No. 23-6267

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE GONZALEZ III — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TO THE COURT OF CRIMINAL APPEALS OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jose Gonzales III
(Your Name)

2101 FM 369 N. Iowa Park,TX 76367
(Address)

Iowa Park, TX 76367
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1). Is McCoy v Louisiana a logical extension of Florida V Nixon at all when concession of Petitioner's guilt was never discussed prior to trial?

2). Does adjudicating a McCoy claim as one of ineffective assistance of counsel amount to any meaningful adjudication of a McCoy claim?

3). After a not guilty plea, does requiring basically an "outburst" objection to preserve a McCoy claim violate a defendant's Fifth Amendment right to remain silent while refusing to admit guilt during trial?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Ex Parte Jose Gonzales III Tr.Ct. No. CR 11004141-D(2) in the Texas Court of Criminal Appeals WR-86,547-02.

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OTHER

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 _____ 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[ ] is unpublished.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 _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] 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,
[X] is unpublished.

The opinion of the _____ court appears at Appendix _____ 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 _____.

[ ] 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a 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. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was AUGUST 23, 2023. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a 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

UNITED STATES CONSTITUTION SIXTH AMENDMENT:

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 shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

This is a direct collateral attack presented to the highest Court in Texas as a McCoy v Louisiana claim. Jurisdiction has been established above, respectfully. The vehicle used in the State Court was a Texas Code of Criminal Procedure Article 11.07 writ for habeas corpus relief. The State high Court adjudicated the McCoy claim as one of ineffective assistance of trial counsel for conceding Petitioner's guilt in front of the jury, telling the jury the case was indefensible and actually asked the jury to convict him in a case where the death penalty was not being sought. Appendix-B p.4 STATE'S ORIGINAL ANSWER TO APPLICATION FOR WRIT OF HABEAS CORPUS. The Attorney General of Texas, for some unknown reason, actually answered for the State outside the prescribed rules of the Article. QUESTION #2) actually asks the Court here to determine if adjudicating, or misconstruing, a McCoy claim as one of ineffective assistance of counsel is any meaningful adjudication of the claim at all. This Court at p. 1511 of McCoy explicitedly held this is not an ineffective assistance of counsel claim. QUESTION #1) asks the Court to determine if McCoy is an actual logical extention of Florida V Nixon as the Attorney General at p. 4-5 Appendix-B states while citing Ex parte Barbee 616 SW 3d 836, 839(Tex. Crim. App. 2021) to support the Article 11.07 §4 dimissal and ultimate denial of the second writ. That position was ultimately adopted verbatim by the Trial Court and the Texas Court of Criminal Appeals white card denial which are collectively Appendix-A here.

As a seemingly alternative argument, in the event it was found that the McCoy claim was previously unavailable overcoming the Sec-

tion § 4 bar, as Petitioner presented it, the Attorney General at p.5-6 of Appendix-B, also relying on Barbee supra, asserts that Petitioner "fails to demonstrate sufficient facts that would entitle him to relief under McCoy." For clarity, the jest of the Attorney General's argument on §4 was that the claim Petitioner presented could have been reasonably formulated by way of Florida V Nixon as McCoy, in their opinion, is a logical extension of Nixon. Petitioner argues that it is not a logical extension of Nixon nor does it apply in this present case based on the very important fact that at no time until the jury was present did either of his attorneys ever inform him or confer with him in any way about conceding guilt at the trial. In Nixon, the defendant remained silent when advised of the intended strategy. In McCoy the defendant absolutely revolted at the suggestion and at trial. What seperates this case from both, yet brings it into the ambient of McCoy, is the fact that it was never discussed with Petitioner period until it happened at trial. Petitioner, being a police officer at the time of the crime that brought us here and an ex-border guard, had many opportunities to be in Court and was no stranger to the necessity of standing to object and the effect he preceived a jury would have on him objecting to his own lawyer in open court. It is noteworthy to point out that Petitioner was shackled in leg irons for no legal reason and told to be still and not move or the jury would hear the leg irons, State habeas application p.6-7 RR Vol.3 p.126. It is also import to point out that after his attorney told the jury panel in voir dire basically he was guilty he questioned his attorney and was told it was just voir dire. V 2 p.131-132, V2 p.139. After that false assurance, Petitioner pled **not guilty** and expected the state to be held to their burden of proof.

