No. 21-1357

In The
Supreme Court of the United States

JAMES S. TYLER, III,

Petitioner,

v.

WARDEN DARREL VANNOY
LOUISIANA STATE PENITENTIARY,

Respondent.

**On Petition For A Writ Of Certiorari
To The First Judicial District Court
Of Caddo Parish, Louisiana**

REPLY BRIEF FOR PETITIONER

WILLIAM M. SOTHERN*
LAW OFFICE OF
WILLIAM M. SOTHERN
1024 Elysian Fields Avenue
New Orleans, LA 70117
billy@sothernlaw.com
(504) 524-7922

RACHEL I. CONNER
LAW OFFICE OF
RACHEL I. CONNER
3015 Magazine Street
New Orleans, LA 70115
(504) 581-9083

Attorneys for James Tyler
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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ARGUMENT

A. The *McCoy* decision was dictated by long-settled precedents and general Constitutional principles.

In *Teague v. Lane*, the Court attempted to apply a retroactivity principle in a way that balanced state interest in the finality of convictions against the need to enforce constitutional protections. 489 U.S. 288 (1989). Recognizing that the task of determining whether a case announces a new rule or is merely the application of an old rule to a new factual scenario would prove difficult, the Court expressly did not "attempt to define the spectrum of what may or may not constitute a new rule" for the purposes of retroactivity. *Id*. at 301. The Court, however, offered the following: "a case announces a new rule if the result was not dictated by precedent existing at the time the petitioner's conviction became final." *Id*.

The Court employed these guidelines in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Prior to *Penry*, no specific Supreme Court decision had commanded courts to instruct juries how to consider specific mitigating evidence in a particular case. However, Eighth Amendment jurisprudence had repeatedly reaffirmed the need for an individualized assessment of the appropriateness of the death penalty. *See*, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978). The Court concluded that "despite the absence of a specific holding requiring the instruction sought by Penry, the rule Penry sought to benefit from was dictated by the Eighth Amendment principles espoused in the Court's prior cases." *Penry*, 492

U.S. at 316. The Court ultimately held that the rule was not new and did not impose a new obligation on Texas.

This Court's recognition that the application of established general principles in an analogous context is not a new rule barred by *Teague*, remains the law. *See Bousley v. United States*, 523 U.S. 614 (1998) (rejecting the argument that the petitioner's claim that his guilty plea was not knowing and intelligent was barred by *Teague* in part because "[t]here is surely nothing new about this principle. . .").

Since the Sixth Amendment guarantees criminal defendants the assistance of counsel for their defense, this Court's right to counsel jurisprudence necessarily affords defendants a right to prohibit counsel from conceding guilt. It is unreasonable to contend that capital defendants possessed a fundamental right to be defended by counsel at the time of Tyler's 1999 conviction, but had no authority to insist on being allowed to exercise it. A rule that allows capital defendants to present a defense and exercise their right to counsel is no new rule. *McCoy* simply requires the states to fulfill their obligations expressed in *Powell v. Alabama*, 287 U.S. 45 (1932) and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Just as Penry sought the application of Eighth Amendment principles well-established at the time of his conviction, Tyler seeks the application of Sixth Amendment principles that were established at the time his conviction became final.

a. *McCoy*'s holding would have been apparent to all "reasonable jurists" at the time of Mr. Tyler's trial.

At the time of Tyler's trial and conviction, it was clear from this Court's jurisprudence in *Gideon* and *Powell* that a state could not, consistent with the Sixth and Fourteenth Amendments, try a capital defendant without providing him the assistance of counsel for the purpose of defending against the state's accusations.

Shortly after the Court issued its opinion in *Gideon*, it affirmed that the purpose of the right to counsel "is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . " *Washington*, 388 U.S. at 19. This theme continued in *Chambers v. Mississippi* when the Court held, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." 410 U.S. at 294. A decade later, the Court reiterated, "We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Trombetta v. California*, 467 U.S. 479, 484 (1984).

