No._____

In the Supreme Court of the United States

October Term, 2018

EX PARTE JOHN WILLIAM KING,
Petitioner.

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

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

This Court held in *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) that the Sixth Amendment guarantees a defendant the right to choose "the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." That is exactly what happened in Mr. King's case.

The Texas Court of Criminal Appeals ("TCCA"), in a five-to-four split decision, summarily dismissed Mr. King's "application as an abuse of the writ without reviewing the merits of the [*McCoy*] claim raised." *Ex parte John William King*, No. WR-49,391-03 (Tex. Crim. App. April 22, 2019) (*per curiam*) at *3. Four judges dissented, holding that "[a] death-sentenced who has asserted his innocence since his capital-murder trial" deserves both a stay of execution and time for the TCCA to "decide this issue unhurriedly." *Id*., Keasler, J. dissenting, joined by Hervey, Richardson and Walker, JJ. at *2.

In the wake of *McCoy* at least two questions have already emerged, and will continue to emerge, in the courts called on to apply that case. The first is the scope of *McCoy*, the manner in which a defendant must have objected to trial counsel's decision to forego a defense, the timing of that objection, and *McCoy*'s applicability when trial counsel concedes a defendant's guilt to a lesser-included offense. Yet another question is the retroactive application of *McCoy,* as one of the concurring opinions raised the question of *McCoy*'s non-retroactivity in light of *Teague v. Lane*, 489 U.S. 288 (1989) *Id.,* Yeary, J., concurring.

The conflicting answers courts have given in post-*McCoy* decisions and the clear request for guidance in the TCCA's split decision in this case call for this Court to clarify, and give rise, to the following questions presented:

1. Whether *McCoy* applies when a defendant's attorneys concede, against his wishes, his guilt to a lesser-included offense during final argument, and is a timely and express statement of his wishes to present an innocence defense sufficient to invoke *McCoy*?
2. Assuming, *arguendo*, that *McCoy* announces a "new rule" within the meaning of *Teague*, and also assuming, *arguendo*, that the TCCA's application of *Teague* is an adequate and independent state bar to preclude federal review of the merits of a claim, does the "new rule" this Court announced in *McCoy* constitute a "watershed rule of criminal procedure," such that it satisfies the second exception to *Teague*, which generally bars retroactive applications of new rules of criminal procedure to cases on collateral review?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which John William King was the Applicant before the Texas Court of Criminal Appeals in a subsequent application for a writ of habeas corpus. Pursuant to Sup. Ct. R. 14.1(b), the following list identifies all the parties in previous matters.

Mr. King was the petitioner before the United States District Court for the Eastern District of Texas, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit and this Court. Mr. King is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The district attorney of Jasper County, Texas and the Director and her predecessors, Rick Thaler, William Stephens, and Doug Dretke were the Respondents before the Texas Court of Criminal Appeals, the United States District Court for the Eastern District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit and this Court.

Mr. King asks that the Court issue a Writ of Certiorari to the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Applicant is not a corporate entity.

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In the
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EX PARTE JOHN WILLIAM KING,
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PETITION FOR WRIT OF CERTIORARI

John William King respectfully petitions for a writ of certiorari to review the judgment and decision of the Texas Court of Criminal Appeals.

OPINION BELOW

The Texas Court of Criminal Appeals ("TCCA") decision sought to be reviewed is unreported and is styled as *Ex Parte John William King*, No.WR-49,391-03 (Tex. Crim. App., April 22, 2019) (*per curiam*), and is included in the appendices volume as Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the petition pursuant to 28 U.S.C. §§ 1257, 1651 and 2101(f). The opinion of the TCCA is the final judgment rendered by the state courts of Texas regarding Mr. King's effort to seek review of his judgment under this Court's

ruling in *McCoy v. Louisiana*. The TCCA denied Mr. King's subsequent writ application on April 22, 2019. *Ex Parte John William King*, *supra*. This petition follows timely pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Procedural History.

i. Introduction.

Petitioner John William King, along with two co-defendants, was indicted for capital murder in conjunction with the kidnaping and death of James Byrd, Jr. In Jasper County, Texas. From the time of indictment through his trial, Mr. King maintained his absolute innocence, claiming that he had left his co-defendants and Mr. Byrd sometime prior to his death and was not present at the scene of his murder. Mr. King repeatedly expressed to defense counsel that he wanted to present his innocence claim at trial. When it appeared that his attorneys intended to concede Mr. King's guilt anyways, Mr. King attempted to replace them.[1] He also wrote multiple letters to the court complaining that his attorneys refused to present an innocence defense. When the court did not intervene, he wrote a letter to a Dallas newspaper outlining his claim of innocence. Yet despite Mr. King's explicit and repeated requests, his counsel conceded his guilt to murder at trial.

Almost twenty years later, this Court held in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) that a defendant has a Sixth Amendment right to insist that his counsel maintain his innocence at trial, and that counsel's concession of guilt over the defendant's objections amounts to a constitutional violation. *See id.* at 1505. This is precisely the violation that occurred in Mr. King's case—his Sixth Amendment rights were infringed

[1] As used herein, the words "concede" or "confess" refer to the actions of the trial attorneys in telling the jury that the defendant was guilty; they do not refer to or imply any concession or admission of guilt by the defendant himself, either at trial or thereafter.

when his attorneys conceded his guilt over his express wishes. Because this Court held that a *McCoy* violation amounts to structural error, a new trial is required in Mr. King's case.

The TCCA's April 22, 2019 opinion greatly heightens the need for this Court's intervention and a stay of execution. That Court's five-to-four split decision, *Ex parte John William King, supra* (Appendix A) denied Mr. King's application and stay request by the thinnest of grounds. The four-judge dissent pointed to Mr. King's repeated assertions of innocence and his trial lawyers' overriding of his express wishes to present an innocence defense; the TCCA's unsuccessful attempts to implement this Court's recent death-penalty precedents; and the "horrible stain [the TCCA's] reputation would suffer if King's claims of innocence are one day vindicated (or perhaps, if the Supreme Court eventually decides that *McCoy* should apply retroactively)." *Ex parte King*, *supra* (Keasler, J., joined by Hervey, Richardson and Walker, JJ., dissenting at *2). The two concurring opinions only add to the urgency of this Court's intervention and the need for lower-court guidance: the question of the possible but as-yet-undecided non-retroactivity of *McCoy* (*Ex parte King*, *supra*, Yeary, J, concurring); and the undecided scope of *McCoy*, whether it is limited to "the unique circumstances present"in that case, yet "leav[ing] it to the higher court to address that possible inconsistency in this case..." (*Id*., Newell, J, concurring at *2-*3). This Court should not allow this "injustice that can never be undone," (*Id*., Keasler, J., dissenting at *2), and act now in light of the TCCA's clear request, by a majority of that Court, for guidance on this important issue.

ii. Procedural History.

