

No. 25-6793

IN THE
Supreme Court of the United States

ROMAN
FLORES, *Petitioner,*

v.

STATE OF *Respondent.*
TEXAS,

**On Petition For A Writ Of
Certiorari To The Texas Court of
Criminal Appeals**

REPLY TO THE STATE'S BRIEF IN OPPOSITION

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REPLY

Respondent largely avoids the constitutional question presented and offers virtually no substantive response to the *McCoy* violation itself. Rather than substantively addressing whether counsel violated Petitioner's Sixth Amendment autonomy rights under *McCoy* by authorizing conviction over Petitioner's insistence on innocence, the State instead throws every conceivable procedural objection at the wall in the hope that one will stick. But none does.

The question whether counsel may authorize conviction under the Texas Law of Parties by conceding a predicate offense despite a defendant's insistence on innocence was raised below, decided below, and is properly before this Court.

I. The State's Alleged "Vehicle Problems" Are Merely Merits Disputes

The State's alleged "vehicle problems" are largely merits disputes repackaged as jurisdictional objections. The relevant closing argument is in the record, the *McCoy* claim was raised and adjudicated below, and Petitioner's insistence on innocence is reflected throughout the proceedings. This case squarely presents the recurring constitutional question whether counsel may authorize conviction on a predicate offense over a defendant's expressed objective of maintaining innocence.

A. The Constitutional Questions Presented Were Decided Below

Respondent argues that the questions presented were not decided below by artificially reframing the petition as a series of distinct constitutional issues never addressed by the state courts. But these are not separate constitutional claims; rather, they are different factual manifestations of the same unresolved autonomy

question. Each formulation identified in the petition ultimately reduces to the same underlying question and federal constitutional issue addressed and rejected by the Texas courts: what functionally constitutes a concession of guilt under *McCoy*?

The state courts resolved that question by concluding counsel's statements were merely "hypothetical" and therefore did not implicate Petitioner's Sixth Amendment autonomy right. The Questions Presented simply identify the various ways Petitioner contends counsel's authorization of conviction – whether through a predicate offense, lesser-included offense, Law of Parties liability, or concession of an element – functionally constituted a concession under *McCoy*.

Clearly, the lower court's characterization of the statements as "hypothetical" is itself a decision about the scope of *McCoy*.

Respondent argues that Flores raises numerous sub-issues upon which the TCCA was supposedly silent. But that framing misunderstands the nature of the constitutional questions presented. Concessions can occur in numerous different ways, and the facts here implicate several of those recurring scenarios simultaneously. The fact that the state courts characterized counsel's statements as merely "hypothetical" does not mean the broader constitutional issue was not decided.

Petitioner is therefore not asking this Court to resolve a collection of unrelated constitutional issues left open by *McCoy*. Rather, Petitioner asks this Court to clarify what, in substance, constitutes a concession of guilt under *McCoy*.

As Respondent itself recognizes, the relevant inquiry under *Adams v. Robertson*, 520 U.S. 83 (1997), is whether the state court had a “fair opportunity to address the federal question that is sought to be presented” before this Court. *Id.* at 86-87.

Indeed, Petitioner’s state habeas application repeatedly presented the broader constitutional question of what functionally constitutes a concession of guilt under *McCoy*. Petitioner expressly argued that counsel conceded guilt to a predicate offense that elevated the case to capital murder under the Texas’ Law of Parties, “knowing that Mr. Flores was not the shooter and was charged as a party of the capital murder offense under Tex. Code Crim. Pro., 7.02(b),” Amended Writ Application at 17; conceded guilt to lesser included offenses because “aggravated robbery and robbery were charged separately as lesser included offenses of capital murder,” *id.*; conceded an element of the charged offense under *Turner v. State*, because “[a] concession of guilt of an element of the crime is still a *McCoy* violation,” *id.* at 19; and effectively authorized conviction through conditional language telling jurors that “if you believe” the State’s witness, they “could convict” Petitioner of aggravated robbery. *Id.* at 15-16, 20-21. The application further argued that counsel thereby “effectively instructed the jury to convict Mr. Flores of capital murder.” *Id.* at 22.

The TCCA was therefore presented with and necessarily addressed the central constitutional issue now presented: whether counsel’s statements functionally constitute a concession of guilt under *McCoy*.

B. Advisory Opinion

Respondent labels the issue a “hypothetical discussion” only because the lower court characterized counsel’s statements as a “hypothetical” concession and therefore concluded no concession occurred. But that merits dispute does not transform the underlying constitutional controversy into a hypothetical one.

