No. 25-6793

IN THE

Supreme Court of the United States

ROMAN FLORES,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to
the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

TOMEE M. HEINING
Chief, Criminal Appeals Division

NATHAN TADEMA*
Assistant Attorney General
**Counsel of Record*

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
nathan.tadema@oag.texas.gov

Counsel for Respondent

QUESTIONS PRESENTED

More than two decades after his conviction became final, Petitioner and Texas convict Roman Flores claims that his trial counsel violated *McCoy v. Louisiana,* 584 U.S. 414 (2018), by presenting a hypothetical during closing argument where his client would be guilty of a lesser included offense *if* the jury believed one of the State's witnesses beyond a reasonable doubt. The state court rejected his claim without issuing an opinion but adopted the lower court's finding that counsel never conceded Flores's guilt and his state habeas application violated the state doctrine of laches. This petition presents the following questions before certiorari could be granted:

I. Does this Court have Article III jurisdiction to consider this petition when (1) the state court never ruled on the issues presented, (2) the petition amounts to a request for an advisory opinion about the breadth of *McCoy*, and (3) the state's denial of his claims pursuant to the doctrine of laches constitutes an adequate and independent state ground for denying his petition?

II. Given that Flores's conviction became final in 2001 and *McCoy* was decided in 2018, do Flores's *McCoy* claims run afoul of the anti-retroactivity principles described in *Teague v. Lane*, 489 U.S. 288, 310 (1989)?

III. Does Flores present a compelling reason for granting certiorari when (1) his petition depends on fact-based error correction, (2) his petition relies on illusory or irrelevant circuit splits, and (3) the TCCA denied his claims through an unpublished order that does not establish any precedent?

LIST OF PROCEEDINGS

State v. Roman Flores, No. 773453 (179th Dist. Ct., Harris Cnty., Tex. Jan. 31, 2000) (judgment and sentence)

Flores v. State, No. 01-00-00296-CR, 2000 WL 1753148 (Tex. App.—Houston [1st Dist.] Nov. 30, 2000) (pet. ref'd) (affirming judgment on direct appeal)

Flores v. State, No. PD-0101-01 (Tex. Crim. App. April 18, 2001) (refusing discretionary review)

Ex parte Flores, No. WR-96,234-01 (Tex. Crim. App. Nov. 13, 2025) (denying state habeas application without written order "on the findings of the trial court and on the Court's independent review of the record")

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INTRODUCTION

Petitioner Roman Flores was tried and convicted in 2000 for the capital murder of twenty-year-old Ronnie Fisk during an armed robbery and was sentenced to life in prison. He appealed, but his conviction was affirmed in 2001, so his conviction became final twenty-five years ago.

He now contends decades later that his trial counsel violated his Sixth Amendment rights during his 2000 trial—in violation of the constitutional protections this Court first recognized in 2018, in *McCoy v. Louisiana*, 584 U.S. 414 (2018). He specifically contends that his attorney "conceded guilt" at trial by stating during argument, "I guess if you believe [the State's key witness] beyond a reasonable doubt then you could convict this man of aggravated robbery."

There are six reasons why his petition is unworthy of this Court's attention: (1) He fails to invoke Article III jurisdiction because the state court never decided the abstract questions presented in his petition; (2) He cannot seek retroactive application of *McCoy* to his 2001 conviction; (3) The state court never published an opinion so he cannot satisfy Supreme Court Rule 10's "compelling reason" prerequisite for granting certiorari; (4) The untimely nature of his state habeas application provides an adequate and independent state ground for denying his petition; (5) Because his petition depends on

rebutting the state court's factual determination, he fails to provide a compelling reason for granting certiorari; and (6) He fails to identify a relevant jurisdictional split to warrant this Court's intervention.

The State discusses each of these reasons in detail below and each argument independently establishes why certiorari review should be denied.

OPINIONS BELOW

The TCCA's order denying Flores's state habeas application (located at Pet. App. at 1) is not reported. The state habeas trial court's recommended findings and conclusions (*see* Pet. App. at 8–57) is also unreported.

JURISDICTION

The state courts did not decide the sub-issues contained within Flores's Questions Presented. The Court has indicated that this failing may present a jurisdictional bar to review. *See*, *e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). If jurisdiction exists, the basis is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Question Presented involves application of the Sixth Amendment right to counsel.

