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

Appendix

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INDEX TO APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICIO ISRAEL MELENDEZ,
Appellant,
vs.
RENEE BAKER, WARDEN,
Respondent.

No. 80192

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David M. Jones, Judge. Appellant Mauricio Israel Melendez argues that the district court erred in denying his petition as procedurally barred. We affirm.

Melendez filed the petition more than six years after remittitur issued on his direct appeal. *Melendez v. State*, Docket No. 54770 (Order of Affirmance, July 29, 2011). Thus, his petition was untimely filed. *See* NRS 34.726(1). The petition was also successive because he had previously litigated a postconviction petition for a writ of habeas corpus. *See* NRS 34.810(1)(b)(2); NRS 34.810(2); *Melendez v. State*, Docket No. 65479 (Order of Reversal, October 16, 2015). Melendez's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Good cause may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to be raised in a timely petition. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, as the State specifically pleaded laches, Melendez was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Melendez argues that the Supreme Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), provides good cause because his

trial counsel conceded guilt to involuntary manslaughter without his informed consent. He is mistaken, as *McCoy* is distinguishable. *McCoy* holds that an attorney may not concede a defendant's guilt of a charged crime where the defendant expressly objects or insists on maintaining his or her innocence. 138 S. Ct. at 1509. *McCoy* differentiated a defendant who opposed counsel's concession from a defendant who "'was generally unresponsive' during discussions of trial strategy, and 'never verbally approved or protested'" the concession. *Id.* (quoting *Florida v. Nixon*, 543 U.S. 175, 181 (2004)). *McCoy* did not hold that a defendant must expressly consent to a concession or that a canvass must precede a concession. *See id.*; *see also Nixon*, 543 U.S. at 186-92 (rejecting notion that concession strategy requires express consent or that it is the functional equivalent of a guilty plea).[1] Here, trial counsel conceded that Melendez committed manslaughter while arguing that the evidence did not show he was guilty of murder. The record shows that Melendez did not expressly object to this concession. Because *McCoy* is distinguishable, we need not resolve Melendez's argument that *McCoy* applies retroactively. Accordingly, Melendez has not shown that *McCoy* provides good cause.[2]

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[1]Notably, *McCoy* did not alter the holding in *Nixon*. *McCoy*, 138 S. Ct. at 1509.

[2]We reject the State's argument that a claim based on *McCoy* can only be raised on direct appeal. A *McCoy* claim can be raised in a postconviction habeas petition, albeit subject to the procedural bar in NRS 34.810(1)(b) because it could have been raised on appeal. *See* NRS 34.724(1) ("Any person convicted of a crime and under sentence of . . . imprisonment who claims that the conviction was obtained . . . in violation of the Constitution of the United States or the Constitution or laws of this State . . . may . . . file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction . . . .").

Melendez has further not demonstrated the district court erred in determining the petition was barred by laches. The State pleaded laches, and prejudice was presumed based on the more-than-five-year period from the decision on direct appeal. NRS 34.800(2). Melendez has not overcome the presumption of prejudice to the State. *See* NRS 34.800(1) (requiring a petitioner to demonstrate a fundamental miscarriage of justice when the State is prejudiced in its ability to conduct a retrial and lack of knowledge or exercise of reasonable diligence when the State is prejudiced in responding to the petition); s*ee also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (recognizing that fundamental miscarriage of justice requires a showing of actual innocence).

We conclude that the district court correctly applied the mandatory procedural bars and did not abuse its discretion in determining the petition was barred by laches. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 233, 112 P.3d 1070, 1074, 1075 (2005).

Having considered Melendez's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. David M. Jones, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Mauricio I. Melendez,

Petitioner,

v.

Renee Baker, et al.,

Respondents.

Case No. A-19-794198-W
(08-C247868)
Dept. No. 29

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

Having come before the Honorable David M. Jones, District Judge, on the 6th day of August, 2019, the Petitioner not being present, represented by C.B. Kirschner, the Respondents being represented by Deputy District Attorney Bernard Zadbrowski, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court makes the following findings of fact and conclusions of law:

STATEMENT OF THE CASE

On May 6, 2019, Petitioner Mauricio Melendez, via counsel, filed a Petition for Writ of Habeas Corpus (Post-Conviction), raising a challenge to his conviction in case number 08-C247868 (judgment of conviction issued October 13, 2009). Melendez raised the following issue:

> Melendez's constitutional right to secured autonomy was violated when trial counsel admitted Melendez's involvement in the crime by conceding his guilt to manslaughter, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Melendez conceded his petition was successive and untimely, but argued the U.S. Supreme Court's decision in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) constituted good cause to overcome the procedural defaults.

On June 17, 2019, Respondents moved to dismiss the petition on the following grounds: 1) it was procedurally barred; 2) an affirmative pleading of laches; and 3) arguing *McCoy* did not constitute good cause or prejudice to overcome the procedural bars.

Melendez filed an opposition to Respondents motion to dismiss on July 17, 2019.

This Court conducted a hearing on the petition on August 6, 2019. At that time, this Court made the following rulings:

FINDINGS

First, this Court grants Melendez's motion for judicial notice of his criminal case, number 08-C247868.

Second, this Court finds *McCoy* is not retroactive pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *McCoy* does not rise to the level of a *Gideon*-style watershed case and there is no indication the U.S. Supreme Court intended this to be a watershed case. *McCoy* was narrowly written and tailored to the specific facts in that case. Absent retroactive application of *McCoy*, Petitioner cannot demonstrate a newly available legal basis resting on a previously unavailable constitutional claim, which would constitute good cause to overcome the procedural defaults. Thus, the petition is procedurally barred.

ORDER

Therefore, it is hereby ordered that the Petition for Writ of Habeas Corpus (Post-Conviction) is denied.

Dated this 30 day of Oct, 2019.

District Judge

Respectfully submitted,

Rene L. Valladares
Federal Public Defender
/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Deputy District Attorney John.Niman@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

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Senior Deputy Attorney General
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/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Mauricio I. Melendez, Petitioner, v. Renee Baker, et al., Respondents.	Case No. A-19-794198-W (08-C247868) Dept. No. 29 Date of Hearing: August 6, 2019 Time of Hearing: 8:30 AM (Not a Death Penalty Case)

REPLY TO STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

On May 14, 2018, the Supreme Court decided the case *McCoy v. Louisiana*,[1] which outlined a new rule of constitutional law guaranteeing an accused's right under the Sixth Amendment to choose the objective of his defense and to maintain his innocence if he chooses. On May 6, 2019, Melendez filed a petition for writ of habeas corpus alleging his trial counsel conceded his guilt to manslaughter without his consent. Melendez's new claim is based on the Sixth Amendment right to secured autonomy outlined in *McCoy*.

On June 17, 2019, the State filed a response to Melendez's petition alleging, among other things, that Melendez cannot show good cause to excuse the procedural default. This reply in opposition follows.

ARGUMENT

1. Legal Standard

To overcome the procedural bars of NRS 34.726, NRS 34.810, and NRS 34.800, a petitioner has the burden to show "good cause" for delay in bringing his claim or for presenting the same claims again.[2] One manner in which a petitioner can establish good cause is to show that the legal basis for the claim was not reasonably available at the time of the default.[3] A claim based on newly available legal basis must rest on a previously unavailable constitutional claim.[4] A petitioner has one-year to file a petition from the date that the claim has become available.[5]

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[1] 138 S. Ct. 1500 (2018).

[2] *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.2d 519, 537 (2001).

[3] *Id.*

[4] *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003).

[5] *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017).

The Supreme Court's recent decision in *McCoy v. Louisiana*[6] provides good cause for overcoming the procedural bars. *McCoy* established a new rule of constitutional law, namely that a defendant has the "secured autonomy" to decide the objective of his defense, and to "make the fundamental choices about his own defense."[7]

This new rule of constitutional law was not previously available to Melendez, who submitted this petition within one year of *McCoy*, which was decided on May 14, 2018.

