributor. The DNA sample included an allele foreign to both D.K. and petitioner.

Petitioner testified to a defense of mistaken identity. D.K. had invited him over. He left home around 5:00 p.m. He wore a red and blue striped polo shirt and jeans. Arriving, he parked and walked towards D.K.'s duplex.

Petitioner heard D.K. scream for help. He encountered two men, one with a buzzed head in a white shirt, the other in a black t-shirt. Petitioner fought with both men. The man in the black shirt hit him in the back with a baseball bat. Petitioner tried to take it away. After more fighting, petitioner chased the men. The man in the black t-shirt disappeared. The man in the white shirt had the child. Petitioner confronted him, punched and kicked him, and demanded the child. The man let him take her and ran away.

Petitioner went back up towards the duplex with the child. He heard someone say to call 911. Remembering he had a restraining order, he decided to leave before the police arrived.

Petitioner called his cousins from the road. He planned to go to a cousin's house to wait to hear from D.K. He did not want to call while the police were there. Petitioner's mother called and said D.K. was dead and that people said he killed her. Petitioner said he needed to talk to his lawyer.

Petitioner did not see anyone hit D.K. with a bat. He had not known she was dead when he left with the child. He did not know how blood got on

his jeans. A urine test showed he had no alcohol in his system and a small amount of methamphetamine, indicative of use within five to seven days.

A softball coach testified that the bat might be used by a high school player or small man or woman. D.K.'s mother had never seen the bat near her home. Her other children had played baseball and softball; their bats had been given away. The coroner testified that D.K.'s mother told him that the bat may have been in the laundry room of the complex before the murder.

II. Relevant Procedural History at Trial

A. Defense Counsel Hanlon's Closing Argument

The first part of Hanlon's closing argument alluded generally to petitioner's innocence. He discussed petitioner's likely state of mind as he drove to see his daughter, the lack of proof that he brought the bat to the premises, the weakness of the eyewitness identification, and the inconclusiveness of the blood spatter evidence and the evidence that petitioner touched the bat on the question of what petitioner actually did. (2 App. 355-396.)

Hanlon argued that petitioner's testimony about fighting two men who really killed D.K. was consistent with the inconsistent eyewitness testimony about whether the killer wore a black or a white shirt. Hanlon did not otherwise advocate for the credibility of petitioner's testimony. He said that

the coincidence of petitioner coming upon two other men doing violence to D.K. was one the jury would have to grapple with. (2 App. 396-398.)

Shifting gears, Hanlon then argued for a guilty verdict on a lesser homicide, primarily manslaughter. (2 App. 398-408.) He argued, "What happened . . . that led to a man beating in the brains of a woman he loved?" (2 App. 401.) He prefaced this by saying that his job was to advocate for his client even if, impliedly, he disagreed with him. He said petitioner would not agree with the argument he was about to make. (2 App. 398-399.) He said the jury should not conclude that he did not believe his client, but the record contained evidence that petitioner was lying. (2 App. 399-400.) Hanlon told the jury, not once, but twice, that his duties as "an officer of the court" required him to argue against petitioner's wishes and inform the jury about the possible falsity of his testimony. (2 App. 399.)

B. <u>Other Proceedings re Petitioner's Requested Defense</u>.

On September 1, 2010, the trial court granted a motion to relieve petitioner's counsel Douglas Horngrad. Attorneys Stuart Hanlon and Sara Rief were appointed. (2 App. 226-250.)

On January 20, 2011, the court held an *in camera*[3] hearing. Hanlon said that rather than proceed on a heat-of-passion manslaughter theory, they

[3] All *in camera* hearings have been unsealed in prior proceedings.

would present the defense petitioner wanted, which was that he "did not commit this crime and that there were other people who did." Petitioner would so testify. (2 App. 252.) To pursue this credibly would require DNA testing on the bat and petitioner's clothes. (2 App. 252-255.)

On May 10, 2011, petitioner asked the court to relieve Hanlon and Rief and appoint the Public Defender. Petitioner believed Hanlon was not being honest with him about the defense that he had been promised. Hanlon had made no public statements about it. The court opined that one would expect defense counsel to remain publicly non-committal about the defense theory. (2 App. 258.) It denied the motion. (2 App. 262-263.)

On May 25, 2011, the court held an *in camera* hearing on Hanlon's request for additional defense funds. Hanlon said that petitioner would be testifying that he did not commit the crime. Whether Hanlon actually argued that would be up to him. (2 App. 265.)

