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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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[1] Kentucky uses the Westlaw citation to the Kentucky Supreme Court opinion. Epperson included the slip opinion version as part of the appendix to the Petition. To be consistent with the Petition, through this reply, Epperson cites to the appendix to his Petition.

[2] The Texas Court of Criminal Appeals is Texas' highest court for criminal cases.

OTHER

APPENDIX

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Kentucky does not dispute the following: 1) Epperson's objective was not just to obtain an acquittal; it was also to maintain at trial he was neither involved in the crime nor the events leading up to it;[3] 2) Epperson informed trial counsel of this objective; 3) counsel violated this objective with statements Epperson asserts admitted involvement in the criminal activity; 4) The Kentucky Supreme directly addressed and expressly resolved the *McCoy* issues Epperson raises in his Petition for a Writ of Certiorari; and, 5) a split among the courts exists, although Kentucky

[3] It is easy to understand why Epperson wanted to maintain he had nothing to do with any of the facts of the crime. One of the victims was Epperson's father's best friend. Admitting involvement in the criminal activity would be devastating because it acknowledges involvement in actions that led to Epperson's father's best friend's murder. That impacts family dynamics and demonstrates why a defendant's objective would not just be to obtain an acquittal but to also maintain lack of involvement in any criminal activity. A defendant, not counsel, should have the autonomy to make that decision.

asserts the split is not as strong as Epperson presents. Despite these points not being in dispute, and even though this Court and the public places great importance and emphasis on individual autonomy, Kentucky asserts a defendant is helpless if counsel disregards the objective to maintain no involvement in the criminal activity because *McCoy v. Louisiana*, 138 S.Ct. 1500 (2008), provides only autonomy to prevent counsel from conceding guilt of the charged offense (the entire elements of the offense).[4] That flies in the face of autonomy, and should be addressed.

As Justice Alito (joined by two Justices) noted in his *McCoy* dissent, "is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged" is a "difficult question" with "important implications" that "may" (and has now been shown to) "arise more frequently" than counsel conceding guilt of the charged offense over a defendant's open and vociferous objection. *Id*. at 1516 (Alito, J., dissenting). Contrary to Kentucky's assertions, there are no procedural or jurisdictional impediments, the questions presented were squarely addressed in the court below, the split among the courts is clear even from just the plain language of lower court opinions,[5] and counsel conceded at least Epperson's involvement in some

[4] Although trial counsel overrode Epperson's objective during cross-examination and closing argument, Kentucky asserts "it is an unsettled question how *McCoy* applies on cross-examination." Brief in Opp. at 13. Epperson disagrees. *McCoy* makes clear the defendant's objective is sacrosanct. No reason exists to believe autonomy disappears based on when during the trial a concession is made. Nonetheless, to the extent this Court believes there can be a serious question as to whether *McCoy* has any application to a concession made during cross-examination, that is simply an additional reason to grant certiorari.
[5] Kentucky asserts this Court rejected Epperson's *McCoy* claim in a previous petition for a writ of certiorari. Not so. There, he presented the question of whether a *McCoy* violation occurs when counsel concedes guilt of some of the charged offenses *without first informing and consulting the client*? Petition, *Epperson v. Kentucky*, 18-6701. Here, Epperson's questions presented are premised on the Kentucky Supreme Court's recent interpretation of *McCoy* in its 2021 opinion in Epperson's case. Anyway, the denial of certiorari has no precedential value, and certiorari is sought now from an opinion that squarely addressed the legal issues raised within the two questions now presented to this Court.

of the criminal activity over Epperson's objective to maintain innocence of involvement in any of the criminal activity. In this regard, Kentucky's argument that counsel did not concede guilt boils down to its interpretation that a concession, in the context of *McCoy*, exists only if counsel concedes all of the elements of the offense. Epperson, and some courts, have concluded that *McCoy* also applies to any concession of criminal activity. As three Justices recognized in *McCoy*, that is an issue with important implications. It is one this Court should resolve here.

Argument

I. Kentucky's procedural and jurisdictional arguments against certiorari are misleading and manufactured.

Kentucky's procedural/jurisdictional arguments can be perhaps best described as a "gotcha" moment or an attempt to have its cake and eat it too. It sought modification of the state court opinion to correct a non-consequential clerical error, which does not render a state court ruling non-final for purposes of certiorari. It relies on a single unexplained sentence to try trick this Court into thinking the state court relied on an independent state procedural ground when the entire state court opinion interpreted and applied *McCoy*, identifying and deciding the questions presented to this Court in an express, detailed, and direct manner. Kentucky also tries a bait and switch game to argue one thing to the Kentucky Supreme Court, getting the court to accept that argument, and then turning around and arguing the opposite here. That is fatal to Kentucky's retroactivity argument, which is legally erroneous anyway. This Court has the authority to reach the federal constitutional issues and should do so.