Mr. King was charged with capital murder and convicted for "intentionally while acting together with Lawrence Russell Brewer and Shaun Allen Berry and while in the course of committing or attempting to commit kidnapping, of James Byrd, Jr., did cause the death of James Byrd, Jr. by dragging him on a road with a motor vehicle" near Jasper, Texas, on June 7, 1988.[2]

At his trial, defense counsel made no efforts to present King's claim of innocence and, despite his plea of "not guilty," at the guilt phase argument his attorneys told the jury he was guilty without his permission, in violation of *McCoy*. (*See* Appendix D).

Mr. King was sentenced to death on February 25, 1999, in the First Judicial District Court of Jasper County, Cause No. 8869, Judge Joe Bob Golden presiding. [ROA.687-691]. On direct appeal, the TCCA affirmed the conviction and sentence on October 18, 2000. *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000).

Nor did Mr. King have any opportunity to present his claim of innocence in state post-conviction proceedings. Attorney John Heath was appointed to represent King in state habeas. Mr. Heath filed a 21-page writ [SHCR 2-23; ROA.753-774], devoid of any extra-record claims or any evidence of investigation of King's claim of innocence. In a letter sent to Mr. King one month before the due date for filing the application Mr. Heath told Mr. King that "*both the direct appeal and the Writ are based solely on the record of*

[2] *See* ROA.684. Page references are either to the federal record pagination on appeal in the Fifth Circuit Court of Appeals, referred to herein as "ROA.[page];" and/or to the state court Reporter's Record ("RR"), with the volume number followed by the page number; or to the Clerk's Record ("CR") or State Habeas Court Record ("SHCR") by the page number.

the case. No new evidence can be brought up at this stage...The purpose of the writ is not to put forth any new defense."[3] [ROA.3410] (emphasis added). Thus, King's claim of innocence was never presented in state court, either at trial or in state post-conviction proceedings.

Mr. King refused to sign this incompetent writ [SHCR 23; ROA.774] and filed with the trial court numerous letters, motions and requests advising of the inadequacy of his representation for failure to investigate or present his innocence, asking to proceed *pro se,* alleging a conflict of interest, and asking for alternative counsel who would investigate his claims. [SHCR 37-77; ROA.802-842].[4] However, the trial court did nothing and simply adopted the State's proposed findings and conclusions, without altering a comma, two weeks after they were submitted. [SHCR 177-200; ROA.776-799].[5] The TCCA adopted the trial court's findings and conclusions and denied the

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[3] Letter of John Heath to John W. King, dated June 19, 2000. The federal district court, in finding that Mr. Heath was not ineffective [ROA.5838], completely ignored this evidence of his incompetence.

[4] These letters and motions to the trial court clearly expressed King's dissatisfaction both with trial counsel's refusal to investigate his innocence claims and his desire to replace state habeas counsel Mr. Heath for the same reasons. King's filings were actually lengthier than those of Mr. Heath.

[5] Compounding the complete failure of King's attorneys in state court, Mr. Heath failed to file any proposed findings and conclusions. On January 8, 2001, the trial court issued an order determining that there were no controverted factual issues, and ordered both parties to file their proposed findings of fact and conclusions of law within 30 days of the order. [SHCR at 86]. The State filed their proposed findings and conclusions on February 7, 2001. [SHCR at 177-201; ROA.776-799]. Mr. Heath simply disregarded this order.

application on June 20, 2001. *Ex Parte John William King,* No. 49,391-01 (unpublished opinion). No evidentiary hearing was held in the state post-conviction proceedings.

Mr. King filed a petition for writ of habeas corpus in the Federal District Court for the Eastern District of Texas, on September 6, 2002. [ROA.241-675]. On March 29, 2006, the district court granted in part the State's motion for summary judgment as to certain claims [ROA.4098-4116] and also granted Mr. King's motion to stay and hold the case in abeyance while he returned to state court to exhaust his remaining claims. [ROA.4117-4118].

Mr. King timely filed his first subsequent state habeas application in the trial court and in the TCCA on June 22, 2006. *Ex parte John William King*, No. WR-49,391-02. [ROA.11260-11622]. Without explanation, the trial court denied two motions for King to proceed *in forma pauperis* and for appointment of counsel. [ROA.11687-11700, 11704-11717, 11729]. No hearing was held and King was without appointed counsel during the pendency of his application. After an unexplained delay of over six years, the trial court forwarded the petition to the TCCA on June 25, 2012 and on September 12, 2012, it was dismissed "without considering the merits of the claims." *Ex Parte John William King,* No. WR-49,391-02 (Tex. Crim. App. Sept. 12, 2012) (not designated for publication). [ROA.11679-11680].

An amended federal petition was filed on January 6, 2013, when Mr. King's case returned to the Federal District Court for the Eastern District of Texas. [ROA.4161-4754]. Motions for discovery [ROA.5584-5654] and an evidentiary hearing [ROA.5662-5716]

were denied [ROA.5802] and the amended petition was denied on June 23, 2016, only a few weeks after the case had been re-assigned to a new judge. The federal district court denied relief on all of the claims raised in the federal petition, finding that they were procedurally barred as a result of the failure to raise them in the initial state court proceedings, and that Mr. King had failed to meet the legal standard for overcoming the procedural bars. That opinion, *King v. Director, TDCJ*, 2016 WL 3467097 (E.D. Tex., June 23, 2016), also denied a certificate of appealability ("COA") on all claims. [ROA.5819-5913].

King timely filed a Notice of Appeal on July 21, 2016. [ROA.5914-5916]; 28 U.S.C. § 2107(a); FED. R. APP. P. 4(a)(1)(A). After briefing, the Fifth Circuit Court of Appeals granted a COA on the claim that trial counsel were ineffective in presenting Mr. King's case for actual innocence, but denied a COA on three additional issues. *King v. Davis*, 703 F. App'x 320 (5th Cir. 2017) (*per curiam*). After further briefing and oral argument in January of 2018, on February 22, 2018, the Fifth Circuit issued an opinion denying relief on King's claim of ineffective assistance of trial counsel for failure to investigate and present his innocence claim. *King v. Davis*, 883 F.3d 577 (5th Cir. 2018). A petition for rehearing was denied on March 23, 2018.

Mr. King filed a petition for *certiorari* in the United States Supreme Court on June 20, 2018. The petition was denied on October 29, 2018. *King v. Davis*, No. 17-9535.

