Case No. 21-6734

In the Supreme Court of the United States

ROGER EPPERSON

Petitioner,

v.

COMMONWEALTH OF KENTUCKY

Respondent,

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

*****CAPITAL CASE*****

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), require a simultaneous, on-the-record objection by the defendant when trial counsel at most makes an alternative argument for avoiding guilt?
2. Does *McCoy* apply to a strategic decision by trial counsel to contest guilt by stating that, even if the defendant were present near where the crime occurred, the defendant would still be not guilty?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Roger Epperson and Respondent Commonwealth of Kentucky.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT

Two juries have convicted Roger Epperson of murdering Edwin and Bessie Morris. The first jury convicted him of two counts of murder and sentenced him to death. However, the Supreme Court of Kentucky reversed because of a voir-dire error. The second jury convicted him of two counts of complicity to murder, first-degree robbery, and first-degree burglary. It also sentenced him to death.

Epperson has spent nearly two decades unsuccessfully challenging these convictions. He first challenged them on direct appeal. *Epperson v. Kentucky* (*Epperson I*), 197 S.W.3d 46, 51 (Ky. 2006). The Supreme Court of Kentucky affirmed and found he "received a fundamentally fair trial devoid of any state or federal constitutional . . . violations." *Id.* at 66. He next filed a post-conviction collateral attack under Kentucky Rule of Criminal Procedure 11.42. *Epperson v. Kentucky* (*Epperson II*), No. 2017-SC-44, 2018 WL 3920226 (Ky. Aug. 16, 2018). The Supreme Court of Kentucky found "no merit in any of Epperson's individual claims." *Id.* at *12. This included his claim under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which failed in part because "it does not appear that counsel ever explicitly conceded guilt." *Epperson II*, 2018 WL 3920226, at *12. This Court then denied certiorari. *Epperson v. Kentucky*, 139 S. Ct. 924 (2019).

Yet Epperson did not stop here. He next brought a procedurally improper second collateral attack in state court. *Epperson v. Kentucky* (*Epperson III*), --- S.W.3d ---, 2021 WL 4486519, at *1 (Ky. 2021). The Supreme Court of Kentucky agreed with the trial court that *Epperson II* resolved the *McCoy* claim. *Id.* at *4. It determined that

Epperson "has not presented anything new which demonstrates there was a concession of guilt to the crime charged." *Id*. It ultimately found Epperson's latest motion to be "an impermissible successive collateral attack." *Id.* The Supreme Court of Kentucky also highlighted several distinguishing factors in *McCoy*. *Id.* at *2–3. It reasoned that *Florida v. Nixon*, not *McCoy*, applied here. *Id.* at *2 (citing *Florida v. Nixon*, 543 U.S. 175 (2006)). *McCoy*, Kentucky's high court explained, governs when defense counsel "admit[s] her client's guilt of a charged crime over the client's intransigent objection to that admission." *Id.* (quoting *McCoy*, 138 S. Ct. at 1510). In *Nixon*, the defendant made no such objection. *Id*. Because Epperson never made a contemporaneous objection, even if his counsel had admitted guilt, *Nixon* would still bar his claim. Epperson then filed his current petition for certiorari.

"A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10. There are no compelling reasons here. For one thing, Epperson's counsel never admitted guilt, so *McCoy* does not apply. For another, the Supreme Court of Kentucky ruled this matter an impermissible successive collateral attack under state law and did not resolve a threshold retroactivity issue. Even if these vehicle problems can be overcome, the alleged splits of authority Epperson identifies are not a compelling reason to grant certiorari. The first split of authority is shallow at best. In the second, all federal appellate courts to rule on the issue have rejected Epperson's preferred answer. This Court should deny his petition for certiorari.

A. The Crime

Edwin and Bessie Morris were murdered in their home on June 16, 1985. *Hodge v. Kentucky*, 17 S.W.3d 824, 833 (Ky. 2000).[1] Edwin Morris was found lying on the kitchen floor, gagged with his hands tied behind his back. *Id*. He had been shot twice—once in the forehead and once in the right side of his head. *Id.* at 834. His wife Bessie Morris was found on a bed, "with her hands tied behind her back and her feet tied together." *Id*. Bessie was also shot twice, both times in the back. *Id*. The three people involved in the burglary and murder are Roger Epperson, Donald Bartley, and Benny Lee Hodge. *Id.* at 833–34.

B. Trial, Appeal, and Retrial

1. Bartley testified against Epperson and Hodge at the first trial. *Id.* at 834; *Epperson I*, 197 S.W.3d at 55. Bartley stated that the three of them went to the Morris home to rob Edwin and Bessie. *Hodge*, 17 S.W.3d at 834. Epperson and Hodge brought firearms. *Id*. While Bartley kept a lookout, Epperson and Hodge went to the front door, where Bessie Morris admitted them. *Id*. From Bartley's lookout post, he saw Epperson and Hodge brandish their weapons and knock Edwin Morris to the floor. *Id*. Bartley heard gunshots before Epperson and Hodge came out of the house with $35,000 in cash. *Id*. They also stole some jewelry and a handgun. *Id*.

At Epperson's first trial, the jury convicted him of two counts of murder and sentenced him to death. However, the Supreme Court of Kentucky reversed because of an error during voir dire. *Epperson III*, 2021 WL 4486519, at *1 n.3.

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[1] The court below did not recount these facts. *Epperson III*, 2021 WL 4486519, at *1. Thus, the facts here are drawn from a co-defendant's direct appeal.