Hanlon said there was substantial evidence that petitioner suffered from psychiatric problems. When he was getting involved with the case, he was told that petitioner had agreed to present a mitigating mental defense. That turned out not to be the case. "Mr. Mitchell has consistently told me he would not go forward with the [mental state] defense." (2 App. 265-267.)

Hanlon said that his duties to petitioner extended beyond just deferring to the defense he wanted to present. He was uncertain if he could put on a defense that contradicted petitioner's testimony. However, it was necessary to investigate. (2 App. 267-268.) He asked for $25,000 to $30,000. The court understood that petitioner was insisting on a defense of complete innocence, with which Hanlon disagreed. (2 App. 269-270.) It refused to approve so much money for "a conflicting defense that might not come into play in any event." (2 App. 270.)

On Friday, June 10, 2011, petitioner asked that he be allowed to represent himself. Hanlon had lied to him, so he expected him to lie to the jury. (2 App. 276.) If he received the files that day or Saturday, he would be prepared to proceed the following Tuesday. He was already prepared to argue the motions that had been filed. (2 App. 277-278.) When petitioner appeared in court the following Monday and asked for a continuance, the trial court denied his request. (2 App. 297-300.)

Hanlon then moved to withdraw. (2 App. 301.) The court held an *in camera* hearing with Hanlon, Rief, and petitioner. Hanlon said he had received two threatening letters from petitioner. (2 App. 305-308.) Petitioner said he had been angry because his lawyers were insisting on a heat-of-passion defense. After they embraced his desired defense, relations improved.

That did not stop him from writing rambling, spur-of-the-moment letters that he sometimes regretted. (2 App. 310-316.) The court denied Hanlon's motion. (2 App. 316-317.)

Back in open court, Hanlon announced doubts about petitioner's competency. (2 App. 319-321.) Doubting Hanlon's credibility, the court declined to suspend proceedings. (2 App. 320, 322, 326-327.)

In opening statement, Hanlon said Mitchell would testify that he was at the homicide scene. He did not say Mitchell would testify about the two other men. (2 App. 328-333.)

Hanlon asked for the manslaughter instructions at the instructions conference. (2 App. 334-340.) The trial court instructed on two theories of manslaughter as well as on second-degree murder. (2 App. 341-343.) Hanlon's closing argument is set out above.

At sentencing on August 16, 2011, the court held an *in camera* hearing on a mutual request that Hanlon and Rief not represent petitioner at sentencing or on a possible motion for new trial. Petitioner was upset because Hanlon had argued in the alternative at trial for a heat-of-passion manslaughter verdict against his express instructions. (2 App. 412.) This had been sprung on him at the last minute, leaving him no time to find new counsel. Petitioner thought Hanlon planned it that way. (2 App. 412-416.)

Although the issue at sentencing was concurrent vs. consecutive sentences, Hanlon doubted that he could perform the way he believed petitioner wanted. He believed that petitioner still wanted him to argue that he did not commit the murder. Although guilt was settled given the verdict, Hanlon was still unwilling to argue against petitioner's wishes. (2 App. 417-420.) "I made that decision once. I'm not going to do it again." (2 App. 418.) If forced to argue, he would simply submit the matter. (2 App. 418, 420.)

The court ordered Hanlon to explain why he argued for manslaughter. Hanlon said that he thought it was the only possible way to save petitioner from life in prison. He had told petitioner at some point that petitioner had the right to testify however he wished, but the decision of what to argue was his. (2 App. 418-419.)

> "Mr. Mitchell clearly expressed his desire that I not do it. I told him—I don't remember when that conversation first came up, whether it was before trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he was saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests." (2 App. 419.)[4]

[4] The trial court declined to relieve Hanlon. At sentencing, petitioner reasserted his innocence. Hanlon said nothing. Petitioner was sentenced.

REASONS FOR GRANTING THE PETITION

I. A Criminal Defendant Has a Sixth Amendment Right of Client Autonomy to Preclude Defense Counsel from Arguing for a Conviction of a Lesser Offense.

