Nos. 18-8970 & 18A1091

IN THE

Supreme Court of the United States

JOHN WILLIAM KING,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

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

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CAPITAL CASE

QUESTIONS PRESENTED

Does the state court's reliance on an independent and adequate state law ground preclude this Court's consideration of Petitioner John William King's abusive claim of trial court error under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), especially where this Court did not hold that *McCoy* applies retroactively and, regardless, King's case is factually distinguishable?

Where *McCoy* does not apply under the facts of the instant case, should the Court grant review to issue an advisory opinion regarding the scope of *McCoy* and whether it is a watershed rule of criminal procedure?

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

In the early morning hours of June 7, 1998, three white supremacists committed one of the most horrific and infamous crimes in recent American history. They chained James Byrd, Jr. (a black man) to the back of a pickup truck and dragged him to his death down a country road in Jasper, Texas. One of those men has since been executed; another is serving a life sentence. Petitioner John William King, the first of the three convicted for Byrd's capital murder, is the last to meet his fate. **King is currently set for execution after 6:00 p.m. CST on Wednesday, April 24, 2019.**

For more than two decades since King's trial concluded in February 1999, he has unsuccessfully challenged the constitutionality of his Texas capital murder conviction and death sentence in both state and federal courts. With just two weeks remaining before his scheduled execution, King filed a second successive state habeas application and moved for stay of execution in the Texas Court of Criminal Appeals (TCCA). Relying upon this Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), King recycled his previously rejected claim that defense counsel were constitutionally ineffective when they inadequately presented an innocence defense. Finding that King failed to meet the requirements of Article 11.071, § 5 of the Texas Code of Criminal Procedure, the TCCA dismissed King's application "as an abuse of

the writ without reviewing the merits of the claim raised" and denied his motion for stay. *Ex parte King*, No. WR-49,391-03, at *3 (Tex. Crim. App. April 22, 2019) (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)); Pet'r App. A.

King now requests a stay of execution and certiorari review of the TCCA's dismissal. However, this Court lacks jurisdiction because the state court's disposition of his claim relied upon an adequate and independent state procedural ground. Even if the *McCoy* claim was not defaulted, King cannot avail himself of the holding based on nonretroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). Assuming *McCoy* applies retroactively, King's case is factually distinguishable because he did not maintain his innocence consistently as McCoy did and King's attorneys never conceded their client's guilt. Because *McCoy* is not applicable to King's case, his request that the Court grant review to clarify the scope of *McCoy* is nothing more than a request for a prohibited advisory opinion. Finally, the extensions of the law that King seeks are unworkable and wholly unwarranted. Accordingly, the Court should deny King's petition for a writ of certiorari and his motion for stay of execution.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit Court of Appeals provided the following summary of the evidence of the capital crime:

This case concerns a high-profile murder in the small town of Jasper, Texas. Early Sunday morning, June 7, 1998, Jasper police discovered the dismembered body of James Byrd, a black man. His torso, legs, and left arm were found on Huff Creek Road in front of a church. The rest of Byrd was found a mile and a half up the road. A forensic pathologist would later testify that Byrd's injuries—cuts and scrapes around his ankles and abrasions covering most of his body—were consistent with having his ankles wrapped together with a chain and being dragged by a vehicle. Byrd's death and dismemberment were caused, according to the pathologist, when he was slung into a culvert on the side of the road.

From Byrd's remains, police followed a blood trail up a logging road. The trail ended at a grassy area where a fight appeared to have occurred. At the grassy area, police found a variety of items, including a cigarette lighter engraved with the words "KKK" and "Possum," three cigarette butts, a can of "fix-a-flat," a CD, a pack of Marlboros, beer bottles, a button from Byrd's shirt, Byrd's baseball cap, and a wrench inscribed with the name "Berry."

Police asked around Jasper to see if anyone saw Byrd on the night he was killed. A lifelong acquaintance of Byrd said he saw Byrd at a party on Saturday night, June 6. Byrd had left the party around 1:30 or 2:00 in the morning, walking alone towards his home. Another acquaintance drove past Byrd, who was walking down the road away from the party. At around 2:30 a.m., after the acquaintance had made it home, he saw Byrd pass, riding in the back of a primer-grey pickup truck. Three white men were in the cab of the truck.