STATEMENT OF THE CASE

I. Facts of the Crime

The state appellate court recounted the essential facts of the crime as follows:

> Ronnie Fisk, the complainant, and two friends, Joe Osuna and Cesar Martinez, were parked at a gas station. While returning from the restroom, Osuna saw appellant and Freddie Motilla approach Fisk, who was standing by the car's trunk. Appellant told Motilla to "get that guy right there by the trunk." Motilla pulled a gun from his jacket, told Fisk and Martinez to "get on the ground," and demanded the keys. Meanwhile, appellant jumped in the driver's side of Fisk's car and appeared to be looking for something.
>
> Osuna and Martinez ran away. Less than a minute later, they heard several gunshots, followed by Fisk's crying out in pain. When they looked back, they saw Fisk fall on his face. Martinez and Osuna ran back to the car just before appellant and Motilla, who had apparently stepped away for a moment, came back together from around the corner of the station's car wash. While Motilla again aimed the gun at them and demanded the keys, Martinez and Osuna saw appellant turn Fisk over, kick him, and search his pockets and neck area. Appellant and Motilla ran away together. Another eyewitness, Rosie Montalvo, testified she had seen appellant and another man screaming at someone; the other man with appellant shot Fisk; and appellant walked back to the victim, "tapped" him with his feet, and put his hand in Fisk's pockets.

Flores v. State, No. 01-00-00296-CR, 2000 WL 1753148, at *1 (Tex. App.—Houston [1st Dist.] Nov. 30, 2000) (pet. ref'd).

II. Evidence Regarding Flores's *McCoy* Claim

Flores predicates his *McCoy* claim on his attorney's closing argument, which reads in pertinent part as follows:

> The real question becomes, if anything, what has the State proved you? I guess they could make a case for an aggravated robbery. If you believe Rosie Montalvo, that out of the clear blue she says this man, identifies him, then at some point she looks up, she hears gunshots, she's nervous, looking for her friends, and at some instance she sees him go over to Ronnie Fisk's body and put his hands on his pockets. I guess if you believe that beyond a reasonable doubt then you could convict this man of aggravated robbery. But I would submit to you that he is not guilty of capital murder. He is darn sure not guilty of having to be reasonably sure that Freddie Motilla—[interrupted by sustained objection]

Resp't App. at 7–8;[1] Pet. Cert. at 7 (quoting uncontextualized excerpts of the above text). Following this argument, Flores's attorney further encouraged the jury to believe Flores's testimony over the State's witnesses and repeatedly emphasized the State's burden of proof. Pet. App. at 39–40.

III. The State Court Proceedings

Flores was convicted and sentenced to life in prison on January 31, 2000, for the capital murder of Ronnie Fisk. Resp't App. at 1–2; Pet. App. at 8. The conviction and sentence were affirmed on direct appeal in November of 2000. Pet. App. at 9; *see Flores*, 2000 WL 1753148, at *2. He sought discretionary

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[1] "Resp't App." refers to the Appendix attached to this brief in opposition.

review with the Texas Court of Criminal Appeals (TCCA), but it was refused in April of 2001. Pet. Cert. at 8.

Twenty-three years passed.

Then, Flores filed a state habeas application in June of 2024. Pet. App. at 9; Resp't App. at 9–28 (amended state habeas application). He claimed a *McCoy* violation among other unrelated claims. Pet. App. at 9; Resp't App. at 16–17.

The state habeas trial court entered findings recommending the denial of Flores's claims in March of 2025. Pet. App. at 8–57. In those findings, the trial court rejected his *McCoy* claim on the sole basis that Flores "fails to prove [his trial counsel] admitted or conceded applicant's guilt." *Id*. at 40. The court also concluded that, due to the 23-year delay in presenting his claims and the resulting prejudice to the State, Flores's entire application should be denied under Texas's doctrine of laches. *Id.* at 55.

The TCCA subsequently "denied without written order the application for writ of habeas corpus on the findings of the trial court and on the Court's independent review of the record" in November of 2025. *Id*. at 1.

Flores then filed this petition for a writ of certiorari to challenge the TCCA's order rejecting his *McCoy* claim.

