

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

DUSTIN MELVIN DAVISON,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS**

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June 21, 2021

QUESTION PRESENTED

Is it unconstitutional to allow defense counsel to concede any aspect of guilt over defendant's unambiguously expressed desire to maintain actual innocence?

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CAPITAL CASE

No. _____

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THE STATE OF OKLAHOMA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS**

To: The Honorable Chief Justice and Associate Justices of the
United States Supreme Court:

Petitioner prays that a Writ of Certiorari issue to review the judgment of
the Oklahoma Court of Criminal Appeals entered in this case.

OPINION BELOW

The Oklahoma Court of Criminal Appeals issued a published opinion in this case, *Davison v. State*, 2020 OK CR 22, 478 P.3d 462. (Appendix A)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The judgment of the Oklahoma appellate court was entered November 19, 2020. (Appendix A) A Petition for Rehearing and Motion To Recall Mandate was filed on December 9, 2020 and subsequently denied in an unpublished order on January 20, 2021. (Appendix B and C)

CONSTITUTIONAL AND RELEVANT STATUTORY PROVISIONS

United States Constitution, Amendment VI:

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.

United States Constitution, Amendment XIV:

Section 1. 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.

OKLA. STAT. TIT. 21, § 701.7(C):

C. A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing,

maiming or using of unreasonable force by said person or who shall willfully cause, procure or permit any of said acts to be done upon the child pursuant to Section 843.5 of this title. It is sufficient for the crime of murder in the first degree that the person either willfully tortured or used unreasonable force upon the child or maliciously injured or maimed the child.

STATEMENT OF THE CASE

1. Facts of the case.

On May 18, 2015, the young life of two (2) year old K.B. was tragically cut short. None of the evidence presented at trial explained exactly what happened, but the State's theory was that Petitioner, Dustin Davison, the ex-boyfriend and then roommate of K.B.'s mother, Jennifer Young, abused the child and caused his death.

Ms. Young testified that just over a week after she graduated from high school, she, K.B. and a few of her friends spent most of the day at Harlow Park celebrating a friend's birthday. (Tr. 723-725) Later that night, Mr. Davison picked her and K.B. up from her friend's house around midnight, and the three (3) of them returned home. (Tr. 711-712, 730) According to her testimony, the next morning, she woke up, got ready for work, got K.B. ready for the day, and Mr. Davison drove her to her job while K.B. rode in the back seat. (Tr. 736) She explained that although K.B. bruised easily, even from just being tickled, he did not have any apparent bruises on him when she dressed him that morning or when she left him in the car with Mr. Davison. (Tr. 736, 739-742, 760)

Mr. Davison testified that after he and K.B. returned home, an individual named Jeremy Walker¹ was waiting there to buy methamphetamine.² Appellant explained that at the time, he was a drug dealer and Walker was a regular customer. (Tr. 1421) Mr. Davison stated that Walker entered the apartment, and after Walker gave Appellant \$100 for drugs, he and Walker began using drugs together. (Tr. 1421, 1438) According to Mr. Davison, at some point, he went into the bathroom and used a syringe to inject meth into his system.³ This caused him to pass out. He testified that he was unconscious for 12 minutes. (Tr. 1441-1442) He knew the exact time because he remembered what song was playing while he shot up and what was playing when he regained consciousness. This made it possible for him to know how much time he had lost. (Tr. 1442)

When Mr. Davison regained consciousness, he walked out into the living room and saw K.B. lying lifeless on the floor. (Tr. 1442) Mr. Davison did not know what to do because Walker was gone. (Tr. 1422) Mr. Davison had not heard anything that was happening in the living room while he was in the

¹ Mr. Davison admitted during cross-examination that the first time he mentioned anything about Jeremy Walker being involved was in 2016 or 2017. He explained that he wanted to tell Ms. Young the truth before he told the detectives or anyone else. This was why he repeatedly asked the detectives interviewing him if he could speak to Ms. Young during his interrogations. (Tr. 1423-1424, 1429)

² Mr. Davison did not mention anything about Jeremy Walker or a third party during his three interrogations with Bethany Police detectives. During the various questioning by police, Mr. Davison gave multiple stories attempting to explain K.B.'s injuries that included accidents, the family's dog, Mr. Davison playing with K.B., K.B. playing on his own, and K.B.'s young uncle picking on K.B. (Tr. 869-870) (State's Exs. 178-180)

³ A detective with the Oklahoma City Police Department testified that police found no signs of meth or any other narcotics at the scene. The officers only found evidence of marijuana and tobacco. (Tr. 1258)

bathroom. He never heard K.B. cry during that time. (Tr. 1441) Appellant tried to resuscitate K.B., but his efforts were unsuccessful. (Tr. 1442) Eventually, Mr. Davison called 9-1-1. (State's Exs. 5 and 5-A) Life saving measures by emergency personnel was unsuccessful, and doctors pronounced K.B. dead in the ER at 3:53 p.m. (Tr. 1022-1023)

