No. 21-1357

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

BRIEF OF AMICUS CURIAE THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (LACDL) IN SUPPORT OF PETITIONER

****CAPITAL CASE****

Christopher J. Murell
Murell Law Firm
2831 St. Claude Avenue
New Orleans, LA 70117
(504) 717-1297 (P)
(504) 233-6691(F)
chris@murell.law

Edward King Alexander, Jr.
Counsel of Record
P. O. Box 3757 / 1011 Lakeshore Drive, Suite 200
Lake Charles, LA 70602
(337) 436-1718 (P)
(337) 494-0370 (F)
ekalexander@pdolaw.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

Constitutional Provisions

INTERESTS OF *AMICUS CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional association devoted to promoting excellence in the practice of criminal law and protecting individual rights guaranteed by the constitutions and laws of the State of Louisiana and the United States. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana, including both private criminal defense lawyers and public defenders. LACDL works with and on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. LACDL files numerous amicus briefs each year, seeking to provide the courts with the perspective of the organization in cases that present issues of broad importance to Louisiana's criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

LACDL seeks to file an amicus brief in the present case in order to provide the Court with the unusual – and flawed – jurisprudential treatment of concessions of guilt in Louisiana and to urge this Court to provide guidance to state courts, especially Louisiana state courts, about the proper handling of concession of guilt claims going forward.

---

[1] Pursuant to this Court's Rule 37, *Amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

This Court in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), did not announce a new rule of constitutional law. *McCoy* reaffirmed the fundamental meaning of the Sixth Amendment's right to counsel. Notwithstanding the clear language of the Constitution, attorneys like McCoy's attorney, as well as judges in Louisiana, had long been misled by Louisiana jurisprudence addressing the concession of guilt decision. *McCoy*, however, corrected the course, reminding Louisiana attorneys and courts that the defendant is the individual with the right to counsel for his defense and, thus, the right to decide whether to concede guilt.

The disjuncture between Louisiana's jurisprudence and this Court's decision in *McCoy* resulted in some defendants, including James Tyler, being left with no remedy for an even clearer Sixth Amendment violation than occurred in McCoy's case with the issue preserved in state court for years before *McCoy* was decided. This Court can and should provide a remedy to similarly-situated defendants who properly preserved their Sixth Amendment objection in state court. Doing so would promote comity and would in no way open the floodgates in the way that retroactive application of *McCoy* would.

ARGUMENT

II. *McCoy* Did Not Announce a New Rule

A. *McCoy Merely Applied the Previous Principle that Already Governed*

As this Court has long acknowledged, a ruling makes no new law if it can be derived from a "clear principle [that] emerges not from any single case . . . but from … [a] long line of authority." *Stringer v. Black*, 503 U.S. 222, 232 (1992). *See also Chaidez. v. United States*, 568 U.S. 342, 347-48 (2013) ("*Teague* also made clear that a case does *not* 'announce a new rule, [when] it [is] merely an application of the principle that governed' a prior decision to a different set of facts."); *id.* ("As Justice Kennedy has explained, 'where the beginning point' of our analysis is a rule of general application, a rule designed for the specific purpose of evaluating myriad factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.") (quoting *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in judgment)).

Justice Harlan long ago wrote in *Mackey v. United States*, 401 U.S. 667 (1963), about the appropriate sphere of postconviction retroactivity—from which *Teague*[2] itself drew much of its inspiration: the relevant inquiry is "whether a particular decision really announced a 'new' rule at all or whether it simply applied well-established constitutional principle to govern a case which is closely analogous

---

[2] *Teague v.* Lane, 489 U.S. 288, 303-10 (1989).

to those which have been previously considered in the prior case law." *Id*. at 695.

B. The *McCoy Decision and Cases Upon Which It Relied Prove That McCoy Did Not Create a New Rule*

This Court in the second paragraph of *McCoy* reiterated the time-honored, fundamental basis for its holding: "Guaranteeing a defendant the right 'to have Assistance of Counsel for his defence', the Sixth Amendment so demands." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1505 (2018); 200 L. Ed. 2d 821, 827. Throughout this Court's opinion, nearly all the cases relied upon for the holding are decades old (some many decades old) and characterize *McCoy* as their natural and logical extension to a new set of facts.[3]

