

## INDEX OF APPENDICIES

### APPENDIX-A

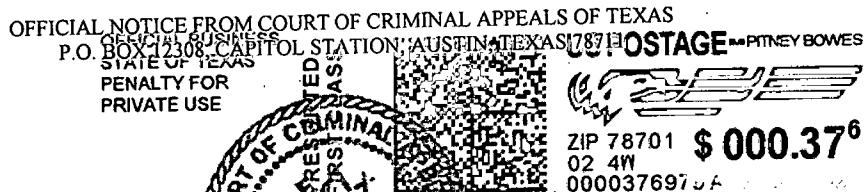
TEXAS COURT OF CRIMINAL APPEALS WHITED CARD DISMISSAL  
ALONG WITH THE TRIAL COURT ADOPTED VERBATIM STATE'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF LAW & RECOMMENDATIONS

### APPENDIX-B

THE ATTORNEY GENERAL OF TEXAS ASSISTANT DISTRICT ATTORNEY PRO TEM'S  
ORIGINAL ANSWER TO APPLICATION FOR WRIT OF HABEAS CORPUS

## **APPENDIX-A**

## **APPENXI**



8/23/2023

GONZALES, JOSE III Tr. Ct. No. CR11004141D(2) WR-86,547-02  
The Court has dismissed without written order this subsequent application for a writ  
of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

3A 05 T

JOSE GONZALES III  
ALLRED UNIT - TDC # 1832029  
2101 FM 369 NORTH  
IOWA PARK, TX 76367

GIZTAAB 76367

CLERK OF COUNTY &  
DISTRICT COURTS  
NUECES COUNTY, TEXAS

TRIAL COURT CAUSE NO. 11-CR-4141-D *23 JUL 10 AM 10:27*

EX PARTE

JOSE GONZALES III

0 IN THE DISTRICT COURT *UNIT*  
0 FOR NUECES COUNTY, TEXAS  
0 105<sup>th</sup> JUDICIAL DISTRICT

**STATE'S PROPOSED FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW, & RECOMMENDATION**

The trial court, having considered the application for writ of habeas corpus, the State's Answer, and the record in this case, finds that there are no controverted, previously unresolved facts material to the legality of the Applicant's confinement which require an evidentiary hearing or further expansion of the record, and that the assertions contained in the State's Answer are correct. The Court recommends that the Court of Criminal Appeals deny the relief requested by the Applicant based on the following proposed findings of fact and conclusions of law:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Applicant, Jose Gonzales III, is confined under the judgment and sentence of the 105th Judicial District Court for Nueces County, Texas, in cause number 11-CR-1141-D.
2. Applicant was convicted by a jury of capital murder and burglary of a habitation with intent to commit a felony (aggravated assault).
3. Applicant is serving concurrent sentences of life imprisonment without the possibility of parole for capital murder and life imprisonment for burglary.

4. The Thirteenth Court of Appeals affirmed Applicant's convictions. *Gonzales v. State*, No. 13-13-00011-CR (Tex. App.—Corpus Christi-Edinburg Aug. 14, 2014, pet. ref'd).
5. The Court of Criminal Appeals refused Applicant's petition for discretionary review.
6. In 2016, Applicant filed his original application for writ of habeas corpus challenging his holding capital murder and burglary convictions.
7. On February 28, 2018, the Court of Criminal Appeals denied the application without written order on the findings of the trial court without hearing.
8. On May 25, 2023, Applicant filed this subsequent pro se application for writ of habeas corpus.
9. Texas Code of Criminal Procedure article 11.07 § 4(a) prohibits review of subsequent applications for writ of habeas corpus except in limited circumstances. *See Tex. Code Crim. Proc. art. 11.07 § 4(a)*.
10. Section 4(a)(1) provides that a subsequent application may be considered on the merits “after final disposition of the initial application challenging the same conviction,” if “the current claims and issues have not been and could not have been presented previously in an original application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.” *Tex. Code Crim. Proc. art. 11.07 § 4(a)(1)*.
11. Applicant claims that his Sixth Amendment rights were violated because trial counsel conceded Applicant's guilt at trial over Applicant's implicit objection. Appl. at 6–7; Mem. at 4–10.
12. Applicant claims that he is entitled to relief on his subsequent application because the United States Supreme Court issued its opinion in *McCoy v. Louisiana* after Applicant's original writ was filed and decided. Appl. at 4.
13. Applicant contends that the legal basis of his claim was unavailable at the time of his original writ. Appl. at 4.

