No. _____

In The Supreme Court of the United States

JAMES S. TYLER, III,

Petitioner,

v.

WARDEN DARREL VANNOY
LOUISIANA STATE PENITENTIARY,

Respondent.

On Petition For A Writ Of Certiorari To The First Judicial District Court Of Caddo Parish, Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a capital defendant objected to his attorney's concession of guilt, does the explicit text of the Sixth Amendment and longstanding right to counsel jurisprudence circumvent the *Teague* bar and require the application of *McCoy* to cases on collateral review?

2. Whether *McCoy* announced a substantive rule that should be applied retroactively to criminal defendants who were subjected to conviction without being afforded their constitutional right to counsel?

3. Whether the *Griffith* rather than *Teague* standard should apply to determine the retroactive application of *McCoy*, where initial review collateral claims are not final after direct review?

STATEMENT OF RELATED CASES

State v. Tyler, 2006-KP-2339 (La. 6/22/07), 959 So. 2d 487, cert. denied, *Tyler v. Cain*, 522 U.S. 1044 (2007).

State v. Tyler, No. 175-282, slip op. (1st J.D.C. Aug. 11, 2006), writ denied, 2006-KP-2339 (La. 6/22/07), 959 So. 2d 487, cert. denied, *Tyler v. Cain*, 522 U.S. 1044 (2007).

State v. Tyler, No. 175282, slip op. (1st J.D.C. Dec. 28, 2012), writ granted in part, denied in part, 2013-0913 (La. 11/22/2013), 129 So. 3d 1230.

State v. Tyler, No. 175282, slip op. (1st J.D.C. Nov. 14, 2014), writs denied, 2015-0093 (La. 05/22/15), 171 So. 3d 922, 2013-0913 (La. 11/06/15), 181 So. 3d 678, cert. denied, *Tyler v. Louisiana*, 137 S.Ct. 589 (2016).

State v. Tyler, No. 175-282, slip op. (1st J.D.C. Feb. 13, 2020), rehearing denied, No. 175-282, slip op. (1st J.D.C. May 15, 2020), writ denied, *Tyler v. Vannoy*, 2020-KP-0984 (La. 11/17/21), 327 So. 3d 507.

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James Tyler respectfully petitions for a writ of certiorari to review the judgment of the First Judicial District Court of Caddo Parish, Louisiana.

INTRODUCTION

Imagine that you are a criminal defendant in Shreveport, Louisiana, facing a charge of first degree murder. You care little about the potential punishment. Your sole objective is to maintain your innocence at trial. You are indigent and untrained in the law, but you know that you have the right to require the state to prove your guilt beyond a reasonable doubt and you know that you have the right to an attorney to assist you in your defense. The trial court appoints an attorney who tells you that his plan, in your "best interest," is to completely concede your guilt at trial. You immediately inform your attorney and the trial court of your objection to your attorney conceding your guilt. Your objections are memorialized in contemporaneous attorney memos and on transcript. Without access to a law library, you file a handwritten *pro se* §1983 suit and a *pro se* motion in the trial court requesting new counsel who will assist you in your defense. These requests are mischaracterized by the trial judge as "personality disputes" over trial strategy and denied.

At trial, your appointed counsel argues to the jury from opening statement to closing argument that you committed the murder, that it was in the course of an armed robbery, and that you are, in fact, guilty of

capital murder. By so doing, he deprives you of all of your trial rights: your presumption of innocence, your right to remain silent, your right to confront your accusers[1], your right to present a defense, he introduces otherwise inadmissible evidence that it adverse to your interests, and wholly violates your constitutional right to the assistance of counsel for your defense. You are, unsurprisingly, convicted of first degree murder and sentenced to die.

Following your conviction, you argue to every appellate court that your conviction violated your rights under the Sixth Amendment. You seek review at the United States Supreme Court and are denied. Then, while your case is on collateral review, another defendant from Louisiana whose attorney improperly conceded his guilt over his objection, is granted certiorari, and ultimately relief, by this Court under nearly identical factual circumstances as yours.

Where your appointed attorney concedes your guilt over your profuse objections and refuses to defend you despite your insistence that he do so, comparisons to the Star Chamber are not hyperbole.

James Tyler was convicted in August 1996 of first degree murder and sentenced to death after his appointed attorneys conceded his guilt over his repeated objections. All that James Tyler asked was that he be assisted by counsel at trial defending against the State's charges, as the Constitution has always

[1] Appointed counsel did not cross examine any of the state's witnesses at trial.

required. In 2018, while Mr. Tyler was in the midst of collateral review, this Court granted Robert McCoy relief because his attorney unconstitutionally conceded his guilt over his objection. James Tyler applied for, but was denied relief, in the trial court when it erroneously held that *McCoy* announced a new rule of law that was not applicable to cases on collateral review.

The kind of sham trial James Tyler was afforded, absent of any adversarial process, prior to his being convicted and sentenced to death was precisely the kind of nightmare the Framers were attempting to guard against when they drafted the Bill of Rights. *Alabama v. Shelton*, 535 U.S. 654, 667, 122 S.Ct. 1764, 1772, 152 L.Ed.2d 888 (2002) citing *United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (Holding that the Sixth Amendment does not "countenance" incarceration based on a conviction that has never been subjected to "the crucible of meaningful adversarial testing.") James Tyler's conviction and death sentence were procured in the complete absence of fairness required by the Constitution.