REASONS FOR DENYING THE WRIT

I. This Case Is An Exceptionally Poor Vehicle For Addressing The Questions Presented.

Flores raises multiple abstract constitutional issues for this Court to decide. He suggests that this appeal "presents an exceptionally clean" vehicle to clarify "a range of closely related issues that have divided [the] lower courts" since *McCoy* was decided. Pet. Cert. at 25–26. For example, he asks the Court to resolve how and whether *McCoy*'s protection:

> (1) applies to concessions involving only an element of the charged offense (*see* Pet. Cert. at 12–15),
>
> (2) applies to concessions of lesser-included or predicate offenses (*see* Pet. Cert. at 15–17),
>
> (3) depends on different levels of "opprobrium" or stigma associated with the concession (*see* Pet. Cert. at 17–19),
>
> (4) applies outside of a death penalty context (*see* Pet. Cert. at 19–22),
>
> (5) depends on the manner and degree of the defendant's proclamation of innocence (*see* Pet. Cert. at 22–25),
>
> (6) applies to conditional or hypothetical concessions (*see* Pet. Cert. at 27–32).

Pet. Cert. at i–ii. But those questions were not decided by the TCCA below. Indeed, when it responded to Flores's state habeas application below, the State didn't urge the TCCA to reject his *McCoy* claim for any of the reasons implicated by the Questions Presented. *See generally*, Resp't App. at 53–58.

Instead, the TCCA denied Flores's entire state habeas application in a summary, single-sentence, postcard order on the findings of the state habeas trial court, and on the TCCA's own review of the record. Pet. App. at 1. In turn, the trial court's findings alternatively rejected Flores's *McCoy* claim on its merits,[2] on the sole basis that—as a matter of historic fact—there was no concession at all. *Id.* at 38–40 (¶¶196–204). Even under the most generous interpretation of this petition, the adopted findings only addressed whether Flores's trial counsel made a hypothetical concession of guilt, which at most could arguably implicate the sixth issue from the above list of issues. *Id.*

A. This Court lacks jurisdiction because the constitutional issues raised in the Questions Presented were not decided below.

With "very rare exceptions," the Court has adhered to the rule that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). "When the highest state court is silent on a federal question" first raised in a certiorari

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[2] In addition to rejecting Flores's *McCoy* claim on its merits, the TCCA also procedurally barred Flores's entire habeas application—and all of its claims—under the equitable doctrine of laches. Pet. App. at 48–49 (¶¶262–73), 55 (¶¶ 51–55); *see id.* at 1 (showing that TCCA incorporated trial court's findings). The State will separately address the laches default in section II, below.

petition, the Court will "assume that the issue was not properly presented," and the petitioner "bears the burden of defeating this assumption" by showing the state court had "a fair opportunity" to address the federal questions raised to the Court here. *Id*. at 86–87. And while this Court has not yet resolved whether the failure to properly raise a constitutional issue in the state courts is jurisdictional, it might be. *See Yee*, 503 U.S. at 533.

Where, as here, the State didn't ask the TCCA to resolve those questions against Flores, there are serious concerns with the justiciability of this appeal. *See Blanchette v. Connecticut Gen. Ins. Corps*., 419 U.S. 102, 138 (1977) ("[B]ecause issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the 'Case or Controversy' sense."). It is impossible to know whether Flores might ever benefit from the Court's resolution of the Questions Presented in his favor, or even whether the TCCA's summary denial was constitutionally erroneous. This is fatal because Article III of the Constitution invests the Court with "authority to adjudicate legal disputes only in the context of 'Cases' or 'Controversies.'" *Camreta v. Green*, 563 U.S. 692, 701 (2011). To enforce this limitation, a litigant must demonstrate a "personal stake" in the suit by satisfying three conditions: That he has "suffered an injury in fact" that is caused by "the conduct complained

of" and that "will be redressed by a favorable decision." *Id*. Flores fails to satisfy those conditions. In sum, because Flores never raised the sub-issues identified above—and because the TCCA was silent on those issues in its postcard order—the Court may lack jurisdiction to consider the Questions Presented. *Id*.

Finally, even if the principles in *Adams* and *Yee* are merely prudential, there are still good reasons to deny certiorari.[3] Flores asks the Court to categorically resolve numerous important constitutional questions left open in *McCoy* and to pronounce their application across an enormous range of hypothetical and unrelated cases. Where such wide-ranging issues are involved "there are strong reasons to adhere scrupulously to the customary limitations on [the Court's] discretion." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). Doing so "discourages the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Id*.