2. At the second trial, Bartley's previous testimony was read into evidence. *Epperson I*, 197 S.W.3d at 55. Hodge's ex-wife, Sherry Hamilton,[2] also testified. *Id.* at 52. Hamilton testified that she, Epperson, Hodge, and Bartley were together days before the murder. (VR 7/16/2003, 8:13:50–8:14:26.) Epperson told the group that he knew a couple who always kept large amounts of cash on them. (*Id.*) Although Hamilton left the group soon after this discussion, she reunited with Epperson, Hodge, and Bartley at a hotel the day after the murders. (VR 7/16/2003, 8:14:30–8:16:25.) In the hotel room, the group saw a news broadcast about the killings. (VR 7/16/2003, 8:16:45–8:17:25.) When Bartley saw it, he looked at Hodge and said, "That's what we done man, that's what we done." (VR 7/16/2003, 8:16:45–8:17:26.) Hamilton also testified that she called Epperson "Straw Boss" because he issued orders to the group. (VR 7/16/2003, 8:19:40.) Because the Commonwealth did not question Hamilton further, her testimony did not contradict Bartley's testimony that Epperson and Hodge murdered Edwin and Bessie while Bartley remained outside.

Epperson's counsel cross-examined Hamilton about previous statements in which she said that Hodge told her that he and Bartley entered the home to commit the murders. (VR 7/16/2003, 8:22:18–8:23:15.) Under cross-examination, Hamilton admitted Hodge told her the plan was for Hodge and Bartley to enter the home while Epperson remained outside because the victims knew him. (*Id.*) Epperson's counsel also questioned Hamilton about a prior statement in which she claimed to overhear Hodge and Bartley giving Epperson details about the murders. (VR 7/16/2003,

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[2] Her full name was Sherry Hamilton Hodge. *See Epperson II*, 197 S.W.3d at 53. On the stand, she introduced herself as Sherry Hamilton. (VR 7/16/2003, 8:09:37.)

8:27:40–8:29:45.) In this statement, Hamilton reported that Epperson told Hodge and Bartley he could see them through a window. (*Id.*)

Since Epperson would not have needed to ask what happened if he entered the home—as Bartley testified—Epperson's counsel used this inconsistency to attack Bartley's and Hamilton's testimonies. Epperson's counsel eventually impeached Hamilton when he showed her the prior statement and read it to the jury. (*Id.*) Hamilton was later recalled to explain this inconsistency. She testified that Hodge said he shot Edwin only after Edwin reached for a gun, which prompted Bartley to shoot Bessie. (VR 7/16/2003, 9:45:30–9:47:00.) Hodge then shot Bessie again to ensure she died. (*Id.*) The trial court instructed the jury on various homicide theories based on whether Epperson was or was not the one who shot Edwin or Bessie. Jury Instr. at R. 1247–1258, *Epperson v. Commonwealth*, 97-CR-16 (Warren Cir. Ct. July 17, 2003).

3. During closing argument, Epperson's counsel emphasized that the evidence required the jury to find Epperson not guilty. (VR 7/17/2003, 9:05:15.) He attacked Bartley as an untrustworthy witness who "sold a story to save his life." (VR 7/17/2003, 9:15:09–9:16:19.) Epperson's counsel said Epperson could not have committed intentional murder because none of the physical evidence was ever linked to him. (VR 7/17/2003, 9:18:40–9:31:24.) Epperson's counsel also cast doubt on the alternative homicide theories. He told the jury that Hamilton never alleged that Epperson entered the Morris home; she only alleged that Epperson waited outside. (VR 7/17/2003, 9:43:21–42.) Epperson's counsel said that the Commonwealth failed to prove even its alternate homicide theories since the Commonwealth never showed that Epperson had the necessary knowledge or intent. (VR 7/17/2003, 9:52:36–9:53:21.)

The jury disagreed. It found Epperson guilty of two counts of complicity to murder, first-degree robbery, and first-degree burglary. *Epperson I*, 197 S.W.3d at 51. Epperson received a death sentence for the murders and a forty-year prison term for the other convictions. *Id*.

C. Direct Appeal

Epperson raised thirty-two issues on appeal. *Id*. The Supreme Court of Kentucky "carefully reviewed each of the allegations presented" and found "no merit in any of them." *Id*. This Court then denied Epperson's petition for certiorari. *Epperson v. Kentucky*, 549 U.S. 1290 (2007).

D. First Collateral Attack

Epperson next tried to set aside his convictions under Kentucky Rule of Criminal Procedure 11.42. *Epperson II*, 2018 WL 3920226, at *1. The trial court conducted evidentiary hearings that began in 2010 and ended in 2014. *Id*. It ultimately found that Epperson's claims of error were "unfounded" and denied relief. *Id*. On appeal, the Supreme Court of Kentucky "found no merit in any of Epperson's individual claims." *Id*. at *12.

During Epperson's collateral-attack appeal, this Court released its decision in *McCoy*. It held that a defendant "has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 138 S. Ct. at 1505. Based on *McCoy*, Epperson petitioned for rehearing, which the Supreme Court of Kentucky granted. It issued a new opinion addressing Epperson's *McCoy* claim. After describing *McCoy* in detail, the court said that "the factual circumstances in the

case at hand are very different . . . nothing of the sort that occurred in *McCoy* occurred in Epperson's case." *Epperson II*, 2018 WL 3920226, at *12. Epperson's *McCoy* claim failed for two reasons. First, Epperson never registered any objection to his trial counsel's strategy. *Id.* Second, "it does not appear that counsel ever explicitly conceded guilt on any of Epperson's charges." *Id.* The court described well the conditional argument that Epperson's counsel made: "deny all involvement, but if involved, deny involvement in the murders." *Id.* at *4. Such an argument, the court said, "does not appear to be the type of concession upon which *McCoy*'s holding is predicated." *Id.* at *12. Epperson raised *McCoy* in his subsequent petition for certiorari. In his reply, Epperson argued (at 1 n.1) that he had exhausted his *McCoy* claim. This Court denied certiorari. *Epperson v. Kentucky*, 139 S. Ct. 924 (2019).