On Monday, a day after Byrd's body was discovered, police stopped a primer-gray pickup for a traffic violation. Its driver was Shawn Berry. In the truck, police found a tool set which matched the wrench found at the grassy area. Berry was arrested. Dried blood spatters under the truck and on one of the tires were discovered and then DNA tested. The DNA matched Byrd's. A substance consistent with fix-a-flat was found inside one of the truck's tires. In the truck's bed, police found a rust stain in a chain pattern.

> Police searched Berry's apartment, which he shared with Lawrence Russell Brewer and John William King. They seized the roommates' drawings, writings, clothes, and footwear. Among the items seized were two pairs of "Rugged Outback" sandals, one size 9.5 and another size 10. The size-10 sandals were found in King's room, under his dresser, and next to his photo album. They were stained with Byrd's blood. An FBI forensic examiner, who compared the sandals to footprints at the grassy area, found that either the size-9.5 or -10 sandals could have created some of the prints. Another FBI agent took foot measurements of various suspects. King's feet were size 9.5, Shawn Berry's were 9, Brewer's were 7, and Lewis Berry's, Shawn Berry's brother who stayed sometimes at the apartment, were 10.
>
> The three cigarette butts found in the grassy area were DNA tested. DNA from one butt revealed King as a major contributor, excluded Shawn Berry and Brewer as contributors, and did not exclude Byrd as a minor contributor. A minor contributor, an FBI investigator would explain at trial, deposits a small amount of DNA—say, by taking a single drag off a cigarette.
>
> More physical evidence came to light linking King to the grassy area and the killing. The "Possum" lighter was King's (Possum was King's nickname in prison). Police also uncovered a 24-foot logging chain which matched the rust stains in the bed of Shawn Berry's truck. The chain was found in a covered hole in the woods behind the house of a mutual friend of the roommates. The mutual friend, Tommy Faulk, testified that on June 7, the day Byrd's body was found, King and Brewer showed up unannounced at Faulk's house. They came in Berry's truck. They parked on the side of Faulk's house facing the woods, entered through the back door, stayed for a brief time, and then left.[] The chain was found the next day in the woods behind Faulk's house.

King v. Davis, 883 F.3d 577, 581-82 (5th Cir. 2018) (footnote omitted).

II. Judicial Proceedings

A. Indictment and pre-trial

A Jasper County, Texas, grand jury indicted King for capital murder,

charging that on or about June 7, 1998, King "did then and there intentionally while acting together with Lawrence Russell Brewer and Shawn 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[.]" CR 4 (ROA.6157).[1]

King was represented at trial by C. Hayden Cribbs, Jr. and Brack Jones. As relevant to the claims before this Court, in preparing for trial, King's attorneys attempted to "discover and develop any evidence of mental illness, insanity, or mental defects which might have excused Mr. King from criminal responsibility or mitigated punishment," but were unsuccessful. SHCR 141-42 (ROA.10036-37). Two forensic psychologists evaluated King and found he was intelligent, but found no evidence of insanity, mental illness or mental disability. SHCR 142-43 (ROA.10037-38). King's attorneys did not challenge their client's competency to stand trial and did not raise an insanity defense.

Defense counsel also investigated King's claim of a possible alibi witness, but again to no avail. According to lead counsel Hayden Cribbs:

> Just before trial or at the beginning of trial, Mr. King told us that he remembered seeing a young white person sitting out smoking on or near the steps of the apartment complex when he came back

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[1] "CR" is the Clerk's Record from King's direct appeal. "ROA" is the record on appeal filed in the Fifth Circuit. As used herein, "RR" refers to the Reporter's Record of transcribed testimony and exhibits from trial. "SHCR" is the State Habeas Clerk's Record. Citations are preceded by volume number (where applicable) and followed by page reference.

> to the apartment with Brewer, Berry, and Mr. Byrd on the night of the offense. We sent two investigators out to the apartment complex in an attempt to locate this unknown person, although Mr. King had no other information about his identity. The investigators searched the entire complex area, checked with every apartment, and found no one who could recall having seen Mr. King return that night nor could possibly identify any young person matching the description given by Mr. King living at or visiting anyone at the apartment complex.

SHCR 144 (ROA.10039). No additional witnesses were identified by King that could assist the defense in raising a claim of innocence.

