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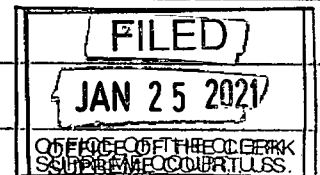
IN THE
Supreme Court of the United States

PHILLIP VANCE SMITH, II
PETITIONER,

v.

ORIGINAL

JOSH STEIN; ERIK A. HOOKS
RESPONDENT.



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

PETITION FOR WRIT OF CERTIORARI

Phillip Vance Smith, II

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QUESTION PRESENTED

Whether *McCoy v. Louisiana*, 138 U.S. 1500 (2018)
applies retroactively to cases on collateral review?

PARTIES TO THE PROCEEDING

Phillip Vance Smith, II, pro se, and Erik A. Hooks (head of the North Carolina Department of Public Safety) are parties to the proceeding. To date, Erik A. Hooks has been represented by Josh Stein (Attorney General) and the North Carolina Attorney General's Office.

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OPINIONS BELOW

Phillip Smith was convicted in a non-capital trial in North Carolina's Wake County Superior Court on 8 March 2002 in docket number 01CR522131 for one count of first-degree murder. Counsel was appointed on appeal. Smith's direct appeal was denied by the North Carolina Court of Appeals. State v. Smith, 158 N.C. App. 747, 582 S.E.2d 83 (2003). The North Carolina Supreme Court denied Smith's Petition for Discretionary Review. State v. Smith, 357 N.C. 661, 590 S.E.2d 858 (2003). Soon after, Smith sought post-conviction relief. His first attempt was denied without hearing on 2 February 2005. Years later, Smith filed a second post-conviction attempt, which was denied without hearing on 20 May 2016.

Petitions for writs of certiorari to the North Carolina Court of Appeals (State v. Smith, PI6-847 (2016)) and the North Carolina Supreme Court (State v. Smith, 369 N.C. 484, 795 S.E.2d 361, 362 (2017)) also failed without review.

Thereafter, Smith filed a petition for habeas corpus with the United States District Court for the Eastern District of North Carolina. On 18 September 2018, the District Court denied relief based on untimeliness violations of The Antiterrorism and Effective Death Penalty Act ("AEDPA"). Smith v. Hooks, No. 5:17-HC-2103-BO. The District Court's opinion can be found in Appendix B. App. 11. The United States Fourth

Circuit Court of Appeals issued a Certificate of Appealability on one issue: Whether the rule announced in McCoy v. Louisiana, 138 U.S. 1500 (2018) applies retroactively to cases on collateral review. Counsel was appointed. After reviewing the paper briefs, the Fourth Circuit affirmed the District Court's dismissal of Smith's petition on 3 December 2020 (No. 18-7239). The Fourth Circuit's opinion appears in Appendix A. App. 1.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit entered judgement on 3 December 2020. No petition for rehearing was timely filed in this case. This Court has jurisdiction under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal proceedings, the accused shall enjoy the right... to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

While Phillip Smith's habeas petition was pending in the district court, this Court decided—for the first time—that the Sixth Amendment entitles a criminal defendant to insist "that counsel refrain from admitting guilt" against his client's wishes. McCoy v. Louisiana, 138 U.S. 1500, 1505 (2018). This ruling applies directly to Smith's case.

During his 2002 non-capital murder trial in a North Carolina state court, Smith's lawyer conceded guilt to first-degree felony murder over Smith's objection, even though the trial court also gave lesser-included offense instructions for second-degree murder. App. 40-41. As a result, Smith was convicted and sentenced to life without parole. McCoy questions whether Smith was convicted for the facts of the case, or his attorney's concession of guilt.

The district court decided that McCoy was not a "watershed" ruling of criminal procedure applicable to cases on collateral review under the standard set out in Teague v. Lane, 489 U.S. 288 (1989). App. 23-26. Consequently, the district court dismissed Smith's petition as untimely on 18 September 2018. App. 27. The district court denied a certificate of appealability.

The Fourth Circuit issued a certificate of appealability on the sole question of whether McCoy applied retroactively to cases on collateral review. The Fourth Circuit affirmed the dismissal

of Smith's habeas petition on 3 December 2020, deciding that McLoy is a new rule, but not a watershed rule.