A forensic pathologist at the Office of the Chief Medical Examiner in Oklahoma City, testified that K.B. had approximately forty-nine (49) distinct bruises on his torso, chest, abdomen, arms, and legs,⁴ significant bleeding on the tissue that connected his small intestine. (Tr. 1112, 1118) The pathologist also found a total of four (4) areas of focal bruising on K.B.'s face and back of the head and a seven (7) cm skull fracture on the right side of K.B.'s head. (Tr. 1142-1143, 1149, 1152)

2. Disposition of Petitioner's *McCoy v. Louisiana* claim on direct appeal.

Prior to trial, multiple hearings were held because defense counsel did not agree with Mr. Davison's decision to testify the way he intended to testify and they wished to withdraw from the case. (O.R. 467-471) In a hearing on the Motion to Withdraw, defense counsel stated that there was an "irreconcilable conflict between Mr. Davison and between [sic] his defense team." (10/27/2017 Tr. 5) Defense counsel's motion to withdraw was denied, and defense counsel were unable to dissuade Mr. Davison from testifying. (Tr. 1380, 1411, 1414) Moments before Mr. Davison took the stand, defense

⁴ This number excluded the bruises to K.B.'s head and any internal injuries. (Tr. 1112, 1131)

counsel rested and stated that defense had no witnesses. (Tr. 1419) Then immediately prior to his testimony, the trial court informed the jury that Mr. Davison was testifying against the advice of counsel. (Tr. 1420) Mr. Davison then testified in narrative form and told the jury that he was not guilty and a third party abused K.B. (Tr. 1422) After resting for a second time, defense counsel stood up during closing and told the jury that there was a reason they spent so much time talking about punishment in voir dire. He also told the jury Mr. Davison was guilty and was blocking it out. Defense counsel closing argument was brief.

DEFENSE COUNSEL: Thank you, Judge. Good morning, ladies and gentlemen of the jury. I guess I'm the lawyer that doesn't have any sense in taking this case to court. That's what I hear from [the detective]. . . [The detective] was asking no lawyer in his right mind would take this case to court, and so here I am. You can judge for yourself.

In a Capital murder case, a man on trial for something that will take his life or a substantial portion of his life or maybe life without parole is entitled to a lawyer. So there are other reasons why you get a lawyer in court, just not because the lawyer doesn't have his right mind about him. So let's get over that right away. I do have my right mind.

I'm not going to belabor the point. I'm not going to argue a long time. **There was a reason that we spent a long time in voir dire talking about punishment and I won't belabor this.**

There are some things I want you to look at. Jennifer—my heart goes out to her. I mean, my gosh, fifteen years old, pregnant, has to leave her home because her mother is doing meth. She takes the baby, goes to an alternative high school, works at Sonic, can't stay at her father-in-law -- if they had gotten married, it would be at his father-in-law's house. So she leaves there and then she meets Dustin Davison.

And Dustin -- I think you know something about who he is. He's a complicated person, like we all are, good points and bad points. He takes this mother and child in. He's a couple years older. Takes them into his mother's house and his stepfather's house. At first, she just lives there from time to time and then she just moves in and, fait accompli, and they're in there.

And they treat Jennifer well. They treat [K.B.] well, but, again, Jennifer has pride. She wants to be out on her own. She gets some money from her deceased father and she has a little bit of an estate, I guess. So she tries to make it out on her own and Dustin goes with her. And Dustin did spend a lot of time with [K.B.], by just the force of circumstances.

Jennifer got child care when she was in high school, but when she's working -- Dustin. So he's the one who changes him, changes [K.B.], feeds him, nourishes him, takes care of him, and there's not one word from Jennifer that she was ever nervous about that or thought that [K.B.] was in danger at all from Dustin.

[K.B.'s uncle], Jennifer's younger brother, said that: I hung out with Dustin. And I think it's interesting that Dustin hangs out with younger people a lot of times, kind of gives you some insight. But, again, the prosecutor tried to get [K.B.'s uncle] to say, well, when we got in front of that Xbox, then he'd just blow up or get excited. No, he really didn't.

So no one thought and saw this coming. Six weeks or so prior to [K.B.'s] death, Jennifer and Dustin break up. They continue to cohabitate. They continue to live together, out of necessity, more than anything else. She needed somebody to watch [K.B.] during the day, and so they -- he sleeps on the couch now.

