

# APPENDIX

A

COURT OF COMMON PLEAS OF MONROE COUNTY  
FORTY-THIRD JUDICIAL DISTRICT  
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 1582 CR 2006

vs. :

MIGUEL GONZALEZ,  
Petitioner : PCRA PETITION

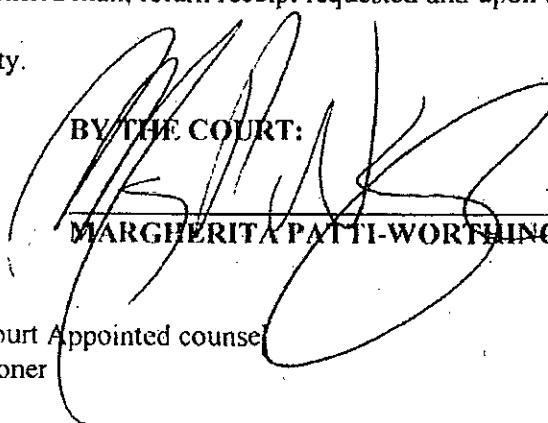
ORDER

AND NOW, this 15th day of March, 2019, upon consideration of Petitioner's Post-Conviction Relief Act Petition, and after a review of the record, testimony from the hearing in this matter, and briefs filed by counsel, Petitioner's PCRA Petition is **DENIED**.

Petitioner is advised that he has **thirty (30) days** from the date of this Order within which to file an appeal with the Pennsylvania Superior Court.

**IT IS FURTHER ORDERED** that the Clerk of Courts is directed to serve a copy of this decision upon the Petitioner by certified mail, return receipt requested and upon the Office of the District Attorney of Monroe County.

BY THE COURT:

  
MARGHERITA PATTI-WORTHINGTON, P.J.

cc: District Attorney  
Brian Gaglione, Esq.-Court Appointed counsel  
Miguel Gonzalez, Petitioner  
HX-4697  
Box 244  
Graterford, PA 19426  
Court Administration  
MPW2019-012

Clerk of Courts  
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**COURT OF COMMON PLEAS OF MONROE COUNTY  
FORTY-THIRD JUDICIAL DISTRICT  
COMMONWEALTH OF PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA : 1582 CR 2006**

**vs.**

**MIGUEL GONZALEZ, : PCRA PETITION**  
**Petitioner**

**OPINION**

This matter comes before the Court on Miguel Gonzalez' (hereinafter "Petitioner") Petition for Post-Conviction Collateral Relief (hereinafter "PCRA"). We consider whether the invocation of the United States Supreme Court's decision in *McCoy v. Louisiana*<sup>1</sup> satisfies the newly-recognized constitutional right exception to the time limit prescribed by the Post Conviction Relief Act.

On November 18, 2006, police responded to a report of Jeannette Claudio lying dead in a house. Petitioner also had a head wound and a loaded gun was found lying next to his body. Petitioner was arrested and removed in an ambulance. Petitioner survived and was apparently able to recover from the head wound. The couple's two children were in the residence at the time of the murder. At trial, Petitioner failed to convince the jury of his diminished capacity. Petitioner was convicted on December 8, 2008 of Criminal Homicide Murder in the First Degree, two counts of Recklessly Endangering Another Person, Former Convict in possession of a Firearm, and Intercept Communications.

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<sup>1</sup> 138 S. Ct. 1500 (2018). Petitioner appears to raise this as the third exception to the PCRA timeliness requirements, i.e., "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." See 42 Pa. C.S. § 9545(b)(1)(iii).

On January 12, 2009, Petitioner was sentenced to life imprisonment without parole followed by incarceration of not less than four, nor more than eight years. On February 10, 2009, Petitioner filed his notice of appeal to the Pennsylvania Superior Court arguing violation of his state and federal right to present a defense, failure to instruct the jury on lesser degrees of homicide, and insufficiency of the evidence. A memorandum decision filed on December 30, 2009, by the Superior Court affirmed the conviction and judgment of sentence.

On January 29, 2010, Petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on July 14, 2010. Petitioner did not file any petition for Post-Conviction Relief at the state court level following the denial of the petition for allowance of appeal.

