

No. _____

October Term, 2021

In the
Supreme Court of the United States

Mauricio Melendez,
Petitioner,

v.

Renee Baker, Warden, et al.,
Respondents.

On Petition for Writ of Certiorari to the
Nevada Supreme Court

Petition for Writ of Certiorari

Rene Valladares
Federal Public Defender,
District of Nevada
*C.B. Kirschner
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Counsel of Record for Petitioner

QUESTION PRESENTED

In 2018, this Court decided *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), recognizing a criminal defendant's right to secured autonomy over his defense. Within a year of that decision, Petitioner Mauricio Melendez, filed a new state petition for writ of habeas corpus (post-conviction) alleging this right was violated when his trial attorney conceded guilt to manslaughter without his consent.

On appeal, the Nevada Supreme Court held *McCoy* did not apply because Melendez did not expressly object to his attorney's concession. This Court should grant certiorari on the following question:

1. Whether, under *McCoy v. Louisiana*, defendants must expressly object to an attorney's concession of guilt in order to assert their right to secured autonomy over their defense?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mauricio Melendez respectfully prays that a writ of certiorari issue to review the order of the Nevada Supreme Court. *See* Appendix 001.

OPINION BELOW

The order of the Nevada Supreme Court, affirming the denial of Mr. Melendez’s second state post-conviction petition for writ of habeas corpus is unreported and appears at App. 001–004.

JURISDICTION

The Nevada Supreme Court’s order of affirmance was issued on March 9, 2021. App.001. In response to the COVID-19 pandemic, this Court extended the deadline for filing petitions for writ of certiorari to 150 days from the date of the lower court judgment. Per this Court’s most recent Order on July 19, 2021, the 150-day deadline applies to final orders issued on or before that date.

This Court has statutory jurisdiction under 28 U.S.C. § 1257(a). This petition presents a federal constitutional question for this Court’s review because the Nevada Supreme Court’s decision did not invoke any state-law grounds “independent of the merits” of Mr. Melendez’s federal constitutional challenge. *See Rippo v. Baker*, 137 S.Ct. 905, 907 n.1 (2017); *Foster v. Chatman*, 136 S.Ct. 1737, 1746 (2016). The Nevada Supreme Court’s ruling analyzed whether, under this Court’s recent precedent, Mr. Melendez had to explicitly object to his attorney’s concession of guilt in order to invoke his constitutional right to secured autonomy over his defense.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

A. Mr. Melendez is charged with first-degree murder.

Petitioner Mauricio Melendez was charged with murder in the shooting death of his wife, Chennel Melendez. Mr. Melendez told the police that he and his wife had been drinking when he decided to show her how to use his handgun. Despite being intoxicated, they played around with the firearm and it accidentally discharged, killing Chennel. There were no other bruises or injuries to Chennel, and no history of violence between the couple.

Mr. Melendez was in shock when his wife died. His first thought was to clean up some of the blood so that their son wouldn't see it. He then laid his wife's body on the sofa, still hoping that she would "wake up." He did not attempt to flee or dispose of any of the evidence. The rags he used to clean the blood were still in his kitchen when police arrived. Mr. Melendez eventually called 911 and cooperated with the police, including telling them where the gun was. When interviewed by the police, he emphatically stated he thought the gun was unloaded and didn't understand

how his wife got shot. He told them it was an accident.

B. The theory of the defense is that the shooting was accidental.

From the very start, the theory of the defense was that the shooting was accidental. During opening statements, lead defense counsel repeatedly told the jury that the shooting was “unplanned, unexpected and unintentional.” Throughout the trial, the defense emphasized that there was no evidence of motive or intent to kill. They presented character evidence that Mr. Melendez was a peaceful and law-abiding person. And at the close of trial, the court instructed the jury that, per Nevada law, an accident is not a crime.