Justice Alito, writing for the Dissent in *McCoy*, opined that "if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1515, 200 L.Ed.2d 821 (2018) (Alito, J., dissenting).

That is precisely what occurred in James Tyler's case. However, neither a capable trial judge nor the appellate courts have corrected the fatal error. This Court is Mr. Tyler's final venue for relief.

OPINIONS BELOW

The order of the Louisiana Supreme Court denying Mr. Tyler's application for supervisory writs (App. 1) is available at: *Tyler v. Vannoy*, 2020-00984 (La. 11/17/21), 327 So. 3d 507.

The ruling of the district court denying Mr. Tyler's application for post-conviction relief (App. 2) is unpublished.

JURISDICTION

The Louisiana Supreme Court denied Mr. Tyler's application for supervisory writs on November 17, 2021. Mr. Tyler did not file a motion for rehearing. On February 3, 2022, Justice Alito granted a 60-day extension of time in which to file a petition for a writ of certiorari to April 16, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides in pertinent part, "In all criminal prosecutions,

the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment of the U.S. Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Relevant Procedural Background

James Tyler was convicted of one count of first degree murder on August 28, 1996 after his appointed counsel conceded his guilt of the capital murder over his repeated objections. He was sentenced to death on August 31, 1996.

His conviction and sentence were affirmed on direct appeal by the Louisiana Supreme Court. *State v. Tyler*, 97-0338 (La. 9/9/98), 723 So. 2d 939, cert. denied, *Tyler v. Louisiana*, 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999).

On August 4, 1999, Mr. Tyler filed a *pro se* petition for post-conviction relief, which was denied by the trial court. *State v. Tyler*, No. 175-282, slip op. (1st J.D.C. Aug. 11, 2006), writ denied, *State v. Tyler*, 2006-KP-2339 (La. 6/22/07), 959 So. 2d 487. On September 14, 2007, Mr. Tyler sought certiorari in the United States

Supreme Court. Certiorari was denied on November 26, 2007. *Tyler v. Cain*, 522 U.S. 1044 (2007).

Mr. Tyler filed a counseled Amended Supplemental Petition for Post-Conviction Relief on May 7, 2009 raising 28 assignments of error, including several directly addressing Mr. Tyler's appointed counsel's concession of guilt at trial. Evidentiary hearings were held December 27-30, 2011. The district court denied Mr. Tyler's Amended Application for Post-Conviction Relief on December 28, 2012. *State v. Tyler*, No. 175282, slip op. (1st J.D.C. Dec. 28, 2012), writ denied, *State v. Tyler*, 2013-0913 (La. 11/22/2013), 129 So. 3d 1230.

On February 4, 2016, Mr. Tyler filed a Petition for Writ of Certiorari to the United States Supreme Court, urging his claims related to the denial of his right to counsel by his appointed counsel's concession of guilt over his objection. Certiorari was denied on December 12, 2016. *Tyler v. Louisiana*, 137 S.Ct. 589 (2016).

On July 18, 2016, Mr. Tyler filed a habeas petition in United States District Court for the Western District of Louisiana. Among 35 separate claims in the petition, Mr. Tyler again urged in five separate claims that his Sixth Amendment right to counsel was violated when his appointed counsel conceded his guilt over his objection.

While these filings were pending, the United States Supreme Court issued its decision in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018).

On May 8, 2019, the U.S. District Court for the Western District of Louisiana issued a stay to allow Mr. Tyler the opportunity to present Mr. Tyler's constitutional claims based on *McCoy* to the Louisiana State Courts.

On May 14, 2019, Mr. Tyler filed a *Supplemental Petition for Habeas Corpus Relief* in the First Judicial District Court. On February 11, 2020, the post-conviction court denied Mr. Tyler's *Supplemental Petition for Habeas Corpus Relief*, finding that Mr. Tyler's application should be denied. The trial court found that because *McCoy* was not retroactively applicable to cases on collateral review, Mr. Tyler could not claim relief under *McCoy*.

Counsel for Mr. Tyler filed a Motion to Reconsider District Court's Denial of James Tyler's Supplemental Petition for Post-Conviction Relief on March 13, 2020. On May 15, 2020, the post-conviction court denied the motion to reconsider.

The Louisiana Supreme Court denied Mr. Tyler's writ application on November 17, 2021. *Tyler v. Vannoy*, 2020-00984 (La. 11/17/21), 327 So. 3d 507. App. 1, x.

II. Relevant Factual Background

James Tyler was arrested on May 31, 1995 and charged with the first-degree murder of Jock Efferson, during the course of an alleged armed robbery. The state alleged that the murder was committed with the

intent to inflict great bodily harm on two others, Denise Washington and Rahsaan Roberson.

Three days after his arrest, Alan Golden was appointed to represent James Tyler and took on the role as lead counsel. Associate counsel, Kurt Goins, was enrolled on July 12, 1996, five weeks prior to trial, and was assigned responsibility for the entire guilt phase of Mr. Tyler's trial. Alan Golden delegated to himself the responsibility for the penalty phase.