On December 9, 2010, Petitioner filed a *pro se* petition for federal *habeas corpus* relief in the United States District Court for the Eastern District of Pennsylvania. Petitioner argued ineffective assistance of counsel, and prosecutorial misconduct. By Order dated May 13, 2011, the case was transferred to the United States District Court for the Middle District of Pennsylvania. The District Court denied Petitioner's *habeas corpus* petition for failure to exhaust state remedies and concluded that “[Petitioner] failed to qualify for any exception for his procedural default, as he ha[d] not alleged either cause and prejudice or a fundamental miscarriage of justice.” *Gonzalez v. Pennsylvania*, No. 4: CV-11-0955, 2014 WL 2090699, at \*3 (M.D. Pa. May 16, 2014). On July 19, 2016, the United States Court of Appeals for the Third Circuit affirmed the District Court's May 16, 2014 order denying Petitioner's petition for *habeas corpus* relief. Petitioner filed an appeal to the U.S. Supreme Court on January 12, 2017, which is still pending.

On July 19, 2018, Petitioner filed the instant *pro se* Motion for Post-Conviction Collateral Relief and We appointed counsel on August 3, 2018. On November 30, 2018, the Commonwealth filed its Answer and Brief in Opposition to Petitioner's *pro se* Motion for Post-Conviction Collateral Relief. A hearing on Petitioner's PCRA petition was held on January 7, 2019.

Petitioner alleges in his present PCRA that his trial counsel was ineffective by questioning his innocence, presenting a diminished capacity defense without consulting Petitioner of the overall trial strategy, and contradicting Petitioner's testimony in court. Petitioner alleges a violation of his constitutional right "to decide on the objective of his defense." Pet. Br. at 4.

### DISCUSSION

Petitioner has filed a PCRA claim arguing a violation of his constitutional rights under the Sixth Amendment of the U.S. Constitution<sup>2</sup> as incorporated to the Commonwealth by the Fourteenth Amendment (A). Petitioner avers he satisfies his burden under 42 Pa. C. S. § 9545(b)(1), notwithstanding the date his sentence became final for purposes of PCRA relief. If untimely, We have no jurisdiction to address the merits of Petitioner's PCRA. *Com. v. Fahy*, 737 A.2d 214, 223 (1999).

#### **A. Petitioner fails to meet his burden under the 42 Pa. C. S. § 9545**

Petitioner invokes § 9545(b)(1)(iii) by arguing that he meets the timeliness exception by filing within one year of the date his constitutional claim arose (1), and arguing a newly recognized constitutional right applies retroactively to his trial proceedings (2). The Court considers these arguments in turn. It is the Petitioner's burden to allege and prove that one of the

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<sup>2</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

timeliness exceptions applies. *Com v. Edmiston*, 65 A.3d 339, 346 (Pa. 2013). Whether a petitioner has carried his burden is a threshold inquiry that must be resolved prior to considering the merits of any claim. *Id.*

1. *The PCRA Petition was timely filed*

PCRA petitions must be filed “one year of the date the judgment becomes final.” *See* 42 Pa. C. S. § 9545(b)(1). For these purposes, a judgment is deemed final “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa. C.S. § 9545(b)(3). Only very narrow exceptions apply to the jurisdictional time constraints on a PCRA Petition. *See* § 9545(b)(1)(i)–(iii). Petitioner, however, argues he meets a timeliness exception under 42 Pa. C.S. § 9545(b)(1)(iii). *See* 42 Pa. C.S. § 9545(b)(1)(iii) (providing an exception to the time limit upon recognition of a new constitutional right that is held to apply retroactively to petitioners whose judgments of sentence have become final).

The crux of Petitioner’s argument relies on *McCoy v. Louisiana* as an exception to the timeliness requirements of 42 Pa.C.S. § 9545(b)(iii) by alleging a new constitutional right. “When the exception asserted is Section 9545(b)(1)(iii), the [time] runs from the date of the germane decision.” *Com. v. Secreti*, 134 A.3d 77, 80 (2016).

The Commonwealth responds that the Petition for *Allocatur* was denied by the Pennsylvania Supreme Court on July 14, 2010. Therefore, the Commonwealth contends that following the denial of the Allowance of Appeal, Petitioner’s judgment of sentence became final on July 14, 2010 and is, therefore, untimely. We disagree with the Commonwealth.