A. Introduction

This question implicates the dissent's questions in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). *McCoy* held that a defendant has a Sixth Amendment right of client autonomy that allows him to dictate the ultimate goals of his defense. That right was violated in *McCoy* when defense counsel conceded the defendant's commission of a homicide knowing that he wanted a defense of complete innocence. *Id.* at 1507-1509. The error was structural. *Id.* at 1511. California holds that *McCoy* is not limited to capital cases. *People v. Flores*, 34 Cal. App. 5th 270, 282-283 (2019).

The *McCoy* dissent asked:

> "What about conceding that a defendant is guilty, not of the offense charged, but of a lesser included offense? That is what English did in this case. He admitted that petitioner was guilty of the noncapital offense of second-degree murder in an effort to prevent a death sentence. App. 651. Is admitting guilt of a lesser included offense over the defendant's objection always unconstitutional? Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter? What about simple assault?" *Id.* at 1516-1517 (Alito, J., dissenting) [footnote omitted].

The dissent's questions should be answered in the affirmative. Indeed, this Court should go further. Whether or not defense counsel actually conceded the commission of the *actus reus* in arguing for a conviction on a lesser offense puts the cart before the horse. The defendant's Sixth Amendment right of client autonomy lets him preclude such argument in the first place to avoid inevitably watering down a desired defense of complete innocence. If the known goal of a defendant charged with murder—or any crime—is a defense of absolute innocence, the sole way defense counsel can honor this is to limit his argument to the case for complete acquittal.

Like *McCoy*, this conclusion flows from *Faretta v. California*, 422 U.S. 806 (1975), which recognized a defendant's constitutional right to self-representation. It also flows from *Cooke v. State*, 977 A.2d 880 (Del. 2009) and *State v. Carter*, 270 Kan. 426 (2000), both of which *McCoy* cited and both of which held that defense counsel's imposing a guilt-based "defense" on a client against his wishes violated his constitutional rights. The California courts' conclusion to the contrary conflicts with *McCoy* and the above state supreme court cases. Review should be granted to settle this important question. Supreme Court Rule 10(c).

This is an appropriate case in which to reach this and the following question. It is undisputed that from the outset of the representation,

petitioner insisted on a defense of complete innocence and refused one based on mental state. This issue arose in state habeas proceedings. Under California's test for retroactivity, *McCoy* applies retroactively to state habeas cases. *In re Smith* (2020) 49 Cal. App. 5th 377, 391-392. In denying relief, the Court of Appeal imposed no procedural defaults in the alternative.

B. The Merits

1. *McCoy v. Louisiana*.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." A defendant also has a Sixth Amendment right to forgo the assistance of counsel and represent himself. *Faretta v. California*, 422 U.S. 806, 807 (1975). This is because "[t]he right to defend is personal." *Id.* at 834. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Id.* at 819.

A defendant who appears with counsel cedes most trial management decisions to the attorney. *McCoy v. Louisiana*, *supra*, 138 S.Ct. at 1508. "Some decisions, however, are reserved for the client—notably, whether to

plead guilty, waive the right to a jury trial, testify in one's own behalf,[5] and forego an appeal. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983)." (*Ibid.*)

The question under review in *McCoy* was "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.* at 1507. In *McCoy*, the defendant was charged with capital murder for killing three family members of his estranged wife. *Id.* at 1505-1506. McCoy was adamant about his innocence. "Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong." *Id.* at 1506.

Two weeks before trial, McCoy's retained counsel, English, told him that he intended to concede guilt. McCoy was furious and told him not to do so. He demanded a defense of innocence. It was undisputed that defense counsel was aware of McCoy's wishes. Both McCoy and English sought to sever the relationship. The trial court refused to relieve English, telling him that he was the attorney and the choice of defense, if any, was his. *Ibid.*

During opening statement, English conceded that it was indisputable that McCoy had caused the victims' deaths. This prompted an outburst from McCoy about being sold out for having "murdered his family." *Id.* at 1506-

[5] See *Harris v. New York* (1971) 401 U.S. 222, 225.

1507. McCoy ultimately testified in his own defense, "maintaining his innocence and pressing an alibi difficult to fathom." *Id.* at 1507. During closing argument, English again conceded that McCoy was the killer. *Id.* at 1507. He argued against a verdict of first-degree murder on the theory that McCoy lacked the intent required for that crime. *Id.* at 1512 (Alito, J., dissenting). McCoy was convicted of first-degree murder and ultimately sentenced to death. *Id.* at 1507.