Less than two weeks after Mr. Goins enrolled to represent him at the guilt phase of his trial, James Tyler filed a *pro se* §1983 action in the Western District of Louisiana arguing a conflict of interest with his appointed counsel over counsel's intention to concede Tyler's guilt at trial over his vociferous objection. *See 96-cv-01785-DEW-RSP Tyler v. Golden, Exhibit I to Supplemental Post-Conviction Petition.* The lawsuit sought a declaratory judgment arguing that Mr. Golden's actions "violated plaintiff's rights," as well as injunctive relief restraining Mr. Golden "from retaliating against plaintiff for filing this action," and, lastly, $60,000 in punitive damages. *Id.*

On July 31, 1996, three weeks before trial, Mr. Golden met with James Tyler at the Caddo Correctional Center. According to the visit memo, Alan Golden "told James that if we had to try the guilt phase, we would not contest guilt, but use the proceeding as an early penalty phase. James responded with anger and accused us selling him out." See 7/31/1996 Memo, *Exhibit J to Supplemental Post-Conviction Petition*.

On August 9, 1996, according to the memo from the visit, Golden "reiterated to James that we were not going to contest the fact that he did the crime, but we were going to generally contest the state of mind element, namely specific intent. I explained that we would argue that "there are serious questions about his state of mind." James voiced disagreement over this and said he something in store for trial." See 8/9/1996 Memo, *Exhibit L to Supplemental Post-Conviction Petition.*

On August 14, 1996, James Tyler filed a *pro se* motion, with his §1983 suit appended, asking the trial court to appoint new, unconflicted counsel. *See Pro Se Motion to Appoint New Counsel, Exhibit K to Supplemental Post-Conviction Petition.* Mr. Tyler alleged counsel had failed in every area to represent his interests, specifically arguing that he and counsel "have not been able to agree on a defense for the defendant. This has caused heated discussion between the defendant and his counsel." *Id*. *See Exhibit K to Supplemental Post-Conviction Petition.*

A hearing was conducted on the motion on August 14, 1996. Mr. Golden announced: "I do not wish to make any statement either one way or the other on this is because I cannot do so without bringing up matters which would violate Mr. Tyler's confidences." *See Transcript, Exhibit M to Supplemental Post-Conviction Petition.* The trial court concluded that the issue between Mr. Tyler and Mr. Golden was not "a legal conflict about things" but instead "a dispute between a defendant and his counsel in connection with their representation or his representation of the defendant." *See Exhibit L to Supplemental Post-Conviction Petition.*

The court dismissed the "complaints" as a "personality problem" that was specific to Mr. Golden, and noted that there were three other attorneys from the public defender's office, including Mr. Goins, representing Mr. Tyler. *See Exhibit L to Supplemental Post-Conviction Petition.* Thereafter, the court indicated to Mr. Tyler that he had until 5 p.m. the following day, August 15, 1996, to file a writ application to the Second Circuit.

Thereafter, Mr. Tyler addressed the Court and told the trial judge that he had been unable to file the writ application by the deadline because, though he asked his lawyers to file it for him, they refused to assist him. Mr. Golden then addressed the court, informing the trial judge that the motion and writ are "adverse to my interests" and that he would not assist Mr. Tyler with the writ application. *See Exhibit M to Supplemental Post-Conviction Petition, at p. 59.* Mr. Golden's co-counsel, Mr. Goins, informed the court that he deferred to Mr. Golden. *Id.* The court made clear that Mr. Tyler's counsel would not assist him in the preparation and filing of the writ application, nor would he have *any* assistance of counsel: "It is up to Mr. Tyler himself to do the writ, and his attorney will not assist him on that." *See id. at p. 61*. Mr. Tyler informed the court that he did not know how to file a writ application and that his access to the law library was very limited. *Id. at p. 63*.[2]

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[2] On September 19, 1996, nearly three weeks *after* the trial concluded and Mr. Tyler had been sentenced to death, the Second Circuit issued a ruling denying Mr. Tyler's *pro se* writ application on procedural grounds. *See Exhibit K to Supplemental Post-Conviction Petition.*

On August 19, 1996, Mr. Tyler filed a *pro se* writ application in the Second Circuit. *See Exhibit S to Supplemental Post-Conviction Petition.* In the writ application, Mr. Tyler asserted that he and his attorney had not been able to "agree on a defense." He asserted that "defendant alleged that he did not commit any crimes in the state of Louisiana and has pleaded not guilty. Mr. Golden and his co-counsel has stated that the defendant has an open and shut case so their [sic.] not going to attempt to get the defendant acquitted, but seek to say the defendant did commit a robbery/homicide as a result of intoxication or because the defendant had some sort of mental defect. The defense claims their trying to get the defendant a life sentence instead of the death penalty. If the defendant did not believe he would be acquitted and wanted a life sentence then the defendant would have pleaded guilty instead of not guilty. . . ." *Id.*

Exhibit S to Supplemental Post-Conviction Petition (emphasis supplied).

At trial, over James Tyler's objection, appointed counsel conceded James Tyler's guilt of first-degree murder and the two aggravating factors alleged by the State.