Petitioner relies on *McCoy v. Louisiana* to satisfy the first prong of the timeliness exception of § 9545(b)(1)(iii). Petitioner does not contend that his PCRA is timely, but instead that it meets

one of the express statutory exceptions. Importantly, § 9545(b)(2) was amended by the 2018 Pennsylvania Legislative Service Act,<sup>3</sup> which extends the previous 60-day time limit for filing purposes to a year for claims arising on Dec. 24, 2017 or thereafter. Furthermore, *McCoy* was decided by the U.S. Supreme Court on May 14, 2018. Thus, Petitioner had until May 14, 2019 to bring a claim under the timeliness exception of § 9545(b)(1)(iii), because he falls under this category. Accordingly, the PCRA satisfies the timeliness exceptions. The Court can now turn to addresses whether *McCoy* can offer any relief to Petitioner.

## 2. *McCoy* analysis

Subsection (iii) of Section 9545 requires the petitioner prove both that a new constitutional right has been recognized by either the Pennsylvania or U.S. Supreme Court (a) and that the right has been held by that court to apply retroactively (b). *Com. v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002). Thus, it is Petitioner's burden to meet both prongs under the statute.

### a. *McCoy* does not recognize a "new" constitutional right

In *Robinson*, the Pennsylvania Supreme Court noted that "[i]n general, the proper way to seek to secure innovations in constitutional law is upon direct review, not via the PCRA." *Com. v. Robinson*, 82 A.3d 998, 1021 (2013). This is because the PCRA provides a means to obtain relief based on existing or newly-recognized constitutional rights. 42 Pa.C.S. § 9543(a)(2)(i); § 9545(b)(1)(iii). Therefore, right must first exist for a petitioner to claim it as a basis for relief.

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<sup>3</sup> Pa. Leg. Serv. Act, 2018-146 (S.B. 915).

On post-verdict motions, Petitioner could have claimed that his Sixth Amendment rights had been violated or infringed upon. Here, however, appellant argues a new substantive constitutional rule has been recognized, and then to have that rule applied to him retroactively. The Court is skeptical of Petitioner's argument.

Petitioner presently argues that *McCoy* is a new constitutional rule. Specifically, Petitioner contends the "Sixth Amendment [now] guarantees a right to choose the objective of [the] defense and to insist that [] counsel refrain from admitting guilt even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Pet. Br. at 3 (citing *McCoy*, 138 S. Ct. at 1505).

Notwithstanding Petitioner's argument, We fail to see how *McCoy* recognizes a new constitutional right applicable to Petitioner's case. "The right or rule established by the Supreme Court must touch upon the facts or procedure that resulted either in the petitioner's conviction or sentence." *Com. v. Spotz*, 171 A.3d 675, 681 (2017). *McCoy* is factually distinguishable from Petitioner's case and does not apply to the present circumstances.

*McCoy* and its ancestor, *Nixon*,<sup>4</sup> both relied on strategic decisions involving the concession of guilty acts to avoid the death penalty, something that was not debated during the case at hand. "[F]or purposes of the newly-recognized constitutional right exception, a person serving a sentence of life imprisonment cannot invoke new constitutional rights that govern only death penalty cases . . ." *Id.* Here, there appears to be no such consideration by either Petitioner or trial counsel, which distinguishes the facts from precedential considerations. In addition, *McCoy* appears to announce the manner, in which a defendant must act in order to qualify for Sixth Amendment relief when counsel goes against his directions, not a "new" constitutional

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<sup>4</sup> *Fla. v. Nixon*, 543 U.S. 175 (2004).

right. *McCoy*, 138 S. Ct. at 1507; see e.g., *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009) (defendant's "vociferous and repeated protestations . . . deprived Cooke of his constitutional right to make the fundamental decisions regarding his case."); (citing *Nixon* at 186-187). The majority's opinion in *McCoy* went through great pains to distinguish its reasoning from *Nixon* and draw upon existing case law to cement its holding.

Notwithstanding the U.S. Supreme Court's holding in *McCoy*, Pennsylvania has long held that counsel has "a duty to gain the consent of a defendant regarding the overarching objective or purpose of a defense, and leaves to counsel the authority to control the many aspects involving strategy and tactics in achieving those objectives." *Com. v. Mason*, 130 A.3d 601, 667-68 (Pa. 2015) (quoting *Com. v. Sam*, 635 A.2d 603, 611-12 (1993)); Pa. R. Pro. Rep. 1.2(a). We fail to understand why Petitioner brings this claim now when he could have asserted the same substantive rule under the laws and Constitution of the Commonwealth during or after trial. The Pennsylvania Supreme Court and the Pennsylvania Rules of Professional Conduct stated at the time of Petitioner's trial that the client, not counsel, decides the objectives of representation. Counsel may advise as to the best means by which to pursue those objectives, but has no right, to override what the client deems to be in his best interest. *Sam*, 635 A.2d at 611.

