NO. 18-7637

IN THE SUPREME COURT
OF THE UNITED STATES

FIDENCIO VALDEZ **PETITIONER**

V.

THE STATE OF TEXAS **RESPONDENT**

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

THE STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

STATE'S REPLIES TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

Question One: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider the CCA's decision to dismiss his subsequent habeas application, in that the CCA's decision rests on state-law procedural-default grounds that are independent of the federal question and adequate to support the CCA's judgment.

Question Two: Because Valdez did not properly raise his due-process challenge to article 11.071, section 5(a), in the CCA, that issue is not properly before this Court.

Question Three: Because Valdez did not properly raise his equal-protection challenge to article 11.071, section 5(a), in the CCA, that issue is not properly before this Court.

LIST OF PARTIES

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CITATION TO OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

Ex parte Valdez, No. WR-85,941-02, 2018 WL 4762789 (Tex.Crim.App., Oct. 3, 2018) (not designated for publication)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, statutes, and rules involved in this case, in pertinent part:

U.S. CONST. amend. V:

> No person shall be...deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. VI:

> 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.

U.S. CONST. amend. XIV:

> SECTION 1. ...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.

28 U.S.C. § 1257

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

TEX. CODE CRIM. PROC. art. 11.071 § 5:

> Sec. 5. (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...because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;....
>
> * * *
>
> (c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.
>
> (d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

TEX. R. APP. P. 33.1:

> (a) *In General*. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> > (1) the complaint was made to the trial court by a timely request, objection, or motion that:
> >
> > > (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and...
> >
> > * * *
> >
> > (2) the trial court:
> >
> > > (A) ruled on the request, objection, or motion, either expressly or implicitly;...

TEX. R. APP. P. 79.1

> A motion for rehearing may be filed with the Court of Criminal Appeals clerk within 15 days from the date of the judgment or order.

STATEMENT OF THE CASE

Procedural history

Petitioner, Fidencio Valdez (hereinafter Valdez), was convicted by a jury for the capital murder of Julio Barrios (hereinafter Barrios). (CR1 at 6); (CR7 at 2531, 2570-71); (RR52 at 77).[1] After hearing the punishment evidence, that same jury answered "yes" to the first death-penalty special issue (an affirmative finding of future dangerousness) and "no" to the second death-penalty special issue (no sufficient mitigating circumstances). (CR7 at 2558-59, 2561-62, 2570-71); (RR56 at 156). Based on these answers, the trial court sentenced Valdez to death. (RR57 at 4-5).

Among the 13 points of error Valdez raised on direct appeal of his conviction and death sentence was his complaint that trial counsel rendered ineffective assistance of counsel by conceding that Valdez was guilty of murder during closing arguments in the guilt-innocence stage of trial. *See Valdez v. State*, No. AP-77,042, 2018 WL 3046403 at *23 (Tex.Crim.App., June 20, 2018) (not designated for publication). On June 20, 2018, the Texas Court of Criminal Appeals (hereinafter "CCA") overruled this and Valdez's other points of error and affirmed his conviction and death sentence. *See Valdez*, 2018 WL 3046403 at *31.

On July 28, 2017, during the pendency of his direct appeal, Valdez filed his initial application for post-conviction writ of habeas corpus pursuant to article 11.071 of the Texas Code of Criminal Procedure, which application is still pending in the trial court. *See Ex parte*

[1] Throughout this brief, references to the state appellate record will be made as follows: references to the clerk's record on direct appeal will be made as "CR" and volume and page number; references to the reporter's record of trial will be made as "RR" and volume and page number; and references to trial exhibits will be made as "SX" or "DX" and exhibit number.

Valdez, No. WR-85,941-02, 2018 WL 4762789 at *1 (Tex.Crim.App., Oct. 3, 2018) (not designated for publication); *see also* TEX. CRIM. PROC. CODE art. 11.071.

