No. 21-6734

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

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

DAVID M. BARRON
(*Counsel of Record*)
Staff Attorney III
Capital Post Conviction Unit
Kentucky Department of Public Advocacy
5 Mill Creek Park, Section 101
Frankfort, Kentucky 40601
502-782-3601 (direct line)
502-564-3948 (office main number)
david.barron@ky.gov

BRIAN M. POMERANTZ
Law Offices of Brian M. Pomerantz
P.O. Box 853
Carrboro, NC 27510
323-630-0049
habeas@protonmail.com

Petitioner Roger Epperson files this supplemental brief to his Petition for a Writ of Certiorari to inform this Court that in the barely over two months since the Petition was filed, the significant split among the courts on the resolution of Question Presented 2 has gotten larger, and to explain why Epperson's case does not contain the same problems that made *Harvey v. Florida*, No. 21-653 (cert. denied, Feb. 22, 2022), a poor vehicle to address Question Presented 1. Unlike *Harvey*, Epperson's Petition for a Writ of Certiorari is as perfect a vehicle to address the important question raised within Question Presented 1 as this Court is likely to ever see.

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Since Roger Epperson filed his Petition for a Writ of Certiorari barely over two months ago, additional courts have weighed in on Question Presented 2, thereby increasing the already large split among the courts, and this Court denied certiorari in *Harvey v. Florida*, 21-653, which attempted to raise the same issue Epperson presented in Question Presented 1. As will be explained below, the first development strengthens the basis for granting certiorari, while the second development further demonstrates why certiorari should be granted.

ARGUMENT

The fact that two additional courts have weighed in on the issue Question 2 raises, in the little over two months since the Petition was filed, demonstrates the prevalence of the issue presented to this Court and the need for this Court to promptly resolve the issue.

The second Question Presented is as follows:

> 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?

Since the Petition was filed, Louisiana and Connecticut have weighed in on the issue. Both courts have sided with the United States Court of Appeals for the Second and Eleventh Circuit and the States of Georgia, Kentucky, and Washington by holding *McCoy v. Louisiana*, 138 S.Ct. 1500 (2010), applies only when counsel conceded guilt of all elements of the charged offense. In *State v. Cannon*, 2022 WL 108408 (La. App. 1st Dist.), the court held that because counsel did not concede all elements of the charged offense, counsel presenting a self-defense theory at trial over the defendant's objective for an alibi defense, in which the defendant maintained he was neither present when the crime occurred nor had anything to do with the crime, fell outside the scope of *McCoy*. Likewise, in *Baltas v. Comm. of Corrs.*, 2022 WL 199978 (Conn. App.), the court held that trial counsel conceding the defendant's presence at the

crime scene, but arguing the defendant should be found not guilty because the prosecution failed to prove the defendant actually stabbed the victim, was not a concession of guilt and thus did not implicate *McCoy*).

The facts of *Cannon*, as it relates to Question Presented 2, parallel those of Epperson's case. The defendants in both cases maintained they had nothing to do with the criminal activity and had the objective to maintain non-involvement at trial, only for counsel to then concede at least the defendant's presence when the crime occurred. *Cannon* therefore demonstrates the relevant facts of Epperson's case are not rare and merit this Court's attention. While Epperson believes the holding/decisions of *Cannon* and *Baltas* are erroneous, inconsistent with the holding of *McCoy*, and contrary to the purpose and spirit of *McCoy*, that is not most important at the Petition stage.

Important here is that in the short amount of time since Epperson's Petition was filed, two more jurisdictions have weighed in on one of the two Questions Presented. That those courts did so quickly after the Petition was filed demonstrates the issue is a recurring one for which the split continues to grow in a manner that can only be, and should be, resolved by this Court. Simply, *Cannon* and *Baltas* further strengthen Epperson's already strong case for why this Court should grant certiorari.

Second, while *Harvey*'s Question Presented was similar to Epperson's Question Presented 1, there are significant procedural and substantive differences in the relevant facts and how the lower courts dealt with the claim that made *Harvey* a poor

vehicle through which to address the issue, but, in context, demonstrates how Epperson's Petition presents the ideal circumstances to do so.

Epperson's first question presented is:

> 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?