As Respondent itself acknowledges, the prohibition on advisory opinions applies where a court is merely “advising what the law would be upon a hypothetical state of facts.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). This case presents no such circumstance.

Petitioner challenges the constitutionality of his conviction and continued imprisonment on the ground that trial counsel violated Petitioner’s Sixth Amendment autonomy rights under *McCoy* by authorizing conviction on a predicate offense despite Petitioner’s express insistence on innocence. Because Petitioner remains imprisoned pursuant to that conviction, the controversy is real, concrete, and directly affects his liberty interests. See *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (“[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.”). A ruling by this Court would plainly affect Petitioner’s rights because it would determine whether the constitutional protections recognized in *McCoy* apply to the circumstances presented here and whether Petitioner is entitled to relief.

Respondent incorrectly suggests that Petitioner’s discussion of lower-court disagreement transforms this case into an abstract request for clarification. It does not. Petitioner references conflicting *McCoy* decisions only to demonstrate the

importance of this Court’s review and the differing interpretations lower courts have adopted regarding what functionally constitutes a concession of guilt.

Resolution of the Questions Presented would directly affect the validity of Petitioner’s conviction and sentence based on whether counsel’s conduct violated the Sixth Amendment. This is a concrete controversy, not an advisory opinion.

C. The Doctrine of Laches Does Not Bar Review of Petitioner’s McCoy Claim

The State contends that this Court lacks jurisdiction because the judgment below rests on an adequate and independent state-law ground, namely the doctrine of laches. But the courts below actually reached the merits of Petitioner’s claims, including the *McCoy* claim, and did not deny relief solely on laches grounds. Moreover, laches is generally not applied, or at minimum not consistently applied, to bar structural-error claims such as those arising under *McCoy*.

The trial court expressly concluded that counsel had not “admitted or conceded” guilt before later adding a generalized and stand-alone laches finding without explaining how any alleged delay specifically prejudiced the State’s ability to litigate the *McCoy* claim itself. The court concluded:

267. Due to the passage of time, Guerinot no longer has access to his defense file and does not recall when the applicant’s file was disposed.
268. Due to the passage of time, Guerinot does not have recollection of 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.
269. Castillo, who investigated the applicant’s case and spoke to multiple witnesses, is deceased.
270. Wheelan, attorney for co-defendant Freddie Motilla, is deceased.

271. Bettie Joanne Pampbell, the complainant's mother who testified for the State at the applicant's trial, is deceased.
272. The applicant's delay in pursuing habeas relief has prejudiced the State's ability to respond to the applicant's writ claims.
273. If the State were required to retry the case, the impact of the trial testimony would likely not be the same as it would have been in 2000.
(App. B, *Flores v. Texas*, No. 25-6793.)

At the end of its conclusions of law, the trial court stated:

274. 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 claims.
275. The applicant's claims should be denied under the equitable doctrine of laches.
276. Alternatively, the applicant fails to show trial counsel was ineffective because the applicant fails to show trial counsel was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
277. The applicant is not entitled to habeas relief on his actual innocence claim because the applicant fails to show new evidence establishes his innocence. *Ex parte Elizondo*, 947 S.W.2d 207, 209 (Tex. Crim. App. 1996).
(App. B, *Flores v. Texas*, No. 25-6793.)

None of these findings identifies any specific prejudice relating to the *McCoy* claim. The *McCoy* issue turns on the trial record and counsel's own statements during voir dire and closing argument, all of which were preserved in the transcript and expressly addressed by the trial court on the merits. The court made no finding that the alleged delay impaired the State's ability to litigate whether counsel functionally authorized conviction over Petitioner's insistence on innocence, nor did it identify any missing evidence necessary to resolve that constitutional issue. Instead, the findings consist primarily of generalized passage-of-time concerns and speculative retrial prejudice tied only to Petitioner's ineffective-assistance and innocence claims, not to the *McCoy* autonomy claim presented here.

The TCCA adopted both the merits findings and the laches findings. Accordingly, this case does not present the type of clear and independent procedural bar that would deprive this Court of jurisdiction.

In any event, under Texas law, laches requires more than the mere passage of time; the State must also demonstrate unreasonable delay and actual prejudice resulting from that delay. *Ex parte Perez*, 398 S.W.3d 206, 218 (Tex. Crim. App. 2013).