E. Second Collateral Attack

Epperson believed that the denial of his first collateral attack was an "open door" to develop the state-court record about his *McCoy* claim. *Epperson III*, 2021 WL 4486519, at *1. He thus filed a second Kentucky Rule of Criminal Procedure 11.42 motion. *Id.* But this second motion fared no better than his first. The trial court denied the motion as "both substantively and procedurally improper" because the Supreme Court of Kentucky had rejected Epperson's *McCoy* claim. *Id.*

Because Epperson "did not put forth any new facts or law" not known to the Supreme Court of Kentucky when it first denied Epperson's *McCoy* claim, Kentucky's high court then held that the trial court "was correct to rule the motion was an impermissible successive collateral attack." *Id.* at *4. The court cited with approval its

earlier holding that Epperson's case is factually distinct from *McCoy* because Epperson's counsel never "conceded guilt on any of Epperson's charges." *Id.* (citing *Epperson II*, 2018 WL 3920226, at *12). Fatal to his claim, "Epperson has not presented anything new which demonstrates there was a concession of guilt to the crime charged." *Id.*

The court also discussed the merits of Epperson's *McCoy* claim. It found that *Nixon*, not *McCoy*, governs Epperson's case because he made no contemporaneous objection. *Id.* at *2. *McCoy*, the court found, "is controlling where defense counsel 'admit[s] her client's guilt of a charged crime over the client's intransigent objection to that admission.'" *Id.* (alteration in original) (quoting *McCoy*, 138 S. Ct. at 1510). The court emphasized that it would not interpret *McCoy* "in such a way that allowed a defendant to sleep on his rights and allege a structural error after his direct appeal has proven unsuccessful." *Id.* at *3. The court also determined that *McCoy* would not apply "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.*

Three justices on the Supreme Court of Kentucky concurred in the result.[3] They agreed with the majority that the trial court correctly denied Epperson's second collateral attack because, in *Epperson II*, "we concluded that Epperson's counsel did not explicitly concede guilt to any offense." *Epperson III*, 2021 WL 4486519, at *5 (Minton, C.J, concurring in result only). The concurring justices simply emphasized

[3] At one point, Epperson calls the three concurring justices "dissenting justices." Pet. 14. This is wrong. All seven justices agreed that Epperson's *McCoy* claim fails because his counsel never "concede[d] guilt to any offense." *Epperson III*, 2021 WL 4486519, at *5 (Minton, C.J., concurring in result only).

that they thought *McCoy* "does not necessarily require a contemporaneous objection to defense counsel's presentation of his defense at trial." *Id*. Instead, they would allow a defendant to present a *McCoy* claim even if the defendant first objects during a post-conviction proceeding. *Id*. But again, even the concurring justices recognized that Epperson's counsel never admitted guilt. *Id*.

ARGUMENT[4]

This Court already denied certiorari on Epperson's *McCoy* claim once. It should do so again.

Three primary reasons support denial. First, this case does not raise a *McCoy* issue because Epperson's trial counsel never admitted guilt. The Supreme Court of Kentucky concluded four years ago that "it does not appear that counsel ever explicitly conceded guilt on any of Epperson's charges." *Epperson II*, 2018 WL 3920226, at *12. It reiterated that conclusion last year: "Epperson has not presented anything new which demonstrates there was a concession of guilt to the crime charged." *Epperson III*, 2021 WL 4486519, at *4. Second, this case is a poor vehicle to address the questions presented. For one thing, the Supreme Court of Kentucky ruled that this matter is an impermissible successive collateral attack. *Id.* For another, to reach the questions presented, whether *McCoy* is retroactive must be decided. *Id.* at *4 n.6. And third, the two splits of authority Epperson identifies are not compelling reasons to grant certiorari. Even if this case presented an opportunity to clarify the law, the first

[4] The Commonwealth notes that, at the time of filing, *Epperson III* is not yet final because of a pending petition for modification.

split involves mostly state intermediate courts and is not well established. And federal appellate courts have consistently rejected Epperson's position on the second question presented. Epperson's petition should be denied.

I. *McCoy* is not implicated here because Epperson's counsel never admitted guilt.

The first hurdle Epperson faces is that his trial counsel never admitted guilt. *McCoy*, by its terms, holds that "a defendant has the right to insist that counsel refrain *from admitting guilt*, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." 138 S. Ct. at 1505 (emphasis added). Under *McCoy*, a threshold requirement is that counsel admit guilt. Epperson's petition is built on the factual premise that his counsel admitted guilt. But as the Supreme Court of Kentucky twice recognized, that never happened. Epperson asks this Court to give him the factual victory that has now twice escaped his grasp. But because his counsel never admitted guilt, there is no reason for this Court to decide the questions presented. On this record, they are hypotheticals.

Even if there were some question about whether Epperson's counsel admitted guilt (there is not), the resolution of that issue is hopelessly fact-bound. Resolving such a case-specific issue does not warrant certiorari.

A. Epperson's counsel did not admit guilt when he argued in the alternative that, even if Epperson were present, the Commonwealth did not prove the necessary intent.

Twice now, the Supreme Court of Kentucky held that Epperson presented nothing that "demonstrates there was a concession of guilt to the crime charged." *Epperson III*, 2021 WL 4486519, at *4. The first time it rejected Epperson's *McCoy*

claim, the court discussed how Epperson's trial counsel simply made an alternative argument. Epperson's trial counsel pursued an all-of-the-above strategy of "deny all involvement, but if involved, deny involvement in the murders." *Epperson II*, 2018 WL 3920226, at *4; *see also id.* at *12. As many courts recognize, lawyers often make alternative arguments. *See, e.g.*, *Martinez v. Harris*, 675 F.2d 51, 54 (2d Cir. 1982) ("Arguing in the alternative is a well-accepted practice."). That is how attorneys cover all potential bases for their clients.