The assurances of these earlier Sixth Amendment decisions, established the "rule of *McCoy*" generations before *McCoy*. Had Louisiana fulfilled its obligations in honoring the well-established and consistent jurisprudence of this Court, Tyler's counsel would have been unable to concede his guilt over his objections, as any

number of these decisions prohibit an attorney from taking such action over the protest of the client.

It is insusceptible to debate among reasonable jurists that in 1999 Mr. Tyler possessed the right to the guiding hand of counsel, a right to be heard through counsel, a right to present a defense, and a right to the assistance of counsel specifically for his defense, along with the personal right to insist on being allowed to exercise these fundamental rights. It is also insusceptible to debate that Tyler was consequently denied all of these rights when counsel was allowed to admit guilt over his objections.

The "rule of *McCoy*" was not new to Louisiana and it should not have been surprising to the State as Louisiana's ethics rules for lawyers explicitly prohibits them from conceding their clients guilt unless they are testifying as a witness. *See* La. Rules of Prof. Cond. 3.4(e) ("A lawyer shall not . . . in trial, . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.").

Additionally, Louisiana's Constitution of 1974, which declares its rights are, "inalienable by the state and shall be preserved inviolate by the state" also guaranteed Tyler rights to present a defense, La. Const. art. 1, Sec. 16 right to the presumption of innocence, La. Const. art. 1, Sec. 16 and a right to due process, La. Const. art. 1, Sec. 2.

Of course, the Louisiana courts have been consistently unreasonable, prompting the routine intervention

of this Court. *See*, *e.g.*, *Montgomery v. Louisiana*, 577 U.S. 190, (2016); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Snyder v. Louisiana*, 552 U.S. 47 (2008); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *Cage v. Louisiana*, 498 U.S. 39 (1990); *Kyles v. Whitley*, 514 U.S. 419 (1995).

The Oxford English Dictionary defines "reasonable" as "fair and sensible." The Court should consider that some on the lower judicial ladder have been neither fair nor sensible, hence the need for *this* Court. No one should suggest that the members of this Court are unreasonable. Equally, none should suggest that Justices throughout its history have been infallible as demonstrated when the Court in *Betts* "made an abrupt break from its own well considered precedents," but later acknowledged and decided to return to its earlier "sounder" precedents in *Gideon*. 372 U.S. at 343.

Similarly, those that dissented in *McCoy*, after reviewing this Court's own well considered precedents, could recognize as the *Gideon* Court did, "*Well, actually, we were right the first time*. In accordance with our jurisprudence in *Gideon* and *Powell*, capital defendants do have a right to the assistance of counsel for their defense and an autonomy right to insist on being allowed to exercise it."

b. The State's accusations that Mr. Tyler has "shifted tactics" in his arguments before this Court are inaccurate.

i. Mr. Tyler made the argument in state court that *McCoy* was based on old law.

In its Brief, the State argues that Mr. Tyler's argument that *McCoy* was old law in state court was based on *Florida v. Nixon*, 543 U.S. 175 (2004), which was decided after Tyler's 1999 conviction. The State's assertion is inaccurate.

Mr. Tyler relied on *Nixon* solely to illustrate that *McCoy*'s holding did not present a clear break from any "precedent" emanating from *Nixon*. In what the State mischaracterizes as his "*Nixon* argument," Mr. Tyler actually argued that the *McCoy* holding was dictated by much older precedent and that McCoy, like Mr. Tyler, and like Gideon before him, made the decision to stand trial, but was denied counsel who would hold the prosecution to its heavy burden and present a defense. At its core, McCoy was denied the Assistance of Counsel for his defense, a right the Supreme Court has stated cannot be satisfied by "mere" appointment. *See United States v. Cronic*, 466 U.S. 648, 654-55 (1984) (the Sixth Amendment requires "not merely the provision of counsel, but 'Assistance,' which is to be 'for his defense.' ").

ii. James Tyler vociferously argued to the state court that his trial attorneys' improper concession of his guilt amounted to a constructive denial of counsel in violation of the Sixth Amendment.

