No. 18-9546

IN THE

Supreme Court of the United States

EVERETT CHARLES WILLS, II,
Petitioner,

v.

DARREL VANNOY, WARDEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMENDED PETITION FOR A WRIT OF CERTIORARI

ALAN E. SCHOENFELD
JANET R. CARTER
MICHAEL D. GOTTESMAN
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

RICHARD BOURKE
LOUISIANA CAPITAL ASSISTANCE CENTER
636 Baronne Street
New Orleans, LA 70133

SETH P. WAXMAN
Counsel of Record
SAMUEL M. STRONGIN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTIONS PRESENTED

In *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), this Court held that defense counsel's admission of guilt over a client's express objection violates the Sixth Amendment. The questions presented are:

1. Whether *McCoy* forbids defense counsel's admission of guilt over a client's express objection where the client does not deny the *actus reus* but instructs counsel to present a defense that would negate criminal liability.

2. Whether the State has waived any argument that *McCoy* does not apply retroactively to already-final cases, and if the Court chooses to review the issue despite that waiver, whether *McCoy* applies retroactively; specifically:

   a. Whether *McCoy* established a new rule of constitutional law under the framework of *Teague* v. *Lane*, 489 U.S. 288 (1989); and if so,

   b. Whether the rule of *McCoy* is retroactively applicable to cases on collateral review as a "substantive rule" under the framework of *Teague*;

   c. Whether the rule of *McCoy*, which bars defense counsel from conceding guilt over a client's objection, is retroactively applicable to cases on collateral review as a "watershed rule" under the framework of *Teague*;

d. Whether, as the Court has thrice asked but never answered, States must apply a "watershed rule" under *Teague* in post-conviction proceedings.*

3. Whether the Fifth Circuit's misapplication of the standard for issuing a certificate of appealability warrants summary reversal or vacatur.

---

* *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 729 (2016); *Greene* v. *Fisher*, 565 U.S. 34, 41 n.* (2011); *Danforth* v. *Minnesota*, 552 U.S. 264, 277-278 (2008).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS

IN THE

Supreme Court of the United States

No. 18-9546

EVERETT CHARLES WILLS, II,
Petitioner,

v.

DARREL VANNOY, WARDEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMENDED PETITION FOR A WRIT OF CERTIORARI

Everett Charles Wills, II, respectfully submits this amended petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

McCoy v. *Louisiana*, 138 S. Ct. 1500 (2018), held that defense counsel's admission of guilt over a client's express objection violates the Sixth Amendment. The courts below concluded, in conflict with a decision of the Louisiana Supreme Court, that *McCoy* does not apply if the defendant admits killing the victim.

Charles Wills was convicted of second-degree murder and sentenced to life without parole. Before trial, he instructed his counsel, Kurt Goins, not to admit his guilt, but to argue that he acted in self-defense. Instead, in his opening statement, Goins told the jury that the "evidence won't support" self-defense, insisting "[t]his is a case of manslaughter." Wills immediately and forcefully objected.

The district court denied Wills' habeas petition on the ground that disregarding a client's express instruction to argue self-defense is "not a question of client autonomy" and thus "distinguishable from *McCoy*." The Fifth Circuit denied a certificate of appealability.

This Court should grant certiorari to confirm that there is no difference relevant to the Sixth Amendment between a case in which the defendant asserts that he is innocent because he did not kill the victim and a case in which the defendant asserts that he is innocent because he acted in self-defense. A defendant who seeks exoneration on the grounds of an affirmative defense is just as entitled to "assert[] that the objective of '*his* defence' is to maintain innocence," *McCoy*, 138 S. Ct. at 1509, as one who seeks exoneration on the ground that he did not commit the criminal act.

A second important issue has percolated in the state and lower federal courts since the Court decided *McCoy*: whether *McCoy* applies retroactively to cases already final on direct review. The State has waived that issue in this case. If this Court decides to consider the issue despite that waiver, however, it should confirm that *McCoy* applies retroactively. The question of *McCoy*'s retroactivity is destined to recur until resolved by this Court.

In the alternative, this Court should summarily reverse the decision below, or should grant, vacate, and remand for reconsideration, because the Fifth Circuit manifestly misapplied the certificate of appealability standard most recently articulated in *Buck* v. *Davis*, 137 S. Ct. 759 (2017).

OPINIONS BELOW

The Fifth Circuit's order denying a certificate of appealability (App. 1a-2a) is unpublished. The district court's opinion (App. 3a-7a) is unpublished. The magistrate judge's report and recommendation (App. 9a-41a) is unpublished.

JURISDICTION

The Fifth Circuit entered judgment on March 1, 2019. The petition for certiorari was filed on May 30, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

Charles Wills was convicted of second-degree murder in the killing of Carlos Guster. The trial evidence showed that, late in the evening of April 18, 2011, Guster was walking in the neighborhood where Wills' mother, Aleana Johnson, lived. *See State* v. *Wills*, 125 So. 3d 509, 515 (La. Ct. App. 2013). Guster, who was 26, approached Johnson's house to speak with Wills' sister, 18-year-old Ellen Johnson. *See id.* Ellen and her twin sister Emma were home alone with Emma's young son. *See id.* Ellen testified that Guster had a crush on her; that she had spurned his advances; and that Guster had previously cursed at her, her sister, and her mother. *See id.*

A neighbor testified that she saw Wills pull up in a car, apparently dropping his mother home, and that he called out to Guster. *See* 125 So. 3d at 515. The neighbor then walked into her home but soon heard "popping noises" outside. *See id.*

Aleana, Ellen, and Emma Johnson all testified that Guster was "talking to [Wills] and threatening harm to the sisters before he jumped behind a tree and started to pull something from his pocket." 125 So. 3d at 516. At that point Wills shot Guster, who fell to the ground. *See id.* One sister testified that Wills "'was making sure whatever he was trying to get out of his pocket—I don't even know what he was trying to get out of his pocket. But my brother, you know, shot him again.'" *Id.* Aleana Johnson testified that she heard Guster tell Wills that "he was going to f----- those b----- and then kill everyone." *Id.* The prosecution sought to impeach her with her statement to police that she had gone into the house and did not see the shooting; Johnson explained that she did not see it, but heard it. *See id.*

Wills told police, in a statement that was played for the jury, that Guster had pulled a gun, and that Wills had taken it and shot him. *See id.*[1]

Kurt Goins, an assistant in the Caddo Parish public defender's office, represented Wills at trial. Wills told Goins that his shooting of Guster was justifiable homicide: he acted in self-defense.[2] *See* Wills Aff. 1, Dkt. 17-8 at 123.[3] Goins' handwritten notes from his initial meetings with Wills through shortly before trial confirm that Wills was adamant about arguing self-defense.[4]

The trial took place in December 2012. In his opening statement, the prosecutor told the jury that self-defense and defense of others would be key issues in the case:

---

[1] Further testimony from neighbors is recounted in the opinion on direct appeal. *See Wills*, 125 So. 3d at 515-517.