Defense counsel told the jury in opening statements:

> What I want to do is take a couple of moments with you and talk to you about some things that are not really issues in this case. You will learn through the testimony the following: **first, that James Tyler indeed shot and**

> **killed Jock Efferson at the Pizza Hut on that evening in May 1995. Two, you will learn that he wounded Denise Washington and Rahsaan Roberson. . . . You will see them both come into the courtroom, take the witness stand, tell what happened and identify James Tyler as their assailant. That is not in dispute in this case. Thirdly, you will learn that in the course of this he robbed the Pizza Hut of money**.

Transcript, Exhibit P to Supplemental Post-Conviction Petition.

Thereafter, appointed counsel entirely refused to subject the State's case to adversarial testing. Appointed counsel did not cross-examine any of the State's witnesses. He did not confront the two eyewitnesses about the fact that they had made wildly inconsistent statements about the assailant's height, weight, hairstyle, and clothing. *12/28/2011 Transcript pp. 230-231, Exhibit H to Supplemental Post-Conviction Petition.* Asked why he didn't cross-examine the confidential informant, defense counsel later stated: "[t]here was no point in attacking the evidence she was offering, because it didn't hurt us. We were conceding Mr. Tyler's guilt, so the evidence of identification was of no moment to us. . . . My intention was not to impeach her. . . ." *Id*. at 232, 274.

At the close of the state's case, James Tyler addressed the Court, stating:

> I wanted to put on record that my attorneys are using the defense that I don't agree with.

> I have never agreed with it. That's part of the reason why I filed a motion to appoint new counsel. They are seeking – to me, they seeking witnesses for the State getting on the stand and my attorney who is supposed to represent me not say nothing in my favor. And I understand they may be trying to get me a life sentence, but if I would have wanted a life sentence, I would have pleaded guilty and got a for-sure life sentence. I pleaded not guilty. And I don't think my attorneys should have done that without my permission. They've known for a long time where they stood on that. I didn't want to take no plea bargain, you know, and they still, regardless of what I said or what I wanted, still went against my wishes. I just wanted to put that on the record.

Transcript, Exhibit Q to Supplemental Post-Conviction Petition.

Following James Tyler's objection, the trial court questioned lead counsel about the decision to concede guilt, to which Alan Golden responded, "Our primary objective is of course to save Mr. Tyler's life, to do whatever we can to increase his chances of getting a life sentence for the jury. That is our primary objective. Everything else comes secondary to that." *See Exhibit Q to Supplemental Post-Conviction Petition, pp. 195-96.*

Over his clear objections, James Tyler's attorneys proceeded through opening to closing statements to concede James Tyler's guilt of the charged offenses. The State all but thanked defense counsel in its closing argument to the jury: "[Defense counsel's] comment that soon you'll learn more means that he assumes you

are going to find James Tyler guilty of first degree murder. Obviously the State thinks that's a proper thing to do." *See Exhibit R to Supplemental Post-Conviction Petition.*

Mr. Tyler was convicted following a jury trial of first degree murder on August 28, 1996. The jury sentenced Mr. Tyler to death on August 31, 1996. His conviction and sentence were affirmed on appeal. *State v. Tyler*, 97-0338 (La. 9/9/98), 723 So. 2d 939.

Following this Court's decision in *McCoy*, Mr. Tyler filed a Supplemental Post-Conviction Petition arguing that he was entitled to relief pursuant to *McCoy*. The trial court denied the petition. In its order denying Mr. Tyler relief, the trial court incredulously restated *McCoy's* holding, opining that "If [Tyler] were on trial today, *McCoy* would appear to require this Court to allow him to override his counsel's advice and insist upon claiming innocence even in the face of overwhelming evidence against him." App. 2.

The Louisiana Supreme Court denied Mr. Tyler's application for supervisory writs. *Tyler v. Vannoy*, 2020-00984 (La. 11/17/21), 327 So. 3d 507.

The Louisiana Supreme Court erred when it affirmed the trial court's refusal to apply the holding of *McCoy v. Louisiana* to Mr. Tyler's case on collateral review. The trial court concluded, without discussion, that *McCoy* announced a new rule of criminal procedure which did not meet either of the exceptions for retroactivity discussed in *Teague v. Lane*. *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Mr. Tyler is seeking relief from this Court.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG.

a. The holding in *McCoy* was simply an application of fundamental Sixth Amendment jurisprudence, mandated by the text of the Sixth Amendment and should be applied to Mr. Tyler's case.

James Tyler, an indigent defendant who stood charged with capital first degree murder, asked nothing more than to exercise his right to the assistance of an attorney for his defense, as expressly dictated by the Sixth Amendment. U.S. Const. Amend. 6. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.") In *McCoy*, this Court held that, "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right 'to have the Assistance of Counsel for his defense,' the Sixth Amendment so demands." *McCoy*, 138 S.Ct. at 1505. This Court's holding in *McCoy* was dictated by longstanding principles involving a defendant's "ultimate authority to make certain fundamental decisions regarding the case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), affirming an accused's "individual dignity and autonomy," *McKaskle v.*

Wiggins, 465 U.S. 168, 178 (1984), and mandating that a defendant's "choice[s] must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta v. California*, 422 U.S. 806, 834 (1975) (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970)). Guaranteeing a defendant the assistance of counsel for his defense "as the Sixth Amendment so demands" broke no new ground nor did it impose any new obligations on the State of Louisiana.