C. Counsel does an about-face during closing arguments and asks the jury to convict Mr. Melendez of manslaughter.

During closing arguments, co-counsel for the defense inexplicably changed tack and asked the jury to convict Mr. Melendez of manslaughter. There was no prior indication that the defense was going to ask for a manslaughter verdict. However, counsel explained the accident theory to the jury and then told them he “wouldn’t expect” them to find it in this case. He concluded by asking the jury to look at everything and “[w]hen you do this you punish him, voluntary manslaughter. It makes perfect sense, it fits, it is the right verdict.” Mr. Melendez was ultimately convicted of first-degree murder.

D. Counsel did not obtain Mr. Melendez’s consent before conceding guilt to manslaughter.

During the initial state post-conviction proceeding, Mr. Melendez argued that his attorneys were ineffective for conceding his guilt to manslaughter. The court

held an evidentiary hearing at which Mr. Melendez and both his defense attorneys testified.¹ Lead counsel testified that the theory of the case was that the shooting was an accident and “not a criminal act.” She could not recall what was argued during closing statements or if Melendez consented to co-counsel’s admission of guilt as to manslaughter.

Co-counsel also testified he could not recall if he obtained Mr. Melendez’s consent before conceding guilt to manslaughter during closing arguments.

Mr. Melendez testified that he never agreed to the admission of guilt, nor was such a strategy ever discussed with him.

E. Mr. Melendez files a second state petition within one year of this Court’s decision in *McCoy v. Louisiana*.

In 2018, this Court decided *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), and recognized a new constitutional right of criminal defendants to secured autonomy over their defense. Within a year of that decision, Mr. Melendez filed a new state post-conviction petition alleging his Sixth Amendment right to secured autonomy over his defense was violated by his trial attorneys’ concession of guilt without his consent. App. 044.

The state district court dismissed the petition (App. 005) and Mr. Melendez appealed to the Nevada Supreme Court. The Nevada Supreme Court denied Mr. Melendez’s appeal, distinguishing his case from *McCoy*. The court found Mr.

¹ No evidentiary hearing was granted on the second post-conviction petition, specifically addressing the current claim.

Melendez was not entitled to relief because he did not “expressly object” to counsel’s unexpected concession (App. 002), as did the defendant in *McCoy*.

REASONS FOR GRANTING THE PETITION

A. Certiorari is warranted because the Nevada Supreme Court decided an important question of federal law that has not been, but should be, settled by this Court.

The current issue stems from this Court’s recent decision in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). In that case, the defendant, Robert McCoy, was charged with multiple counts of first-degree murder. *McCoy*, 138 S.Ct. at 1506. His attorney, Larry English, believed that conceding guilt to the charged crimes was the only way of avoiding a death sentence. *Id.* McCoy strongly disagreed with the proposed strategy and told his attorney so. *Id.* When English told the jury that McCoy committed the murders, McCoy protested, in what the trial court referred to as an “outburst.” *Id.* at 1506-07. This Court held that, under the Sixth Amendment, “When a client expressly asserts that the objective of ‘*his* defence’ is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.” *Id.* at 1509 (emphasis in original). This Court wrote, “If, after consultations with English concerning the management of the defense, McCoy disagreed with English’s proposal to concede McCoy committed three murders, it was not open to English to override McCoy’s objection.” *Id.*

In a separate section of the opinion addressing harmless versus structural error, this Court wrote that “counsel’s admission of a client’s guilt over the client’s express objection is error structural in kind.” *Id.* at 1511. It is this “express

objection” language that the Nevada Supreme Court focused on in the present case, holding that Mr. Melendez was not entitled to relief because he did not “expressly object” to counsel’s unexpected concession. App. 002. Here, Mr. Melendez did not have the same opportunity to object before the concession was made because his attorneys did not discuss this strategy with him in advance. On the contrary, it was an abrupt departure from the theory of the defense that had been presented throughout the trial—that the shooting was an accident. The question thus becomes, must a defendant disrupt court and expressly object to a concession of guilt he had no reason to anticipate, or must an attorney obtain consent from his client before conceding guilt?

