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 IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the rule announced in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), applies retroactively to cases on state collateral review.

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STATEMENT OF THE CASE

I. Facts Proven at Trial

James S. Tyler, III was convicted by a unanimous jury in 1996 of first degree murder. The evidence adduced at trial showed that on May 29, 1995, Jock Efferson, Denise Washington, and Rahsaan Roberson were working together at a Pizza Hut restaurant located in Shreveport, Louisiana. Tyler walked to the drive-through window and spoke to Mr. Efferson about buying a pizza. Tyler walked away, but then entered the restaurant several minutes later through a back door. At this time, Tyler was armed with a handgun and carried a ski mask in his other hand.

Tyler coerced Mr. Efferson into opening the cash register before forcing all three employees into the cooler where he ordered them to lie on the floor. Tyler then shot each employee in the head. Ms. Washington and Mr. Roberson retained consciousness and were able to summon help. Mr. Efferson died the next day.

The next night, a police detective received a phone call from Sharlot Tedder, a prostitute and sometimes confidential informant. Ms. Tedder told the detective that the previous evening she stayed with a man later identified as Tyler in a hotel across the street from the Pizza Hut. Tyler left the hotel around the time of the robbery/murder and returned half an hour later, nervous and sweating, and in possession of a handgun. When emergency vehicles showed up shortly after at the Pizza Hut, Tyler replied affirmatively when she asked him if he "did that across the street." Tyler was

then in possession of a large sum of money and spent a significant amount purchasing cocaine.

Eventually, Tyler confided a number of details about the robbery to Ms. Tedder while displaying a wide range of emotions, from remorse with statements that God would not forgive him for what he had done, to disbelief that two of the victims were in fair condition in spite of their gunshot wounds to the head. When the local news reported Mr. Efferson's death, Tyler's response was "one down, two to go." After becoming frightened by Tyler's conduct, Ms. Tedder contacted the police and subsequently assisted them in effectuating Tyler's arrest. Considered with other evidence supporting Tyler's culpability in the murder, a compelling picture of guilt was presented to the jury.

After Tyler was found guilty as charged, a penalty phase trial was held where the jury heard from a former employer of Tyler. This unfortunate gentleman had been shot in the stomach with a shotgun by Tyler during a robbery on Christmas Eve, 1994. The jurors also heard from a number of psychiatric experts presented by the defense to establish Tyler's unsettled mental condition. Following the conclusion of the penalty phase of the trial, the jury unanimously determined that Tyler should be sentenced to death.

II. Defense Counsel's Representation of Tyler

As defense counsel told Tyler, and as set forth above, the case against Tyler was strong. In response to the strength of the State's case and Tyler's psychological

issues, the defense team came up with a plan to concede the factual elements of the crime but to lay the groundwork for the penalty phase by eliciting evidence about Tyler's state of mind. Tyler disagreed with this plan and made his disagreement known. Pursuant to Supreme Court Rule 15.2, Respondent is constrained to point out that the record contradicts Tyler's assertions in brief that " . . . 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" (Pet. p. 12). Counsel did cross-examine some of the State's witnesses – Denise Washington, James Douglas, Mark Davis, Don Johnson, Sharlot Tedder – and attempted to cross-examine Officer Gary Foster. This was part of the defense strategy to plant doubt in the jurors' minds about Tyler's mental status and thus his culpability. Counsel's efforts continued during the penalty phase with a motion for a mistrial, evidence of mental instability, and testimony from Tyler's family members. In spite of counsels' determined efforts to convince the jury to vote for a life sentence, or at least to not unanimously vote for a death sentence, a capital verdict was returned.

III. Procedural History

On direct appeal, Petitioner's conviction and sentence were affirmed by the Supreme Court of Louisiana, *State v. Tyler*, 97-0338 (La. 9/9/98), 723 So. 2d 939, *rehearing denied*, 11/20/98, and this Court denied certiorari on April 19, 1999. *Tyler v. Louisiana*, 526 U.S. 1073, *rehearing denied*, 526 U.S. 1166 (1999). After

these proceedings, direct review of Petitioner's case was complete.