2. Melendez did not argue the waiver of the Sixth Amendment right to secured autonomy requires a full canvas; nevertheless, it does.

The State, in its response, makes much about the fact that *McCoy* does not require a canvass when counsel wishes to concede guilt.[8] But Melendez never made an argument that he should have been canvassed by the court before his attorney conceded guilt.[9]

Nevertheless, the State is wrong to argue the waiver of the Sixth Amendment right to secured autonomy does not require a canvass. The State argues the decision in *McCoy* did not "effectively elevate a concession of guilt at trial to the functional equivalent of a guilty plea that requires a full canvassing."[10] The State's assertion is wrong.

In *McCoy*, the Supreme Court, in carving out the right to secured autonomy as one under the Sixth Amendment, clearly distinguished the autonomy to assert

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[6] 138 S. Ct. 1500 (2018).

[7] *Id.* at 1511.

[8] *See* Response at 7, 6/17/19.

[9] *See* Petition, 5/6/19.

[10] *See* Response at 7, 6/17/19.

innocence from that of trial management: "trial management is the lawyer's province…Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category."[11] Clearly, *McCoy* elevated a concession of guilt at trial to a guilty plea, which requires a full canvassing—the Court explicitly provides the autonomy to decide the objective of the defense is in the same category as whether or not to plead guilty.

Like other constitutional rights, a defendant's waiver of this right to maintain his innocence, and decision to allow counsel to concede charges to the jury, must be knowing, voluntary, and intelligent. The Supreme Court has been clear that "what is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences."[12] Because the Court made clear the defendant's right to assert or maintain his innocence falls within the same category as the right to decide whether to plead guilty, a waiver of the right to maintain his innocence requires a proper canvass, just as is required when a defendant pleads guilty. Just as a defendant has the right to "refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence…"[13] And just like those rights, a defendant must be adequately canvassed on his decision to ensure that the waiver of important

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[11] *McCoy*, 138 S. Ct. at 1508.

[12] *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969).

[13] *See id.* at 1508.

constitutional rights associated with his or her decision is made knowingly, voluntarily, and intelligently.

3. This claim was not previously raised.

The State argues Melendez raised this claim previously.[14] This is simply not true. Melendez could not possibly have raised the claim that his right to the secured autonomy under the Sixth Amendment was violated when his counsel conceded his guilt against his wishes because that right did not exist until it was articulated by the Supreme Court in *McCoy v. Louisiana.*[15]

The claim the State is presumably referring to is one Melendez won during his prior post-conviction proceedings, but lost on the State's appeal. That issue was the ineffective assistance of trial counsel for conceding, in closing statements, the killing was intentional when co-counsel argued, in opening statements, that the killing was accidental.[16] This is a different claim than the one Melendez now raises—the claim Melendez now raises is that the waiver of Melendez's Sixth Amendment right to secured autonomy, as outlined by the Supreme Court in *McCoy*, was not knowing, intelligent or voluntary.[17] This claim was not raised during the prior post-conviction proceeding because the new rule articulated in *McCoy* was not yet in existence. Melendez could not argue that a violation of his right to secured autonomy to direct his defense had occurred as this right had not yet been created by the Court. Despite the similarities between the ineffective assistance of counsel claim and the current claim, Melendez's current claim

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[14] *See* Response at 8, 6/17/19.

[15] 138 S. Ct. 1500 (2018).

[16] *See* Answering Brief at 20-28, 3/30/15, case no. 65479.

[17] *See* Petition, 5/6/19.

implicates his Sixth Amendment right to secured autonomy, not to counsel, which was not previously available to him.

While the two claims are based on similar facts, the analysis is very different. A violation of the new constitutional right as articulated in *McCoy* is structural. When Melendez argued his prior post-conviction petition, this right did not exist. Now, his new claim is that this right was violated when his attorneys conceded his guilt to manslaughter, against his wishes. Therefore, he is entitled to a new trial. This is not the same claim that was raised previously.

4. *McCoy* is new law in Nevada and the claim only became available to Melendez when *McCoy* was decided in 2018.

The State argues Melendez's *McCoy* claim has been available to him since 1994.[18] The premise of the state's argument is that *Jones v. State*[19], decided in 1994, is essentially the same as the holding in *McCoy*, and therefore Melendez could have brought, and perhaps did bring, his claim earlier. The State's argument fails because relief under *Jones v. State* has never been available to Melendez.

Jones v. State, which concerns a claim of a Sixth Amendment violation of effective assistance of counsel, does not and has never extended to Melendez. Although the Nevada Supreme Court in *Jones* did not require a showing of prejudice as "prejudice may be presumed where defense counsel improperly concedes his client's guilt,"[20] (similar to *McCoy*, which states the error is structural), the Court clearly limited the holding in *Jones* to cases in which the defendant had testified on his own behalf and denied his guilt: "We emphasize, however, that our decision is limited to the situation present here, where counsel undermined his

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[18] *See* Response at 7, 6/17/19.

[19] 110 Nev. 730, 877 P.2d 1052 (1994).

[20] *Id.* at 738.

client's testimonial disavowal of guilt during *the guilt phase of trial*."[21] This limitation makes logical sense—*Jones* is about the ineffective assistance of counsel. Although the holding does not require a prejudice inquiry, prejudice can be presumed where an attorney conceded his client's guilt in the face of his client's express denial of guilt, as that concession undoubtedly undermined his client's credibility—prejudice can be presumed.

Melendez's claim is entirely distinguishable, and the holding in *Jones* has never been available to him. Melendez never testified at trial. Rather he chose to exercise his Fifth Amendment right to remain silent and to have the prosecution prove every element of the crime beyond a reasonable doubt. But in remaining silent, he inadvertently ensured the holding of *Jones* would never apply to him as the Court made explicitly clear that it only applies to one who has testified on his own behalf and proclaimed his innocence. The holding in *Jones* is one that never would have extended to Melendez's case; thus, his *McCoy* claim has not been available to him for 25 years as the State asserts.

McCoy, on the other hand, creates no requirement that the defendant testify on his own behalf in order for there to be a Sixth Amendment violation. Rather, *McCoy* explicitly frames the issue as a Sixth Amendment right to secured autonomy held by the defendant: "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel-jurisprudence."[22] A violation of this right is structural, requiring no prejudice inquiry. This is the right Melendez asserts was violated, not his Sixth Amendment right to the effective assistance of counsel.

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[21] *Id.* at 739.

[22] *McCoy*, 138 S. Ct. at 1510-11.

Because the holding in *Jones* clearly limits its application to defendants who testified at trial and had their testimonies undermined by counsel, a claim under *Jones v. State* was never available to Melendez.

5. *McCoy* does apply retroactively to Melendez's case.

The State argues *McCoy* does not apply retroactively to Melendez's case.[23] The State's argument is wrong. Both parties agree, however, that M*cCoy's* retroactivity should be analyzed under the retroactivity framework articulated in *Teague* and adopted by the Nevada State Courts in *Clem v. State*.[24]

A. Legal Standard

In *Teague v. Lane*[25] the Supreme Court set out the analytical framework for determining the retroactivity of its decisions to cases on collateral review. Under *Teague,* a court should first ask whether the decision announced a "new rule"—that is, whether it "breaks new ground or imposes a new obligation on the States."[26]

If the case did announce a new rule, the Court should move to the second step and determine whether the rule falls into one of two exceptions. If the rule does fall into one of the exceptions, then it is retroactive.

The first exception encompasses rules that "place 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe.'"[27] In *Penry v. Lynaugh,*[28] the Court held that *Teague's* first exception "cover[s] not only rules forbidding criminal punishment of certain primary conduct

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[23] *See* Response at 8, 6/17/19.

[24] 119 Nev. 615, 626-30 (2008).

[25] 489 U.S. 288 (1989).

[26] *Id.* at 301.

[27] *Id.* at 311.

