No. 18-8070
No. 18A845

IN THE
Supreme Court of the United States

BILLIE WAYNE COBLE,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals and Application for a Stay of Execution

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

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CAPITAL CASE

QUESTION PRESENTED

Does the state court's reliance on an independent and adequate state law ground preclude this Court's consideration of Coble's successive and abusive claim of trial court error under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), especially where Coble expressed agreement with trial counsel's strategy to partially concede guilt and, unlike McCoy, did not complain about such strategy until postconviction proceedings?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Petitioner Billie Wayne Coble is scheduled for execution after 6:00 p.m. on February 28, 2019 for the capital murders of his wife's father, mother, and brother. Coble has previously and unsuccessfully challenged the constitutionality of his Texas capital murder conviction and his second death sentence in both state and federal courts. Four weeks prior to his scheduled execution, Coble unsuccessfully sought to file a subsequent application for writ of habeas corpus and a motion for stay of execution in the Texas Court of Criminal Appeals (TCCA), relying upon this Court's decision in *McCoy* in support of his claim that his conviction suffered from structural error when trial counsel improperly overrode Coble's Sixth Amendment right to determine the objective of his own defense.

Coble now requests a stay of execution and certiorari review of the lower court's dismissal of his application as an abuse of the writ. Pet'r App. A; *Ex parte Coble*, No. WR-39,707-04, 2019 WL 640202 (Tex. Crim. App. Feb. 21, 2019) (unpublished). However, certiorari is foreclosed because the state court's disposition of his claim relied upon an adequate

and independent state procedural ground. In addition, Coble's claim is wholly meritless. Thus, neither certiorari review nor a stay of execution is appropriate under the circumstances, and both his requests should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The TCCA summarized the facts of the triple homicide as follows:

> Karen Vicha was [Coble]'s third wife. They were married in July 1988 and lived in a house down the road from her brother and across the street from her parents. [Coble] was almost forty years old. The marriage quickly disintegrated, and, after a year, Karen told [Coble] to move out. She wanted a divorce. [Coble] attempted to talk her out of this decision and would randomly call her and show up at her work place.
>
> [Coble] then kidnapped Karen as a further effort to dissuade her from divorcing him. He hid in the trunk of her car while she was at a bar one evening with a girlfriend. When Karen started to drive home, [Coble] folded down the back seat and "popped out of the trunk with a knife." He jumped over the console, halfway into the front seat, and stuck the knife against Karen's ribs. He told her to keep driving until they came to a field. Karen stopped the car, and [Coble] said that if he [sic] couldn't have her, then no one else could. He pulled out a roll of black electrical tape, but Karen kept talking, and, after about two hours, she convinced him that she would reconsider the divorce issue. He let her go, and she called her brother, Bobby, who was a police officer. Bobby told Karen to report the kidnapping.
>
> After he arrested [Coble] for kidnapping Karen, Officer James Head looked in his patrol-car mirror and saw [Coble] staring

at him with a look that "made the hair on the back of [his] head stand up." He got "the heebie-jeebies." [Coble] muttered something like "They're going to be sorry." Officer Head called Karen's brother, Bobby, and warned him about [Coble]. When [Coble] was released on bail for the kidnapping charge, Bobby got Karen a German shepherd for protection. A few days later, [Coble] told Karen, "oh, I see you—you've got a dog now. . . [T]hat's a big mean dog you've got." Shortly thereafter, Karen found the dog lying dead in front of her house.

Nine days after he had kidnapped Karen, [Coble] went to her house in the early afternoon. As Karen's three daughters each came home from school along with Bobby's son, [Coble] handcuffed them, tied up their feet, and taped their mouths closed. Karen's oldest daughter testified that she heard [Coble] cut the telephone lines. Then he left to ambush and shoot Karen's father, mother and brother Bobby as each of them came home.

[Coble] returned to Karen's house after the triple killings and waited for his wife to come home from work. He told the children, "I wish I had blown you away like I intended to." When Karen arrived, [Coble] came out of one of the bedrooms with a gun. [Coble] said, "Karen, I've killed your momma and your daddy and your brother, and they are all dead, and nobody is going to come help you now." She didn't believe him, so [Coble] showed her Bobby's gun lying on the kitchen table and pulled the curtains so she could see her father's truck parked behind the house. He showed her $1,000 in cash that he had taken from her mother. [Coble] told Karen that she was lucky that he hadn't molested her daughters, and he told her to kiss them good-bye. She did. He made her put on handcuffs. Karen talked [Coble] into leaving the house and taking her with him. He said he was going to take her away for a few weeks and torture her.