On December 21, 2018, without notice to Mr. King or his counsel, the District Attorney of Jasper County filed a motion requesting that Mr. King be given an execution

date. The same day, within minutes of its filing, and again without prior notice to Mr. King or his counsel, or an opportunity to respond to or oppose the motion, the presiding judge of the First District Court of Jasper County, Texas, the Hon. Craig M. Mixson, granted the State's motion and signed an Execution Order setting April 24, 2019 as Mr. King's execution date.[6]

On April 10, 2019, Mr. King filed a subsequent application for writ of habeas corpus and a motion for stay of execution in the TCCA. *Ex parte John William King*, WR-49,391-03. On April 17, 2019, the State filed a motion to dismiss the subsequent application and deny the motion for stay of execution. On April 18, 2019, Mr. King filed a response to the State's motion. On April 22, 2019, the TCCA in a five-to-four split opinion dismissed his "application as an abuse of the writ without reviewing the merits of the claim raised" and denied his motion to stay his execution. *Id*. at *3. (Appendix A)

B. Statement of Facts and Summary of the Trial.

The relevant facts of Mr. King's trial, relating to his attorneys' concession of his guilt, are discussed *infra* in the following section.

[6] *See* Appendix to Mr. King's accompanying application for stay of execution.

REASONS FOR GRANTING CERTIORARI

This Court Should Grant Certiorari To Clarify the Scope of *McCoy*, That It Applies When A Defendant's Attorneys Concede, Against His Wishes, His Guilt To A Lesser-Included Offense During Argument And That A Timely And Express Statement Of His Wishes To Present An Innocence Defense Is Sufficient To Invoke *McCoy*.

Mr. King's attorneys violated his Sixth Amendment right to decide upon the objective of the defense when they conceded his guilt at trial, in direct contravention of his repeated and unambiguous expressions of his desire to maintain his actual innocence. Although Mr. King told the trial court in letters and in open court that his attorneys were not investigating or presenting his case for innocence, the trial court did nothing and refused to replace them. The trial attorneys' concession of Mr. King's guilt at the guilt phase arguments violated his constitutionally-protected right to dictate the objective of his defense as articulated by this Court in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

A. Statement of Relevant Facts.

i. The record shows that Mr. King, in a timely fashion, made express statements of his will to maintain his innocence, and timely objected to his counsel's intent to act contrary to that objective.[7]

Mr. King voiced his desired objective—to maintain his innocence—both to defense counsel and to the trial court. He did so unambiguously, repeatedly, and through

[7] This was the question posed by the TCCA in *Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018), at *21 ("The question we confront here, then, is: Does the record show that Appellant, in a timely fashion, made express statements of his will to maintain his innocence?")

multiple channels, including through letters to the court and at a pretrial proceeding that took place on January 11, 1999.

Prior to that proceeding, trial counsel Haden "Sonny" Cribbs, Jr., and Brack Jones, Jr. filed a "Motion to Withdraw as Attorney of Record" for Mr. King [CR 143-144] on January 6, 1999, 19 days prior to jury selection. In a hearing held that day, Mr. King did not appear because he was dissatisfied with his representation. [4 RR 6-7].

In the motion to withdraw, defense counsel cited an "irreconcilable conflict of interest" with Mr. King that require[d] their withdrawal from the case. [CR 143]. Notably, the Supreme Court in *McCoy* found that the defendant's attempt to replace counsel—and counsel's request to be relieved—shortly before trial was evidence of a developing rift between the defendant and his attorney. *McCoy*, 138 S. Ct. at 1506; *see also id.* at 1513 (Alito, J. dissenting). In *McCoy*, as here, this request to replace counsel demonstrated the defendant's attempt to take control of his defense, and to remove the lawyers who were unwilling to investigate or assert his innocence claim.

At the hearing on defense counsel's motion to withdraw, held on January 11, 1999, the trial court asked defense counsel Sonny Cribbs if he wanted the court to hear from Mr. King. [5 RR 5; Appendix B]. Cribbs allowed that King could speak "if he desires to testify." [*Id.*] Mr. King then explained that he had already submitted three separate letters to the court [5 RR 5-6, Appendix B], each stating the same thing: that he had a conflict with his court-appointed attorneys due to his "dissatisf[action]" with their unwillingness to present a claim of actual innocence; that Mr. Cribbs is in disagreement of my

innocence;" and that "on several occasions [Cribbs] has stated that he intends to do no more for my defense than try and ensure that I do no[t] receive the death sentence." [CR 160-161; the letters are at Appendix C]. In these letters, the first of which was dated November 23, 1998, Mr. King requested that his court-appointed counsel, Mr. Cribbs and Mr. Jones, be replaced. [*Id.*]

At the January 11 hearing, the trial court acknowledged having been put on notice of Mr. King's desire to maintain an innocence defense; both sides acknowledged the conflict and the subsequent breakdown in communications. [5 RR 5; Appendix B]. The trial court declined to inquire further into the conflict between Mr. King and defense counsel over his trial objectives and denied counsel's motion to withdraw.

Mr. King also raised his desire to maintain his innocence to the media, in statements he made to the press that the State introduced against him at his trial. Mr. King wrote a letter to a reporter for the Dallas Morning News dated November 12, 1998. [ROA.9771-9777]. In this letter, which the State introduced in the guilt phase of his trial through the testimony of the reporter, Judith Lee Hancock [20 RR 118-126; ROA.9060-66] (Appendix E), King maintained that he was not at the scene of Mr. Byrd's murder. Mr. King stated in the letter that, although he had been driving around with Shawn Berry and Lawrence Brewer in Shawn Berry's pickup truck on the night of the murder, June 6, 1998, he had been dropped off at the apartment he shared with Berry and Brewer while Mr. Byrd was still alive. [*Id.*]

Thus, the reading of this letter before the jury, without any corresponding defense evidence in support, made clear that defense counsel was not contesting guilt, in direct contravention of Mr. King's wishes, subverting and contravening his stated account of his innocence as read to the jury. [20 RR 119-125; ROA.9060-66]. In *McCoy*, the defendant similarly presented an alternative narrative in his testimony at trial, and this Court found that this was plain evidence of the defendant's desire to further an innocence claim. *McCoy*, 138 S. Ct. at 1507. Likewise, here, State's the introduction of Mr. King's statements to the Dallas Morning News shows that Mr. King wanted to argue that he was not present at the scene of the crime—clearly contrary to the defense presented by his counsel.[8]

Mr. King repeatedly expressed his objection to conceding guilt—in letters to the court, at the January 11 hearing, and through his media statements that the State introduced at trial. The sum of these objections amounts to unmistakable evidence of Mr. King's desire to maintain his innocence.

That King did not expressly object during final argument does not defeat a *McCoy* claim, as other courts have held:

> Further, while defendant did not object during closing argument after his counsel conceded his guilt of voluntary manslaughter, we do not think preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction. Rather, the record must show (1) that defendant's plain objective is to maintain his innocence and pursue an acquittal, and (2) that

[8] All that was presented at the defense guilt stage were three very brief witnesses who testified regarding King's racial attitudes and the origin of his tattoos. [21 RR 73-111]. None of this testimony went to King's innocence.