The two cases the State of Louisiana argued to support a contrary conclusion simply do not—as acknowledged by this Court. In *Florida v. Nixon*, the outcome turned on whether a defendant who was "generally unresponsive" and "never verbally approved or protested" trial counsel's strategy could first protest his trial counsel's concession of guilt on appeal. 543 U.S. 175, 181-82 (2004). In *Nix v. Whiteside*, this Court held that a trial attorney could not

---

[3] *See, e.g.*, *Faretta v. California*, 422 U.S.806, 824-28 (1975); *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring); *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Weaver v. Massachusetts*, 582 U.S. __, 137 S.Ct. 1899 (2017); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 5238 U.S. 152, 165 (Scalia, J., concurring).

be faulted for refusing to present a knowingly perjured defense requested by a client. 475 U.S. 157, 173-76 (1986). Neither of these are apposite to when a defendant—for better or worse—instructs his counsel to put on a good faith defense and not concede guilt. These are choices about the client's objectives, *McCoy*, 138 S.Ct. at 1508, governed by the client.

Indeed, recently, the appellate courts in Texas and California correctly identified *McCoy* as a "logical extension" of *Florida v. Nixon*. *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tx. Ct. Cr. App. 2021); *accord In re Smith*, 49 Cal. App. 5th 377, 391-92 (2020). In rejecting a defendant's contention that *McCoy* was a previously unavailable legal basis for relief, the Texas Court of Criminal Appeals wrote:

> But the legal basis for Applicant's claim could have been reasonably formulated from existing precedent because *McCoy* was the logical extension of *Florida v. Nixon*, based on factual distinctions—not legal ones-between the two cases.

Ex parte Barbee, 616 S.W.3d at 839. *See also In re Smith*, 49 Cal. App. 5th at 392 ("*McCoy* interpreted and extended the rule of Nixon to provide guidance in situations where the defendant expressly objects to counsel's strategy of conceding guilt. . . . *McCoy* did not announce a new rule.").

C. *Prior to McCoy, When Interpreting this Court's Precedent, Most State Courts of Last Resort Correctly Concluded that Counsel May Not Concede Guilt over the Client's Objection*

As noted by this Court, Louisiana parted ways with the majority of other state courts of last resort in creating its *McCoy* rule. *See McCoy*, 138 S.Ct. at 1510; 200 L. Ed. 2d at 832-33; *Cooke v. State*, 977 A.2d 803, 842-46 (Del. 2009) (counsel's assertion of "guilty but mentally ill" over defendant's protestation violated constitution); *State v. Carter*, 270 Kan. 426, 440, 14 P.3d 1138, 1148 (2000) (counsel's admission of client's involvement in murder where client maintained his innocence contravened Sixth Amendment); *People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010) (holding that while trial counsel may develop theories based on evidence, she cannot usurp those fundamental choices given to criminal defendants). This Court did not identify any other State Court of last resort that came to the same jurisprudential conclusion as Louisiana.

D. *Louisiana Jurisprudence Fell Out of Line with Other States Based on an Erroneous State Court Appellate Decision*

In the seminal Louisiana case of *State v. Haynes*, No. 27,499 (La. App. 2d Cir. 11/01/95); 662 So.2d 849, 850, the defendant was charged with first-degree capital murder. The victim in the case died from falling off a building after being physically and sexually assaulted. *Id*. at 850-51. At trial, defense counsel in opening statement conceded the defendant's

guilt to kidnapping, raping, robbing, and stabbing the victim in opening statement, but argued the State could not prove the defendant intentionally shoved the woman off the building. *Id*. As counsel was delivering opening, the defendant notified the judge "in plain language" that he did not want his attorneys to argue that he was "guilty of any of the accusations made by the State." *Id*. at 852. Nevertheless, the trial court overruled the defendant's objection and allowed his attorneys to concede his guilt to all crimes except first-degree murder (including second-degree felony murder). *Id*. The jury convicted the defendant of all crimes, including first-degree murder. *Id*. at 850. However, in the penalty phase, the jurors could not agree on a sentence, resulting in the defendant being sentenced to life without parole. *Id*. at 850.

On direct appeal, the defendant in a *pro se* assignment of error argued that it was error for his attorneys to admit his guilt over his objection. *Id*. at 850, 852. Given the defendant's *pro se* claim was styled as "ineffective assistance of counsel," the Louisiana Second Circuit Court of Appeals analyzed the alleged error under *Strickland v. Washington*.[4] *See Haynes*, 662 So.2d at 852-53. The Louisiana Second Circuit held that there was no prejudice due to the wealth of the State's evidence, *id*. at 853, and the defendant's "counsel succeeded in avoiding the death sentence." *Id*.