As [Coble] drove, Karen tried to escape by freeing one hand from the handcuffs and grabbing at the steering wheel,

> making the car swerve into a ditch. She grabbed one of [Coble]'s guns, pointed it at his stomach, and pulled the trigger, but nothing happened. Then Karen and [Coble] fought over the gun, with [Coble] repeatedly pulling the trigger, but still the gun did not fire. [Coble] pistol-whipped Karen until she couldn't see for all of the blood on her face. A woman passerby started shouting at [Coble], "[W]hat are you trying to do to that woman," so [Coble] drove the car out of the ditch as Karen lay in the passenger seat. He shouted at her that if she got blood on his clothes, he would kill her. But he was also rubbing her between her legs as he drove. He told her that his reputation was ruined because she had had him arrested and his name was in the papers.
>
> He drove to a deserted field in Bosque County where he threatened to rape her. After dark, he drove out of the field, but they passed a sheriff's patrol car which turned around to follow them. [Coble] grabbed a knife and started stabbing Karen's chin, forehead, and nose, as he was driving. [Coble] said that he did not want to die in prison, so he "floored it" and rammed into a parked car. After the crash, [Coble] turned to Karen and said, "I guess now you'll get a new car." Both [Coble] and Karen were injured in the crash. Officers had to cut the car door open to get Karen out. [Coble] was found with Karen's father's watch and wallet, as well as .37 and .38 caliber revolvers.

Coble v. State, 330 S.W.3d 253, 261–63 (Tex. Crim. App. 2010) (footnotes omitted), *cert. denied*, 131 S. Ct. 3030 (2011).

II. Course of State and Federal Proceedings

Coble was originally convicted and sentenced to death in April 1990 for the murders of his brother-in-law, Bobby Vicha, his mother-in-law, Zelda Vicha, and his father-in-law, Robert John Vicha. Coble's conviction

and sentence were both upheld on direct appeal to the TCCA. *Coble v. State*, 871 S.W.2d 192 (Tex. Crim. App. 1993) (*Coble I*), *cert denied*, 513 U.S. 829 (1994). Coble subsequently filed a state application for writ of habeas corpus, in which he alleged, as relevant here, that his trial counsel was ineffective for failing to present an insanity or diminished capacity defense at the guilt phase of trial and that his due process rights were violated when he was involuntarily medicated during trial and thus relinquished his right to testify. I SHCR-01 at 110–16, 247–57.[1] After the trial court entered findings of fact and conclusions of law, the TCCA denied Coble habeas relief. I SHCR-01 at cover; V SHCR-01 at 1286–1307.

Coble then filed a federal habeas petition raising, among others, the above two claims for relief. *See* Mem. Op. and Order at 9–10, *Coble v. Johnson*, No. W-99-CV-080 (W.D. Tex. 2000), ECF No. 49. The district court denied Coble federal habeas relief but granted Coble a certificate of

[1] "SHCR" refers to the State Habeas Clerk's Record, with the application number indicated after the hyphen. "CR.1990" and "RR.1990" refers to the clerk's record and reporter's record, respectively, in Coble's 1990 trial court proceeding. Similarly, "CR.2008" refers to the documents and pleadings filed in the state convicting court, or clerk's record in Coble's 2008 trial court proceeding. All are preceded by the volume number and followed by the page numbers.

appealability (COA) on the issue of ineffective assistance of counsel. *Id.* at 78; Certificate of Appealability at 2, *Coble v. Johnson*, No. W-99-CA-080, ECF No. 65. Coble's death sentence was subsequently overturned by the Fifth Circuit on appeal on an unrelated issue.[2] *Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007). Accordingly, Coble was granted a new punishment hearing in September 2008, wherein he was again sentenced to death. 13 CR.2008 2358–59. This second sentence was affirmed on direct appeal in a published opinion delivered October 13, 2010. *Coble*, 330 S.W.3d at 253.

While direct appeal of his new sentence was still pending, Coble filed a lengthy state application for writ of habeas corpus in the trial court raising a total of twenty claims for relief. *Ex parte Coble*, No. WR-39,707-03, 2012 WL 405481, at *1 (Tex. Crim. App. Feb. 8, 2012). After an evidentiary hearing was held, the trial court entered its findings of facts and conclusions of law recommending that relief be denied. VII SHCR-03 at 1223–32. Based upon these findings and conclusions as well as its own

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[2] Specifically, the Fifth Circuit found a reasonable likelihood that the special issues submitted to Coble's jury at the punishment phase of trial prevented the jury from giving "meaningful consideration and effect" to Coble's evidence of mental illness and troubled background. *Id.* at 446–48 (citing *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007)).

review of the record, the TCCA then denied Coble state habeas relief. *Ex parte Coble*, 2012 WL 405481, at *1.

A year later, Coble filed a 600-page federal habeas petition raising a total of twenty-one claims for relief. Fed. Writ Pet. at 126–599, *Coble v. Stephens*, W-12-CV-039, 2015 WL 5737707 (W.D. Tex. 2015), ECF No. 21. The district court denied relief on each of Coble's allegations and denied him a COA. *Coble v. Stephens*, 2015 WL 5737707, at *11, 19–20, 25. Coble then sought a COA from the Fifth Circuit on seven claims. *See Coble v. Davis*, 682 F. App'x 261, 273 (5th Cir. 2017) (unpublished) (No. 15-70037). The Fifth Circuit denied COA on five claims and granted COA on the remaining two. *Id*. at 261, 263, 273–74. After further briefing by the parties and oral argument before the Fifth Circuit, Judge Dennis, writing for the panel, affirmed the district court's opinion. *Coble v. Davis*, 728 F. App'x 297, 302 (5th Cir. 2018) (unpublished) (No. 15-70037). On October 9, 2018, this Court denied Coble's petition for writ of certiorari. *Coble v. Davis*, 139 S. Ct. 338, 338 (2018).