A defendant's right to determine the ultimate objective of his defense, grounded in his Sixth Amendment right to counsel and reaffirmed by *McCoy*, has been well-established since the founding of the American Colonies, prior to the adoption of the Bill of Rights. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1507, 200 L.Ed.2d 821 (2018) citing *Faretta v. California*, 422 U.S. 806, 823, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Founders of our Nation conceived within themselves the idea and desire for individual rights and personal choice. In 1791, this idea gave birth to the Bill of Rights, which for two centuries has integrated and affected all segments of society, including those charged with crime. These rights include the Sixth Amendment right to the assistance of counsel, which is "fundamental to the fair administration of American justice." *Faretta*, 422 U.S. at 819. Along with this inalienable right to be defended, came Tyler's personal choice to defend, which is "given directly to the accused." *Id.* at 819-820.

In defining the contours of this right, this Court has noted that the term "'[a]ssistance' of [c]ounsel" as it appears in the Sixth Amendment "contemplat[es] a

norm in which the accused, and not a lawyer, is master of his own defense." *Gannett Co. v. DePasquale*, 443 U.S. 368, 382, fn. 10, 99 S.Ct. 2898 (1979). The Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta*, 422 U.S. at 819-820, 95 S.Ct. 2525. Counsel was conceived as a "defense tool[] guaranteed by the [Sixth] Amendment," to be "an aid to a willing defendant, not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Faretta*, 422 U.S. at 820.

To insist that one's lawyer refrain from admitting guilt, is to demand that one's lawyer defends. This insistence is the attempted exercise of one's guaranteed right to be defended by counsel. This insistence has no other purpose. In *Faretta*, the Court explained that "[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction . . . " *Id*. *McCoy's* holding that a capital defendant has the right to insist that his attorney refrain from admitting guilt is not a new right, but a long held personal right afforded to capital defendants by the Sixth and Fourteenth Amendments of our Constitution, and corresponding jurisprudence.

In contrast to the new right to self-representation the *Faretta* Court found, without textual support from the Constitution, Tyler's insistence was an attempt to exercise his personal right to defend, just as it is written in the Constitution, through the assistance of

counsel. However, this Court "has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process." *Faretta*, FN 15. Among these rights are what the dissenters in *Faretta* say are "constitutional prerogatives." The right to be "present in person at each significant stage of a felony prosecution" is identified as being in this category. *Faretta*, 422 U.S. at 842. While there is "no textual support for" the *Faretta* majority's "conclusion in the language of the Sixth Amendment," *Faretta*, 422 U.S. at 846, there *is* textual support for a defendant's right to the assistance of counsel for his defense. The availability of this Sixth Amendment right necessarily inheres a constitutional due process right to insist on being permitted to exercise it. The right to insist that one's lawyer refrain from admitting guilt is a constitutional prerogative that is inherent in the right to assistance of counsel for one's defense.

Far from novel, this constitutional prerogative has existed, at a minimum, since the Court in *Gideon* announced that the right to counsel was the most fundamental right a criminal defendant could have. Since the right to defend is personal, when this personal choice to defend through counsel is not honored, the right to counsel has not been afforded.

To deny Tyler the exercise of his free choice to insist on the assistance of counsel for his actual defense, goes against the spirit and logic of the provision, as the Framers did not yield at pronouncing an accused shall be provided the assistance of counsel. They concluded,

as the *Cronic* Court observed, that the Amendment requires, "not merely the provision of counsel, but 'Assistance,' which is to be 'for his defense.'" *United States v. Cronic*, 466 U.S. 648, 654-55 (1984).

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *Id.*; *United States v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). The *Cronic* Court, quoting, Judge Wyzanski, colorfully explained: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States v. Cronic*, 466 U.S. 648, 657, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984).

The *Cronic* Court explicated:

> The substance of the Constitution's guarantee of the assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice 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, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975). It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S. at 343, 100 S.Ct. at 1715.

United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984).

The constructive denial of counsel occurs when an attorney fails to assist his client during a critical stage of the prosecution. The type of constructive denial of counsel that occurred in Mr. Tyler's trial was not "simply an error in the trial process," but affected the entire conduct of the trial from beginning to end. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-578 (1986)). Without the assistance of counsel, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.*

These precepts were likewise codified in the Model and Louisiana Codes of Professional Ethics well before the time of James Tyler's trial. *Cf.* Rule 1.2 ("a lawyer shall abide by a client's decisions concerning the

objectives of representation."); Rule 3.4(c) ("A lawyer shall not: assert personal knowledge of facts in issue except when testifying as a witness, or **state a personal opinion as to** the justness of a cause, the credibility of a witness, the culpability of a civil litigant or **the guilt of an accused**."); *see also* 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 11.6(c), p. 935 (4th ed. 2015) ("A lawyer is not placed in a professionally embarrassing position when he is reluctantly required . . . to go to trial in a weak case, since that decision is clearly attributed to his client.").