[28] 492 U.S. 302 (1989).

but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Subsequent decisions have referred to the rules encompassed by this exception as "substantive" rules.[29]

In *Montgomery v. Louisiana,*[30] the Court held that the rule of *Miller v. Alabama*[31] was substantive for purposes of *Teague's* first exception because *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth."[32]

The second exception encompasses bedrock rules of criminal procedure—specifically "those procedures that are implicit in the concept of ordered liberty," or, "the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[33] New procedural rules will apply retroactively if they meet the criteria for *Teague's* second exception, under which new "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding" are retroactive.[34] This second exception extends to rules that "not only improve accuracy," but also "'alter our understanding of the bedrock procedural elements'" essential to the fairness of a proceeding.[35]

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[29] *See, e.g., Schriro v. Summerlin,* 542 U.S. 348, 351-352 (2004) ("New *substantive* rules ... include[ ] ... constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish[.]" (citation omitted)).

[30] 136 S. Ct. 718 (2016).

[31] 567 U.S. 460 (2012).

[32] *Montgomery,* 136 S. Ct. at 734.

[33] *Id.*

[34] *Sajjle v. Parks,* 494 U.S. 484, 495 (1990) (quoting *Teague,* 489 U.S. at 311).

[35] *Sawyer v. Smith,* 497 U.S. 227, 242 (1990) (quoting *Teague,* 489 U.S. at 311); *see also Whorton v. Bockting,* 549 U.S. 406, 421 (2007).

B. New rule

The Supreme Court has held "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government," and if "it was not dictated by precedent existing at the time the defendant's conviction became final."[36]

McCoy announced a new rule—it is an "explicit and substantial break with prior precedent,"[37] because it has carved out a new rule of constitutional law—indeed, when the Sixth Amendment right to secured autonomy of a defendant is violated, the error is structural according the Supreme Court.[38] Prior case law dealing with a defendant's right to self-representation or autonomy did not create a right that when violated constitutes structural error. This is clearly a break with precedent and a new rule of constitutional law.

***C. McCoy* alters the class of criminal defendants whom the State may punish.**

McCoy applies retroactively on collateral review because it is a "substantive rule of constitutional law."[39] Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose."[40] The Supreme Court has held that a substantive rule under *Teague* may extend a categorical guarantee to criminal defendants on the basis of either conduct or status.[41] Thus, rules restricting the state's ability to

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[36] *Id.* at 301.

[37] *Allen v. Hardy*, 478 U.S. 255, 258 (1986).

[38] *McCoy*, 138 S. Ct. 1500.

[39] *Montgomery*, 136 S. Ct. at 728.

[40] *Id.* at 729-730.

[41] *Id.* at 729.

punish a "particular class of persons" qualify as substantive.[42] Under *Teague,* therefore, new substantive rules include ones that "alter[ ] ... the range of conduct or class of persons that the law punishes."[43]

The Supreme Court has explained that substantive rules should have retroactive effect because "the need for finality in criminal cases" must be balanced against "the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law."[44] Finality concerns are "at their weakest" when examining rules that modify the "range of conduct or class of persons that the law punishes," because concerns regarding unauthorized punishment are heightened.[45] The balance of interests therefore shifts strongly in favor of retroactivity for such rules.[46] *McCoy* makes clear that defendants whose guilt was admitted over their objection fall into a class of people whom the state may not punish. This is a substantive rule that fits within the first *Teague* exception and should apply retroactively.

McCoy reflects a categorical guarantee of "the defendant's right to make the fundamental choices about his own defense," in particular the "[a]utonomy to decide that the objective of the defense is to assert innocence."[47] It ensures this right by carving out a specific class of defendants defined by a shared status: defendants

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[42] *Sajjle,* 494 U.S. at 495; *see also Penry,* 492 U.S. at 330 (rules prohibiting punishment for a "class of defendants because of their status or offense" are substantive).

[43] *Welch v. United States,* 136 S. Ct. 1257, 1266 (2016).

[44] *Id.,* at 1266.

[45] *Id.*

[46] *See id.; see also Mackey v. United States,* 401 U.S. 667, 693 (1971) (opinion of Harlan, J.) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.").

[47] *McCoy,* 138 S. Ct. at 1508, 1511.

whose express opposition to their counsel's admission of their guilt was disregarded. Its holding recognizes that such defendants merit distinct constitutional protection from conviction and punishment by the state. If a defendant has insisted on maintaining his innocence and objected to his counsel's contrary strategy, and his counsel has admitted the client's guilt over his objection, the defendant is immune from punishment until the constitutional defect is cured and he is afforded the opportunity to maintain his innocence at a new trial.[48] Thus, the only way the state may punish a member of the *McCoy*-protected class is to remove the defendant from the class by vindicating his right to determine the objective of his defense. In other words, defendants in the class recognized by *McCoy* cannot be convicted until they receive trials in which *they* (not their lawyers) set the fundamental objectives of the defense.

Although the constitutional protection articulated in *McCoy* is framed as a right accorded to defendants, its functional guarantee to defendants is freedom from punishment in conjunction with the deprivation of that right. Because "the function of the rule" "determine[s] whether [it] is substantive or procedural,"[49] the change *McCoy* effectuates is a change of substantive law, *i.e.,* a change to the scope of the state's power to punish those who wish to maintain their innocence and hold the state to its burden of proof.

The functional effect of the *McCoy* rule is to alter the scope of the state's power to punish. The autonomy right that *McCoy* explicates carves out shields a particular class of persons from the scope of the state's power to convict and sentence. Thus, the function of *McCoy* is to insulate that class of defendants from

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[48] *See id.* at 1511 (holding that the error was structural and that the defendant must therefore "be accorded a new trial without any need to first show prejudice").

[49] *Welch,* 136 S. Ct. at 1266.

punishment by placing them beyond the state's reach. It is therefore substantive under *Teague* and should apply retroactively.

D. Alternatively, *McCoy* falls within the procedural exception to non-retroactivity.

New procedural rules must "meet two requirements" to apply retroactively.[50] "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[51] The rule articulated in *McCoy* meets these requirements because it: (1) assures that the prosecution's case is subject to the adversarial testing that is key to "better, more accurate, decision-making,"[52] and (2) implicates a bedrock procedural rule that it is universal *(i.e.,* applicable to every criminal case), and cross-cutting *(i.e.,* necessary to ensure the proper vindication of numerous *other* core rights of defendants).

***i. McCoy's* holding minimizes the risk of an inaccurate conviction.**

McCoy's holding is essential to the functioning of our adversary system, which is designed to increase the likelihood of accurate convictions and minimize the risk of inaccurate ones.

The United States has "elected to employ an adversary system of criminal justice."[53] "The very premise of our adversary system," the Supreme Court has repeatedly explained, "is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go

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[50] *Whorton,* 549 U.S. at 418.

[51] *Id.* (quotations and citations omitted).

[52] *Kaley v. United States,* 134 S. Ct. 1090, 1103 (2014).

[53] *United States v. Nixon,* 418 U.S. 683, 709 (1974).

free."[54] This feature of the adversary system—that it minimizes the likelihood of a wrong result at trial—is so fundamental that the Supreme Court has said it "underlies and gives meaning to the Sixth Amendment."[55]

"[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'"[56] The Supreme Court has recognized that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."[57] And without "the guiding hand of counsel," even a defendant with the "perfect" defense "faces the danger of conviction because he does not know how to establish his innocence."[58] "[T]he right to counsel" thus forms "the foundation of our adversary system,"[59] and a defendant lacking the aid of counsel is less able to subject the prosecution's case to the adversarial testing essential to discovering the truth.

A defense attorney's admission of the defendant's guilt against the defendant's wishes upends this adversarial system. "A fundamental premise of our criminal law is that the prosecution has the burden of proving beyond a reasonable

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[54] *Herring v. New York,* 422 U.S. 853, 862 (1975); *accord Kaley,* 134 S. Ct. at 1103 (characterizing as "generally sound" the notion "that the adversarial process leads to better, more accurate, decision-making"); *Penson v. Ohio,* 488 U.S. 75, 84 (1988) (describing the adversary system as "premised on the well-tested principle that truth-as well as fairness-is 'best discovered by powerful statements on both sides of the question'"); *Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18, 28 (1981) (explaining that "our adversary system presupposes" that "accurate and just results are most likely to be obtained through the equal contest of opposed interests").