Harvey raised the same question presented, *App.* at 18, but failed to lay out how many courts have weighed in on the issue and how large is the split. See *Harvey v. Florida*, No. 21-653, Petition for a Writ of Certiorari. *App*. at 18-59. The split is much larger than *Harvey* made it out to be. Thus, it is much more important for this Court to address the issue than it appeared to be in Harvey's Petition.

Worse, Harvey tried to create a Question Presented that did not exist legally or factually. He argued that the Florida Supreme Court held a defendant must contemporaneously object on the record at trial for a *McCoy* issue to exist, *id*., but the Florida court never said that within its opinion. *Harvey v. State*, 318 So.3d 1238 (Fla. 2021). As Florida asserted in its Brief in Opposition, "the use of the word 'objection' does not mean that a criminal defendant is now required to stand up in the middle of trial and make a record of his displeasure. Instead, it means that if a criminal defendant wishes to maintain innocence, that intention must be made known to his counsel." *Harvey v. Florida*, No. 21-653, Brief in Opposition at 81-82. Florida law is

consistent with what was said within the *Harvey* Brief in Opposition. As Epperson asserted within his Petition, Florida law requires only that trial counsel be made aware of the defendant's objective of his defense. *Atwater v. State*, 300 So.3d 589, 591 (Fla. 2020); *Padron v. State*, 2021 WL 5615092 (Fla. App.). Thus, the split Harvey alleged was illusory; it did not exist within his case, but it does here with the Kentucky Supreme Court having actually held what Harvey alleged erroneously Florida had held.

Nor did the facts support Harvey's contention that counsel conceded guilt over his objection. Before conferencing the case, this Court requested the record. The parties had disagreed significantly as to whether Harvey had informed counsel that the objective of his defense was to maintain innocence. Notably, an evidentiary hearing had been held with conflicting statements from Harvey and trial counsel in that regard. On appeal, the Florida Supreme Court found that "Harvey does not allege that trial counsel conceded guilt over Harvey's express objection. Rather, Harvey simply alleges that trial counsel failed to consult with him in advance." *Harvey*, 318 So.3d at 1240. Thus, it was at least disputed as to whether Harvey ever raised in state court the issue he attempted to present in his Question Presented, and there was a factual dispute and adverse factual findings on whether Harvey ever told counsel his objective was an innocence defense. That in itself demonstrates Harvey's case was a poor vehicle through which to address the issue, but there was more.

Retroactivity was also at issue in light of the lower Florida court ruling that *McCoy* does not apply retroactively, and Florida then raising non-retroactivity within

its Brief in Opposition. *Harvey v. Florida*, No. 21-653, Brief in Opposition at 76-77. All of this combined to create a large number of factual issues and procedural impediments that provided strong reason to deny certiorari in *Harvey* despite the importance of the issue raised within the Question Presented.

In contrast, none of those procedural impediments and factual issues exist in Epperson's case, making it what *Harvey* was not – the ideal case to address an important issue that has divided the lower courts.

Unlike most cases, retroactivity is a non-issue here. Kentucky expressly waived retroactivity before the Kentucky Supreme Court. There, Kentucky argued the court "should not consider whether *McCoy* is retroactive," and "[r]esolution of this issue should be reserved for another time." *Epperson v. Commonwealth, Kentucky Brief on Appeal* at 20-21. Heeding that request, the Kentucky Supreme Court ruled, "we need not decide whether *McCoy* is retroactive." *Petition* App. at 9. With Kentucky having expressly waived a non-retroactivity argument in state court, and with the Kentucky Supreme Court then expressly agreeing to not apply non-retroactivity analysis, Kentucky has forfeited and/or waived any non-retroactivity argument. Thus, retroactivity is not, and cannot, be at issue here.[1]

Instead of deciding Epperson's claims on procedural grounds, the Kentucky Supreme Court turned to the merits. Epperson had alleged, and supported with his

[1] This Court's non-retroactivity doctrine applies only in the federal habeas context. As this Court has held, states are free to apply this Court's precedent retroactively, even if this Court would not do so in the federal habeas context. *Danforth v. Minnesota*, 552 U.S. 264 (2008). Thus, this Court's non-retroactivity doctrine is applicable on certiorari from a state court decision only if the state court found the law did not apply retroactively. That did not occur here. The state court did not address retroactivity, instead deciding the claim on its federal constitutional merits under *McCoy*.

own affidavit, that he informed trial counsel that his objective was a factual innocence defense—only for counsel to then disregard that objective. Epperson was denied an evidentiary hearing, thereby meaning the alleged facts had to be presumed true on appeal and also before this Court, unlike in *Harvey* where an evidentiary hearing had been held and the facts were disputed. Rather than decide the appeal on factual grounds, the Kentucky Supreme Court decided the case purely as a matter of law, squarely stating both the legal argument Epperson presented and why the court interpreted *McCoy* differently.