On October 17, 2018, the 54th Judicial District Court of McClennan County, Texas, set Coble's execution date for February 28, 2019. On February 1, 2019, Coble filed in the state district court a subsequent state

habeas application under Article 11.071 along with a motion for a stay of execution. In his subsequent application, Coble contended that his conviction suffered from structural error when defense counsel improperly overrode his Sixth Amendment right to determine the objective of his own defense and that his second death sentence was based on the materially inaccurate testimony of State's witness A.P. Merillat. *Ex parte Coble*, 2019 WL 640202, at *1; Pet'r App. A. The TCCA held that Coble had "failed to make a *prima facie* showing that the recent case of *McCoy* . . . applies to him in his situation" but that, regardless, he had "failed to show that either claim otherwise" met the requirements of Texas Code of Criminal Procedure article 11.071 § 5. *Id*. Accordingly, the TCCA dismissed Coble's application as an abuse of the writ without reviewing the merits of the claims. *Id*. (citing art. 11071 § 5(c)). The TCCA also denied Coble's motion for stay of execution. *Id*. The instant petition follows.

REASONS FOR DENYING THE WRIT

I. Coble Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The question Coble presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of

certiorari is not a matter of right, but of judicial discretion, and will only be granted for "compelling reasons." But in cases such as this, that assert only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id.*

Here, Coble advances no compelling reason to review his case, and none exists. Indeed, the issue in this case involves only the lower court's proper application of state procedural rules for collateral review of death sentences. Specifically, Coble was cited for abuse of the writ because he did not meet the subsequent application requirements of Texas Code of Criminal Procedure article 11.071, § 5. The state court's disposition, which relied upon an adequate and independent state procedural ground and did not reach the merits of Coble's claims, forecloses a stay of execution or certiorari review.

Additionally, Coble appeals from the dismissal of state habeas proceedings but fails to demonstrate that any aspect of those proceedings violated the Constitution. As Justice O'Connor described the role of state habeas corpus proceedings:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings

> . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). Similarly, Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

498 U.S. 931, 932 (1990). Coble's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction, and there is simply no jurisdictional basis for granting certiorari review in this case.

II. Certiorari Review and a Stay of Execution Are Foreclosed by an Independent and Adequate State Procedural Bar.

Article 11.071, § 5(a) of the Texas Code of Criminal Procedure forbids state courts to consider a prisoner's successive state habeas application unless:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the

> factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (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; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

This abuse-of-the-writ statute is an independent and adequate state-law ground for disposing of an applicant's claims. *See*, *e.g.*, *Moore v. Texas,* 535 U.S. 1044, 1047-48 (2002) (Scalia, J., dissenting); *Balentine v. Thaler,* 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Section 5 is an adequate state-law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) ("Texas' abuse-of-the-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) ("[T]he Texas abuse of the writ doctrine is an adequate ground for considering a claim procedurally defaulted."); *Barrientes v. Johnson*, 221 F.3d 741, 758–59 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997).

And this Court has held on numerous occasions that it will not review a state court's decision where the state court made a "plain statement" that its decision was not compelled by federal law and where the decision indicates "clearly and expressly" that it is based on an independent and adequate state-law ground. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Thus, a "plain statement" by the state court that its decision rests on state-law grounds rebuts the presumption that a federal court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so" when a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law." *Id.* at 1040–41. Where that presumption is rebutted, "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Long*, 463 U.S. at 1042; *see also Zacchini v. Scripps-Howard Broad Co.*, 433 U.S. 562, 566 (1977) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected

its view of federal laws, our review would amount to nothing more than an advisory opinion.").

Here, the TCCA held: 1) that Coble failed to make a *prima facie* showing that *McCoy* "applies to him in his situation"; 2) that he failed to show that either claim *otherwise* met the requirements of § 5; and 3) that his claims should thus be dismissed as "an abuse of the writ without reviewing the merits." *Ex parte Coble*, 2019 WL 640202 (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)); Pet'r App. A. Assuming for the sake of argument that the first of the three TCCA holdings could "fairly appear" to be interwoven with federal law,[3] the remaining two holdings—that his claim otherwise failed to meet the requirements of § 5 and that it constituted an abuse-of-the-writ—are alternative "plain statements" that clearly and expressly indicate that the TCCA's disposition relied upon

[3] It is not clear that the TCCA did not apply, for example, state non-retroactivity principles in this instance, given that this Court did not hold that *McCoy* was a retroactive rule. *See, e.g.*, *Ex parte Oranday-Garcia*, 410 S.W.3d 865, 869 (Tex. Crim. App. 2013) (finding that petitioner had failed to make a prima facie showing that this Court's opinion in *Padilla v. Kentucky*, 559 U.S. 356 (2010) "applies to the facts of his case because of" the TCCA's prior decision in *Ex parte De Los Reyes*, 392 S.W.3d 675 (Tex. Crim. App. 2013), which held that *Padilla* does not apply retroactively). In any case, even assuming such ambiguity means that the TCCA's first statement "fairly appears" to at least be interwoven with federal law, it is of no matter, as explained above.

the adequate and independent abuse-of-the-writ statute.[4] *See Long*, 462 U.S. at 1041 ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); *see also Harris v. Reed*, 489 U.S. 255, 263 (1989) (holding that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar"). There is no jurisdictional basis for granting certiorari review in this case. Accordingly, Coble's petition presents nothing for this Court to consider.