Petitioner's brief adequately summarizes the history of the State collateral litigation in Tyler's case with one small oversite: after the filing of his first, *pro se* application for post conviction relief on October 25, 1999, this application was either not ruled upon by the trial court or was subsumed into the supplemental application for post conviction relief filed in January, 2002. As set forth in Petitioner's brief, this application was denied by the post conviction court and the Supreme Court of Louisiana denied writs. *State v. Tyler*, 2006-KP-2339 (La. 6/22/07), 959 So. 2d 487. This Court then denied certiorari. *Tyler v. Cain*, 552 U.S. 1044 (2007). A subsequent application for post conviction relief filed in 2009 was also denied. *State v. Tyler*, 2015-0093 (La. 5/22/15), 171 So. 3d 922; *State v. Tyler*, 2013-0913 (La. 11/6/15), 181 So. 3d 678. Again, this Court denied certiorari. *Tyler v. Louisiana*, 137 S. Ct. 589 (2016).

Petitioner subsequently filed a petition for writ of habeas corpus in the Western District of Louisiana. *Tyler v. Vannoy*, 5:16-cv-1059, Western District of Louisiana. After the issuance of the opinion in *McCoy*, the habeas proceedings were stayed to allow Petitioner to return to state court to present and exhaust any claim he might have based upon the ruled announced in *McCoy*.

The *Supplemental Petition for Post-Conviction Relief* underlying the instant petition for writ of certiorari

was filed in the First Judicial District Court on May 14, 2019. In the *Supplemental Petition*, Tyler made the following claims: (1) a straightforward *McCoy* claim, (2) conflict of interest between Tyler and his counsel pursuant to *Holloway v. Arkansas*, 435 U.S. 475 (1978) in light of *McCoy*, (3) conflict of interest between Tyler and his counsel pursuant to *Cuyler v. Sullivan*, 446 U.S. 335 (1980) in light of *McCoy*, (4) the denial of counsel at critical stages of the proceedings in violation of *United States v. Cronic*, 466 U.S. 468 (1984) in light of *McCoy*, (5) the denial of effective assistance of counsel due to the breakdown of communication between Tyler and his trial attorneys in light of *McCoy*, and (6) the denial of effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1994) in light of *McCoy.*

The district court, in a Ruling that described Tyler's Petition as "well done and quite thorough," made plain that the only question to be decided in Tyler's particular circumstances was whether or not *McCoy* applied retroactively. Pet. App. 3. Based upon the district court's analysis using the framework established in *Teague v. Lane*, 489 U.S. 288 (1989), the district court denied the Petition. Specifically, the district court found that the *McCoy* rule does not fit the first *Teague* exception in that it does not prohibit punishment for either certain conduct or a category or class of defendants. The district court also correctly found that the second *Teague* exception clearly does not apply either, because the *McCoy* rule does not implicate the fundamental fairness or accuracy of the criminal proceeding

such as the right to counsel found in *Gideon v. Wainwright*, 372 U.S. 335 (1963). As the district court noted, the court was concerned that *McCoy* might lead to less favorable verdicts for more defendants. Pet. App. 6.

On March 13, 2020, Tyler filed a *Motion to Reconsider District Court's Denial of James Tyler's Supplemental Petition for Post-Conviction Relief*. In the *Motion to Reconsider*, Tyler argued that (1) the rule announced in *McCoy* was an old rule and thus retroactive to cases both on direct and collateral review, citing *Whorton v. Bockting*, 549 U.S. 406 (2007), (2) that *McCoy* announced a substantive, rather than procedural, rule which puts it within the first exception to the *Teague* rule, (3) and that if not substantive, the rule announced in *McCoy* is a new bedrock procedural rule that is entitled to retroactive application.

On May 15, 2020, the district court denied the *Motion to Reconsider* and gave its reasons as follows:

> In the Motion to Reconsider, counsel seems to admit that the February 13, 2020 Ruling addresses Tyler's claim #1, which is the same as the first claim in the Petition. The list itself shows the reason this Court did not address each and every one of the other five (5) claims in its original Ruling on February 13, 2020. Counsel lists the five (5) remaining claims in the Motion to Reconsider, but suggests each is to be reviewed "**in light of *McCoy***." Counsel's approach in the Motion to Reconsider seems disingenuous in view of the issue(s) involved in the cases cited in claims 2-6 ("ineffective

> assistance of counsel") and their inapplicability to the issue in *McCoy* ("autonomy of defendants in strategic decisions"). The new rule of *McCoy* does not address the effectiveness of counsel in view of counsel's conflicts as in *Holloway v. Arkansas*, 435 U.S. 475 (1978) ("*Holloway*) or *Cuyler v. Sullivan*, 446 U.S. 335 (1980). ('*Sullivan*"). The new *McCoy* rule does not concern whether the defendant's case was presumptively affected by counsel's conflict or if the defendant must prove some deleterious effect. Likewise, the new rule of *McCoy*, and the issues in this case do not involve the question of whether external circumstances surrounding a defense of a case can be said to require reversal without delving into whether under those circumstances defense counsel's work was acceptable as was the case in *United States v. Cronic*, 446 U.S. 468 (1984) ("*Cronic*").