[2] Louisiana's "justifiable homicide" statute sets out the conditions under which a killing may be justified by self-defense, among other grounds. *See* La. Rev. Stat. § 14:20(A). A separate statute addresses "[d]efense of others." *See id.* § 14:22.

[3] All references to "Dkt." are to the district court docket in this case, *Wills* v. *Vannoy*, No. 5:17-cv-753 (W.D. La.).

[4] *See* Dkt. 17-8 at 127-128 ("Client Interview" attached to attorney visitation receipt dated 4/27/11: "DEFENSE: Self-Δ. (Δ started with denial) then self-Δ."); *id.* at 129 (6/2/11: "Δ asserted as before he acted in self-Δ."); *id.* at 131 (3/18/12: "Δ insisted on his self-Δ claim"); *id.* at 132 (10/17/12: "Δ clings to his self-Δ theory, which I told him I have not found evid. to support. This did not please Δ nor did possib. of arguing manslaughter."); *id.* at 133 (10/21/12: "Δ doesn't like my mansl. arg, I told Δ basically there's not available self-Δ … When we reached an impas[s]e, I told Δ 'there's nothing more to say.' He replied 'you got that right[.]'").

> [The e]vidence is going to be clear that the Defendant … was the individual who killed Carlos Guster. The issues that you're going to have to deal with in this trial are whether this is a reasonable use of self-defense or defense of others.

Dkt. 15-8 at 32. But when Goins delivered his opening, he told the jury that the evidence "won't support" self-defense. He described Wills' recorded statement to police, and said:

> You will hear Everett's claim of self-defense through his statement. The evidence won't support that. This is a case of Manslaughter. And at the end, that is what I will argue that you find.

Dkt. 15-8 at 37. Wills immediately and forcefully objected to Goins' admission of guilt. As he explained in an affidavit submitted in both state and federal post-conviction proceedings:

> When Mr. Goins told the jury that I was guilty of Manslaughter, I waited until he sat down and told him that he could not plead me guilty to the jury like that. Mr. Goins told me, "I already did." The bailiff told me that I could not talk to Mr. Goins during trial because he needed to pay attention to the trial. I told the bailiff that I wanted to stop the trial and speak to the Judge. However, this never happened.
>
> The bailiff's name is Corporal Darryl Smith. He called Sergeant Gaye and an unknown female deputy sheriff who spoke with me in the hall way. I told the deputies that Mr. Goins had pled me guilty and that I cannot continue trial with him. Sgt. Gaye told me that Mr. Goins is

> one of the best lawyers in the Public Defender's Office, and that if I did not like the job that he was doing I should hire another attorney. Sgt. Gaye also said that if Mr. Goins said I was guilty then I must be.
>
> I told the deputies that there was a serious conflict of interest going on with Mr. Goins and I. I said that Mr. Goins was not representing me, it seemed as if he was representing the state.

Wills Aff. 2-3, Dkt. 17-8 at 124-125.

Despite Wills' protests, Goins in closing again excluded the possibility of a not-guilty verdict and argued that Wills committed manslaughter:

> [W]hat we're arguing about is not whether a crime was committed, or who did it …. What we're arguing about is what offense was committed …. And as I told you in my opening statement, this is a case of Manslaughter.

Dkt. 15-9 at 172. Later, he added: "A person who acts in self defense does not have legal responsibility for the killing. … But a person who has not acted in self defense has a responsibility for the killing. And Everett has done that." Dkt. 15-9 at 183. He concluded: "I ask that you return a verdict of Manslaughter." Dkt. 15-9 at 184.

Wills did not testify. The jury found him guilty of second-degree murder by a vote of 10 to 2. Dkt. 15-9 at 207-208. He was sentenced to life without parole. Dkt. 15-9 at 212.

Wills appealed his conviction and sentence. The Court of Appeal affirmed, 125 So. 3d at 519, and the Louisiana Supreme Court denied his application for su-

pervisory or remedial writs, *see State ex rel. Wills* v. *State*, 140 So. 3d 1184 (La. 2014) (Mem.).

Wills filed a timely *pro se* application for state post-conviction relief on August 17, 2015. He argued that his rights under the Sixth and Fourteenth Amendments were violated when Goins "[r]e-wrote [Wills'] defense theory without his consent[and] conceded guilt in his opening statement[] and in his closing argument" and "[f]ailed to subject the state's case to meaningful adversarial testing." Dkt. 1-4 at 110. Wills explained that Goins had presented his manslaughter theory to the jury "in opposition to [Wills'] affirmative defense of justifiable homicide"—a defense Wills had "consistently maintained"—and did so without notifying Wills, let alone obtaining his consent. Dkt. 1-4 at 111.

Although Wills framed these arguments principally under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *United States* v. *Cronic*, 466 U.S. 648 (1984), he also invoked the autonomy-based principles that would become the analytical framework of *McCoy*. *Compare* Dkt. 1-4 at 111 (in arguing that Goins' admission of guilt over Wills' objection violated his constitutional rights, relying on principle that "'such basic decisions as … whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make'"), *with McCoy*, 138 S. Ct. at 1508. Wills also relied on *Wiley* v. *Sowders*, 647 F.2d 642 (6th Cir. 1981), which held that defense counsel's admitting guilt deprived the defendant of the "constitutional right to have his guilt or innocence decided by the jury" and "nullified the adversarial quality of this fundamental issue." *Id.* at 650 (quoted in Dkt. 1-4 at 113); *see also id.* at 649 (citing *Brookhart* v. *Janis*, 384 U.S. 1 (1966)). Wills also argued that Goins' admitting his guilt constructively de-

nied Wills the right to testify in his own defense. *See* Dkt. 1-4 at 126.