[55] *United States v. Cronic,* 466 U.S.648, 655-656 (1984).

[56] *Id.* at 656 (emphasis added).

[57] *Powell v. Alabama,* 287 U.S. 45, 69 (1932).

[58] *Id.*

[59] *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

doubt that the accused committed the offense charged."[60] The adversary system requires defense counsel to hold the state to this burden, "put[ting] the State's case in the worst possible light."[61] When "the prosecution's case" is not forced to "survive the crucible of meaningful adversarial testing," the trial is stripped of "its character as a confrontation between adversaries."[62] More specifically, when defense counsel admits the defendant's guilt to the jury over the defendant's objection, the defendant is, effectively, staring down two prosecutors. Criminal trials become the very "sacrifice of unarmed prisoners to gladiators" the Sixth Amendment aims to avoid.[63]

Because partisan advocacy on both sides "best promote[s]" accurate outcomes of criminal trials,[64] "if the adversary system is not permitted to function properly, there is an increased chance of error, and with that, the possibility of an incorrect result,"[65] *McCoy's* holding preserves the functioning of the adversary system, and, consequently, promotes the accuracy of trial results.

The Supreme Court has indicated that only cases establishing rules of significance similar to that of *Gideon v. Wainwright*[66] are likely to fall under the second *Teague* exception.[67] *McCoy* is such a case. The risk of unfair trials and

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[60] *Nilva v. United States,* 352 U.S. 385, 399 (1957).

[61] *United States v. Wade,* 388 U.S. 218, 257 (1967) (White, J., dissenting in part and concurring in part).

[62] *Cronic,* 466 U.S. at 656-657.

[63] *See Cronic,* 466 U.S. at 657 (quotations omitted).

[64] *Herring,* 422 U.S. at 862.

[65] *Laniford v. Idaho,* 500 U.S. 110, 127 (1991) (internal citation omitted).

[66] 372 U.S. 335 (1963).

[67] *See, e.g., Sajjle,* 494 U.S. at 495 ("Although the precise contours of this exception may be difficult to discern, we have usually cited *Gideon v. Wainwright* ... to illustrate the type of rule coming within the exception.") (citations omitted).

inaccurate verdicts that *McCoy* curbs is the exact same risk *Gideon* protects against.

In *Gideon,* the Court treated as an "obvious truth" the proposition that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[68] Lawyers are "necessities, not luxuries," the Court explained, a fact made plain by the "vast sums of money" the government spends "to establish machinery to try defendants accused of crime."[69] The Court said the "noble idea" of defendants receiving "fair trials before impartial tribunals in which every defendant stands equal before the law" "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[70] Equally, that "noble idea" cannot be realized if a defendant's lawyer refuses to assert the defendant's innocence, despite the defendant's express instruction. In mitigating the risk that a defendant will be unable to pose a fair adversary to the "machinery" of the state without counsel serving as an advocate, *McCoy* mirrors *Gideon,* the benchmark against which *all* procedural rules are measured. As such, it satisfies the first criterion for retroactivity.

***ii. McCoy's* holding implicates a bedrock procedural rule.**

McCoy likewise satisfies *Whorton's* second requirement for retroactivity because its universal and cross-cutting holding implicates a bedrock rule of procedure.

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[68] *See Gideon,* 372 U.S. at 344.

[69] *Id.*

[70] *Id.* at 344-345 (quoting *Powell,* 287 U.S. at 68-69).

The Court's holding, that "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,"[71] applies to every criminal case, whether capital or non-capital, state or federal, felony or misdemeanor. Indeed, the rule in *McCoy* sweeps at least as broadly as the right to counsel in *Gideon,* and arguably more so, because the latter is limited by the Court's ruling that "where no sentence of imprisonment was imposed, a defendant charged with a misdemeanor ha[s] no constitutional right to counsel."[72] The fact that *McCoy* is applicable to every criminal case separates it from narrower cases that the Supreme Court has considered to fall outside the procedural *Teague* exception such as *O'Dell* v. *Netherland,*[73] which held that "the narrow right of rebuttal that *Simmons* [v. *South Carolina,* 512 U.S. 154 (1994),] affords to defendants in a limited class of capital cases" fell outside the procedural *Teague* exception.[74]

In addition to applying to every criminal case, *McCoy* is also a bedrock procedural rule because it is "essential to the fairness of a proceeding."[75] Not only is the right protected in *McCoy* critical to the functioning of the adversary system, but a violation of that right is a cross-cutting error that can thwart other core rights of criminal defendants.

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[71] *McCoy*, 138 S. Ct. at 1505.

[72] *Nichols* v. *United States,* 511 U.S. 738, 743 (1994).

[73] 521 U.S. 151 (1997).

[74] *Id.* at 167.

[75] *Whorton,* 549 U.S. at 421.

As discussed above, a *McCoy* violation vitiates a defendant's right to hold the prosecution to its burden of proof under the Due Process Clause.[76] In addition, a defense counsel's objected-to admission of guilt undermines the defendant's right to choose to testify (or not testify) "in the unfettered exercise of his own free will."[77] If a defendant wants to contest the prosecution's guilt-phase case and does not want to testify, but the defense attorney affirmatively tells the jury the defendant is guilty, testimony from the defendant is the *only* means through which the defendant can mount a defense. This forces a defendant into a dilemma in which he *must* give up either his right to choose not to testify (as happened in *McCoy)* or his right to challenge the state's guilt case. On the other side of the coin, if the defendant does testify, an admission of guilt from the defendant's own lawyer significantly diminishes the value of that testimony.[78]

The Supreme Court's holding in *McCoy* preserves the basic tenets of our adversary system of criminal justice, decreases the likelihood of the innocent being convicted, applies in every criminal case, and protects numerous rights beyond the one directly in question in that case. As such, it has the requisite "'primacy' and 'centrality'" to fall within the *Teague* exception for procedural rules,[79] and therefore applies on collateral review.

6. *McCoy* does apply

Contrary to the assertions of the State,[80] *McCoy* did not hold a vociferous and unambiguous objection was required in order to preserve a defendant's Sixth

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[76] *In re Winship,* 397 U.S. at 364.

[77] *Brooks* v. *Tennessee,* 406 U.S. 605, 610 (1972).

[78] *See Buck* v. *Davis,* 137 S. Ct. 759, 766 (2017) ("When damaging evidence is introduced by a defendant's own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value.").

[79] *Whorton,* 549 U.S. at 421.

[80] *See* Response at 10-11, 6/17/19.

Amendment right to secured autonomy. While the defendant in that case did raise such an objection, the grant of a new trial was not premised on the objection. The Court held:

> We hold 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. 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.[81]

Melendez did object, but it's not in the trial record. See his testimony on post-conviction. Counsel had no recollection of Melendez agreeing to sudden change in trial strategy. Autonomy was violated whether or not it's clear from the face of the trial record.

Here, as in *McCoy*, Melendez always maintained that the shooting was entirely accidental and that he was innocent. Defense attorney Coffee's concession to manslaughter was a radical departure from the defense theory of the case, which was that the shooting was accidental. Rather than adhere to the case theory, he told the jury that he would not expect them to find that it was an accident and instead asked them to punish his client by finding him guilty of manslaughter. Trial counsel in this case failed to either consult with Melendez or obtain his consent before admitting his guilt to the charge of manslaughter. Nor did the court canvas Melendez about whether he agreed to this radical change in the theory of the defense.

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[81] *Id.* at 1505 (emphasis in original).