Yet neither the courts below nor Respondent explains how the alleged delay specifically prejudiced litigation of Petitioner's *McCoy* claim. The findings refer only generally to faded memories, lost files, deceased (irrelevant) witnesses, and difficulties retrying an old case, but *Perez* requires the State to show that such prejudice was actually caused by the delay and would have been avoided had the petition been filed earlier. 398 S.W.3d at 212 n.5. Respondent makes no such showing.

Notably, trial counsel submitted a post-conviction affidavit, yet never asserted that he was merely posing a hypothetical during closing argument. *Guerinot Aff.* (Dec. 4, 2024). That characterization was supplied by the State and the trial court itself, despite counsel remaining entirely silent on the concession in his affidavit.

At the same time, counsel's affidavit demonstrates that he clearly remembered Petitioner's objective at trial. Counsel stated that Flores "wanted a trial," "wanted to testify," and "[n]ever exhibited any incompetency or lack of understanding about the charges, proceedings, or the trial." *Guerinot Aff.* ¶ 6 (Dec. 4, 2024). Counsel further confirmed that Flores rejected a twenty-year plea offer and insisted on proceeding to trial rather than pleading guilty. *Id.* ¶ 4.

We agree with Respondent that Context is important. Flores rejected a plea agreement in Harris County in the late 1990s – a jurisdiction then known for aggressively pursuing capital prosecutions and carrying out executions at an extraordinary rate – even though the case involved a white deceased victim and Flores, a Hispanic defendant with a criminal record, faced allegations of gang involvement and the possibility of spending the rest of his life in prison. Counsel’s own affidavit confirms that Flores nevertheless insisted on trial and on testifying in his own defense. *Id.* ¶ 4, 6. Under these circumstances, Flores’s chosen objective of maintaining innocence and Guerinot’s memory of it could not have been clearer.

The State also references alleged prejudice in retrying Petitioner decades later. But laches concerns prejudice in responding to the habeas claims themselves, not generalized difficulty associated with re-prosecution. See *Ex parte Perez*, 398 S.W.3d 206, 212 (Tex. Crim. App. 2013). And because *McCoy* errors are structural, the constitutional injury was complete once counsel overrode Petitioner’s autonomy regarding the objective of the defense.

In any event, a state procedural rule cannot constitute an adequate and independent state ground unless it is “firmly established and regularly followed.” *Ford v. Georgia*, 498 U.S. 411, 423–24 (1991) (citing *James v. Kentucky*, 466 U. S. 341, 466 U. S. 348-351). Texas does not apply laches in such a regular or predictable manner, especially in relation to structural constitutional claims.

To the contrary, the Texas Court of Criminal Appeals has repeatedly granted habeas relief despite delays ranging from six years to more than thirty years. See,

e.g., *Ex parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000) (seven years); *Ex parte Garcia*, 547 S.W.3d 228 (Tex. Crim. App. 2018) (twelve years); *Ex parte Westerman*, 570 S.W.3d 731 (Tex. Crim. App. 2019) (28 years); *Ex parte Nicholson*, 634 S.W.3d 743 (Tex. Crim. App. 2021) (37 years); *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009) (20 years); *Ex parte Harbin*, No. WR-82,672-01, 2015 WL 3540861 (Tex. Crim. App. June 3, 2015) (23 years); *Ex parte Callaway*, No. WR-87,705-01, 2018 WL 7570476 (Tex. Crim. App. Oct. 31, 2018) (13 years); and *Ex parte Sadler*, 638 S.W.3d 711 (Tex. Crim. App. 2022) (16 years). Indeed, the Court itself acknowledged in *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013), that laches determinations are made on a “case-by-case basis.” *Id.* at 216–18.

Respondent also fails to show that the TCCA regularly applies laches to structural *McCoy* claims. In *Ex parte Barbee*, No. WR-71,070-03 (Tex. Crim. App. Feb. 10, 2021), the TCCA addressed the substance and availability of a *McCoy* claim raised in a subsequent writ application arising from a 2006 capital murder conviction without invoking laches, concluding instead that “*McCoy* was a logical extension of *Nixon*.” *Barbee* thus undermines Respondent’s assertion that Texas consistently treats laches as an adequate and independent bar to *McCoy* claims.

By contrast, Respondent does not cite a single case demonstrating that the TCCA regularly applies the equitable doctrine of laches to structural *McCoy* autonomy claims in post-conviction proceedings.

Under these circumstances, the State’s argument fails.

II. Petitioner Does Not Seek the Application of a New Rule Beyond *McCoy*

The State's reliance on *Teague* is misplaced because Petitioner does not seek recognition of a new constitutional rule beyond *McCoy v. Louisiana*, 584 U.S. 414 (2018), but instead seeks application of McCoy's established Sixth Amendment autonomy principles to materially similar facts.