The State trial court denied relief on December 18, 2015. *See* Dkt. 1-9 at 13-15. It set out the standards for ineffective assistance and then announced that Wills had failed to meet those standards in a cookie-cutter, one-paragraph discussion that mentioned no fact specific to Wills' claim. That paragraph read, in full:

> Petitioner has not met this burden of proof. Petitioner has failed to prove that trial counsel's performance, or lack thereof, fell below the standard of reasonableness and competency nor has Petitioner shown that but for these "errors" made by trial counsel, there is a reasonable probability that the outcome of the trial would have been different. There is a strong presumption that the conduct of trial counsel is reasonable and professional and Petitioner's mere assumptions with no factual or evidentiary basis do not equate to ineffective assistance. Therefore, this Court finds Petitioner's claim to be without merit.

Dkt. 1-9 at 14.

The Court of Appeal denied Wills' application for supervisory review on March 24, 2016, *see* Dkt. 1-9 at 32, and the Louisiana Supreme Court denied his applications for supervisory writs on May 26, 2017, *see* Dkt. 1-9 at 35, 40.

Wills filed a timely federal habeas petition on June 8, 2017. Still proceeding *pro se*, Wills contended that he had been deprived of his Sixth Amendment rights when Goins admitted his guilt against his express wishes and instructions to argue self-defense and de-

fense of others. Again, while framing his arguments largely in terms of *Strickland* and *Cronic*, he invoked the fundamental, autonomy-based Sixth Amendment principles that animated *McCoy*. *See, e.g.*, Dkt. 1-3 at 20, 36-37. Wills also argued that the state court "d[id] not address any portion of [his] claim of IAC on the merits" and that its ruling "is clearly contradicted by the exhibits [he] produced." Dkt. 1-3 at 14-15.

The State in response, clearly aware that Wills' petition raised an autonomy-based Sixth Amendment right, tried to fit the facts of Wills' case into those of *Florida* v. *Nixon*, 543 U.S. 175 (2004). *See* Dkt. 15-3 at 29. This argument was impossible to reconcile with the evidence: it misapprehended Goins' notes and ignored Wills' affidavit.[5]

This Court decided *McCoy* v. *Louisiana* on May 14, 2018. McCoy was convicted and sentenced to death for the killing of three relatives. 138 S. Ct. at 1503. Before trial, McCoy's attorney, Larry English, advised McCoy that the evidence was overwhelming and that he planned to admit McCoy's guilt in hopes of avoiding a death sentence. *See id.* at 1506. McCoy opposed that approach and told English to assert his innocence. *See id.* Nonetheless, English told the jury that McCoy had killed the three victims. *See id.* McCoy testified in his

[5] Goins' notes recounted Wills' insistence on self-defense and rejection of Goins' manslaughter idea. *See supra* n.4. Wills' affidavit described his efforts to alert the court to his objection to Goins' admission of guilt. *See supra* at 6-7; *cf. United States* v. *Mullins*, 315 F.3d 449, 455 (5th Cir. 2002) ("[R]outine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to do so."). In any event, *McCoy* requires only that a defendant inform her counsel—not the court—of her instruction not to admit guilt. *See, e.g.*, *People* v. *Eddy*, 244 Cal. Rptr. 3d 872, 879 (2019).

own defense, "maintaining his innocence and pressing an alibi difficult to fathom." *Id.* at 1507.

This Court reversed McCoy's convictions. It held that a defendant has the right to insist that counsel not admit guilt, regardless of counsel's view of how best to protect the defendant's interests. 138 S. Ct. at 1505. Whether to admit guilt is a question not of strategy but of the client's fundamental objectives, and it is therefore a decision reserved for the client. *See id.* The Court explained:

> With individual liberty—and in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt. …
>
> Trial management is the lawyer's province…. Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.

Id. at 1505, 1508 (citation omitted).[6]

Because the admission of guilt over a defendant's objection "blocks the defendant's right to make the fundamental choices about his own defense," and because "the effects of the admission would be immeasurable," the Court concluded that the error is structural, automatically requiring a new trial. 138 S. Ct. at 1511.

On May 16, two days after *McCoy* came down, the magistrate judge issued his report and recommendation. He correctly observed that Wills based his Sixth Amendment claim on counsel's telling the jury he was guilty of manslaughter instead of arguing self-defense, and correctly described the applicable law.[7] But then the magistrate judge analyzed the merits not of Wills' Sixth Amendment claim, but of the unmade self-defense claim that he had instructed Goins to present. App. 20a-22a. The judge concluded that, on the evidence at trial, "Wills could not have claimed self-defense or defense of another." App. 21a-22a.[8] On that

---

[6] The Court distinguished *Nixon*, in which defense counsel had proposed admitting guilt at trial in the hopes of avoiding a death sentence and the defendant had neither objected nor affirmatively consented, *see* 543 U.S. at 178. "If a client *declines to participate* in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with *express statements* of the client's will to maintain innocence, however, counsel may not steer the ship the other way." *McCoy*, 138 S. Ct. at 1509 (emphasis added).

[7] *See* App. 19a-20a (in Louisiana, where defendant asserts self-defense, state retains "entire and affirmative burden" of proof).

[8] The magistrate judge does not appear to have considered whether Wills would have testified—and provided additional evi-

basis, he continued, "Wills' attorney pursued the only viable defense left to Wills, the defense of manslaughter." App. 22a. And as to presentation *of that defense*, the judge concluded, counsel was not ineffective. *See id.* (emphasis added).

The judge rejected Wills' argument that counsel's admission of guilt had constructively denied Wills the right to testify in his own defense, saying that Wills "did not have a viable defense of self-defense" and "had an opportunity to testify." App. 34a. The judge did not discuss whether counsel's telling the jury that Wills was guilty of manslaughter, over Wills' express objection, itself constituted ineffective assistance or otherwise violated Wills' Sixth Amendment rights. Nor did the judge mention this Court's just-issued decision in *McCoy*.

Wills filed timely objections to the magistrate judge's report. He argued that the report was wrong to reject his Sixth Amendment claims, both under *McCoy* and under pre-*McCoy* cases. *See* Objections, Dkt. 20 at 1-3, 10-11. The Warden had an opportunity to respond to Wills' objections, *see* Dkt. 20, but chose not to do so.