At the initial post-conviction hearing, Attorney Craig maintained that the theory of the case was that the shooting was accidental, "So our position was that it was an accidental shooting and not a criminal act."[82] She could not recall what was argued during the closing or if Melendez consented to the admission of guilt as to manslaughter.[83] Attorney Coffee also testified at the post-conviction hearing that he could not recall if he obtained Melendez's consent before conceding guilt to manslaughter.[84] Finally, Melendez testified at the hearing and clearly stated he did not agree to the admission of guilt.[85]

A defendant is never required to disrupt court by making a pro se objection when he is represented by counsel. Counsel here knew Melendez wanted to maintain his innocence but abruptly changed the theory of the defense sometime before making closing statements and conceded guilt to manslaughter. Melendez was never given the opportunity to object in court, on the record, during trial because he was not canvassed. It is rarely wise for a represented defendant to make an outburst in front of the jury, which would have been the only way for Melendez to get his objection on the record. It is sufficient that counsel already admitted to conceding guilt without the consent of Melendez and against his wishes. Hence, Melendez's right to secured-autonomy, as recognized in *McCoy*, was violated.

7. Melendez does not need to prove prejudice

Finally, the State argues Melendez's petition must fail because he did not demonstrate prejudice.[86] While Melendez maintains he was, in fact, prejudiced by

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[82] Tr. 1/23/13 at 77.

[83] *Id*. at 178.

[84] *Id*. at 191.

[85] *Id*. at 196.

[86] *See* Response at 11, 6/17/19.

counsel's abrupt concession of guilt, he is not required to prove prejudice. "Violation of a defendant's Sixth Amendment-secured autonomy" is a "structural" error and "not subject to harmless-error review."[87] In *McCoy*, the Court observed that an admission of guilt by counsel "blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt."[88] Consequently, the Court granted McCoy a new trial "without any need to first show prejudice."[89]

Nevertheless, Melendez can demonstrate prejudice. Here, defense attorney Craig repeatedly told the jury during opening statements that the shooting was an accident, saying it was "unplanned, unexpected and unintentional."[90] That was the theory of the defense throughout the trial. However, during closing statements, defense attorney Coffee suddenly asked the jury to convict Melendez of manslaughter.[91] Coffee discussed the accident theory, on which the jury was instructed and then told the jury, "You're within your power to find that here. Wouldn't expect you to find that here."[92] He then concluded by asking the jury to look at everything and "When you do this you punish him, voluntary [sic] manslaughter.[93] It makes perfect sense, it fits, it is the right verdict."[94] As a result,

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[87] *McCoy*, 138 S. Ct. at 1511.

[88] *Id*.

[89] *Id*.

[90] Tr. 7/28/09 at 85, 86.

[91] Tr. 7/30/09 at 129-151.

[92] *Id*. at 149.

[93] Voluntary manslaughter, defined at NRS 200.050, was not charged and did not appear on the verdict form. Melendez was charged with, and the jury was instructed on, involuntary manslaughter, defined at NRS 200.070.

[94] Tr. 7/30/09 at 151.

the accident theory was off the table. Melendez was prejudiced because his own attorney cast dispersions on his defense and asked the jury to find him guilty of a homicide. The evidence against Melendez was circumstantial. There was no history of violence between Melendez and his wife, he did not attempt to flee after the shooting or dispose of evidence, and in fact, he called the police. A reasonable jury likely would have reached a different verdict if defense counsel hadn't suddenly changed tactics and asked for a finding a guilt. Therefore, Melendez has shown good cause and prejudice sufficient to overcome the procedural bars.

CONCLUSION

Accordingly, for the reasons stated in the Petition, as supplemented herein, Melendez respectfully submits that he has demonstrated sufficient grounds to overcome any purported procedural bars and respectfully requests this Court:

1. Issue a writ of habeas corpus to have Mauricio Melendez brought before the Court so that he may be discharged from his unconstitutional confinement and sentence;

2. To the extent any pertinent facts are in dispute, conduct an evidentiary hearing at which proof may be offered concerning such matters; and

3. Grant such other and further relief as, in the interest of justice, may be appropriate.

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

I affirm this document does not contain any social security numbers.

Dated July 17, 2019.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Deputy District Attorney John.Niman@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Heather D. Procter
Senior Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MAURICIO I. MELENDEZ, aka,
Mauricio Israel Melendez, #1431528,

Defendant.

CASE NO: A-19-794198-W

DEPT NO: XXIX

STATE'S RESPONSE TO DEFENDANT'S SECOND SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST- CONVICTION) AND STATE'S MOTION TO DISMISS

DATE OF HEARING: JUNE 25, 2019
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN NIMAN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Response to Defendant's Second Supplement to Petition for Writ of Habeas Corpus – Post Conviction and State's Motion to Dismiss.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 23, 2008, Mauricio I. Melendez, aka Mauricio Israel Melendez (hereinafter "Defendant") was charged by way of Information with Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.303, 193.165). On September 24, 2008, Defendant was arraigned and entered a not-guilty plea. On July 27, 2009, an Amended Information was filed in open court containing the same charge.[1] Defendant proceeded to trial beginning July 27, 2009 and concluding July 31, 2009. At the conclusion of trial, the jury found Defendant guilty of First Degree Murder With Use of a Deadly Weapon.

Defendant was sentenced on September 17, 2009. Defendant was adjudged guilty pursuant to the jury's verdict and sentenced to 20 years to Life in the Nevada Department of Corrections, plus a consecutive 8 to 20 years for the deadly weapon enhancement. Defendant received 406 days credit time served. The Judgment of Conviction was filed October 13, 2009.

Defendant filed a timely Notice of Appeal on October 15, 2009. On July 29, 2011, the Nevada Supreme Court affirmed Defendant's conviction and remittitur issued on August 23, 2011.[2]

On February 29, 2012, Defendant filed a Pro Per Post-Conviction Petition for Writ of Habeas Corpus and a Motion for Appointment of Counsel. The State filed its Response and Opposition on May 9, 2012. On May 31, 2012, this Court decided to appoint post-conviction counsel. On June 7, 2012, Betsey Allen, Esq. appeared on behalf of Karen A. Connolly, Esq. who confirmed as counsel for Defendant.

On June 12, 2012, Defendant errantly filed a Notice of Appeal, apparently believing his Post-Conviction Petition for Writ of Habeas Corpus had been denied. The Nevada

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[1] The Amended Information changed the date of the alleged incident from "on or about the 7th day of August, 2008" to "on or between August 6 and August 7, 2008" on the first page of the Amended Information.

[2] Case No. 54770.

Supreme Court dismissed Defendant's Appeal on June 27, 2012.

Defense counsel filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus on April 5, 2013 and an Amendment to the Supplement on April 9, 2013. The State filed its Response to both on June 6, 2013. The Defendant filed a Reply to the State's Response on July 8, 2013. Argument was set for July 18, 2013, but Ms. Connolly was unable to attend and the matter was continued to July 30, 2013. On July 30, 2013, the Court noted that it had reviewed the Points and Authorities and that an Evidentiary Hearing would need to be set. On August 6, 2013, the Evidentiary Hearing was re-set to December 18, 2013. The Court noted that courtesy copies of any supplemental briefs should be provided.

On August 16, 2013, Defendant filed a Second Supplement to Petition for Writ of Habeas Corpus – Post Conviction. Then-Judge Abbi Silver granted that petition, and the Nevada Supreme Court reversed.

On May 9, 2019, Defendant filed the instant Third Petition for Writ of Habeas Corpus – Post Conviction. The State responds herein.

ARGUMENT

I. THE INSTANT PETITION IS PROCEDURALLY BARRED.

Defendant's petition is both successive and time-barred with no good cause or prejudice shown. It should be denied.

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence **must be filed within 1 year after entry of the judgment of conviction** or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur**.** For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

(emphasis added). "[T]he statutory rules regarding procedural default are mandatory and

cannot be ignored when properly raised by the State." State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

Per the language, the one-year time bar prescribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998); see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (NRS 34.726 should be construed by its plain meaning).