A. For purposes of seeking certiorari, a state court decision remains final during the pendency of a modification petition seeking to correct an inconsequential clerical error.

Kentucky states misleadingly that, "at the time of filing, *Epperson III* [from which certiorari is sought] is not yet final because of a pending petition for modification," Brief in Opp. at 9 n.4, without informing this Court that Kentucky filed a modification petition (its second) to correct an inconsequential clerical error that has no impact on the ruling, holding, or questions presented to this Court. As a result, under this Court's precedent, the pending petition for modification does not impact the time for seeking certiorari or finality, for purposes of certiorari.

Twice in a paragraph, the Kentucky Supreme Court said Epperson was convicted in 1996. He was convicted in 2003. Acknowledging this "minor factual inaccuracy" that does "not affect the remainder of the Opinion," Kentucky requested correction. Reply App. at 2. The court did so while noting "[s]aid correction did not affect the holding of the original Opinion of the Court. The correction is made only to reflect an incorrect date on page 2 of the Opinion." Pet. App. at 12.

Epperson filed his Petition for a Writ of Certiorari a few days later because the time for seeking certiorari would have otherwise expired. Thirteen days later and nineteen days after the court granted the first modification of opinion, Kentucky filed another modification petition seeking to correct the same clerical error in a second location, noting again the minor factual correction "will not affect the remainder of the Opinion." Reply App. at 5-6. That modification petition remains pending and will have no effect on the holding or the questions presented for review.

The test to determine if a state court decision is final is "whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court. Where the order or judgment is final in this sense, the time for applying to this Court [for certiorari] runs from the date of the appellate court's order." *Dep't of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942). "[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Fed. Trade Comm. v. Minneapolis Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952). And, the rule that time for seeking certiorari begins to run when rehearing or modification petitions are decided "does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court." *Missouri v. Jenkins*, 495 U.S. 33, 45 n.13 (1990).

As the Kentucky Supreme Court made clear, correction of the minor clerical error has no effect on the opinion. The second modification petition seeks to further correct the same clerical error, with the resulting opinion leaving in place the fully adjudicated rights that are the subject of the questions presented. Thus, under this Court's law, the ruling is final for purposes of certiorari. This Court has jurisdiction.[6]

B. The Kentucky Supreme Court did not decide Epperson's appeal on an independent state law ground.

As explained in the Petition, the Kentucky Supreme Court squarely identified and directly addressed the controlling issues raised within the questions presented.

[6] This Court has authority to defer consideration if it desires to await the lower court ruling on Kentucky's latest inconsequential petition for modification.

The court dedicated seven of its barely over nine-page opinion, and all of its analysis section, to doing so. Kentucky relies on one unexplained sentence in the conclusion to argue the court decided the appeal on adequate and independent state law grounds. Brief in Opp. at 15-16. "[W]hen a state court decision fairly appears . . . to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," independent state law doctrine does not bar review. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). At most, the decision is intertwined with *McCoy*, not an independent state ground.

The Kentucky Supreme Court began its "analysis" section by discussing and interpreting *McCoy*, noting in the first paragraph it does not read *McCoy* as "sweepingly" as Epperson, and dedicating its analysis to a discussion of *McCoy*'s holding, its interpretation of *McCoy*, and why it rejects Epperson's interpretation. Pet. App. at 3-10. The court did not say the claim is denied under state law.

Rather, after interpreting *McCoy* to require a contemporaneous on-the-record objection to the trial court and to apply only when defense counsel concedes the entirety of the charged offense, the Kentucky Supreme Court stated:

> [a]s we held, *McCoy* only controls when there is an 'intransigent objection' on the record. The circuit court below was correct in refusing to hold an evidentiary hearing because it is unnecessary to hear testimony to prove that fact. Merely citing to the record when such objection occurred would suffice. Epperson has not done that because he did not make any such objection. *McCoy* simply is not applicable to his case. We also believe that our initial impression of the specific objections made by Epperson remain correct. Again, an evidentiary hearing is unnecessary to determine if Epperson's counsel did in fact concede guilt. Epperson has not presented anything new which demonstrates there was a concession of guilt to the crime charged."

