No. **16-8255**

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT McCOY, *Petitioner*

v.

STATE OF LOUISIANA, *Respondent*

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

OFFICE OF THE DISTRICT ATTORNEY
26TH JUDICIAL DISTRICT
STATE OF LOUISIANA
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State of Louisiana v. Robert McCoy, 2014-1449 (La. 10/19/2016),
_____ So. 3d _____ (2016), *rehearing denied* (12/06/2016)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

LSA-Code of Criminal Procedure Article 795

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Robert McCoy was convicted of three counts of first degree murder on August 4, 2011. Following a penalty phase, the jury returned a verdict of death on each of the three counts. McCoy was sentenced to death in accordance with the jury's verdict on January 23, 2012.

Petitioner's convictions and sentences were affirmed on direct appeal by the Supreme Court of Louisiana in *State of Louisiana v. Robert McCoy*, 2014-1449 (La. 10/19/2016); ____ So. 3d _____, *rehearing denied* (La. 12/6/2016).

QUESTIONS PRESENTED

1.

Petitioner's claim of the denial of self-representation and defense counsel's concession of guilt in his opening statement to the jury as a reasonable strategy by counsel in the face of overwhelming evidence.

2.

Petitioner's claim of racial discrimination in jury selection based on a simultaneous peremptory strike by both the prosecution and the defense of the same juror and Louisiana's statutory provisions in the Louisiana Code of Criminal Procedure art. 795.

1.

1.

Petitioner's Claim of Denial of Self-Representation and the Defense Counsel's Concession of Guilt in his Opening Statement to the Jury as a Reasonable Strategy by Counsel in the Face of Overwhelming Evidence

Defense counsel's concession of guilt in his opening statement to the jury was a valid and reasonable trial strategy which is reviewed under the usual test for constitutionally adequate assistance of counsel articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U. S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In *Florida v. Nixon,* 543 U. S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), the defense counsel was faced with the inevitability of going to trial on a capital murder charge and a strong case for the prosecution. The defense counsel concluded that his best course for trial strategy would be to concede Nixon's guilt, thereby preserving credibility to the jury for consideration of any penalty phase mitigation evidence and for defense pleas to spare Nixon's life. Defense counsel tried several times to explain this strategy to Nixon, who remained unresponsive and gave very little, if any, assistance or direction in preparing a defense. At trial, Nixon engaged in disruptive behavior and absented himself from most of the trial. During his trial, McCoy was also disruptive and uncooperative with his counsel who was retained by McCoy's parents after McCoy was not satisfied with counsel from the public defender's office.

Florida v. Nixon holds that it is not invariably ineffective for counsel to concede guilt on some charges, even in a capital prosecution, as part of an effort to make the defense credible. In reversing the decision by the Florida Supreme Court, the Supreme Court in *Florida v. Nixon* held that counsel's failure to obtain defendant's express consent to a strategy of conceding guilt in a capital murder trial in the face of overwhelming and heinous evidence does not automatically render defense counsel's performance deficient.

Admit the Act and Win the Case: Reasonable Trial Strategy

The trial tactic of "admit the act and win the case" by trying to save the defendant's life in a capital murder trial where evidence of guilt is overwhelming, the crime is heinous and the defendant refuses to cooperate with counsel is aimed at maintaining credibility with the jury in the penalty phase. Counsel's strategic choices should not be impeded by a rigid blanket rule demanding the defendant's consent. Counsel's trial strategy under the circumstances of this case satisfies the *Strickland* standard because it is not the equivalent to a guilty plea and McCoy still retained the rights accorded a defendant in a criminal trial.

In *Florida v. Nixon,* the Supreme Court noted:

> Despite (defense counsel's) concession of Nixon's guilt, Nixon retained the rights accorded a defendant in a criminal trial. The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crime

> with which Nixon was charged. That aggressive evidence would be separated from the penalty phase thus enabling the defense to concentrate that portion of the trial on mitigating factors.
>
> The defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as (defense counsel) did, to exclude prejudicial evidence . . . in the event of errors in the trial or jury instruction, a concession of guilt would not hinder the defendants right to appeal.

The "concession of guilt issue" should be evaluated under the *Strickland v. Washington* standard of analysis of "Did counsel's representation fall below an objective standard of reasonableness" instead of the rigid standard announced in *United States v. Cronic,* 466 U. S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) of automatically presuming prejudice if there is an attorney-client conflict in trial tactics.

Citing *Florida v. Nixon,* the Court of Appeals for the Eleventh Circuit in *Darden v. United States*, 708 F. 3d 1225 (11th Cir. 2/12/2013) and the Seventh Circuit in *United States v. Flores,* 739 F. 337 (7th Cir. 1/03/2014) supported the defense counsel's trial tactics of conceding guilt to preserve credibility with the jury to maintain credibility with the jury in the face of overwhelming evidence.