This Court did not apply its ineffective assistance jurisprudence because the issue was "client autonomy" under the Sixth Amendment. *Id.* at 1510-1511. Citing *Faretta*, it emphasized that the right to make a defense under the Sixth Amendment was "personal." That is why the Sixth Amendment speaks of the "assistance" of counsel. *Id.* at 1507-1508. While most trial management decisions are ceded to defense counsel, the client retains exclusive control over certain fundamental decisions. *Id.* at 1508.

These fundamental decisions included McCoy's goal of maintaining complete innocence.

> "Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices

> about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." *Id.* at 1508.

These objectives may not necessarily be sound or realistic, but that risk is as accepted in this context as it is when defendant represents himself under *Faretta*. *Ibid*.

The defendant's objectives also may not be strictly tethered to the goal of avoiding a conviction.

> "Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. *Ibid*.

Such decisions must be honored. "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (emphasis in original).

2. Defense Counsel Violated Petitioner's Right of Client Autonomy When, Knowingly and Against Petitioner's Wishes, He Argued for a Manslaughter Conviction.

McCoy holds that a defendant has a Sixth Amendment right to insist on a defense of complete innocence. The facts of *McCoy* involved an explicit concession of homicide. However, nothing in *McCoy's* discussion of client autonomy holds or implies that the right to dictate the ultimate goals of the

representation is limited to precluding explicit concessions of guilt. If a defendant wants to take an all-or-nothing approach to acquittal and prevent defense counsel from arguing for a conviction of mitigated homicide or some lesser offense, he has that right under *McCoy*.

That flows from *Faretta v. California*, 422 U.S. 806 (1975), In holding that a defendant has a constitutional right to dispense with counsel and represent himself, this Court stated throughout the opinion that the Constitution does not force a lawyer on the accused.

> "To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored [.] *Id.* at 834.

If petitioner had been granted his *Faretta* rights, he could have limited his argument to complete innocence. He could have run the risk of conviction on the charged offense rather than risk undermining his case for complete acquittal by assuming in the alternative that the jury would not believe him. His rights should be no different if he accepts the *assistance* of counsel. It would be strange if, though the Constitution does not force a lawyer on a

defendant, a defendant's lawyer could try to force a conviction on him, even one less serious than what the prosecution originally charged.

This conclusion also flows from *Cooke v. State*, 977 A.2d 880 (Del. 2009) and *State v. Carter*, 270 Kan. 426 (2000), both of which *McCoy* cited as persuasive authority. *McCoy v. Louisiana*, *supra*, 138 S.Ct. at 1507, 1509-1511.

> "[W]here, as here, the defendant *adamantly objects* to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury. The right to make these decisions is nullified if counsel can override them against the defendant's wishes. In this case, the trial court's failure to address the breakdown in the attorney-client relationship allowed defense counsel to proceed with a trial objective that Cooke expressly opposed. This deprived Cooke of his Sixth Amendment right to make fundamental decisions concerning his case." *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) (emphasis in original, footnotes omitted).

> "Viewing [attorney] Zoller's conduct as part of a trial strategy or tactic is to ignore the obvious. By such conduct defense counsel was betraying the defendant by deliberately overriding his plea of not guilty. He not only denied Carter the right to conduct his defense, but . . . it was the equivalent to entering a plea of guilty. To allow the defense counsel to argue to the jury that Carter is guilty while Carter is verbally maintaining his innocence violates his Sixth Amendment right to counsel and interferes with his due process right to a fair trial. Zoller had no right to conduct a defense premised on guilt over his client's objection. If Zoller could not accept Carter's rejection of such a defense, then he should have either proceeded with a defense acceptable to Carter

> or sought permission to withdraw as defense counsel. Zoller did neither. *State v. Carter*, 270 Kan. 426, 440-441 (2000).

Both courts also drew their conclusions from *Faretta* and other cases on self-representation. *Id.* at 437-440; *Cooke v. State*, *supra*, 977 A.2d at 841, fns. 33 & 35; 842, fn. 41; 847, fn. 67; 851, fn. 95.

McCoy should be read to allow a defendant to preclude alternative arguments for conviction of lesser offenses. Nothing in *McCoy* is to the contrary. The Court of Appeal cited *McCoy's* statement that defense counsel "could not interfere with McCoy's telling the jury 'I was not the murderer,' although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction." *McCoy v. Louisiana*, *supra*, 138 S.Ct. at 1509. (1 App. 1.) However, this language should not justify Hanlon's disobedience of petitioner's wishes.