The Constitution's guarantee of assistance of counsel "cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940) (footnote omitted). To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. "Because the right to counsel is so fundamental to a fair trial, the Constitution cannot bear trials in which counsel, though present in name, is unable [or unwilling] to assist the defendant to obtain a fair decision on the merits." *Evitts v. Lucey*, 469 U.S. at 836 (1985). By admitting his guilt, Mr. Tyler's attorneys prevented him from receiving a fair decision on the merits.

The legal landscape at the time of Mr. Tyler's conviction mandated that he be afforded the "guiding hand of counsel" throughout his trial. This is clearly expressed in *Childress v. Johnson* where the Fifth Circuit expounded: "We break no new ground by declaring

that a defense lawyer who fails to actively assist the defendant during a critical stage of the prosecution is not the counsel whose assistance is contemplated by the Sixth Amendment. The *Gideon* violations in this case were "constitutional error[s] of the first magnitude" *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997).

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. This Court has "long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a defense." *California v. Trombetta*, 467 U.S. 429, 645 (1984). See also *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("We broke no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.") As this Court has long recognized, the assistance of counsel insures that due process is afforded to an accused. "The right of an accused in criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1974). When counsel ignored these longstanding fundamental precepts of Fourteenth Amendment due process by improperly conceding Tyler's guilt, he violated James Tyler's corresponding rights to be heard, to defend against the State's accusations, and to receive a fair decision on the merits.

McCoy merely reaffirmed the longstanding fundamental Constitutional principle that criminal defendants are entitled to the assistance of counsel *for the*

purpose of their defense. This right necessarily encompasses the obvious right to insist that counsel not concede their guilt on the ultimate question over a defendant's objection. To be the "master" of one's defense is nothing but an empty formalism if, in practice, it means that your "assistant" can entirely concede your guilt to capital murder at trial over your objection.

The holding in *McCoy*, which "simply applied well-established constitutional principles to govern a case which is closely analogous to those which have been previously considered in the prior case law," should be retroactively applied to James Tyler. *Mackey v. United States*, 401 U.S. 667, 695 (1971). "To deny an accused a choice" to exercise his right to be defended by counsel, "is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms." *Faretta*, 422 U.S. at 815. Indeed, the right to the "assistance of counsel for his defense" would be a hollow right – one that existed only in theory – if a defendant had no power to exercise it. In other words, if the right to assistance of counsel for one's defense exists only in theory, *McCoy* should not apply retroactively to capital cases on collateral review. But if the right to the assistance of counsel is an absolute right and fundamental to a fair trial, Mr. Tyler is entitled to a new trial.

b. *McCoy* announced a substantive rule that should be applied retroactively to cases on collateral review.

The *Teague* Court recognized an exception to its retroactivity bar for substantive rules as "[setting] forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016). When a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Id.* at 200.

The Supreme Court has explained that substantive rules should have retroactive effect because "the need for finality in criminal cases" must be balanced against "the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law." *Welch v. United States*, 136 S.Ct. 1257, 1266 (2016). Finality concerns are "at their weakest" when examining rules that modify the "range of conduct or class of persons that the law punishes" because concerns regarding unauthorized punishment are heightened. *Id.* The balance of interest therefore shifts strongly in favor of retroactivity for such rules. See *id.* See also *Mackey v. United States*, 401 U.S. 667 (1971) (opinion of Harlan, J.) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly to repose."). The Sixth and Fourteenth Amendments or our Constitution "guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of

counsel before he can be validly convicted and punished by imprisonment." *Martinez v. Court of Appeal of California*, Fourth Appellate Dist., 528 U.S. 152 (2000). The Constitution requires specifically that the assistance given to a defendant be "in his defense." *Scott v. Illinois*, 440 U.S. at 373-374.

Mr. Tyler attempted to exercise his right to the assistance of counsel, and was unlawfully convicted and sentenced to death without ever receiving the guiding hand of counsel in the criminal prosecution, in violation of principles and intent of this Court's holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

> "Viewed from a historical perspective, Gideon . . . stands as a notice that in the free world, no man shall be condemned to penal servitude without a lawyer to defend him . . . The Supreme Court has said it is unconstitutional for a state to convict a person without a lawyer. To refuse complete retroactive effect would mean that persons would be held in prison pursuant to a procedure which a unanimous Supreme Court says violates the Constitution."

Abe Krash, Right to a Lawyer: the Implications of *Gideon v. Wainwright*, 39 Notre Dame L. Rev. 150, 154, 156 (1964).

McCoy reaffirmed a defendant's personal right to defend. *Id.* at 1507. See *Faretta*, 422 U.S. at 834. In doing so, *McCoy* carved out a specific class of defendants: defendants who were subjected to punishment after their lawyers refused to defend in spite of the defendant's objections. Where a defendant has been constructively denied his Sixth Amendment right to counsel,

the defendant is immune from punishment until the constitutional defect is cured and he is afforded assistance of counsel "for his defense" at a new trial. Cf. *Powell v. Alabama*, 287 U.S. 45, 53, (1932) (Holding that the Sixth Amendment right to counsel forbids the incarceration of a criminal defendant who was appointed counsel but under circumstances that amounted to "a denial of effective and substantial aid.").