And you heard the testimony that he quit taking care of himself. He stunk, quit taking showers, he lost weight. I think when he was checked in, he weighed 114 pounds. Dustin said he weighed less than that. That's drug usage. That's drug usage. And it may not just be the marijuana that was on the table. IT may be other drugs as well. His mother's controlled dangerous

substance, which is prescribed, is in the bathroom. So Dustin is tanking. He's going downhill.

The day that [K.B.] died, again, Jennifer and Dustin had a little spat about taking the dog out and keeping the apartment clean. I mean, those are low-level arguments in domestic, domestic history. Those are low-level arguments, persistent arguments, constant themes, but low-level, not enough to get somebody. . [sic].

[K.B.] gets two corn dogs. They come home and they have a couple of corn dogs because -- I forgot to ask the medical examiner, but [the detective] pointed that out that there were corn dogs. So they did -- but two hours -- who knows what happened.

The law requires, in element number two, a malicious killing, a willful, malicious killing. And Ms. Collins was absolutely right. There's not much to get to willful. It has to be purposeful. I'm submitting to you that the injuries that occurred to [K.B.] occurred rapidly. They did not occur over a series of days. There was not, you know, continuous torture, this kind of thing. It happened rapidly. And then the 911 calls.

I submit to you that the person who did this probably trying to block things out. He can't imagine that he did this,

but he did it. Okay. But he just could be blocking it out. And then he spends --

PROSECUTOR: Your Honor, facts not in evidence.

THE COURT: Sustained.

DEFENSE COUNSEL: Well, you know the evidence a whole lot better than I do because I'm one person and I get old and senior moments occur more often for me than others. But you know what the evidence is. You've seen it here, black and white. You've seen Dustin. You have some idea of who he is.

I'd ask you to look very closely at the requirements for malicious injury; that it's more than just a willful or purposeful act. It takes more than that. It may not be enough, you know, it's -- if you kill an adult, you got to intend to kill them. That's malice aforethought, and you have to intend to kill them.

And children get a break. Children - it's easier to get convicted of first degree murder for killing a child than it is for killing an adult. And that's the way it should be. But just ask yourself whether or not the killing of [K.B.] was malicious, and it's got to be beyond a reasonable doubt. I didn't make that up. That's the law. It's got to be beyond a reasonable doubt for each element of the crime.

Thank you for your attention. This has been a relatively short trial, and thank you.

(Tr. 1464-1469)

On direct appeal, Mr. Davison relied on *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) and argued that trial counsel committed structural error and denied Mr. Davison his sixth amendment right to autonomy by conceding Mr. Davison's guilt in the first stage of trial in direct opposition to Mr. Davison's trial testimony. The Oklahoma Court of Criminal Appeals gave *McCoy* a limiting interpretation by defining concession based on *Black's Law Dictionary* and *Webster*.

"*Black's Law Dictionary* 262 (5th Ed. 1979) defines a concession as "a yielding to a claim or demand." *Webster's Ninth New Collegiate Dictionary* 271 (1986) says to "concede" is to "accept as true, valid, or accurate." The unabridged *Webster's Third New International Dictionary* 469 (1963) says to "concede" is to "acknowledge grudgingly or hesitantly;" or to "acknowledge as won by an opponent without formal determination of the result."

Davison, at ¶ 45, 478 P.3d at 474. After limiting the definition of concession, the appellate court found:

. . . that trial counsel did not concede Appellant's guilt for first degree murder in violation of the Sixth Amendment. . . Despite long, perhaps impossible, odds, counsel's first-stage argument pursued an acquittal based on reasonable doubt of the elements of child abuse murder, specifically the element of willful or malicious injury being the cause of death. Counsel therefore did not concede Appellant's guilt according to the plain meaning of the term, and did not unconstitutionally usurp control of the objectives of Appellant's defense in violation of the Sixth Amendment.

Davison at ¶¶ 46-47, 478 P.3d at 474-475.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO ANSWER THE IMPORTANT QUESTION WHETHER IT IS UNCONSTITUTIONAL TO ALLOW DEFENSE COUNSEL TO CONCEDE ANY ASPECT OF GUILT OVER DEFENDANT'S UNAMBIGUOUSLY EXPRESSED DESIRE TO MAINTAIN ACTUAL INNOCENCE.

A. Oklahoma's appellate court's application of *McCoy* is overly restrictive and continues to deny a defendant the right to make the fundamental decisions regarding his case.

The Sixth Amendment guarantees an accused the right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. It "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. . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819-820 (1975)

Under the Oklahoma Court of Criminal Appeals' reasoning, a defendant only controls, at best, whether he has a defense not the actual objective of his defense. This Court in *McCoy* clearly states that "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." *McCoy* at 1509. Mr. Davison's trial lawyers did not abide by his expressed objective.