App. 2-3.

The district court went on to discuss at length the disconnect between Tyler's lengthy arguments that the rule established in *McCoy* was not a new rule, and thus entitled to retroactivity, with the subsequent declaration that "*McCoy* established a new bedrock procedural rule on par with *Gideon*." Pet. App. 3.

Following the denial of relief in the post conviction court, Petitioner filed an application for writ of review in the Louisiana Supreme Court. In addition to presenting the claims denied by the post conviction court, Tyler added an argument that his case was not final

on direct review. The court denied the writ application without comment. Pet. App. 1. The instant petition for writ of certiorari to this Court followed.

INTRODUCTION

Tyler seeks to have his capital conviction and sentence reversed through a retroactive application of the rule announced in *McCoy v. Louisiana* on state collateral review. The basis of Tyler's claims lies in his disagreement over twenty-five years ago with his counsel's trial strategy. Tyler's defense team consisted of highly skilled attorneys experienced in capital defense who carried out the thankless task of representing a difficult, obstreperous client to the best of their considerable abilities. The facts plainly established by the evidence – that Tyler shot three restaurant employees at close range in the head, including a pregnant woman, killing one of them – were sufficient to horrify any juror. The strength of the case against him, which included his confession, was such as to almost guarantee a conviction. When the evidence was considered along with Tyler's criminal history, including a close-up shotgun blast to the abdomen of the victim of another robbery, a death sentence seemed a likely outcome.

At the time, his attorneys believed that avoiding the death penalty had to be their highest priority even if their client disagreed. As ably stated by Justice Crichton of the Supreme Court of Louisiana in earlier litigation in this case, "On issue of counsel, I note that

Tyler, at no cost to him and with apparently minimal assistance from him, received excellent assistance of multiple lawyers who, as established by the record, worked tirelessly and zealously on his behalf." *State v. Tyler*, 2013-0913 (La. 11/6/2015), 181 So. 3d 678, (Crichton, J., concurring and assigning reasons).

Indeed, the same defense team successfully used this same strategy to avoid a death penalty in another case arising out of this jurisdiction. Eventually, the United States Fifth Circuit Court of Appeals sitting *en banc* held in that case that *Strickland*, not *Cronic*, provided the appropriate test by which to evaluate an ineffective assistance of counsel claim arising out of a concession to focus on penalty strategy in capital cases. In fact, the Fifth Circuit found that the strategy was not ineffective. *Haynes v. Cain*, 298 F.3d 375, 380 (5th Cir. 2002), *cert. denied*, 537 U.S. 1072.

While it is now clear after *McCoy* that even the noblest motives on the part of counsel cannot override a client's voiced decision on the objective of the representation, at the time of Tyler's trial his counsel, and the trial court, believed that the choice of trial strategy belonged solely to counsel. Decades passed before that position became clearly incorrect with the issuance of *McCoy v. Louisiana*. The State of Louisiana consented to a stay of Tyler's federal habeas litigation to allow him an opportunity to convince the state courts that *McCoy* applied retroactively on state collateral review.[1]

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[1] The possibility of successfully bringing this claim in Petitioner's federal habeas litigation has been foreclosed by the

The Louisiana Supreme Court adopted the retroactivity analysis set forth by this Court in *Teague v. Lane* many years ago.[2] Under *Teague*, especially now that *Teague* has been modified by *Edwards*, it is clear that the *McCoy* rule does not apply retroactively to cases that are final on direct review. While *Danforth v. Minnesota*, 552 U.S. 264 (2008), allows states the option of adopting a broader standard of retroactivity, not surprisingly the Louisiana state courts declined to do so in this case that has been final for decades.

Now, Tyler asks this Court to require the state courts to retroactively apply a new constitutional rule of criminal procedure to a case that is on state collateral review. Furthermore, to obtain the requested relief, he must convince this Court to formulate a new rule of retroactivity for cases on state collateral review. For as the law stands now, new constitutional substantive rules apply retroactively on state collateral review but, thus far, this Court has not held that the same applies when the new rule is procedural. Moreover, Tyler

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issuance of the Opinion in *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 (2021), which modified *Teague* by eliminating the possibility that a new rule of criminal procedure would ever be applied retroactively on federal collateral relief to final cases. As the Court pointed out, to hold out hope that such a rule would ever be deemed to apply retroactively, when such had never happened and it appeared never would, only led to pointless litigation which was a waste of resources and a delay of finality. Those considerations apply equally to state collateral relief proceedings.