The district court ruled on July 20, 2018. It summarily dismissed the bulk of Wills' objections but addressed his argument that his "attorney's decision to change the affirmative defense from defense of self and others to manslaughter was without Wills' express consent and violative of the Sixth Amendment as set forth in *McCoy* v. *Louisiana*." App. 5a-6a. It described *McCoy* as holding that "the defendant ha[s] an absolute

---

dence to support self-defense or defense of others—if Goins had not admitted his guilt in his opening statement.

right to maintain his innocence" and an attorney may not concede guilt when the defendant "consistently maintained his innocence." App. 6a. This is "an issue of 'client autonomy, not counsel's competence.'" *Id.* (quoting *McCoy*, 138 S. Ct. at 1510).

The district court held that *McCoy* did not apply in the circumstances of Wills' case. It stated: "Wills claims that his counsel was deficient in failing to pursue his defense of self or defense of others theory. Yet, this Court finds that the decision of Wills' attorney was not a question of client autonomy and this case is distinguishable from *McCoy*." App. 6a. In a footnote, it expanded: "Throughout his case, McCoy maintained that he 'was not the murderer.' Here, Wills admitted that he shot the victim and instead challenges counsel's decision to pursue a manslaughter defense over a defense of self or defense of others defense." App. 6a n.1 (quoting *McCoy*, 138 S. Ct. at 1509).

The district court did not expressly discuss the application of *Teague* to *McCoy*, but its decision implicitly accepts that *McCoy* applies retroactively to already-final cases. Nor did the court expressly discuss exhaustion. It is therefore unclear whether the court (1) accepted that Wills had exhausted his autonomy-based challenge (now articulated under *McCoy*) by presenting an autonomy-based Sixth Amendment claim to the state courts, *see supra* at 8-9; or (2) believed that the *McCoy* claim was unexhausted but dismissed it on the ground that it was "plainly meritless," *see Rhines* v. *Weber*, 544 U.S. 269, 277 (2005); *see also* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust [state remedies].").

After rejecting Wills' *McCoy* claim, the district court briefly analyzed and rejected his objections under *Strickland*. It stated that the trial evidence "d[id] not support a defense of self or defense of others theory," without considering how trial counsel's decision to concede guilt bore on the evidence adduced at trial. *See* App. 6a. It denied a certificate of appealability.

Wills sought a certificate of appealability from the Fifth Circuit. The Warden again chose not to file a response. Wills argued that he had made a substantial showing of the denial of his Sixth Amendment rights, in that Goins' concession of Wills' guilt both violated Wills' autonomy and denied him the effective assistance of counsel. *See* Wills Br. for COA, *Wills* v. *Vannoy*, No. 18-30895 (5th Cir. Sept. 7, 2018) (citing, among others, *Strickland*, *Cronic*, and *McCoy*).

The Fifth Circuit denied a certificate of appealability on March 1, 2019. It observed that "Wills renews each of the claims raised in the district court," but concluded that he "failed to make the required showing" that "reasonable jurists would find the district court's assessment of his … claims debatable or wrong, … or that the issues deserve encouragement to proceed further." App. 1a-2a (citing *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003), and *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000)).

Wills filed a timely *pro se* petition for certiorari on May 30, 2019. After the State waived response and this Court, on September 19, 2019, requested a response, Wills retained counsel. This amended petition is submitted pursuant to the accompanying motion.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DISAGREEMENT OVER WHETHER *MCCOY* IS LIMITED TO DEFENDANTS WHO DENY THE *ACTUS REUS*

The district court reasoned that defense counsel's admission of Wills' guilt over Wills' objection and contrary to his instruction to argue self-defense or defense of others is "not a question of client autonomy," and rejected Wills' claim under *McCoy*. App. 6a. By denying a certificate of appealability, the Fifth Circuit concluded that "jurists of reason" could not "disagree with the district court's resolution of [Wills'] constitutional claims." *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003). That was mistaken, and it conflicts with a decision of the Supreme Court of Louisiana. The Court should grant certiorari to resolve this conflict.

A. The Supreme Court Of Louisiana Has Held, In Conflict With The Fifth Circuit, That *McCoy* Applies To A Defendant Who Admitted Killing The Victim

The Supreme Court of Louisiana has correctly held that *McCoy* protects a defendant who admitted killing the victim but instructed his counsel to present a defense that would have, if successful, resulted in a not-guilty verdict. *See State* v. *Horn*, 251 So. 3d 1069 (La. 2018). That decision directly conflicts with the Fifth Circuit's decision below; this Court should grant certiorari to resolve the conflict.

The defendant in *Horn* was charged with first-degree (capital) murder for the death of 12-year-old Justin Bloxom. 251 So. 3d at 1070. At trial, defense counsel argued that the State had failed to prove either of two elements of first-degree murder: specific intent

to kill and engagement in aggravated or second-degree kidnapping. *See id.* at 1072. In closing argument, counsel repeatedly told the jury that he was "not asking them to find defendant 'not guilty,'" but only to find him not guilty of first-degree murder. *Id.* at 1074-1075. Instead, counsel said, "I think the facts fit manslaughter, but if you don't want to accept that … you can convict him of second-degree murder." *Id.* at 1075.

These statements were contrary to Horn's instructions. Horn made clear both before trial and immediately after closing arguments that he objected to counsel's "refusal to use the defense" he requested. *Horn*, 251 So. 3d at 1074-1075. Specifically, Horn "instructed counsel only to make an argument of accidental killing via the negligent homicide statute." *Id.* at 1075.

On appeal, the State argued that Horn's instruction to argue negligent homicide—as opposed to denying outright that he killed the victim—made *McCoy* inapplicable. *See Horn*, 251 So. 3d at 1075. The Louisiana Supreme Court rejected that argument:

> [We] decline to restrict application of the holding in *McCoy* solely to those cases where a defendant maintains his absolute innocence to any crime. *McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense. Although Mr. McCoy's objective was to pursue a defense of innocence by presenting an alibi defense, Mr. Horn's objective was to assert a defense of innocence to the crime charged and the lesser-included offenses, i.e. asserting his innocence to any degree of murder.