The Oklahoma Uniform Jury Instruction regarding the elements of murder in the first degree involving the death of a child states:

No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a child under the age of eighteen;

Second, the death resulted from the willful **or** malicious injuring/t torturing/maiming/(using of unreasonable force);

Third, by the defendant.

Oklahoma Uniform Jury Instruction-Criminal 2d. 4-65(A). After telling the jury that the State was correct about willful, defense counsel argued that the purposeful, rapid abuse was not malicious. Mr. Davison had made it clear that he wished to run the defense that he never abused K.B. Contrary to Mr. Davison's expressed wishes and his trial testimony, defense counsel argued to the jury that Mr. Davison abused the child but was blocking it out.

The Oklahoma appellate court found that although this argument by defense counsel was an absolute contradiction to Mr. Davison's testimony and his unambiguously expressed desire for his defense, it was not a concession of Mr. Davison's guilt or a violation of his rights under the Sixth Amendment. Because defense counsel argued that one of the options for the second element of the crime must be proven beyond a reasonable doubt, the appellate court held that defense counsel had not usurped control over the objectives of Mr. Davison's defense. Under the limited "plain meaning" of concede, the appellate court determined that defense counsel pursued an acquittal based on counsel's defense objective.

B. State appellate courts are split on the extent of a defendant's control over his defense requiring this Court's clarification.

At least three (3) states have found that defense counsel's failure to present the factual innocence claim requested by the defendants was structural error and violated the Sixth Amendment. The Court of Appeals, Third District, California agreed "that *McCoy* protects defendant's right to determine that the objective of his defense is innocence. . ." *People v. Eddy*, 33 Cal. App. 5th 472, 481, 244 Cal. Rptr. 3d 872, 878 (2019).⁵ The Court of Criminal Appeals of Texas found that defense counsel violated *McCoy* when he argued that the defendant was not guilty of capital murder because the killing of the second victim was not intentional even though there was no question that the defendant wanted to maintain his innocence. *Turner v. State*, 570 S.W.3d 250 (2018). The Supreme Court of Louisiana concluded that defense counsel's decision to concede that defendant was guilty of second-degree murder or manslaughter over the defendant's objections resulted in structural error that required the defendant's sentence and conviction be vacated. *State v. Horn*, 251 So.3d 1069, 1077 (2018)

By contrast, the State of Oklahoma has held that the choice to run the defense of actual innocence is not an objective under the control of the defendant. The Court should grant the writ of certiorari in this case to resolve this split in authority.

⁵ "... trial counsel conceded in his closing argument that defendant 'committed the crime [of voluntary manslaughter] . . . but maintained that defendant was not guilty of first or second degree murder.' *Id.* at 477.

C. This case presents a good vehicle for the Court to determine whether maintaining factual innocence during the guilt phase of a capital trial is an objective controlled by the defendant.

In *McCoy*, this Court made it clear that “Autonomy to decide that the objective of the defense is to assert innocence” is a decision reserved for the client. *McCoy*, at 1509. However, the Oklahoma Court of Criminal Appeals has narrowed that autonomy down to only whether the defendant is able to plead not guilty. Mr. Davison told the jury that he was innocent of the charged crime. He did not abuse K.B., and he did not cause the child’s death. However, mere moments later, his attorney got up and told the jury not only that he abused K.B., but that he did so willfully. Mr. Davison’s innocence objective was thrown out the window in favor of his trial attorney’s objective of conceding guilt but arguing that it was not malicious.

Petitioner’s case presents a good vehicle for the Court to decide the question of whether the choice to maintain his innocence at the guilt phase of a capital trial is an objective that remains under the control of the defendant. Petitioner submits that it is, and this objective cannot be changed by defense counsel as it is not a strategic choice “about how best to *achieve* a client’s objectives;” it is a choice about what the client’s objectives in fact *are*.” *McCoy* at 1508.

The issue is now before the Court having been fully developed below. Accordingly, the case provides a good vehicle for determination of this issue that impacts virtually all active capital jurisdictions in the United States.

CONCLUSION

Petitioner prays the Court grant his petition to decide that the Sixth Amendment of the United States Constitution is violated when defense counsel concedes any aspect of guilt when a defendant has expressed a clear desire to maintain his innocence at trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrea Digilio Miller, member of the bar of this Court, do hereby certify that I have served a copy of the Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals on counsel for the Respondent, State of Oklahoma, by depositing the same in the U.S. Mail, postage prepaid, to Jennifer Miller, Chief of the Criminal Division, Office of the Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this 21st day of June, 2021. All parties required to be served have been served.



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ANDREA DIGILIO MILLER