14. A legal basis was previously unavailable “if the legal basis was not recognized by and could not have been reasonably formulated from a final decision in the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.” Tex. Code Crim. Proc. art. 11.07 § 4(b).
15. The Supreme Court issued its opinion in *McCoy v. Louisiana* on May 14, 2018. 138 S. Ct. 1500 (2018).
16. Applicant’s first state habeas application was filed and disposed of by the Court of Criminal Appeals before the Supreme Court issued its opinion in *McCoy*.
17. But in *Ex parte Barbee*, the Court of Criminal Appeals explicitly decided that *McCoy* does not meet the “previously unavailable legal basis” exception for a subsequent writ. 616 S.W.3d 836, 839 (Tex. Crim. App. 2021), *cert. denied sub nom. Barbee v. Texas*, 142 S. Ct. 258 (2021).
18. The Court of Criminal Appeals found that *McCoy* was a logical extension from the Supreme Court’s decision in *Florida v. Nixon*, thus a claim “could have been rationally fashioned” from it.” *See id.* (citing *Florida v. Nixon*, 543 U.S. 175 (2004)).
19. Applicant’s claim relies on a legal basis that could have been rationally fashioned from existing precedent when his previous application was filed.
20. If an applicant fails to establish one of the limited circumstances, the application is procedurally barred and must be dismissed as subsequent. *See Ex parte Santana*, 227 S.W.3d 700, 702–04 (Tex. Crim. App. 2007).
21. Applicant fails to establish an exception to the subsequent application bar.
22. Applicant’s petition is procedurally barred.
23. The instant application must be dismissed as subsequent, and the requested relief denied.

## RECOMMENDATION

Based on the foregoing proposed findings of fact and conclusions of law, the Court recommends that habeas relief be DENIED, and the instant application be DISMISSED AS SUBSEQUENT.

SIGNED AND ENTERED on this the 18th day of July, 2023.

7/18/2023 3:10:28 PM

  
The Honorable Jack Pulcher  
PRESIDING JUDGE

**ORDER**

The Court ORDERS the Clerk of this Court to certify a copy of the Findings of Fact, Conclusions of Law, and Recommendation entered in this cause and to immediately transmit along with this Order and a copy of the various documents filed in conjunction with the present application for writ of habeas corpus together as a complete writ transcript to the Clerk of the Court of Criminal Appeals pursuant to Texas Code of Criminal Procedure article 11.07.

The Clerk of this Court is further ordered to mail a copy of its Findings of Fact, Conclusions of Law, and Recommendation and a copy of this Order to the Applicant pro se and to counsel for the State.

7/18/2023 3:10:46 PM

SIGNED AND ENTERED on this the 18th day of July, 2023.



The Honorable Jack Pulcher  
PRESIDING JUDGE

23 JUL 10 AM 10:29  
FILED AM 10:29  
JULY 23 2023  
CLERK OF COURT &  
DISTRICT COURT  
ROBESON COUNTY, TEXAS  
JUDY  
MARIE LORENZEN

## **APPENDIX-B**



July 7, 2023

Jose Gonzales III  
TDCJ #01832029  
Allred Unit  
2101 FM 369 North  
Iowa Park, TX 76367

Re: *State of Texas v. Jose Gonzales III*  
Civil Action No. 11-CR-4141-D

Dear Mr. Gonzales:

Enclosed in the above numbered and styled cause is a copy of State's Original Answer to Application for Writ of Habeas Corpus which was filed electronically with the Court on this date.

Sincerely,

s/ Katie Abell  
KATIE ABELL  
Assistant Attorney General  
Criminal Appeals Division  
(512) 936-1400

KDA/j2z  
Enclosure

TRIAL COURT CAUSE NO. 11-CR-4141-D

0 IN THE DISTRICT COURT  
EX PARTE  
0 FOR NUECES COUNTY, TEXAS  
JOSE GONZALES III  
0 105<sup>th</sup> JUDICIAL DISTRICT

STATE'S ORIGINAL ANSWER  
TO APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas, by and through the undersigned Assistant District Attorney Pro Tem, Katie Abell, respectfully submits this response to Applicant's Application for a Writ of Habeas Corpus under article 11.07 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 11.07.