Id. at 1075-1076. Under Louisiana law, if the jury had credited Horn's desired negligent-homicide defense, it

would have had to return a not-guilty verdict. *See id.* at 1076 ("The only verdicts the jury was permitted to enter were 'guilty,' 'guilty of second degree murder,' 'guilty of manslaughter,' or 'not guilty.' *See* La. C.C.P. art. 814."). Accordingly, counsel's admission of guilt violated Horn's right, under *McCoy*, to control the "fundamental choice[]" of his defense's objective. *Id.*

Wills' *McCoy* claim would succeed under the rule adopted in *Horn*. Like Horn, Wills did not deny that he killed the victim. And, like Horn, he instructed his counsel not to admit guilt and instead to present a defense that would have, if accepted, resulted in a not-guilty verdict. *See, e.g.*, *State* v. *Curley*, 250 So. 3d 236, 243 (La. 2018) ("Self-defense is … 'a defense based on justifiable conduct, in the nature of an affirmative defense, which defeats culpability.'" (citation omitted)); *State* v. *Deshotel*, 674 So. 2d 260, 260 (La. 1996) (per curiam); *State* v. *Sandiford*, 90 So. 261, 263 (La. 1921). Instead of following that instruction, Wills' counsel, like Horn's counsel, told the jury that his client was guilty of manslaughter.

The Fifth Circuit's decision therefore directly conflicts with the Louisiana Supreme Court's. This Court should grant certiorari to resolve the conflict. Although the split is not yet deep, a conflict between the highest court of a State and the federal court of appeals for the circuit in which that State lies is a serious one that warrants prompt resolution. *See* Pet. Reply 4, *Mathena* v. *Malvo*, No. 18-217 (U.S. Oct. 30, 2018) (the "main reason we are seeking review" is because the "Fourth Circuit's decision has created a direct split with Virginia's highest court on the same important matter"), *cert. granted*, 139 S. Ct. 1317 (2019); *Virginia* v. *LeBlanc*, 137 S. Ct. 1726, 1729-1730 (2017) (per curiam) (granting certiorari and reversing Fourth Circuit

decision that conflicted with Virginia Supreme Court decision, because doing so, "rather than waiting until a more substantial split of authority develops[,] spares Virginia courts from having to confront this legal quagmire"); *see also Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 762 (1994) (certiorari granted to resolve the conflict between Florida Supreme Court and Eleventh Circuit).

The issue on which the Fifth Circuit has split from the Louisiana Supreme Court is an important one. It concerns the scope of the personal "right to defend," the exercise of which "must be honored out of that respect for the individual which is the lifeblood of the law." *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1507 (2018) (internal quotation marks omitted). This Court should grant certiorari.

B. The Fifth Circuit's Decision Is Wrong

The courts below were wrong to conclude that *McCoy* applies only to a defendant who denies committing the *actus reus*. *McCoy* itself makes that plain, and this Court should reverse.

A defendant's Sixth Amendment right to control "*his* defence" is at the heart of *McCoy*. 138 S. Ct. at 1509 (quotation marks omitted). If the defendant decides that his objective is to assert innocence—whatever his basis for doing so might be—that *is* his objective, and "his lawyer must abide by that objective and may not override it by conceding guilt." *Id.*

Put differently, *McCoy* held that "[a]utonomy to decide that the objective of the defense is to assert innocence" belongs in the "category" of "decisions [that] … are reserved for the client." 138 S. Ct. at 1508. "[M]aintaining … innocence," it explained, is not a

"strategic choice[] about how best to *achieve* the client's objectives; … [it is a] choice[] about what the client's objectives in fact *are*." *Id.* Accordingly, *McCoy* "h[e]ld that a defendant has the right to insist that counsel refrain from admitting guilt." *Id.* at 1505.

Nothing about that holding or its rationale turns on the grounds on which the defendant asserts innocence. A defendant who, like Wills, asserts that he acted in self-defense "maintain[s] [his] innocence" just as much as one who asserts that he was not at the crime scene. *See, e.g.*, *Sandiford*, 90 So. at 263 (defendant's "guilt or innocence" depended on resolution of his self-defense claim). Wills, just as much as McCoy, "ha[d] the right to insist that counsel refrain from admitting guilt." *McCoy*, 138 S. Ct. at 1505.

The grant of certiorari in *McCoy* further confirms that the Court did not confine itself to the Sixth Amendment rights of defendants who deny the *actus reus*. The question presented was broadly worded: "Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection?" *See* Pet. i, *McCoy* v. *Louisiana*, No. 16-8255 (U.S. Mar. 6, 2017).[9] And the Court observed that the decision under review had parted ways with decisions of three other State supreme courts. *See McCoy*, 138 S. Ct. at 1510. In one of those decisions, the court had affirmed a defendant's right to insist that counsel not admit guilt and instead argue self-defense. *See People* v. *Bergerud*, 223 P.3d 686, 692 (Colo. 2010) (defense counsel argued in opening that defendant lacked the deliberation required for first-degree murder, instead of "present[ing]

[9] The petition presented two questions, but the Court granted only the first. *See McCoy* v. *Louisiana*, 138 S. Ct. 53 (2017) (Mem.).

the self-defense theory [defendant] desired"). If this Court had considered McCoy's denial of the *actus reus* to be material to the Sixth Amendment right, it would not have concluded that the decision under review had "parted ways" with *Bergerud*.

Under *McCoy*, Wills had a Sixth Amendment right to insist that his counsel not admit his guilt and instead argue that he acted in self-defense. The Fifth Circuit was wrong to conclude otherwise.

II. *TEAGUE* IS NO OBSTACLE TO WILLS' CLAIM

Several state and lower federal courts are currently considering whether *McCoy* applies retroactively to cases on collateral review under *Teague* v. *Lane*, 489 U.S. 288 (1989). This Court need not address that issue here, however, because the State waived the issue by failing to raise it in the courts below. If the Court were to reach the issue despite the State's waiver, it should conclude that *McCoy* applies retroactively.

A. The State Has Waived Any Argument That *McCoy* Does Not Apply Retroactively

It is well established that "a State can waive the *Teague* bar by not raising it." *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994); *see also Danforth* v. *Minnesota*, 552 U.S. 264, 289 (2008) ("We have held that States can waive a *Teague* defense, during the course of litigation, by expressly choosing not to rely on it, or by failing to raise it in a timely manner." (citations omitted)).

The State failed to raise *Teague* at all, let alone in a timely manner, in the courts below. As explained above, at 13, Wills relied on *McCoy* at his first opportunity: in his objections to the magistrate judge's report and recommendations, which issued just two days

after this Court announced *McCoy*. The State could have opposed Wills' objections on the ground that his *McCoy* claim was *Teague*-barred, *see* Dkt. 20 ("Response to Objection to R&R due by 6/12/2018"), but it chose not to do so. Accordingly, the district court addressed Wills' *McCoy* claim on the merits, implicitly accepting the retroactivity of *McCoy*'s rule. Then, when Wills sought a certificate of appealability from the Fifth Circuit, the State again could have opposed his application on the ground that the district court erred by considering the *McCoy* claim on the merits, notwithstanding *Teague*. Again, it chose not to file a response. The State's actions constitute a clear waiver.