On November 23, 1998, King sent a letter to the trial court stating that he wanted different counsel appointed, that he was "dissatisfied" with Mr. Cribbs's representation "to date," that counsel "has proven to be delinquent in his efforts to provide me with requested information and an adequate update on my case," and that counsel "is in disagreement of my innocence, and on several occasions, has acknowledged the he plans to do no more in my defense than try to ensure that I do not receive the death sentence." CR 160 (ROA.6313); Pet'r App. C. King's letters did not state that he desired to present a defense of innocence or that his attorneys failed to investigate his claim of innocence. *See id.*

On January 6, 1999, Mr. Cribbs moved to withdraw as attorney of record, stating that King was uncooperative, on numerous occasions had refused to talk with his attorneys, and refused to follow counsel's advice including King's granting interviews with the media concerning his case. CR 143-44 (ROA.6296-

97). During a hearing on the motion, the trial court asked if King would like to testify, but King stated that he had "already written numerous letters explaining the situation." 5 RR 5 (ROA.6837); *see* Pet'r App. C. The court confirmed that the court had received two letters, and King explained that he actually wrote only one letter and sent copies of it to the court on different dates. 5 RR 5-6 (ROA.6837-38). Defense counsel then asked King on the record if he would be willing to meet after the hearing to talk, and King agreed. 5 RR 6 (ROA.6838). After King agreed to begin talking to counsel, the trial court denied the motion to withdraw. 5 RR 7 (ROA.6839). The record does not contain any other mention of innocence by King during eleven days of voir dire proceedings, or during the hearing on motions at the start of guilt/innocence, nor during either stage of trial. *See generally* 6 RR to 25 RR (ROA.6842-9517).

B. King's conviction

At the start of trial, King entered a plea of not guilty. 17 RR 10-11 (ROA.8175-76).

1. The State's case

The Fifth Circuit Court of Appeals summarized the evidence presented during the State's case-in-chef:

> At King's trial, the State introduced all the previously mentioned physical evidence, as well as evidence showing King's violent hatred of black people. During his first stint in prison (which ended about a year before Byrd was killed), King was the "exalted cyclops" of the Confederate Knights of America (CKA), a white-

supremacist gang. King's drawings displayed scenes of racial lynching. Several witnesses testified that King would not go to a black person's house and would leave a party if a black person showed up. King also had several prison tattoos. Among them were a burning cross, a Confederate battle flag, "SS" lightning bolts, a figure in a Ku Klux Klan robe, "KKK," a swastika, "Aryan Pride," and a black man hanging by a noose from a tree.

The State also put on evidence of King's larger ambitions. The State introduced King's writings, which indicated that King wished to start a CKA chapter in Jasper. The writings also indicated that King was planning for something big on July 4 (a little less than a month after the killing occurred). In prison, King spoke with other inmates about his goal of starting a race war, and about initiating new members to his cause by having them kidnap and murder black people. He wrote a letter to a friend about his desire to make a name for himself when he got out of prison. A gang expert, who reviewed King's writings, said that King's use of persuasive language showed he sought to recruit others to his cause. The expert also testified that where Byrd's body was ultimately left—on a road in front of a church rather than in the surrounding woods—demonstrated that the crime was meant to spread terror and gain credibility.

King did not testify at his trial. But his version of events was introduced by the State through a letter he sent from jail to the Dallas Morning News. In that letter, King professed his innocence. He explained that his Possum lighter had been misplaced a week or so before he was arrested. He also presented his account of the night, pinning the murder on Shawn Berry and implying that the murder was the result of a steroid deal gone wrong. He admitted that he, Shawn Berry, and Brewer were drinking and driving around in Berry's truck on the night of the killing, but explained that he and Brewer had told Berry to drop them off at the apartment. Heading home, Berry spotted Byrd walking on the side of the road. Berry and Byrd, according to King, knew each other from county jail, and Byrd had sold Berry steroids in the past. After a brief exchange, Byrd hopped in the truck behind the cab. Berry explained that Byrd would ride along because the two of them "had business to discuss later." The party took a detour to a grocery store before heading home. At the store, Berry asked