Under the guidance and language of the aforementioned authorities, We conclude that *McCoy* applies an established rule to a new set of facts, it does not recognize a new constitutional right. Even assuming *arguendo* that *McCoy* recognizes a new constitutional right, Petitioner would still fail to meet the second prong under § 9545.

b. *McCoy does not apply retroactively*

As mentioned above, Petitioner urges this Court to conclude, that *McCoy* is fully retroactive on timely collateral reviews. The Pennsylvania Supreme Court interpreted the statutory language to mean that a retroactivity determination must exist at the time that the petition is filed. *Abdul-Salaam*, 812 A.2d at 502.

“Under the [Pennsylvania] framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are *still* on direct review.” *Com. v. Ross*, 140 A.3d 55, 59 (Pa. Super. 2016) (*emphasis added*). “A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a ‘watershed rule of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Id.* Similarly, on the federal level, a new rule of constitutional significance must be made explicitly.

Because *McCoy* involves a Sixth Amendment claim, this issue is properly controlled by the holding in *Tyler*.<sup>5</sup> In *Tyler*, the U.S. Supreme Court held that “a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.” *Tyler*, 533 U.S. 656, 663; 28 U.S.C.A. § 2255. The U.S. Supreme Court must explicitly hold, or several of its decisions dictate, that a particular rule is made retroactively applicable to cases on collateral review. *In re Turner*, 267 F.3d 225, 231 (3d Cir. 2001). Retroactivity is, thus, properly analyzed as a threshold question. We cannot attempt to define what may or may not constitute a new rule for retroactivity purposes. In general, however, the only way the U.S. Supreme Court can, by itself, “lay out and construct” a rule’s retroactive effect, or “cause” that effect “to exist, occur, or appear,” is through its holding. *Tyler*, 533 U.S. at 663. Therefore, the relevant question is not

<sup>5</sup> *Tyler v. Cain*, 533 U.S. 656, 663 (2001).

whether the Supreme Court should make a case applicable retroactively or suggested the same, but whether it has actually done so.

In *McCoy*, the U.S. Supreme Court made no express determination regarding its retroactive application to cases that have already been adjudicated. Petitioner cannot find relief because *McCoy* appears to apply to future proceedings, not past ones. Thus, Petitioner has failed to satisfy his burden under 42 Pa.C.S. § 9545 to prove a meritorious exception to the PCRA time-bar. We are without jurisdiction to offer him any relief. *Com. v. Jackson*, 30 A.3d 516, 523 (Pa. Super. 2011).

Accordingly, we enter the following Order:

# APPENDIX

## B

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF  
PENNSYLVANIA  
v.  
MIGUEL GONZALEZ, : No. 840 EDA 2020  
Appellant :

Appeal from the PCRA Order Entered March 15, 2019,  
In the Court of Common Pleas of Monroe County  
Criminal Division at No. CP-45-CR-0001582-2006

BEFORE: LAZARUS, J., DUBOW, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED NOVEMBER 16, 2020**

Miguel Gonzalez appeals from the March 15, 2019 order, entered in the Court of Common Pleas of Monroe County, denying his PCRA petition.<sup>1</sup> After careful review, we affirm.

Appellant was charged in connection with the death of Jeannette Claudio, his girlfriend/wife.<sup>2</sup> The relevant factual history is as follows:

On November 18, 2006, police responded to a report of Jeannette Claudio lying dead in a house. [Appellant] also had a head wound and a loaded gun was found lying next to his body. [Appellant] was arrested and removed in an ambulance. [Appellant] survived and was apparently able to recover from the

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<sup>1</sup> 42 Pa.C.S.A. §§ 9541-9546.

<sup>2</sup> Ms. Claudio is alternatively referred to as either appellant's girlfriend or wife.

head wound. The couple's two children were in the residence at the time of the murder.

PCRA court Rule 1925(a) opinion, 3/15/19 at 1. At trial, appellant's counsel conceded that appellant was the shooter, and presented a diminished capacity defense, despite appellant's testimony as to his innocence. (*Id.* at 1, 3; appellant's PCRA petition, 7/19/18 at 3-4, ¶¶ 5(III), 6(A).)

