No. 2021 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER EPPERSON

Petitioner

v.

COMMONWEALTH OF KENTUCKY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

In *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), the Court recognized as sacrosanct the defendant's autonomy over the objective of the defense, and recognized counsel cannot contradict a defendant's objective to maintain innocence. As in *McCoy*, Roger Epperson had been charged with the murder of people close to him (his father's best friend and wife) and, as in *McCoy*, Epperson desired to maintain innocence not just of the charged offenses (legal innocence) of murder, robbery, and burglary, but also of any criminal activity that led to the crimes perpetrated against the victims (factual innocence). Epperson, who was not the initial suspect, was arrested despite other individuals having confessed to the murders in factually accurate and specific detail. Epperson has consistently maintained his innocence since arrest. Trial counsel was well aware of Epperson's objective to assert his factual innocence at trial. Epperson told his counsel that he wanted them to fully maintain his factual innocence at trial and to not concede any activity that led to, or involved, the crimes perpetrated against the victims. At a post-conviction evidentiary hearing on a separate issue, trial counsel confirmed that the plan was to present an innocence defense that Epperson had nothing to do at all with the criminal activity. Yet, to Epperson's surprise, counsel did not follow through with that plan at trial.

Trial counsel failed to contest the intent element of the charged offenses, but conceded the actus reus, eliciting testimony that Epperson drove the getaway car and did not enter the victims' home because he knew the victims. Trial counsel also conceded that during closing argument. Following *McCoy*, Epperson raised the issue in state court.

The Kentucky Supreme Court addressed the *McCoy* claim on its federal constitutional merits, but held the claim failed for two reasons.

First, by a 4-3 vote, the Kentucky Supreme Court held that *McCoy* requires an on-the-record contemporaneous objection to the trial court and thus Epperson's claim fails because he first raised the *McCoy* issue in a post-trial proceeding. The Kentucky Supreme Court did so despite the Court having granted, vacated, and remanded in light of *McCoy*, *Hashimi v. United States*, 139 S.Ct. 377 (2018), even though Hashimi had not made an on-the-record objection to counsel conceding guilt during closing argument.

Second, the Kentucky Supreme Court held that *McCoy* applies only when counsel concedes the entirety of the charged offense in contradiction to the defendant's objective to maintain legal innocence, but does not apply when counsel concedes guilt of an element of the offense when the defendant's objective was to maintain factual innocence. This second aspect is a matter the *McCoy* dissenting Justices recognized is difficult but has important consequences. Courts across the country have struggled

with this difficult issue, and are split on how to interpret and apply *McCoy* in these circumstances, with some reaching the same conclusion the Kentucky Supreme Court reached, but many reaching the opposite conclusion.

This gives rise to the following questions presented:

1) Does *McCoy* apply where the defendant made clear to counsel the objective of the defense is to maintain innocence, only for counsel to then concede guilt, without the defendant then contemporaneously objecting to the trial court, as Alabama, California, Florida, Georgia, Massachusetts, Minnesota, Oregon, Texas, Wisconsin, and the United States Court of Appeals for the Fourth and Eighth Circuits Circuit have held, or does *McCoy* require a defendant to make a contemporaneous on-the-record objection before the trial court, as Kentucky, Michigan, and Oklahoma have held?

2) Does *McCoy* apply where counsel conceded guilt of an element of an offense despite the defendant's objective to maintain factual innocence of criminal activity, as California, Oregon, the United States District Court for the Northern District of Illinois, and the Army Court of Appeals have held, or does *McCoy* apply only where counsel conceded guilt of all the elements of the charged offense, as the United States Court of Appeals for the Second and Eleventh Circuits, and the States of Georgia, Kentucky, and Washington have held?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Roger Epperson requests a Writ of Certiorari issue to review the Supreme Court of Kentucky's opinion affirming the denial of state post-conviction relief, through which Epperson argued, under *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), a constitutional violation occurred when trial counsel, aware that Epperson's trial objective was factual innocence (that he was completely innocent and had no involvement at all in the criminal activity that led to the death of two people), elicited evidence that Epperson was involved in the planning of the crime and drove the getaway car, and then conceded in closing argument that Epperson might have been the getaway driver.

This case arises before this Court through state court proceedings in which the state court noted the interpretation of *McCoy* Epperson sought and argued for within his briefs, addressed *McCoy* on its merits, expressly articulated the two dispositive issues that are now raised through the questions presented, interpreted *McCoy* in a manner that conflicts with how many other courts have interpreted *McCoy*, and affirmed the denial of relief because of that interpretation of *McCoy*. Also, because this case arose in state court, AEDPA is inapplicable and thus poses no additional hurdles or limitations on relief. Rather, this case involves a split among the lower courts on how *McCoy* applies to common facts, and provides this Court with an ideal conduit to resolve the matter because the Kentucky Supreme Court squarely identified and address the issues in a manner that was dispositive to the outcome.

CITATIONS TO OPINION BELOW

The Supreme Court of Kentucky's opinion addressing and deciding the *McCoy* claim on its federal constitutional merits, *Epperson v. Commonwealth*, is to-be-published, and was issued on September 30, 2021, and modified on October 1, 2021 and December 17, 2021, the latter in a manner that did not impact the court's holding or reasoning. Because the latest modified opinion is not yet available on Westlaw, Epperson provides slip opinion page citations and attaches the slip opinion as part of the appendix (App. 1-12). The trial level court order denying relief, which the Supreme Court of Kentucky affirmed, is also attached. (App. at 13-14).