On July 6, 2018, Valdez filed his subsequent article 11.071 writ application, which was received by the CCA on July 23, 2018, and is the writ application at issue in this petition. *See Ex parte Valdez*, 2018 WL 4762789; *see also* (Valdez's petition, Exhibit C). In this subsequent writ application, Valdez, citing to this Court's decision in *McCoy v. Louisiana*, ---U.S.---, 138 S.Ct. 1500 (2018), raised the following three grounds for habeas relief:

> (1) Because [Valdez's] trial counsel admitted [Valdez's] guilt, despite knowing that [Valdez] denied involvement in the murder and had provided evidence of an alibi, and that [Valdez] objected to the admission of guilt, [Valdez] is entitled to a new trial (ground one);
>
> (2) By admitting [Valdez's] guilt, despite knowing that [Valdez] denied involvement in the murder and had provided evidence of an alibi, trial counsel failed to subject the prosecution's case to meaningful adversarial testing (ground two);
>
> (3) [Valdez] was denied the effective assistance of counsel when trial counsel admitted [Valdez's] guilt, despite knowing that [Valdez] denied involvement in the murder and had provided evidence of an alibi (ground three). *See* (Valdez's petition, Exhibit C at i-ii) (capitalization omitted).

On October 3, 2018, the CCA, after briefly setting out the procedural history, dismissed Valdez' subsequent habeas application as being procedurally barred:

> We have reviewed the subsequent application and find that [Valdez] has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the merits of the claims.

See Ex parte Valdez, 2018 WL 4762789 at *1. Valdez filed in this Court his Petition for Writ of Certiorari on January 2, 2019.

Summary of the offense

The CCA set out the basic facts of the offense in its opinion on Valdez's direct appeal. *See Valdez*, 2018 WL 3046403 at *1-3. In summary, on December 10, 2010, Valdez spoke with Barrios on the phone and negotiated the purchase of $300 worth of ecstasy pills (30 or 40 pills) for which he (Valdez) had no money. *See id*. at *1. Valdez drove his girlfriend Veronica Cera's SUV, with her as the passenger, to northeast El Paso, stopping briefly at a friend's house, where he had hidden a bag of guns, before continuing to the location of the exchange. *See id*. After arriving at the agreed-upon location, Valdez had Barrios get into the backseat of the SUV; drove to a darker location, followed by Barrios's uncle, who had given Barrios a ride; and told Barrios to give him the pills. *See id*. at *1-2. Valdez then refused to pay for the pills, and when Barrios angrily demanded his pills back, Valdez responded that he was not going to give him anything and shot Barrios in the head. *See id*. at *2. After getting out of the SUV, Valdez pulled Barrios out and shot him as he (Barrios) was on the ground, shot twice at Barrios's uncle, and then fled the scene in the SUV. *See id*.

In a pretrial lineup and again at trial, Barrios's uncle positively identified Valdez as the shooter. *See id*. at *3. Cera later witnessed Valdez telling a friend to get rid of the gun. *See id*. Cell-phone records identified Valdez as the individual who repeatedly called Barrios until the time of the murder and placed him approximately three-tenths of a mile from the location of the murder. *See id*. at *2-3. Subsequent forensic testing revealed blood inside Cera's SUV and its tire well that yielded DNA profiles consistent with Barrios's DNA. *See id*. at *3. The medical examiner testified that Barrios died as a result of two gunshot wounds to his head, both of which exhibited stippling, indicating that the assailant fired the gun in close proximity. *See id*.

Trial counsel's closing argument

In its guilt-innocence jury charge, the trial court included instructions on the lesser-included offenses of murder and manslaughter. (CR7 at 2546-2549).

During guilt-innocence closing argument, trial counsel argued at the outset that the theme of the defense was "...sloppy, incomplete, selective presentation" of evidence by the State, which was unacceptable in a case where the State was seeking a conviction for capital murder and a sentence of death. (RR52 at 36); *see also* (RR52 at 38).

