No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

Fidencio Valdez
Petitioner

v.

The State of Texas
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

Petition for Writ of *Certiorari*

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Questions Presented

Capital Case

❶ Whether the Court of Criminal Appeals of Texas misapplied this Court's decision in ***McCoy v. Louisiana***, 584 U.S. _____ (No. 16-8255; May 14, 2018): by determining that the legal basis for Petitioner's ***McCoy*** claim was available before ***McCoy***, although Petitioner could not have raised the ***McCoy*** claim in his initial *habeas* application, and nothing in ***McCoy*** requires that the supporting facts must appear in the record of trial.

❷ Texas' Code of Criminal Procedure Article 11.071 § 5(a) denies due process of law to Texas *habeas corpus* applicants under a sentence of death.

❸ Whether Texas' Code of Criminal Procedure Article 11.071 § 5(a) denies equal protection of law to Texas *habeas corpus* applicants under a sentence of death.

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Note on Hyperlinks and Abbreviations Utilized

Petitioner utilizes hyperlinks to cited opinions. When there is no published reporter citation, the hyperlink will be to the posted opinion on the particular court's official website. All other hyperlinks are to a copy of the opinion on the Google Scholar site. Additionally, Petitioner uses the following abbreviations in this petition:

❶ Standard Citation forms for the Federal Circuits (e.g., "5th Cir."), and Texas Court of Criminal Appeals ("Tex.Cr.App."); United States Reports ("U.S."); Federal Reporter, 3rd Edition ("F.3d"); 2nd Edition ("F.2d"); Federal Supplement ("F.Supp"); as well as Southwest Reporter, 3rd Edition ("S.W.3d"), and 2nd Edition ("S.W.2d").

❷ "RR" for the "Reporter's Record" or Statement of Facts, "CR" for the "Clerk's Record" or Transcript.

❸ "C.Cr.P.," for Texas Code of Criminal Procedure; "Tex.R.Evid.," for the Texas Rules of Evidence; "Tex.R.App.Pro.," for the Texas' Rules of Appellate Procedure; "Fed.R.Evid.," for the Federal Rules of Evidence.

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A. Opinions / Orders Below

The unpublished Order of the Court of Criminal Appeals dated October 3, 2018.[1]

B. Statement Regarding Jurisdiction

This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1257 (a), as the opinion of the Court of Criminal Appeals is the final judgment rendered by the state courts of Texas regarding Petitioner's effort to seek review of his judgment under this Court's ruling in ***McCoy v. Louisiana***. ***Gallick v. Baltimore & Ohio R.Co.***, 372 U.S. 108 (1963); ***R.***

[1] See Exhibit "A" in the Appendix.

J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 138-139 (1986); ***Grady v. North Carolina***, 575 U. S. ____ (No. 14-593; March 30, 2015).

In ***Michigan v. Long***, 463 U.S. 1032 (1983), the Court announced the following presumption:

> "[W]hen … a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

Long, 559 U.S. 1040-1041. At the same time, the Court adopted a plain-statement rule to avoid the presumption:

> "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Long, 559 U.S. at 1041. That is simply not the situation in the instant case.

In its Order of October 3, 2018, the Court of Criminal Appeals announced no basis for its decision, stating only that Petitioner "has failed to satisfy the requirements of Article 11.071 § 5(a)." It did not cite to any Texas case, nor did it cite to any State constitutional provision. The

decision of the Court below can only indicate it's belief that ***McCoy v. Louisiana*** is inapplicable for some unstated reason. Thus, the decision of the Court of Criminal Appeals did not rest on any independent state ground which would preclude review by this Court. Accordingly, Petitioner asserts that, under the ***Long*** presumption, the Court has jurisdiction to entertain this petition.