First, as noted above, *McCoy* held that what might be sound strategy is irrelevant to the issue of client autonomy. Second, the reference to the defendant's telling the jury "I was not the murderer" cannot merely refer, as Hanlon assumed, to the client taking the stand to tell his story. That right may have informed *McCoy*, but it long predated it and has nothing to do with the question presented there. *Id.* at 1513, 1516.

Rather, "I was not the murderer" must refer to defense counsel arguing that to the jury on the client's behalf. The language that follows about arguing mental state can only be harmonized with the core holding of *McCoy* if, unlike what happened in *McCoy*, such argument does not undermine the defendant's claim of innocence of the *actus reus*. It is hard to imagine how that tightrope might successfully be walked in most cases. It certainly was not in petitioner's.

This is not a case where, consistent with *McCoy*, defense counsel could argue that *whoever* committed the crime was guilty only of a lesser crime because of a missing element, *e.g.*, the absence of force or fear in a petty theft charged as a robbery. Such an argument would not undermine the defendant's insistence that he was innocent of the *actus reus*. It would not link him to a crime against his will and to his potential embarrassment.

Petitioner's case is very different. There was no room for Hanlon to argue petitioner's innocence while also arguing that *whoever* committed this homicide lacked the required intent or malice and only committed manslaughter. The only person whose mental state we have circumstantial evidence of was petitioner. The only person who could have committed manslaughter "because of a sudden quarrel or in the heat of passion" and because he "acted rashly and under the influence of intense emotion that

obscured his reasoning or judgment" was petitioner. (2 App. 342.) The only person about whom Hanlon could have argued, "What happened . . . that led to a man beating in the brains of a woman he loved?" was petitioner. (2 App. 401.) Under *McCoy*, petitioner was entitled to preclude this type of argument to avoid diluting the strength of his case for complete acquittal.

II. To Violate *McCoy*, Defense Counsel Need not Say "The Defendant is Guilty" or Similar Words. Implied or Tacit Concessions Such as Occurred in Petitioner's Case Suffice.

If a concession is required to violate *McCoy*, what must it look like? There are many ways in law—and life—to assert something directly without saying it as explicitly as McCoy's counsel did. This case exemplifies that. Because an attorney has many rhetorical arrows in his quiver, a *McCoy* violation should not require an explicit concession. The test should be the likely impact of the argument on a reasonable juror. Review should be granted to settle this important question of law. Supreme Court Rule 10(c).

This is an appropriate case in which to reach this question. Hanlon never said, "Ladies and gentlemen of the jury, I concede that Mr. Mitchell killed the victim." However, the likely impact of his equivocations on the jury was "Forget everything I just said about innocence. Focus on manslaughter."

Hanlon did not defend petitioner's credibility. Rather, he said petitioner's testimony about third parties presented a coincidence that the

jury would have to grapple with. Beginning his argument about manslaughter, he told the jury that petitioner would object to his making it, remarks that told the jury he did not know about the argument and had not authorized it. He said the record supported the conclusion that petitioner was lying. (2 App. 398-400.)

Hanlon's professed disavowal of not believing his client actually told the jurors the exact opposite. It told them that they should not belabor petitioner's innocence defense but, rather, focus on manslaughter.[6] Nothing in *McCoy* suggests that defense counsel may pay lip service to the defendant's claims of absolute innocence and then negate them in front of the jury because doing so seems like the sounder strategy.

Most damningly, Hanlon referred to himself as an officer of the court. He did this not once, but twice.

> "I want to talk to you about an issue that's very difficult, not because it's difficult to talk about, but because my job as an attorney is to be an advocate for my client. I'm also an officer of the court. And I see my job in closing argument as arguing what I believe the evidence suggests and have you think about it. . . .
>
> I don't—you know, I try never to do that, and that's why this is difficult, but it's something, as an officer of the court and an advocate for my client, I have to do, because there certainly is evidence on which you could conclude, depending on how you

[6] Hanlon's argument involves two rhetorical devices. "Apophasis" is the practice of bringing up a subject or asserting a point by claiming not to mention it. "Paralipsis" is the device of emphasizing a point by claiming it deserves little emphasis.

> understand the inferences for circumstantial evidence, that Mr. Mitchell is not being totally honest with you about what happened." (2 App. 398-400.)