> Brewer for some cash "to replenish his juice, steroid supply." Brewer obliged him, and the group got back in the truck, this time with Berry and Byrd up front so that they could chat about the deal, and Brewer and King in the back. Berry dropped Brewer and King off at the apartment and then left with Byrd.
>
> The State poked two holes in this story. First, the State adduced testimony from Lewis Berry and Keisha Atkins, King's friend, that contrary to King's story that he lost the Possum lighter a week before, he had the lighter on the night of the killing. Lewis Berry explained that King had lost his lighter, but that it had been returned to him before the night of the killing. Second, the State put on evidence that Brewer's shoe was stained with Byrd's blood, undermining King's claim that both he and Brewer were dropped off earlier.
>
> The State also put on a note King had tried to smuggle to Brewer while both men sat in jail. A portion of the note reads as follows:
>
>> As for the clothes they took from the apt. I do know that one pair of shoes they took were Shawn's dress boots with blood on them, as well as pants with blood on them. As far as the clothes I had on, I don't think any blood was on my pants or sweat shirt, but I think my sandals may have had some dark brown substance on the bottom of them.
>>
>> . . .
>>
>> Seriously, though, Bro, regardless of the outcome of this, we have made history and shall die proudly remembered if need be. . . . Much Aryan love, respect, and honor, my brother in arms. . . . Possum.
>
> The State also introduced a wall scratching from King's cell: "Shawn Berry is a snitch ass traitor." King was aware at the time that Shawn Berry had spoken to police about the circumstances of Byrd's murder.

King, 883 F.3d at 582-84.

2. King's defense

King's attorneys gave no opening statement and did not concede King's guilt. 17 RR 17-18; 21 RR 72 (ROA.8182-83, 9183). At the close of the State's case-in-chief, defense counsel moved for a directed verdict of not guilty, alleging the State failed to prove beyond a reasonable doubt that King is guilty of capital murder or any lesser included offense. CR 217-18 (ROA.6370-71). The trial court denied the motion. 21 RR 70 (ROA.9181).

During the defense's case, King's attorneys did more than "try to ensure that [King did] not receive the death sentence," CR 160 (ROA.6313), and attacked the State's case in several ways. First, the capital murder charge against King was premised on his killing Byrd in the course of a kidnapping, *see* Tex. Penal Code § 19.03(a)(2), so King's counsel challenged this kidnapping theory. For example, King's counsel elicited testimony from an eyewitness who saw Byrd in the back of Shawn Berry's truck that there was no "indication that Mr. Byrd was hollering for help or anything." 17 RR 188 (ROA.8353). King's counsel also attacked the credibility of the State's pathology expert, who testified that Byrd was likely conscious at the beginning of the dragging, *see* 21 RR 51 (ROA.9162), which was necessary for the State's theory of kidnapping. *See, e.g.,* 19 RR 16; 21 RR 63 (ROA.8181, 9174). During closing arguments, King's counsel emphasized to the jury that, for capital murder, "[t]he question is was Mr. Byrd kidnapped?" 22 RR 27 (ROA.9253). Counsel

further argued that the State's only theory of kidnapping backed up by evidence—that Byrd was restrained via the chain while he was dragged—did not hold up because that was "the method of death," not a separate act. 22 RR 27-31 (ROA.9253-57).

Second, King's counsel fought back against the State's racial-motive theory by challenging the admission of evidence of King's racial animus. 17 RR 73-76, 214, 223, 241-42; 18 RR 210-11 (ROA.8238-41, 8379, 8388, 8406-07, 8626-27). They also repeatedly tried to undermine the State's theory of motive by calling witnesses to testify that King was a racist only in prison and that his racism was a method of self-preservation. *See, e.g.*, 17 RR 84-88; 18 RR 27-28, 38; 19 RR 4, 7-10, 81-86, 252-53; 20 RR 64, 68; 21 RR 10, 106 (ROA.8249-53, 8443-44, 8454, 8660, 8663-66, 8737-42, 8908-09, 9002, 9006, 9121, 9217). King's counsel likewise elicited testimony from those who knew King that King had never sought to recruit them into any racist organization. *See, e.g.*, 20 RR 164; 21 RR 12-13, 107 (ROA.9102, 9123-24, 9218). Finally, King's counsel called a witness to testify that in prison, one has to join a race-based gang for protection.21 RR 74, 77-78, 81-82 (ROA.9185, 9188-89, 9192-93). This witness, who knew King well in prison, attempted to refute testimony that King sought to target minorities for violence upon his release from prison. 21 RR 79-80, 84-85 (ROA.9190-91, 9195-96). A witness who met King immediately after King's release from prison testified similarly. 21 RR 92 (ROA.9204).