> trial counsel disregards that objective and overrides his client by conceding guilt. (*McCoy*, *supra*, 584 U.S. at pp. ——, ——, 138 S. Ct. at pp. ——, —— – —— [200 L.Ed.2d at pp. 827, 829-833].) Although such evidence may come in the form of a defendant objecting during argument, on this record we conclude *McCoy* applies here.
> *People v. Eddy*, 2019 WL 1349489 (Ca. Ct. App. 3d Dist, Mar. 29, 2019) at *6.

Similarly, in interpreting *McCoy*, the TCCA has held that "[a] defendant makes a *McCoy* complaint with sufficient clarity when he presents express statements of [his] will." *Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018), at *20. Although Mr. King clearly did this, the TCCA did not discuss *Turner* and its simularities with Mr. King's case in summarily denying his subsequent application. *Ex parte John William King*, *supra* (Appendix A). Like the defendant in *McCoy*, Mr. King maintained his innocence "at every opportunity . . . both in conference with his lawyer and in open court." *McCoy*, 138 S. Ct. at 1509.

ii. At the guilt phase arguments, Mr. King's counsel conceded his guilt to the lesser-included offense of non-capital murder.[9]

At the guilt phase arguments defense counsel conceded King's presence at the scene of Mr. Byrd's murder. Defense counsel Brack Jones began by telling the jury that "I think it's clear to the jury that a capital murder is the intentional killing of an individual while in the commission of another felony. In this case, as we talked about [that felony] is kidnapping...Basically kidnapping is an abduction..." [22 RR 23]. Jones then argued that the dragging was not a kidnaping or an abduction, but was the method of death, that

[9] Relevant excerpts from defense counsel's guilt phase arguments are included in the appendices volume as Appendix D [22 RR 23-32, 35, 38, 44-46; ROA.9249-9258, 9261, 9264, 9270-9272].

there was no restraint, and that the basic "question is was Mr. Byrd kidnapped?" [22 RR 25-27]. He also argued that the dragging was the cause of death and not the abduction and kidnapping [22 RR 27-29] and that Byrd voluntarily got into the pickup. [22 RR 31].[10] Mr. Jones told the jury that "[w]e know at a point there was a terrible, terrible brutal, horrendous, painful death, absolutely no question. The question is was Mr. Byrd kidnapped?" [22 RR 27]. He then argued that "was that an assault or was it a kidnapping? Was that a fight, a killing or a kidnapping?' [22 RR 29]. His argument was that "they have not proved kidnapping" by pointing out that the tattoos and the book on the Ku Klux Klan did not prove a kidnaping. [22 RR 30]. He added

> Don't find the elements of kidnapping because of what he believes or what happened to him in the penitentiary. Find it only based on evidence, based on beyond a reasonable doubt; and please remember you can strongly believe a kidnapping occurred or you can believe he's not guilty of the kidnapping, and that's not enough.
> [22 RR 30-31].

Mr. Jones further stated that the State could not prove kidnaping "because we only have Mr. Byrd voluntarily getting into that pickup...We don't think a kidnapping occurred...The murder and the kidnapping are two separate issues that you've got to reach, and we ask you to consider that." [22 RR 31-32].

Attorney Sonny Cribbs gave the remainder of the defense argument and continued this theme of guilt-but-no-kidnaping. [22 RR 32]. Cribbs argued that "if there is a doubt in your mind or reasonable doubt in your mind that it is no proof to you beyond a

[10] The State's theory was that there was a fight in the truck when the victim Mr. Byrd resisted being forced out at the crime scene [ROA.8286, 8292, 8293, 8297] where the ashtray could have been spilled.

reasonable doubt that there is a kidnapping, then the law requires you to find him not guilty of capital murder, and then you can proceed with the issue of murder." [22 RR 35]. He said, regarding the cigarette butt that had King's DNA on it, that if he is a racist he would not share it with a black person [22 RR 38], thus conceding his presence at the crime scene and his guilt of non-capital murder. Cribbs argued extensively that the State had not proved capital murder, which required proof of kidnaping:

> [H]as the State proved beyond a reasonable doubt that John William King committed the offense of capital murder? Did he intentionally kill James Byrd Jr. While committing the offense of kidnapping or intentionally or attempting to commit kidnapping? If they fail to prove that element, and that is an element, then you must find him not guilty [of capital murder]. If [you] find him not guilty of capital murder, the alternative then comes to the lseer included offense. [non-capital murder]
> [22 RR 44; ROA.9270]

Cribbs also argued that

> [t]he only thing we're talking about is whether John William King killed James Byrd, Jr. In the commission or attempted commission of kidnapping. And we haven't heard very much evidence about kidnaping. We've heard a lot of evidence about the way Mr. Byrd died and it is absolutely unimaginable to die like that. But the cause of death doesn't make it a capital murder period.
> [22 RR 45-46; ROA 9271-9272].

He then went on to explain that "the State of Texas hasn't proven beyond a reasonable doubt, the offense of capital murder, as required by proving [the] additional element of kidnapping beyond a reasonable doubt or attempted, *then you must find him guilty of* [non-capital] *murder*." [22 RR 46] (emphasis added).

Cribbs also conceded Mr. King's presence at the crime scene. Cribbs told the jury that "[t]he one cigarette butt that tends to tie John William King to this offense is a cigarette butt that I remember Mr. Gray saying is that one that somebody else took a drag off" [22 RR 38], forgetting that it was inconclusive as to Byrd and did not necessarily tie Mr. King to the victim or indicate his presence at the crime scene.[11] Defense counsel then argued that Byrd may have taken the butt out of the ashtray "and took a puff because the doctor said that could be how the contamination of the DNA evidence on that cigarette butt got there" [22 RR 39], again ignoring that the DNA was inconclusive as to Byrd. Cribbs told the jury that the charge says "mere presence alone at the scene of the alleged offense, if any, will not constitute one a party to the offense" [22 RR 41] and argued that the State had not proved beyond a reasonable doubt that King committed a murder in the course of a kidnaping. [22 RR 44]. This too was a concession to the lesser-included offense, non-capital murder.

At the guilt phase argument, Mr. King's attorneys conceded all elements of the lesser included charge—non-capital murder—in violation of his Sixth Amendment rights. Mr. King's counsel contested only one element of the capital murder charge: to be guilty under the prosecution's capital murder theory, he must have committed murder in the course of committing another felony—in this case, kidnaping. *See* TEX. PENAL CODE

[11] The cigarette butt was never shown to have Mr. Byrd's DNA on it—the tests were inconclusive. The testimony was that King was the major contributor, and Byrd could not be excluded as a minor contributor but could also not be confirmed. [ROA.8966]. In all, King's DNA was found only on the cigarette butt which contained King's primary and *possibly* Byrd's DNA. [ROA.8993].