JURISDICTION

28 U.S.C. § 1257(a) allows this Court to review, by writ of certiorari, federal constitutional issues decided by the highest court of a state and thus provides this

Court jurisdiction to review the Supreme Court of Kentucky's September 30, 2021 decision, which was modified on October 1, 2021 and December 17, 2021. As the December 17, 2021 Order granting the Commonwealth's petition for modification of opinion states, the modification did not impact the Kentucky Supreme Court's holding or reasoning. Thus, under this Court's case law, Epperson's Petition for a Writ of Certiorari is due within ninety days of the September 30, 2021 decision and has been filed within that time frame.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees the right to counsel in criminal proceedings.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[1]

Someone broke into the house of Ed and Bessie Morris, robbed them, bound and gagged them, and shot them to death. The police did not have an immediate suspect, but according to police reports, multiple people had confessed to the murders. This included an individual who described exactly how the victims were bound and

[1] The official record of the trial and of the post-conviction evidentiary hearing that was held on other claims, and where the post-conviction trial testimony cited herein occurred, is a video record. Epperson therefore does not provide record citations in the statement of the case at this point of the proceedings.

gagged prior to being shot to death. That individual was neither Roger Epperson nor his codefendants, Benny Hodge and Donald Bartley. Yet, Epperson (along with Hodge and Bartley) was charged, after Bartley implicated himself and Epperson in return for a favorable deal to avoid the death penalty in this case and also in a separate case. Despite no physical evidence linking Epperson, Bartley, or Hodge to the murders, and despite each of them being excluded as the source of a hair found on the nightgown Bessie Morris was wearing when murdered, Epperson was charged with the burglary, robbery, and two counts of murder, a capital offense. The prosecutor pursued the murder charges under both a principal and a complicity (accomplice) theory of liability, either of which would, if convicted, render Epperson eligible for the death penalty if the jury found Epperson guilty of robbery, burglary, or any other applicable aggravating circumstance.

From the moment of arrest through the present, Epperson has consistently maintained his factual innocence, not just of the murder of his father's best friend and the best friend's wife, but also of having anything to do with the crimes. Epperson has steadfastly maintained both that authorities had the wrong person and that he had nothing to do with the crimes. Epperson also communicated to his trial attorneys both before trial and throughout the trial, that his objective before the jury was to maintain his factual innocence of any activity or involvement in the events that led to the crimes perpetrated against the victims. As trial counsel testified in state post-conviction proceedings, they thereby rejected a trial strategy that Epperson committed some of the criminal acts but not all the elements of the charged offenses

in favor of a defense that Epperson was not involved at all with the crimes for which he stood trial. That defense would have been consistent with Epperson's objective to maintain that he had nothing to do with any crime committed against Ed and Bessie Morris; but, to Epperson's surprise, that was not the defense presented to the jury.

In his opening statement, trial counsel told the jury that, at the end of trial, the defense would ask for the only verdict the evidence would support – not guilty on all charges. The prosecution then proceeded to present its evidence of guilt as a principal, and alternatively, its evidence of guilty by complicity, since, under Kentucky law, it did not matter whether the evidence showed guilt as a principal or as an accomplice because either theory would result in conviction of the same offense and render Epperson eligible for the death penalty. Rather than completely contest the prosecution's case and comply with the objective of Epperson's defense, trial counsel never contested intent to commit the crimes, and contrary to Epperson's objective of his defense, elicited evidence supporting guilt and conceded guilt of some of the charged offenses, or at least elements of the charged offenses.

Specifically, during cross-examination of Sherri Hodge in the prosecution's case-in-chief, trial counsel asked Hodge, "now the plan was for Roger [Epperson] to wait in the automobile, right?" She answered yes, and said she was told that was the plan because Epperson knew the victims. Trial counsel then elicited from her that Epperson told her that he could see Bartley and Benny Hodge enter the victims' home. Epperson first learned that trial counsel would do this at the same time the jury did – when his own attorneys elicited the testimony. Then, during closing

argument, counsel told the jury that Epperson waited in the getaway vehicle while Hodge and Bartley committed the murders, and that Epperson did not enter the house because he knew the victims.

Epperson argued before the state courts that the statement in closing argument did a few things. First, it conceded Epperson's involvement in the planning and carrying out of the crime. Second, it conceded Epperson's presence at the crime scene. Third, it conceded guilt of robbery and burglary. Fourth, it conceded guilt of murder by complicity because it admitted Epperson was present when the crime occurred with intent to participate, since he, according to counsel, at most, drove the getaway car and watched Benny Hodge and Donald Bartley enter the victims' home. Fifth, if the jury accepted this concession, it was sufficient to find Epperson guilty. Finally, all of this went against Epperson's objective of his defense to maintain factual innocence -- that he had absolutely nothing to do with the offenses perpetrated against Ed and Bessie Morris.

Shortly after trial counsel conceded Epperson's guilt of burglary and robbery and involvement with the murders as a non-triggerman, the jury convicted Epperson of burglary and robbery as a principal and of murder by complicity. The jury then found the aggravating circumstance of robbery and promptly voted to recommend the judge impose a death sentence, which the judge imposed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In post-conviction proceedings, Epperson argued, among other claims, that his constitutional rights were violated when counsel elicited evidence of guilt and then

conceded guilt during closing argument, as discussed within the statement of the case. While Epperson's rehearing petition was pending before the Kentucky Supreme Court, this Court decided *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

Epperson supplemented his rehearing petition and sought a remand. The Kentucky Supreme Court denied a remand, but granted rehearing and issued a new opinion that addressed the *McCoy* claim on its merits. It ultimately denied relief.