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[3] The failure here also informs the Court's decision to grant certiorari. *See City of Canton v. Harris*, 489 U.S. 378, 383–84 (1989) ("[T]he decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition."). The State does not waive this defect and, instead, cites the defect and urges this Court to deny review for this reason. *See id*. at 384 ("Nonjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived.").

Scrupulous adherence to this prudential rule also helps in other ways. For example, the rule helps to ensure the adequacy of the appellate record in this Court because, if the state court addressed the federal question, then it is likely to have compiled the record with the constitutional issue in mind. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Moreover, requiring a petitioner to raise the federal question below invests the state court with an opportunity to "rest its decision [against the petitioner] on an adequate and independent state ground[,]" and to thereby render the Court's review of the federal question unnecessary. *See Gates*, 462 U.S. at 222.

B. This Court lacks jurisdiction because any opinion the Court issued would likely be advisory.

Flores's petition amounts to a hypothetical discussion about the contours of *McCoy* and boils down to a request for an advisory opinion concerning these issues. The fatally abstract nature of the Questions Presented in relation to the TCCA's judgment is apparent throughout Flores's certiorari petition. *See* Pet. Cert. at 10–33. For instance, Flores hardly mentions the TCAA's legal analysis and instead devotes nearly all his argument to documenting an abstract "split" regarding *McCoy*'s potential application to various theoretical facts, *see id.*, which is reason alone to deny certiorari. *See*, *e.g.*, *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) ("Under Article III, federal courts do

not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question."); *see also Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical set of facts.") (quotation marks and citation omitted); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (no justiciable controversy is presented "when the parties are asking for an advisory opinion").

C. This Court lacks jurisdiction because the judgment below rests on an adequate and independent state law ground.

In addition to rejecting the merits of his claims, the TCCA also procedurally barred Flores's habeas application—and all its claims—under Texas' equitable doctrine of laches. Pet. App. at 48–49 (¶¶262–73), 55 (¶¶ 51–55); *see id*. at 1 (showing that TCCA incorporated trial court's findings). This determination presents an independent and adequate state basis for denying relief which makes this case an inappropriate vehicle for certiorari.

"A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (quoting *Coleman v. Thompson*, 501

U.S. 722, 729 (1991)).[4] The state-law ground may be a substantive rule dispositive of the case or a procedural barrier to adjudication of the claim on the merits. *See Walker v. Martin*, 562 U.S. 307, 315 (2011). To qualify as an "adequate" procedural ground, a state rule must be "firmly established and regularly followed." *Id.* at 316 (quoting *Kindler*, 558 U.S. at 60). Finally, a discretionary state procedural rule "can serve as an adequate ground to bar federal habeas review." *Id.*

Here, there is a state law ground for denying relief that is independent of the federal questions before this court. Although Texas does not provide a statute of limitations for state habeas applications challenging non-capital felony convictions, *see* Tex. Code Crim. Proc. Article 11.07, Texas's laches doctrine can, nevertheless, bar habeas relief when the State is harmed due to an applicant's unreasonable delay in pursuing a habeas claim. *Ex parte Perez*,

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[4] To be sure, *Coleman* involved this Court's appellate review of a state conviction in federal habeas corpus; hence, the Court's jurisdiction there flowed from 28 U.S.C. § 1254(1), and not from § 1257(a). However, the "adequate and independent" state-ground doctrine exists for purposes of both the Court's jurisdiction under § 1257, and for federal habeas appeals under § 1254(1), and the Court often interchanges the concepts. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) ("[A]ssuming that the same standard governs the scope of a district court's power to grant federal habeas relief as governs this Court's jurisdiction to review a state-court judgment on direct review . . . ."); *Coleman*, 501 U.S. at 729 ("We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions.").

398 S.W.3d 206, 215 (Tex. Crim. App. 2013). "The purpose of the laches doctrine is 'to consider whether an applicant has slept on his rights and, if he has, how that has affected the State, and whether, in light of the delay, it is fair and just to grant him relief.'" *Ex parte Hill*, 632 S.W.3d 547, 551 (Tex. Crim. App. 2021) (quoting *Perez*, 398 S.W.3d at 218–19). If laches applies, the TCCA "will not consider an applicant's claims and will deny relief." *Id*. Finally, "the doctrine of laches is a theory which" the Texas courts "may, *and should*, employ" when determining "whether to grant relief in any given [Article] 11.07 case." *Ex parte Hill*, 711 S.W.3d 221, 225 (Tex. Crim. App. 2025) (emphasis and alteration in original).