After those clarifications, Petitioner returns to the State's alternative argument. That argument amounts basically to his failure to object. The basis of the argument, in Petitioner's limited understanding, is that Texas by way of its own precedent announced in Barbee supra, has mandated a more stringent objection rule that what McCoy actually holds. Ex parte Barbee 616 SW 3d at 845. A fact in this case, because it is recorded on the face of the record, that no one can deny is that Petitioner pled not guilty and proceeded to trial on that plea after his attorney told the jury he was guilty. The fact that his own attorney tried to get him to confess while on the stand is also recorded on the record along with Petitioner's refusal to admit to killing his wife and mother of his son. V 5 p.142-143 and V 5 p.56. This refusal to go along with his own attorney's attempt to have him confess is direct evidence Petitioner stood by his not guilty plea and more importantly the presumption of innocence afforded to all criminal defendant's in America. This alone proves his attorneys were well aware of his desire to maintain his innocence and refusal to plead guilty or admit guilt. The fact is further proven when the State makes their best attempt to obtain the confession his own attorney could not obtain. V 5 p.60. No confession was obtained. Petitioner's own attorney, after not getting the confession themselves, tried yet again to get Petitioner to confess. V 5 p.66-68. Again no confession came. The entire courtroom was put on notice at that point, most importantly the Trial Judge, that Petitioner had not agreed and did not agree with his attorney's decision to plead him guilty by admitting his guilt to the jury. In fact, no reasonable jurist could disagree with the fact that Petitioner refused to plead guilty in any way including by agreeing with

his attorney he was guilty. The only reasonable deduction a reasonable jurist could come to from the record is that Petitioner absolutely objected to the attorney's strategy of admitting his guilt to the jury. The Judge was obligated, under McCoy, despite how Texas has now construed the Supreme Court precedent announced in McCoy, to step in and refuse to allow the attorneys to concede Petitioner's guilt. Instead, the jury was surely left with the impression that Petitioner refused to go along with his own trial counsel's concession of guilt.

QUESTION #3) Asks the Court to decide if an "outburst objection", such as was the case in both McCoy and Nixon, is necessary when the concession is made, an outburst that is prohibited and against the decorum of the court room-especially when shackled-in order to preserve the McCoy claim. That question is posed as requiring a defendant to give up his right to remain silent and appear in direct opposition to his own attorneys. The question also, again in Petitioner's limited understanding, must include the fact that a record of refusing to plead guilty is developed to be considered. At the very least the record and the attorneys concession of guilt are in direct opposition. If these attorneys ever discussed conceding Petitioner's guilt, and Petitioner swears under the penalty of perjury that no such discussion of that sort ever took place, then it would logically follow that Petitioner would have readily admitted guilt when asked to by the State and his own defense team. Instead reluctance and outright refusal is what the record holds along with a not guilty plea. Remembering the concession of guilt proceded Petitioner taking the stand and required him giving up his Fifth Amendment right to remain silent at the time to make an outburst objection is important to the

question presented. Under the Texas scheme, an outburst objection is required. In both McCoy and Barbee,as well as Nixon, it is undisputed that the attorneys conferred with their clients about conceding guilt at trial. Because the Texas Court of Criminal Appeals section 4ed this writ, Petitioner has no other remedy to raise the McCoy claim. The Trial Court by adoption, Appendix-A, of the State's **interpretation of the record and evidence, Appendix-B,** agreeed that the State was correct in adjudicationg the writ as an ineffective assistance of counsel claim. The State was also of the opinion that no further record development was needed. This is important because Petitioner objected and requested record development at least on the issue of what was or was not discussed with the attorneys concerning consession of guilt. To this day, no matter what, it is impossible to determine a McCoy,or even a Nixon,claim without knowing what was discussed or conferred about with the client. Even the misconstructed view that this is an ineffective assistance of counsel claim requires knowing what discussion took place and input from the contested attorneys is needed,eventhough this Court has clearly held this is not an ineffective assistance of counsel claim, to resolve a McCoy claim.

