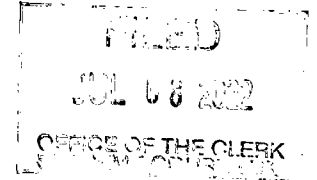


NO. 22-5115

ORIGINAL

IN THE  
SUPREME COURT  
OF THE UNITED STATES



MICHAEL KENNEDY-PETITIONER

Vs.

STATE OF FLORIDA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

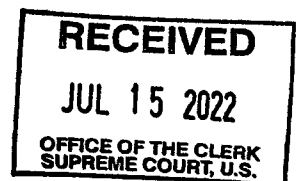
MICHAEL KENNEDY, PRO SE  
PETITIONER

DC # J43421

RECEPTION AND MEDICAL CENTER-MAIN UNIT

P.O. BOX 628

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### **QUESTIONS PRESENTED**

1. Does the Sixth and Fourteenth Amendments require that before a trial counsel can concede a defendant's guilt, trial counsel must first consult with the defendant and obtain the defendant's consent to the concession of guilt?

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

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

**OPINIONS BELOW**

☒ For cases from **federal courts**:

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

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☒ is unpublished.

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

☒ reported at \_Lexis 21312 (M.D. Fla. Feb. 4, 2021 Case No.: 3:18-cv-BJD-JRK); or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **State Courts**:

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

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☐ is unpublished.

The opinion of the \_\_\_\_\_ District Court of Appeals Fla. Court appears at Appendix B to  
the petition and is;

☐ reported at \_\_\_\_\_; or  
☐ has been designated for publication but is not yet reported; or  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**

The date on which the United States Court of Appeals decided my case was February 8, 2022.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 20, 2022, and copy of the order denying rehearing appears at Appendix C.

☒ An extension of time to file the petition for writ of certiorari was granted to and including July 8, 2022 (date) on June 7, 2022 (date) in Application No. 21 A 796.

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

☐ For cases from **state courts**

The date on which the highest State Court decided my case was \_\_\_\_\_, 20\_\_\_\_. A copy of the decision appears on Appendix \_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, 2011, and copy of the order denying rehearing appears at Appendix \_\_\_\_.

☐ An extension of time to file the petition for writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_A\_\_\_\_\_.

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **6<sup>th</sup> Amendment of the United States Constitution;**

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 defense.

### **14<sup>th</sup> Amendment, § 1 of the United States Constitution;**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **STATEMENT OF THE CASE**

On June 7, 2009, the Petitioner, Michael Kennedy, attended a party in Duval County Florida. During the party, Mr. Kennedy became intoxicated after consuming Xanax and a large number of alcoholic beverages.

During the party, an argument occurred between Mr. Kennedy and the two alleged victims over monies owed to Mr. Kennedy. Rather than paying Mr. Kennedy the monies owed to him, the two alleged victims got into their vehicle and began to leave the scene. As the two victims were leaving, Mr. Kennedy fired one shot from a firearm.

The State of Florida charged Mr. Kennedy, with two counts of Aggravated Assault and one count of Shooting At, Within, or Into a Vehicle. Mr. Kennedy entered a not guilty plea to all charges. A jury found Mr. Kennedy guilty on all counts and the Trial Court sentenced Mr. Kennedy to concurrent 20-year minimum mandatory prison sentences on the two counts of Aggravated Assault and a concurrent 15-year prison term on the charge of Shooting At, Within, or Into a Vehicle.

The First District Court of Appeal of Florida affirmed Mr. Kennedy's convictions and sentences.<sup>1</sup>

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<sup>1</sup> *Kennedy v State*, 101 So. 3d 843 (Fla. 1<sup>st</sup> DCA 2012)



Mr. Kennedy filed a Fla. R. App. P. 9.141(d) petition for a writ of habeas corpus in the First District Court of Appeal of Florida alleging that his appellate counsel was ineffective. The First District Court of Appeal of Florida denied the petition.<sup>2</sup>

On July 28, 2013, Mr. Kennedy filed a Fla. R. Crim. P. 3.850 motion that the Post Conviction Court summarily denied without an evidentiary hearing. The First District Court of Appeal of Florida affirmed the Post Conviction Court's Order.<sup>3</sup>

Mr. Kennedy timely filed a petitioner for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the Federal District Court for the Middle District of Florida. The District Court denied the petition and a certificate of appealability.<sup>4</sup>

Mr. Kennedy petitioned the Eleventh Circuit Court of Appeals for a Certificate of appealability. The Eleventh Circuit Court of Appeals denied Mr. Kennedy a certificate of appealability. The Eleventh Circuit Court of Appeals denied a timely motion for a rehearing.

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<sup>2</sup> *Kennedy v State*, 109 So. 3d 888 (Fla. 1<sup>st</sup> DCA 2013)

<sup>3</sup> *Kennedy v State*, 235 So. 3d 816 (Fla. 1<sup>st</sup> DCA 2017)

<sup>4</sup> *Kennedy v Sec. Fla. Dept. of Corrections* (Lexus 21312 Mid. Dist Fla. 2021)

## REASONS FOR GRANTING OF WRIT

**Issue One:** Does the Sixth and Fourteenth Amendments require that before a trial counsel can concede a defendant's guilt, trial counsel must first consult with the defendant and obtain the defendant's consent to the concession of guilt?