Texas does not impose a time limitation on the filing of an initial writ application. Had the Legislature intended to impose such a limitation, it could have done so, as it did in death-penalty cases. *See* Tex. Code Crim. Pro. 11.071. More importantly, however, this was not a subsequent writ application. This was Petitioner's initial application for writ of habeas corpus. Petitioner therefore was not required to demonstrate a previously unavailable legal basis in order to obtain review of his claim. *See* Tex. Code Crim. Pro. 11.07 (4)(a)(1).

Even assuming *Teague* were implicated, the TCCA itself concluded in *Ex parte Barbee*, a subsequent writ application challenging a 2006 capital murder conviction, that *McCoy* did not announce a "new" constitutional rule, but instead was a "logical extension of *Nixon*" grounded in longstanding autonomy principles already embedded in prior precedent. *Ex parte Barbee*, No. WR-71,070-03, slip op. at 4, 14-15 (Tex. Crim. App. Feb. 10, 2021). The TCCA specifically explained that *McCoy* rested on "familiar legal principles" concerning defendant autonomy, counsel's duty to consult with the client, and structural error, all of which were already established in prior Supreme Court precedent. *Id.* at 14. The court specifically emphasized that "McCoy was a logical extension of *Nixon* and 'could have been rationally fashioned' from it." *Id.* at 14-15. According to the TCCA, *McCoy* "did not make it easier to establish a claim,"

but instead merely required the factual circumstance absent in *Nixon*: “a defendant’s express objections to a concession of guilt disregarded by counsel and court.” *Id.* at 15.

McCoy itself likewise relied on longstanding precedent recognizing that certain fundamental decisions belong to the defendant, including *Faretta*, *Jones*, and *Brookhart*. See *McCoy*, 584 U.S. at 422-23. In *Brookhart v. Janis*, 384 U.S. 1 (1966), the Court held that counsel could not waive the defendant’s right to plead not guilty and contest the State’s case where the defendant himself insisted he was “in no way pleading guilty.” The Court explained that counsel lacks the power to “override his client’s desire expressed in open court to plead not guilty” by entering the functional equivalent of a guilty plea “whatever the label.” *Id.* at 11.

Justice Sotomayor’s dissent in *Crawford v. Mississippi* further underscores why Respondent’s reliance on *Teague* is misplaced. Joined by Justices Kagan and Jackson, Justice Sotomayor explained that *McCoy* “readily qualifies as an old rule” because it merely applied established Sixth Amendment autonomy principles from cases such as *Faretta* and *Jones* to a different factual circumstance. *Crawford v. Mississippi*, 607 U.S. ___, ___ (2025) (Sotomayor, J., dissenting). The dissent thus recognized that *McCoy* was rooted in longstanding autonomy principles predating *McCoy* itself, rather than announcing a novel constitutional rule.

Flores therefore represents the natural doctrinal progression of this Court’s autonomy jurisprudence. In *Brookhart*, this Court recognized that counsel could not override a defendant’s decision to plead not guilty and contest the State’s case. In

Nixon, counsel conceded guilt where the defendant did not expressly object. In *McCoy*, counsel conceded guilt over the defendant’s express objection. And here, counsel authorized the jury to convict Petitioner of capital murder under the Law of Parties by authorizing conviction for the underlying aggravated robbery despite Petitioner’s repeated insistence on innocence. That progression reflects ordinary constitutional development, not the creation of a new rule under *Teague*.

The State’s attempt to transform this case into a sweeping retroactivity dispute therefore misunderstands both *McCoy* and the narrow questions presented here.

III. This Case Presents Important and Recurring Questions Concerning the Scope of McCoy

Respondent attempts to reduce this case to a factual dispute over counsel’s wording, but that is precisely the constitutional issue presented. *McCoy* cannot be avoided through semantics focusing only on whether counsel expressly stated “my client is guilty,” while ignoring the functional effect of counsel’s statements before the jury. The question presented concerns the unresolved boundary between permissible strategy and unconstitutional usurpation of the defendant’s Sixth Amendment autonomy rights under *McCoy*.