[4] 466 U.S. 668 (1984).

In subsequent federal habeas proceedings, a district court granted relief finding that counsel's concession of guilt constituted a constructive denial of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). *See Haynes v. Cain*, 2000 U.S. Dist. LEXIS 23933, at *6 (W.D. La. July 11, 2000). This decision was initially affirmed by a panel of the Fifth Circuit. *See Haynes v. Cain*, 272 F.3d 757, 761-64 (5th Cir. 2001). Revisiting that decision *en banc* under the deferential AEDPA standard, however, the Fifth Circuit vacated the panel's decision. *See Haynes v. Cain*, 298 F.3d 375, 379-82 (5th Cir. 2002). Framing counsel's concessions to rape and kidnapping over defendant's vociferous and repeated objections as "strategic decisions," the Fifth Circuit reinstated the state court's denial of relief which had concluded that *Strickland v. Washington* rather than *Cronic* applied to this situation. *Id*.

The opinions in the *Haynes* case significantly muddied the waters for Louisiana practitioners and courts, leaving many with the mistaken impression that the decision whether to concede guilt, even over the client's objection, is a strategic matter left to counsel. Indeed, one need to go no further than *State v. McCoy* to see the muddled development of Louisiana law. 2014-KA-1449 (La. 10/19/16); 218 So.3d 535, 565. For example, Mr. McCoy's trial counsel wrote in an affidavit: "I consulted with other counsel and **was aware of the Haynes case so I believed that I was entitled to concede Robert [McCoy]'s guilt of second degree murder even though he had expressly told me not to do so** . . . ." *Id.* (emphasis added). The Louisiana Supreme

Court likewise erroneously followed the reasoning in *Haynes*.[5]

In effect, until this Court intervened in *McCoy*, Louisiana had developed an anomalous practice resulting from the errant intermediate appellate court opinion in *Haynes*. As set forth above, based on this Court's precedent, the other states that considered this same issue came to the same conclusion as this Court did in *McCoy*—proof again that *McCoy* was not a new rule.

E. *Post-McCoy*, *Louisiana Courts have Applied the Appropriate Standard, But Not All Litigants Have Received Review*

There have been several post-*McCoy* cases in Louisiana where our courts now have applied the correct Sixth Amendment standard. For example, in *State v. Brian Horn*, 2016-KA559 (La. 09/07/18); 251 So.3d 1069, starting before trial, the defendant submitted pleadings to the trial Court that his attorneys were not following his instructions and admitted defendant's guilt over his objection. *Id.* at 1074 ("The

---

[5] In affirming Mr. McCoy's death sentence, the Louisiana Supreme Court denied relief first because, "This court does not sit to second guess strategic and tactical choices made by trial counsel." *Id.* at 567. The Louisiana Supreme Court then wrote: "Given the circumstances of this crime and the overwhelming evidence incriminating the defendant, admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute a reasonable trial strategy," *id.* at 572, and consequently Mr. McCoy "ha[d] shown no per se violation of the Sixth Amendment resulting from any conflict of interest. *Id.*

record further demonstrates that Mr. Horn disagreed with his counsel's decision to concede guilt as part of the defense strategy and the defendant made the district court aware of the disagreement both before and during trial."). The Louisiana Supreme Court on direct appeal correctly reversed Horn's conviction based on this Court's clear directive in *McCoy*. *Id*. at 1077.

Nevertheless, there are a handful of Louisiana capital post-conviction petitioners, like Tyler, who expressly objected to concession but who have never received meaningful consideration of their claims because they were raised before this Court granted review in *McCoy*. When it is evident that *McCoy* is not a new rule but a logical extension of this Court's jurisprudence, it is unjust for Robert McCoy and Brian Horn to get relief when petitioners like James Tyler do not.

II. Acknowledging That *McCoy* Is an Old Rule Would Not Open The Floodgates Or Undermine Comity

As detailed above, the *Haynes* case left many Louisiana defense attorneys erroneously believing that it was within their sole authority to decide as a matter of "strategy" whether to concede their clients' guilt at trial. *McCoy*, however, laid bare the structural error of that approach.