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance of filing the petition with the District Court within the one-year mandate, absent a showing of "good cause" for the delay in filing. Gonzales, 118, Nev. at 593, 590 P.3d at 902. The one-year time bar is therefore strictly construed. In contrast with the short amount of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged mental health and competency issues. Id. at 595, 53 P.3d at 903.

Here, remittitur issued on August 23, 2011. Defendant accordingly had until August 23, 2012 to file the instant petition. As it was not filed until May 9, 2019, the mandatory provisions of NRS 34.726 bar his claim.

Further, the petition is successive. NRS 34.810(2) reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive

petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

This is Defendant's third petition, and it is therefore successive under NRS 34.810(2). Because this petition is untimely under NRS 34.726 and successive under NRS 34.810(2), it is procedurally barred.

II. THE STATE AFFIRMATIVELY PLEADS LACHES.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The statute also requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The State pleads laches in the instant case.

Were the petition to be granted, the State would be put in the untenable position of having to retry a case from which remittitur issued nearly eight years ago. Accordingly, NRS 34.800 directly applies here, and there is a presumption that the State will be prejudiced by the loss of evidence and the lapse of witness memory. Because the State has considered this

case closed for eight years, it respectfully requests that the instant petition be dismissed.

III. MCCOY V. LOUISIANA FAILS TO PROVIDE EITHER GOOD CAUSE OR PREJUDICE TO OVERCOME THE PROCEDURAL BARS.

A showing of good cause and prejudice may overcome procedural bars. To avoid procedural default, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements. See Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

"To establish good cause, [a petitioner] *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012).

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Petitioner has failed to demonstrate either here. He alleges that McCoy v. Louisiana, 138 S.Ct. 1500 (2018) provides good cause to overcome the procedural bars to his petition.

This fails. McCoy held that "it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection" and that such an error is structural. Id. at 1507, 1511. It did not, as Petitioner seems to allege, effectively elevate a concession of guilt at trial to the functional equivalent of a guilty plea that requires a full canvassing.

Moreover, McCoy does not apply in the context of a post-conviction petition for writ of habeas corpus. In fact, McCoy explicitly stated that the Supreme Court's ineffective-assistance-of-counsel jurisprudence, as governed by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), does not apply to this type of claim. 138 S.Ct. at 1507, 1511. Instead, the Court assigned the error to the trial court for allowing counsel to concede guilt contrary to the defendant's vociferous opposition to such a strategy. Id. This makes it a claim appropriate for direct appeal. NRS 34.810(1).

Further, the rule stated in McCoy is not good cause to overcome the procedural bars because it is not new law in Nevada. The Nevada Supreme Court held in State v. Jones that counsel is ineffective where he undermines his "client's testimonial disavowal of guilt during *the guilt phase of the trial."* Jones v. State, 110 Nev. 730, 739, 877 P.2d 1052, 1057 (1994) (emphasis added). This is McCoy's essential holding—counsel cannot concede guilt over the objection of his client. As such, this claim has been available to Petitioner under Jones since 1994. He cannot show good cause for failing to raise the claim earlier. The name of the case might be different, but the cause for relief is the same.

Indeed, under Rippo, 134 Nev. at __, 423 P.3d at 1090, a procedural default may be excused if "[a] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after … after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur." Here, McCoy is irrelevant to good cause because Jones has been available for almost 25 years. See, Crump v. State, 2016 Nev. Unpub. Lexis 374 at 6-7 n.5 ("Riley would not provide good cause as it relies on Hern, which has been available for decades."). Petitioner's position is indistinguishable from the Nevada Supreme

Court's rejection of Riley as good cause in Crump because Hern was available for years. Crump, 2016 Nev. Unpub. Lexis 374 at 6-7 n.5.

Furthermore, McCoy cannot be read to create new law as to Petitioner when the very claim that he is now raising was raised and rejected on appeal from his petition for writ of habeas corpus. See Pet. 5; Melendez v. State, Docket No. 65479 (Oct. 16, 2015) at 3-4. Having challenged this issue years ago under then-existing Nevada law, Petitioner cannot now avail himself of this allegedly new rule by claiming it was not previously available to him.

Finally, McCoy cannot demonstrate good cause because it applies only prospectively. The Nevada Supreme Court has adopted a general retroactivity framework based upon the United States Supreme Court's holding in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). Clem v. State, 119 Nev. 615, 626–30, 81 P.3d 521, 529–32 (2008); Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). The Teague Court held that with narrow exception, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added). Even if this Court does find that McCoy creates a new constitutional rule in Nevada despite the twenty-five-year-old holding in Jones, Petitioner's case has been final for more than a year as it has been appealed, collaterally challenged, and appealed again since the filing of the Judgment of Conviction. For these reasons, McCoy is not retroactive, and a finding of good cause as to Petitioner's McCoy claim is impossible.

Next, Petitioner also fails to demonstrate that he was prejudiced as his McCoy claim is meritless. Indeed, a review of the law leading to McCoy quickly dispels Petitioner's disingenuous claim that the new rule requires a canvass when counsel wishes to concede guilt. Fifteen years ago, the Supreme Court held that no "blanket rule demand[s] the defendant's explicit consent" to the strategic concession of guilt. Florida v. Nixon, 543 U.S. 175, 192 (2004). Instead, the Court held that when counsel informs the defendant of the strategy and the defendant thereafter neither approves nor protests the strategy, the strategy may be implemented. Id. at 181.

In Armenta-Carpio v. State, 129 Nev. 531, 306 P.3d 395 (2013), the Nevada Supreme

Court addressed Nixon as it explained how guilty pleas differ from the strategic decision to conceded guilt at trial:

> The Court explained that unlike a guilty plea, a concession strategy preserves the rights accorded a defendant in a criminal trial: (1) the prosecution is still required to present competent, admissible evidence establishing the essential elements of the charged crimes; (2) the defense retains the right to cross-examine prosecution witnesses and pursue exclusion of prejudicial evidence; and (3) the defense can seek relief on appeal from trial error. Id. As the Supreme Court had observed decades earlier, "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709 (1969). The Supreme Court also rejected the idea that counsel is automatically barred from pursuing a concession strategy just because the defendant, informed by counsel, neither consents nor objects to the course that counsel determines is the best strategy, explaining that the issue in those cases is whether counsel's representation fell below an objective standard of reasonableness and prejudiced the defense. Nixon, 543 U.S. at 178–79, 125 S.Ct. 551; see also Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Id. at 534–35, 306 P.3d at 397–98.

Accordingly, the court held that a concession of guilt is not the functional equivalent of a guilty plea. Id. at 535–36, 306 P.3d at 398–99.[3] Five years after the Nevada Supreme Court decided Armenta-Carpio based on its reading of Nixon, the Supreme Court of the United States decided McCoy, the case Petitioner is now claiming provides good cause and prejudice for overcoming the procedural bars to the instant petition. Petitioner, while ignoring prior Nevada law, also misrepresents McCoy.

In McCoy, the Supreme Court "granted certiorari … on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." McCoy, 138 S.Ct. at 1507. In that capital murder case, the defendant "vociferously insisted that he did not engage in the charged acts and adamantly

[3] This determination overruled a contrary holding in Hernandez v. State, 124 Nev. 978, 990, 194 P.3d 1235, 1243 (2008), overruled by Armenta-Carpio v. State, 129 Nev. 531, 306 P.3d 395 (2013). Hernandez was the law when this case went to trial.

objected to any admission of guilt." Id. at 1505. In fact, the defendant "testified in his own defense, maintaining his innocence." Id. at 1507. His attorney disregarded his objections by telling the jury, during the guilt phase of trial, that he had committed three murders. Id. at 1503. With those facts before the Court, it 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" a better chance at leniency. Id. at 1505. The McCoy Court distinguished its holding from Nixon, flatly declaring that Nixon "is not to the contrary." Id. at 1504.