Third, to combat the State's evidence of King's consciousness of guilt, the defense elicited testimony that King appeared to behave normally shortly after Byrd's murder. 18 RR 35-36 (ROA.8451-52) (King spoke to his friend, Keisha Atkins, at 5:00 a.m. and sounded normal); *see also* 20 RR 85 (ROA.9023) (eliciting testimony that King was calm later that day).

Finally, King's attorneys attacked the State's physical evidence in various ways, including:

- eliciting testimony that other persons' property was also found at the crime scene. *See* 17 RR 146 (ROA.8311) (compact disc player belonging to Lewis Berry);
- attacking Keisha Atkins's identification of the sandals that she asserted King was wearing the night of Byrd's murder. 18 RR 32-33, 35, 47, 90 (ROA.8448-49, 8451, 8463, 8506);
- eliciting testimony that King's DNA could have been placed on the cigarette butt found at the murder scene long before Byrd's murder. 20 RR 45-46 (ROA.8983-84). Following up on this during closing, King's counsel suggested that the additional unidentified DNA on King's cigarette butt could have been Byrd's, which would tend to show that the butt came from the truck's ashtray, rather than from King at the crime scene. 22 RR 39 (ROA.9265);
- establishing that Lewis Berry had access to King's apartment and also had the same shoe size as the sandals on which Byrd's blood was found. 18 RR 91, 121, 124-25, 127, 131-32 (ROA.8507, 8537, 8540-41, 8543, 8547-48);
- eliciting testimony that other people had access to Faulk's property where the chain was found, and could have disposed of the chain. 19 RR 263-64: 20 RR 166-67 (ROA.8919-20, 9104-05); *see also* 22 RR 37 (ROA.9263) (during closing, King's counsel asserting, "There's no evidence that chain was put behind any place by [King]."); and

- eliciting testimony establishing that no physical evidence was found on the chain the State claimed was used in Byrd's murder. 20 RR 49 (ROA.8987).

During closing argument, King's attorneys again did not concede King's guilt. 22 RR 22-46 (ROA.9248-72). Counsel's arguments instead largely focused the jury's attention on the legal requirements of the capital-murder charge, encouraged them to engage in a rational and analytic assessment of the case in accord with the trial court's instructions, and distracted them from the emotional and graphic nature of the State's evidence and argument they had seen and just heard. *See generally id.* These arguments ultimately did not convince the jury, as King was convicted of capital murder on February 23, 1999. CR 248 (ROA.6401).

C. King's sentence, direct appeal, and habeas litigation

Following a separate trial on punishment, the jury answered affirmatively the special sentencing issues regarding future dangerousness and the "anti-parties" charge, and answered negatively the special issue on mitigation. CR 291 (ROA.6444). Based on the jury's verdict, on February 25, 1999, the trial court sentenced King to death. CR 293-96 (ROA.6446-49).

The TCCA affirmed King's conviction and sentence on direct appeal. *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000) (ROA.5974-97). King did not file a petition for writ of certiorari.

King filed a state habeas application on July 5, 2000. SHCR-01 at 2-28 (ROA.9901-27). The convicting court entered findings of fact and conclusions of law recommending relief be denied. SHCR-01 at 177-201 (ROA.10066-90). The TCCA largely adopted the same and denied habeas corpus relief. *Ex parte King v. Dretke*, No. WR-49,391-01 (Tex. Crim. App. June 20, 2001) (unpublished) (ROA.11675-76).

On September 6, 2002, King filed a federal habeas petition raising twenty-one claims. *King v. Dretke*, No. 1:01-cv-00435 (E.D. Tex.) (Pet., ECF No. 30) (ROA.241-1724). The district court denied relief on several claims but granted King's motion to stay and abate the proceedings to allow him to exhaust claims in state court. *King*, 2006 WL 887488 (Mem. Op. Mar. 29, 2006, ECF No. 64) (ROA.4098-117).

King filed a successive state habeas application on June 22, 2006, which the TCCA dismissed "as an abuse of the writ without considering the merits of the claims." *Ex parte King*, No. WR-49,391-02, 2012 WL 3996836 (Tex. Crim. App. Sept. 12, 2012) (unpublished) (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)) (ROA.11679-80).