[2] *State ex rel. Taylor v. Whitley*, 91-2343 (La. 10/19/1992), 606 So. 2d 1292, *cert. denied*, *Taylor v. Whitley*, 508 U.S. 962 (1993).

asks the Court to undertake this task of dubious value when the rule in question has no bearing on the accuracy or fairness of his trial. This court has already denied certiorari in another case from this jurisdiction, *Hampton v. Vannoy*, 2020-390 (La. 12/08/2020), 306 So. 3d 430 (Mem.), *cert. denied*, 1142 S. Ct. 96 (Mem.) (2021), after the Supreme Court of Louisiana declined to apply *McCoy* retroactively on state collateral review. Tyler presents no compelling reasons why his case warrants different treatment.

Alternatively, Tyler asks this Court to overturn the accepted rule for determining the finality of a conviction and instead utilize his suggested method which would effectively render the concept of finality meaningless. Doing so would impinge upon the states' ability to define the scope of state collateral review and open the floodgates of litigation as litigants seek relief for claims that did not even exist at the time their cases became final. Respondent suggests, as set forth below, that the better course is to deny certiorari and continue allowing states to determine how retroactivity of new constitutional procedural rules is determined on state collateral review.

REASONS FOR DENYING THE PETITION

The post conviction court correctly determined that the *McCoy* rule is a new constitutional rule, that it is a procedural, not substantive rule, and that it is not a watershed rule of criminal procedure that

warrants retroactive application to cases already final. Pet. App. 4-6. The Supreme Court of Louisiana wisely left this decision in place. Pet. App. 1. The arguments Tyler presents here, rejected by the state courts, diverge widely from the jurisprudence of this Court on the questions of whether the *McCoy* rule is a new rule, whether it is a procedural rule, and whether it is a watershed rule. Additionally, Tyler presents an argument here that was not presented to the post conviction court – that he is entitled to retroactive application of the *McCoy* rule because his case was not final, in contravention of the long-standing rule of finality. This argument, which the post conviction court did not have an opportunity to rule upon, certainly should not weigh in favor of a grant of certiorari.

I. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), announced a new constitutional rule.

A critical question when determining retroactive applicability is whether a rule is a new rule or merely clarifies or fleshes out an established rule. If the rule is not new, then it "applies both on direct and collateral review." *Whorton*, 549 U.S. at 416. Without mentioning *Teague v. Lane* in this portion of his brief, Tyler seems to argue that the *McCoy* rule is outside the ambit of *Teague* because it is an established rule, and thus retroactively applicable even to final cases.

A rule is new unless it was "dictated by precedent existing at the time the defendant's conviction became

final." *Teague*, 489 U.S. at 301 (plurality opinion). More recent jurisprudence from this Court buttresses this understanding.

> "In other words, a rule is new unless, at the time the conviction became final, the rule was already "apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 528, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997). The starkest example of a decision announcing a new rule is a decision that overrules an earlier case. See *Whorton*, 549 U.S. at 416, 127 S. Ct. 1173."

Edwards v. Vannoy, 141 S. Ct. 1547, 1555 (2021). When evaluated by these standards, *McCoy* clearly announced a new rule.

This inquiry – whether the rule was already apparent to all reasonable jurists at the time the conviction became final – must be answered in the negative. Contradicting this argument is the history of Tyler's own case as well as others similarly situated, including others from the same jurisdiction. In *Haynes*, from the same jurisdiction and era that presents a remarkably similar situation, the question of whether a defendant or his counsel controlled the objective of the defense was considered and decided as a question of ineffective assistance of counsel without mention of the Sixth Amendment right to autonomy that *McCoy* rests upon. *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002), *cert. denied*, 537 U.S. 1072 (2002). If this rule was "simply an application of fundamental Sixth Amendment jurisprudence," as claimed by Tyler in brief, it somehow

eluded the notice of skilled appellate practitioners and the highest levels of the judiciary for the almost quarter century that has passed while this case has made its way through the courts.