Based on language within the opinion, Epperson filed a new post-conviction action before the trial court. He argued his constitutional right to autonomy was violated when trial counsel elicited testimony that Epperson planned the crime, was present when the crime occurred, did not enter the victims' home because he knew the victims, and drove the getaway vehicle, the latter of which counsel also conceded during closing argument and all of which contradicted what Epperson had told counsel was the objective of his defense – to maintain that he had nothing to do with any criminal activity perpetrated against the victims. Epperson sought an evidentiary hearing and supported the claim with his own affidavit. *Epperson Aff.* (App. at 15-16).

Within the affidavit, Epperson attested that "I made clear to [trial counsel] that I did not murder Ed and Bessie Morris, did not rob them, did not burglarize them, did not wait outside the house while the crime occurred, did not drive the getaway vehicle, and was not otherwise involved with the crimes." *Epperson Aff.* (App. at 15). Epperson further attested, "I also made clear to [trial counsel] that . . . I expected them to present a defense that I had nothing to do with any aspect of the

crimes" and that "I was not present when the crimes occurred." *Id*. "It was my understanding before trial and during trial that [trial counsel] would follow my decision in this regard." *Id*. Epperson had reason to believe that, as trial counsel testified at the initial post-conviction evidentiary hearing, they intended to present a defense that Epperson had nothing to do with the crimes at all.

Trial counsel never informed Epperson of an intent to change course or to otherwise disregard Epperson's objective. Because of that and because he had made clear to counsel that he "wanted an innocence defense presented," Epperson was "shocked" when "[trial counsel] told the jury during closing argument that [he] drove the getaway vehicle and waited outside because the victims knew [him], and [] was further surprised when trial counsel elicited that testimony from Sherri Hodge." *Id*. As Epperson stated in his affidavit, counsel doing so "ignore[d] my express wishes," *id*., and "[i]t was done in direct disregard to what I had told [trial counsel] about the defense theory I wanted presented at trial." *Id*. at 15-16.

Despite Epperson's affidavit and nothing in the record refuting it, the post-conviction trial court denied an evidentiary hearing and summarily denied relief because it believed the Kentucky Supreme Court had already decided the claim. App. at 13-14. Epperson appealed.

The Kentucky Supreme Court directly addressed and squarely resolved the application of *McCoy* and specifically, as dispositive to Epperson's claim, decided the two issues raised within the questions presented. This makes Epperson's case a straightforward case through which to resolve the issues.

The Kentucky Supreme Court acknowledged that Epperson argued that, under *McCoy*, "an objection need [not] be made on the record before the trial court[,]" and a *McCoy* violation occurs "when the desire for an actual innocence defense is expressed to counsel, and counsel subsequently disregards that desire by conceding guilt to an element of the offense." *Epperson*, 2019-SC-724, *Slip Op.* at 4. The Kentucky Supreme Court realized that Epperson's claims turned entirely on whether the court agreed with that interpretation of *McCoy*. It did not.

The court ruled by a four to three vote that *McCoy* requires a contemporaneous on-the-record objection to the trial court. *Id*. at 5-6. It also held unanimously that *McCoy* applies only where counsel conceded guilt of the entirety of a charged offense over the defendant's objection, but not where counsel conceded guilt of an element of an offense, even if doing so conflicts with the defendant's objective to maintain factual innocence. *Id*. at 6-8. Based on these interpretations of *McCoy*, the Kentucky Supreme Court denied relief because Epperson did not first raise a *McCoy* issue until post-trial proceedings, and because it believed counsel's concession was only to an element of an offense, instead of to the entirety of a charged offense. *Id*. at 8-9.

In a concurring opinion that parallels the split of authority among the state courts, three justices disagreed on whether *McCoy* requires a contemporaneous on-the-record objection: "*McCoy* does not necessarily require a contemporaneous objection to defense counsel's presentation of his defense at trial. Instead, its holding is that a 'defendant's autonomy to decide that the objective of the defense is to assert innocence' is sacrosanct." *Id*. at 10 (Minton, C.J., joined by two other Justices,

concurring in result only). Nonetheless, because Epperson did not object on-the-record at trial, and because the court construed the concession to be only to an element of the offense, the majority held *McCoy* was inapplicable and denied Epperson's claim.

Epperson did not seek rehearing, but instead timely seeks certiorari.

REASONS FOR GRANTING THE WRIT

I. In the wake of *McCoy* recognizing the defendant's autonomy to decide the objective of his defense, both state high courts and federal courts are significantly divided on two issues. First, does a *McCoy* violation occur when trial counsel contradicts the defendant's objective of the defense by conceding guilt, or must the defendant also contemporaneously object on-the-record? Second, does the concession of guilt of an element of an offense violate *McCoy* when the defendant's objective is to maintain factual innocence, or must trial counsel concede guilt to all elements of a charged offense, rendering *McCoy* applicable only to a defendant's objection to maintain legal, not factual, innocence? The *McCoy* dissenting justices noted the difference, recognized the issue has important implications, and believed this issue should be left for another day. That day has now come. This Court should grant certiorari to resolve these issues and thus ensure uniformity among the lower courts.**

In *McCoy*, the Court held that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense[,]" and "that a defendant has the right to insist that counsel refrain from admitting guilt . . . ." *McCoy*, 138 S.Ct. at 1505. "If, after consultations with [counsel] concerning the management of the defense, [the defendant] disagreed with [counsel's] proposal to concede [the defendant] committed [the crimes], it was not open to [counsel] to override [the defendant's] objection." *Id.* at 1509. Instead, "[w]hen a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that

objective and may not override it by conceding guilt." *Id*. at 1509. Conceding commission of the criminal acts but arguing a mens rea defense when the defendant's objective was to maintain that he did not commit a criminal act "were not strategic disputes about whether to concede an element of a charged offense. They were intractable disagreements about the fundamental objective of the defendant's representation." *Id*. at 1510. This much is clear from *McCoy*, but other aspects remain unsettled.