In Mr. Melendez’s initial state post-conviction petition, he originally raised a claim of ineffective assistance of counsel for his attorneys’ concession without consultation under *Florida v. Nixon*, 543 U.S. 175 (2004). This Court’s decision in *McCoy* was a natural extension of this Court’s decision in *Nixon*. In *Nixon*, an attorney’s strategic concession of guilt was permitted—absent the defendant’s consent—because the defendant had refused to communicate with his attorneys while they prepared his defense. *Nixon*, 543 U.S. at 181-84, 192. Nevertheless, Nixon’s attorneys repeated explained their strategy to him and the trial court even held multiple hearings to ensure Nixon knew of the plan and had the opportunity to weigh-in. *Id.* at 189.

Mr. Melendez’s case is distinguished from *Nixon* in two respects: first, Mr. Melendez had actively participated in his defense and was communicative with his

attorneys; second, his attorneys never attempted to explain their planned concession to him in advance of making it (if it was even planned). Nevertheless, for reasons that Mr. Melendez still assert were incorrect, he was denied relief under *Nixon*.

The next question is whether Mr. Melendez’s case is also distinguishable from *McCoy*. It is undisputed that Mr. Melendez did not consent to his attorneys’ concession of guilt, which was not discussed with him in advance. But he also did not disrupt court and “expressly object” when his attorney made the unexpected concession during closing arguments. In such situations, is the onus on defendants to object, or on attorneys to obtain consent before conceding guilt?

As discussed more in the section below, lower courts have been struggling with how to apply *McCoy* since this Court decided it. The decision in the current case illustrates the need for clarification on how a defendant can assert this new, fundamental right. Other, similar constitutional rights—such as the right to trial counsel, right to a jury trial, and right to remain silent—cannot be waived unless the waiver is knowing, intelligent, and voluntary. *See Farett v. California*, 422 U.S. 806 (1975); *Boykin v. Alabama*, 396 U.S. 238 (1969); *Miranda v. Arizona*, 384 U.S. 436 (1966). What about a defendant’s right to secured autonomy over his defense? The Nevada Supreme Court’s holding would mean that not only can it be forfeited without a knowing, intelligent, and voluntary waiver—but that a defendant must disrupt court and object out-of-turn in order to assert it.

This Court should address whether an outburst from the defendant is

required before he can assert his right to secured autonomy. Here, there was no earlier opportunity for Mr. Melendez to object because his attorney's concession to manslaughter was an unexpected and radical departure from the theory set out during the trial. If it was a planned strategy, it was not discussed with Mr. Melendez in advance. Additionally, the trial court never inquired if Mr. Melendez agreed with the concession. Thus, his only recourse would have been to actually disrupt the proceedings in order to voice his objection. If such an express objection is required, at a minimum a judicial canvass should also be warranted. Absent consultation by counsel or a judicial canvass, the Nevada Supreme Court's requiring of an "express objection" is so restrictive as to render a defendant's right to secured autonomy largely worthless.

A better alternative, to protect this fundamental right, is for the burden to be placed on counsel to obtain their client's consent before making such a concession. In this case, Mr. Melendez testified he would not have agreed to conceding guilt to manslaughter, as he consistently maintained the shooting was accidental. Guidance is needed to determine how the right to secured autonomy is properly preserved and invoked.

B. Certiorari is warranted because the Nevada Supreme Court issued a decision in conflict with other state and federal courts.

The current open question has left the lower courts struggling to decide how to apply *McCoy*. So far, application has been inconsistent among state and federal courts. Some courts have agreed with the Nevada Supreme Court that *McCoy*

requires an express objection by the defendant, but not all. Some courts have held that the totality of the record merely needs to reflect that the defendant's goal was to maintain his innocence or otherwise pursue a goal contrary to counsel's concession of guilt.

Courts giving a narrow interpretation of *McCoy* include: *Harris v. Georgia*, 856 S.E.2d 378, 383 (Ga. App. 2021) (finding that nothing in *McCoy* "requires counsel to obtain the express consent of a defendant prior to conceding guilt"); *Atwater v. Florida*, 300 So.3d 589, 590-91 (Fla. 2020) (finding the defendant did not expressly object to any admission of guilt and "*McCoy* did not hold that counsel is required to obtain the express consent of a defendant prior to conceding guilt"); *California v. Lopez*, 31 Cal.App.5th 55, 66 (Cal. App. 2019) (finding *McCoy* does not apply "where the defendant does not expressly disagree with a decision relating to his right to control the objective of his defense"); *Truelove v. North Dakota*, 945 N.W.2d 272, 276 (N.D. 2020) (finding, under *McCoy*, the record must reflect the defendant objected to the trial strategy or wanted to maintain his innocence to the charge conceded); and *Louisiana v. Horn*, 251 So.3d 1069, 1076-77 (La. 2018) (finding *McCoy* violation where attorney conceded guilt over defendant's objections).