C. Statutory Provisions at Issue

This case involves Article 11.071 § 5(a), C.Cr.P.:

> a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> >
> > (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> >
> > (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

D. Constitutional Provisions at Issue

The following provisions of the Constitution of the United States are involved in this case:

The **Fifth Amendment** provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The **Sixth Amendment** provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The **Fourteenth Amendment** provides, in relevant part:

> (Section 1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E. Statement of the Case

This case involves both an "initial" and "subsequent" *habeas corpus* applications. Petitioner's initial application (see Exhibit "B" in the Appendix) is still pending in the State courts of Texas. His subsequent application (see Exhibit "C" in the Appendix) is has been dismissed (see *infra*), and, thus cannot be considered by the trial / *habeas* court. The case also involves a state rule of procedure which prohibits consideration of *habeas corpus* claims made by applicants under sentence of death filed after a particular date, which rule is more restrictive than that same prohibition applied to non-death penalty applicants.

F. Procedural History

Petitioner filed his initial application for post-conviction writ of *habeas corpus* in the trial court pursuant to Article 11.071, C.Cr.P. ("the initial application"), on July 28, 2017. This Court handed down its opinion in ***McCoy v. Louisiana***, 584 U.S. _____ (No. 16-8255; May 14, 2018), a little more than nine (9) months later.

On July 6, 2018, Petitioner filed his "Subsequent Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P." ("the subsequent application") with the Clerk of the convicting Court. The undersigned counsel only styled the *habeas corpus* application as a

"subsequent" application because, in a similar situation in an unrelated case, the Court of Criminal Appeals criticized the undersigned's action in labeling a supplement to an initial *habeas corpus* application as a "supplemental" application, and not a "subsequent" application. See ***Ex parte John Allen Rubio***; Nos. WR-65,784-02 and WR-65,784-04 (Tex.Cr.App. May 23, 2018).[2] As is set out below, in the non-capital setting, a *habeas corpus* application is only categorized as a "subsequent" application if it is "filed after final disposition of an initial application challenging the same conviction." See Article 11.07 § 4(a), C.Cr.P., (emphasis added). In death penalty *habeas*, however, a subsequent application is one which "is filed after filing an initial application . . .." See Article 11.071 § 5, C.Cr.P. (emphasis added).

The subsequent application, which was prompted by ***McCoy***, was received at the Court of Criminal Appeals on July 28, 2018. On October 3, 2018, without any fact finding by the habeas court or input from the parties, the Court of Criminal Appeals determined that Petitioner had "failed

[2] The Court of Criminal Appeals has issued more than a few unpublished orders finding a failure to meet the requirements of Section 5(a) which offer no explanation. See, e.g., ***Ex parte Carty***; WR-61,055-03 (Tex.Cr.App.; August 22, 2018); ***Ex parte Reynoso***, WR-66,260-02 (Tex.Cr.App.; June 16, 2010); ***Ex parte White***; WR-48,152-03 & WR-48,152-04 (Tex.Cr.App.; May 6, 2009).

to satisfy the requirements of Article 11.071 § 5(a)," and summarily dismissed the subsequent application. Other than stating that section 5(a) had not been satisfied, the Court below provided no explanation as to why it was dismissing the writ application.

G. Discussion Regarding Timeliness

The Court of Criminal Appeals dismissed Petitioner's subsequent *habeas corpus* application on October 3, 2018. Petitioner filed a "suggestion," pursuant to Rule 79.2 (d), Tex.R.App.Pro., asking the Court of Criminal Appeals to reconsider, on its own initiative, the dismissal of Petitioner's subsequent application for writ of habeas corpus. To date, the Court of Criminal Appeals has not acted on that suggestion. Moreover, there is no requirement that the Court actually act on such a suggestion, nor is it the practice of the Court of Criminal Appeals to rule one way or the other on such a suggestion. The Court below is free to and most often simply ignores such suggestions. Consequently, Petitioner asserts that the dismissal order of October 3, 2018, is the final judgment rendered by the state courts of Texas on Petitioner's subsequent writ of habeas corpus

Pursuant to section 1 of Rule 13, of the Rules of the Supreme Court of the United States, "A petition for a writ of *certiorari* seeking review of a judgment of a lower state court that is subject to discretionary review by the

state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."