Absent a situation where the criminal defendant vociferously and unambiguously objected to counsel admitting guilt, it is Nixon, and not McCoy, that governs. McCoy did not create any new rights except when a defendant does object in such a manner. Counsel still has the discretion to concede guilt absent such an objection from his client if the client is informed of the decision first. Regardless, neither Nixon nor McCoy require a court to canvass a defendant whose counsel seeks to concede guilt as a matter of strategy. Petitioner's attempts to use McCoy to equate concessions at the guilt phase with the entry of a guilty plea *despite* (1) the Supreme Court's contrary holding in Nixon, (2) its determination that Nixon was unaffected by McCoy, and (3) the Nevada Supreme Court's holding in Armenta-Carpio explicitly analyzing Nixon necessarily fail as they incorrectly state the law. Petitioner does not claim, and the record does not support, that he vociferously objected to counsel's concession of guilt. Thus, McCoy simply does not provide the relief Petitioner seeks.

Here, as Defendant concedes, the theory at trial was that the shooting was accidental. As the Nevada Supreme Court held, the "concession did not directly contradict" what counsel had told the jury in opening statements. Melendez, Docket No. 65479 at 4. The record does not reflect that Defendant objected vociferously to this plan, and he does not allege otherwise here. Further, because the theory was that the shooting was accidental, Defendant had at the very least consented to conceding that he was the person who shot his wife. Here, he alleges that he never gave his consent to the concession to voluntary manslaughter, but McCoy does not require such a remedy. The facts here do not implicate McCoy—they implicate Nixon, a

case which the McCoy court explicitly held was not to the contrary of its holding and remains good law. To repeat, Nixon held that when counsel informs the defendant of the strategy and the defendant thereafter neither approves nor protests the strategy, the strategy may be implemented without a blanket rule requiring the defendant's explicit consent. Nixon, 543 U.S. at 181, 192. Regardless of whether Defendant agreed to the strategy, there is nothing to suggest that he objected to it. Pet. 13. Applying Nixon, the Nevada Supreme Court in Armenta-Carpio overruled a prior holding requiring a canvas before the concession of guilt. Defendant's McCoy claim is based on a disingenuous reading of the case, and it is therefore meritless.

Finally, because Defendant has previously raised this issue under then-existing Nevada law and it was rejected, he cannot show prejudice now. Melendez v. State, Docket No. 65479 (Oct. 16, 2015) at 3-4. Indeed, the Supreme Court's holding is the law of the case. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6.

Accordingly, Defendant has failed to demonstrate good cause or prejudice sufficient to overcome the procedural bars to his petition. It should be denied.

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CONCLUSION

For the foregoing reasons, the State respectfully requests that Defendant's Petition for

Writ of Habeas Corpus be DISMISSED.

DATED this 17th day of June, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ JOHN NIMAN
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Response to Defendant's Second Supplement to Petition for Writ of Habeas Corpus – Post Conviction and State's Motion to Dismiss, was made this 17th day of June, 2019, by Electronic Filing to:

C.B. KIRSCHNER, FEDERAL PUBLIC DEFENDER
CB_Kirschner@fd.org

/s/ J. MOSLEY
Secretary for the District Attorney's Office

PWHC
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
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(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Mauricio I. Melendez

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Mauricio I. Melendez, Petitioner, v. Renee Baker, Warden, and the Attorney General for the State of Nevada, et al., Respondents.	Case No. _____ Dept. No. 29 Date of Hearing: Time of Hearing: (Not a Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center, Pershing County, Nevada.

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Nevada.

3. Date of judgment of conviction: October 13, 2009.

4. Case Number: 08-C247868

5. (a) Length of Sentence: 20 years to life plus consecutive 8 to 20 years.

(b) If sentence is death, state any date upon which execution is scheduled: Not applicable.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes [ ] No [X]

If "yes", list crime, case number and sentence being served at this time: Nature of offense involved in conviction being challenged: First Degree Murder with Use of a Deadly Weapon.

7. Nature of offense involved in conviction being challenged:

8. What was your plea?

(a) Not guilty X (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: Not applicable.

10. If you were found guilty after a plea of not guilty, was the finding made by: (a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No X

12. Did you appeal from the judgment of conviction? Yes X No __

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court.

(b) Case number or citation: Case No. 54770.

(c) Result: Judgment of conviction affirmed.

14. If you did not appeal, explain briefly why you did not: Not applicable.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes X No _____

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: Eighth Judicial District Court.

(2) Nature of proceeding: State post-conviction petition for a writ of habeas corpus.

(3) Ground raised:

On February 29, 2012, Mr. Melendez filed a proper person Petition for Writ of Habeas Corpus (Post-Conviction). Mr. Melendez raised the following grounds in his *pro se* petition:

1-A. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington, due to trial counsel's failure to retain, consult or utilize at trial an expert as to the customs and practices of El Salvador as they related to the petitioner and the facts and circumstances of the alleged incidents.

1-B. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to object, pursuant to the United States Supreme Court's decision in Melendez-Diaz v. Mass. To the use of a substitute coroner by the state to testify as to the autopsy at trial.

1-C. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to counsel's failure to communicate the State's plea offer to him.

1-D. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v.

Washington due to counsel's failure to address the issue of destruction of evidence (petitioner's blood) at any stage of the proceedings.

1-E. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to consult with, hire and/or retain the services of a toxicologist/expert on intoxication.

1-F. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to properly prepare for the testimony of Claudine Eggleston at trial.

1-G. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to retain, consult, or utilize at trial, experts to investigate and testify as to the shooting.

1-H. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to object to the testimony of Detective Steven Popp at trial.

1-I. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to object and to preserve for the record the improper admission of the testimony of Claudine Eggleston.

1-J. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to object or otherwise preserve for the record the testimony of Nicole Todorovich.

1-K. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v.

Washington due to trial counsel's failure to prepare a viable defense to the charges at trial.

1-L. Petitioner was denied effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to trial counsel's failure to obtain his client's consent before conceding guilt at trial.

2. Petitioner was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and to the United States Supreme Court's decision in Strickland v. Washington due to appellate counsel's failure to:

A. Raise meritorious issues on appeal:
   1. Failure to raise the issue of cumulative error;
   2. Failure to include the issue of concession of guilt;
   3. Failure to include the issue re Melendez-Diaz;
   4. Failure to raise the issue of destruction of evidence;
   5. Failure to raise the issue of the failure to canvass Melendez.

B. Comply with Nevada's indigent standards of performance:
   1. Failure to comply with the standard two: identification of issue on appeal;
   2. Failure to complete with standard four: duty to meet with trial lawyers;
   3. Failure to comply with standard five: duty to confer and communicate with client;
   4. Failure to comply with standard eight: post-decision responsibilities.

3. The cumulative effect of the errors of trial counsel denied Petitioner due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

4. The cumulative effect of the errors of appellate counsel denied Petitioner due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The court appointed Karen Connolly to represent Mr. Melendez in post-conviction proceedings. Ms. Connolly supplemented Mr. Melendez's *pro se* petition on April 5, 2013 with the following claims:

The actions and inactions of trial and appellate counsel violated petitioner's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution:

A. Trial counsel failed to conduct an adequate investigation.

B. Trial counsel failed to object to improper testimony of Melissa Hill.

C. Trial counsel failed to object to improper testimony of Nicole Todorovich and an adequate investigation was not conducted.

D. Melendez received ineffective assistance of trial counsel for failure to properly advise the petitioner as to plea negotiations.

E. Trial counsel failed to file a motion to suppress Petitioner's statement.

F. Trial and appellate counsel failed to object to the district court giving Instruction Numbers 7, 26, and 34, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

G. Cumulative error.

H. Appellate counsel failed to raise all issues of merit on appeal.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___X___ No _____

(5) Result: Petition granted.

(6) Date of Result: The district court issued a notice of entry of a written order granting the petition on April 14, 2014. On appeal by the state, the Nevada Supreme Court issued an order of reversal on October 16, 2015 in case No. 65479.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: See paragraph (6), above.

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: United States District Court.