The relevant procedural history, as found by the PCRA court, is as follows:

On [October 7], 2008, after trial by jury, appellant was convicted of first[-]degree murder, [third-degree murder,] two counts of recklessly endangering another person, possession of a firearm prohibited, and intercept[ed] communication[s].<sup>[3]</sup> On January 12, 2009, appellant was sentenced to life imprisonment without parole followed by incarceration of not less than four, nor more than eight years. [On January 21, 2009, appellant filed a motion for reconsideration of sentence which was denied by the trial court on January 23, 2009.]

On February 10, 2009, appellant filed a notice of appeal to the Pennsylvania Superior Court. The Superior Court affirmed the conviction and judgment of sentence by memorandum decision on December 30, 2009. Appellant filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on July 14, 2010. Following this denial, appellant did not file any petition for post-conviction relief at the state level.

On December 9, 2010, appellant filed a *pro se* petition for federal **habeas corpus** relief in the United States District Court for the Eastern District of Pennsylvania alleging ineffective assistance of counsel

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<sup>3</sup> 18 Pa.C.S.A. §§ 2501(a), 2502(c), 2705, 6105(a)(1), and 5703(1), respectively.

and prosecutorial misconduct. By order dated May 13, 2011, the case was transferred to the United States District Court for the Middle District of Pennsylvania. The District Court denied appellant's habeas corpus petition for failure to exhaust state remedies and concluded, "[appellant] failed to qualify for any exception for his procedural default, as he ha[d] not alleged either cause and prejudice or a fundamental miscarriage of justice." **Gonzalez v. Pennsylvania**, No. 4: CV-11-0955, 2014 WL 2090699, at \*3 (M.D. Pa. 2014). On July 19, 2016, the United States Court of Appeals for the Third Circuit affirmed the District Court's decision. Appellant filed a petition for writ of **certiorari** to the U.S. Supreme Court on January 12, 2017, which was denied on March 25, 2019.

On July 19, 2018, appellant filed a **pro se** motion for post-conviction collateral relief. On August 3, 2018, [the PCRA court] appointed Brian Gaglione, Esq., as appellant's counsel. On March 1[5], 2019, after hearing,[<sup>4</sup>] [the PCRA] court issued a PCRA opinion and order denying appellant's PCRA petition and affording appellant thirty (30) days to file an appeal with the Pennsylvania Superior Court. Appointed counsel[,] Brian Gaglione, Esq., failed to file a timely appeal. On August 19, 2019, appellant filed a **pro se** PCRA petition for restoration of appellate rights, **nunc pro tunc**, based on the allegation his court-appointed counsel failed to file a timely appeal, and that said failure constituted **per se** ineffectiveness of counsel. On September 16, 2019, [the PCRA court] removed Brain [sic] Gaglione, Esq., and appointed Janet Marsh Catina, Esq. as [appellant]'s court-appointed attorney and scheduled a hearing.

On November 8, 2019, after hearing and with the concurrence of the Commonwealth, [the PCRA] court granted [appellant]'s **pro se** petition for reinstatement of appellate rights, **nunc pro tunc**. Appellant was afforded thirty (30) days to file an

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<sup>4</sup> The hearing was held on January 7, 2010.

appeal with the Pennsylvania Superior Court. Appointed counsel, Janet Marsh Catina, Esq., failed to file a timely appeal. By order dated February 21, 2020, [the PCRA] court reinstated appellant's appellate rights and afforded thirty (30) days to file an appeal with the Pennsylvania Superior Court. In addition, [the PCRA court] removed Janet Marsh Catina, Esq. as counsel, and appointed Lauren E. Allu, Esq., as counsel to represent appellant for the purpose of appeal.

Appellant filed his notice of appeal on March 2, 2020. . . .

PCRA court Rule 1925(a) opinion, 4/15/20 at 1-3 (extraneous capitalization omitted; some bolding and italics added). On March 4, 2020, the PCRA court ordered appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.C.P. 1925(b). Appellant timely complied. The PCRA court filed its Rule 1925(a) opinion on April 15, 2020, incorporating its prior PCRA opinion and order of March 15, 2019.