The Court did not specifically answer whether the defendant making clear to counsel the objective of his defense is sufficient or if the defendant must actually object contemporaneously on the record to the trial court, perhaps because it was unnecessary to do so since the record was clear that *McCoy* had objected to the trial court. And, as Justice Alito noted in his three-Justice dissent, the majority did not explicitly answer what the dissenters considered to be a "difficult [] question [that] may arise more frequently" and that "would have important implications": "is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged?" *Id*. at 1516 (Alito, J., dissenting). Perhaps the majority did not address that because it disagreed with the dissent over whether counsel conceded only an element of the offense or made a concession that contradicted the fundamental objective of the defense. Regardless, the lower courts have been left to grapple with the difficult questions *McCoy* did not expressly answer.

Unsurprisingly, the lower courts have struggled, resulting in a significant split of authority that only this Court can resolve in a way that brings consistency to the

application of *McCoy*. Clarification is necessary to ensure that whether a defendant prevails under *McCoy* no longer turns on the arbitrariness of which jurisdiction the case arose. It is therefore time for this Court to address the question the *McCoy* dissenters thought more than three years ago should be left for another day, and also time to resolve whether relief is available when counsel knowingly concedes guilt in contradiction to the defendant's fundamental objective of his defense, but the defendant failed to personally object to the trial court contemporaneously with counsel's concession before the jury.

A. State high courts and federal courts of appeals are split on this following question that this Court should resolve: does *McCoy* apply where the defendant made clear to counsel the objective of the defense is to maintain innocence, only for counsel to then concede guilt without the defendant then contemporaneously objecting to the trial court?

A significant split among the lower courts exists as to whether *McCoy* requires a contemporaneous on-the-record objection from the defendant. Nine states, plus the United States Court of Appeals for Eighth Circuit and the Fourth Circuit, upon a GVR from this Court in a case in which there had been no on-the-record objection before the trial court, have taken the position that *McCoy* does not require the defendant to object on-the-record before the trial court; it requires only that defense counsel was aware of the defendant's objective of his/her defense and that counsel then contradicted that by conceding guilt. *Morgan v. State*, 2020 WL 2820172 (Ala.Crim.App.); *People v. Franks*, 35 Cal. App. 5th 883, 248 Cal. Rptr. 3d 12 (2019); *People v. Flores*, 34 Cal. App. 5th 270, 246 Cal. Rptr. 3d 77 (2019); *People v. Eddy*, 33 Cal. App. 5th 472, 24 Cal. Rptr. 3d 872 (2019); *Atwater v. State*, 300 So.3d 589, 591

(Fla. 2020); *Padron v. State*, 2021 WL 5615092 (Fla. App.); *Pass v. State*, 864 S.E.2d 464 (Ga. App. 2021.); *Commonwealth v. Alemany*, 174 N.E.3d 649 (Mass. 2021); *State v. Fry*, 2019 WL 4746137 (Minn. App.); *State v. Nelson*, 2019 WL 4164847 (Minn. App.); *Thompson v.* Cain, 433 P.3d 772 (Or. App. 2018); *Ex Parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021); *Ex Parte Quiroga*, 2020 WL 469635 (Tex. Crim. App.); *State v. Chambers*, 955 N.W.2d 144, 149 (Wisc. 2021); *United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019); *United States v. Hashimi*, 768 Fed. Appx. 159 (4th Cir. 2019) (concluding the record does not make clear that Hashimi consented or objected to counsel's concession of guilt, and noting that any facts from outside the record that would show Hashimi informed counsel that he did not want counsel to concede guilt could be presented within a *McCoy* claim to be raised in a post-conviction proceeding).

For example, an Oregon appellate court "read *McCoy* [to mean], when approaching the issue of counsel's concession of guilt, the proper inquiry is on the fundamental objective of the defendant, as expressed to defense counsel. When a defendant's expressed fundamental objective is to maintain innocence, that defendant's Sixth Amendment guarantees are violated when counsel nevertheless concedes guilt in light of that objective." *Thompson*, 433 P.3d at 777.

Likewise, in a case where the defendant did not object during closing argument after counsel conceded guilt and did not raise the issue until a post-trial proceeding, a California appellate court ruled that "we do not believe preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant

objects in court before his or her conviction. Rather, the record must show (1) the defendant's plain objective is to maintain his innocence and pursue an acquittal, and, (2) that trial counsel disregards that objective and overrides his client by conceding guilt." *Eddy*, 33 Cal. App. 5th at 482.

In a 4-3 opinion, the three dissenting justices of the Kentucky Supreme Court agreed with this approach in Epperson's case, concluding: "*McCoy* does not necessarily require a contemporaneous objection to defense counsel's presentation of his defense at trial. Instead, its holding is that a defendant's autonomy to decide that the objective of the defense is to assert innocence is sacrosanct." *Epperson*, 2019-SC-724*, Slip. Op*. at 10 (Minton, C.J., concurring in result only).

The majority opinion in *Epperson* joined courts in Michigan and Oklahoma in interpreting *McCoy* to apply only when the defendant objects on-the-record to the trial court that counsel plans to, or just did, concede guilt in contradiction to the defendant's desired objective, automatically denying relief unless the record itself indicates an on-the-record objection. *Epperson*, 2019-SC-724*, Slip. Op*. at 5-6; *People v. Watson*, 2020 WL 7296979 (Mich. App.); *Knapper v. State*, 473 P.3d 1053, 1078 (Okla. Crim. App. 2020).