III. This Court Should Not Ignore the Application of State Law to Review Coble's *McCoy* Claim.

In his petition, Coble argues that this Court should grant him certiorari review on two issues that he believes *McCoy* left open: 1) to whom must a defendant object when trial counsel decides to forego a

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[4] These statements certainly indicate that, even if this Court were to disagree with the TCCA's finding that Coble did not make a *prima facie* showing under *McCoy*, the TCCA would render the same judgment, and this Court's opinion would thus be nothing more than an advisory opinion. To be sure, as indicated in footnote 3, *supra*, the TCCA could apply—if it did not already—state non-retroactivity principles as it has previously. *Cf.* Section III.A, *infra* (noting that the state court could, in the cases of similarly situated applicants, apply non-retroactivity principles even if this Court were to create a new rule in this case).

defense; and 2) does *McCoy* apply only to defendants who claim actual innocence. *See* Petition at 4–11. In other words, Coble expressly asks this Court to extend its holding in *McCoy* to the circumstances of this case, wherein he did not contemporaneously object on the record and did not claim innocence. But such an extension would be a violation of the anti-retroactivity principles enumerated in *Teague v. Lane*, 489 U.S. 288 (1089) (plurality opinion). And Coble asks for such an extension because the facts of his case clearly do not come within the ambit of *McCoy*; thus, his claim lacks merit under *McCoy*. Finally, extending *McCoy* as Coble wishes has no basis in law or policy.

A. This Court should not grant certiorari to review the question presented because it is barred by *Teague's* non-retroactivity principles.

In *McCoy*, this Court held that, where a defendant vociferously insisted that he was factually innocent of the charged criminal acts and adamantly objected to any admission of guilt, the trial court committed structural error when it nevertheless allowed trial counsel to concede his guilt at trial. 138 S. Ct. at 1505 (citation omitted). It concluded, "Once [McCoy] communicated [his desire to maintain his innocence] to court and counsel, strenuously objecting to [counsel's] proposed strategy, a

concession of guilt should have been off the table. The trial court's allowance of [counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment." *Id.* at 1512.

What *McCoy* did not hold—as effectively conceded by Coble's questions presented—was that objections to trial counsel *alone* were enough to constitute a violation or that *McCoy* extends broadly to trial counsel's decision *not* to present a specific defense, particularly where a defendant's factual innocence is not at issue.[5] *See, e.g.*, *McCoy*, 138 S. Ct. at 1510 (noting that in three state cases which had addressed a similar issue, "the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel's preferred course").

Consequently, it is clear that what Coble actually asks this Court to do is to extend—not simply apply—its holding in *McCoy* to encompass the facts of his case. But Coble's conviction became final on October 3, 1994, when this Court denied certiorari from direct appeal. *Coble v. Texas*, 513 U.S. 829, 829 (1994). Hence, under *Teague*, any new

[5] Indeed, as explained further below, Section III.C, such an extension would contravene *McCoy's* guiding principles.

constitutional rule recognized by this Court should not be applicable to Coble unless he meets a *Teague* exception. *See Teague*, 489 U.S. at 310 (holding that unless a new constitutional rule falls within one of the enumerated exceptions, the new rule "will not be applicable *to cases which have become final before the new rules are announced*" (emphasis added)).

Importantly, the rationale for *Teague* applies with equal vigor to this Court's review of a state postconviction proceeding. The *Teague* plurality criticized early retroactivity implementations, noting that the "selective application of new [constitutional] rules violates the principle of treating similarly situated defendants the same." *Id.* at 304 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323–24 (1987)). To avoid the intolerable inequity that disparate treatment engendered, the plurality determined that, with two exceptions, it would "simply refuse to announce a new rule in a given case unless the rule would be applied retroactively *to the defendant in the case and to all others similarly situated*." *Id.* at 316 (emphasis added).

That limiting principle finds application here. The constitutional rule which Coble seeks—an extension of the Court's holding in *McCoy*—

would not benefit all similarly situated petitioners, i.e., petitioners with final convictions who are pursuing state collateral review. Specifically, whether or not Coble could benefit from the new rule, other similarly situated petitioners pursuing state postconviction review are unlikely to benefit because the state courts are free to deny retroactive application of new rules in their own postconviction proceedings. *See Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (holding that state courts are not bound by *Teague* and may adopt their own non-retroactivity rules for postconviction proceedings); *see also* Section II n.3, *supra*.

In sum, Coble's conviction was final in October 1994; hence, any new rule this Court could announce extending *McCoy* to encompass objections made *only* to trial counsel or to situations where the defendant has *not* maintained his factual innocence should not apply to him. This is because such an argument relies on the creation of a retroactive rule of constitutional law, to be applied after a state conviction has become final, and the Court should not grant certiorari on such a basis. With this in mind, Coble's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

B. This Court should not grant certiorari where the facts of Coble's case clearly do not fall within the ambit of *McCoy*.