B. If The Court Chooses To Disregard The State's Waiver, It Should Confirm That *McCoy* Applies Retroactively Under *Teague*

The Court has discretion to consider a *Teague* argument despite a State's failure to raise it in the lower courts. *See, e.g.*, *Buck* v. *Davis*, 137 S. Ct. 759, 780 (2017). If this Court grants certiorari to review the first question presented, we respectfully submit that it should not exercise that discretion. *See id.* (declining to consider waived *Teague* argument where "issues we thought worthy of review … would be insulated from consideration" if argument were persuasive). However, if it chooses to consider *Teague*, it should conclude that *McCoy* applies retroactively. That question presents an important issue of federal law that will recur until resolved by this Court.

1. *McCoy* Applies Retroactively Under *Teague*

Teague governs the retroactivity of rules of constitutional law to cases on collateral review. Under

Teague, a rule will apply retroactively if it is not a "new" rule—in other words, if it was "*dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (plurality opinion); *cf. id.* (a new rule is one that "breaks new ground or imposes a new obligation on the States").

Even "new" rules apply retroactively if they fall into one of two exceptions. The first exception encompasses rules that "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe,'" *Teague*, 489 U.S. at 311 (plurality opinion), as well as those that "prohibi[t] a certain category of punishment for a class of defendants because of their status or offense," *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989). Subsequent decisions have characterized these rules collectively as "substantive" rules. *See, e.g.*, *Schriro* v. *Summerlin*, 542 U.S. 348, 351-352 (2004).

The second exception encompasses new "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311 (plurality opinion)). This exception extends to rules that "not only improve accuracy," but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague*, 489 U.S. at 311); *see also Whorton* v. *Bockting*, 549 U.S. 406, 421 (2007).

McCoy applies retroactively under these standards.

a. *McCoy* was dictated by precedent existing at the time Wills' conviction became final, and, accordingly, it did not announce a "new" rule. Specifically,

McCoy was dictated by this Court's decisions in *Faretta* v. *California*, 422 U.S. 806 (1975), *Brookhart* v. *Janis*, 384 U.S. 1 (1966), and *Florida* v. *Nixon*, 543 U.S. 175 (2004). Those cases established the predicates that mandated *McCoy*'s result: the personal nature of the Sixth Amendment right to a defense and the defendant's autonomy to make decisions fundamental to that defense.

In *Faretta*, this Court concluded that the Sixth Amendment "grants to the accused *personally* the right to make *his* defense." 422 U.S. at 819 (emphasis added); *see also id.* at 820 ("the right to make a defense" has a "personal character upon which the [Sixth] Amendment insists"). *Faretta* also concluded that the Counsel Clause "speaks of the 'assistance' of counsel," and thus forbids an action that would render counsel "not an assistant, but a master." *Id.* at 820.

McCoy follows ineluctably from these principles. The defendant's "personal[]" right to make "his defense," *Faretta*, 422 U.S. at 819, mandates that he controls the objectives of that defense. Because "an assistant, however expert, is still an assistant," *id.* at 820, counsel cannot constitutionally override the defendant's decision as to those objectives. *See generally McCoy*, 138 S. Ct. at 1508 (relying on those passages in *Faretta* and concluding that "[a]utonomy to decide that the objective of the defense is to assert innocence belongs in … [the] category" of "decisions [that] … are reserved for the client").

Brookhart and *Nixon* further confirm that *McCoy*'s rule is not new. In *Brookhart*, the Court held that defense counsel could not constitutionally override "his client's *expressed desire*" to plead not guilty and agree instead to a "truncated" trial procedure that was the

"*practical equivalent of*"—but not formally—"a plea of guilty." 384 U.S. at 3, 6-8 (emphasis added).[10] And in *Nixon*, the Court held that when a defendant in a capital case, "informed by counsel, *neither consents nor objects* to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course" under either *Strickland* v. *Washington*, 466 U.S. 668 (1984), or *United States* v. *Cronic*, 466 U.S. 648 (1984). *Nixon*,

---

[10] The Court held that doing so would improperly "shut off the defendant's right to confront and cross-examine the witnesses against him." *Brookhart*, 384 U.S. at 8. Equally, counsel's concession of guilt in *McCoy* and in Wills' case fundamentally undermined their constitutional rights over their own testimony. A defendant has a right both to testify in his own defense and to choose not to testify. *See Rock* v. *Arkansas*, 483 U.S. 44, 52 (1987) (right to testify in own defense is "[e]ven more fundamental to [the Sixth Amendment right to] a personal defense than the right to self-representation"); *Brooks* v. *Tennessee*, 406 U.S. 605, 609 (1972) (defendant's decision whether to testify or remain silent should be made "in the unfettered exercise of his own will"). Counsel's concession of guilt over the defendant's objection both impermissibly influences the defendant's calculus over whether to remain silent and renders the defendant's "right" to testify in his own defense a profoundly empty one. *Cf. McCoy*, 138 S. Ct. at 1511 ("[A] jury would almost certainly be swayed by a lawyer's concession of his client's guilt.").

To be sure, *Nixon* rejected the argument that *Brookhart* "require[s] … 'affirmative, explicit acceptance'" by the defendant of proceedings that surrender "'the right to contest … guilt or innocence.'" 543 U.S. at 188-189 (citation omitted). But, as explained below, at 25-26, *Nixon* involved a defendant who remained resolutely silent when counsel explained his proposal to concede guilt at the first phase of a capital trial in the hopes of avoiding a death sentence at the second phase. *Nixon* therefore had no reason to consider *Brookhart*'s application to a case where—as here—the defendant expressly maintained his innocence and rejected counsel's admission of guilt.

