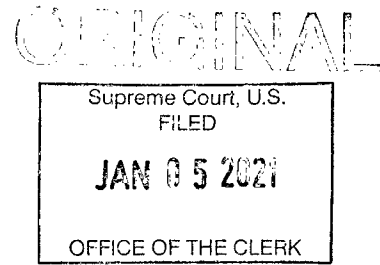


No. 20-7178



IN THE
SUPREME COURT OF THE UNITED STATES

NOLAN C. TURNER III — PETITIONER

VS.

DARREL VANNOY, WARDEN — RESPONDENT(S)

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

PETITION FOR WRIT OF CERTIORARI

NOLAN C. TURNER III
326827, ASH—1
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTIONS PRESENTED

This was a capital first-degree murder case that ended with a responsive verdict of guilty of second-degree murder which lead to the following questions:

1. Over Turner's objection, trial counsel told the jury the offense committed in this case was a general intent second degree murder and not the charged offense of first degree murder. Turner's counsel told the jury the shooting only happened because a gunfight started after the robbery occurred because Turner, although he knew better, just wanted to get out. Did trial counsel's concession of guilt to second degree murder, over Turner's express objection, violate Turner's right to maintain his innocence?
2. Before this Court rendered the decision in *McCoy v. Louisiana*, Turner had unsuccessfully litigated a claim that his trial counsel pled him guilty over his express objection. In denying the claim, the trial court applied an incorrect standard. Is there a remedy for cases that have become final prior to the announcement of the *McCoy* rule?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Nolan C. Turner III

326827, Ash—1

Louisiana State Penitentiary

Angola, LA 70712

James E. Stewart Sr., District Attorney

Attention: Appeals Division

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported;
or,
☐ unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported;
or,
☐ unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☒ reported at 2020-00047 (La. 9/29/20); 301 So.3d 1158; or,
☐ has been designated for publication but is not yet reported;
or,
☐ unpublished.

The opinion of the Louisiana Second Circuit Court of Appeal appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported;
or,
☒ is unpublished.

JURISDICTION

- ☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

- ☐ No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

- ☒ For cases from **state courts**:

The date on which the highest state court decided my case was September 29, 2020.

A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

“In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

“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.”

Article 1, § 13 of the Louisiana Constitution provides in pertinent part:

“When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of ... his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution....At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.”

STATEMENT OF THE CASE

Turner was charged, tried and convicted by a twelve-member jury for first degree murder. Turner was not successful in his direct appeal, or collateral attack of, his conviction and sentence in the state or federal courts.

On May 14, 2019, Turner filed a Successive Application for Post-Conviction Relief with Memorandum and Exhibits in Support ("SAPCR") under *La. C. Cr. P. art. 930.8 (A)(2)*'s exception clause. The State filed a response to Turner's SAPCR alleging relief must be denied because his SAPCR: (1) was filed more than two years after the judgment of conviction in violation of *La. C. Cr. P. art. 930.8*; (2) did not qualify for any of the exceptions listed in *La. C. Cr. P. art. 930.8*; (3) was repetitive in violation of the entirety of *La. C. Cr. P. art. 930.4*; (4) conclusory, speculative and self-serving in violation of *La. C. Cr. P. art. 930.2*; and (5) was lacking because Turner failed to refer to the record to prove his allegation and did not articulate what portions of the trial were unconstitutional and why. Turner traversed the State's answer to his SAPCR and refuted the unfounded allegations. On September 16, 2019, the district court agreed with the State and denied Turner's SAPCR. Attachment C. After giving the district court notice of his intent to seek appellate review and requesting a return date,

Turner timely filed an application for supervisory writ of review in the appellate court. On December 5, 2019, the appellate court, citing *La. C. Cr. P. art. 930.2*, denied Turner's writ application on the showing made.