At the Mr. Kennedy's trial, his trial counsel told the jury during closing argument:

*Ah-ha, this crime, this element was proven. This is why they have this crime, for the facts of this case. Mr. Kennedy knowingly, and you heard him say it, he acted out, he discharged a firearm, and where did he do it, he did it on the right of way of a paved road, or in this case, the street. The*

*And did he do it in public? Absolutely. The testimony was he did it front of Robie Allen. He did it {in} front of Ms. Piercy. They were in the vehicle. They were there. They heard it. It's public. Its outside. It's in a neighborhood.*

*You're going to find Mr. Kennedy committed a crime this day, and unfortunately, as a defense attorney, he may not be guilty. I may not in good faith be able to get up here and say he didn't do anything wrong that day.<sup>5</sup>*

Mr. Kennedy alleged in ground four of the Habeas Petition that his counsel never consulted with him or obtained his consent before conceding his guilt to the jury.<sup>6</sup>

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<sup>5</sup> Page 8 of the order of the District Court denying Mr. Kennedy's petition for a writ of habeas corpus.

<sup>6</sup> Page 8A of the Habeas Petition

This Court in *McCoy v. Louisiana* held the Sixth and Fourteenth Amendments reserves the right to decide whether to concede guilt to a defendant and not the defendant's counsel.<sup>7</sup> Thus, the Court in *McCoy* concluded, if a defendant insists that his counsel not concede guilt, then counsel may not concede the defendant's guilt.<sup>8</sup> This is true even if counsel believes that it is in the best interest of the defendant to concede guilt.<sup>9</sup>

This Court made clear that its holding in *McCoy* does not apply in those cases where a defendant does not express an objection to his counsel making a concession of guilt.<sup>10</sup> Other Courts have interpreted the Court's holding in *McCoy* as not applicable unless a Defendant insists that counsel not concede guilt.<sup>11</sup>

The issue that Mr. Kennedy raises in this petition is whether before conceding a defendant's guilt, trial counsel must meet with the defendant to inform the defendant that, unless the defendant objects, counsel intends to concede the

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<sup>7</sup> *McCoy v. Louisiana*, 584 U.S. \_\_\_, 138 S. Ct. 1500, 200 L. Ed. 2d 821, 831 (2018)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* 200 L. Ed.2d at 830-831

<sup>10</sup> *Id.* 200 L. Ed.2d at 831 (Citing *Florida v. Nixon*, 543 U. S. 175, 125 S. Ct.151, 160 L. Ed.2d 565 (2004))

<sup>11</sup> *Saunders v. Warden*, 803 Fed. Appx. 343, 349 N.4 (11<sup>th</sup> Cir. 2020); *Brantley v. Florida*, Lexus 23855 (11<sup>th</sup> Cir. July 28, 2020); *Juando V. Davis*, 12 F.4<sup>th</sup> 1081 (9<sup>th</sup> Cir. 2021); *Atwater v. State*, 300 So. 3d 589, 590 (Fla. 2020); *Recalde v. State*, Lexus 2390 (Fla. 3<sup>rd</sup> DCA March 30, 2020); *Price v. State*, 322 So. 3d 202 (Fla. 3<sup>rd</sup> 2021)

defendant's guilt, why counsel believes that it is in the defendant's best interest to concede guilt, and obtain the defendant's consent to concede guilt.

The rational for this principle is simple. How can a defendant who is usually poor, unsophisticated, and ignorant of the finer point of criminal law and procedure be aware that the defendant has the right to object to a concession of guilt by counsel unless the defendant is first informed of that right? It is an empty shell game to first grant a defendant the right to object to a concession of guilt by counsel, but then deny the same defendant the right to know that the option to object to a concession of guilt by defendant's counsel exists before such counsel actually concedes the defendant's guilt.

The District Court failed to address this claim in denying the Habeas Petition and denying a certificate of appealability.<sup>12</sup>

Likewise, the Eleventh Circuit Court of Appeals failed to address this issue in denying Mr. Kennedy a certificate of appealability.<sup>13</sup> Instead, the Eleventh Circuit held that the State Post Conviction Court did not unreasonably apply the *Strickland v. Washington* standard for an ineffective assistance of counsel claim.<sup>14</sup>

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<sup>12</sup> Pages 11,12,13, and 14 of the District Court's order

<sup>13</sup> Page 3 of the opinion by the Eleventh Circuit

<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

In *McCoy*, this Court held that counsel's concession of guilt over a defendant's objection is structural error and is not subject to a *Strickland* analysis.<sup>15</sup>

Mr. Kennedy argues that jurists of reason would debate, or for that matter agree that this same principle applies to this issue, or at least that the issue deserves encouragement to proceed further.<sup>16</sup> Thus, the Eleventh Circuit erred by not granting Mr. Kennedy a certificate of appealability on this issue. For this reason, the Court should grant certiorari on this issue.

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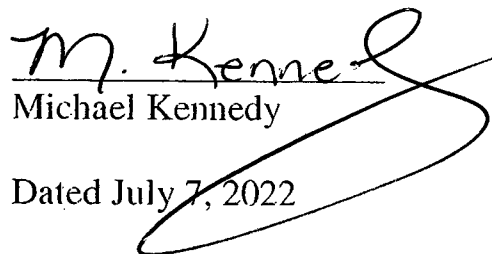
<sup>15</sup> *McCoy* 138 S. Ct. at 1510

<sup>16</sup> *Slack v. McDaniel*, 529 U.S. 473, 483- 484, 120 S.Ct. 1595, 146 L. Ed. 2d 542 (2000)

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

  
Michael Kennedy

Dated July 7, 2022