Specifically, the Fourth Circuit erroneously decided that McLoy is simply the progeny of Gideon v. Wainwright, 372 U.S. 335 (1963), which articulates an indigent criminal defendant's right to counsel. The Fourth Circuit considered McLoy "an extension of a watershed rule [i.e., Gideon] rather than a watershed rule itself." App. 10.

Since 1791, it has been well established that the Sixth Amendment entitles indigent defendants to representation, not Gideon v. Wainwright. Although Gideon reaffirmed that right, McLoy reaffirms a defendant's right to the presumption of innocence, and his right to maintain it.

To determine if a recent ruling is an extension of a previous one, subtract the supposed precedential ruling. This method proves that if Gideon never existed, McLoy's "newly discovered right" would be seen rooted autonomously in the Sixth Amendment. □

McLoy, 138 U.S. at 1514. (Alito, J. dissenting). Contrariwise, if McLoy never existed, a defendant's counsel could still concede guilt because Gideon only affirms counsel for indigents. McLoy cannot be a mere "extension" of Gideon because McLoy specifically targets a lawyer's obligation to abide by his client's wishes in promotion of fairness to the proceeding □ appointed or retained.

According to the Fourth Circuit's decision, no ineffective assistance of counsel ("IAC") decision could be applied

retroactively on collateral review because all would be "extensions" of Gideon's right to counsel. The Fourth Circuit's reasoning contradicts the intended purpose of retroactive application in habeas proceedings, which demands "evenhanded justice... be applied retroactively to all who are similarly situated." Teague, 489 U.S. at 290.

The Fourth Circuit erred in finding that McLoy does not apply retroactively to cases on collateral review. This Court should review that decision under Supreme Court Rule 10(c), stating that "a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court," based on the importance of the issue to the public.

STATEMENT OF THE FACTS

In 2001, Phillip Smith killed Bico Waters in a drug deal gone bad. Smith had agreed to sell drugs to Waters and intended to rob him. When Waters and his friend Gregory Adams arrived to buy drugs, Smith got into the backseat of a car driven by Adams and drew a gun. Waters drew a gun of his own, but it was later found to be a plastic gun that appeared real. The men argued, and Smith shot Waters. Smith later turned himself in to police and was indicted for first-degree murder.

Smith testified in his own defense at trial and told the jury that he abandoned the attempted robbery after Waters

confronted him with what he thought was a gun. Smith testified that he was retreating from the fray and only shot Waters to protect himself, establishing an arguable affirmative defense against felony murder in North Carolina.

During a private conference prior to closing arguments, Smith's attorney explained that he "wanted to tell the jury that [Smith] was guilty of felony murder" during closing arguments. App. 44. His attorney said "he had no choice" except to admit guilt, because Smith "admitted to attempting to rob [Waters] during testimony." App. 44. Smith refused to give consent and told his attorney that he "did not agree with him telling the jury that [he] was guilty of anything," because the trial court included second-degree murder as a lesser-included offense jury instruction. App. 41, 44. But in open court, Smith's attorney told the trial court that he had "spoken with Smith" and Smith had "no objection" to him "arguing that [Smith] is in fact guilty as charged with respect to the felony murder." App. 42. When the trial court questioned Smith, he told the Court that he did not want his lawyer to admit guilt. App. 42-43. The Court allowed Smith's attorney to concede guilt without Smith's consent. App. 44.

After Smith's lawyer told the jury that he was guilty of felony murder, the jury found him guilty of that charge. The trial court sentenced Smith to life without parole, the only sentence available for non-capital first-degree murder convictions in North Carolina.

REASONS FOR GRANTING A WRIT OF CERTIORARI

At the time of Phillip Smith's conviction in 2002, no federal precedent prevented a trial attorney's concession of guilt against a client's wishes. In fact, this Court had never addressed the issue. Correspondingly, the Fourth Circuit agreed that Mcloy met all of the stringent requirements to apply retroactively to cases on collateral review, except the watershed element.

App. 5-10. Failure to decide that Mcloy is a watershed ruling undermines one of the "principle functions of habeas corpus," assuring "that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." Teague, 489 U.S. 312 (1989).