Coble must rely on an extension of *McCoy* because the facts of his case have no merit under it. In *McCoy*, "the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." 138 S. Ct. at 1505 (citation omitted). Indeed, beginning at his arrest, McCoy had "insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong." *Id.* at 1506. And after reviewing the case, his second counsel Larry English concluded that the evidence was overwhelming and that the only chance to escape the death penalty would be to concede guilt, but McCoy was "furious" about pursuing that strategy and continued to insist that English pursue acquittal. *Id.*

During trial, McCoy's concerns were made clear to the court when McCoy strenuously objected at least twice to his counsel's strategy to concede guilt: once, at a pretrial hearing during which the trial court told counsel, "You are the attorney . . . you have to make the trial decision of what you're going to proceed with"; and second, during his counsel's

closing argument, to which the trial court responded by informing McCoy that his counsel was representing him and that the court "would not permit 'any other outbursts.'" *Id.* at 1506 (citations omitted). McCoy also maintained his innocence during his testimony before the jury, pressing the "difficult to fathom" alibi he had been relying on since his arrest. *Id.* at 1507. Despite this, "the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant 'committed three murders. . . . [H]e's guilty.'" *Id.* at 1505.

Holding that it was unconstitutional to allow defense counsel to concede guilt over the defendant's "intransigent and unambiguous objection," the Court distinguished the facts of the case from its prior decision in *Florida v. Nixon*, 543 U.S. 175 (2004). *McCoy*, 138 S. Ct. at 1509. The Court noted that, in *Nixon*, Nixon's attorney did not "negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective." *Id.* Indeed, "defense counsel had several times explained to [Nixon] a proposed guilt-phase concession strategy, but [Nixon] was unresponsive," neither consenting nor objecting at any point during trial. *Id.* at 1505, 1509. Instead, "Nixon complained about the admission of his guilt only *after* trial." *Id.* at 1509 (emphasis

added). "McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.*

Coble's case does not remotely approximate the facts of *McCoy*. Crucially, not only did Coble not object at any point before or during trial, he *acquiesced*. Indeed, during a colloquy with the trial court after the defense presented its only witness at the guilt phase of trial, trial counsel informed the court:

> MR. ABLES: May it please the court. My client, Mr. Coble, co-counsel, and I have discussed what approach the defense should take today. We have discussed it personally with our client. We've discussed it with our witnesses. In reviewing the record as it stands right now, we have determined at this point we will rest our case. What I would like to do is ask the Court to inquire of our client if in fact that is what Mr. Coble agrees that is we do.

VI RR.1990 723. The court and Coble then had the following exchange:

> THE COURT: All right. And have they gone over the fact that you have the right to call witnesses and offer evidence and offer whatever defenses you might have in this matter?
>
> THE DEFENDANT: Yes, sir.
>
> . . .

THE COURT: And are you in agreement with what Mr. Ables has just stated to the Court?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You understand that you have—in the opinion of the Court, *there is not any evidence in this that's going to justify a submission of insanity as a defense to the jury at this time. You understand that?*

THE DEFENDANT: Yes, sir.

THE COURT: All. Right. Do you have any complaint about the representation that you have received from your attorneys?

THE DEFENDANT: No. sir.

THE COURT: *Are there any witnesses that you have wanted to call as witnesses or wanted them to talk to that they have not either themselves or the investigator Mr. Youngblood, who is also in here, have not talked to?*

THE DEFENDANT: No, sir.

VI RR.1990 723–24 (emphasis added).[6] Thus, Coble's *agreement* is a far cry from the strenuous and insistent objections in *McCoy*.[7]

That Coble's case presents stark differences from *McCoy* is further evidenced by Coble's inaction during counsel's closing argument. The primary focus of defense counsel's closing argument was that, while Coble may have committed three murders, he did not commit them in the same criminal transaction, a necessary component to establish *capital*

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[6] Coble attempts to undermine his express agreement in this colloquy by insinuating that he was involuntarily drugged the day the colloquy took place. *See* Petition at 3; *see also* Coble's Subsequent Application for Writ of Habeas Corpus at 36, *Ex parte Coble*, 2019 WL 640202 (No. WR-39,707-04). But this issue has been litigated in both state and federal courts and found to be without merit. *See, e.g.*, Statement of the Case, Section II, *supra*; IV SHCR-01 at 18 (finding that Coble was medicated with one dose of Vistaril, an antihistamine and anti-anxiety agent, on April 5, 1990, at the request of his attorney and that this dose had absolutely no effect on his subsequent decision not to testify); Mem. Op. and Order at 62–67, *Coble v. Johnson*, No. W-99-CV-080, ECF No. 49 (finding that no facts supported the argument that he was *involuntarily* medicated, given that Coble had the final say on whether to take the medication); *Coble*, 80 F. App'x at 312 (finding Coble's arguments that he did not voluntarily take the Vistaril unpersuasive). Nevertheless, whether or not Coble was medicated on the day of the colloquy does not negate the fact that he failed to object to trial counsel's strategy at any other point in trial, including the day he waived his right to testify on his own behalf.