**STATEMENT OF THE CASE**

Applicant, Jose Gonzales III, was convicted by a jury of capital murder and burglary of a habitation with intent to commit a felony (aggravated assault). SHCR at 114–15.<sup>1</sup> Applicant was sentenced to concurrent sentences of life imprisonment without the possibility of parole for the capital murder and life imprisonment for the burglary. *Id.*

Applicant filed a notice of appeal in the Thirteenth Court of Appeals, trial counsel filed an *Anders* brief, and, subsequently, Applicant filed a pro se brief. SHCR at 132–33. The Thirteenth Court of Appeals conducted an independent review of the entire record, counsel's brief, and Applicant's pro se brief, concluded there was no

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<sup>1</sup> The State refers to the Clerk's Record for Applicant's original state habeas application, filed under WR-86,547-01, as "SHCR," followed by the relevant page number(s).

reversible error in the record, and affirmed Applicant's convictions. *See id.* at 131–134; *Gonzales v. State*, No. 13-13-00011-CR (Tex. App.—Corpus Christi-Edinburg Aug. 14, 2014, pet. ref'd). The Texas Court of Criminal Appeals (CCA) then refused Applicant's petition for discretionary review. SHCR at 135.

In 2016, Applicant filed his original application for writ of habeas corpus in which he raised thirteen grounds for relief. SHCR at 3–29 (Writ), 30–78 (Memorandum). The State filed a response arguing that Applicant failed to show that he was entitled to the requested relief and that his application should be denied. *Id.* at 107–11. The trial court agreed, entered findings of fact and conclusions of law, and recommended that relief be denied. *Id.* at 170. The CCA then Ordered a response from trial counsel addressing Applicant's ineffective assistance of counsel claims. *See* SHCR Order 5.17.17. Trial counsel submitted an affidavit, the State filed a Supplemental Answer, and the trial court entered Supplemental Findings of Fact and Conclusions of Law. SHCR Supp. 2–6 (Supp. Answer), 10–12 (Affidavit), 13 (Supp. FFCL). Ultimately, on February 28, 2018, the CCA denied the application without written order on the findings of the trial court without hearing. SHCR Action Taken.

Now before the Court is Applicant's subsequent application for writ of habeas corpus under Article 11.07 § 4.

#### **STATE'S GENERAL DENIAL**

The State generally denies each and every allegation of fact made by the Applicant.

## **APPLICANT'S ALLEGATIONS**

The State understands Applicant to allege that his Sixth Amendment rights were violated when trial counsel conceded Applicant's guilt over Applicant's implicit objection. *See* Appl. at 6–7; Mem. at 4–10. Applicant contends that he is entitled to relief on his subsequent application because the Supreme Court issued its opinion in *McCoy v. Louisiana* after Applicant's original writ was filed and decided and the legal basis of his instant claim was therefore unavailable. *See* Appl. at 4.

## **NECESSITY FOR EXPANSION OF THE RECORD AND EVIDENTIARY HEARING**

Additional evidentiary development is permitted only if this Court “decides that there are controverted, previously unresolved factual issues material to the legality of” Applicant's confinement and enters an order designating those issues of fact to be resolved. *See* Tex. Code Crim. Pro. art. 11.07 § 3(d). The State respectfully submits that Applicant fails to make a showing that he is entitled to any further fact-finding process on his claim, and his claim can be resolved based on the record alone. As such, there is no need for an expansion of the record or an evidentiary hearing.

## **ARGUMENT AND AUTHORITIES**

Article 11.07 § 4(a) prohibits review of subsequent applications for writ of habeas corpus except in limited circumstances where the applicant establishes one of the following exceptions:

- (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

- (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

Tex. Code Crim. Proc. art. 11.07 § 4(a). If an applicant fails to establish one of the two exceptions, the application is procedurally barred and must be dismissed as subsequent. *See Ex parte Santana*, 227 S.W.3d 700, 702–04 (Tex. Crim. App. 2007).