This interpretation of *McCoy* is the exact opposite reached by the majority of courts, and represents a clear split on the meaning and application of *McCoy* that will continue to grow and become more entrenched until this Court resolves the split. Regardless of which way this Court would resolve this split, it is time for this Court

to ensure *McCoy* means the same thing, and is equally applied, in every State and federal court.

B. State high courts and federal courts are split on this question that this Court should resolve: does *McCoy* apply where counsel concedes guilt of an element of an offense in contradiction to the defendant's objective to maintain lack of involvement with any criminal activity (factual innocence) or does *McCoy* apply only where counsel concedes guilt of all the elements of the charged offense (legal innocence)?

The lower courts are also split on whether *McCoy* applies when counsel concedes guilt of an element of the offense despite the defendant's objective to maintain factual innocence of involvement in the criminal activity or events that led to the crime, or whether *McCoy* is triggered only when counsel concedes all elements of the charged offense (legal innocence). This is the issue the *McCoy* dissenters believed to be difficult and that would arise more frequently with important implications. *McCoy*, 138 S.Ct. at 1516 (Alito, J., dissenting).

California, Oregon, the United States District Court for the Northern District of Illinois, and the Army Court of Appeals, have held that, under *McCoy*, the defendant's autonomy is violated when defense counsel concedes an element of the offense over the defendant's objective to maintain factual innocence. *People v. Jackson*, 2021 WL 2493351 (Cal. App.); *People v. Flores*, 34 Cal. App. 5th 270, 246 Cal. Rptr. 3d 77 (Cal. App. 2019); *Thompson v. Cain*, 433 P.3d 772 (Or. App. 2018) (defendant maintained that he did not have sexual encounters with the victim, but defense counsel conceded the sexual encounter was consensual); *United States v. Lancaster*, 2021 WL 1811735 (Army Ct. App.) (counsel can concede some of the

elements of a charged offense "so long as attorney and client share the same objective"); *Price v. United States*, 2021 WL 2823093, *7 (N.D. Ill.) ("If a defendant objects to a partial admission strategy and wishes to maintain his innocence, counsel must abide by those wishes.").

Addressing the issue in the most detail, the *Flores* Court, noted that, under *McCoy*, "cases in which a defendant insists on maintaining his innocence of the alleged acts—despite counsel's advice to admit the acts but deny the necessary mental state—amount to intractable disagreements about the fundamental objective of the defendant's representation." *Flores*, 34 Cal. App. 5th at 273, *quoting McCoy*, 138 S.Ct. at 1510. Indeed, in *McCoy* itself, defense counsel conceded the killing (actus reus), but contested the intent element (mens rea) that had to also be found to be convicted of the charged offense. *Id*. Thus, according to the *Flores* Court, under *McCoy*, counsel "must not concede the actus reus of a charged crime over their client's objection[,]" *id.*, and counsel violated this edict by conceding the act of driving while contesting whether Flores had formed the premeditated intent to kill required for a first degree murder conviction. *Id*.

Disregarding that *McCoy* involved defense counsel conceding an element of the offense (actus reus) while contesting another element (mens rea) when the defendant's objective was to maintain factual innocence (that he had nothing to do with the crime - neither the actus reus nor the mens rea), numerous courts have nonetheless held that *McCoy* applies only when counsel concedes guilt to all elements of the charged offense. *Epperson*, 2019-SC-724, *Slip. Op*. at 6-8; *United States v.*

Rosemond, 958 F.3d 111, 122-23 (2d Cir. 2020); *Thompson v. United States*, 791 Fed. Appx. 20, 26-27 (11th Cir. 2019); *United States v. Christensen*, 2019 WL 9240238 (D. Ariz.); *Anthony v. State*, 857 S.E.2d 682 (Ga. 2021); *Matter of Somerville*, 2020 WL 6281524 (Wash. App.).

As this demonstrates, a significant split exists on whether *McCoy* applies to conceding guilt of an element of an offense when doing so is contrary to the defendant's factual innocence objective, or whether counsel is permitted to concede guilt to an element of an offense over the client's objection, so long as counsel contests (or at least does not concede) guilt of all the elements of the charged offense. There is no way the split can be resolved without this Court's intervention, and thus it will continue to grow unnecessarily unless this Court grants certiorari on this important issue. It should do so regardless of which side of the split it determines is correct.

C. The questions presented raise important issues, one of which three members of the Court have already recognized to be a difficult issue with important implications that will arise more often than the issue they believed the Court to have addressed in *McCoy*.

It is hard to imagine a more important right for a criminal defendant than the autonomy to decide the objective of one's own defense. After all, it is the defendant's individual liberty that is at stake and the defendant who will have to live with the consequences of the chosen defense and any admissions or concessions that are made. *McCoy*, 138 S.Ct. at 1505. As the Court recognized in *McCoy*, sometimes those consequences are more important to the defendant than whether the defendant is convicted. A defendant "may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members." *Id.* at 1509. Or, as in Epperson's case,

while the defendant may be factually innocent of all criminal activity and thus not want to admit to criminal activity he/she did not commit, there is also an opprobrium with conceding involvement in the murder of, or criminal activity that ultimately resulted in the murder of the defendant's father's best friend. Under *McCoy*, it is the defendant's prerogative to maintain factual innocence of all criminal activity for any of those or other reasons. That autonomy was paramount in *McCoy*, but would be curtailed substantially if, even though it has no impact on whether trial counsel contradicted the defendant's objective of the defense, the defendant must object on-the-record before the trial court for the autonomy right to be recognized.[2] Considering the autonomy interest at stake, it is important for this Court to decide whether it is consistent with *McCoy* and a defendant's fundamental autonomy right to so significantly constrict the defendant's right and autonomy.