(2) Nature of proceeding: Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

(3) Grounds raised:

1. Mauricio Melendez was denied his right to the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

A. Trial counsel failed to object to the State's use of a substitute coroner to testify about the autopsy report at trial.

B. Trial counsel failed to investigate and prepare for witness Claudine Eggleston.

C. Trial counsel failed to hire a forensic or other qualified expert in regards to the shooting.

D. Trial counsel failed to get Melendez's consent before conceding

E. Trial counsel failed to hire an expert on the cultural practices of El Salvador.

F. Cumulative error

2. Prosecutorial misconduct denied Mauricio Melendez due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No ___X____

(5) Result: Pending.

(6) Date of result: Not applicable.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Not applicable.

(c) As to any third petition, application or motion, give the same information:

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No _____

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? No If so, identify:

a. Which of the grounds is the same:

b. The proceedings in which these grounds were raised:

c. Briefly explain why you are again raising these grounds.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).

The claims presented in this petition are based on a recent U.S. Supreme Court decision, *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). The new constitutional law outlined in *McCoy* was not previously available to Melendez.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? Yes If so, state

briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

New Rule of Law

To overcome the procedural bars of NRS 34.726 and NRS 34.810, a petitioner has the burden to show "good cause" for delay in bringing his claim or for presenting the same claims again.[1] One manner in which a petitioner can establish good cause is to show that the legal basis for the claim was not reasonably available at the time of the default.[2] A claim based on newly available legal basis must rest on a previously unavailable constitutional claim.[3] A petitioner has one-year to file a petition from the date that the claim has become available.[4]

The Supreme Court's recent decision in *McCoy v. Louisiana*[5] provides good cause for overcoming the procedural bars. *McCoy* established a new rule of constitutional law, namely that a defendant has the "secured autonomy" to decide the objective of his defense, and to "make the fundamental choices about his own defense."[6]

This new rule of constitutional law was not previously available to Melendez, who submitted this petition within one year of *McCoy*, which was decided on May 14, 2018.

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[1] *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.2d 519, 537 (2001).

[2] *Id.*

[3] *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003).

[4] *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017).

[5] 138 S.Ct. 1500 (2018).

[6] *Id.* at 1511.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes X No _____

If yes, state what court and the case number: United States District Court, Case No. 2:16-cv-01003-JAD-CWH.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Clark County Public Defender, Scott Coffee and Christy Craig, at trial; Clark County Public Defender, Audrey Conway, on direct appeal; and Karen Connolly on post-conviction.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes _____ No X

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

Ground One: Melendez's constitutional right to secured autonomy was violated when trial counsel admitted Melendez's involvement in the crime by conceding his guilt to manslaughter, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

On May 14, 2018, the United States Supreme Court decided *McCoy v. Louisiana*.[7] The Court held that the Sixth Amendment guarantees a defendant the right "to have the *Assistance* of Counsel for *his* defense."[8] The Court explained this to mean that the objective of the defense is for the accused, not his attorney, to decide: "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt . . . or to maintain his innocence, leaving it to the State to

[7] 138 S.Ct. 1500 (2018).

[8] *Id.* at 1505 (emphasis in original).

prove his guilt beyond a reasonable doubt."[9] Thus, if the accused wishes to maintain his innocence, his attorney may not concede guilt.

The Court explained that "a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in granting to the accused personally the right to make his defense, speaks of the *assistance* of counsel, and an assistant, however expert, is still an assistant."[10] The *McCoy* holding relied in part upon an earlier Supreme Court case, *Gannet Co. v. DePasquale*, where the Court observed that the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense."[11]

"If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest."[12] But counsel may not "block[ ] the defendant's right to make the fundamental choices about his own defense,"[13] and thereby violate the defendant's constitutionally-secured autonomy to decide the objective of his defense.

Mauricio Melendez was charged with open murder in connection with the shooting death of his wife. Here, as in *McCoy*, Melendez always maintained that the shooting was entirely accidental and that he was innocent. At trial, defense counsel Craig told the jury in her opening statement that the shooting and death of Chennel Melendez, the victim, was accidental. Craig repeatedly told the jury that the shooting was "unplanned, unexpected and unintentional."[14]

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[9] *See id.*

[10] *Id.* at 1508 (alterations and quotation marks omitted) (emphasis added).

[11] *See id.* (quoting *Gannet Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979)).

[12] *Id.* at 1509.

[13] *See id.* at 1511.

[14] Transcript (Tr.) 7/28/09 at 85, 86.

However, in the closing argument, defense counsel Coffee asked the jury to convict Melendez of manslaughter.[15] Coffee discussed the accident theory, on which the jury was instructed and then told the jury, "You're within your power to find that here. Wouldn't expect you to find that here."[16] He then concluded by asking the jury to look at everything and "When you do this you punish him, voluntary [sic] manslaughter.[17] It makes perfect sense, it fits, it is the right verdict."[18]

Coffee's concession to manslaughter was a radical departure from the defense theory of the case, which was that the shooting was accidental. Rather than adhere to the case theory, he told the jury that he would not expect them to find that it was an accident and instead asked them to punish his client by finding him guilty of manslaughter. Trial counsel in this case failed to either consult with Melendez or obtain his consent before admitting his guilt to the charge of manslaughter. Nor did the court canvas Melendez about whether he agreed to this radical change in the theory of the defense.

At the post-conviction hearing, Attorney Craig maintained that the theory of the case was that the shooting was accidental, "So our position was that it was an accidental shooting and not a criminal act."[19] She could not recall what was argued during the closing or if Melendez consented to the admission of guilt as to manslaughter.[20] Attorney Coffee also testified at the post-conviction hearing that he could not recall if he obtained Melendez's consent before conceding guilt to

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[15] Tr. 7/30/09 at 129-151.

[16] *Id*. at 149.

[17] Voluntary manslaughter, defined at NRS 200.050, was not charged and did not appear on the verdict form. Melendez was charged with, and the jury was instructed on, involuntary manslaughter, defined at NRS 200.070.

[18] Tr. 7/30/09 at 151.

[19] Tr. 1/23/13 at 77.

[20] *Id*. at 178.

manslaughter.[21] Finally, Melendez testified at the hearing and clearly stated he did not agree to the admission of guilt.[22]

Attorney Coffee's concession was in direct contradiction with Melendez's assertion of innocence and it "block[ed] the defendant's right to make the fundamental choices about his own defense."[23] This violated Melendez's Sixth and Fourteenth Amendment rights.

This constitutes a structural error, and therefore is not subject to a prejudice inquiry. Due to counsel's unilateral violation of Melendez's secured autonomy to insist on his innocence and be the master of his own defense, Melendez is entitled to a new trial.

Dated this 6th day of May, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

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[21] *Id*. at 191.

[22] *Id*. at 196.

[23] *McCoy*, 138 S.Ct. at 1511.

VERIFICATION

Under penalty of perjury, the undersigned declares that she is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of her own knowledge except as to those matters stated on information and belief and as to such matters she believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated this 6th day of May, 2019.

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Wolfson, Steven.Wolfson@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Heather D. Procter
Senior Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

JOC

FILED
OCT 13 2009
CLERK OF COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MAURICIO I. MELENDEZ
aka Mauricio Israel Melendez

Defendant.

CASE NO. C247868

DEPT. NO. XIV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crime of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; thereafter, on the 17TH day of September, 2009, the Defendant was present in court for sentencing with his counsel, SCOTT COFFEE, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee, and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED as follows: to LIFE with a MINIMUM parole eligibility of TWENTY (20) YEARS, plus a CONSECUTIVE term of TWENTY (20) YEARS MAXIMUM with a MINIMUM parole eligibility of EIGHT (8) YEARS for the Use of a Deadly Weapon in the Nevada Department of Corrections (NDC), with FOUR HUNDRED SIX (406) DAYS Credit for Time Served.

DATED this 8th day of ~~SEPTEMBER~~ October, 2009.

DONALD D. MOSLEY
DISTRICT JUDGE

SENIOR JUDGE JAMES A. BRENNAN