543 U.S. at 178 (emphasis added). In so holding, the Court emphasized the absence of protest at least four times. *See id.*; *id.* at 179 ("failure to provide express consent"); *id.* at 181 ("never verbally approved or protested"); *id.* at 192 ("defendant is unresponsive"). The unavoidable implication was that the absence of objection was determinative: if the defendant *had* objected, the conviction would not stand—exactly as the Court held in *McCoy*.

b. Even if *McCoy*'s rule were new, it applies retroactively because the right it protects is a substantive Sixth Amendment right, not a procedural right. Under *Welch* v. *United States*, 136 S. Ct. 1257 (2016), "the function of the rule" dictates whether it is substantive or procedural, *id.* at 1265-1266, and *McCoy*'s function is to protect the defendant's autonomy, not to regulate the niceties of his trial, *see McCoy*, 138 S. Ct. at 1508. Put differently, *McCoy*'s holding that a defendant has the "right to make the fundamental choices about his own defense," *id.* at 1511, cannot be reframed as merely "regulat[ing]" trial procedure, *see Welch*, 136 S. Ct. at 1265, because the autonomy to make those fundamental choices stands apart from the conduct of the trial itself. As with the decision at issue in *Welch*, *McCoy* "did not, for example, 'allocate decisionmaking authority' between judge and jury, or regulate the evidence that the court could consider in making its decision." *Id.* (citations omitted). And "'even the use of impeccable fact-finding procedures could not legitimate'" a conviction or sentence rendered on an individual whose counsel conceded guilt against her wishes. *Id.*; *see McCoy*, 138 S. Ct. at 1510-1511. A violation of "the defendant's right to make the fundamental choices about his own defense," is not "simply an error in the trial process itself." *McCoy*, 138 S. Ct. at 1511.

Those who suffer a *McCoy* violation therefore suffer a harm different in kind from the harm occasioned by a procedural violation, and they, as a class, cannot be subject to criminal punishment unless granted a new trial in which their right to decide the "fundamental objective of [their] representation" is respected. *See* 138 S. Ct. at 1510. *McCoy* is retroactive under *Teague*'s first exception.

c. Finally, if this Court were to conclude that *McCoy*'s rule is both new and not substantive, it should hold that it is retroactive as a "watershed" rule, "implicating the fundamental fairness and accuracy of criminal proceedings." *Whorton*, 549 U.S. at 416 (quotation marks omitted). New procedural rules must "meet two requirements" to apply retroactively. *Id.* at 418. "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* (quotation marks and citations omitted).

McCoy's rule meets both requirements. *First*, when a defendant maintains innocence but her counsel admits guilt, there is no meaningful testing of the prosecution's case. It is a foundational principle of our system of criminal justice that adversarial testing is necessary to prevent an impermissibly large risk of inaccurate conviction. "The very premise of our adversary system … is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975). When counsel admits guilt against the defendant's express wishes, conviction is virtually guaranteed—irrespective of the defendant's actual guilt or innocence.

Second, if (by hypothesis) *McCoy* established a new procedural rule, then that rule altered our understanding of "bedrock" elements of fairness. It is on par with the rule of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the benchmark case for *Teague*'s second exception. *Gideon* held that the "noble idea" of defendants receiving "fair trials before impartial tribunals in which every defendant stands equal before the law" "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.* at 344-345 (quoting *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932)). Equally, that "noble idea" cannot be realized if defense counsel tells the jury that the defendant is guilty even though the defendant maintains innocence. Such a defendant no more has "a lawyer to assist him" than one who has no lawyer at all.

In holding that *McCoy* satisfies the second, "watershed" exception, this Court should confirm that this exception remains a basis for retroactive application of new rules. Although this Court has not yet applied the watershed exception articulated in *Teague* to hold retroactive a newly-announced rule, it likewise has not proposed eliminating the exception.[11]

2. *McCoy*'s Retroactivity Is A Certworthy Issue

Courts around the country are currently considering *McCoy*'s retroactivity. In Texas, for example, the

---

[11] The Court may wish to confirm, further, that the Constitution itself mandates retroactive application of rules falling into the "watershed" exception—as it did for "substantive" rules in *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 729 (2016). To do so is not strictly necessary for a decision in Wills' favor, however, since he is proceeding here in federal habeas corpus.

Court of Criminal Appeals recently granted a stay of execution and ordered briefing on the question (among others), "Is *McCoy* retroactive to convictions that are already final upon direct review?" *Ex parte Barbee*, 2019 WL 4621237, at *2 (Tex. Crim. App. Sept. 23, 2019) (per curiam). The Louisiana Supreme Court, similarly, remanded a capital case for consideration of whether "*McCoy* v. *Louisiana* applies retroactively on state collateral review." *State* v. *Magee*, __ So. 3d __, 2018 WL 6647250 (La. Dec. 17, 2018) (per curiam).[12] The issue is presented in myriad other state and federal cases.[13] It is likely to recur until definitively resolved by this Court.[14]

---

[12] On remand, the district court ruled that *McCoy* does not apply retroactively under *Teague*. *See State* v. *Magee*, No. 430371J (22d Jud. Dist. Ct. St. Tammany Parish July 11, 2019). An application for supervisory writ is currently pending in the Louisiana Supreme Court.

[13] *See, e.g.*, *State* v. *Weber*, 2019 WL 3430487, at *2-4 (Del. Super. July 29, 2019) (report and recommendation); *Smith* v. *Hooks*, 2018 WL 9815045, at *7-8 (E.D.N.C. Sept. 19, 2018); *Elmore* v. *Shoop*, 2019 WL 3423200, at *10 (S.D. Ohio July 30, 2019) (report and recommendation); *see also, e.g.*, *Harvey* v. *State*, 2019 WL 5273180 (Fla. Oct. 14, 2019) (appellee briefing retroactivity of *McCoy* under Florida's standard in Supreme Court of Florida); *Howard* v. *Baker*, 2019 WL 4346573, at *1-2 (D. Nev. Sept. 12, 2019).

[14] Resolution by this Court is also important because some States permit a successive petition for postconviction relief based on a new decision like *McCoy* only after *this Court* has ruled it retroactive. *See, e.g.*, *Commonwealth* v. *Manus*, 2019 WL 2598179 at *3 (Pa. Super. June 25, 2019) (discussing *McCoy* claim under 42 Pa. Stat. § 9545(b)(1)(iii)); *State* v. *Lewis*, 2014 WL 2192147, at *2-3 (Ohio Ct. App. May 27, 2014) (discussing *Alleyne* v. *United States*, 570 U.S. 99 (2013), claim under Ohio Rev. Code § 2953.23(A)(1)(a)).