Attachment B. After the appellate court's denial, Turner timely filed an application for a writ of certiorari to the Louisiana Supreme Court. On September 29, 2020, the Louisiana Supreme Court denied Turner's writ application and said: "The application was not timely filed in the district court, and applicant fails to carry his burden to show that an exception applies." Attachment A. Thereafter, Turner sought federal habeas release in the federal district court. On November 17, 2020, Magistrate Judge Hornsby stayed Turner's habeas petition, for a period of sixty days, and instructed him to receive authorization from Court of Appeals for the district court to consider his habeas petition; however, because this Court has not yet declared the holding of *McCoy v. Louisiana* to be applied retroactively, Turner is presenting this important question to the Court for consideration. This instant petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE WRIT

Turner has raised a claim which, if proven, entitles him to relief. The state courts have denied him relief and Turner now comes before the Court to present his claim. In *McCoy v. Louisiana*, 584 U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018) this Court held that the Sixth Amendment guarantees a defendant the right to choose the objective of his or her defense and to insist that counsel refrain from admitting guilt over the counsel's experienced-based opinion because some decisions, like whether or not to plead guilty, are for the client to make. See *McCoy v. Louisiana*, 138 S.Ct. at 1507, 1508-12. In *State v. Horn*, 2016-0559 (La. 9/7/18); 251 So.3d 1069, the Louisiana Supreme Court echoed the sentiments of the McCoy Court and went on to say that the holding in McCoy was "broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *State v. Horn*, 251 So.3d at 1075. As a result of this new interpretation concerning the Sixth Amendment's right to the assistance of counsel, there is an unprecedented area of law in need of judicial guidance. Cf. *State v. Cannon*, 2018-1846 (11/20/18); 257 So.3d 182. Also, contrary to the state courts claim, *La. C. Cr. P. art. 930.8(A)(2)* provided the necessary vehicle for Turner to have his claim heard. The McCoy Court also said: "Because a client's autonomy, not counsel's competence, is in issue, we do not apply

our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) to [a] McCoy[] claim.” *McCoy v. United States*, 138 S.Ct. at 1510-11; see also *State v. Horn*, 251 So.3d at 1077.

In addition to the new interpretation concerning the conceding of guilt over a defendant’s express objection, Turner asked the state courts to consider that: (1) he had told the trial judge he was being prosecuted in a case where the State was seeking the death penalty; (2) the only evidence against him was unreliable eyewitness testimony; (3) the suggestive and tainted photographic lineup irreversibly poisoned the minds of the witnesses; (4) he intended on pursuing an alibi defense to establish his actual innocence; and (5) his trial counsel conceded guilt to second degree murder over his express objection and defense. Instead of sustaining the State’s misplaced procedural objections, the state courts had a legal duty to consider Turner’s claim on its merit and grant relief.

Under Rule 10, the Louisiana courts have denied relief contrary to important questions of federal law that has been settled by this Court and has decided an important federal question in a way that conflicts with relevant decisions of this Court as set forth below:

1. The state courts misapplied Articles, 914, 922, 930.2, 930.4 and 930.8(A) of the Louisiana Code of Criminal Procedure to Turner's Second Application for Post-conviction Relief; and, in doing so, erroneously denied Turner's violation of autonomy claim contrary to clearly established federal law.

The state officials tasked with defending Turner did not defend him. Instead, the alleged defense team (Michael Vergis, David McClatchey and Kurt Goins) conceded Turner's guilt over his repeated and express protestations of innocence. In an affidavit defending Mr. Vergis, Mr. McClatchey suggests Turner is guilty of misconstruing Mr. Vergis's closing argument. Mr. McClatchey claims the first part of Mr. Vergis's argument was "that the offense itself [was] not even first degree murder but at best a second degree murder." Attachment D. If that does not qualify as a concession of guilt, nothing does. It is also of interest that Mr. Goins notarized the affidavit. It is now known that this kind of deliberate violence to the most basic element of the adversarial system contravenes the Sixth Amendment's guarantee of autonomy in the conduct of one's defense. See *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) and *State v. Horn*, 2016-0559 (La. 9/7/18); 251 So.3d 1069. It is also known that this kind of error is structural and entitles a defendant to an automatic reversal. The question presented here is, what to do with a conviction obtained in violation of a rule that became final prior

to the rule's announcement—especially where the claim was unsuccessfully litigated before this new rule was announced because the state courts applied an incorrect standard.