Mr. Tyler was appointed counsel, who refused to defend, and under the watchful eye of the trial Court, ignored his repeated protest and did the complete opposite, which renders his conviction and sentence constitutionally invalid.

Because this Court's holding in *McCoy* carved out a category of defendants for whom punishment is unconstitutional, *McCoy* meets the first exception to the general retroactivity bar set out in *Teague* and should be applied to cases on collateral review.

c. The *Griffith*, rather than *Teague*, standard should apply to determine the retroactive application of *McCoy* where initial review collateral claims are not final after direct review.

The *McCoy* decision did not address its application to cases on collateral review. In *Teague*, this Court held that, with some narrow exceptions, new federal constitutional rules do not apply retroactively to cases that became final before the new rule was created. *Teague*

v. Lane, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The Court held that:

> . . . finality interests are of overriding importance. *Id.* at 309, 109 S.Ct. 1060. Once a case becomes final, this Court reasoned that the purpose of a new rule is no longer a relevant question; instead, the only relevant question is whether applying the new rule will further the purpose for which the writ of habeas corpus is made available. *Id.* at 306, 109 S.Ct. 1060. Because habeas corpus is designed as a tool to deter the violation of established constitutional standards, a habeas court "need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Id.*

In its decision denying relief, the post-conviction court determined that James Tyler's conviction was "final," as the proceedings on direct appeal had concluded, and that the decision in *McCoy* was a new rule that was not retroactively applicable to Tyler. However, at the time that James Tyler's conviction became "final" for *Teague* purposes, at the conclusion of his direct appeal, he had not yet had the opportunity to raise his Sixth Amendment improper concession claim before the highest state court. Mr. Tyler's concession claim, like many Sixth Amendment post-conviction claims, relied on evidence outside the record, and was therefore relegated to post-conviction review. In addition, at the time of James Tyler's direct review, improper concession claims, some rising out of the same judicial district in Caddo Parish with the same attorneys as

Tyler's, were being analyzed as ineffective assistance of counsel claims. *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002).

By operation of statute and as a matter of nearly universal prevailing jurisprudence, Tyler, and others similarly situated to him, will not have had the opportunity to raise their improper concession claims when their convictions became final. Because such initial review collateral claims are not truly "final" until after post-conviction review has concluded, this Court should apply the retroactivity rule of *Griffith v. Kentucky*, one grounded in "basic norms of constitutional adjudication," which demands that all cases pending for similarly situated litigants receive the benefit of a "new" rule. 479 U.S. 341, 322 (1987). The reasoning underpinning the finality and repose interests protected by Teague is inapposite when the constitutionally injured party has not yet had an opportunity to litigate the claim.

In *Griffith v. Kentucky*, this Court held that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* This Court criticized as arbitrary the practice of "simply fishing one case from the stream of appellant review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by the new rule." *Id.* at 323, 107 S.Ct. 708 (quoting *Mackey*, 401 U.S. 667, 679. (Harlan, J., concurring)). The Court also criticized limited prospectivity as inequitable,

violating "the principle of treating similarly situated defendants the same." *Griffith*, 479 U.S. at 323, 107 S.Ct. 708 (citing *Desist v. United States*, 394 U.S. 244, 258-259, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting) and *United States v. Johnson*, 457 U.S. 537, 556 n. 16, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)). This Court "refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final" and held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S. at 328, 107 S.Ct. at 716.

The Court was cognizant that, for cases pending on direct review, applying a new rule to one litigant and not to others who had not yet had a full appellate review would result in "intolerable inequities." The *Griffith* Court described this unfairness:

> . . . the problem with not applying new rules to cases pending on direct review is "the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. 457 U.S. at 556, n. 16, 102 S.Ct. at 2590, n. 16. Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: "The time for toleration has come to an end." *Id.*

Griffith, 479 U.S. at 323.

Seeking to find a compromise between granting retroactivity and proper deference to a state's interest in comity and finality, the Court drew a bright line between cases on direct review and those on collateral review. Justice Harlan reasoned that "given the broad scope of constitutional issues cognizable on habeas, it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." *Id.* at 689, 91 S.Ct. at 1178.

In *Teague*, this Court opined: "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing." *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 1076, 103 L.Ed.2d 334 (1989). The *Teague* Court's decision to limit retroactivity to those pending on collateral review, absent narrow exceptions, was premised on the notion that those litigants on collateral review had "had their day in Court." In other words, *Teague* assumed that "typically" once a conviction has become final, a litigant has had a full and fair opportunity to litigate his claim.

However, the *Teague* doctrine preceded the advent of the initial-review collateral proceedings identified in *Martinez*, as the Court had not yet issued opinions like *Strickland v. Washington*, 466 U.S. 668 (1984) which

required extra record materials to vindicate the relevant constitutional rights. This Court has identified such proceedings as "initial-review collateral proceedings" as they can represent a defendant's first opportunity to vindicate some of his federal constitutional rights. *Martinez v. Ryan*, 566 U.S. 1 (2012). This Court has explained that, in this context, "the initial-review collateral proceeding [can be] a prisoner's 'one and only appeal' as to an ineffective assistance of counsel claim. . . ." *Id.* "Where . . . the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." However, "[a] question has been 'fully and finally litigated' only 'when the highest court of the state to which a defendant can appeal as of right has ruled on the merits of the question.'" Henry J. Friendly, 38 U. Chi. L. Rev. 142, 158. Because they are first cognizable in post-conviction, initial review collateral claims are not truly "final" until after post-conviction review has concluded.