Appellant raises the following issues on appeal:

1. Did the trial [c]ourt commit reversible error when it held that a new constitutional right was not created by the Supreme Court's decision in ***McCoy v. Louisiana***, 138 S.Ct. 1500 (2018)?
2. Did the trial [c]ourt commit reversible error when it held that the holding in ***McCoy v. Louisiana***, 138 S.Ct. 1500 (2018) was not retroactive?

Appellant's brief at 6.

In his brief, appellant contends:

that his trial counsel was ineffective by questioning his innocence, presenting a diminished capacity defense

without consulting [a]ppellant of the overall trial strategy and contradicting [a]ppellant's testimony in court that he was innocent. Appellant argued [sic] a violation of his constitutional rights under the Sixth Amendment of the U.S. Constitution as incorporated to the Commonwealth by the Fourteenth Amendment. Specifically, [that] his constitutional rights were violated when he was not able to decide on the objective of his defense.

*Id.* at 9 (citations omitted). Appellant argues that **McCoy** created a new constitutional right that "a criminal defendant has a constitutional right to decide the objective of his defense," and that this right applies retroactively. (*Id.* at 11.)

"When reviewing the denial of a PCRA petition, this court's standard of review is limited to whether the PCRA court's determination is supported by evidence of record and whether it is free of legal error. . . . We review the PCRA court's legal conclusions *de novo*." **Commonwealth v. Hart**, 199 A.3d 475, 481 (Pa.Super. 2018) (citations and quotation marks omitted).

Initially, we note that appellant does not contend that his PCRA petition is timely. Rather, appellant argues that **McCoy** created a new constitutional right, and therefore, he falls within the new constitutional right exception to the timeliness requirement. **See** 42 Pa.C.S.A. § 9545(b)(iii). Section 9545(b)(iii) provides that to invoke the constitutional right exception to the timeliness requirement, the petitioner must prove that "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time

period provided in this section and has been held by that court to apply retroactively." *Id.*

Section 9545(b)(2) was amended to provide that, as to claims arising after December 24, 2017, "[a]ny petition invoking an exception . . . shall be filed within one year of the date the claim could have been presented." *Id.* The constitutional right exception runs from the date of the decision recognizing the new right. **See Commonwealth v. Secreti**, 134 A.3d 77, 80 (Pa.Super. 2016). **McCoy** was decided on May 14, 2018. Thus, appellant had until May 14, 2019, to bring a claim under the constitutional right timeliness exception. Appellant satisfied the threshold requirement, for asserting the new constitutional right exception to the timeliness requirement, by filing his petition on July 19, 2018. To fall within the exception, however, this court has held:

[s]ubsection (iii) of Section 9545 has two requirements. First, it provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or this court after the time provided in this section. Second, it provides that the right "has been held" by "that court" to apply retroactively. Thus, a petitioner must prove that there is a "new" constitutional right and that the right "has been held" by that court to apply retroactively. The language "has been held" is in the past tense. These words mean that the action has already occurred, *i.e.*, "that court" has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.

**Commonwealth v. Murphy**, 180 A.3d 402, 405 (Pa.Super. 2018) (citation omitted), **appeal denied**, 195 A.3d 559 (Pa. 2018).

As to whether **McCoy** created a new constitutional right, the Supreme Court held as follows:

When a client expressly asserts that the objective of “**his** defence” is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U.S. Const. Amdt. 6 (emphasis added) . . . .

Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel’s, or the court’s, respective trial management roles.

**McCoy**, 138 S.Ct. at 1509 (emphasis and quotation marks in original; some citations omitted).

The Supreme Court further explained:

Violation of a defendant’s Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called “structural”; when present, such an error is not subject to harmless-error review. . . . Structural error affect[s] the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself. An error may be ranked structural, we have explained, if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest, such as the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge’s failure to tell the jury that it may not

convict unless it finds the defendant's guilt beyond a reasonable doubt.

Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. Such an admission 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.

*Id.* at 1511 (citations and quotation marks omitted).

*McCoy*, however, did not recognize a new constitutional right. In *Commonwealth v. Weiss*, 81 A.3d 767 (Pa. 2013), our supreme court stated:

[O]nly a criminal defendant has the authority to concede criminal liability and authorize counsel to present a defense of diminished capacity. Counsel cannot do so over the objections of a client who maintains his innocence. *Commonwealth v. Weaver*, . . . 457 A.2d 505, 506-07 (1983) (holding that even if diminished capacity was the only viable defense, trial counsel would be deemed ineffective for presenting this defense without the consent of the defendant).