Defense counsel further argued that:

> Fidencio Valdez is involved in this murder. Plain and simple. You've heard it from me. There is no – I think if I stood up here and told you, "It wasn't him." You know, "they didn't prove it" – let me ask you this – they say our theory changed – how many times did they put on a witness regarding the cell phone? How many times did I ask one of those witnesses, "Now, you can't prove he's the person using that phone, can you?
>
> "No, I can't."
>
> "All you can say is that the phone is at a certain location."
>
> "Yes. That's right."
>
> How many times did you hear me ask that? That's the defense of "I'm not there. It wasn't me." That's the defense of, "Hey, I'm with Nikky."
>
> You didn't hear me ask that one time. Not once. And the very first 15 minutes of my argument, I'm telling you he's there. We know he's there, because Forest Zozoya tells you, "I saw a guy with glasses." You've seen a video clip with glasses. He's wearing glasses.
>
> Now, something Forest didn't tell you is he didn't say he pulled him out of the car. Forest told you, "I didn't see, but I did see him shoot him when he was on the ground."
>
> So we don't know what happened in that transaction in the car. (RR52 at 39-40).
>
> * * *
>
> 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. (RR52 at 40).

Later, defense counsel reiterated:

> Again, don't waste your time. Yes, he's there. He's in the car. It's his phone. He's at the murder scene. He's seen shooting someone else, Julio Barrios. So, let's move past that.

(RR52 at 44); *see also* (RR52 at 52 – where defense counsel also argued, "Don't get lost in the recordings. He's there. He's involved. He's involved with the shooting of Barrios.").

But defense counsel repeatedly focused on what he believed was the State's selective presentation of evidence to support the narrative that what occurred in the SUV was an intentional robbery, when the evidence simply supported the theory that the shooting occurred because of Valdez's distrust of Barrios, who defense counsel characterized as not a "little boy," but a drug dealer:

> So something bad happened between these two guys, and Barrios got shot. That's it. That's this case. That's all there is. It's a drug deal gone bad.
>
> Now, whether you want to believe it's reckless, or whether you want to believe it's intentional, that's your – I'm not going there to go there. You decide which one you want to believe. (RR52 at 55); *see also* (RR52 at 43, 45-46, 48-50, 52-57).
>
> * * *
>
> I think this – this is – there's one verdict in this case with regards to the count of the shooting of Barrios, and that's murder. If you feel it's manslaughter, you can go there, but this – there's one verdict.
>
> There's no robbery. In order to get to robbery you have to disregard all the inconsistencies of everybody else telling you what happened.... You have to disregard the selectiveness. You have to disregard the incomplete investigation, the lack of ballistics, the lack of blood testing in the car, the lack of luminol, the lack of people being shown everything, good and bad, and you've got to just accept the fact that they were sloppy, and "Well, you know, we'll cut them a break because they're the [S]tate."

(RR52 at 57-58); *see also* (RR52 at 58 – where defense counsel further argued, "...you'll decide. And I think the evidence is pointed to a murder.").[2]

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[2] As Valdez notes in his petition, his assertions of fact about his interactions with trial counsel behind-the-scenes have not yet been found true by any factfinder, *see* (Valdez's petition at 12 n.4), and the State does not concede to the veracity of his factual assertions in this regard.

ARGUMENT AND AUTHORITIES

I. Question One: Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider the CCA's decision to dismiss his subsequent habeas application, in that the CCA's decision rests on state-law procedural-default grounds that are independent of the federal question and adequate to support the CCA's judgment.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Included within the non-exhaustive list of factors this Court considers in determining whether to exercise such discretion are: that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," SUP. CT. R. 10(b); that "a state court...has decided an important question of law that has not been, but should be, settled by this Court," SUP. CT. R. 10(c); or that "a state court...has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). In his petition, Valdez does not expressly invoke any of the foregoing reasons for granting review, but, as will be discussed below, none of the aforementioned reasons for review are implicated in this case.

A. The *Long* jurisdictional presumption does not apply in this case because the CCA's decision does not fairly appear to rest primarily on federal law or to be interwoven with such law.

This Court has held that it will not review a question of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state-law ground is substantive or procedural. *See id*. In the context of direct review of a state-court judgment, the independent and adequate state ground

is jurisdictional. *See id*. When this Court reviews a state-court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*, and if resolution of the federal question cannot affect the judgment, there is nothing for this Court to do. *See Coleman*, 501 U.S. at 730. Because this Court has no power to review a state-law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See id*. at 729.