Id. at 9. That paragraph detailed the court's understanding of *McCoy* and why it believed the facts and evidence did not support a *McCoy* claim. The focus was on what was conceded and if Epperson had objected at trial because that is what the court believed *McCoy* required. If the court had held, as Epperson argued, that an on-the-record objection was not required, then he would have been entitled to an evidentiary hearing.[7] Similarly, if the Kentucky Supreme Court had interpreted *McCoy* to apply to trial counsel conceding factual involvement in the criminal activity, instead of guilt of the charged crime, then it would have recognized a *McCoy* violation. This means the entire analysis portion of the ruling was interwoven with *McCoy*.

This context is necessary to review the sentence Kentucky relies upon. Buried within its conclusion, the Kentucky Supreme Court stated "it was correct [referring to post-conviction trial court] to rule the motion was an impermissible successive collateral attack." Petition App. at 9. The court provided no further explanation or discussion But, the court's entire analysis was in the context of how to interpret *McCoy*, with the statement that the post-conviction action was an "impermissible successive collateral attack" seeming to be based on the court interpreting *McCoy*'s to not be as "sweeping" as Epperson does. Simply, if the court interpreted *McCoy* as

[7] *United States v. Hashimi*, 768 Fed.Appx. 159, 163 (4th Cir. 2019), supports this conclusion. The Fourth Circuit held the record did not contain definitive evidence on if Hashimi opposed the concession. The court made clear Hashimi could present post-conviction evidence on it. Epperson attempted to do the same, but the Kentucky Supreme Court interpreted *McCoy* to prohibit that. If the court interpreted *McCoy* as the Fourth Circuit did, Epperson's claim would have been remanded for further findings. The court ruled that was unnecessary because *McCoy* required a contemporaneous objection and the lack of that meant whether counsel overrode Epperson's objection was irrelevant. This further demonstrates the sentence Kentucky relies upon was interwoven with *McCoy*.

Epperson did, it would not have then concluded it to be an "impermissible successive collateral attack." It would have remanded for further resolution under *McCoy*.

That seems to be how the three concurring Kentucky Supreme Court justices viewed the majority opinion. They "disagree[d] with the majority's conclusion that Epperson's claim is now procedurally barred under *McCoy*." *Id*. at 10. That is the only way to interpret the majority opinion in light of this Court's independent state law doctrine. The Kentucky Supreme Court certainly did not make clear on the face of its opinion that it was relying on an independent state ground to deny relief. Rather, the court's entire discussion and analysis focused on *McCoy*, leaving this Court with only one fair conclusion: the Kentucky Supreme Court decision was interwoven with federal law and thus this Court has jurisdiction to review the questions presented.

C. Kentucky is estopped from its non-retroactivity argument, which fails legally anyway.

Kentucky asserts retroactivity is a "threshold issue" the Kentucky Supreme Court did not resolve, but, "to reach the questions presented, whether *McCoy* is retroactive must be decided." Brief in Opp. at 2, 9, 16. That is wrong. We know that because Kentucky previously told the Kentucky Supreme Court the exact opposite and also because this Court's law is clear that the non-retroactivity doctrine applies to federal habeas cases while leaving the States free to apply it or not.

In response to Epperson's retroactivity argument before the Kentucky Supreme Court, Kentucky told the court to skip retroactivity analysis and decide the *McCoy* issue regardless, in a heading entitled, "This Court should not consider whether *McCoy* is retroactive," under which Kentucky argued, "there is no need to

decide whether *McCoy* is retroactive given the procedural impropriety of Epperson's appeal and his failure to show trial counsel conceded guilt. Resolution of this issue should be reserved for another time." Reply App. at 10-11. The court accepted Kentucky's invitation to bypass retroactivity analysis and to instead decide the merits. After first deciding *McCoy* requires the defendant to object to the trial court and *McCoy* applies only to concession of the charged offense, the court ruled "we need not decide whether *McCoy* is retroactive" because we are holding "*McCoy* simply is not applicable to [Epperson's] case." Pet. App. at 9. Simply, the court did exactly what Kentucky asked it to do, bypass retroactivity and instead reach the merits.

Kentucky's current position that retroactivity is a "threshold" issue that must be resolved before this Court can reach the merits is unreconcilable with its successful position in state court. Having argued successfully in state court that retroactivity need not be addressed, thereby indicating it could not be a "threshold" issue, and the court having accepted that argument, Kentucky is judicially estopped from arguing retroactivity must now be addressed before this Court could review the questions presented that deal with what the Kentucky Supreme Court directly held.