I. Standard of Retroactivity.

Federal courts are prohibited from granting relief to state prisoners "based on a rule announced after his conviction and sentence became final." Caspar v. Bohlen, 510 U.S. 383 (1994).

Only "new" rules of constitutional law can be considered retroactive to cases on collateral review through two exceptions. The first allows retroactive application if a new rule forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." O'Dell v. Netherland, 521 U.S. 151 (1997).

The second "permits retroactive application of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (internal quotations removed). Both exceptions are rooted in Teague v. Lane, 489 U.S. 312 (1989).

II. Fourth Circuit Agrees that McLoy Announced a New Rule

To determine whether a rule is "new," a federal court "must ascertain the legal landscape" as it existed at the time of the defendant's conviction and "ask whether the Constitution, as interpreted by the precedent then existing, compels the rule." Beard v. Banks, 542 U.S. 406, 411 (2004). "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Chaidez v. United States, 568 U.S. 342, 347 (2013). A rule is not "dictated" by prior precedent unless it would have been "apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, 528 (1997).

The Fourth Circuit did not contest McLoy's status as a new constitutional rule. The Fourth Circuit decided that "[p]rior to McLoy, the Supreme Court had viewed a lawyer's concession of guilt as a tactical choice that counsel could make—in the absence of her client's consent—without exceeding limitations." App. 6. The Fourth Circuit based its finding on Florida v. Nixon, 543 U.S.

175 (2004), which was decided a few months after Smith's conviction became final and represents the "legal landscape" at the time. Nixon rejected "a blanket rule demanding a defendant's explicit consent" and "unanimously determined that such an admission [of guilt] was not automatically prejudicial ineffective assistance of counsel." App. 6. (quoting Nixon, Id. at 192).

Moreover, the Fourth Circuit noted several other features supporting McLox's new status. (1) McLox cited no "controlling precedent." App. 7. (2) This Court made McLox "structural," a break from Strickland v. Washington, 466 U.S. 668 (1984) "because a client's autonomy, not counsel's competence, is in issue." App. 7. (citing McLox, 138 U.S. at 1511; also Id. at 1508-09). (3) McLox "appears to have been susceptible to debate among reasonable minds." App. 7 (citing Butler v. McKellar, 494 U.S. 407 (1990)).

And (4), "Justice Alito noted in dissent, the McLox rule appears to be a 'newly discovered constitutional right' making 'its first appearance' in that decision." App. 8. (quoting McLox, 138 U.S. at 1514, 1518 (Alito, J. dissenting)).

Lastly, McLox explained that a lawyer's concession of guilt over his client's objection results in "structural" error because it "blocks the defendant's right to make the fundamental choices about his own defense." McLox, 138 U.S. at 1512. This Court has found an error to be "structural, and thus subject to automatic reversal only in a very limited class of cases." Neder v. United States, 527 U.S. 1 (1999). Categorizing McLox as

"structural" sequesters it from other IAC violations, affirming that McLoy announced a "new" constitutional rule not dictated by existing precedent. See *Chavez*, 568 U.S. at 347.

III. McLoy is a Watershed Rule of Criminal Procedure

McLoy applies retroactively to cases on collateral review because it is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). For a new procedural rule to be watershed, it must (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Block*, 549 U.S. 406, 416 (2007). McLoy does both.

A. Fourth Circuit Agrees that McLoy Diminishes the Likelihood of an Inaccurate Conviction

The Fourth Circuit concluded that the "McLoy rule may well be necessary to prevent an impermissibly large risk of an inaccurate conviction." App. 8. Indeed, a defense attorney is more than just a strategist. A defense attorney is a trusted official upon which a jury relies to guide them through many complicated matters they may not understand. For the above

reason, McLoy recognized that "the effects of [counsel's] admission of guilt would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." McLoy, 138 U.S. at 1511. McLoy advances Teague's finding that watershed rules are "components of basic due process" deemed "central to an accuracy determination of innocence or guilt." Teague, 489 U.S. at 313. Given the severity of a McLoy violation, it proves impossible to imagine a jury that would not convict Phillip Smith after hearing he was guilty from defense counsel, his only advocate in the courtroom.