ANN. §19.03(a)(2) (Vernon Supp. 1986); *see also* CR 239, 242; ROA.6392 (jury instructions on the capital charge). Trial counsel only contested the kidnapping, but not the non-capital murder charge and repeatedly conceded Mr. King's guilt on all elements of the capital charge except the kidnaping. This strategy—in light of the pile of evidence presented by the prosecution—was a concession of Mr. King's guilt on the non-capital murder charge.

B. Certiorari Should Be Granted Because The TCCA's Opinion And Summary Dismissal Conflicts With *McCoy*.

i. Defense counsel's concession of guilt to a lesser-included offense undermined Mr. King's constitutional right to determine the objectives of his defense.

Despite Mr. King's repeatedly-conveyed desire to present an actual innocence defense, his trial counsel presented no evidence to demonstrate that Mr. King was in fact innocent and told the jury he was guilty of non-capital murder. In doing so, trial counsel conceded Mr. King's guilt, directly contrary to his stated objective. This concession violated Mr. King's Sixth Amendment right to determine the "objective of his defense" as articulated in *McCoy*. *See also Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018).

This concession, contrary to Mr. King's clear and unwavering wishes to the contrary, violated his Sixth Amendment rights as articulated by this Court in *McCoy*. As this Court held, defense counsel "could not interfere with McCoy's telling the jury 'I was not the murderer.'" *McCoy*, 123 S. Ct. at 1509. When counsel is "[p]resented with

express statements of the client's will to maintain innocence," as Mr. King's counsel was here, "counsel may not steer the ship the other way." *McCoy,* at 1510.

Further, during trial, defense counsel made no attempt to present evidence that Mr. King was not present at the scene of the Mr. Byrd's death. Such evidence would have been crucial to an innocence claim, since Mr. King was convicted under the law of the parties, meaning that his presence and any action in furtherance of the crime would be enough to convict. By conceding King's presence at the crime and contesting only the fact that a kidnapping had occurred, the defense effectively conceded King's guilt.

Further, Mr. King's counsel presented only three witnesses at the guilt phase, none of whom could speak to the events of the night in question or cast doubt on the prosecution's narrative of the alleged murder. [21 RR 73-111]. Instead, the defense's case only and exclusively sought to explain the trauma Mr. King experienced from a prior incarceration, and to refute claims that he held long-ingrained racist attitudes. The entirety of the testimony brought forth by defense counsel went to mitigation, rather than innocence; the defense merely sought to *explain* Mr. King's behavior, rather than to *deny* it.

In light of *McCoy*'s requirement that counsel not concede guilt over a defendant's clear desire to the contrary, trial counsel's concession that Mr. King was guilty of non-capital murder violated his Sixth Amendment right to be master of his own defense.

ii. This Court's holding in *McCoy* compels a reversal.

As this Court held in *McCoy v. Louisiana*, 138 S. Ct. 1500, 1503 (2018), the Sixth Amendment guarantees a defendant the right to choose "the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." This Court also held for the first time that "[t]he Court's ineffective-assistance-of-counsel jurisprudence, *see Strickland v. Washington*, 466 U.S. 668...does not apply here, where the client's autonomy, not counsel's competence, is in issue." *Id.* at 1504.[12]

McCoy, a capital case, involved the killing of three victims in Louisiana, where the defendant was appointed counsel from the public defender's office. *Id.* at 1506. However, the attorney-client relationship quickly broke down, as it did with Mr. King's attorneys, and Mr. McCoy sought leave to represent himself until his parents retained new counsel, Mr. Larry English. *Id*. New counsel concluded that the evidence against his client was overwhelming, and that a death sentence was inevitable. *Id.* English told McCoy this two weeks prior to trial, and McCoy was "furious" when told that English planned to concede McCoy's commission of the murders to the jury. *Id*. McCoy told English not to make that concession and wanted him to pursue acquittal. *Id*. Part of English's strategy, as with Mr. King's attorneys, was to argue for an offense less than capital murder, in McCoy's case due to his mental incapacity which prevented him from forming the specific intent necessary for the commission of first degree murder. *Id.*

[12] Despite this Court's clear instruction in McCoy that the former ineffective-assistance-of-counsel framework was no longer the standard for evaluating

Just as with Mr. King, McCoy sought to terminate English's representation. *Id*.[13] The Court refused the request, as it did with Mr. King. At his opening statement at the guilt phase, English said that the evidence conclusively showed that McCoy was guilty. McCoy protested. English continued his opening statement, telling the jury that the evidence was unambiguous and that his client committed the three murders. *Id.* at 1507. In his closing argument, English reiterated that McCoy was the murderer. *Id.*

On appeal, the Louisiana Supreme Court "affirmed the trial court's ruling that defense counsel had authority so to concede guilt, despite the defendant's opposition to any admission of guilt" because "counsel reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence." *Id*. The Supreme Court Court granted *certiorari* on the question of "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.*

This Court initially distinguished the situation in *McCoy* from *Florida v. Nixon*, 543 U.S. 175 (2004). *Nixon* held that "when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy"... '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." *Id.* at 1505, quoting *Nixon* at 192. *Nixon* was not applicable in *McCoy* because McCoy insisted on his innocence and objected to the

[13] As previously noted, before trial, Mr. King brought his concerns about his trial attorneys' failure to investigate his claims of innocence to the attention of the trial court and asked for their dismissal.

admission of guilt, *McCoy* at 1505, 1509. Here too, King insisted on his innocence throughout the process, whereas in *Nixon*, the defendant declined to participate in his defense. *McCoy* at 1509.

McCoy distinguished between duties traditionally the province of counsel and those of the defendant:

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez v. United States,* 553 U.S. 242, 248 (2008)...Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.
> *McCoy* at 1508, citing *Jones v. Barnes,* 463 U.S. 745, 751 (1983).

This Court then affirmed the principle that

> [a]utonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These 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*.

McCoy at 1508, *citing Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty").

The *McCoy* Court recognized that

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.; Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. Rev. 1147, 1178 (2010) (for some defendants, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence"); cf. *Jae Lee v. United States,* 582 U.S. ——, ——, 137 S.Ct. 1958, 1969, 198 L.Ed.2d 476 (2017) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certai[n]" conviction (emphasis deleted)). When a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U.S. Const. Amdt. 6 (emphasis added); see ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation").
> *McCoy* at 1508-1509.