Returning to federal district court, King filed an amended habeas corpus petition that incorporated and expanded on the grounds originally raised. *King v. Director, TDCJ-CID*, No. 1:01-cv-00435 (E.D. Tex.) (Am. Pet., ECF No. 75) (ROA.4161-4992). On June 23, 2016, the district court denied relief on all

claims and declined to certify any issue for appeal. *King v. Director, TDCJ-CID*, 2016 WL 3467097 (E.D. Tex. June 23, 2016). In 2017, the Fifth Circuit Court of Appeals granted King a certificate of appealability (COA) to appeal one claim of trial counsel ineffectiveness in presenting the case for King's innocence and denied COA on the remaining issues. *King v. Davis*, 703 F. App'x 320, 2017 WL 3411876 (5th Cir. Aug. 8, 2017). On February 22, 2018, the Fifth Circuit affirmed the denial of habeas corpus relief, and subsequently denied rehearing. *King v. Davis*, 883 F.3d 577 (5th Cir. 2018), *rhr'g denied*, No. 16-7008 (March 23, 2018). This Court denied King's petition for certiorari review of the Fifth Circuit's decision. *King v. Davis*, 139 S. Ct. 413 (Oct. 29, 2018).

On December 21, 2018, the convicting court entered an order setting King's execution for Wednesday, April 24, 2019. *State of Texas v. John William King*, cause No. 8869 (1st Dist Ct., Jasper County, Texas, Dec. 21, 2019).

With two weeks remaining before his scheduled execution, on April 10, 2019, King filed a second successive state habeas application raising a claim based on *McCoy* and moved for a stay of execution. *See Ex parte King*, No. WR-49,391-03, at *2-3. The TCCA dismissed King's application and denied his motion for stay of execution. *Id.* at *3. The instant petition followed.

ARGUMENT

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." Sup. Ct. R. 10. King 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, King was cited for abuse of the writ because he did not meet the successive habeas application requirements of Texas Code of Criminal Procedure article 11.071, § 5. The state court's disposition, which expressly relied upon an adequate and independent state procedural ground and did not reach the merits of King's claim, forecloses a stay of execution or certiorari review.

I. Certiorari Review is Foreclosed by an Independent and Adequate State Procedural Bar.

King raised his *McCoy* claim in a second successive state habeas application. The TCCA held that King "failed to meet the requirements of Article 11.071, § 5" and dismissed his application "as an abuse of the writ without reviewing the merits of the claim raised." *Ex parte King*, No. WR-49,391-03, at *3. Article 11.071, § 5(a) of the Texas Code of Criminal Procedure forbids state courts to consider a 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 statute, like the federal habeas "second or successive" writ prohibition, works to limit the number of attempts an inmate may seek to collaterally attack a conviction, subject to certain, limited exceptions. *Compare* Tex. Code Crim. Proc. 11.071, § 5(a), *with* 28 U.S.C. § 2244(b). *See also Beard v. Kindler*, 558 U.S. 53, 62 (2009) (noting that federal courts should not "disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.").

In the lower court, King argued that his successive habeas application met the requirements for consideration on the merits under § 5(a)(1) because the legal basis for his *McCoy* claim was unavailable on the date King filed his initial habeas application in 2000 and his first successive habeas application in 2006. To the contrary, King's actual underlying complaint—that trial counsel made insufficient efforts to demonstrate that King was innocent (*e.g.*,

Pet. 18)—has already been litigated in the state and federal courts as a claim of trial counsel ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). *See, e.g.,* SHCR-02 at 141-58 (ROA.11403-16) (successive state habeas application claim raised in 2006 alleging "trial counsel's deficient performance in not presenting a viable defense showing applicant's actual innocence constitutes ineffective assistance of counsel, and deprived applicant of his rights under the Sixth and Fourteenth Amendments to the United States Constitution."); *King v. Director, TDCJ*, 2016 WL 3467097, at *27-35 (denying federal habeas corpus relief on King's claim that "trial counsel was ineffective for failing to present a viable defense of actual innocence"); *King v. Davis*, 883 F.3d at 581-95 (affirming federal district court's denial of federal habeas corpus relief on King's claim that "trial counsel was constitutionally ineffective in presenting the case for King's innocence."). As part of that claim, King pointed to the same theory of innocence and the same decisions and actions of trial counsel that he refers to in this petition, but he now re-casts his claim as one of structural error under *McCoy*. There is very little difference, if any, between King's claims in federal court and the ones made here despite King's attempt at recharacterizing the claim. A habeas applicant cannot simply relabel a previously-litigated claim under new Supreme Court precedent to have it warrant review on the merits under § 5(a)(1).