The State argues that Tyler shifted tactics "arguing that a constructive denial of counsel occurred and claiming that 'McCoy merely reaffirmed the longstanding principle that criminal defendants are entitled the assistance of counsel for the purpose of their defense.'" Opp. at 9. There has been no shift in tactics as these arguments were presented in state court by counsel and pro se by Mr. Tyler.

In particular, Mr. Tyler argued pro se in state court that: "Though a prominent feature in *McCoy* highlights a defendant's right to autonomy, at its core, *McCoy* involves a defendant's right to have the Assistance of Counsel for his Defense. . . . As explained in *Childress v. Johnson*, 103 F.3d 1229 (5th Cir. 1997), '[C]onstructive denial of counsel occurs when the defendant is denied the guiding hand of counsel.' Mr. Tyler was unquestionably deprived of this guiding hand. . . ." Pro se supplement to Supervisory Writ. p. 3-4. *See also* LASC Writ Application at 25-26.

c. The State's mischaracterization of the case against Mr. Tyler as "strong" is a result of its never having been subjected to minimal adversarial testing.

The State attempts to justify trial counsel's actions by arguing, unpersuasively, that the case against Tyler was "strong" and that various facts were "proven" at trial. Opp. at 1-2, 3, 8. In Tyler's trial, where both the prosecution and defense were arguing in favor of the defendant's guilt, the impression given to the jury and left in the appellate record is that the State's case was strong. This impression results from a complete failure of the adversarial process.

The only direct evidence against Mr. Tyler consisted of the testimony of confidential informant, Sharlot Tedder, a crack addicted drug dealer, prostitute, and convicted felon who by the time of Tyler's trial was again incarcerated with pending charges. The descriptions of the two surviving witnesses were problematic for the State. One described with certainty the gunman's height as being four feet ten inches, while Tyler is five feet nine inches. The other failed to positively identify Tyler in both a photographic and pretrial live line up. There was no physical evidence linking Tyler to the crime. There was no video, no fingerprints, no DNA, and no confession.

The State argues that trial counsel cross-examined State witnesses. Opposition at 3. Tyler's attorney indisputably *questioned* State witnesses but this questioning failed to meet the definition and purpose of

"cross-examination," as it made no effort to challenge their testimony on direct examination.

Indeed, counsel's sole objective for questioning State witnesses was to elicit evidence of Tyler's guilt. During the questioning of two police officer witnesses, counsel actually elicited highly prejudicial testimony that Mr. Tyler was wanted in Missouri for a similar shooting and robbery. R. 3577, 3585-86.

Defense counsel's efforts actually provoked admonition from the trial court: "But this is the States case, not yours. . . . Under the current state of law, I don't think Defense Counsel can ask for the admissibility of his own client's confession in the State's case, as you are trying to do." R. 3504-06.

B. In the alternative, the rule announced in *McCoy* is substantive and therefore should be applied retroactively to James Tyler.

The State argues the McCoy decision announced a new procedural rule. To elucidate what constitutes a substantive rule, the State cites to *Montgomery v. Louisiana*, 577 U.S. 190 (2016), a case the Louisiana Supreme Court unreasonably decided on the issue of retroactivity.

In *Montgomery*, Louisiana unsuccessfully argued that because *Miller v. Alabama*, 567 U.S. 460 (2012) requires a certain process, it must have set forth a procedural rule. This Court held that Louisiana conflated a procedural requirement necessary to implement a

substantive guarantee, with a rule that "regulate[s] only the manner of determining the defendant's culpability." *Montgomery*, 577 U.S. at 210. This Court explained, "There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id*.

Tyler submits that it is patently unconstitutional to deprive of life and liberty to a class of capital defendants who were denied the rights to present a defense and to the guiding hand of counsel absent a waiver. *See Gideon*, 372 U.S. at 340; *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938) ("When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to convict and sentence.").