[7] Indeed, such express agreement is a far cry even from the "general unresponsiveness" presented in *Nixon*. *See McCoy*, 138 S. Ct. at 1509. Thus, Coble would not even be able to show a tenable claim of ineffective assistance of counsel under *Nixon*. *Nixon*, 543 U.S. at 192 ("When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland [v. Washington*, 466 U.S. 668 (1984)], that is the end of the matter; no tenable claim of ineffective assistance would remain.").

murder. *See* VI RR.1990 758 ("We don't have one criminal transaction, because there was not one criminal transaction. This man may be guilty of three murders. He is not guilty of capital murder."), 759–60 ("And I'm not telling you you are going to walk out here and find him guilty of nothing. What I am telling you is the law of capital murder does not apply in this case. The law was not written to apply in this type of case where we have a family situation, a marriage gone bad, kidnapping, anger, frustration, hurt. We have three transactions."), 760 ("If anything, this man is guilty of murder."), 760–61 ("This man did not kill three people in the course of one transaction."); Tex. Penal Code § 19.03(a)(7) (a person commits capital murder if he murders more than one person during the same criminal transaction or during different transactions but pursuant to the same scheme or course of conduct).

Counsel directed the jury to the explicit inclusion of the lesser-included offense instruction in their jury charge. VI RR.1990 751 ("There is two offenses what you are instructed on in this charge. There is capital murder and murder. Now, that's in there for a reason. The judge didn't just put it in there for grins."). And, acknowledging that the jury was

"going to convict the defendant of something," counsel asked them to convict for murder, not capital murder.[8] VI RR.1990 757.

Not once during counsel's closing arguments—or any other point in trial—did Coble express objection, disagreement, or displeasure. *See generally* VI RR.1990 750–61. Rather, the only evidence before this Court of any protest at all is Coble's postconviction affidavit.[9] But complaining

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[8] It is arguable, as noted by the dissent in *McCoy*, that *McCoy* is limited to the circumstances of a full, rather than partial, concession of guilt, unlike the one presented here where trial counsel conceded only to the lesser-included offense of murder. *Compare McCoy*, 138 S. Ct. at 1506 n.1 (noting that McCoy's attorney's lesser-included-offense strategy "would have encountered a shoal, for Louisiana does not permit introduction of evidence of a defendant's diminished capacity absent the entry of a plea of not guilty by reason of insanity"), *with id*. at 1516–17 (noting that, while *McCoy's* attorney *had* conceded only to a lesser-included offense, the majority had found that argument to be a shoal, thus leaving the question of whether admitting guilt of a lesser-included offense is always unconstitutional). Indeed, the TCCA has noted that the "significance of [the majority's] footnote is unclear," but found that, in a situation where the defendant "maintained his innocence and did not ultimately receive a lesser-included-offense instruction," the footnote was not a basis for distinguishing defendant's case from *McCoy*. *Turner v. State*, -- S.W.3d --, 2018 WL 5932241, at *20 n.66 (Tex. Crim. App. Nov. 14, 2018) (No. AP-76,580); *but see State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010) (noting that in the TCCA's jurisprudence on actual innocence, "the term 'actual innocence' shall apply . . . only in circumstances in which an accused did not, in fact, commit the charged offense or *any of the lesser-included offenses*" (emphasis added)).

[9] Coble effectively admits that there is no record evidence of objection during trial. *See* Petition at 8–9 ("Unlike Robert McCoy, Mr. Coble asserted his objective—to present a defense and not concede guilt—only to his lawyers before and during the trial. *He did not raise his concerns to the trial court*." (emphasis added)). Instead, Coble proffers his own self-serving affidavit, offered in support of a claim raised in his first state habeas application that he was involuntarily drugged during trial and in which he alleged that he expressed his displeasure with trial counsel's strategy to trial counsel before and during trial. *See id*. at 9 n.4 (citing to Coble's 1997 affidavit, in which he stated, "I was not satisfied with the decisions my attorneys were making

about the admission of guilt only *after* trial is not sufficient. *See McCoy*, 138 S. Ct. at 1509 ("Nixon complained about the admission of his guilt only after trial. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court."); *Nixon*, 543 U.S. at 185 (Nixon complained that his counsel was ineffective for conceding his guilt without obtaining his express consent for the first time on direct appeal). Thus, even if, as Coble contends, the colloquy between Coble and the trial court were not sufficient to establish express *agreement* to counsel's strategy, *see* Petition at 9 n.3, Coble's complete failure to protest trial counsel's strategy is dispositive.

Yet there remains one final difference: as Coble concedes, Petition at 11, Coble never "insist[ed] that his lawyers present an innocence case." Indeed, even when given the opportunity to testify on his own behalf, Coble assured the court that he did not wish to do so. *See* IX RR.1990

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in not offering any defense," and "[w]hen they decided to rest . . . I did not agree with this decision, and I told my attorneys this."); *see also* Pet'r App. B. However, Coble's affidavit is not "unrefuted." Indeed, the state habeas court found that, even if Coble's affidavit had been admissible and admitted as evidence at the evidentiary hearing, Coble was "not worthy of belief under oath." V SHCR-01 at 1221. In any case, even assuming the veracity of Coble's affidavit, Coble's objections only to trial counsel are not sufficient to establish a claim of trial court error under *McCoy*. *See* Section III.C, *infra*.

1148 ("THE COURT: Do you understand that you have the right to testify if you wish to, or you have the right not to testify? THE DEFENDANT: Yes, sir. THE COURT: And have you come to a decision of your own free will and choice what you wish to do in reference to that matter after talking to your attorney . . . ? THE DEFENDANT: Yes, sir. . . . Not to take the stand."). But in *McCoy*, this Court held "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, *or to maintain his innocence*, leaving it to the State to prove his guilt beyond a reasonable doubt." *McCoy*, 138 S. Ct. at 1505 (emphasis added).