Examining the record bears out that Epperson's trial counsel consistently argued against the Commonwealth's main and alternate homicide theories. Epperson's trial counsel spent the first part of his closing argument impeaching the evidence showing that Epperson committed intentional murder. (VR 7/17/2003, 9:18:40–9:31:25.) He then defended against murder by complicity and criminal facilitation to murder. To prove a defendant guilty of murder by complicity, the Commonwealth must prove that the defendant "intended for the victim to be killed." *Hudson v. Kentucky*, 385 S.W.3d 411, 415 (Ky. 2012). To prove a defendant guilty of criminal facilitation to murder, the Commonwealth must prove that someone else committed murder and that the defendant, "knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so." *Roberts v. Kentucky*, 410 S.W.3d 606, 609 (Ky. 2013) (citations omitted). Epperson's trial counsel tried to show Epperson not guilty under these theories too.

Epperson's trial counsel argued that the evidence did not show Epperson had any intent to cause Edwin's or Bessie's deaths, nor did Epperson know Bartley and Hodge intended to kill them. Epperson's counsel noted that the physical evidence

suggested the killers panicked. But the plan Hamilton testified about "was for [Epperson] to stay out in the van because [Edwin and Bessie] knew him." (VR 7/17/2003, 9:43:21–9:43:50.) Thus, Epperson's counsel argued Epperson could not be guilty of facilitating murder because the plan to murder Edwin and Bessie arose without Epperson's knowledge. Far from an admission of guilt, this argument attacks the Commonwealth's theories of murder head-on. Epperson's counsel explained the significance of this argument:

> What does that tell us? If we believe [Hamilton], and there's no reason not to believe some of the things that she tells us, there was no plan to kill anyone. If we believe [Hamilton], there was no plan to kill anyone because if they were worried about identifications, [Epperson] would have went in. If their plan was to kill these people it doesn't matter who gets identified. If [Epperson's] plan was to go in, kill Mr. and Mrs. Morris, he would go in and kill Mr. and Mrs. Morris. He wouldn't sent Bartley and Hodge in.
>
> Think about that. They didn't use [Epperson's] car. They borrowed a van, and Roger stayed outside. Why would he stay outside if his intent was to go in and kill them? It's common sense. [Hamilton] is telling us what happened. [Hamilton] is telling us that whatever happened inside was not planned. That [Hodge] killed Mr. Morris and that Bartley killed Ms. Morris.

(VR 7/17/2003, 9:43:50–9:44:52.) Six times, Epperson's counsel emphasized that this argument applies "if" the jury believed Hamilton's testimony. (*Id.*)

Epperson's trial counsel also argued: "Think about what Mr. Epperson's intent was, if any, in this entire thing. Why would he be waiting outside if his intent was that whatever happened in that house, happened?" (VR 7/17/2003, 9:53:05–9:53:23.) Here again, the trial record refutes any suggestion that Epperson's counsel admitted guilt. Epperson's counsel simply reminded the jury that, at best, Hamilton's testi-

mony provided evidence that Epperson waited outside while Hodge and Bartley committed the murders. This conditional argument, addressing testimony from the trial, was no admission. Epperson's counsel stuck to his theory to "deny all involvement, but if involved, deny involvement in the murders." *Epperson II*, 2018 WL 3920226, at *4.

Epperson suggests that the Supreme Court of Kentucky acknowledged Epperson's counsel admitted guilt. Pet. 22. But each of the quotes he uses arose while the court discussed Epperson's allegations. *Epperson III*, 2021 WL 4486519, at *1. When the court discussed Epperson's *McCoy* claim, it quoted its earlier holding about Epperson's counsel never admitting guilt. *Id.* at *4 (quoting *Epperson II*, 2018 WL 3920226, at *12).

B. Epperson's counsel did not admit guilt when he cross-examined Hamilton.

Nor did Epperson's counsel admit guilt when he cross-examined Hamilton. To begin, it is an unsettled question how *McCoy* applies on cross-examination. *McCoy* instructs that counsel "provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what arguments to conclude regarding the admission of evidence.'" *McCoy*, 138 S. Ct. at 1508 (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). Which questions to ask on cross-examination, then, is a strategic choice for counsel pursuing the defendant's "fundamental objective." *See id.* at 1510. But even if *McCoy* implicates questions asked on cross-examination, Epperson's *McCoy* claim still fails because Epperson's counsel never admitted guilt through questioning.

In context, Epperson's counsel questioned Hamilton to emphasize how her testimony conflicted with Bartley's. Bartley testified that Hodge and Epperson entered the home and killed Edwin and Bessie. *Epperson I*, 197 S.W.3d at 55. Hamilton testified on direct examination that Epperson knew the victims, planned the robbery, and acted as the group's leader. (VR 7/16/2003, 8:13:30–8:16:15; 8:19:10–47.) Epperson's counsel sought to draw attention to the inconsistencies between these two witnesses' testimonies. To do so, Epperson's counsel cross-examined Hamilton about her previous statements in which she stated that Hodge told her Epperson was outside when the killings occurred. (VR 7/17/2003, 8:22:18–8:23:15.) Epperson's counsel used the statement Hamilton overheard to convey that Epperson did not enter the Morris home. (VR 7/16/2003, 8:27:40–8:29:40; 9:46:40–9:46:49). As explained above, Epperson's counsel used this to argue that Epperson was not guilty of intentional murder, not guilty of murder by complicity, and not guilty of criminal facilitation to murder.