In his brief, Valdez cites *Michigan v. Long* for the proposition that "...when...a state court decision fairly appears to rest primarily on 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." *See* (Valdez's petition at 2), *quoting Michigan v. Long*, 463 U.S. 1032, 1040-41 (1991). Acknowledging that this Court also held in *Long* that this Court would not review a state-court decision that indicates clearly and expressly that it was alternatively based on bona fide separate, adequate, and independent grounds, *see* (Valdez's petition at 2), *quoting Long*, 463 U.S. at 1041, Valdez nevertheless argues that the aforementioned presumption set out in *Long* applies in this case because "...the [CCA] announced no basis for its decision, stating only that [Valdez] []has failed to satisfy the requirements of Article 11.071 § 5(a)[];" the CCA "...did not cite to any Texas case, nor did it cite to any State constitutional provision;" and "[t]he decision of the [CCA] can only indicate [its] belief that *McCoy v. Louisiana* is inapplicable for some unstated reason." *See* (Valdez's petition at 2-3).

But as this Court has held, a necessary predicate for the application of the *Long* jurisdictional presumption is that the complained-of state-court decision must fairly appear to rest primarily on federal law or to be interwoven with federal law. *See Coleman*, 501 U.S. at 735. In the absence of this necessary predicate, "it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *See id*. at 737, *citing Long*, 463 U.S. at 1041.

In this case, the CCA clearly and expressly stated that the dismissal of Valdez' subsequent habeas application was based on his failure to satisfy the requirements of article 11.071, section 5(a), of the Code of Criminal Procedure. *See Ex parte Valdez*, 2018 WL 4762789 at *1 ("We have reviewed the subsequent application and find that [Valdez] has failed to satisfy the requirements of Article 11.071, § 5(a)."). Section 5(a) of article 11.071, entitled "Subsequent Application," sets out, in relevant part, that:

> Sec. 5. (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...because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;.... *See* TEX. CRIM. PROC. CODE art. 11.071 § 5(a)(1).[3]

Article 11.071, section 5(d), further provides that "[f]or purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision

[3] Valdez acknowledges in his petition that his subsequent writ application did not implicate subsections (a)(2) and (a)(3) of article 11.071, section 5. *See* (Valdez's petition at 15).

of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date." *See* TEX. CRIM. PROC. CODE art. 11.071 § 5(d).[4] And the CCA determines, in the first instance, whether the subsequent habeas claims satisfy the requirements of article 11.071, section 5(a). *See* TEX. CRIM. PROC. CODE art. 11.071 § 5(c).

Contrary to Valdez's assertions, the CCA's dismissal of his writ application as failing to satisfy the requirements of article 11.071, section 5, does not necessarily lead to the conclusion that the CCA must have determined that *McCoy* was inapplicable or that the CCA decided any question of federal law. *See* (Valdez's petition at 3). In its order, the CCA plainly stated that it was dismissing Valdez' subsequent habeas application "*...without considering the merits of the claims*" because Valdez failed to satisfy the requirements of article 11.071, section 5(a)–a state procedural rule. *See Ex parte Valdez*, 2018 WL 47622789 at *1 (emphasis added). Since 1994, Texas' abuse-of-the-writ doctrine has provided an adequate state ground for the purpose of imposing a procedural bar to federal review. *See Barrientes v. Johnson*, 221 F.3d 741, 758-59 (5th Cir. 2000) ("We have previously held that Texas's abuse-of-the-writ doctrine has, since 1994, provided an adequate state ground for the purpose of imposing a procedural bar."). The CCA did not undertake any kind of legal analysis with respect to the application of *McCoy* in its order, nor did it announce a general rule that *McCoy* can never constitute a new legal basis for relief by any habeas applicant. Because the CCA's decision does not fairly appear to rest primarily on federal law or to be interwoven with such law, the *Long* jurisdictional presumption

[4] Valdez acknowledges in his petition that the factual basis of his claim was available to him at the time he filed his initial writ application. *See* (Valdez's petition at 15).

does not apply. *See Coleman*, 501 U.S. at 740-41 (holding that the jurisdictional presumption did not apply where the state-court's decision rested solely on an independent state procedural rule and there was no mention of federal law in the state court's three-sentence dismissal order).

B. The CCA's decision rests on state-law procedural-default grounds that are independent of the federal question and adequate to support the CCA's judgment.