In this case, the TCCA concluded that Flores's tardy state habeas application warranted the application of the doctrine laches. *See* Pet. App. at 48–49 (¶¶262–73), 55 (¶¶ 51–55). For example, due to the passage of twenty-three years[5] before Flores filed his state habeas application, the TCCA found

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[5] Although "only" six years passed between the issuance of *McCoy* and Flores's filing of his state habeas application, the doctrine of laches still applies in this case, especially considering the avenues for pursuing Flores's claims prior to *McCoy*. If he truly believed his attorney conceded guilt against his wishes, he could have pursued his claim through a *Strickland* ineffective-assistance-of-counsel claim or one of *McCoy*'s precursor precedents. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf,

that defense counsel no longer has access to his defense file, and could no longer recall "specific aspects of the applicant's representation including conversations with co-defendant Motilla, details of the entire testimony preparation with the applicant, defense trial witnesses, and his trial strategy." Pet. App. at 49 (¶¶267–68). So too, the TCCA found the defense investigator, the codefendant's attorney, and a State's witness (i.e., the complainant's mother) were all deceased. *Id*. (¶¶269, 271). And finally, that court found Flores's delay in pursuing his claims prejudiced the State's ability to respond to his claims and would impair the State's ability to retry the case. *Id*. (¶273). The TCCA adopted the trial court's conclusions that "due to the applicant's 23-year delay in filing this application for habeas corpus relief, the State is prejudiced in its ability to respond to the applicant's claim," and "[t]he Applicant's claims should be denied under the equitable doctrine of laches." Pet. App'x. at 55 (¶55).

Since the passage of time in this case hinders the State's ability to retry this case or investigate any factual questions arising out of Flores's claims, this case presents a poor candidate for certiorari. Moreover, the denial of Flores's

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or take an appeal"); *Gannett Co. v. DePasquale*, 443 U.S. 368, 382, n.10 (1979) (the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense").

claims based on the laches doctrine constitutes an independent and adequate state ground for rejecting his petition. *See Walker*, 562 U.S. at 317 (holding California's discretionary time rule is an independent and adequate state bar preventing federal habeas review); *Kelley v. Zoeller*, 800 F.3d 318, 327 (7th Cir. 2015) (claim barred by laches is an independent and adequate state law ground preventing federal habeas review); *Smith v. Addison*, 373 F. App'x 886, 2010 WL 1544366, at *2 (10th Cir. Apr. 20, 2010) (same).

II. The Court Should Deny Certiorari Because Flores's Petition Seeks the Application of a New Rule in Violation of the Court's Anti-retroactivity Principles.

Flores's petition asks this Court to apply *McCoy* to his conviction even though this Court decided *McCoy* seventeen years after his conviction became final. But *Teague v. Lane* generally prohibits the retroactive application of a new rule of constitutional law, so his petition should be denied. 489 U.S. 288, 310 (1989).

Habeas corpus is generally not an appropriate avenue for the creation or application of new constitutional rights. *Id.* Thus, with few exceptions, new constitutional rules do not apply to convictions finalized before the new rule was announced. *Id.* This principle of non-retroactivity respects comity "by validat[ing] reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."

Butler v. McKeller, 494 U.S. 407, 414 (1990). The *Teague* inquiry includes three steps. First, the date on which the petitioner's conviction became final must be determined. *O'Dell v. Netherland*, 521 U.S. 151, 156–57 (1997). Second, the habeas court determines whether a state court addressing the petitioner's claim at the time the conviction became final would have felt compelled to conclude the rule he sought was constitutionally required. *Id*. If not, then the rule is new. *Id*. If the rule is new, the court must determine whether it falls within one of two exceptions: (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense; or (2) watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id*. However, this Court later abolished *Teague*'s second exception. *See Edwards v. Vannoy*, 593 U.S. 255, 272 (2021) ("New procedural rules do not apply retroactively on federal collateral review.").

Flores's conviction became final in early 2001, when his time for filing a petition for certiorari in this Court expired. *See Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). And Flores urges this Court to review his conviction under *McCoy v. Louisiana,* which was decided in 2018. Given his reliance on precedent decided seventeen years after his final conviction date, Flores's

petition depends on the retroactive application of a new constitutional rule. *See Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.").