The quote on which Epperson relies is not some key admission that Epperson's counsel admitted to the plan about which Hamilton testified. Pet. 5. In context, Epperson's counsel was asking about Hamilton's testimony. *She* is the one who overheard that the plan was for Epperson to wait outside while the robbery took place. The question from Epperson's counsel at most conveyed that Hamilton's testimony did not establish that Epperson was guilty of murder under any theory.

* * *

In sum, Epperson's counsel never admitted guilt to anything. The factual predicate to a *McCoy* claim is simply absent here. Even if there were some question about

this factual issue (there is not), resolving this case-specific issue is not a proper use of certiorari.

II. This case is a poor vehicle to resolve the questions presented.

Even if the conditional statements by Epperson's counsel were interpreted as an admission of guilt, there are at least two obstacles to overcome before the questions presented can be resolved.

First, Epperson must overcome a jurisdictional issue. Epperson brought his first collateral attack under Kentucky Rule of Criminal Procedure 11.42, which requires that the motion "state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition shall conclude all issues that could reasonably have been presented in the same proceeding." Kentucky's highest court has held that "courts have much more to do than occupy themselves with successive 'reruns' of [Rule 11.42] motions stating grounds that have or should have been presented earlier." *Hampton v. Kentucky*, 454 S.W.2d 672, 673 (Ky. 1970). So under Kentucky law, "successive [Rule 11.42] motions" are "bar[red]." *Sanders v. Commonwealth*, 339 S.W.3d 427, 438 (Ky. 2011); *accord McDaniel v. Commonwealth*, 495 S.W.3d 115, 121–22 (Ky. 2016).

Epperson III held that this matter, which arises from Epperson's second Rule 11.42 motion, constitutes "an impermissible successive collateral attack." 2021 WL 4486519, at *4. This state-law holding implicates the doctrine regarding an independent and adequate state-law ground for decision. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal

ground for the decision could not affect the judgment and would therefore be advisory."); *see also Hodge v. Haeberlin*, 579 F.3d 627, 638–39 (6th Cir. 2009) (discussing Kentucky's Rule 11.42).

Although the Supreme Court of Kentucky discussed the merits of Epperson's *McCoy* claim in *Epperson III*, the court's alternative state-law holding under Rule 11.42 is clear from the face of the opinion. To recap, the trial court held that Epperson "had already presented this claim," *Epperson III*, 2021 WL 4486519, at *1, and the Supreme Court of Kentucky agreed, *id.* at *4. It reasoned that "Epperson's second [Rule 11.42] motion did not put forth any new facts or law that was not known to us when we issued our ruling in 2018. . . . We also believe [the trial court] was correct to rule the motion was an impermissible successive collateral attack." *Id.* This alternative state-law ground for decision is clear and express. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); *Sochor v. Florida*, 504 U.S. 527, 533–34 (1992) (finding that state court relied on alternative state-law holding). Thus, to answer the questions presented, the Court must first deal with this jurisdictional issue.

Second, resolving the questions presented logically requires answering the threshold question of whether *McCoy* is retroactive. The Supreme Court of Kentucky expressly noted but did not decide this issue because the court found *McCoy* otherwise inapplicable. *Epperson III*, 2021 WL 4486519, at *4 n.6. Recently, two federal circuits,

in federal habeas, have found that *McCoy* is not retroactive. *Smith v. Stein*, 982 F.3d 229, 235 (4th Cir. 2020); *Christian v. Thomas*, 982 F.3d 1215, 1224–25 (9th Cir. 2020).

Epperson is wrong to claim that the Commonwealth "expressly waived" any argument that *McCoy* is not retroactive. Suppl. Br. 6. In its brief below (at 20–21), the Commonwealth argued that the Supreme Court did not need to resolve the retroactivity issue to reject Epperson's *McCoy* claim. And that is exactly what the Supreme Court of Kentucky did. *Epperson III*, 2021 WL 4486519, at *4 n.6.

III. Even if Epperson's counsel admitted guilt, the splits of authority Epperson identifies do not warrant certiorari.

Epperson spends the body of his Petition discussing the splits of authority allegedly at issue. Pet. 12–19. Even if Epperson's counsel admitted guilt, and even if Epperson can overcome the vehicle problems discussed above, any splits of authority here do not warrant certiorari.

A. The first split of authority Epperson identifies does not justify certiorari.

The first question Epperson presents is whether *McCoy* applies "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." Pet. 12. It bears repeating that Epperson's trial counsel never admitted guilt. But even if he had, the split of authority Epperson identifies is insufficiently compelling for the Court to grant certiorari.

Epperson argues that nine state courts plus two federal circuits hold that *McCoy* "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." Pet. 12.

But a closer examination of this authority shows that this characterization overstates matters. Most of the state cases do not come from a state's highest court. *See* S. Ct. R. 10(a) & (b) (focusing on decisions by a "state court of last resort"). And many of Epperson's cases involved facts to which *McCoy* does not apply. If this Court grants certiorari, it will wade into what is at best a small and tepid split of authority mostly involving intermediate state appellate courts.

By Epperson's count, Alabama, California, Florida, Georgia, Massachusetts, Minnesota, Oregon, Texas, and Wisconsin do not require a contemporaneous objection when trial counsel overrules a defendant and admits guilt. Pet. ii. Taking each in turn, the decision from Alabama is from its intermediate appellate court. *Morgan v. State*, --- So.3d ---, 2020 WL 2820172 (Ala. Crim. App. May 29, 2020). And it rejected a *McCoy* claim because "there is nothing in the record showing that [the defendant] told his counsel, before trial, that he wanted to pursue a theory of absolute innocence rather than a theory of self-defense." *Id.* at *4. The Alabama court also held that certain elicited testimony, "without more, cannot be considered a presentation of self-defense to the jury." *Id.* at *6. In any event, the defendant's counsel there informed the trial court of the defendant's objection. *Id.* at *5.