Even if the jury misunderstood Hanlon's ultimate point amidst his evasions, invoking his duties as an officer of the court would have told the jury he knew petitioner had lied and that the jury should also so conclude. If a prosecutor had invoked his duties and ethics to bolster the credibility of a witness, any defendant would complain about prosecutorial vouching. Hanlon also improperly vouched—for his own client's guilt.

To Hanlon's point that conceding petitioner's guilt of homicide was something "I have to do" as an officer of the court, the response is, "No, you don't." Although a defendant's constitutional right to testify does not include the right to testify falsely and his Sixth Amendment right to counsel does not include having the knowing assistance of counsel in suborning his perjury, *Nix v. Whiteside*, 475 U.S. 157, 173-176 (1986), nothing in the record shows that petitioner told Hanlon his intended testimony was false.

McCoy distinguished the Louisiana Supreme Court's reliance on *Whiteside* on that basis. "But McCoy's case does not resemble Nix, where the defendant told his lawyer that he intended to commit perjury. There was no such avowed perjury here." *McCoy v. Louisiana*, *supra*, 138 S.Ct. at 1510. Had Hanlon so known, his duty would have been not to put petitioner on the

stand or to withdraw. *Ibid*. Hanlon had no business putting him on the stand and then telling the jury that he lied.

In denying relief, the Court of Appeal primarily cited sister state and federal circuit cases that are either not on point or that contradict *McCoy*. The case of *United States v. Rosemond*, 958 F.3d 111 (2d Cir. 2020) held that *McCoy* was not violated when defense counsel conceded that the defendant paid to have the victim shot but disputed the element of intent to kill. *Id.* at 119, 123 (1 App. 1-2.) However, *Rosemond* read *McCoy* as limited to cases where counsel concedes every element of a charged crime. *Id.* at 122. This contradicts *McCoy* where only the *actus reus* of homicide was conceded.

The cited case of *Truelove v. State*, 945 N.W. 2d 272 (N.D. 2020) is similarly distinguishable. (1 App. 2.) It held that counsel's strategy that the defendant testify and admit striking the victim did not violate *McCoy* because it was "not necessarily" a complete concession of the charge of aggravated assault. *Id.* at 275-276. Again, this contradicts *McCoy*.

The Court cited *Merck v. State*, 298 So.3d 1120 (Fla. 2020) for the proposition that arguing alternative defenses of identity and voluntary intoxication does not violate *McCoy*. *Merck* is a barebones dismissal in which the supposed alternative argument of identity is not mentioned. The Court simply held that arguing voluntary intoxication is not a concession of guilt.

Id. at 1121. The case lacks sufficient discussion to be persuasive. However, if the voluntary intoxication argument was logically bound up with a concession over the defendant's objection that the defendant had committed the *actus reus* of the charged murder, it would violate *McCoy*.

The cited case of *People v. Maynard*, 176 A.D. 3d 512 (N.Y. App. Div. 2019) actually supports petitioner's position. There, the two issues were who robbed the victim and whether the victim was robbed in a dwelling to make the case second-degree burglary, a more serious charge. *Id.* at 513. *Maynard* held that counsel's emphasis on the stronger argument of where the robbery occurred did not violate *McCoy*. *Id.* at 513-514. This is the kind of case alluded to above where defense counsel may argue that *whoever* committed the crime was not guilty of the charged crime because of a missing element. That is not the case here because the only person who could have been guilty of voluntary manslaughter was petitioner.

The Court cited *People v. Franks*, 35 Cal. App. 5th 883 (2019) for a general statement of *McCoy*. *Id.* at 891. (1 App. 1.) The facts of *Franks*, where the defendant was convicted of voluntary manslaughter, do not support the denial of relief. There, counsel admitted that the defendant had been with the victim prior to her body being discovered. He urged the jury to consider a verdict of involuntary manslaughter. *Id.* at 888. On appeal, the defendant

argued that this "implicit concession" that he had caused the victim's death violated *McCoy*. *Id.* at 889. Relief was denied solely because the defendant had not made his wishes for a defense of absolute innocence known to counsel. *Id.* at 891.

Franks did not hold that concession of the *actus reus* of a charged crime does not violate *McCoy*. More importantly, it did not hold that an "implicit concession," *i.e.*, something other than "Ladies and Gentlemen of the Jury, the defendant is guilty of X," but amounting to the same thing, can never violate *McCoy*. This Court should decide that question in petitioner's favor.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Dated: April 12, 2021

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