1. Nothing in *Turner v. State*, which post-dates the dismissal order in this case, supports Valdez's argument that the CCA necessarily considered the application of *McCoy* in dismissing his subsequent habeas application.

Despite the CCA's clear and express statement that it was dismissing Valdez' subsequent habeas application without considering the merits of his claims, Valdez, citing to the CCA's treatment of *McCoy* in *Turner v. State*, ---S.W.3d---, No. AP-76,580, 2018 WL 5932241 (Tex.Crim.App., Nov. 14, 2018) (not yet reported), an unrelated direct-appeal case that post-dates the CCA's dismissal order in this case, speculates that the CCA might nevertheless have addressed the application of *McCoy* in Valdez's case and decided to dismiss his subsequent habeas application because it determined that *McCoy* is inapplicable. *See* (Appellant's petition at 3, 16-18). Specifically, based on the CCA's statement in *Turner* that it "...agree[d] that a defendant cannot simply remain silent before and during trial and raise a *McCoy* complaint for the first time after trial," *see Turner*, 2018 WL 5932241 at *20, Valdez suggests that the CCA dismissed his subsequent habeas application because it believed that an objection and supporting facts must appear on the record to sustain a *McCoy* claim or that "...the structural issue identified in *McCoy* cannot be raised on post-conviction *habeas corpus*," a holding that Valdez contends is unsupported by the "...law and/or logic." *See* (Valdez's petition at 16-17).

At the outset, absolutely nothing in the CCA's dismissal order in this subsequent habeas proceeding suggests that its dismissal of Valdez' subsequent habeas application was guided by its analysis in *Turner*, a case that was decided over a month after the dismissal of Valdez' subsequent habeas application. And prefaced with the observation that "...the preservation and record development claims in this case are interrelated," the CCA's statement in *Turner*–that a defendant cannot remain silent before and during trial and raise a *McCoy* complaint after trial–makes perfect sense in the context of a direct appeal, which *Turner* was, where a reviewing court is being called upon to hold that the trial court committed structural error for allowing trial counsel to disobey his client's objectives in the absence of record support showing that the trial court was put on notice that the defendant found trial counsel's defensive strategy objectionable and contrary to his objectives. *See Turner*, 2018 WL 5932241 at *20-21; *cf. Hull v. State*, 67 S.W.3d 215, 217 (Tex.Crim.App. 2002) (explaining that rule 33.1 of the Texas Rules of Appellate Procedure, Texas' error-preservation rule, "...ensures that trial courts are provided an opportunity to correct their own mistakes at the most convenient and appropriate time–when the mistakes are alleged to have been made"); *see also* TEX. R. APP. P. 33.1. But *Turner*–again, a direct-appeal case–in no way expressed an opinion on what would be required to sustain such a *McCoy* claim in a state habeas proceeding.[5]

[5] Valdez's assertions of fact regarding his interactions with trial counsel, the veracity of which the State does not concede, *see* (Valdez's petition at 10-11, 18), illustrate the problem with Valdez's attempt to litigate his claim of trial-court error in a habeas proceeding, in that he complains that the trial court committed structural error on the basis of facts about his interactions with trial counsel that were apparently never brought to the trial court's attention at trial. And while he notes that *he* should not be required to "...interrupt a trial court's orderly process and decorum to vent his displeasure with..." his attorney's trial strategy, *see* (Valdez's petition at 18 n.5), Valdez does not allege that he requested that *counsel* advise the trial court that he (Valdez) wished to address the court regarding the alleged inadequacies of trial counsels' representation.

For all the foregoing reasons, nothing in *Turner* supports Valdez's assertion that the CCA necessarily addressed the application of *McCoy* in dismissing Valdez' subsequent habeas application.

2. Regardless of whether *McCoy* may serve as a new legal basis for all habeas applicants in general, *McCoy* did not constitute a new legal basis for Valdez because he was able to reasonably formulate, before filing his initial habeas application, the argument that trial counsel's concession of guilt violated his constitutional rights.