To overcome the procedural bar of his subsequent application, Applicant relies on the “previously unavailable legal basis” exception and claims that he is presenting a claim that “was not available at the time of the original writ.” Appl. at 4; *see Tex. Code Crim. Proc. art. 11.07 § 4(a)(1)*. A legal basis was previously unavailable “if the legal basis was not recognized by and could not have been reasonably formulated from a final decision in the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.” Tex. Code Crim. Proc. art. 11.07 § 4(b). “A legal basis was previously available if it ‘could have been rationally fashioned’ from relevant precedent, or if it is founded on ‘familiar principles articulated in earlier cases’ from relevant courts.” *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (internal citations omitted), *cert. denied sub nom. Barbee v. Texas*, 142 S. Ct. 258 (2021).

Applicant claims that trial counsel violated his Sixth Amendment right to the assistance of counsel by conceding Applicant’s guilt over his implicit objection. Appl. at 6–7; Mem. at 4–10. He contends that the legal basis for his claim was unavailable until 2018 when the Supreme Court issued its opinion in *McCoy*—after his original writ had been filed and decided. Appl. at 4; Mem. at 4–5; *McCoy v. Louisiana*, 138 S.

Ct. 1500 (2018). But the CCA explicitly decided that the Supreme Court's decision in *McCoy* does not meet the "previously unavailable legal basis" exception for a subsequent writ because the legal basis of a *McCoy* claim "could have been reasonably formulated from existing precedent because *McCoy* was the logical extension of *Florida v. Nixon*." *Ex parte Barbee*, 616 S.W.3d at 839 (citing *Florida v. Nixon*, 543 U.S. 175 (2004)).

The CCA explained: "*McCoy* was founded on 'familiar legal principles' that dealt with the division of labor between attorney and client, the duty of the attorney to consult with his client about important matters, the client's exclusive right to make fundamental decisions about his own defense with the assistance of counsel, and structural error." *Ex parte Barbee*, 616 S.W.3d at 844 (internal citations omitted). As such, the CCA reasoned, *McCoy* was a logical extension of *Nixon*, and a claim "could have been rationally fashioned" from it." *Id.* And "*McCoy* did not make it easier to establish a claim. [It] merely required factually what *Nixon* explicitly lacked: a defendant's express objections to a concession of guilt disregarded by counsel and court and aired before a jury during trial." *Id.* at 845.

Because Applicant's claim relies on a legal basis that could have been rationally fashioned from existing precedent when his previous application was filed, his application must be dismissed as subsequent. See Tex. Code Crim. Proc. art. 11.07

§ 4.2

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<sup>2</sup> In addition to establishing the previous unavailability of the legal basis for his claim, Applicant must allege facts that, if true, would entitle him to relief on that basis. See *Ex parte Barbee*, 616 S.W.3d at 839. Here, even if Applicant's claim was not previously available, Applicant fails to demonstrate sufficient facts that would entitle him to relief under *McCoy*. Applicant claims that

## CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to enter an Order recommending the application be DISMISSED as a subsequent writ.

Respectfully submitted,

/s/ Katie Abell  
KATIE ABELL  
Assistant Attorney General/  
Assistant District Attorney Pro Tem  
State Bar No. 24101343

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Austin, Texas 78711  
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Fax: (512) 936-1280

*Attorney for the State*

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the record demonstrates “his complete unwillingness to admit guilt,” and that his decision to plead not guilty is clear evidence of an expressed refusal to concede guilt. Mem. at 6–7. But he also admits that “the record holds no expressed objection” to counsel’s concession of guilt, rather he argues that his reluctance to admit guilt is evidence enough that he would not have agreed to such a strategy. Appl. at 6–7; Mem. at 5–9. These facts demonstrate that Applicant maintained his innocence and refused to plead guilty, but “they do not demonstrate that he told [trial counsel] that his defensive objective was to maintain his innocence at trial.” *See Ex parte Barbee*, 616 S.W.3d at 845. Thus, the application fails to allege facts that, if true, would entitle Applicant to relief under *McCoy*—assuming the merits of his claim could even be considered.

## CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing pleading was served by placing same in the United States mail, postage prepaid, on the 7th day of July 2023, addressed to:

Mr. Jose Gonzales III  
TDCJ #01832029  
Allred Unit  
2101 FM 369 North  
Iowa Park, TX 76367

/s/ Katie Abell  
KATIE ABELL  
Assistant Attorney General/  
Assistant District Attorney Pro Tem