The Kentucky Supreme Court acknowledged that Epperson argued that, under *McCoy*, "an objection need [not] be made on the record before the trial court . . . ." *Petition* App. at 4. The Kentucky Supreme Court realized that Epperson's claims turned entirely on whether the court agreed with that interpretation of *McCoy*, noting "[w]e do not read *McCoy* so sweepingly." *Id*. By a four to three vote, the court held that *McCoy* requires a contemporaneous "on-the-record objection" to the trial court. *Petition* App. at 5-6.[2] Because an evidentiary hearing is not necessary to determine whether there was a contemporaneous on-the-record objection at trial, the Kentucky Supreme Court affirmed the denial of an evidentiary hearing, *Petition* App. at 9, and decided the claim solely as a matter of law based on its interpretation that *McCoy* required an on-the-record objection at trial.

[2] Epperson notes the Kentucky Supreme Court's interpretation of the word "objection" differs from how Florida courts and Florida in its Brief in Opposition in *Harvey* interpreted the word.

That conclusion has not only split the courts across the country, it split the Kentucky Supreme Court by a 4-3 vote. In a concurring opinion, three Kentucky Supreme Court Justices expressed, "*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." *Petition* App. at 10 (Minton, C.J., joined by two other Justices, concurring in result only). Epperson asserts that the three concurring justices' interpretation of *McCoy*, which numerous courts have agreed with, is the correct interpretation of the holding, spirit, and principle of *McCoy* that protects an individual's autonomy right.

Whereas *Harvey* was a poor vehicle through which to address the issue, the following demonstrate that Epperson's case is the ideal vehicle for this Court to address the important issue regarding autonomy:

a) The Kentucky Supreme Court expressly and clearly noted the issue was whether or not *McCoy* requires an on-the-record objection at trial or only that trial counsel disregards the defendant's articulated defense objective;

b) The Kentucky Supreme Court decided that legal issue, as opposed to deciding the case by resolving a factual dispute or through applying a procedural impediment;

c) The resolution of the legal issue was dispositive of the issue raised in Question Presented 1, for which the necessary facts are not in dispute; and,

d) The Kentucky Supreme Court itself decided the legal issue by a narrow majority that is representative of the split amongst the courts across the country.

Indeed, how the issue has been presented and how the Kentucky Supreme Court addressed and resolved the issue means this Court may never see a more ideal situation and vehicle by which to address the important issue presented to this Court in Epperson's Petition.

CONCLUSION

The proximity of the denial of certiorari in *Harvey* is not a reason to deny Epperson's Petition. Rather, it further supports why Epperson's Petition should be granted with regard to Question Presented 1. And, the fact that in a little over two months, two more courts have weighed in on the issue presented in Question Presented 2, further demonstrates the prevalence of that issue and enlarges the already large split among the courts on the issue.

This Court should therefore grant Epperson's Petition so it can resolve these important issues regarding autonomy and provide the lower courts with much needed guidance on an issue that arises often and takes up much of the lower courts' time as those courts grapple with the meaning and interpretation of *McCoy*. This Court could, and should, settle that now, thereby both creating uniformity among the lower courts

and alleviating the time-intensive burden on those courts as the issue continues to arise repeatedly without clarification from this Court.

For these reasons and the ones expressed within the Petition, Epperson respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

David M. Barron
(*Counsel of Record*)
Staff Attorney III
Capital Post Conviction Unit
Kentucky Department of Public Advocacy
5 Mill Creek Par, Section 101
Frankfort, KY 40601
(502) 782-3601 (direct line)
(502) 564-3948 (office main number)
david.barron@ky.gov

Brian M. Pomerantz
Law Offices of Brian M. Pomerantz
P.O. Box 853
Carrboro, NC 27510
323-630-0049
habeas@protonmail.com

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