Thus, where there was express agreement with counsel's strategy, a failure to object to or protest such strategy at any other point of trial, and an absence of a consistent and adamant plea of factual innocence, Coble cannot come close to establishing trial court error under the "stark scenario" presented in *McCoy*. *See* 138 S. Ct. at 1510. His claim therefore lacks merit, and this Court should not exercise its discretion to review Coble's petition.

C. This Court should not grant certiorari where the extension of law Coble seeks is not warranted.

Conceding that the facts of his case do not come within *McCoy's* ambit, Coble asks this Court to extend *McCoy*. But, apart from such an extension being barred by *Teague*, *see* Section III.A, *supra*, such an extension is not supported by law or policy. Thus, this Court should not grant Coble's petition.

As indicated above, Coble first asks this Court to extend *McCoy* to encompass a situation where a defendant objected to trial counsel's strategy *only* to trial counsel, not the court. Petition at 4–9. He alleges that "[f]airly read," *McCoy* stands for the proposition that a defendant "must make his objection to defense counsel *or* the court." *Id.* at 5. Coble contends that the sole purpose of the Court focusing on whether McCoy made objections to the trial court was for "issue-preservation," not to establish "the existence of an underlying constitutional claim." *Id.* at 7. He points to "inconsistent conclusions" made by state courts in interpreting *McCoy's* principles on this issue of "when and to whom the defendant must object to raise a possible *McCoy* violation." *Id.* at 6–8 (citing to *Epperson v. Commonwealth*, No. 2017-SC-000044-MR, 2018 WL 3920226, at *12 (Ky. Aug. 16, 2018); *Thompson v. Cain*, 295 Or. App.

433, 441 (2018); *People v. Taylor*, No. C084200, 2018 WL 4063587, at *5 (Cal. App. 3d Dist. Aug. 27, 2018); *Turner v. State*, 2018 WL 5932241, at *20).

But Coble misinterprets these "inconsistent" opinions and ignores *McCoy's* central issue. Indeed, not one of the cases he cites held that an objection to trial counsel alone was sufficient under *McCoy*. *See Epperson*, 2018 WL 3920226, at *12 (finding "striking dissimilarities between Epperson's case and *McCoy*," where Epperson had "not evidenced 'intransigent' or 'vociferous' objection to trial counsel's strategy," nor had he objected at every opportunity, before or during trial, to his lawyer and in open court); *Thompson*, 295 Or. App. at 437– 38, 442–43 (remanding for fact-finding, in light of *McCoy*, on an *ineffective assistance of trial counsel* claim "to evaluate whether trial counsel's strategy to concede sexual contact between defendant and victim during closing met constitutional standards," where defendant had maintained his innocence); *Taylor*, 2018 WL 4063587, at *4 (finding that defendant had failed to establish ineffective assistance for conceding that defendant had committed robbery, but not felony murder, and noting that *McCoy* did not change its view because the record did not "show what counsel

discussed with defendant and does not show that defendant objected to the tactical concession," but assuming he objected, his remedy would lie in habeas corpus, not direct appeal); *Turner*, 2018 WL 5932241, at *17–18 (finding constitutional error where counsel conceded guilt where there was "no question that Appellant wanted to maintain his innocence," as he did on both direct and cross examination before the jury, where it was "apparent from the defense's opening statement that his attorneys knew at the beginning of trial that their strategy was contrary to Appellant's," and where Appellant stated during cross examination that "he had wanted to object to" the defense's opening).

Nor would doing so cohere with *McCoy's* holding that it was *trial court error*—not ineffective assistance of counsel—to allow trial counsel to concede guilt over a defendant's insistent objection. *See McCoy*, 138 S. Ct. at 1512 ("The *trial court's allowance* of [counsel]'s admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment." (emphasis added)). Indeed, to reach that conclusion, the Court distinguished, but did not overrule, its prior holding in *Nixon*—which held that a strategic decision to concede guilt *is* governed by *Strickland*—by focusing, in part, on the fact that McCoy had

opposed counsel's strategy at "every opportunity before *and during trial*, both in conference with his lawyer *and in open court*." *Id.* at 1509 (citing *Nixon*, 543 U.S. at 181, 185) (emphasis added).

The Court thus predicated its holding in these circumstances on "a client's autonomy, not counsel's competence," and the Court consequently did "not apply [its] ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510–11. This makes sense because the Court's decision relied primarily on *Faretta v. California*. *Id*. at 1507–12; *Faretta*, 422 U.S. 806, 823 (1975) (trial court violated defendant's Sixth Amendment rights by forcing him to accept appointed counsel after he had unequivocally expressed his desire to represent himself). Thus, the structural error at issue in these circumstances was the *trial court's*, not counsel's, error. *See, e.g.*, *McCoy*, 138 S. Ct. at 1511 (citing to numerous cases discussing structural error, all within the context of trial court error). It therefore follows that *the trial court* must be made aware of a defendant's objections or objectives, not trial counsel alone. As such, this Court should not extend *McCoy* to find that structural error exists when a defendant objects to trial counsel alone.