From the dismissal of his writ application, Valdez gleans that the CCA might "...have determined that the legal basis [of Valdez' subsequent habeas application] was, in fact, available before *McCoy*, and that, accordingly, [Valdez] could have raised the *McCoy* claim in the initial application." *See* (Valdez's petition at 16). To the extent that Valdez argues that the CCA must have considered *McCoy* in determining that *McCoy* is not a new legal basis to raise in any subsequent habeas application, the CCA would not have needed to make such a blanket holding to dismiss Valdez' subsequent habeas application because, regardless of whether *McCoy* can be a new legal basis to *other* habeas applicants, the record reflects that it was not a new legal basis to *Valdez* under article 11.071, section 5(d).

On direct appeal, and long before he filed his initial writ application, Valdez, though not complaining specifically about structural trial-court error, was able to reasonably formulate the argument, as an ineffective-assistance-of-counsel complaint, that trial counsel's concession of guilt violated his constitutional rights. *See Valdez*, 2018 WL 3046403 at *23 ("In point of error ten, [Valdez] argues that his counsel rendered constitutionally ineffective assistance by conceding to the jury that appellant had committed 'murder, plain and simple.'"). Also, although the petition for writ of certiorari in *McCoy* was filed in this Court on March 6, 2017, after Valdez

filed his brief on direct appeal in the CCA on February 22, 2016, nothing prevented Valdez from bringing *McCoy* to the CCA's attention during the pendency of his direct appeal, particularly where he was already permitted to file an amended brief, raising trial-court error for failing to *sua sponte* include an accomplice-witness instruction in the jury charge–almost two months after the State had already filed a reply brief addressing Valdez's claim that trial counsel rendered ineffective assistance of counsel for not requesting such an instruction in the charge–and where the CCA did not decide his direct appeal until June 20, 2018.[6] But even if Valdez could not have raised his *McCoy* trial-court-error claim on direct appeal, he certainly could have raised it in his first habeas application, which was filed on July 28, 2017. *Cf. Shipman v. Perry*, No. 1:18-CV-0607-TWT-AJB, slip op. at *7 (N.D.Ga., July 1, 2018) (not reported) (holding, in a federal habeas proceeding, that to the extent that the petitioner intended to raise a structural-error claim based on *McCoy* that was distinct from his ineffective-assistance-of-counsel claim, the petitioner procedurally defaulted any such claim where he failed to raise such a claim in his state habeas action, even though *Faretta v. California*, 422 U.S. 806 (1975), and the pending petition for writ of certiorari in *McCoy* were available at the time).

In any case, while addressing Valdez's claim on direct appeal that trial counsel rendered ineffective assistance of counsel by conceding guilt, the CCA nevertheless specifically distinguished *McCoy* from Valdez's case because nothing in the record showed that trial counsels' strategy was not in line with Valdez's:

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[6] *See* (case details for CCA cause number AP-77,042 at http://www.txcourts.gov/cca for docket entries for Valdez's motion for leave to file an amended brief, filed in the CCA on September 21, 2016, and the CCA's notice granting Valdez's motion for leave to file an amended brief, also filed on September 21, 2016).

> In *McCoy v. Louisiana*, the Supreme Court held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.["] *McCoy v. Louisiana*, 138 S. Ct. 1500, ___(2018) (emphasis added). However, in *McCoy*, the defendant, while on the record, affirmatively denied any guilt and protested to the court his objections to his trial attorney's chosen defense strategy of admitting guilt in favor of the hope of a lesser-included charge. *Id.* at ___. Here, the record contains no challenge to show that counsel's strategy was not in line with the defendant's objective. *See id*. at ___ ("[W]hen counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, 'no blanket rule demands the defendant's explicit consent' to implementation of that strategy." (citing *Florida v. Nixon*, 543 U.S. 175, 181 (2004)). For our purposes here, [Valdez] presents no evidence in the record to overcome the presumption of competent representation.

See Valdez, 2018 WL 3046403 at *25 n.120. Although he could have, Valdez did not seek rehearing in the CCA to further expound upon a *McCoy* structural-trial-court-error claim. *See* TEX. R. APP. P. 79.1.