This Court has repeatedly granted review to clarify the scope of constitutional protections in recurring contexts,¹ particularly where lower courts have struggled to apply broad constitutional principles to varying factual circumstances. See *McCoy v. Louisiana*, 584 U.S. 414 (2018); *Florida v. Nixon*, 543 U.S. 175 (2004). This case

¹ See for example the Court’s recent continued doctrinal refinement of Batson’s procedural/application boundaries in *Pitchford v. Cain*, 608 U.S. ___ (2026).

therefore presents an important and recurring constitutional question concerning the boundaries of the Sixth Amendment autonomy right recognized in *McCoy*.

Respondent invokes the “full context” of counsel’s statements as though that context eliminates any constitutional concern. But Petitioner agrees that the full context matters. Viewed in full context, counsel’s statements reflected a consistent strategy of authorizing conviction on a predicate offense while only making an inefficient attempt at contesting the capital-murder component of the case. During voir dire, counsel informed prospective jurors: “And this is not Perry Mason. I don’t expect someone to come screaming up from the back of the courtroom and go: they got the wrong guy!” (2 RR 103) thereby poisoning the potential jurors’ minds from the outset to expect that this was not going to be an innocence case.

The broader context surrounding counsel’s own later statements further underscores the constitutional concern. Years after trial, counsel openly acknowledged that he “never left the DA’s office” in terms of his “mindset,” and admitted that “a lot of people” had accused him of maintaining a prosecutorial mentality while serving as defense counsel. (Ex. 3 to Amended Writ Application, J. Guerinot Interview, Feb. 17, 2022, at 6.) Counsel further stated that, in Harris County, the possibility of an innocent person being executed was “non-existent,” and admitted that he had “never” represented an innocent client in a capital case. (*Id.* at 10.) He also made deeply troubling racial generalizations during the same interview, including stating that he did not want Asians on juries because they were supposedly “government oriented” and deferential to authority. (*Id.* at 12.) Viewed together with

counsel's voir dire statements conditioning jurors that "this is not Perry Mason," and his later authorization that jurors "could convict" Petitioner of aggravated robbery if they believed the State's witness, the "full context" reveals far more than isolated hypothetical language. It reveals a defense strategy shaped by a deeply entrenched prosecutorial mindset fundamentally incompatible with Petitioner's repeated insistence on innocence and objective of fully contesting the State's accusations.

Respondent criticizes Petitioner for not identifying a single case involving counsel framing a concession through "hypothetical" language, but that argument merely reinforces the constitutional problem presented. There are countless ways counsel may functionally concede guilt without uttering the precise words "my client is guilty," as can be seen in this case, which is precisely why lower courts have struggled to define the boundaries of *McCoy*.² Petitioner is not asking this Court to engage in a semantic exercise based on counsel's precise wording. Rather, Petitioner seeks clarification of when counsel's statements, viewed functionally and in context, amount to an unconstitutional usurpation of the defendant's autonomy right.

Indeed, this Court has already recognized that constitutional violations cannot be avoided through "empty rhetoric" or formalistic distinctions untethered from the practical effect of counsel's actions. See *McCoy v. Louisiana*, 584 U.S. 414, 424-28 (2018) (focusing on counsel's effective concession of guilt over defendant's objection); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (holding that counsel could not waive the

² Bluntson further illustrates that uncertainty. Although the TCCA concluded that Bluntson was incompetent to waive counsel and represent himself in a capital proceeding, it simultaneously determined that he had not sufficiently invoked or preserved his autonomy objection under *McCoy*. That tension underscores the unsettled boundaries of Sixth Amendment autonomy jurisprudence. *Bluntson v. State*, No. AP-77,067 (Tex. Crim. App. May 7, 2025).

defendant's right to plead not guilty and contest the State's case without defendant's consent, regardless of the label attached to the proceeding); *Florida v. Nixon*, 543 U.S. 175, 187-89 (2004) (focusing on the functional effect of counsel's concession strategy and the defendant's response thereto). The split therefore is not limited to identical wording, but concerns the broader constitutional question of what, in substance, constitutes a concession of guilt under *McCoy*.

Lastly, Respondent argues that the TCCA's unpublished order lacks precedential value and therefore presents no compelling reason for review. But the absence of substantive guidance from the State's highest criminal court on this recurring and unsettled *McCoy* issue only underscores the need for this Court's clarification.

Conclusion

Lower courts continue to struggle with when counsel's statements functionally cross the line from permissible strategy into unconstitutional usurpation of the defendant's autonomy under *McCoy*. But constitutional autonomy rights cannot turn on magic words, conditional phrasing, or distinctions "whatever the label." *Brookhart*, 384 U.S. at 7-8. The petition for certiorari should be granted.

Respectfully submitted, June 3, 2026

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