Louisiana's post-conviction relief statute provides specific and limited grounds for relief, which include that "[t]he conviction was obtained in violation of the Constitution of the United States or the State of Louisiana" and explicitly bars re-litigation of claims that were previously raised on direct appeal or which could have been raised on direct appeal but which were not. La. C.Cr.P. art. 930.3, 930.4. Consequently, Louisiana's

post-conviction statute creates an "initial-review collateral proceeding" that is "the equivalent of a prisoner's direct appeal" as to several core constitutional claims. *Any* claim raising a constitutional deprivation and requiring an expansion of the record is deferred until after a defendant's conviction has become "final" on direct review. For example, claims of ineffective assistance of counsel, conflict of counsel claims, *McCoy* claims, *Brady* and other forms of prosecutorial misconduct claims, and claims specifically related to abuse of appellate processes by their nature will not have been considered or given a full and fair hearing at the direct review stage.

Brady itself arose from state post-conviction review proceedings of a Maryland state conviction and death sentence. *Id.* Because the case was formally on collateral review and because *Brady* was seeking a new rule from the United States Supreme Court, *Brady* is impliedly retroactive even to petitioners whose cases are final. Significantly, although *McCoy* was decided following the defendant's direct appeal, his case was atypical in several significant respects. Following Mr. McCoy's conviction, new counsel was appointed who filed and litigated a Motion for New Trial based on McCoy's improper concession claim. Therefore, though on direct appeal, the record of Mr. McCoy's concession claim had been expanded during a post-trial evidentiary hearing with witness testimony and other extrinsic evidence sufficient to establish his claim.

Lastly, in the context of a capital case, there is even more need to scrutinize *Teague's* "finality" line for which cases are granted retroactive application. Following his attorney's improper concession of guilt, Mr. Tyler was sentenced to die. In *Murray v. Giarratano*, this Court recognized the particular significance of the Sixth Amendment to capital defendants. *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 2776, 106 L.Ed.2d 1 (1989). This Court noted that legislatures conferred greater access to counsel on capital defendants than on persons facing lesser punishment even in colonial times. See *Powell*, 287 U.S. at 61-63, 65, 53 S.Ct. at 61-62, 63. The First Congress required assignment of up to two attorneys to a capital defendant at the same time it initiated capital punishment. Act of Apr. 30, 1790, ch. 9, §§ 1, 3, 8-10, 14, 1 Stat. 112-115 (authorizing death sentence for willful murder, treason, and other crimes). Nearly a century passed before Congress provided for appointment of counsel in other contexts. See *Mallard v. United States District Court*, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) (interpreting Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252, now codified at 28 U.S.C. § 1915(d)). Similarly, Congress at first limited the federal right of appeal to capital cases. See *Evitts v. Lucey*, 469 U.S. 387, 409, 105 S.Ct. 830, 843, 83 L.Ed.2d 821 (1985).

This Court also expanded capital defendants' ability to secure counsel and other legal assistance long before bestowing similar privileges on persons accused of less serious crimes. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932), for instance, established a right to

appointment of counsel for capital defendants three decades before that right was extended to felony defendants facing lesser forms of punishment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). In *Bute v. Illinois*, 333 U.S. 640, 674, 68 S.Ct. 763, 780, 92 L.Ed. 986 (1948), the Court held that a state court was not required to question a defendant in a noncapital case about his desire for counsel while repeatedly holding that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment. *Id.* at 676, 68 S.Ct. at 781.

Both before and after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), established that the Constitution requires channeling of the death-sentencing decision, various Members of this Court have recognized that "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). It is therefore an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980).

Ideally, "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct

review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983). There is, however, significant evidence that in capital cases what is ordinarily considered direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of finality. As this Court has noted, "[g]iven the irreversibility of capital punishment, [potential errors] deserve adversarial scrutiny even if it is discovered after the close of direct review." *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 2776, 106 L.Ed.2d 1 (1989).

For all of the foregoing reasons, this Court should apply *McCoy* retroactively to cases on collateral review.

II. THIS CASE IS THE RIGHT VEHICLE FOR RESOLVING AN IMPORTANT AND RECURRING QUESTION OF LAW.

The questions presented address important questions of federal constitutional law which should be, but have not been, settled by this Court. Louisiana, from which the *McCoy* case originated, appears to be the sole jurisdiction where an attorney can improperly concede his client's guilt at trial over his objection, the client is sentenced to die, and there is no venue for relief.

Mr. Tyler's entitlement to relief pursuant to *McCoy* is indisputable. And yet, due to a misfortune in the timing of this Court's decision in *McCoy*, Mr. Tyler

sits on Death Row in Louisiana, without having had even the semblance of a fair trial.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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