Nonetheless, Kentucky is wrong. The Petition does not arise in the context of federal habeas corpus review. Certiorari is sought from a state post-conviction ruling. As such, this Court's retroactivity doctrine has no baring. This Court has made clear its retroactivity doctrine "limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, *but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy*

for a violation that is deemed 'nonretroactive' under Teague." *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (emphasis added). This Court reiterated that last year, citing *Danforth*, while noting "States remain free, if they choose, to retroactively apply a [federal constitutional] rule as a matter of state law in state post-conviction proceedings." *Edwards v. Vannoy*, 141 S.Ct. 1547, 1559 n.6 (2021). Retroactivity in a case arising out of a state post-conviction proceeding is thus not a "threshold" issue. It is not even an issue for this Court to decide. It is left to the States. Here, Kentucky decided to neither apply the retroactivity doctrine nor address retroactivity. It chose to address the merits of Epperson's claim. As such, retroactivity is not at issue here.

II. The split among the courts is real; this Court should resolve it.

As to question presented 1, Kentucky acknowledges California law is that *McCoy* does not require the defendant to contemporaneously object to the trial court. Brief in Opp. at 19 ("Epperson is correct that *Eddy* did not require a contemporaneous objection for a *McCoy* claim to succeed."). Kentucky also acknowledges Wisconsin ruled a contemporaneous on-the-record objection is not required to preserve a *McCoy* claim, but then claims this Court should disregard that because the statement was not necessary to the holding. *Id*. at 22. And, Kentucky acknowledges Oregon law can be construed as not requiring a contemporaneous objection for a *McCoy* claim, *id*. at 21. Oregon held so expressly: "as we read *McCoy*, 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*." *Thompson v. Cain*, 433 P.3d 772, 777 (Or. App. 2018) (emphasis added).

Kentucky admits it fails to see how some courts addressed the issue and further urges this Court to disregard the split because it believes the statements from those courts were unnecessary to their rulings. A basic cannon of construction is that courts do not use superfluous language and that words and terms are to be given their plain meaning unless doing so would lead to absurd results. It would not here. Epperson will briefly discuss Kentucky's arguments about some of these cases to refute Kentucky's arguments and thus further show the split warrants certiorari.

The entirety of the relevant sentence in the Alabama court opinion, not the portion Kentucky selectively quotes, makes clear how the court interpreted *McCoy*. "Because there is nothing in the record showing that Morgan told his counsel, before trial, that he wanted to pursue a theory of absolute innocence rather than a theory of self-defense, Morgan's counsel's statements about self-defense in his opening statement did not, as Morgan argues, violate *McCoy* or Morgan's Sixth Amendment right to determine the objective of his own defense." *Morgan v. Alabama*, 2020 WL 2820172, *4 (Ala.Crim.App.). The word "because" indicates what follows was why there was no *McCoy* violation, and what follows was the court saying the record failed to show the defendant *told his counsel, before trial*. It does not say failed to object contemporaneously during trial. So, if the defendant had informed counsel before trial, the first requirement of *McCoy* would have been satisfied, leaving to be resolved only if a concession had been made. That is the opposite of what Kentucky held.

Other courts used the disjunctive "or," which, by definition, means an alternative. Those courts used it to describe the means the defendant could comply

with *McCoy* by making the objective of his defense and opposition to a concession known. *United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019) (lack of any statement to either "counsel or the court" of desire to maintain innocence); *Commonwealth v. Alemany*, 174 N.E.3d 649, 668 (Mass. 2021) ("could have raised his concerns with defense counsel or the judge"); *Atwater v. State*, 300 So.3d 589, 591 (Fla. 2020) (never "expressed to counsel that his objective was to maintain his innocence or that he expressly objected to any admission of guilt," which contains two alternative means to satisfy *McCoy* by conveying information to counsel). In each of these cases, the courts expressed different ways of satisfying *McCoy*, at least one of which was to inform counsel of the objective of the defense. Florida has since made its interpretation even clearer: "a defendant must make his intention to maintain innocence clear to his counsel, and counsel must override that objective by conceding guilt . . . ." *Recalde v. State*, 2022 WL 945429, *4 (Fla.App.). Each of these courts made clear how it interpreted *McCoy* in a way that applies to future cases in those jurisdictions and which differs from the Kentucky Supreme Court's interpretation.