Similarly, the three cases Epperson cites from California are all from intermediate appellate courts and not all of them necessarily decided the first question presented. Pet. 12–13. In the first case, the California court rejected the *McCoy* claim because "nothing in the record indicates that [the defendant] ever made it clear to his counsel (or the court) that the objective of his defense was to maintain innocence, or

that [the defendant] voiced 'intransigent objection'—or any opposition—to his lawyer's defense strategy." *People v. Franks*, 248 Cal. Rptr. 3d 12, 18 (Cal. App. 2019). The second California case sustained a *McCoy* claim when "counsel overrode [the defendant's] stated goal of maintaining his innocence." *People v. Flores*, 246 Cal. Rptr. 3d 77, 79 (Cal. App. 2019). But the defendant there told the court of his objection to his counsel's strategy. *Id.* at 81, 85. And in the third case, the court sustained a *McCoy* claim when "trial counsel knew that defendant did not agree with the strategy of conceding manslaughter in closing argument" and admitted guilt anyway. *People v. Eddy*, 244 Cal. Rptr. 3d 872, 878 (Cal. App. 2019). Epperson is correct that *Eddy* did not require a contemporaneous objection for a *McCoy* claim to succeed. *Id.* at 879. But how California's intermediate appellate courts apply *McCoy* does not require this Court's attention, but that of California's highest court.

Although the decision Epperson cites from Florida comes from its highest court, that decision is inapplicable to the question presented. That court did not even address the merits of a *McCoy* claim. *Atwater v. State*, 300 So.3d 589, 591 (Fla. 2020) (per curiam). The defendant there never claimed "that he expressed to counsel that his objective was to maintain his innocence or that he expressly objected to any admission of guilt." *Id.* at 591. This led the court to conclude that "[a]t its heart, [the defendant's] claim is not a *McCoy* claim; [the defendant] has not alleged that counsel conceded guilt over [the defendant's] objection."[5] *Id.*

[5] Epperson also cites *Padron v. State*, 329 So.3d 261 (Fla. App. 2021) (per curiam), as a Florida case that bears on his first question presented, Pet. 13, but he never explains how that one-paragraph decision is relevant.

Nor does Epperson's favored case from Georgia's intermediate appellate court help his argument. There, the court rejected a *McCoy* claim because the defendant "presented no evidence" that he objected to his attorney's trial strategy. *Pass v. State*, 864 S.E.2d 464, 469 (Ga. App. 2021). In fact, the court pointed out that the defendant also did not "voice any objections to the trial court." *Id.* It is unclear why Epperson cites this case for the opposite holding. Pet. ii, 13. Georgia's intermediate appellate court, at least, arguably should be on the other side of the ledger.

Epperson also misconstrues his authority from Massachusetts. Pet. 13. There, the Supreme Judicial Court of Massachusetts ruled that the lower court "was entitled to discredit the defendant's affidavit . . . stating that he had objected to his counsel's use of the insanity defense on multiple occasions." *Commonwealth v. Alemany*, 174 N.E.3d 649, 667 (Mass. 2021). Epperson does not explain how this fact-specific holding implicates the first question presented. *See* Pet. 13–14.

Epperson cites two cases from Minnesota's intermediate appellate court. Yet both cases are unpublished. *See State v. Fry*, No. A18-1837, 2019 WL 4746137 (Minn. App. Sept. 30, 2019); *State v. Nelson*, No. A18-1482, 2019 WL 4164847 (Minn. App. Sept. 3, 2019). Even still, they should not be counted as part of any split about the need for a contemporaneous objection. In the first case, the court did not resolve a *McCoy* issue because "[i]t is unclear from the record whether the defendant acquiesced to counsel's concession of guilt." *See Fry*, 2019 WL 4746137, at *3. This decision also relied heavily on pre-*McCoy* case law from Minnesota's high court. *Id.* And in the second case, the court similarly applied mainly pre-*McCoy* case law from Minnesota's state courts. *Nelson*, 2019 WL 4164847, at *5. If anything, this case seems to support

a proposition contrary to that for which Epperson cites it. *Id.* at *6 ("[N]othing in the record indicates that appellant objected to defense counsel's strategy throughout trial.").

Oregon's intermediate appellate court similarly has never directly answered the first question presented. Instead, it held that under *McCoy*, *Nixon*, and state precedent, "the proper inquiry is on the fundamental objective of the defendant, as expressed to defense counsel." *Thompson v. Cain*, 433 P.3d 772, 777 (Or. App. 2018). In one sense, this focus could mean that the Oregon court would not require a contemporaneous objection for a successful *McCoy* claim. But the court did not dwell on the objection issue. It also relied heavily on pre-*McCoy* state precedent. *Id.* at 775–77 (citing *Pinnell v. Palmateer*, 114 P.3d 515 (Or. App. 2005)). Ultimately, whether the defendant presented a successful *McCoy* claim was for the lower court to determine on remand. *Id.* at 778.