Most importantly, Texas's 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 Article 11.071, § 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."). Citation for abuse of the writ is an adequate and independent state-law ground for dismissal, depriving this Court of certiorari jurisdiction.

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's decision does not appear to rest on federal law. Rather, the lower court held that King (1) failed to show that his application met the requirements of Article 11.071, § 5; and (2) that his application should thus be dismissed as "an abuse of the writ without reviewing the merits." *Ex parte King*, No. WR-49,391-03, at *3 (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)). Even if the TCCA's holdings appeared to rest on federal law, which they do not, they are "plain statements" that clearly and expressly indicate that the disposition relied upon the adequate and independent abuse-of-the-writ statute.[2] *See Long*, 462 U.S. at 1041 ("If the state court decision indicates

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[2] These statements certainly indicate that, even if this Court were to disagree with the TCCA's finding that King failed to meet the requirements of Article

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").

King contends the Court nevertheless has jurisdiction to review the TCCA's § 5 dismissal of his *McCoy* claim because a concurring opinion cites to *Teague*, which is not a consistently applied rule and is not independent of federal law in Texas. Pet. 35. King argues the TCCA "apparently applied" the rule in *Teague* by adding a requirement that a previously unavailable legal rule be retroactively applicable. *See id.* He is mistaken. Although Judge Yeary notes that King never argued *McCoy* applied retroactively, his concurring opinion is merely an alternative ground for rejecting King's writ application, and not the basis for the TCCA's § 5 dismissal. Instead, five of the TCCA judges, including Judge Yeary, joined the majority vote of the per curiam order dismissing King's second successive habeas application as an abuse of the writ and denying his motion for a stay. *Ex parte King*, No. WR-49,391-03. There is

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11.071, § 5, the TCCA would render the same judgment, and this Court's opinion would thus be nothing more than an advisory opinion.

no mention of *Teague* in the TCCA's order of dismissal. *See id.* King cannot seriously contend the TCCA impliedly adopted *Teague*'s requirement of retroactive applicability, and then with equal silence, denied King leave to proceed on a successive application on such basis.[3] Accordingly, King cannot show from the face of the TCCA's order of dismissal that federal law was considered.

Because King's *McCoy* claim is procedurally defaulted, there is no jurisdictional basis for granting certiorari review in this case. Accordingly, King's petition and motion for stay present nothing for this Court to consider.

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

In his petition, King argues that this Court should grant certiorari review on two issues that he believes *McCoy* left open: (1) whether the "new rule" announced in *McCoy* is a watershed rule of criminal procedure; and (2) whether *McCoy* applies to a concession of guilt to a lesser included offense. *See* Pet. ii. In other words, King expressly asks this Court to extend its holding in

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[3] Indeed, state courts are not bound by *Teague* and may adopt their own nonretroactivity rules for postconviction proceedings. *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008). The TCCA has done so. *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). However, the TCCA's order in this case does not rely upon or even mention any nonretroactivity rule.

McCoy to apply under the circumstances of his case. But *McCoy* itself is a new rule for purposes of *Teague v. Lane*, *supra.*, and any extension of *McCoy* also runs afoul of the nonretroactivity principles enumerated in *Teague.* Yet even if *McCoy* applies retroactively, the decision does not impact King because the facts of his case are clearly distinguishable. Consequently, King's petition seeks a prohibited advisory opinion. Finally, extending *McCoy* as King wishes has no basis in law or policy. The Court thus has no compelling reason to grant review or a stay of execution.

A. The questions presented are barred by *Teague's* nonretroactivity principles.

To the extent King now contends that *McCoy* ought to be given retroactive application, then his argument is too little, too late. In the lower court, King did not even acknowledge that retroactivity is an issue, much less allege that the new rule in *McCoy* meets the *Teague* criteria. This Court has long held that it will neither decide issues raised for the first time on petition for certiorari nor decide federal questions not raised and decided in the court below. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). The Court should decline to review King's claims for just such reason.