Consequently, regardless of whether *McCoy* may serve as a new legal basis for other habeas applicants, *McCoy* does not constitute a new legal basis for Valdez under article 11.071, section 5(d), because he was able to reasonably formulate the argument for direct appeal and certainly before the filing of his initial habeas application. Without the application of *McCoy*, Valdez's complaint becomes nothing more than a challenge to the application of a state statute, which does not raise a federal question for this Court to review. *See Webb v. Webb*, 451 U.S. 493, 494 n.1 (1981) (noting that an issue that is purely a question of sate law is not properly subject to review by this Court); *see also* 28 U.S.C. § 1257; SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law.").

3. Because: (a) Valdez complained on direct appeal about trial counsel's concession of guilt as a violation of his constitutional rights; (b) Valdez had the opportunity to bring *McCoy* to the CCA's attention during the pendency of his direct appeal; and (c) the CCA considered and distinguished *McCoy* in rejecting Valdez's ineffective-assistance-of-counsel claim on direct appeal, his *McCoy* trial-court-error complaint was not cognizable on state habeas.

In Texas, like most states, complaints that could have been raised on direct appeal cannot be raised on post-conviction habeas review. *See Ex parte Beck*, 541 S.W.3d 846, 852 (Tex.Crim.App. 2017); *see also Johnson v. Lee*, ---U.S.---, 136 S.Ct. 1802, 1804 (2016) (observing that all states impose a longstanding and oft-cited procedural bar that prohibits a criminal defendant from raising in state habeas proceedings claims that could have been raised on direct appeal). The CCA has stated "...countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been raised on appeal." *See Ex parte Beck*, 541 S.W.3d at 852, *citing Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex.Crim.App. 2004). In general, even constitutional claims may be forfeited if the habeas applicant had the opportunity to raise the issue on appeal. *See Ex parte Beck*, 541 S.W.3d at 852. That is because the writ of habeas corpus is an extraordinary remedy that is available only in the absence of an adequate remedy at law. *See id.*

As discussed above, Valdez was able to reasonably formulate on direct appeal that trial counsel's concession of guilt violated his constitutional right to effective assistance of counsel, and the CCA considered and distinguished *McCoy* while addressing Valdez's ineffective-assistance-of-counsel claim. And to the extent Valdez wished to further expound upon a claim of structural-trial-court error under *McCoy*, he had an opportunity to do so during the pendency of his direct appeal, but did not do so. Consequently, his *McCoy* trial-court-error complaint was

not cognizable on state habeas, *see*, *e.*g., *Ex parte Beck*, 541 S.W.3d at 852, which further serves to demonstrate that the dismissal of Valdez' subsequent habeas application for failing to satisfy the statutory requirements of article 11.071, section 5(a), was based on the application of state, and not federal, law. *Cf. Lee*, 136 S.Ct. at 1806 (holding that a similar state procedural bar in California was adequate to bar federal habeas review).

4. Even if this Court's decision in *McCoy* was a new legal basis that Valdez could not have raised on direct appeal, Valdez faced an additional state procedural hurdle in that *McCoy* did not apply retroactively to his subsequent-writ collateral attack.

The CCA, adopting, as a matter of state law, the general retroactivity principles this Court set forth in *Teague*, has established the terms under which decisions from this Court affecting criminal cases will apply retroactively in Texas. *See Ex parte Lave*, 257 S.W.3d 235, 237 (Tex.Crim.App. 2008), *see also Teague v. Lane*, 489 U.S. 288, 310 (1989).[7] Generally, a new constitutional rule of criminal procedure will apply to cases still pending on direct review, but not to cases on collateral review. *See Ex parte Keith*, 202 S.W.3d 767, 769 (Tex.Crim.App. 2006); *see also Teague*, 489 U.S. at 310.[8]

Even if, as Valdez contends, this Court's decision in *McCoy* was so new that he could not have previously raised it on direct appeal and in his initial habeas application, Valdez faced an

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[7] This Court has recognized that state courts are not bound to follow the federal retroactivity principles set forth in *Teague*. *See Danforth v. Minnesota*, 552 U.S. 264, 278-79 (2008).