This Court's opinion in *McCoy* constitutes a new, important, and broad pronouncement about the defendant's personal right to dictate the objectives pursued at trial. It is not an opinion that should be read in the narrowest possible terms—the terms the State will advance here. In recognizing that "[s]ome decisions [] are reserved for the client," the Court did not limit the defendant's decisional right to extend only to maintaining absolute innocence. *McCoy*, 138 S. Ct. at 1508. Instead, it wrote about the defendant's "[a]utonomy to decide [] the objective of the defense." *Id.* The opinion cites the American Bar Association's Model Rule of Professional Conduct 1.2(a), which provides that a "lawyer shall abide by a client's decisions concerning the objectives of the representation." *Id.* at 1509. Thus, the concession by Mr. King's attorneys that he was

guilty of the lesser-included offense of non-capital murder violates the holding of *McCoy* and he must be granted a new trial.

Other courts have similarly held that concession to a lesser-included offense constitutes a *McCoy* violation. *See, e.g., State v. Horn*, 251 So. 3d 1069, 1074 [c]ounsel specifically told the jury he was not asking them to find the defendant 'not guilty,' and further stated that the facts fit second-degree murder or manslaughter");[14] *Eddy*, 2019 WL 1349489 at *6 (finding a *McCoy* violation where "counsel conceded his [client's] guilt of voluntary manslaughter" in a first-degree murder case).

Mr. King "should not be expected to object with the precision of an attorney," especially where the evidence reflects that he did assert his objective to both the court and his attorneys and the lawyers simply overrode it and argued he was guilty of a lesser-included offense.

iii. This Sixth Amendment error is structural, not requiring a showing of prejudice.

McCoy held that

> "[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), or *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984), to McCoy's claim. See Brief for Petitioner 43–48; Brief for Respondent 46–52. To gain redress for attorney error, a defendant ordinarily must show prejudice. *See Strickland,* 466 U.S., at 692, 104 S. Ct. 2052. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.

[14] The Supreme Court of Louisiana in *Horn* also held that "*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *Id.* at 1075.

McCoy at 1510-1511.

This Court further elaborated as to why a finding of prejudice was not required:

> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, *e.g., McKaskle,* 465 U.S., at 177, n. 8, 104 S. Ct. 944 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); *United States v. Gonzalez–Lopez,* 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (choice of counsel is structural); *Waller v. Georgia,* 467 U.S. 39, 49–50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (public trial is structural). Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver,* 582 U.S., at ——, 137 S.Ct., at 1908 (citing *Faretta,* 422 U.S., at 834, 95 S.Ct. 2525). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U.S., at —— – ——, 137 S.Ct., at 1908 (citing *Gonzalez–Lopez,* 548 U.S., at 149, n. 4, 126 S.Ct. 2557, and *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).
>
> *McCoy* at 1511.

This Court found two rationales for this finding: (1) that counsel's override of his client's wishes negated McCoy's constitutional rights and created a structural defect in the proceedings; and (2) that it blocked the defendant's right to make the fundamental choices about his own defense. *Id.* "McCoy must therefore be accorded a new trial without any need first to show prejudice." *Id.*

Nor has this Court always required a showing of actual prejudice where a defendant's constitutional rights have been infringed. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (citing cases of structural error); *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (finding actual prejudice not required when members of defendant's race were excluded from grand jury); *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984) (noting structural error in the denial of a public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (finding the right to self-representation at trial "is not amenable to 'harmless error' analysis"); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (finding the total deprivation of the right to counsel warranted reversal of defendant's conviction); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (reversing defendant's conviction where judge was not impartial at trial).

In some circumstances—for example where counsel has been completely denied, where counsel fails to subject the prosecution's case to meaningful adversarial testing, or where circumstances justify a presumption of prejudice, such as where counsel has an actual conflict of interest in representing multiple defendants—structural error is present and no showing of *Strickland* prejudice is required. *See also Cronic*, 466 U.S. 648, 659 (1984)).

The underlying claim here is the un-counseled and against-his-will admission of his guilt which deprived King of his right to plead not guilty and prevented him from being the master of his own defense in violation of the Sixth Amendment. *See McCoy*, 138 S. Ct. at 1510–11; *cf.* Corrected Brief for Petitioner at 43, *McCoy v. Louisiana*, 138

S. Ct. 1500 (2018) (No. 16-8255), 2017 WL 6885223, at *43 (McCoy also argued that "[w]ere this Court to...analyze counsel's admission of guilt as an issue of ineffective assistance of counsel, McCoy would still be entitled to a new trial. England's admission of McCoy's guilt...constituted ineffective assistance under *United States v. Cronic*, 466 U.S. 648 (1984)."

C. The TCCA's Opinion Heightens the Need For This Court's Intervention As The Majority of that Court Are Requesting Guidance on *McCoy*.

The opinion of the TCCA is a clear request for guidance by a majority of that Court, on both the scope of *McCoy* and its possible non-retroactivity. These are the two questions presented herein. Granting certiorari and issuing a stay here will serve both the public and the State's interest in seeing that justice is done, as in the wake of *McCoy* these questions are virtually certain to re-occur soon.

In *Ex parte John William King* (Appendix A), the four-judge dissent points to the facts of Mr. King's case being similar to Mr. McCoy's: King's repeated assertions of innocence and his trial lawyers' overriding of his express wishes to present an innocence defense. *Id.* (Keasler, J., dissenting at *2.)

As the dissent acknowledges, and as discussed in Mr. King's accompanying application for a stay of execution, there is abundant evidence of his innocence, an issue that is still unresolved. For instance, co-defendant Russell Brewer has admitted that King was not involved in the crime in his lengthy statement "Coup de Grace" [ROA.4766-4805] written shortly before his execution in 2011. Brewer states that King was not

present when Byrd was murdered; that Shawn Berry was using steroids and was supplied with them by the victim, the motivating factor for the murder; and that at his trial, Brewer was pressured by his attorneys into substituting John King for Lewis Berry as being at the scene of the crime. [*Id.*]. There is also evidence that the main piece of forensic evidence against King, sandals with the victim's blood on them, did not belong to Mr. King but to his roommate.[15] Mr. King's attorneys failed to explain that on the night of the murder, other people had access to Mr. King's "Possum" lighter found at the scene of the crime;[16] failed to point out obvious inconsistencies in the State's theory of the case and logical gaps in their reasoning; and failed to present evidence that Mr. King planned to re-locate to Georgia, which would have negated his alleged motive for the crime, to start a race-hate group in Jasper, Texas.[17]

The four-judge dissent also acknowledges the TCCA's unsuccessful attempts to implement this Court's recent death-penalty precedents, pointing to *Moore v. Texas*, 139

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[15] FBI agent Tim Brewer testified that King's shoe size was nine and a half and Shawn Berry's was a size nine. [ROA.8527, 8543]. Brewer was a size seven. [ROA.8528]. Lewis Berry was a size ten. [ROA.8540, 8547]. Agent Brewer testified that the sandals that had blood on them, State's Exhibit 45, were size ten sandals. [ROA.8477].