In his Application for Supervisory Writs with the Supreme Court of Louisiana, Tyler relied heavily on the argument that the *McCoy* rule was dictated by *Florida v. Nixon*, 543 U.S. 175 (2004), and thus was not a new rule. As pointed out by the State in its Opposition to that pleading, this position was meritless. *Nixon* had not been issued at the time Tyler's conviction became final in 1999; it could not be the precedent that dictated the result at the time of finality in Tyler's case. *Teague*, 489 U.S. at 301. Also, the question presented in *McCoy*: whether a defendant's attorney may concede guilt over the defendant's vociferous objections, was expressly reserved by the *Nixon* Court. Tyler has now shifted tactics to focus on the origins of the right to the assistance of counsel, arguing that a constructive denial of counsel occurred and claiming that "*McCoy* merely reaffirmed the longstanding fundamental Constitutional principle that criminal defendants are entitled to the assistance of counsel *for the purpose of their defense.*" Pet. pp. 22-23.

This focus does not serve to justify a finding that *McCoy* announced a new rule. A similar argument was made in *Edwards*, 141 S. Ct. at 1556 which eliminated the *Teague* 'watershed rule' exception for non-retroactivity of new procedural rules in federal collateral relief proceedings.

> "Edwards responds that the Court's decision in *Ramos* must have applied a settled rule, not a new rule, because the decision adhered to the original meaning of the Sixth Amendment's right to a jury trial and the Fourteenth Amendment's incorporation of that right (and others) against the States. That argument conflates the merits question presented in *Ramos* with the retroactivity question presented here."

Edwards v. Vannoy, 141 S. Ct. 1547, 1556 (2021).

Tyler's argument on this point is no more persuasive than that presented in *Edwards*. Because *McCoy* answered the question left open in *Nixon*, and because the *McCoy* rule was not already apparent to all reasonable jurists at the time the conviction became final, the rule is a new one.

II. The new rule announced in *McCoy* is a procedural, rather than substantive, rule.

Tyler maintains his argument made to the court below that the *McCoy* rule is substantive, not procedural. The distinction is a significant one, as new constitutional rules of substantive law are given retroactive application to all cases, regardless of finality and state or federal basis. As the Court held recently, " . . . 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." *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016), *as revised* (Jan. 27, 2016). Substantive rules

apply retroactively "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

New constitutional rules of criminal procedure were formerly subject to the strenuous *Teague* analysis to determine if the rule applied retroactively to cases that are final on direct review or only to those cases that are not yet final. Procedural rules were not granted automatic retroactive application because they have a "more speculative connection to innocence" than substantive rules. *Schriro*, 542 U.S. at 352. "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 577 U.S. at 201. *Teague* only allowed retroactive application of new procedural rules to "watershed rules of criminal procedure" which had to satisfy a two-part test: "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 417-18 (citations omitted). The *Teague* test was so rigorous that no new post-*Teague* rule ever satisfied it.

This Court's opinion in *Edwards*, 141 S. Ct. at 1555, a case not mentioned by Tyler in brief, eliminated the 'watershed rule' exception in *Teague* and the possibility that a new rule of criminal procedure would

ever be applied retroactively on federal collateral relief to final cases. As the Court pointed out, to hold out hope that such a rule would ever be deemed to apply retroactively, when such had never happened and it appeared never would, only led to pointless litigation which was a waste of resources and a delay of finality. The sea change wrought by *Edwards* makes the distinction between substantive and procedural rules even more critical than before.

New rules that are "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense" are substantive rules. *Montgomery*, 577 U.S. at 198 (internal quotation marks omitted). This first category of substantive rules, which are those that forbid criminal punishment for certain primary conduct, is not at issue here.

Instead, Tyler argues that the *McCoy* rule falls within the second category of substantive rules which are those that prohibit a certain category of punishment for a class of defendants because of their status or offense. An example is the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012), and made retroactive even on state collateral review in *Montgomery* – that juvenile homicide offenders cannot be subject to a mandatory life without parole sentence. Notwithstanding Tyler's attempts to paint himself as a member of a class of defendants that share a status or offense ("defendants who were subjected to punishment after their lawyers refused to defend in spite of

the defendant's objections" – Petitioner's Brief, p. 25), the *McCoy* rule clearly does not belong in this category. Tyler does not point to a category of punishment as being prohibited – his exclusion would extend to any punishment meted out in the relevant circumstances. Similarly, his 'class' of defendants is meaningless – the same argument could be used to find a 'class' of defendants in any situation whose only commonality was a similar assignment of error on appeal or collateral review. If this Court were to accept Tyler's argument, any defendant whose trial suffered from a constitutional defect would become a member of a class thereby immune from punishment until the constitutional defect is cured, even if the trial occurred decades earlier and the trial court correctly followed the law as stood at the time of the trial.