Since Flores invites retroactive application of a new constitutional rule, this Court must consider whether such an application of *McCoy* may be allowed under *Teague*'s single remaining section. But *McCoy* plainly does not involve a new rule forbidding criminal punishment or prohibiting a category of punishment. Accordingly, both circuit courts which considered retroactive application of *McCoy* declined to do so. *See Smith v. Stein*, 982 F.3d 229, 234, 235 (4th Cir. 2020) ("*McCoy* is not retroactively applicable on collateral review"); *Christian v. Thomas*, 982 F.3d 1215, 1225 (9th Cir. 2020) ("We therefore conclude that the Supreme Court has not made *McCoy v. Louisiana* retroactive to cases on collateral review.").

Finally, to the extent Flores might rejoin that *Teague* is explicitly limited to constitutional rules that are first recognized in federal habeas corpus, he would be incorrect. It appears that this Court has not yet analyzed the procedural gap between the finality of a state conviction and the onset of federal habeas corpus, at least with respect to the Court's non-retroactivity analysis. *See Truesdale v. Aiken*, 480 U.S. 527, 529–30 (1987) (Powell, J.,

dissenting) ("[T]he Court [has not] decided whether the same retroactivity rules should apply to state post-conviction proceedings . . . [as] apply to federal habeas corpus proceedings."); *see also Mallett v. Missouri*, 494 U.S. 1009, 1012 (1990) (Marshall, J., dissenting from denial of certiorari) (questioning whether *Teague* applies to Court's review of state postconviction proceedings).

Despite the seventeen-year gap between his final conviction date and the issuance of *McCoy*, Flores's petition seems oblivious to applicability of the *Teague* and retroactivity concerns and does not address the issue. *See generally*, Pet. Cert. Given his failure to address *Teague* and the glaring retroactivity problems with his *McCoy* claims, Flores's petition should be denied.

III. The Court Should Deny Certiorari Because Flores Fails to Identify a Compelling Reason to Grant It.

Flores fails to identify any compelling reasons to grant certiorari given that: (1) his argument is entirely and unabashedly factbound; (2) the suggested split is illusory; and (3) the TCCA's order denying his *McCoy* claim is unpublished.

A. The Court should deny certiorari because Flores seeks only fact-bound error correction.

In rejecting Flores's *McCoy* claim, the TCCA relied on a determination of historic fact that functionally nullified *McCoy*'s application in this case.

Specifically, the TCCA adopted findings rejecting Flores's *McCoy* claim because: "[Flores] fails to prove [defense counsel] admitted or conceded [Flores]'s guilt." Pet. App. at 40 (¶203). In reaching this conclusion, the TCCA specifically reviewed the entire context of defense counsel's supposed "admission" to the jury. *Id*. at 38–40 (¶¶199–203). The TCCA also recognized that defense counsel attacked the State's key witness and argued that the jury should believe Flores's testimony[6] over the witness. *Id*. at 39 (¶201). It also emphasized defense counsel's "repeated emphasis on the State's burden of proof." *Id*. at 39–40 (¶202). Only after reviewing the full context of defense counsel's statements, the state courts rejected Flores's factual premise that defense counsel admitted or conceded his guilt. *Id*. at 40.

To squarely rule on the issues in this case, the Court would have to reweigh the ultimate findings of fact made by the lower courts. But this Court rarely grants certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) (Renquist, J.) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived

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[6] Flores "told the jury that he did not commit, assist in, or participate in any robbery or murder." Pet. Cert. at 6.

correctness of the judgment we are asked to review."); *see also Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue."). There are strong reasons to apply this limit here because the relevant findings have "fair support" in the record. *See Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737, 745 (1929) ("[I]t is our province to inquire, not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."); *see also Hernandez*, 500 U.S. at 369 (accepting state court fact finding because supported by one of two permissible views of the evidence).

In sum, without any evidence suggesting an exceptional error by the state courts, Flores's petition should be denied because it depends on overturning the factual findings of the state trial court and the TCCA. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *see also* Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb,

Supreme Court Practice § 5.12(c)(3), p. 5–45 (11th ed. 2019) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari").