Similarly, whether, consistent with *McCoy*, counsel is prohibited from conceding an element of the offense when the defendant's objective is to maintain factual innocence is an important issue. To recognize this, the Court need look no further than to itself. The three Justices who dissented in *McCoy* recognized that this issue likely arises more often than what they perceived the majority to have decided

[2] The timing of when the matter is raised also does not significantly impact the remedy that would be available. Unlike in many other types of situations where a trial court could rectify the issue and continue with the trial, there is no way to undue the harm of defense counsel conceding guilt to the jury. Thus, if the issue is brought to the trial court's attention when counsel concedes guilt, which would be the earliest it could possibly be done in a situation like that in Epperson's case in which the defendant first learned counsel was planning to contradict Epperson's objective of his own defense when counsel made the concession, a mistrial would be the only remedy. In this context, that is not materially different in result from reversing a conviction because the counsel contradicted the defendant's objective of the defense.

and that it is a "difficult" issue that "would have important implications." *Id*. at 1516 (Alito, J., dissenting). The dissenters were correct that it is an important issue.

If counsel is allowed to make such a concession, as the Kentucky Supreme Court held, then a defendant whose objective is to maintain factual innocence, regardless of the reason, is faced with the conundrum of either having to forgo the right to counsel in order to protect his/her objective/autonomy or forgo what means so much to the individual defendant – not conceding any involvement in the criminal activity. These implications are important, as is the damage the Kentucky Supreme Court's interpretation of *McCoy* would have on a defendant's autonomy to control the full objective of the defense. How to deal with that is certainly more difficult for the lower courts to figure out without guidance from this Court, but it is an important issue this Court should now take up since the split among the lower courts is clear and will not resolve itself.

D. The current split on the two issues means whether a defendant prevails under *McCoy* turns solely on the jurisdiction where the case arises, and thus poses grave risk to *McCoy* having any practical consequences and to the public's perception of the institution of the Court as a body that renders decisions that are applied fairly, consistently, and equally in all jurisdictions.

The split among the lower courts is not one to relegate to the realms of law school hypotheticals or final exams. It has a real-life significant dispositive impact on the outcome of cases and the autonomy and lives of defendants, impacting the public's perception of the institution of the Court. Anytime the Court's decision can be applied in a diametrically differently manner solely based on the jurisdiction where a court interprets the Court's precedent, fairness, consistency, and the paramount

supremacy of the Court's opinions are called into question, resulting in irreversible damage to the institution of the Court.

Literally, the difference between prevailing or not comes down to which interpretation of *McCoy* is correct, and on current practical levels, on which jurisdiction the case arises. For example, if Epperson's case arose in California or Oregon, his case would have been remanded for an evidentiary hearing to determine whether he had made counsel aware that the objective of his defense was to maintain his factual innocence (innocence of all elements of the offense, and a defense that he had nothing to do with the crime). If he then proved so at a hearing, his conviction would be reversed. But because his case arose out of Kentucky and the Kentucky Supreme Court interpreted *McCoy* differently, he does not even get the opportunity to prove his claim and is instead stuck with counsel having contradicted the objective of his defense to maintain factual innocence of the murder of his father's best friend.

The outcome should not turn on where the case arose; the meaning of a federal constitutional right, and application of any of the Court's precedent, should not turn on which state or federal court applies the precedent. It should instead turn on the meaning of *McCoy*, in which the same facts would lead to the same outcome everywhere in the country. *McCoy* can only mean one thing with regard to each of the areas for which the lower courts are split. Which of the alternative views on the matter is correct is a matter for this Court to decide. Regardless of how this Court decides those issues, resolving it will rectify the current problem of the lower courts reaching different conclusions on the meaning of a single case that has led to very

different outcome for defendants based entirely on where their case arose. This Court should resolve the entrenched split and thereby bring uniformity to the meaning and application of *McCoy* and the autonomy right dealt with therein.

II. This case presents an ideal vehicle for resolving the split of authority in a manner that will resolve the issues for all future *McCoy* claims.

The questions presented herein stand out from the vast majority of Petitions for a Writ of Certiorari that are filed each year. Unlike most, it presents important questions for this Court to review. It is further distinct in that the lower court squarely resolved the two issues the question presented pose. And, this case lacks the impediments that most Petitions have to overcome for relief to be available. Not here.

This case arises before this Court through state court proceedings in which the state court noted the interpretation of *McCoy* Epperson sought and argued for within his briefs, addressed *McCoy* on its merits, expressly articulated the two dispositive issues that are now raised through the questions presented, interpreted *McCoy* in a manner that conflicts with how many other courts have interpreted *McCoy*, and affirmed the denial of relief because of that interpretation of *McCoy*. Also, because this case arose in state court, AEDPA is inapplicable and thus poses no additional hurdles or limitations on relief. Rather, this case involves a split among the lower courts on how *McCoy* applies to common facts, and provides this Court with an ideal conduit to resolve the matter because the Kentucky Supreme Court squarely identified and address the issues in a manner that was dispositive to the outcome.