Furthermore, although Wills' case illustrates that *McCoy* errors are not confined to the capital context, they will likely occur more frequently in that context, *see McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting), and so are more likely to arise in connection with emergency applications for stays of execution, *see, e.g.*, *King* v. *Texas*, Nos. 18-8970 and 18A1091. Deciding *McCoy*'s retroactivity now will remove the need to resolve the issue's certworthiness repeatedly and on an emergency basis.

III. ALTERNATIVELY, THE COURT SHOULD SUMMARILY REVERSE OR VACATE THE DECISION BELOW

If the Court does not grant certiorari, we respectfully submit that it should summarily reverse the Fifth Circuit's denial of a certificate of appealability. As this Court has explained, "a prisoner seeking a COA need only demonstrate a 'substantial showing of the denial of a constitutional right.' … A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)).

A. As explained above, at 14, the district court considered Wills' *McCoy* claim without expressly addressing exhaustion. Its conclusion that Wills' claim was "distinguishable from *McCoy*" was a merits determination. *See* App. 6a & n.1. Irrespective of whether the court believed the claim was exhausted but meritless, or unexhausted and "plainly meritless," *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005), Wills was entitled to a certificate of appealablity. The question whether this case falls within the scope of *McCoy* is, at least, one on

which "jurists of reason could disagree." *See supra* Part I (lower courts' conclusion that Wills' claim fell outside *McCoy* was both incorrect and in conflict with decision of Louisiana Supreme Court).[15]

B. The State might argue that this Court should nevertheless affirm on the ground that Wills did not exhaust his autonomy-based Sixth Amendment claim in state court. But that is not correct. *See supra* at 8-9.[16] And in rejecting Wills' Sixth Amendment claims, the State court relied on its determination that Wills had presented "mere assumptions with no factual or evidentiary basis." *See* Dkt. 1-9 at 14. That was an unreasonable determination of fact. Wills' affidavit described the key facts with specificity, including his adamant objection after Goins admitted guilt in opening and his appeal to courtroom personnel. *See* Aff. 1-3, Dkt. 17-8 at 123-125. Wills also submitted handwritten notes in which Goins contemporaneously recorded Wills' repeated "insist[ence]" on self-defense, his rejection of Goins' manslaughter argument, and their resulting "impas[s]e." *See* Dkt. 17-8 at 127-129, 131-133.

Any reasonable observer would conclude that the State court was wrong to dismiss the facts in Wills' affidavit and Goins' notes as "mere assumptions" and to deem them to have "no factual or evidentiary basis." This is not a question on which "'[r]easonable minds re-

---

[15] Even if the State had not waived *McCoy*'s retroactivity, that issue is likewise, at least, one that reasonable jurists would find debatable. *See supra* Part II.

[16] There is no dispute that Wills' other Sixth Amendment claims are exhausted. *See* App. 10a.

viewing the record might disagree' about the finding in question." *Wood* v. *Allen*, 558 U.S. 290, 301 (2010).[17]

Because the state court dismissed Wills' Sixth Amendment claims based on that unreasonable determination, *see* Dkt. 1-9 at 14, Wills is entitled to habeas relief, *see* 28 U.S.C. § 2254(d)(2) (relief available if state postconviction adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented"). *A fortiori*, Wills' entitlement to relief under section 2254(d)(2) easily clears the bar for granting a certificate of appealability.

C. Moreover, even considering only pre-*McCoy* decisions under AEDPA's deferential standard, it was susceptible to debate among reasonable jurists that the state court's decision was contrary to, or an unreasonable application of, *Strickland* and *Cronic*. Wills' self-defense claim was supported by the trial testimony of three witnesses and his own recorded statement to police, and this evidence was sufficient for the judge to charge the jury on self-defense. *See* Dkt. 15-9 at 194-195.[18] And yet Goins told the jury that Wills was guilty

[17] *Wood* left open the question whether a habeas petitioner seeking relief under § 2254(d)(2) must also satisfy the standard of § 2254(e)(1), where (as here) no evidentiary hearing occurred in federal court. *See* 558 U.S. at 293. That question need not be resolved in this case either, because Wills' evidence easily meets both tests: Wills' affidavit and Goins' notes are clear and convincing evidence that overcomes any presumption that it was correct.

[18] In light of this, the district judge and magistrate judge were wrong to conclude (App. 6a, 21a-22a) that "Wills could not have claimed" self-defense or defense of another on the trial evidence. *See State* v. *Langford*, 62 So. 597 (La. 1913) ("[I]n the present case the law of self-defense could not have been inapplicable, since the judge did charge it[.]").

of manslaughter. Goins' representation thereby fell below an objective standard of reasonableness and both prejudiced Wills and constituted a "breakdown in the adversarial process" that was presumptively prejudicial. *See Strickland*, 466 U.S. at 687-688; *Cronic*, 466 U.S. at 662. Again, at the very least, jurists of reason could conclude that Wills' *Strickland* and *Cronic* claims were adequate to deserve encouragement to proceed further.

D. Finally, if this Court does not summarily reverse, we respectfully submit that it should grant the petition, vacate the decision below, and remand for reconsideration in light of *Buck*. As in the decision that *Buck* reversed, the Fifth Circuit below "phrased its determination in proper terms," 137 S. Ct. at 773, but misapplied the standard. The result was yet another instance of the Fifth Circuit's disregard for this Court's section 2253(c)(2) line of cases, and this Court should, at the very least, instruct the Fifth Circuit to reconsider this case in light of the most recent decision in that line.[19]

---

[19] It is no bar to the requested disposition that *Buck* predated the Fifth Circuit's decision. *See, e.g.*, *Youngblood* v. *West Virginia*, 547 U.S. 867 (2006) (per curiam) (remanding for reconsideration in light of *Brady* and its progeny); *Stutson* v. *United States*, 516 U.S. 193 (1996) (per curiam) (remanding for reconsideration in light of decision issued over a year before decision under review); *Robinson* v. *Story*, 469 U.S. 1081 (1984) (remanding for reconsideration in light of decision issued three months before decision under review).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Fifth Circuit's decision denying a certificate of appealability should be summarily reversed, or, at least, vacated and remanded.

Respectfully submitted.

ALAN E. SCHOENFELD
JANET R. CARTER
MICHAEL D. GOTTESMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

RICHARD BOURKE
LOUISIANA CAPITAL
ASSISTANCE CENTER
636 Baronne Street
New Orleans, LA 70133

SETH P. WAXMAN
Counsel of Record
SAMUEL M. STRONGIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

NOVEMBER 2019