B. Flores's suggested split is illusory and unworthy of review.

Flores asserts that the state court's treatment of defense counsel's statement as a mere hypothetical "exemplifies one side of a nationwide split." Pet. Cert. at 31. But his supposed split topples awkwardly upon inspection. To begin, Flores's *McCoy* claim derives from an out-of-context hypothetical posed by defense counsel during closing argument which reads as follows: "I guess if you believe [Rosie Montalvo's testimony] beyond a reasonable doubt then you could convict this man of aggravated robbery." Pet. App. at 39. The state court found this statement inadequate to "prove [defense counsel] admitted or conceded the applicant's guilt." *Id*. at 40.

Flores claims such a hypothetical concession of guilt exemplifies a nationwide split, but he does not cite a single case from a competing jurisdiction where a purely hypothetical admission of guilt (e.g. "If you believe X, then my client is guilty") led to a *McCoy* violation. *See generally*, Pet. Cert.

At most, Flores suggests in a footnote that the TCCA in one of its own cases recognized a *McCoy* violation based on an "almost identical" hypothetical concession. Pet. Cert. at 9, n.3 (citing *Ex parte Brown*, No. WR-25,632-03, 2022

WL 215416 (Tex. Crim. App. Jun 15, 2022)). But there are three problems with this example. First, it is a TCCA case and therefore does not suggest a jurisdictional split such as those recognized in Rule 10. Second, the case is unpublished and is not precedent. *See* Tex. R. App. P. 77.3. And third, while defense counsel in that case made a hypothetical concession, he *also* made several explicit concessions and inculpatory statements during closing argument. *See Brown v. State*, 866 S.W.2d 675, 680 (Tex. App.—Houston [1st] 1993, pet. ref'd) (defense counsel stating in a delivery-of-controlled-substance trial, e.g, "There's no doubt that that person, the officer who was masquerading as a dope head, was assisted in his quest to buy some dope by [my client].").

Flores's remaining arguments variously describe how the unique and parochial facts attendant to each respective appeal interact with the abstract and hypothetical legal ambiguities within *McCoy*'s constitutional framework, which had largely been identified by Justice Alito in his dissenting opinion and by Justice Gorsuch during oral argument. Pet. Cert. at 10–25. Critically, Flores fails to show that any other courts would have reached a different result than the TCCA did here. In other words, any supposed "conflict" or "confusion" suggested in the cited opinions results from applying the detailed facts of each appeal to *McCoy*'s well-known legal uncertainties. But none of those issues arose in this case. None were addressed by the TCCA. The only issue this case

turned on is whether there was a concession at all. And Flores fails to identify a circuit split that would apply to that question. This petition must be denied.

C. The TCCA denied Flores's state habeas application in an unpublished order, so it does not present a jurisdictional conflict.

The TCCA decided Flores's state habeas application without issuing any opinion, order, or binding precedent. Pet. Appx. at 1. Since this case sets no precedent, this case presents no compelling reason to grant certiorari as required by Rule 10 of the Rules of the Supreme Court.

Rule 10 provides that review on a writ of certiorari is not a matter of right but of judicial discretion, and it will be granted only for "compelling reasons." Rule 10 identifies non-exhaustive examples of compelling reasons, which predominantly involve a court deciding "an important federal question" in a way that conflicts with another federal court or state court of last resort or deciding a case in a way that presents an extraordinary departure from accepted and usual course of judicial proceedings.

But here, the TCCA denied his petition "without written order" so it did not opine on an important federal question or otherwise decide the issue in an unusual way. Pet. Appx. at 1. At most, it adopted the trial court's finding that Flores "fails to prove [his trial counsel] admitted or conceded applicant's guilt." *Id*. at 40. But that finding did not decide an important federal question, is

consistent with the holding in *McCoy*, and the adoption of that finding without a written opinion establishes no precedent. *See* Tex. R. App. P. 77.3 ("Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court.").

Since this case did not establish any precedent, it does not create a conflict between the TCCA and any other court as contemplated in Rule 10. Similarly, the adoption of the trial court's finding did not resolve any important federal questions about the application of *McCoy*. Without any jurisdictional conflicts or remarkable legal precedent, this case presents no compelling reasons to grant certiorari.

CONCLUSION

Flores's petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

TOMEE M. HEINING
Chief, Criminal Appeals Division

s/ Nathan Tadema
NATHAN TADEMA
Assistant Attorney General
Texas Bar No. 24044285
Counsel of Record

Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
nathan.tadema@oag.texas.gov

Counsel for Respondent