Further, pursuant to section 3 of Rule 13, "The time to file a petition for a writ of *certiorari* runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). Consequently, this petition is timely if filed on or before January 2, 2019 (the actual date being January 1, 2019, a holiday).

H. Arguments in Favor of Issuing a Writ of *Certiorari*

Issues Restated

❶ Whether the Court of Criminal Appeals of Texas misapplied this Court's decision in ***McCoy v. Louisiana***, 584 U.S. _____ (No. 16-8255; May 14, 2018): by determining that the legal basis for Petitioner's ***McCoy*** claim was available before ***McCoy***, although Petitioner could not have raised the ***McCoy*** claim in his initial *habeas* application, and nothing in ***McCoy*** requires that the supporting facts must appear in the record of trial.

❷ Whether Texas' Code of Criminal Procedure Article 11.071 § 5(a) denies due process of law to Texas *habeas corpus* applicants under a sentence of death.

❸ Whether Texas' Code of Criminal Procedure Article 11.071 § 5(a) denies equal protection of law to Texas *habeas corpus* applicants under a sentence of death.

Facts Relevant to the Issues Presented

On February 8, 2012, Petitioner was charged by indictment with the December 10, 2010, murder of Julio Barrios, while "committing and attempting to commit the offense of robbery" (CR P. 6). On May 30, 2014, he was convicted of capital murder (RR Vol. 52, PP. 77-78). At the punishment phase of trial, the jury answered the first special issue "yes" and the second special issue "no" (RR Vol. 56, P. 156). On June 5, 2014, the trial court assessed a sentence imposing the death penalty on Count 1 based on the jury verdict (RR Vol. 57, PP. 5-6). Notice of appeal was given on July 3, 2014 (CR Vol. 7, 2617). On July 7, 2014, Appellant filed a motion for new trial (CR 2620), which was overruled by operation of law. Direct appeal in the Court of Criminal Appeals concluded on June 20, 2018, when the instant conviction was affirmed. See ***Valdez v. State***, AP-77,042 (Tex.Cr.App.; June 20, 2018). Petitioner's *certiorari* petition on direct appeal (18-369) was denied on December 3, 2018.

Petitioner's initial *habeas corpus* application was filed of record with the clerk of the trial court, (the "*habeas* court") on July 28, 2017. As discussed, herein, that application remains pending.

I. Disposition in the Court Below

In its decision of October 3, 2018, the Court of Criminal Appeals determined that Petitioner "failed to satisfy the requirements of Article 11.071 § 5(a)," C.Cr.P., and summarily dismissed the subsequent application.

J. Discussion of Arguments & Authorities

Prior to trial, Petitioner advised trial counsel that he was not involved in the predicate offense and had an alibi. He also told trial counsel he would not admit guilt as to the predicate murder because he wasn't involved. Petitioner never abandoned this position.

Two or three weeks before trial was to begin, trial counsel learned that Petitioner had received a traffic ticket approximately four hours after the shooting, while driving an automobile which trial counsel believed belonged to Veronica Cera, a purported witness to the instant offense, and which vehicle trial counsel believed was the vehicle at the scene of the offense. When confronted with this information, according to information recently related to the undersigned by trial counsel, Louis Lopez, Petitioner "shut down," and stopped communicating with trial counsel.[3]

[3] See paragraph number one (1) on page two (2) of trial counsel's affidavit dated January 19, 2018, which was attached to the State's response to Applicant's initial habeas corpus application. Attached as Exhibit "D" in the Appendix.

Initially, Petitioner conceded he had received a citation, but tried to explain to trial counsel that the ticket he received was while driving a car belonging to Sonia Cera, not the vehicle belonging to Veronica Cera, which had been spotted at the scene of the crime. Petitioner also reiterated to trial counsel that he had no personal knowledge of who was involved in the shooting because he was not involved, wasn't there, and did not want to testify. Petitioner also advised counsel that he did not want counsel to seek a lesser included conviction if it involved admitting he was guilty.