B. Fourth Circuit Erred by Deciding McLoy Is Only an Extension of Gideon v. Wainwright.

The watershed-rule requirement forwarded in Teague also demands that a new rule must alter our understanding "of essential" and "bedrock procedural element[s]" of criminal proceedings. Teague, 489 U.S. at 315.

In its denial, the Fourth Circuit determined that McLoy does not alter our understanding of essential and bedrock procedural elements because "McLoy refines the Gideon rule," which states that criminal defendants have a right to counsel, "but [McLoy] is an extension of a watershed rule [i.e., Gideon] rather than a watershed rule itself." App. 10. The Fourth Circuit supported

its finding by holding, "it is not enough that a new procedural rule is fundamental in some abstract sense. App. 9. (citing Schiro v. Summerlain, 542 U.S. 348, 352 (2004) (internal quotations removed). The court added that it is not "sufficient that a new rule is based on a bedrock right." App. 9. (citing Whorton, 549 U.S. at 420-21) (internal quotations removed).

To be clear, the crucible for a watershed rule does not require a bedrock principle to be formerly unknown. It is enough that the right may have been unrecognized because it was overshadowed by an earlier decision, like the obscure ruling in Florida v. Nixon, 543 U.S. 175 (2004), which held "the Constitution does not bar counsel" from conceding guilt. *Id.* at 178. Nixon may not have posited precedence over McLoy, but this Court's determination that an unconsensual admission of guilt "was not automatically prejudicial ineffective assistance of counsel" cast a dark shroud over the right until McLoy illuminated its unconstitutionality. Nixon, 543 U.S. at 192.

Gideon v. Wainwright, 372 U.S. 335 (1963), the model watershed ruling, provides an analogous example. Gideon's right to counsel did not materialize out of thin air. Gideon actually overruled Betts v. Brady, 316 U.S. 455 (1942), which prevented the extension of the due process clause of the Fourteenth Amendment to state as well as federal criminal proceedings, ensuring that all defendants, indigent or not, had representation.

The Gideon Court reaffirmed that the right to counsel, "[f]rom the very beginning," has been "fundamental and essential to fair trials." Gideon, 372 U.S. at 345. However, if the Fourth Circuit heard Gideon today, it would likely find that Gideon is not a watershed rule because it is "based on a bedrock right." App. 9. See Whorton, 549 U.S. at 420-21.

McLoy alters our understanding of the essential bedrock procedural elements by declaring that an attorney's unconsensual concession of guilt is unconstitutional, when Florida v. Nixon, 543 U.S. 175 (2004) left the question open. The Fourth Circuit's claim that McLoy's rule is "fundamental in some abstract sense" is misguided. App. 9. See Schiro, 542 U.S. at 352. McLoy's targeted protection against a trial attorney's concession of guilt is "central to an accuracy determination of innocence or guilt," not abstract in the least. Teague, 489 U.S. at 313.

McLoy "restore[d] constitutional principles" essential to "achieve a fair system of justice" rooted more deeply in tradition and the Constitution than the basic right to counsel, because McLoy promises that the adversarial process will be honest and fair. See Gideon, 372 U.S. at 344.

If Gideon's right to counsel had never arrived, McLoy would still dictate an attorney's duty to abide by his client's wishes not to admit guilt, proving that McLoy operates apart from Gideon. Before Gideon, privately retained counsel controlled all aspects of trial management, including what

arguments to make, what objections to raise, what evidence to admit, and what to "say in summation." McLoy, 138 U.S. at 1516 (Alito, J. dissenting). Gideon changed none of that. McLoy alters our understanding of bedrock procedural elements by redirecting a power counsel once held constitutionally, to the client. McLoy solely governs this right—parallel to Gideon's—not as an "extension."

C. Pre-Teague Retroactivity Rulings Cited by the Fourth Circuit Magnify Its Error

To support its finding that McLoy is Gideon's progeny, the Fourth Circuit noted, "[b]efore the institution of the watershed requirement in Teague, the Supreme Court repeatedly addressed rules derived from Gideon—like the right to counsel at plea hearings, the right to counsel at probation revocation hearings, the right to counsel on appeal, and the right to counsel at any prosecution leading to actual imprisonment—and held them retroactively applicable." App. 9. (citing Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968); McLonnell v. Rhy, 393 U.S. 2, 3-4 (1968); Berry v. City of Cincinnati, 414 U.S. 29, 29-30 (1973)) (emphasis added). However, the cited cases do not prove that McLoy is an "extension" of Gideon, but actually the opposite. App. 10.