[8] There are two exceptions to this general rule of non-retroactivity for cases on collateral review. First, a new rule will be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the law to proscribe. *See Teague*, 489 U.S. at 310-11; *Ex parte Keith*, 202 S.W.3d at 769. Second, a new rule will be retroactive if it requires the observance of procedures that are implicit in the concept of ordered liberty. *See Teague*, 489 U.S. at 310-11; *Ex parte Keith*, 202 S.W.3d at 769. The scope of this second exception is limited to those new procedures without which the likelihood of an accurate conviction is seriously diminished. *See Teague*, 489 U.S. at 313.

additional state procedural hurdle in that *McCoy* did not apply retroactively to his subsequent-writ collateral attack, which also further serves to demonstrate that the CCA's dismissal of Valdez' subsequent habeas application for failing to satisfy the statutory requirements of article 11.071, section 5(a), was based on the application of state, and not federal, law. *See*, *e.g.*, *Ex parte Lave*, 257 S.W.3d at 237 (dismissing the habeas applicant's subsequent habeas application for failing to satisfy the requirements of article 11.071, section 5(a)(1), where the sought-to-be-relied-upon new constitutional rule did not retroactively apply to cases on collateral review).

For all the foregoing reasons, because the CCA's decision rests on state-law procedural-default grounds that are independent of the federal question and adequate to support the CCA's judgment, Valdez has failed to establish a compelling reason for this Court to exercise its judicial discretion to consider the CCA's decision to dismiss his subsequent habeas application. *See*, *e.g.*, *Coleman*, 501 U.S. at 729; *see also Barrientes*, 221 F.3d at 758-59. This Court should thus refuse to consider question one in Valdez's petition.

II. Question two: Because Valdez did not properly raise his due-process challenge to article 11.071, section 5(a), in the CCA, that issue is not properly before this Court.

This Court has held that it will generally refuse to consider a federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review." *See Howell v. Mississippi*, 543 U.S. 440, 443 (2005); *Adams v. Robertson*, 520 U.S. 83, 86 (1997). This Court has further explained that when the state-court decision is silent on the federal question raised in the petitioner's petition for writ of certiorari, the Court will assume that the issue was not properly presented to the state court. *See Adams*, 520 U.S. at 86-87. And the burden is on the

petitioner to then rebut this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented" in this Court. *See id*.

In his petition, Valdez asserts that article 11.071, section 5(a), on its face and as applied to him, violates his due-process rights under the Fifth Amendment in that: (1) "...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;" and (2) "...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 [Valdez] and every applicant in a capital *habeas case* due process." *See* (Valdez's petition at 19-22) (emphasis in original); *see also* U.S. CONST. amends. V, XIV.

Valdez did not timely raise this due-process complaint in the CCA, even though Valdez was aware of the possibility that the CCA would find his subsequent habeas claims barred under section 5(a). *See* (Valdez's petition, Exhibit C at 22-24). And the CCA did not address any such claim. *See* (Valdez's petition, Exhibit C); *Ex parte Valdez*, 2018 WL 4762789 at *1. Because this due-process issue was neither properly raised in, nor addressed by, the CCA, this Court should refuse to consider question two in Valdez's petition.

III. Question three: Because Valdez did not properly raise his equal-protection challenge to article 11.071, section 5(a), in the CCA, that issue is not properly before this Court.

Again, this Court has generally refused to consider a federal-law challenge to a state-court decision if the federal claim was not properly presented to, or considered by, the state court that

rendered the complained-of decision. *See Howell*, 543 U.S. at 443. In his petition, Valdez asserts that article 11.071, section 5(a), on its face and as applied to him, violates his right to equal protection under the Fourteenth Amendment, in that "...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." *See* (Valdez's petition at 19, 22-23) (emphasis in original); *see also* U.S. CONST. amend. XIV.

Valdez did not timely raise this equal-protection complaint in the CCA, even though Valdez was aware of the possibility that the CCA would dismiss his subsequent habeas claims as barred under section 5(a). *See* (Valdez's petition, Exhibit C at 22-24). And the CCA did not address any such claim. *See* (Valdez's petition, Exhibit C); *Ex parte Valdez*, 2018 WL 4762789 at *1. Because this equal-protection issue was neither properly raised in, nor addressed by, the CCA, this Court should refuse to consider question three in Valdez's petition.

CONCLUSION

For all of these reasons, this Court should deny Valdez's Petition for Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

Respectfully submitted,

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