Attorney Lopez informed Petitioner that he would make all necessary strategy decisions, because he had been practicing law for 25 years, and Petitioner should follow his instructions. He also lectured Petitioner on the subject of loyalty, advising Petitioner that there was "no honor among gang members." Trial counsel and Petitioner could not agree, and Petitioner advised trial counsel that he would not testify, because "every decision I make I will have to deal with for the rest of my life."

Given the argument, and the tone taken by trial counsel, Petitioner came to believe that his lawyers were not out to help him. Petitioner and trial counsel did not thereafter discuss strategy.

Trial counsel has never indicated that Petitioner backed away from his alibi. Counsel has only indicated that Petitioner stopped communicating with counsel.[4]

On the first day of individual voir dire, trial counsel questioned some of the potential jurors, about the possibility of a lesser included conviction. During individual voir dire of potential juror number 5, Jo Ann Cruz, the following occurred:

> Q. (Mr. Lopez) Okay. So you understand that murder itself is not capital murder. So you can intentionally want to kill someone all you want to. Okay? You may dream about it, tell everybody, or blog about it, send tweets. Okay? "When I see Louis Lopez, I'm going to kill him. He took" -- "he spoke" -- "he asked me questions longer than he promised." But that's not going to put you at the point where you're going to be facing a death sentence in Texas if you do carry out that murder. You will have premeditated it, you will have thought about it a lot, it may be pretty intentional, but that's not going to get you to where you'll be looking at a death sentence.
>
> Do you understand?
>
> A. (Ms. Cruz) Yes.
>
> Q. Okay. And the reason why I bring this up is because -- have you ever heard of the lesser included?
>
> A. No.
>
> Q. No, because most people don't. And it's kind of a trick question because it gives me an opportunity to explain what that is. When you are charged with capital murder -- okay? -- you have to remember -- just like I explained to you -- it's murder plus something. Well, if the state, during their case -- because remember, the burden of proof is on them. We don't have a burden. The burden of proof is on them. If they were to bring you a murder

[4] The allegations of fact stated *infra* have yet to be confirmed by Texas' courts, as the evidentiary hearing on the initial application, which the *habeas* court has scheduled, but then stayed pending the outcome of various ancillary matters, has yet to take place.

but then they failed to show you the plus -- okay? -- the other stuff that makes it capital -- if they just present to you that the defendant killed a person but they failed to show that the person was a fireman or policeman in the line of duty -- or let's say they presented evidence that person murdered -- the defendant murdered a child but failed to prove to you that the -- that was under the age of 10, then you would have just murder. That's a lesser included. Okay?

Does that make sense?

A. Yes.

Q. So then the defendant wouldn't be guilty of capital even though they're charged with capital, and that's what they say they're going to prove. If they only prove murder, then the person is guilty of just murder. Okay?

Now, the reason I'm getting to this -- this is what's important, and this will all loop back to your answer. In a murder case the type of punishments available for a jury to consider if you believe a person has committed intentional murder, premeditated murder -- if you have found beyond a reasonable doubt that that person has committed murder -- not capital, okay, but just murder -- the punishment for that is 5 years minimum up to 99 years or life. There's no death sentence for just regular murder. Okay? You can only get death when? When it's a capital murder. Right? So a regular murder, no death. All you can get is 5 to 99 or life, everything in between. It's like a gas tank. You can get an empty tank or a full tank, everywhere in between is what you can get -- okay? -- what the jury can consider.

Now, if you were a juror and you're sitting as a juror and you've -- okay. We've already found the person guilty of murder. They proved a murder, but the state didn't -- they couldn't get to that next level. They couldn't show the plus. Okay? Would you, as a juror, be able to consider the minimum punishment five years, given the statement that you wrote here that premeditated murder deserves the death penalty?

A. Yes. Because, to be honest, I didn't know the difference between capital murder until right now. You know, I didn't know that there was that plus. I didn't know the difference. So, yes, what I answered back then to now is different, and it would be just based on the evidence that I hear during those two times. If it's less and they do fail to show the other, the plus, then, you know, he's -- it's whatever is -- whatever evidence was brought forth and what actually is proven to me that would guide me to the decision that I need to make. I wouldn't right away presume, Oh, he's already -- you know, I'm not going to give him the five years because I think, you

know, the evidence shows something else when it hasn't been presented. It's going to be strictly on what's -- and I would be able to do whatever sentence -- the lesser sentence if that's what should be because of the evidence that was shown.