Notwithstanding the Louisiana courts' confusion, some criminal defendants, including ones facing the death penalty like James Tyler, always knew that what counsel had done in their cases was wrong, and they had timely and repeatedly raised

their Sixth Amendment complaints to the Louisiana state courts long before *McCoy*.

An affirmation that *McCoy* did not announce a new rule of constitutional law would not open the floodgates to new "*McCoy* claims" but, rather, would allow defendants who properly preserved their Sixth Amendment claims long before *McCoy* was decided to receive the merits review they always should have had.

A. *State Default Rules Rather Than Teague's Retroactivity Doctrine Should Determine Whether Defendants Receive Merits Review Of Their Sixth Amendment Concession Claims*

Should this Court conclude in *Tyler* that *McCoy* was not a new rule but, rather, an iteration of the Court's longstanding Sixth Amendment principles, then the only defendants who would be entitled to relief would be the same ones who are already entitled to relief under *McCoy*: those people who objected to their counsels' concession of guilt and who timely presented their Sixth Amendment claims according to state court procedural rules.

The post-*McCoy* case of *Ex parte Barbee*, 616 S.W.3d 836 (Tx. Ct. Cr. App. 2021), provides a perfect example of this limiting principle. As set forth above, the state court in *Barbee* found that *McCoy* did not announce a new rule, and, thus, the petitioner's successor petition raising a Sixth Amendment concession of guilt claim for the first-time under *McCoy* was deemed untimely. *Barbee*, 616

S.W.3d at 839. By failing to raise his complaint regarding counsel's concession of guilt in a timely manner, the petitioner in that case defaulted his Sixth Amendment claim pursuant to the Texas state rules of appellate procedure, unrelated to the timing or retroactivity of the *McCoy* decision.

In effect, announcing that *McCoy* is not a new rule would not open the floodgates to new litigation; instead, it would affirm the state court rules of procedural default.

B. *Defendants Who Properly Preserved Their Sixth Amendment Claim Under Louisiana Law Should Receive Review Under McCoy*

As in most states, Louisiana law specifically provides for the timing and procedure required to raise allegations of error during and following trial. The Louisiana Code of Criminal Procedure provides that errors occurring during the course of a criminal trial should be raised by defense counsel at the first available opportunity: at the time of the error; on direct appeal; or in state post-conviction.

Pursuant to Article 841 of the Louisiana Code of Criminal Procedure, a contemporaneous objection, made at the time of the alleged error in the trial court, is required in order to raise a record-based allegation of error on direct appeal. La. C.Cr.P. art. 841 ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.").

Louisiana's contemporaneous objection rule is rigid. Unlike many states and the federal system, Louisiana does not have a traditional "plain error" rule which would permit review of an unpreserved error on direct appeal unless the record itself reveals ineffective assistance of counsel. *See State v. Thomas*, 427 So. 2d 428, 433 (La. 1982). Accordingly, Louisiana courts after *McCoy* have generally required some indication in the record that counsel and the defendant disagreed about a concession of guilt in order to address a *McCoy* claim on direct appeal. *See*, *e.g.*, *State v. Johnson*, 18-523 (La. App. 3 Cir. 2/6/19), 265 So.3d 1034 (denying *McCoy* relief where defendant never objected, and the admissions were not clear as to elements of the crime).[6]

While the failure to raise all preserved allegations of error on direct appeal will generally result in the waiver of those issues, where resolution of an alleged error requires the introduction of new evidence and/or a hearing, the Louisiana Supreme Court has consistently held that post-conviction is the proper forum for litigating that claim. *See Tassin v. Whitley*, 602 So.2d 721 (La. 1992).

---

[6] Louisiana also no longer makes an exception to the contemporaneous objection rule in capital appeals so that capital cases will not be treated differently than non-capital cases with respect to *McCoy* error. The Louisiana Supreme Court had previously adopted an exception to the contemporaneous objection rule which permitted capital direct appellants to raise errors affecting either the guilt-innocence or penalty phase of a capital trial notwithstanding counsel's failure to lodge an objection in the trial court. *See State v. Glass*, 455 So. 2d 659, 667 (La. 1984).

As set forth in his petition for review from this Court, James Tyler raised his Sixth Amendment claim that counsel unconstitutionally conceded his guilt over his objection long before *McCoy* was decided. *Tyler* Cert Petition at 6. Like Mr. McCoy, Mr. Tyler vociferously objected to counsel's concession of guilt during the course of his 1996 trial, and his claim was reserved for state post-conviction where the court could take new evidence. *See id*.[7]

In his 2009 state post-conviction petition, citing all of the legal authority relied upon in *McCoy*, Mr. Tyler argued that counsel's concession of guilt over his express objection was *per se* error without the necessity of showing prejudice. The state court acknowledged that Mr. Tyler had properly preserved his Sixth Amendment claim under the state procedural rules.