The further misconstruction by the Court of Criminal Appeals ,by adoption of the Trial Court's adoption of the Attorney General's position that McCoy is a logical extension of Florida v Nixon, is brought into reasonable question as well. The reason being, Florida v Nixon , according to Honorable Judge Ginsburg at p.1505, requires knowing what or was not discussed.Judge Ginsburg also there states clearly that Nixon in in **contrast** to McCoy. The ability to reasonably formulate the McCoy claim based on Nixon must fail and clearly this is not a subsequent §4 case no matter what Barbee holds in Texas. In support

of this layman's argument, Petitioner asserts that his court appointed appellant attorney filed an Anders Brief and the Court of Appeals on direct review considered the whole record and found no-reversable errors. See Appendix-B at p.1-2. Nixon does not apply and McCoy absolutely does. Record development as to attorney client discussion would be very helpful in deciding this case and may require remand.

REASONS FOR GRANTING THE PETITION

McCoy v Louisiana 138 S.Ct. 1500 is a landmark case where it was clearly decided presents a structural error. This Honorable Court should address any State's attempt to ease an attorney's obligation to protect a defendant's autonomy. When a defendant pleads not guilty the instant presumption of innocence until proven guilt is a maxim of law so precious to the accused it cannot be manipulated by States who seek to lessen the obligation to defend by conceding a client's guilt. This is what has happened in Texas by the State's intentional development of their own precedent in Ex parte Barbee 616 SW 3d 836, 839 to defeat any new claims of the McCoy precedent.

When a defendant refuses to plead guilt and instead pleads not guilty an attorney should be barred from concedeing guilt with out the expressed consent of the defendant such as many courts have adopted by asking the client if it is his decision not to testify. The admission of guilt by an attorney after a not guilty plea should not be allowed in any event with out direct defendant agreement. Texas has mandated that a defendant, after a not guilty plea and multiple refusals to admit guilt recorded on the record, make what would amount to an outburst objection to his own attorney's conduct. That in and of itself is a conflict of interest between an attorney and a client in open court and a fundamental right violation that also surpasses the structural barrier. Should Texas be allowed to require a conflict of interest to preserve a McCoy violation? A conflict that would also require the giving up one's Fifth Amendment right to remain silent. Silence in front of a jury and silence in front a his counsel in trial preparation are two completely differ-

ent forms of silence. Nixon was silent in front of both then complained. Petitioner was suprised at trial after never being consulted, informed or conferred with by his attorneyss before trial about the concession of his guilt. Petitioner's refusals to admit guilt to his own attorney in open court cannot be considered silence. It at least implies that he was not in agreement with the attorney about his guilt. An implicit objection that should have warranted, according to McCoy, the Judge stepping in and stopping the attorney from not only conceding Petitioner's guilt multiple times but actually asking the jury to find Petitioner guilty. See V 5 p.100, V5 p.110-111.

This Court should grant this petition and stop any further consession of guilt by an attorney after a not guilty plea without a mandatory recorded admission of compliance from a defendant that he fully understands the attorneys strategy and is complicit to it. The right to remain silent is routinely explained to defendants in open court and asked if it is the clients objective and decision to remain silent and not testify. The right to waive trial counsel and represent one's self is likewise often fully explained in open court. Why? To stop any attempt to circumvent a client's autonomy to make those choices and then later complain. The decision to plead not guilty, even in the face of almost certain conviction, is no less protected by the Constitution than any other God given right in the United States of America. Clarity is far better than forcing a defendant to make an out of order outburst objection in open court to protect his right to hold the state to their burden of proof where he has been convicted of nothing at that point and the presumption of innocence prevails above all else until proven guilty.

Once the attorney pled Petitioner guilty and actually asked the

jury to convict him the presumption of innocence was no more and legally the jury was required to convict this not guilty pleading defendant. This should not happen in America and Texas should not be allowed to lessen the effect of an attorney conceding his clients guilt in any manner. That consideration is even higher when an attorney not only concedes his clients guilt to the jury without his permission and without consulting him in any way, but as in this case actually goes as far as to ask the jury to find his client guilty when his client has refused to admit guilt while on the stand and maintains his not guilty plea by doing so. V5 111, V5 110-111.

CERTIFICATE OF COMPLIANCE

By Petitioner's signature below and under the penalty of perjury,28 U.S.C. §1746, Petitioner does hereby certify that the above direct collateral attack writ of certiorari,being 12 pages of the 40 alotted,complies with the page limit. Rule 33.2(b).

Respectfully submitted,

Jose Gonzales III.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: October 18, 2023