A. *La. C. Cr. P. art. 930.2* does not apply.

The state appellate court, citing *La. C. Cr. P. art. 930.2*, denied Turner's writ application on the showing made. Attachment C. Turner met his burden of proof as set forth in TITLE XXXI-A—which governs properly filed applications for post conviction relief. See *La. C. Cr. P. art. 924 et seq.* The appellate court was tasked with reviewing the district court's reasons for denying Turner relief; however, the appellate court failed to address the district court's reasons for denying Turner's SAPCR. In light of *La. C. Cr. P. art. 930.2*, the appellate court should have remanded the matter to the district court with instructions to conduct an evidentiary hearing because Turner presented sufficient evidence to support his factual claim. See *La. C. Cr. P. art. 930*. And, Mr. McClatchey (not Mr. Vergis who actually conceded guilt) claimed, in an affidavit he provided the State, that "Mr. Vergis did not concede guilt and in fact argued that Mr. Turner was not guilty and innocent of this offense." Attachment D. The state courts have failed to consider what Mr.

Vergis actually *said* when he did, in fact, concede guilt to a specific intent murder over Turner's objection:

Now, the question is, we have someone who is now deceased, *that makes it murder. I believe*, in this case, *it's second degree murder*, not first... Yes, he should have known better, but you sure weren't trying to kill anyone. You were going to be shot or be shot [sic]. And that doesn't justify it. It's still wrong. *It is still murder, but it's not first degree murder; it is clearly second degree murder. It is general intent...* Now that we have established that it's a second degree murder and what took place, let's move on to some of the evidence which has been used.

Record Below Appendix L, pp. 70-71.

The appellate and supreme court's failure to, at least, remand for an evidentiary hearing is clearly contrary to the holdings of *McCoy* and *Horn*, supra. Especially where Turner, under *La. C. Cr. P. art. 930.2*, submitted evidence sufficient to prove his trial counsel conceded guilt over his express objection.

B. *La. C. Cr. P. art. 930.8* does not apply.

Instead of addressing Turner's claim on its merit, the state courts misapplied *La. C. Cr. P. art.*'s 930.8, 914, 922 and 930.4 to his SAPCR. The state courts failed to consider 930.8(A)(2)'s specific exception under which Turner's claim falls. In pertinent parts, *La. C. Cr. P. art. 930.8 (A)(2)* provides:

No application for post-conviction relief ... shall be considered if it is filed more than two years after the judgment of

conviction and sentence has become final ... *unless* any of the following apply:

The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.

The district court erroneously concluded that Turner's SAPCR "was not filed in a timely fashion, requiring this Court to dismiss his Application." Attachment C. The district court went on to say Turner's conviction and sentence became final October 4, 2010. Attachment C. The district court's logic and legal conclusions are wrong and the appellate and supreme courts should have addressed it. Turner's conviction and sentence became final June 24, 2004, ninety days after state supreme court declined discretionary review following the affirmance of his conviction and sentence on direct appeal. As for the *McCoy* rule, it should be considered a watershed rule because it meets the twin criteria of being a structural error and an error that causes a fundamental breakdown in the adversarial process. Cf. *Teague v. Lane*, 489 U.S. at 310-11; *Montgomery v. Louisiana*, 136 S.Ct. at 728-29.

The district court also said Turner "had two years ... or until October 4, 2012 to file his Application for Post-Conviction Relief" and since he "failed to file his Application in a timely manner, it must be denied." Attachment C.

In other words, the state courts have denied Turner relief because he should have collaterally attacked his conviction and sentence concerning a violation of client autonomy eight years before this Court announced the *McCoy* rule.