The above citations guarantee and extend the right for counsel to be present during a proceeding, exactly like Gideon. Not one governs defense counsel's strategic choices or a defendant's

right to object to a concession of guilt, as in McLoy. Those cases are not in McLoy's stratosphere and cannot be likened to a right demanding that a criminal defendant now has the power to "insist that his attorney contest his guilt with respect to all charged offenses." McLoy, 138 U.S. at 1514. They do not compare.

D. McLoy Promotes Primacy and Centrality to Effect Profound Change

McLoy fosters sufficient "'primacy' and 'centrality'" to possibly effect "a profound and 'sweeping' change" justifying retroactive application. Whorton, 549 U.S. at 420 (quoting Saffle, 494 U.S. at 495). Yet, McLoy will not move the earth.

McLoy displays primacy because it is not controlled by prior precedent. App. 7-8. See also McLoy, 138 U.S. at 1514, 1518 (Alito J. dissenting) (defining McLoy's new right as "rare.")

McLoy forwards centrality by specifically shifting "the balance of power between counsel and client," giving the defendant a "right to make the fundamental choices about his own defense." App. 10. See McLoy, 138 U.S. at 1511. This "basic" right could not be more "central to an accuracy determination of innocence or guilt." Teague, 489 U.S. at 313.

McLoy effects a profound and sweeping change by compelling states to provide fair and accurate trials that uphold a defendant's right to maintain innocence until proven guilty. McLoy will not open

the floodgates, causing states to relitigate thousands of final cases, because McLoy only affects a limited class of people who were prejudiced by their attorney in the worst way: an unconstitutional concession of guilt over their recorded objection.

This Court has found that "[r]oughly 95% of felony cases... are resolved by guilty pleas." Missouri v. Frye, 566 U.S. 134, 143 (2012). It is likely that less than one percent of all people who went to trial will be able to prove a lawyer conceded guilt against their wishes. However, McLoy affects every criminal defendant maintaining innocence by imposing "a new obligation on the states [and] the federal government" to ensure attorneys cannot concede guilt without a client's consent. Butler, 494 U.S. at 412, 415.

N. McLoy Applies to Smith's Case

The Fourth Circuit declined to adjudicate the merits of Smith's case because it did not consider McLoy a watershed ruling. App.10. However, some facts are pertinent for review; specifically, non-capital versus capital with a McLoy violation.

The dissent in McLoy addressed this issue best by finding that it is "hard to see how the [McLoy rule] could come into play in any other case than a capital case in which the jury must decide both guilt and punishment," because "in all other cases, guilt is almost always the only issue for the jury,

evidence they [the jury] have the privilege or the opportunity to" decide second-degree murder. App. 41. No logical reason exists justifying why Smith's counsel overrode his wish to maintain innocence in order to concede guilt to felony murder when a lesser, more advantageous option was available and applicable to the evidence presented at trial.

CONCLUSION

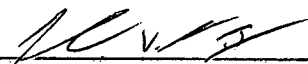
The Fourth Circuit's decision that McLoy is merely an extension of Gideon v. Wainwright, 372 U.S. 335 (1963) is a misguided view of the new rule announced in McLoy. McLoy is a watershed rule that alters our understanding of bedrock procedural elements by deeming a once constitutional practice unconstitutional to promote fairness and accuracy in trials. No other ruling could be more important.

Without McLoy, one cannot gauge if a criminal defendant was convicted because of the evidence, or counsel's unconsensual concession of guilt. No trial with a McLoy violation can be considered fair, and all deserve retroactive application on collateral review.

There is no doubt that Gideon articulated criminal defendants' right to counsel. But only McLoy gave defendants the "right to make the fundamental choices about his own defense." McLoy, 138 U.S. at 1511.

As such, Mr. Smith's conviction runs afoul of this nation's legal tradition and it must be vacated and re-tried under fair conditions consistent with Meloy v. Louisiana, 138 U.S. 1500 (2018)

Respectfully Submitted,
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Dated: 25 January 2021