Finally, Kentucky said the Fourth Circuit case of *Hashimi* did not directly address whether a contemporaneous objection was required. This Court had GVR'd in light of *McCoy* even though it was clear the record did not reflect a contemporaneous objection. The Fourth Circuit then noted the record contained no definitive evidence on whether Hashimi consented or objected to the concession, and then said, "if there are facts not currently in the record before us that call this conclusion into question, Hashimi can raise them in post-conviction. *Hashimi*, 768

Fed.Appx. at 163; *accord*, *Felicianosoto*, 934 F.3d at 787 (ruling the claim can be presented in post-conviction with non-record evidence); *State v. Fry*, 2019 WL 4746137, *3 (Minn.App. 2019) ("when it is unclear from the record whether the defendant acquiesced to counsel's concession of guilt, the proper method for considering the issue is in a postconviction proceeding where factual determinations can be made. . . ."); *Ex parte Gonzalez Quiroga*, 2020 WL 469635 (Tex.Crim.App.) (holding the allegation that counsel ignored the defendant's wishes by conceding guilt, if proven true, might entitle him to relief, and thus remanding for fact-finding based on non-trial record evidence). If a contemporaneous objection was required, there would be no basis to remand or allow post-conviction litigation because, as the Kentucky Supreme Court ruled, one would only need to look at the record to see if an objection had been made and deny relief if not. Whether the defendant consented or objected would not matter. Thus, the statements that the record contained no definitive evidence one way or the other and the claim could be presented through non-record evidence in post-conviction is the opposite of what the Kentucky Supreme Court held and indicates a contemporaneous objection is not required.

As this all demonstrates, the split is real and serves as one of the grounds for granting certiorari. The same is so for the second question presented. Kentucky acknowledges a split among the courts. That split is not as large as it is on the first question, but it is a split on an issue Justice Alito (and two other Justices) described as a "difficult question" with "important implications." *McCoy*, 138 S.Ct. at 1516

(Alito, J., dissenting). That, along with the significance of the issue to a defendant's autonomy and how it impacts the outcome for Epperson is reason to grant certiorari.

III. Whether the Kentucky Supreme Court interpreted *McCoy* erroneously should be decided after granting certiorari, the case is not fact intensive, and the Kentucky Supreme Court recognized a concession occurred.

Whether Epperson or the Kentucky Supreme Court's interpretation of *McCoy* is correct is an important issue that should be decided after briefing and argument. The two questions presented raise important, difficult issues that go to the heart of the fundamental right to individual autonomy and have split courts across the country. That warrants this Court's attention and resolution, and Epperson's case remains the ideal case through which to resolve those issues.

This case does not necessitate the fact intensive inquiry Kentucky suggests. Kentucky focuses on the murder charges, ignoring Epperson was also convicted of robbery and burglary – charges counsel conceded over Epperson's objection with his statements that Epperson intentionally waited outside and drove the getaway car.

Regarding the murder charges concession, the Kentucky Supreme Court recognized "[t]his concession" but ruled it "does not appear to be the type of concession upon which *McCoy's* holding is predicated," as "it does not appear that counsel ever explicitly conceded guilt on any of Epperson's charges." Pet. App. at 8; *id*. at 9 (lack of evidence that "there was a concession of guilt to the crime charged"). This language recognized a concession was made, but held the concession fell outside the scope of *McCoy* because it did not concede all the elements of the charged offense. The dispute is thus not over whether a concession occurred, but whether, as a legal issue, a

concession to an element of the offense or to any involvement in the criminal activity that defies the defendant's objective falls within the scope of *McCoy*. This legal issue is clearly prevalent in Epperson's case and was directly addressed by the Kentucky Supreme Court in a way that differs from how many other courts decided the issue.

This Court regularly resolves legal issues and remands to apply its ruling to the facts. This Court can easily do so here, thereby alleviating any potential basis to request the record at this stage (although this Court could request it). Thus, Epperson's case is neither factually intensive nor turns on the facts. It turns on two important legal issues that have split the courts, and that this Court should resolve.

Conclusion

Epperson's questions presented raise important constitutional issues regarding a defendant's autonomy that have split the courts and that the Kentucky Supreme Court squarely addressed and resolved in a manner that makes this case an ideal vehicle to address the questions presented. The arguments Kentucky pitched in opposition are routine arguments that are not supported by the law or facts. They are certainly not grounds to deny certiorari in this important case.

Respectfully submitted,

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