C. *La. C. Cr. P. art. 930.4* does not apply.

The state courts misapplied *La. C. Cr. P. art. 930.4(D)* to Turner's SAPCR. The state district court said:

Petitioner's Application must be dismissed pursuant to Article 930.4 of the Louisiana Code of Criminal Procedure. Petitioner has not raised any new arguments specifying why there was a violation of Article 1, § 13 of the Louisiana Constitution and the Sixth Amendment of the United States Constitution, but rather, has alleged the **same claim** that was asserted in his first Application for Post-Conviction Relief, filed on February 9, 2005. This Court has already issued a ruling denying that first Application for Post-Conviction Relief. As this Application contains the exact same argument and fails to raise any new claim suggesting that Petitioner's trial counsel conceded his guilt over his express objection, Article 930.4 of the Louisiana Code of Criminal Procedure requires this Court to dismiss Petitioner's Application.

Attachment C (Emphasis in original).

Although the facts are the same, the claim presented in Turner's SAPCR is not the same as the one presented in his APCR. The APCR contained an ineffective-assistance-of-counsel claim. The claim presented in his SAPCR is the violation of his right to insist his attorney not concede guilt to *any* offense.

D. There is a difference in the claim raised in Turner's SAPCR versus the one raised in his original APCR.

The claim in Turner's original APCR was that his trial counsel was ineffective for conceding Petitioner's guilt in closing argument without his consent. The issue complained of here is that Turner's right to choose the objective of his defense was violated when his counsel conceded guilt over his express objection. In other words, the claim in the original APCR was an ineffective-assistance-of-counsel claim and the instant claim is not. See *McCoy v. Louisiana*, 138 S.Ct. at 1510-11; *State v. Horn*, 251 So.3d at 1077. Accordingly, *La. C. Cr. P. art. 930.4(D)* is not applicable because Turner's violation of autonomy claim is *new* and, in essence, *different* from his previous ineffective-assistance-of-counsel claim.

E. There is a difference between the rule announced in *Florida v. Nixon* versus the rule announced in *McCoy v. Louisiana*.

The district court relied on *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 563, 160 L.Ed.2d 565 (2004) to deny Turner's original ineffective-assistance-of-counsel claim where his defense counsel was ineffective for conceding guilt in closing argument without his consent. Turner was charged with first degree murder and the prosecution was seeking the death penalty. The district court reasoned that although "defense counsel argued that the

offense was a Second Degree Murder, but does not concede that Petitioner was the person at the scene.... There is no indication that defense counsel conceded to Petitioner's guilty [sic] to the crime, or to his guilt of a lesser crime." See Record Below. In fact, the *McCoy* Court explained the difference between cases similar to *Nixon*'s versus those similar to *McCoy*'s:

We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, *id.*, 181, 125 S.Ct. 551, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy, *id.*, at 192, 125 S.Ct. 551.

In the case now before us, in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged criminal acts and adamantly objected to any admission of guilt.

McCoy v. Louisiana, 138 S.Ct. at 1505.

Turner never acquiesced to his trial counsel's concession strategy and consistently maintained his innocence. In fact, Turner reminded the trial judge that he was "being prosecuted in a case in which the State is asking for the death penalty" and that he intended on pursuing "an alibi defense therefore claiming [his] innocence." In denying Turner's original APCR, the district court said counsel's closing argument ("that the offense was a Second Degree Murder") did not amount to a concession of guilt over Turner's objection because counsel did "not concede that Petitioner was the person at the scene." The district court's reasoning is flawed.

F. Another reason the *McCoy* rule should apply retroactively to this case.

Turner unsuccessfully litigated his ineffective-assistance-of-counsel claim to this honorable Court before the new interpretation of the Sixth Amendment, as found in *McCoy v. Louisiana*, was handed down. In *McCoy*, the Court said the decision whether to plead guilty or not rests solely in the discretion of a criminal defendant and not his attorney. The *McCoy* Court specifically said:

[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. Guaranteeing a defendant the right "to have the *Assistance* of counsel for *his* defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

McCoy v. Louisiana, 138 S.Ct. at 1505.