Q. That is outstanding, because that's the answer I was looking for. What we are looking for as jurors is people who will listen to all the evidence, not have any preconceived ideas. In other words, they come in here a blank slate. Okay?

Now, you may have personal convictions and you may have certain ways of -- you may have personal convictions, you may be opposed to certain things or you may believe certain things, you may not be in agreement with certain things, but regardless of those feelings, what we ask is that -- we ask jurors to be able to set aside those and to be able to sit at this table and to be able to look at the evidence that's presented and then answer the questions or follow the instruction that you're given according to the law.

Does that describe you?

A. Yes.

(RR Vol. 10, PP. 153-156). Similar questioning occurred throughout individual voir dire. At the conclusion of voir dire, the defense elected to have the jury assess punishment, even if the defendant was found guilty of murder (RR Vol. 49, PP. 45-46).

During his final argument at guilt-innocence, attorney Lopez told the jury, "*Fidencio Valdez is involved in this murder. Plain and simple. You've heard it from me*" (RR Vol. 52, P. 39). Additionally, he advised the jury that:

> So what am I doing? Our defense has always been, from the very beginning -- and it is today, it was yesterday, it is now -- this is a drug deal gone bad. That's all it is. This is two people in a suspicious situation where there's not a lot of trust, where it's dangerous, and it went south. That's all.

RR Vol. 52, P. 40.

As set out above, Section 5(a) of Article 11.071, C.Cr.P., provides three bases for the ability to submit a subsequent application in a capital case:

> ❶ the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> ❷ by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> ❸ by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

The second and third provisions would not appear to apply to the instant case, nor did Petitioner suggest they applied. Moreover, Petitioner has not suggested in any way that the factual basis was not known at the time the initial application was submitted. Rather, the subsequent application was based on the holding of this Court in ***McCoy v. Louisiana***, 584 U.S. _____ (No. 16-8255; May 14, 2018), meaning the legal basis was not available until the decision in ***McCoy*** was delivered. There is no Texas case law holding that an intentional failure to follow a client's wishes with regard to trial decisions violated the client's rights in any manner.

Thus, it would appear that, in dismissing the subsequent application, the Court of Criminal Appeals may have determined that the legal basis was, in fact, available before ***McCoy***, and that, accordingly, Petitioner could have raised the ***McCoy*** claim in the initial application. Alternatively, the Court may have also decided, in ***Turner v. State***, No. AP-76,580 (Tex.Cr.App.; November 14, 2018), that a ***McCoy*** claim cannot be raised in any *habeas corpus* proceeding in Texas.

In that regard, Petitioner would show that, subsequent to the October 3, 2018, dismissal in this case, the Court of Criminal Appeals examined and considered ***McCoy***. In the majority opinion in ***Turner***, the Court of Criminal Appeals held that "a defendant cannot simply remain silent before and during trial and raise a ***McCoy*** complaint for the first time after trial." ***Turner***, slip op at 42. For that proposition, that court cited the discussion in ***McCoy*** of ***Florida v. Nixon***, 543 U.S. 175 (2004):

> Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach. 543 U.S., at 181, 125 S.Ct. 551. Nixon complained about the admission of his guilt only after trial. Id., at 185, 125 S.Ct. 551. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. See App. 286-287, 456, 505-506. See also Cooke, 977 A.2d, at 847 (distinguishing Nixon because, "[i]n stark contrast to the defendant's silence in that case,

> Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty"). "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, slip op. at 8-9.