The Kentucky Supreme Court began its opinion by recognizing that "Epperson argued *McCoy v. Louisiana* [citation omitted] governed his claim that his attorney at trial conceded guilt against his expressed desire to maintain actual innocence of the crimes charged." *Epperson*, 2019-SC-724, *Slip. Op.* at 4. The court also stated expressly that Epperson alleged specifically that "his counsel (1) conceded guilt to burglary and robbery during closing arguments in the guilt phase of the trial, and (2) conceded guilt when he elicited testimony from a witness placing Epperson in the get-away vehicle." *Id.* The court also acknowledged that Epperson had "filed an affidavit stating he desired an actual innocence defense at trial and communicated said desire to his counsel prior to the start of the trial," and that "he also stated he was not informed his counsel planned to concede he was involved with the crimes in any way or that they would elicit testimony he was present at the scene of the crime as a get-away driver." *Id.* The Kentucky Supreme Court therefore recognized that Epperson had asserted that counsel conceded guilt in contradiction to what he told counsel was the objective of his defense and that counsel doing so violated *McCoy*. Epperson acknowledged, as the record makes clear anyway, that he did not object to counsel's actions on-the-record before the trial court. In this context, the Kentucky Supreme Court turned to interpreting *McCoy* and applying it to Epperson's case.

Making clear the aspect of *McCoy* at issue, the court stated that Epperson argued that, under *McCoy*, "an objection need [not] be made on the record before the trial court[,]" and a *McCoy* violation occurs "when the desire for an actual innocence

defense is expressed to counsel, and counsel subsequently disregards that desire by conceding guilt to an element of the offense." *Id*. at *2-3.

Over the disagreement of three justices who concurred in result only, the Kentucky Supreme Court majority expressly rejected Epperson's argument and instead held expressly that for *McCoy* to apply, the defendant must object on-the-record to the trial court. *Id*. at *3. Turning to the second aspect of *McCoy*, the court ruled, "we do not believe, contra Epperson, that *McCoy* applies to a scenario in which an attorney concedes guilt as to one or more elements of a crime, rather than to the crime *in toto*." *Id*.

Because the court concluded that trial counsel conceded only an element of the offense instead of conceding guilt of all the elements of a charged offense, and because Epperson did not object on-the-record to the trial court during trial, the court held that Epperson could not prevail under *McCoy* and even that *McCoy* was inapplicable. By doing so, the Kentucky Supreme Court squarely addressed the two issues raised through the questions presented in a way that was dispositive of the outcome of Epperson's case. As a result, this Petition is the ideal vehicle to resolve the split among the lower courts on crucial, important issues regarding a defendant's own autonomy that at least three members of this Court have already recognized have important implications.

III. The Kentucky Supreme Court majority's narrow interpretation of when *McCoy* applies is inconsistent with *McCoy*, fails to comport with the meaning and purpose of *McCoy*, and if allowed to stand, will render *McCoy* meaningless.

The Kentucky Supreme Court's interpretation of *McCoy* to apply only in the narrow circumstance where both the defendant objected on-the-record before the trial court to the concession of guilt and counsel conceded guilt to all elements of the offense over the defendant's objection is incompatible with *McCoy* and, if allowed to stand, will relegate *McCoy* to near non-existence.

McCoy was about the defendant's autonomy to choose the objective of the defense and that counsel must abide by that objective. That objective could be to maintain innocence of the charged offenses by which counsel acknowledges the defendant committed some of the elements of the offense as long as counsel argues the prosecution did not prove all elements necessary to convict (legal innocence), or it could be to maintain innocence of any activity that led to, or resulted in, the crime (factual innocence). Both scenarios are significant to a defendant's liberty interest and autonomy. A defendant could desire counsel deny guilt of all elements of the offense because the defendant had nothing to do with the offense and does not want the world or the record to acknowledge activity the defendant did not do, or the defendant might not want to admit to any criminal activity perpetrated against a family member or someone who is closely associated to a family member. *McCoy* recognized this particular objective as one that falls within the scope of the defendant's autonomy and thus an objective counsel cannot override even if counsel

would be doing so by conceding only one of multiple elements of an offense. *McCoy*, 138 S.Ct. at 1508.

In *McCoy*, the charged offense included at least two elements, the act of committing the murders and the mental state of intent. Defense counsel conceded the act of committing the murders, but counsel contested the requisite level of intent; counsel thus conceded only one element of the offense. *Id*. at 1510; *id*. at 1512 (Alito, J., dissenting) (counsel "did not admit that Petitioner was guilty of first-degree murder," but instead "admitted that Petitioner committed one element of that offense" while "strenuously argu[ing] that Petitioner was not guilty of first-degree murder because he lacked the intent."). The Court did not reject the claim because counsel conceded only an element of the offense. Instead, it focused on McCoy's objective of his defense and whether the concession contradicted that objective.

McCoy's objective was to not admit to an act that was part of the charged offense – to not admit to any action that led to, or resulted in, the victims' deaths. If counsel wants to then concede an element of the offense, as counsel desired to do in *McCoy*, that is not a strategic dispute over how to achieve an objective of acquittal, it is instead a dispute over what is the actual objective of the defense with dire consequences for the defendant. Even if acquitted, the defendant's objective would still be violated by the concession of an element of the offense. The Court recognized so in *McCoy*: that conceding commission of the criminal acts but arguing a mens rea defense when the defendant's objective was to maintain that he did not commit a criminal act "were not strategic disputes about whether to concede an element of a

charged offense. They were intractable disagreements about the fundamental objective of the defendant's representation." *Id*. at 1510.

Thus, whether a concession falls within the scope of *McCoy* does not turn on whether counsel conceded an element of the offense or the entirety of the charged offense but instead on what was the defendant's fundamental objective of the defense. If the objective was simply to obtain an acquittal (legal innocence), then whether to concede an element of the offense is a strategic decision for counsel to make. But, if the defendant's objective of his defense is to maintain factual innocence of all alleged criminal activity (to not concede any element of the offense, or to maintain that he/she had no involvement in the actions that resulted in the charged crime), then conceding any element of the offense contradicts that objective. Because "it is the defendant's prerogative, not counsel's to decide on the objective of his defense[,]" and the "defendant has the right to insist that counsel refrain from admitting guilt," *id*. at 1505, counsel "must abide by that objective and may not override it by conceding guilt." *Id*. at 1509. Thus, where the defendant's objective is to deny all involvement in activity that resulted in the charged criminal offense (factual innocence) under *McCoy*, the defendant's right to autonomy is violated when counsel concedes any element of the offense.