The United States Fifth Circuit in *Haynes v. Cain*, 298 F. 3d 375, (5th Cir. 2002) (en banc), *cert. denied*, 537 U. S. 1072, 123 S. Ct. 676, 154 L. Ed. 2d 567 (2002) supported application of the *Strickland* standard in evaluating concession of guilt strategy in order to maintain credibility with the jury.

2.

Petitioner's claim of racial discrimination in jury selection based on simultaneous peremptory strike of the same juror by both the prosecution and the defense and Louisiana's statutory provisions in the Code of Criminal Procedure art. 795.

The defense raised a *Batson* objection to the State's peremptory strike of a prospective juror, Venus, an African American woman, who was simultaneously struck by the defense. Louisiana's statutory provisions in Article 795 of the Louisiana Code of Criminal Procedure provide that:

> C. No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory race or gender neutral reason for the exercise of the challenge unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.
>
> D. The court shall allow to stand each peremptory challenge exercised for a race or gender neutral reason either apparent from the examination or disclosed by counsel when required by the court. <u>The provisions of Paragraph C and this Paragraph shall not apply when both the state and defense have exercised a challenge against the same juror.</u>

Claiming a violation of the rule established in *Batson v. Kentucky,* 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) petitioner seeks to expand *Batson* to require a satisfactory race or gender neutral reason for the exercise of a peremptory challenge by the State for the same prospective juror excused by the defense.

LSA-C. Cr. P. art. 795 provides the proper remedy for simultaneous strikes by the State and defense for the same juror by not requiring further revelations or reasons for the strike. The trial court applied this simultaneous strike statute to resolve the defense claim of a *Batson* violation.

Petitioner cites *Miller-El v. Dretke*, 545 U. S. 231 (2005) in support of his claim that the State's simultaneous strike of prospective juror Venus is evidence of a *Batson* violation by the State. This claim is not supported by the evidence. The opinion of the Supreme Court of Louisiana was not unreasonable in light of the evidence presented. Petitioner presented no side by side comparison of black jury venire panelists who were struck and white similar situated panelists who were not and a simultaneous strike of the same prospective juror struck by the defendant does not establish a pattern of discriminatory intent.

REASONS TO DENY THE WRIT

1) Conceding guilt in the guilt phase of a capital murder trial in the face of heinous and overwhelming evidence in order to maintain credibility with the jury in the penalty phase and try to save the defendant's life was a reasonable strategy by defense counsel;

(2) despite the concession of guilt in the face of overwhelming evidence, the defendant retained the rights accorded a defendant in a criminal trial because he was able to appeal trial errors and instruction to the jury errors;

3) heinous and aggressive evidence would be separated from the penalty phase and enable the defense to concentrate on mitigation evidence;

4) LSA-C. Cr. P. art. 795, Louisiana's statute on simultaneous jury strikes provided the proper remedy for simultaneous strikes by the State and the defense against the same prospective juror and there was no *Batson* violation in the *voir dire* process;

5) petitioner has failed to establish a violation of a constitutional right to warrant the granting of a writ of *certiorari* to the Supreme Court of Louisiana.

CONCLUSION

The Supreme Court of Louisiana in *State of Louisiana v. Robert McCoy,* No. 2014-KA-1449 (La. 10/19/2016), correctly resolved the same issues raised in this petition for Writ of Certiorari by the defense.

Respondent further contends (1) the rulings by the trial court and Supreme Court of Louisiana on the issues of self-representation and concession of guilt by defense counsel in the defendant's opening statement were correct (2) defense counsel's actions were reasonable strategic trial tactics under the circumstances of the case (3) Louisiana's statutory provisions of LSA-C. Cr. P. art. 795 relative to simultaneous peremptory jury strikes by the State and the defendant of the same prospective juror did not violate the rule in *Batson v. Kentucky* and (4) a writ of certiorari to the Supreme Court of Louisiana should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the Respondent's

Brief in Opposition to Writ of Certiorari

has been served on all parties of interest including counsel for the petitioner by mailing a copy by U. S. Mail, postage prepaid, and addressed to:

Richard Bourke, *Counsel of Record*
Meghan Shapiro
Louisiana Capital Assistance Center
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on this 23rd day of March 2017.

John M. Lawrence, *Counsel of Record*

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ON WRIT OF CERTIORARI TO THE
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APPENDIX

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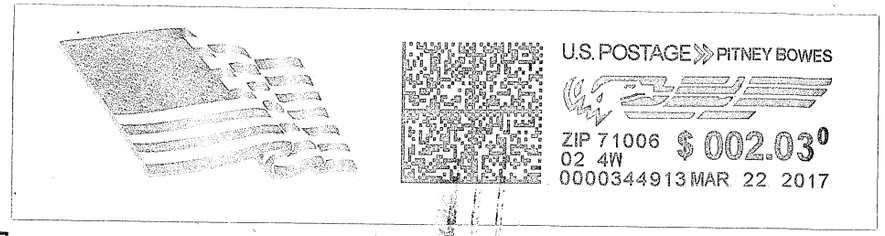

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