*Id.* at 798. Furthermore, a recent panel of this court held:<sup>5</sup>

[A] defendant's "secured autonomy" under the Sixth Amendment is not a "new" constitutional right. *See, e.g., Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (recognizing defendant's ultimate authority to decide whether to plead guilty, waive jury trial, testify in his own defense, or take appeal); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (explaining Sixth

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<sup>5</sup> "This panel is not empowered to overrule another panel of the Superior Court." *Commonwealth v. Beck*, 78 A.3d 656, 659 (Pa.Super. 2013).

Amendment grants to accused personally right to make his own defense; Sixth Amendment speaks of "assistance" of counsel; "assistant," however expert, is still assistant). **McCoy** simply applied a defendant's well-rooted Sixth Amendment right to autonomy to a new set of circumstances. **See, e.g., Commonwealth v. Garcia**, 23 A.3d 1059 (Pa.Super. 2011), **appeal denied**, 614 Pa. 710, 38 A.3d 823 (2012) (holding application of criminal defendant's long-standing constitutional right to effective assistance of counsel to new set of facts did not create "new constitutional right" under PCRA). **See** 42 Pa.C.S.A. § 9545(b)(1)(iii).

**Commonwealth v. Hoffman**, 2020 WL 200838 at \*2 (Pa.Super. January 13, 2020) (unpublished memorandum) (quotation marks in original); **see also Commonwealth v. Manus**, 2019 WL 2598179 (Pa.Super. June 25, 2019) (unpublished memorandum). Therefore, appellant has failed to meet the first prong of the new constitutional right timeliness exception.

Assuming, **arguendo**, that **McCoy** recognized a new constitutional right, the exception in Section 9545(b)(1)(iii) would still be inapplicable.

Moreover, even assuming that **McCoy** announced a newly recognized constitutional right, appellant has failed to establish that the **McCoy** decision applies retroactively to cases on collateral review. The Supreme Court of Pennsylvania has expressly stated that "the language 'has been held' in Section 9545(b)(1)(iii) means that a **retroactivity** determination must exist **at** the time that the petition is filed." **Commonwealth v. Abdul-Salaam**, 812 A.2d 497, 502 (Pa. 2002) (emphasis added). The Supreme Court of the United States has also made no such determination.

**Commonwealth v. Traub**, 236 A.3d 1112, 2020 WL 1922527 \*3 (Pa.Super. April 21, 2020) (unpublished memorandum) (emphasis and quotation marks

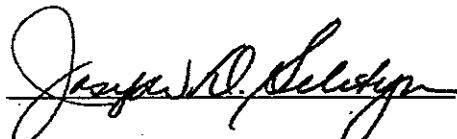
in original). **See also Commonwealth v. Murphy**, 180 A.3d 402, 405-406 (Pa.Super. 2018) (holding new constitutional right exception only applies if Supreme Court of United States or Supreme Court of Pennsylvania held right at issue applies retroactively), **appeal denied**, 195 A.3d 559 (Pa. 2018).

Here, appellant has failed to establish that **McCoy** has been held by the Supreme Court of the United States to apply retroactively on collateral review. **See Commonwealth v. Brown**, 2020 WL 3224911 (Pa.Super. June 15, 2020) (unpublished memorandum) (holding **McCoy** does not apply retroactively).<sup>6</sup>

For the preceding reasons, appellant's petition cannot satisfy either prong of the PCRA's new constitutional right timeliness exception and, therefore, the PCRA court did not err or abuse its discretion in dismissing appellant's petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/16/20

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<sup>6</sup> Several panels of this court have held **McCoy** does not apply retroactively, including **Commonwealth v. Parker**, 2020 WL 755044 \*3 (Pa.Super. February 14, 2020) (unpublished memorandum).

# APPENDIX

# C

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 685 MAL 2020  
Respondent : Petition for Allowance of Appeal  
v. : from the Order of the Superior Court  
MIGUEL GONZALEZ,  
Petitioner

## ORDER

**PER CURIAM**

AND NOW, this 12th day of May, 2021, the Petition for Allowance of Appeal is  
**DENIED.**

A True Copy Amy Dreibelbis, Esquire  
As Of 05/12/2021

Attest: Amy J. Dreisbach  
Deputy Prothonotary  
Supreme Court of Pennsylvania