There are two problems with the Court of Criminal Appeals' statement in ***Turner***. First, ***McCoy*** does not support the Court's conclusion, because nothing in ***McCoy*** requires that the supporting facts to appear in the record. Second, while the idea that the ***McCoy*** objection must appear in the record makes some sense on direct appeal, and both ***Nixon*** and ***McCoy*** are direct appeal cases, this theory makes no sense whatsoever in a post-conviction *habeas* proceeding, where claims must be non-record claims, and cannot be based on the record, especially in light of this Court's characterization of ***McCoy*** error as "structural." If the Court of Criminal Appeals was holding in ***Turner*** that the structural issue identified in ***McCoy*** cannot be raised on post-conviction *habeas corpus*, that holding is unsupported at law and/or logic.

In the instant case, it is clear that trial counsel knew his client maintained his innocence and presented counsel with an alibi. To the

extent that the Court may have denied permission to seek *habeas* relief based on ***McCoy*** in the subsequent application in the instant case because Petitioner did not voice his objections on the record or to counsel off-the-record, the cited passage in ***McCoy*** wouldn't support that decision because the statement in ***McCoy*** is based only on the fact of a defendant declining to participate. If Petitioner failed to participate, as counsel would have it, that failure was based entirely on counsel's failure to follow Petitioner's wishes by investigating and presenting his alibi defense. Petitioner's failure to control his attorney should not be held against Petitioner, but, as in ***McCoy***, against the attorney.[5]

Moreover, as with the discussion above, whether the Court of Criminal Appeals dismissed the subsequent application in this case because there was no objection during trial is unknown, because of the summary nature of the Court's Order. The Court of Criminal Appeals has never made known to the bench and bar whether a defendant's failure to voice his or her objections to trial counsel's strategy constitutes a waiver of that claim for both appellate and *habeas* purposes.

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[5] Indeed, requiring a criminal defendant to interrupt a trial court's orderly process and decorum to vent his displeasure with his attorney's failure to carry out his wishes is neither realistic in expectation nor appropriate to maintenance of that decorum. Given that the accepted standard is that the defendant will only address the court through his or her attorney, such a requirement would invite overt disobedience of the court.

Petitioner asserts that Article 11.071 § 5(a), C.Cr.P., denies due process and equal protection, both on its face and in the manner in which the Court has applied it. Petitioner asserts this claim in three variations:

❶ First, because it requires a Texas *habeas* applicant in a capital case to complete all investigation and file all claims by a certain date, even when the time period permitted is unreasonable under the facts of a case, the statute denies due process on its face.

❷ Second, because the Texas Court failed to explain to the bench and bar how to satisfy the restrictions in section 5(a) with regard to ***McCoy*** claims and by explaining why particular claims in many *habeas* cases have failed to satisfy the requirements of section 5(a), the Court has denied Applicant and every applicant in a capital *habeas case* due process.

❸ Finally, because it provides more process to a capital *habeas* applicant who was sentenced to life than it does to a capital *habeas* applicant who was sentenced to death, the statute denies equal protection.

Due Process

The liberty protected by the Fifth Amendment's Due Process Clause is not merely a creation of the Bill of Rights. Indeed, the United States has long recognized that the liberty safeguarded by the Constitution has far deeper roots. See the second paragraph of the Declaration of Independence, finding it self-evident that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty, and the pursuit of Happiness."

The "most elemental" of the liberties protected by the Due Process Clause is "the interest in being free from physical detention by one's own government." ***Hamdi v. Rumsfeld***, 542 U.S. 507, 529 (2004); see ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992)("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"). Although a valid criminal conviction justifies punitive detention, it does not entirely eliminate the liberty interests of convicted persons. For while a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." ***Wolff v. McDonnell***, 418 U.S. 539, 555–556 (1974); ***Shaw v. Murphy***, 532 U.S. 223, 228–229 (2001)("Incarceration does not divest prisoners of all constitutional protections").

This Court's jurisprudence has recognized protected interests in a variety of post-conviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause of the Fourteenth Amendment requires States to respect certain fundamental liberties in the post-conviction context. See, e.g., ***Thornburgh v. Abbott***, 490 U.S. 401, 407 (1989)(right to free speech); ***Turner v. Safley***,

482 U.S. 78, 84 (1987)(right to marry); ***Cruz v. Beto***, 405 U.S. 319, 322 (1972)(right to free exercise of religion); ***Lee v. Washington***, 390 U.S. 333 (1968)(right to be free of racial discrimination); and ***Johnson v. Avery***, 393 U.S. 483 (1969)(right to petition government for redress of grievances).