Whether Texas courts have addressed Epperson's first question presented is unclear. In the first case Epperson cites, the Court of Criminal Appeals of Texas held that the defendant "fails to allege facts that would entitle him to relief under *McCoy*." *Ex Parte Barbee*, 616 S.W.3d 836, 838 (Tex. Crim. App 2021). Much like the Supreme Court of Kentucky in *Epperson III*, the Texas court held that the defendant's *McCoy* claim was procedurally and substantively barred. *Id.* at 845. This case did not directly address whether a *McCoy* claim requires a contemporaneous objection. If anything, it suggests such an objection is required. *Id.* ("*McCoy* merely required factually what *Nixon* explicitly lacked: a defendant's express objections to a concession of guilt disregarded by counsel and court and aired before a jury during trial."). The other Texas

case Epperson cites is similarly unhelpful. The court simply held that the defendant "has alleged facts that, if true, might entitle him to relief." *Ex parte Gonzalez Quiroga*, No. WR-90,560-01, 2020 WL 469635, at *1 (Tex. Crim. App. Jan. 29, 2020) (per curiam).

Finally, the Supreme Court of Wisconsin reached a similar conclusion to the one the Supreme Court of Kentucky did in *Epperson II* and *Epperson III*. The Wisconsin high court concluded that the defendant's trial counsel "never abandoned his position of absolute innocence." *State v. Chambers*, 955 N.W.2d 144, 152 (Wis. 2021). In dicta, Wisconsin's court noted in a footnote that "[w]e read *McCoy* as not necessarily requiring a defendant to contemporaneously object on the record in order to preserve that claim." *Id.* at 149 n.6. But, as noted above, this case did not turn on the presence or absence of a contemporaneous objection. The court's bottom line was simply that "trial counsel did not concede [the defendant's] guilt during closing argument." *Id.* at 150.

It is worth pausing to review the numbers. Epperson alleges that nine states do not require a contemporaneous objection. Pet. ii, 12–13. But of those nine states, only California's intermediate appellate court has directly decided not to require a contemporaneous objection. One state high court has addressed the issue in dicta. And at least one state intermediate appellate court seems to require a contemporaneous objection.

Epperson's claim about federal appellate courts fares no better. He correctly points out that the Eighth Circuit has addressed a *McCoy* issue. Pet. 13. But he overlooks the grounds on which the Eighth Circuit resolved the case. The defendant there

took the stand and admitted to the conduct that he objected to counsel conceding. *United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019). The court also noted that the record lacked an express statement by the defendant "in response to his attorney's concessions, either to his counsel or the court." *Id.* As a result, while the Eighth Circuit did indeed point to the lack of an objection by the defendant (both to counsel and the court), the court did not directly decide whether a defendant must make a contemporaneous objection in court to press a *McCoy* claim.

The final court Epperson cites is the Fourth Circuit. Pet. 12. But the Fourth Circuit did not directly address whether a contemporaneous objection was required. It simply held, in an unpublished decision, that "the record in this case includes no definitive evidence regarding whether [the defendant] consented or objected to his counsel's concession of guilt . . . prior to closing argument." *United States v. Hashimi*, 768 F. App'x 159, 163 (4th Cir. 2019) (per curiam).

In summary, out of the many courts Epperson claims came out his preferred way on the first question presented, only one did so directly while another did so in dicta. And neither federal circuit Epperson cites affirmatively answered the question presented.

Epperson is also wrong about the cases he alleges form the other side of the split. Epperson claims that Michigan requires a contemporaneous objection. Pet. 14. But the unpublished decision he cites from Michigan's intermediate appellate court is not entirely clear. The court noted that a *McCoy* issue is "not subject to preservation requirements." *People v. Watson*, No. 349242, 2020 WL 7296979, at *5 (Mich. App. Dec. 10, 2020) (per curiam). But, to Epperson's point, the court also noted that the

defendant "voiced no objection at trial" or at sentencing. *Id.* at *6. Even if this case stands for the proposition for which Epperson cites it, an unpublished decision from an intermediate state appellate court does not provide a compelling reason to grant certiorari.

The case Epperson cites from the Court of Criminal Appeals of Oklahoma does not directly take a position on the question presented. In that case, the court held that "[d]efense counsel never expressly conceded guilt; never said that [the defendant] was the killer; and never said that [the defendant] committed the charged offenses." *Knapper v. State*, 473 P.3d 1053, 1076 (Okla. Crim. App. 2020). This is like the Supreme Court of Kentucky's factual discussion in *Epperson II* and *III*. It is true that Oklahoma's court then noted that "[the defendant] never voiced, at any time prior to or during trial, any disagreement or concern regarding trial strategy or counsel's representation of him." *Id.* at 1077–78. But that discussion appears to be dicta given the court's determination that the defendant's attorney did not concede guilt.

In summary, the split that Epperson identifies on his first question presented, which mostly involves state intermediate appellate courts, is not nearly as deep or established as he claims. No federal appellate court has directly addressed the first question Epperson presents. This Court should not be the first.

B. All federal circuits to address the second question presented have held that *McCoy* does not apply when counsel concedes only an element of the offense.

The second question Epperson presents is whether *McCoy* applies "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)." Pet. 15. Even if Epperson's trial counsel conceded an element of the offense, the cases Epperson identifies are largely a consensus against his preferred holding. In his Petition, Epperson claims that two states, one federal district court, and the Army Court of Appeals have found a *McCoy* violation when trial counsel concedes only an element of an offense. Pet. ii, 15–16. He claims that two federal courts of appeal and four States require admission of all elements of the charged offense. Pet. ii, 16–17; Suppl. Br. 2–3. But a careful examination of these precedents shows the split of authority is mostly lopsided.