Notwithstanding facts that were even more compelling than those of *McCoy*, the state court failed to grant Mr. Tyler the relief that Mr. McCoy received based on its reliance on the erroneous ruling in *Haynes*. *McCoy* made it clear that Mr. Tyler's claim should not be analyzed under the *Strickland v. Washington* framework but, rather, should be treated like the denial of the right to self-representation and the denial of the right to counsel of choice,

---

[7] In *McCoy*, by contrast, the defendant had the benefit of new counsel for the Motion for New Trial proceedings and, thus, litigated his Sixth Amendment claim and developed a full evidentiary record at a hearing immediately following trial and before direct appeal.

both of which Mr. Tyler had been citing for more than a decade.

Pursuant to *McCoy*, defendants like Mr. Tyler – who faithfully adhered to state court procedural rules and preserved their Sixth Amendment objection to counsel's concession of guilt – should be given meaningful review of their constitutional claims.

C. *The Louisiana Supreme Court Has Repeatedly Indicated That This Issue Needs to be Resolved*

Following this Court's decision in *McCoy*, Louisiana petitioners like Mr. Tyler were again denied merits review of their Sixth Amendment claims based on the assumption that *McCoy* announced a new rule that did not constitute a watershed rule of criminal procedure. To be sure, *McCoy* was a new rule to the Louisiana courts.

When petitioners raised their "*McCoy* claims" as a new rule, pursuant to the Louisiana courts' precedent, they were turned away from the courts on the grounds that *McCoy* did not announce a watershed rule of criminal procedure. Another Louisiana state case recently heard by this Court, however, established that the procedural exception to the *Teague* bar on retroactivity – upon which courts like Mr. Tyler's relied to deny relief – was always illusory. *See Edwards v. Vannoy*, 141 S.Ct. 1547; 209 L.Ed. 2d 651 (2021).

Taken together, the system failed defendants like Mr. Tyler whose counsel conceded their guilt at trial but whose timely objections to that concession

were never reviewed on the merits due to a cascade of flawed Louisiana state court jurisprudence.

Since *McCoy* was decided, justices of the Louisiana Supreme Court have repeatedly indicated the need to resolve the question of whether *McCoy* announced a new rule that should be retroactive to cases that are no longer on direct appeal. *See*, *e.g.*, *Hampton v. Vannoy*, 2020-00390 (La. 12/8/20), 306 So.3d 430 (Crichton, J., would grant and docket for full consideration to address the retroactivity of *McCoy, supra*, citing *Teague, supra*); *State v. Deal*, 2020-00524 (La. 03/23/21), 312 So.3d 1093 (same); *State v. King*, 2020-00890 (La. 10/20/20), 303 So.3d 304 (Johnson, J., dissenting) (same). Amicus respectfully submits that this Court should grant review to resolve this recurring issue.

D. *There Is A Split in The Fifth Circuit*

Finally, review in this case is particularly appropriate considering the Texas Court of Criminal Appeals' decision in *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tx. Ct. Cr. App. 2021), discussed above. Though both in the same circuit, Louisiana and Texas courts have disposed of this significant question of federal constitutional law differently, and the result is that defendants in Louisiana have narrower Sixth Amendment rights than defendants just across the state line. This Court should grant review to resolve this split in our circuit and, further, adopt the position of the Texas Court of Criminal Appeals holding that *McCoy* did not announce a new rule.

CONCLUSION

For the reasons set forth herein, *Amicus* respectfully requests that the Court grant review in this case.

Respectfully submitted,

Christopher J. Murell
Murell Law Firm
2831 St. Claude Avenue
New Orleans, LA 70117
(504) 717-1297 (P)
(504) 233-6691(F)
chris@murell.law

Edward King Alexander, Jr.
Counsel of Record
P. O. Box 3757 / 1011 Lakeshore Drive, Suite 200
Lake Charles, LA 70602
(337) 436-1718 (P)
(337) 494-0370 (F)
ekalexander@pdolaw.org

Counsel for Amicus Curiae, LACDL

May 18, 2022