Between the time the Court of Criminal Appeals was created in 1891 and 1965, *habeas corpus* jurisdiction rested in the Court and there was no procedural difference in capital and non-capital *habeas corpus* proceedings. Texas' statutory *habeas corpus* scheme began with the enactment of Article 11.07, C.Cr.P., in 1965, and continued the procedural unanimity. The enactment of Article 11.071, in 1995, changed all that, and, since that time, capital *habeas* applicants are entitled to less "process" than their non-capital counterparts.

One can simply not question the basic proposition that convicted persons such as Petitioner retain a constitutionally protected measure of interest in liberty, especially, as in this case, when the process designed to protect the litigant's liberty interest was created, then restricted, by the State. In short, Petitioner is entitled to due process during his *habeas corpus* proceedings, and Article 11.071 § 5(a), restricts that process (cf., ***Wolff v. McDonnell***, *supra*).

To the extent it can be read to deny Petitioner the opportunity to litigate a claim that did not arise until after the initial application was filed, Article 11.071 § 5(a), C.Cr.P., denies Petitioner due process. By finding he has not satisfied the requirements of Article 11.071 § 5(a), the Court denies dues process to Petitioner, and all capital *habeas* applicants whose subsequent applications have been summarily dismissed without explanation.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." ***Lawrence v. Texas***, 539 U.S. 558, 579 (2003); see also ***Cleburne v. Cleburne Living Center, Inc.***, 473 U. S. 432, 439 (1985); ***Plyler v. Doe***, 457 U. S. 202, 216 (1982). Petitioner asserts that Chapter 11, C.Cr.P., fails to satisfy that standard, due to a major difference between Article 11.07 § 4(a), and Article 11.071 § 5(a).

In the instant case, Petitioner was sentenced to death. Thus, pursuant to Article 11.071 § 5(a), C.Cr.P., any claims discovered and "filed after filing an initial application," are treated as "subsequent applications," and are subject to the "one writ" rule. Had the trial turned out differently and Petitioner received a life sentence, all claims discovered and "filed after filing an initial application," would not be subject to the "one writ" rule so

long as they were filed before "final disposition of an initial application." Plainly put, had Petitioner received a life sentence, his ***McCoy*** claim could not have been summarily dismissed.

In the instant case, Petitioner's subsequent application was based on this Court's holding in ***McCoy***. Despite the fact that the initial application was filed before ***McCoy*** was delivered, Petitioner's ***McCoy*** claim is subject to the "one writ" rule, and has already been dismissed without consideration. Had Petitioner been sentenced to life without parole, his ***McCoy*** claim would not be subject to dismissal under the "one writ" rule, because the initial application remained pending at the time of filing, as it remains at the time of this filing, and there had been no final disposition.

Petitioner asserts that it is unconscionable to give less process to a capital *habeas* applicant than would be provided to him if the jury had instead returned a life sentence verdict. Nevertheless, that is exactly what Article 11.071 § 5(a), C.Cr.P., gives a *habeas* applicant in a capital case, less protection and less process than if he or she had not been sentenced to death, but had received a life sentence for the very same offense.

L. Prayer for Relief

The above premises considered, Fidencio Valdez, Petitioner, respectfully prays that this Honorable Court will deem timely and grant his petition for writ of *certiorari* to the Court of Criminal Appeals of Texas, and, upon review, hold that Article 11.071 § 5(a), and the actions of the Court of

Criminal Appeals of Texas have violated Applicant's rights to due process and equal protection, as well as the rights to due process and equal protection due and owing to all *habeas corpus* applicants who have been condemned to death. Applicant further prays the Court will vacate the Court of Criminal Appeals' order of October 3, 2018, and will remand this case for further proceedings.

Respectfully submitted,

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