Similarly, acknowledging that he, unlike McCoy, never insisted on an actual innocence defense, Coble secondly argues that this Court should extend *McCoy* to situations beyond actual innocence. Petition at 9–11. Coble essentially argues that this Court should apply *McCoy* to find structural error where trial counsel does not *affirmatively* present the specific defense a defendant wishes and then concedes guilt. *Id.* at 11 (arguing that Coble wanted his lawyers to present an insanity defense and Coble did not agree with their decision to drop his defense and concede guilt). But such an interpretation would lead to absurd results.

Indeed, a claim that trial counsel did not *present* a desired defense fits squarely within this Court's ineffective-assistance-of-counsel jurisprudence.[10] *See McCoy*, 138 S. Ct. at 1508 ("Trial management is the lawyer's province: Counsel provides his or her assistance by making decision such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of

[10] And in the instant case, Coble's specific allegation—that counsel failed to present an insanity defense—has also been litigated in the state and federal courts, and counsel's decision not to present an insanity or diminished capacity defense was appropriately found to be strategically reasonable under *Strickland*, in light of the lack of evidence demonstrating that Coble was insane at the time of the offense. *See* V SHCR-01 at 1212; *see also* Mem. Op. and Order at 24–25, *Coble v. Johnson*, No. W-99-CV-080, ECF No. 49.

evidence."); *cf. Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). But a criminal defendant is entitled to "autonomy to decide that the objective of the defense *is to assert innocence*" and to "*insist on maintaining her innocence at the guilt phase of a capital trial*." *Id.* (emphasis added). That is because "[t]hese are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *Id.* (emphasis in original). Thus, "[w]hen a client expressly asserts that the objective of '*his* [defense]' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt" or structural error may ensue.[11] *Id.* at 1509.

By its terms, the Court *did* limit its holding to situations involving a decision between factual innocence and concession of guilt. To be sure, in addressing the dissent's contention that the conflict between McCoy

[11] The dissent in *McCoy* noted that petitioner's counsel, at oral argument before this Court, admitted that, to be constitutionally sufficient, McCoy's counsel "was not required to take any affirmative steps to support [McCoy]'s bizarre defense, but instead of conceding that petitioner shot the victims, [counsel] should have ignored that element entirely." 138 S. Ct. at 1514 (Alito, J., dissenting). Thus, it is clear that even the petitioner in *McCoy* did not contemplate it extending to situation where a counsel declines to advance the specific defense the defendant sought.

and his counsel was unlikely to recur, the Court noted that three other state supreme courts had addressed a similar conflict, and in each of those cases, "as here, the defendant *repeatedly and adamantly insisted on maintaining his factual innocence* despite counsel's preferred course: concession of the defendant's commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defense." *McCoy*, 138 S. Ct. at 1510 (emphasis added). The Court noted: "These were *not strategic disputes about whether to concede an element of a charged offense*; they were intractable disagreements about the fundamental objective of the defendant's representation." *Id.* (emphasis added). Thus, as one court has aptly held, there is no reason to "read *McCoy* to suggest that the 'objective of the defendant' relates to anything other than the defendant's decision to maintain innocence or concede guilt." *United States v. Rosemond*, 322 F.Supp.3d 482, 486 (S.D.N.Y. 2018). Indeed:

> To hold otherwise could have chaotic and untold consequences. [Movant] asks this Court to broaden *McCoy* and call into question whether the many disagreements that arise between criminal defendants and their trial counsel with respect to counsel's choices about how best to seek acquittal in fact are impairments of the criminal defendants' right to autonomy. Extending *McCoy* in this manner could lead to endless postconviction litigation concerning what

> transpired between defendants and their lawyers and how the defendants' unsuccessful defenses were conducted. It would substantially impair the finality of jury verdicts in criminal cases. This is particularly so because such challenged would not be cabined, as they are when a defendant asserts ineffective assistance of counsel, by any requirement that a defendant prove prejudice in order to obtain relief.

Id. at 487. Coble's argument that *McCoy* should be read to encompass defense objectives *beyond* actual innocence therefore has no basis in law or policy, and this Court should decline to review Coble's petition.

IV. Coble Is Not Entitled to a Stay of Execution.

The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Before utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*,

547 U.S. 573, 584 (2006). "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

As discussed above, Coble cannot demonstrate a strong likelihood of success on the merits. He has not preserved any claim alleging a violation of his constitutional rights. And even if his claim was preserved, it is unworthy of this Court's attention. Certainly, the State has a strong interest in carrying out a death sentence twice imposed for a horrific capital murder that occurred nearly thirty years ago. *See Hill*, 547 U.S. at 584. Indeed, the public's interest lies in executing a sentence duly assessed and for which more than a decade's worth of judicial review has terminated without finding reversible error. The public's interest is not advanced by staying Coble's execution to consider a procedurally defaulted and meritless claim based on a decision handed down three decades after Coble terrorized and murdered his ex-wife's entire family. This Court should not further delay justice. *See Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of

justice." (emphasis in original)). Considering all of the circumstances in this case, equity favors Texas, and this Court should deny Coble's application for stay of execution.

CONCLUSION

The state court's dismissal of Coble's claims on an adequate and independent state law ground divests this Court of jurisdiction to consider this petition. Regardless, Coble fails to present a compelling reason to grant certiorari review. For all the reasons discussed above, the petition for a writ of certiorari and application for stay of execution should be denied.

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