In contrast, procedural rules are defined as rules that affect "only the manner of determining the defendant's culpability." *Schriro*, 542 U.S. at 353. Procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro*, 542 U.S. at 352. An example of a procedural rule is found in this Court's recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which required that all convictions in jury trials result from a unanimous verdict. Similarly, the rule announced in *McCoy* – with its focus on the apportionment of rights and responsibilities between criminal defendants and defense counsel related to the conduct of the case – is also directed solely at the

manner of determining a defendant's culpability. As such, it is clearly a procedural rule.

III. Tyler's case was final after direct review and this Court has already rejected retroactive application of new procedural rules to final cases

Tyler next argues that he is entitled to retroactive application of the *McCoy* rule because his conviction was not final when *McCoy* was issued. Tyler never presented this argument to the post conviction court that issued the only reasoned opinion in this litigation thus far. He first made a claim along these lines in his Application for Supervisory Writs to the Louisiana Supreme Court seeking review of the post conviction court's decision, but even in that pleading Tyler admits that for *Teague* purposes his conviction has been final since 1999.

> "As a threshold matter, James Tyler's conviction became "final" for *Teague* analysis purposes, on April 19, 1999, when the United States Supreme Court denied his petition for certiorari, following the decision by the Louisiana Supreme Court denying his direct appeal and confirming his conviction and death sentence. *Tyler v. Louisiana*, 526 U.S. 1073, (1999); *State v. Tyler*, 97-0338 (La. 9/9/98); 723 So. 2d 939."

App. 18, Excerpt from *Application for Supervisory Writs From Trial Court's Denial of James Tyler's Supplemental Application for Post-Conviction Review Based on McCoy v. Louisiana*, p. 22.

Thus, Tyler's contention before this Court that his case is somehow not yet final for retroactivity purposes, expressed in a lengthy argument promoting the virtues of endless litigation, lacks consistency with his own position as well as legal merit, for this argument is flatly contradicted by the law on this point. As this Court has plainly stated:

> "State convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994)."

Beard v. Banks, 542 U.S. 406, 411 (2004).

Tyler's case has been final since this Court denied certiorari following his unsuccessful direct appeal to the Supreme Court of Louisiana. *Tyler v. Louisiana*, 526 U.S. 1073, *rehearing denied*, 526 U.S. 1166 (1999). Furthermore, Tyler's claim that special treatment should be afforded capital cases on the question of retroactivity is not borne out by precedent – *Beard* is a capital case.

As Tyler's case was final when *McCoy* was decided, there is no need for this Court to utilize the rule announced in *Griffith v. Kentucky*, 479 U.S. 314 (1987) as Tyler suggests. *Griffith* requires retroactive application of new rules of criminal procedure to all cases pending on direct review. In the situation presented here, however, *Griffith* is inapplicable.

Furthermore, in *Ramos v. Louisiana* this Court restated its reliance on *Teague* to govern retroactivity in state collateral courts.

> "Under our case law, a State must give retroactive effect to any constitutional decision that is retroactive under the standard in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), but it may adopt a broader retroactivity rule. *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016); *Danforth v. Minnesota*, 552 U.S. 264, 275, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)."

Ramos, 140 S. Ct. at 1438 n. 31.

Since *Edwards* has now clarified that no new constitutional rule of criminal procedure will be retroactive under the *Teague* standard, it follows that the rule announced in *McCoy* will only apply retroactively to final cases when a state court chooses to do so. This decisions rests with the states because it is a question of state law. See *Danforth*, 552 U.S. at 288. This Court does not resolve questions of state law. *DIRECTV, Inc. v. Imburgia*, 557 U.S. 47 (2015); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). This Court has already declined

the opportunity to apply *McCoy* retroactively to a capital case on state collateral review. *Hampton v. Vannoy, cert. denied*, 142 S. Ct. 96 (Mem.) (2021). There is no compelling reason why this Court should rule differently for Tyler than it did for Hampton.

As set forth above, there is no basis for this Court to intervene in Tyler's state post conviction litigation. Tyler effectively asks this Court to overturn last year's decision in *Edwards*, abolish the distinction between substantive and procedural rules, and allow litigation to continue *ad infinitum* any time a new decision implicating the U.S. Constitution is issued. Any expansion of the category of retroactively applicable rules, much less on the scale that Tyler proposes, is unwarranted and unwelcome.

CONCLUSION

The State of Louisiana respectfully asks the Court to deny Tyler's petition for a writ of certiorari.

Respectfully submitted,

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