The Kentucky Supreme Court, and the other courts that have interpreted *McCoy* the same way the Kentucky Supreme Court did in Epperson's case simply got this wrong by misunderstanding what counsel actually conceded in *McCoy* and by failing to give proper weight to a defendant's right to autonomy over the objective of

the defense that the defendant will have to live with for the rest of his/her life. Epperson's trial counsel made the same type of concession McCoy's trial attorney made, and counsel did so despite Epperson desiring a factual innocence defense just as McCoy desired. Epperson should thus prevail under a straight reading of *McCoy* if this Court rules, as most courts that have addressed the issued have ruled, that *McCoy* does not require an on-the-record contemporaneous objection to the trial court.

Even if one concludes that the concession trial counsel made, and Epperson's objective of his defense, do not fall directly under the facts of *McCoy*, reaching any conclusion other than that conceding guilt of an element of an offense in contradiction of the defendant's objective violates *McCoy* would mean a defendant who does not want to admit to having any involvement in a crime perpetrated against a family member, or against anyone else, would have no remedy available to prevent the concession or once the concession has been made. That would turn matters upside down by making the defendant seem to be an agent of counsel, and it would be the antithesis of autonomy and inconsistent with the Court's recognition that the client's autonomy to decide the objective of his/her defense is sacrosanct and cannot be overridden.

That does not change based on when the defendant first raises the issue that counsel conceded guilt in contradiction of his/her objective. Regardless of when the issue was first raised, whether or not the objective of the defendant was violated and the autonomy matter at stake remains same. At most, the timing of when the matter is first raised impacts the credibility and sincerity of the defendant's objection and

what was actually his/her objective, but credibility and sincerity are factual issues courts have to resolve on a regular basis. It should be no different here, particularly in light of the significance of the autonomy matter at issue and the reality that whether the claim is raised contemporaneously or post-trial makes little actual difference. On a practical level, it is the difference between a mistrial being granted and a court reversing for a mistrial. In this context, that is a distinction without a difference. And, the Court never ruled in *McCoy* that a defendant's autonomy is violated if the defendant raises the issue to the trial court during the trial but not if he/she first raises the claim later. That would make no sense. The autonomy right remains the same.

In *McCoy*, the Court laid out the facts in *Florida v. Nixon*, 543 U.S. 175 (2004), and noted that Nixon's attorney conferred with Nixon, only for Nixon to then remain silent on counsel's plan to concede guilt, while *McCoy* vociferously objected at every opportunity. The Court, however, never stated that how, or when, the defendant made clear the objective of the defense and how counsel violated it was dispositive of whether the right recognized in *McCoy* exists. As noted earlier, courts have split on the significance of this.

In Epperson' case, the Kentucky Supreme Court considered it to be "the decisive factual predicate used to distinguish *McCoy* from *Nixon*[,]" and thus *McCoy* controls where counsel admits the defendant's guilt over the defendant's "intransigent objection." *Epperson*, 2019-SC-724 at 5. Not so.

The significant factual difference here between *Nixon* and *McCoy* is this: Nixon never expressed to counsel the objective of his defense or that he objected to counsel conceding guilt, while McCoy informed counsel of the objective of his defense and told counsel that he objected to conceding guilt. This means that what matters for purposes of *McCoy* is whether the defendant informed counsel of the objective of the defense and then if counsel contradicted it. If the defendant sat quietly and never informed counsel of the objective of the defense or that he/she did not want counsel to concede guilt of the crime or even an element of the offense, then the autonomy right was not violated for the simple reason that counsel had no reason to know counsel's decisions or actions would go against the defendant's objective of his/her own defense. On other hand, if the defendant made clear to counsel the objective of his/her defense and counsel then contradicts that objective at trial, the violation of the defendant's autonomy is complete upon counsel contradicting that objective. This conclusion is further supported by the fact the Court GVR'd *Hashimi v. United States*, 139 S.Ct. 377 (2018), for further consideration in light of *McCoy*, even though the record made clear that Hashimi had not objected on-the-record to counsel conceding guilt during closing argument.

As a rule, all of this means the defendant need establish only he/she informed counsel of his/her objective of the defense and that counsel then disregarded that objective (or overrode it) by conceding guilt. Epperson has done so.

It is beyond dispute that Epperson maintained his innocence and that he told counsel that he wanted, expected, and directed his defense to be that he had nothing

to do with the crime at all. Trial counsel so testified at an evidentiary hearing on a separate post-conviction matter prior to *McCoy* being decided. The Kentucky Supreme Court did not find otherwise. It is also beyond dispute that trial counsel elicited testimony both that Epperson drove the getaway car and did not enter the victims' house because he knew the victims. And, it is beyond dispute that trial counsel said in closing argument that Epperson was at most the getaway driver instead of the triggerman. Epperson has asserted that those actions by counsel contradicted the objective of his defense. He submitted an affidavit in support, providing more than enough factual evidence of it. Under these circumstances, Epperson's case is one where a correct interpretation of *McCoy* would make a difference. It would give him an opportunity prove his claim, and would then, upon proof before the state courts, entitle him to a new trial. The impact granting certiorari would have on Epperson's case and on ensuring the right recognized in *McCoy* is fully implemented further supports why certiorari should be granted.

CONCLUSION

For the above reasons, Petitioner Epperson respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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