On the other hand, a number of courts have interpreted *McCoy* more broadly. In *United States v. Read*, 918 F.3d 712, 719-20 (9th Cir. 2019) the Ninth Circuit found that, under *McCoy*, defense counsel cannot present an insanity defense "over a competent defendant's clear rejection of that defense." The defendant in that case wanted to fight the assault charge but did not wish to assert an insanity defense.

Id. at 715-17. His attorney did it anyway. *Id.* at 717. The court found that an insanity defense was inconsistent with the defendant’s goals. *Id.* at 721. The court cited *McCoy* for the defendant’s “Sixth Amendment right to choose his or her defense.” *Id.* See also *Taylor v. Steele*, __ F.4th __, 2021 WL 3137968, *5 (8th Cir. July 26, 2021) (“*McCoy* addresses when a client has given his counsel directions but counsel ignores those directions.”).

In *Turner v. Texas*, the Texas appellate court addressed a case similar to *McCoy*, in that both of the defendants maintained they did not kill the alleged victim, but their attorneys argued guilt of a lesser offense. 570 S.W.3d 250, 275 (Tx. App. 2018). The court held a defendant under those circumstances “should not be expected to object with the precision of an attorney” and merely needs to present “express statements of his will to maintain innocence.” *Id.* at 276. The court found a *McCoy* violation based on the totality of record, including the defendant’s testimony, opening statements of counsel, as well as statements made during pretrial hearings—which show the defendant wanted to maintain his innocence. *Id.* at 276-77.

Similarly, in *California v. Eddy*, the California appellate court looked to a post-trial hearing to conclude that the defendant “did not agree with the strategy of conceding manslaughter in closing argument.” 33 Cal.App.5th 472, 481 (Cal. App. 2019). The court specifically held that, under *McCoy*, preservation of the right does not turn “on whether a defendant objects in court before his or her conviction.” *Id.* at 482. Rather, “the record must show (1) that defendant’s plain objective is to

maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt.” *Id.* at 182-83. *See also United States v. Rosemond*, 958 F.3d 111, 110, 120-21 (2nd Cir. 2020) (addressing *McCoy* claim based on defendant’s filings after his conviction stating he disagreed with counsel’s trial strategy conceding one of the elements of the offense, but ultimately finding *McCoy* applied only to conceding guilt to actual charges, not individual elements).

The Nevada Supreme Court’s decision in the current case directly conflicts with the holdings of the Second, Eighth, and Ninth Circuits, as well as the appellate courts of Texas and California. Under the rationale of those courts, Mr. Melendez would be entitled to relief under *McCoy* based on the totality of the record, including Mr. Melendez’s statement to the police, the opening statement at trial, and the testimony at the post-conviction evidentiary hearing. All of those reflect that Mr. Melendez consistently maintained his innocence of any crime because the death of his wife was entirely accidental. Therefore, trial counsel’s unexpected concession of guilt to manslaughter during closing arguments was contrary to Mr. Melendez’s express goal of his defense.

The lower courts will continue to struggle with how to apply *McCoy* absent intervention by this Court. This Court deemed a defendant’s right to secured autonomy a fundamental right under the Sixth Amendment. But this right quickly risks being eroded away by unduly burdensome, and realistically unworkable, requirements.

CONCLUSION

For these reasons, Mauricio Melendez respectfully requests this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court. In the alternative, Melendez requests this Court grant certiorari, vacate the decision of the Nevada Supreme Court, and remand this matter for further proceedings.

Dated August 5, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ C.B. Kirschner

C.B. Kirschner
Assistant Federal Public Defender