[16] Keisha Adkins McNeely states in an affidavit that on the night of the murder "Shawn Berry, Russell Brewer, Bill and I were standing at the bar and someone had the lighter. I didn't see Bill with the lighter...The lighter was readily available to anyone in the apartment who wanted to pick it up." [ROA.1447]. Brewer confirms that he, not King, actually had possession of the lighter on the night of the murder in his statement. [ROA.11215].

[17] Probation documents un-presented at trial indicated three different requests for a transfer of King's probation to Georgia. [ROA.4095-4097]. A January 30, 1998, a "Placement Request" was submitted to transfer King's probation to his new "proposed residence" in Duluth, Georgia to be with his natural father [ROA.4095]; a February 2, 1998 formal request for a transfer of probation to Georgia [ROA.4096]; and a March 2, 1998 request, a mere three months before the murder. [ROA.4097].

S. Ct. 666 (2018), and the "horrible stain [the TCCA's] reputation would suffer if King's claims of innocence are one day vindicated (or perhaps, if the Supreme Court eventually decides that *McCoy* should apply retroactively)." *Ex parte King*, *supra* (Keasler, J., joined by Hervey, Richardson and Walker, JJ., dissenting at *2).

The two concurring opinions only add to the urgency of this Court's intervention and the need for lower-court guidance: the question of the possible but as-yet-undecided non-retroactivity of *McCoy* (*Ex parte King*, *supra*, Yeary, J, concurring); and the undecided scope of *McCoy*, whether it is limited to "the unique circumstances present"in that case, and "leav[ing] it to the higher court to address that possible inconsistency in this case..." (*Id*., Newell, J, concurring at *2-*3). This Court should not allow this "injustice that can never be undone," (*Id*., Keasler, J., dissenting at *2), and act now in light of the TCCA's clear request for guidance in this important issue by a majority of that Court. because there is substantial evidence of Mr. King's innocence.

The four-judge dissent clearly addresses the danger of leaving this question unresolved:

> What harm do we risk by taking that course [granting a stay]? If King's claims lack merit, then the justice he so richly deserves will only have been delayed. If, on the off chance, his claims are meritorious, the Court's decision will have paved the way for an injustice that can never be undone. A few months' delay seems a small price to pay to avoid that horrifying possibility—even if it is but a slight possibility.

Ex parte King, supra, Keasler, J, dissenting, joined by Hervey, Richardson and Walker, JJ.

The four-judge dissent also addresses the "public interest" criteria in granting a stay and examining the issue without the

> What I do know is this: A death-sentenced man who has asserted his innocence since his capital-murder trial has asked us to review his claim that his trial lawyer overrode his express wishes to pursue a defense consistent with his innocence. In light of this Court's recent earnest, but ultimately unsuccessful, attempts to implement new Supreme Court precedent in death-penalty cases, and especially in light of the horrible stain this Court's reputation would suffer if King' claims of innocence are one day vindicated (or, perhaps, if the Supreme Court eventually decides that *McCoy* should apply retroactively), I think we ought to take our time and decide this issue unhurriedly. I would grant the stay.
> *Id.*

Another judge who concurred in the majority opinion also seemingly asks for guidance from this Court on the issue of the ambit and scope of *McCoy*: "[n]evertheless, I would leave it to the higher court to address that possible inconsistency in this case rather than wait years for clarification." *Id.,* Newell, J concurring at *3.

Mr. King has not had an evidentiary hearing on this or any claim. *See Frank v. Mangum,* 237 U.S. 309, 326 (1915) (due process requires "a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure"); *McDonald v. Missouri*, 464 U.S. 1305, 1306-1307 (1984) (Blackmun, J., in chambers) (stating that any person with a right to review, "no matter how heinous his offense may appear to be, is entitled to have that review before paying the ultimate penalty.)

D. *McCoy* Represents a "Watershed Rule" Not Subject to *Teague*.

Regarding the second question presented regarding *McCoy*'s retroactivity raised in Judge Yeary's concurrence, *Teague v. Lane*, 489 U.S. 288 (1989) presents no bar to this Court's consideration of Mr. King's claim. On May 14, 2018, this Court announced in *McCoy* that a criminal defendant has the right to decide upon the objectives of his trial. The autonomy *McCoy* establishes extends beyond entering a plea, waiving the right to a jury trial, or waiving the right to testify on one's own behalf, and includes the right to maintain one's innocence of the charged offense. This Court held in *Teague* that, as a general principle, new constitutional rules of criminal procedure should not apply retroactively to cases on collateral review at the time the new rule is announced. This principle is subject to two important exceptions: first, that a rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" (*Teague*, 489 U.S.16 at 311). The second exception is that a new rule should apply retroactively if it requires the observance of "those procedures that . . . are implicit in the concept of ordered liberty" *id*. at 693; this Court has explained that procedures "implicit in the concept of ordered liberty" are those that constitute a "watershed rule of criminal procedure." *Id*. at 311.

Assuming, for the sake of argument, that *McCoy* announces a "new rule" within the meaning of *Teague, McCoy* would not have retroactive effect to cases, such as Mr. King's, that are on collateral review, except that it constitutes a watershed rule of criminal procedure and thus falls within the second *Teague* exception. Before *McCoy*, this Court

had not recognized or laid the groundwork for the claim that a defendant possessed a Sixth Amendment right to decide upon the objective of his defense. This Court's prior case law did not apply the Sixth Amendment standard newly-used in *McCoy*; rather, it addressed claims about a client's trial objectives under the rubric of the right to the effective assistance of counsel, a standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *McCoy* therefore broke new ground, holding that "[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence" *McCoy*, 138 S. Ct. at 1510-11. *McCoy* was the first case to explicitly recognize this type of Sixth Amendment violation. It represents a significant departure from this Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004) and it sets a new standard for evaluating a criminal defendant's right to autonomy under the Sixth Amendment, outside the prior framework of effective assistance of counsel. It creates an entirely new category of decisions that fall within the scope of the client's domain, rather than counsel's, at trial, and it constitutes a watershed rule of criminal procedure.

Trial management is ordinarily the lawyer's province: counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *McCoy* 138 S. Ct. at 1508, citing *Gonzalez v. United States*, 553, U.S. 242, 248 (2008). A criminal defendant, on the other hand, retains certain rights: the right to decide whether to go to trial or plead guilty; the right to insist upon a jury; the right to

testify on his or her own behalf (or to waive such a right). In *McCoy*, this court held that the criminal defendant now has an additional fundamental right: the right to decide that the objective of his defense is to assert innocence. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence, or to reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. This right falls within the ambit of a client's autonomy because "these 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*. (*McCoy*, 138 S. Ct. at 1508, emphasis added.) This type of choice falls outside the realm of the lawyer's domain or control and into the realm of the client's control.