C. The State's assertion that Mr. Tyler did not raise his "*Griffith* claim" in state court is patently incorrect.

The State argues that Tyler "never presented this [Griffith] argument to the post conviction court that issued the only reasoned opinion in this litigation thus far." Opp. at 12, 19. This is not accurate.

In state post conviction, Tyler sought leave and was granted permission to file a pro se response to the

State's procedural objections.[1] The State's procedural history omits Tyler's pro se petition, which was filed on April 20, 2020.[2] Tyler's pro se brief argued that his concession of guilt claim should be exempted from a *Teague* bar because Louisiana's procedural framework steered concession of guilt claims to post conviction rather than direct appeal and therefore he was denied the full and fair adjudication of his claim prior to his conviction becoming final, upon with *Teague* was premised. *See Teague*, 489 U.S. at 311.

In his pro se filing, Tyler cited to *Griffith v. Kentucky*, 479 U.S. 314 (1987) for relief and in support of this argument, asserting that as a petitioner whose conviction had been affirmed prior to the adjudication of his claim, he should be viewed as being in the same legal posture as those with "traditional pending cases," cases on direct review. The post-conviction court considered and rejected Tyler's argument in its May 15, 2020 Order denying relief.

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[1] To the extent that Mr. Tyler's *pro se* arguments were not as fully briefed as the counseled argument made to the Louisiana Supreme Court, this Court has held that pro se documents are to be liberally construed. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Haines v. Kerner*, 404 U.S. 519 (1972).

[2] Similarly, the State neglected to identify the fact that Mr. Tyler filed the first post conviction filing in his case pro se on August 4, 1998. A copy of this filing is available upon review, along with Mr. Tyler's affidavit of indigency and institutional statement, with corresponding express mail receipts, showing service from the Tunica, LA post office on August 4, 1998 to Judge Bryson, the Caddo Parish Clerk of Court, and the DA's Office, with USPS Tracking No. EJ945832480US.

a. The exception to the finality rule urged by James Tyler neither impinges on a state's determination of the finality of convictions nor opens the proverbial "floodgates" to litigation.

The State argues that the retroactive application of *McCoy* would open the proverbial floodgates. Opp. at 11. Since, as Justice Alito acknowledged in *McCoy*, objections to counsel's concession of guilt are a rare occurrence, the individuals that would be part of any flood of litigation simply don't exist.

By counsel's count based on a review of pending state court cases, there are potentially six individuals in Louisiana[3] that could be affected if *McCoy* were applied retroactively to capital cases on collateral review – a small but significant number.[4] A finding for retroactivity would not automatically entitle those

[3] The State argues that there is no compelling reason to treat Tyler's case differently than *Hampton v. Vannoy*, 142 S.Ct. 96 (2021), another Louisiana petitioner with a *McCoy* claim for whom the Court denied certiorari. By contrast to Hampton, Tyler's entitlement to relief on the merits is clear. Indeed, the state court conceded that if *McCoy* was retroactively applicable that Tyler would be entitled to relief. No similar finding was made in Mr. Hampton's post-conviction decision.

[4] In its Amicus Brief, the Louisiana Association of Criminal Defense Lawyers submitted an obvious typographical error and clearly intended for its argument to read that a retroactive application of *McCoy* would not open the floodgates to litigation "the way a retroactive application of *Ramos* would." Amicus Brief at 2.

individuals to a new trial, but merely warrant an evaluation on the merits of their claims.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

William M. Sothern*
Law Office of
William M. Sothern
1024 Elysian Fields Avenue
New Orleans, LA 70117
billy@sothernlaw.com
(504) 524-7922

Rachel I. Conner
Law Office of
Rachel I. Conner
3015 Magazine Street
New Orleans, LA 70115
(504) 581-9083

Attorneys for James Tyler
**Counsel of Record*

Dated: July 13, 2022