The first California case Epperson cites is an unpublished decision that found no *McCoy* violation. *People v. Jackson*, No. A157033, 2021 WL 2493351 (Cal. App. June 18, 2021). The intermediate appellate court stated that it "reviewed the record in this matter at length and concluded that [the defendant] did not unambiguously oppose defense counsel's partial concession strategy either in his communications with counsel or his statements in court." *Id.* at *6. Because the defendant "was content to allow his trial counsel to pursue a partial concession defense theory," the court held that *McCoy* did not apply. *Id.* at *8–9. That said, Epperson characterizes his other California authority—*Flores*—correctly. Pet. 16. The California intermediate appellate court there stated that "criminal defense lawyers must allow their clients to dictate the fundamental objective at trial, and thus must not concede the actus reus of a charged crime over their client's objection." *Flores*, 246 Cal. Rptr. 3d at 79. The court found a *McCoy* violation when counsel conceded only the actus reus while

maintaining the defendant's legal innocence. *Id*. Still, an intermediate state court decision hardly provides a compelling reason to grant certiorari.

Epperson's citation from Oregon has already been distinguished. Even still, the court there framed the issue as whether it violates *McCoy* "to concede a defendant's guilt as to some charges in closing argument." *Thompson*, 433 P.3d at 773. And the court did not ultimately resolve that issue under *McCoy*. It instead remanded the case to the trial court to determine whether counsel's actions "met constitutional standards." *Id*. at 778.

Epperson's citation to a district court decision from the Northern District of Illinois is similarly unpersuasive. Pet. 16. Even if it decided Epperson's second question presented, a split involving a district court does not present a compelling reason to grant certiorari. *See* S. Ct. R. 10(a) & (b). That case, however, dealt with a defendant who "was not charged with the drug crime to which counsel conceded guilt." *Price v. United States*, No. 20 C 1184, 2021 WL 2823093, at *7 (N.D. Ill. July 7, 2021). On top of that, the defendant "ratified his counsel's partial admission strategy." *Id.* at *8. So while this case contains language suggestive of Epperson's second question presented, *id.* at *7, it did not turn on this issue.

Epperson's cited U.S. Army Court of Criminal Appeals decision is also unpublished. *See United States v. Lancaster*, No. ARMY 20190852, 2021 WL 1811735 (Army Ct. App. May 6, 2021). The court cited several federal circuit courts as supporting the holding that "an attorney may, as a strategic decision, effectuate a client's overall objective of acquittal by conceding certain elements of a crime, while still contesting others." *Id.* at *4 (citing *United States v. Rosemond*, 958 F.3d 111, 122–23 (2d

Cir. 2020), *cert. denied*, 141 S. Ct. 1057 (2021); *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019); *United States v. Holloway*, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019); *Thompson v. United States*, 791 F. App'x 20, 26–27 (11th Cir. 2019)). After citing this precedent, the military court reviewed the record and determined that the defendant's "overall desired strategy . . . was the very strategy defense counsel pursued." *Lancaster*, 2021 WL 1811735, at *7 (cleaned up).

Epperson recognizes that the Second and Eleventh Circuits require trial counsel to admit legal guilt for a defendant to present a successful *McCoy* claim. Suppl. Br. 2. But he neglects to mention the other supporting circuit authority cited immediately above. As a result, Epperson's claimed split of authority is uneven and so does not warrant certiorari.

IV. The Supreme Court of Kentucky properly held *McCoy* does not apply here.

At every turn, the Supreme Court of Kentucky faithfully applied *McCoy* according to its terms. *McCoy* holds that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy*, 138 S. Ct. at 1510. The Supreme Court of Kentucky took *McCoy* to mean exactly what it said. *Epperson II*, 2018 WL 3920226, at *10; *Epperson III*, 2021 WL 4486519, at *2. The expansive reading of *McCoy* that Epperson proffers contradicts *McCoy*'s language. Pet. 24.

McCoy emphasized the importance of an objection at trial. The Court pointed out that "[i]n the case now before us, in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. The Court distinguished *Nixon* by

noting that the defendant there "'never verbally approved or protested' counsel's proposed approach." *Id.* at 1509 (quoting *Nixon*, 543 U.S. at 181). Discussing the defendant's objective of maintaining innocence, *McCoy* held that "[o]nce he communicated that [objective] to court and counsel, strenuously objecting to [counsel's] proposed strategy, a concession of guilt should have been off the table." *Id.* at 1512. *McCoy*'s language focusing on the defendant's contemporaneous objection was no accident.

The Supreme Court of Kentucky correctly recognized that an objection at trial "is the decisive factual predicate used to distinguish *McCoy* from *Nixon*." *Epperson III*, 2021 WL 4486519, at *2. And this makes sense. Trial courts should be able to "presume that such a concession [of guilt] is part of a legitimate and agreed upon strategy absent an objection from the defendant himself." *Id.* at *3. If no objection were required, "that would force the trial court to divine whether the defendant does in fact have an objection to a concession of guilt." *Id*. And Kentucky's court was sensitive to the consequences of such a rule. *Id.* ("We will not interpret *McCoy* in such a way that allows a defendant to sleep on his rights and allege a structural error after his direct appeal has proven unsuccessful.").

Because *McCoy* requires a contemporaneous objection that Epperson never made, whether it applies if his counsel admitted guilt to only an element of a charged offense is academic. Even so, as Kentucky's court noted, counsel's statements in *McCoy* "could only have the legal effect of conceding guilt to the crime charged." *Id.* Plus, the court continued, *McCoy* itself "highlighted the difference between conceding elements of the offense and the crime charged." *Id.* From this, the court below cor-

rectly "discern[ed] an intent to distinguish between strategic disputes about conceding an element of an offense as opposed to an attorney's concession of guilt to the crime charged and subsequent hope for leniency from the jury." *Id.* at *4. For these reasons, even if the Court determines that Epperson's questions presented are properly before it, Epperson's position would take *McCoy* well beyond the "stark scenario" there. *See McCoy*, 138 S. Ct. at 1510.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted by,

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