The rule announced in *McCoy* is a significant departure from the 2004 decision in *Florida v. Nixon*. In *Nixon*, this Court considered whether the Constitution bars counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." This Court held that when counsel confers with a defendant and the defendant remains silent, neither approving nor opposing, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy. *Nixon* at 192. *McCoy* was different: the defendant explicitly told his trial counsel not to concede (as did Mr. King) and trial counsel knew of Mr. McCoy's opposition to counsel telling the jury that he was guilty of the murders.

This Court in *Teague* drew from Justice Harlan's approach to retroactivity doctrine, in *Mackey v. United States*, 401 U.S. 667 (1971), in which he explained:

> Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.

Mackey at 693-94. Justice Harlan gave as an example of one such "bedrock procedural element" the "right to counsel at a trial now held a necessary condition precedent to any conviction for a serious crime." *Id*.

McCoy announces a watershed rule of criminal procedure that falls within the second exception to the *Teague* non-retroactivity principle because it, too, is a "bedrock procedural element" designed to "vitiate the fairness of the conviction." *Teague* at 312-13, quoting *Mackey,* 401 U.S. at 693-94. A *McCoy* violation is a structural error requiring a new trial to correct:

> "Counsel's admission of a client's guilt over the client's express objection is error structural in kind . . . such admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt."

McCoy, 138 S. Ct. at 1511.

Based on this reasoning, this Court decided that a *McCoy* violation necessitates a new trial without requiring the defendant to show first that he was prejudiced by the concession. It also provides a rationale for giving retroactive effect to the rule announced in *McCoy* to cases on collateral review at the time *McCoy* was decided.

E. *Teague* is not an established, consistently applied rule and it is not independent of federal law in Texas.

For two individually sufficient reasons, this Court has jurisdiction to review Petitioner's *McCoy* claim in the first instance. First, the TCCA does not have a firmly established and consistently applied rule for applying "new law" from this Court; the TCCA has specifically held decisions from this Court are "new" under state law although they are not "new" under *Teague v. Lane*, 489 U.S. 288 (1989), and has only applied *Teague*'s exceptions inconsistently. Second, the *Teague* rule that the TCCA applies in some arbitrarily chosen instances, and apparently applied in this case, is not independent of federal law, it *is* federal law, as is the federal constitutional question whether watershed rules of criminal procedure must be applied retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

The TCCA refused to consider the merits of Mr. King's *McCoy* claim on grounds that it is barred by Texas's anti-successor rule, Article 11.071, § 5(a). *Ex parte John William King, supra*, Appendix A at *3. The anti-successor rule has an exception where "the … claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application … because the

factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1). According to the concurring opinion of Judge Yeary in this case, the TCCA has added to that requirement of previous unavailability, a requirement that the previously unavailable rule be retroactively applicable under this Court's *Teague* rule. In this instance, *McCoy* would be applicable if it falls under *Teague*'s second exception for watershed rules of criminal procedure. Yeary, J., concurring at *2-*3.

This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting independence and adequacy test for procedural bars to federal habeas review from *Harris v. Reed*, 489 U.S. 255, 260 (1989), in determining jurisdiction under 28 U.S.C. § 1257). Conversely, this Court has jurisdiction to consider Petitioner's *McCoy* claim if the state court's decision was not "based on bona fide separate, adequate, and independent grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). "The question whether a state procedural ruling is adequate is itself a question of federal law." *Beard v. Kindler*, 558 U.S. 53, 60 (2009).

The adequacy of a procedural ruling turns on whether the rule was "firmly established and regularly followed" at the time it was applied to the petitioner's claim. *Id.* (internal quotation marks and citations omitted); *Ford v. Georgia*, 498 U.S. 411, 424

(1991). The TCCA did not have a firmly established and regularly followed rule regarding the application of *Teague* to applications brought under § 5(a)(1).

It is hornbook law that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar cases." *Barr v. City of* Columbia, 378 U.S. 146, 149 (1964) (quoted in *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1983)). Due to Texas's history of failing to comply with the Eighth Amendment's requirements for individualized, proportionate sentencing, the TCCA has had many occasions to consider whether to apply to long-final cases decisions from this Court that the TCCA considers "new law" under Article 11.071, § 5(a)(1), of the Texas Code of Criminal Procedure. When doing so, the TCCA has not mentioned *Teague*. *See*, *e.g.*, *Ex parte Hood*, 304 S.W.3d 397, 404-405 & n.41 (Tex. Crim. App. 2010) (collecting cases in which TCCA retroactively applied "new" Eighth Amendment law under § 5(a)(1) without considering *Teague*).

The concurrence of Judge Yeary faulting Petitioner's counsel for failing to argue *Teague* is ironic because the attorney for the petitioner in *Ex parte Hood*, in which *Teague* is not mentioned, is counsel for Petitioner in this case, in which *Teague* was decisive. *See Hood*, 304 S.W.3d at 397. The essence of the "firmly established" requirement is that it gives the litigant notice of what he must do to avoid a finding of default. *See Ford*, *supra*, 498 U.S. at 423-24. This Court has held a state procedural rule's application inadequate "even though the rule appeared 'in retrospect to form part of a consistent pattern of procedures,' because the defendant in that case could not be 'deemed

to have been apprised of its existence.'" *Ford*, 498 U.S. at 423 (quoting and explaining *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)). It should reach the same conclusion, for the same reason, here.

Texas's adoption of *Teague* also renders means its application of § 5(a) not independent because it is "interwoven with" the application of federal law, *Long*, 463 U.S. at 1040, namely, *Teague*. State courts are not bound to apply *Teague*. *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008). While *federal* courts conducting collateral review must apply watershed rules of criminal procedure that are "new" under *Teague*'s definition, this Court in *Danforth* did not require that *state* courts conducting collateral review must apply new watershed rules. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728-29 (2016). In *Montgomery*, this Court held "that when a new *substantive* rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. at 729 (emphasis added). But this Court limited that holding "to *Teague*'s first exception for substantive rules," finding that "*Teague*'s exception for watershed rules of procedure need not be addressed." *Ibid*. The TCCA is deciding that issue for itself.

Thus, the State has made application of the procedural bar," in this case § 5(a), "depend on an antecedent ruling on federal, that is, on the determination of whether" the rule in question is a watershed rule for purposes of federal habeas review. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Whether a "new" rule falls within *Teague*'s second exception turns on the federal constitutional question whether that rule constitutes part of

the "the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311 (internal quotation marks and citation omitted). Just as the Oklahoma court's application of that state's waiver rule was dependent upon federal law in *Ake*, the TCCA's application of § 5(a) in this case depended on a matter of federal law and this Court's "jurisdiction is not precluded." *Ake*, 470 U.S. at 75.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari to consider the important questions presented by this petition.

Respectfully submitted,

s/s A. Richard Ellis

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