The Louisiana Supreme Court, after being reversed by this Court, concluded that:

... there is no question that a criminal defendant's decision whether to concede guilt implicates fundamental constitutional rights and the right to exercise that decision is protected under the Sixth Amendment. Moreover, a violation of this Sixth Amendment right is a structural error and not subject to

harmless error review. [Thus] ... [a] criminal defendant's express refusal to concede guilt is safeguarded by core constitutional protections.

State v. Horn, 251 So.3d at 1076, 1077.

G. A criminal defendant's right to insist counsel refrain from conceding guilt existed before the *McCoy* rule was announced.

Because a criminal defendant does not surrender complete control of his defense to his counsel, Turner was deprived of his Sixth Amendment right to have the assistance of counsel for his defense when Mr. Vergis conceded guilt to second degree murder. *McCoy v. Louisiana*, 138 S.Ct. at 1506, 1508. Mr. Vergis's action violated the longstanding rule that "such basic decisions as to whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make." *Wainwright v. Sykes*, 443 U.S. 72, 93 n. 1 (1977). The federal Sixth Circuit Court of Appeals explained that "an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty.'" *Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir. 1981). As of May 14, 2018, it was settled that the Sixth Amendment grants an accused the right to make his own defense and when it (the Sixth Amendment) "speaks of the 'assistance' of counsel, [that] assistant, however expert, is still an assistant." *McCoy v. Louisiana*, 138 S.Ct. at 1508.

Mr. Vergis, along with Mr. McClatchey and Mr. Goins, tried to convince Turner to plead guilty to second degree murder. Turner refused. The record of this case is clear, guilt was conceded over Turner's objection and he exhausted the issue all the way to this Court under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984). Again, this was before this issue was settled by the *McCoy* rule. Contrary to law, Mr. Vergis changed Turner's defense and conceded guilt without his consent. Mr. Vergis argued second degree murder in opposition to Turner's adamant plea of not guilty.

In his closing statement, Mr. Vergis told the jury:

Now, the question is, we have someone who is now deceased, that makes it murder. I believe, in this case, it's second degree murder, not first. And here's why: In order to have first degree murder you have to show the specific intent to kill. It was the outcome they wanted. They went there with the intent to kill people. They wanted to do this, but that's not what happened. The robbery was taking place, things were going fine and then a gunfight started and at that point, there was no intent to kill, there was intent to get out. That is general intent. Yes, he should have known better, but you sure weren't trying to kill anyone. You were going to be shot or be shot [sic]. And that doesn't justify it. It's still wrong. It is still murder, but it's not first degree murder; it is clearly second degree murder. It is general intent. Mr. McClatchey during his long voir dire explained that, if you specifically intend to do this, it is going to be specific intent. Now, if this was something going to be a likely consequence of your actions, it is general intent. It wasn't intended. All right. Now that we have established that it's a second

degree murder and what took place, let's move on to the some of the evidence which has been used.

Record below Appendix L, pp. 70-71.

Mr. Vergis's concession was a violation of Turner's right to insist on his innocence and robbed him of his right to the effective-assistance-of-counsel to aid him in presenting his defense. Counsel's strategy of conceding guilt, over Turner's objection, to a lesser charge of second degree murder during closing argument was not strategy but a violation of Turner's right to decide what his defense should be.

Contrary to clearly established law, as determined by this honorable Court, Mr. Vergis, in concluding his argument, said: "We have established that it a [sic] second degree murder and the State has to prove beyond a reasonable doubt that Nolan Turner committed this act. Now, the question is, if Nolan wasn't there, then where was he?" Attachment L. Mr. Vergis's insinuation that Turner was not where he said he was further strengthened the improper concession of guilt over Turner's explicit objection.

Also, while it is insisted that a pro se litigant's claims be presented, the measure for that accounting does not include a willingness to hold pro se litigants "to the same stringent and rigorous standards as are pleadings filed

by lawyers.” *Register v. Thaler*, 681 F.3d at 628 (internal quotation omitted).

Accordingly, Turner is entitled to habeas relief concerning this claim.

CONCLUSION

For the foregoing reasons Turner’s petition for a writ of certiorari should be granted.

Respectfully submitted,



Nolan C. Turner III

Date: January 29, 2021