Even if the Court were to consider King's argument, it does not warrant certiorari review. "In *Teague*, [the Court] defined a new rule as a rule that

'breaks new ground,' 'imposes a new obligation on the States or the federal government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (quoting *Teague*, 489 U.S. at 301) (plurality opinion) (emphasis in original)); *see Felder v. Johnson*, 180 F.3d 206, 210 (5th Cir. 1999) (A new rule for *Teague* purposes is one which was not "dictated by precedent existing at the time the defendant's conviction became final.") (citing *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

In *McCoy*, the 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. *McCoy*, 138 S. Ct. at 1505. *McCoy* thus imposes a new obligation on trial courts to ensure that defense counsel do not undermine a defendant's right to control his defense. Indeed, in his dissent, Justice Alito argued that the *McCoy* majority had adopted a "newly discovered constitutional right" that "made its first appearance today." 138 S. Ct. at 1514. However, King cannot utilize the new rule announced in *McCoy* or any further requested extension of *McCoy* to the fact of this case because King's conviction became final on January 16, 2001, when the time for seeking a writ of certiorari expired. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

Under *Teague*, federal courts are generally barred from applying "new" constitutional rules of criminal procedure retroactively on collateral review. *Caspari*, 510 U.S. at 389-90. The only two exceptions to the *Teague* nonretroactivity doctrine are reserved for (1) rules that would place certain primary conduct beyond the government's power to proscribe, and (2) bedrock rules of criminal procedure that are necessary to ensure a fundamentally fair trial. *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997). *McCoy* is not a substantive rule because it did not "prohibit the imposition of capital punishment on a particular class of persons." *Saffle*, 494 U.S. at 495.

Nor is *McCoy* a watershed procedural rule, despite King's assertion to the contrary. *See* Pet. 31-35. To so qualify, "[f]irst the rule must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction[,]" and "[s]econd, the rule 'must alter our understanding of the bedrock elements essential to the fairness of a proceeding.'" *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (internal quotation marks omitted)). King's arguments focus on the second requirement, largely ignoring the first. *See* Pet. 31-35. Nevertheless, the rule in *McCoy* "simply lacks the 'primacy' and 'centrality' necessary to qualify as a watershed rule. *See Whorton*, 542 U.S. at 421. Indeed, this Court has described the watershed-rule-of-criminal-procedure exception to be "extremely narrow" and noted "that it is unlikely that any such rules ha[ve] yet to emerge." *Id*. at 417-

18 (internal quotations omitted). As a result, King's claim must be rejected pursuant to *Teague*.

In sum, King's conviction was final in January 2001. Thus, any new rule this Court could announce extending *McCoy* 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, King's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

B. Even if *McCoy* applies retroactively, King's case is factually distinguishable.

Even if the Court were inclined to grant review to decide whether *McCoy* is a watershed rule or to clarify the scope of *McCoy*, King's case is not an appropriate vehicle for doing so. King's *McCoy* claim is procedurally defaulted and, regardless, the holding in *McCoy* has no applicability under the facts of King's case.[4] King is once again requesting an advisory opinion from the Court, and the Court should not hesitate to deny review in such instance.

1. King did not maintain his innocence consistently.

In *McCoy*, "the defendant vociferously insisted that he did not engage in

[4] As a result, King must rely on a further extension of *McCoy*, which raises further *Teague*-bar concerns.

the charged acts and adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505 (citation omitted). 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, McCoy's counsel 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 his attorney 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*.

Unlike *McCoy*, King "has not evidenced 'intransigent' or 'vociferous' objection to trial counsel's strategy, nor has he evidenced objection to trial counsel's strategy 'at every opportunity, before and during trial, both in conference with his lawyer and in open court.'" *Epperson v. Commonwealth*, 2017-SC-000044-MR, 2018 WL 3920226, at *12 (Ky. Aug. 16, 2018) (unpublished) (quoting *McCoy*, 138 S. Ct. at 1509). At best, King sent two letters to the trial court stating that he was dissatisfied with counsel's representation in part because counsel "is in disagreement of my innocence,

and on several occasions, has stated that he plans" or "intends" "to do no more in my defense than try and ensure that I do not receive the death sentence." CR 160-61 (ROA.6813-14); Pet'r App. C. King's mistaken belief regarding counsel's intended strategy is bellied by the trial record which reflects that counsel rigorously contested the State's case. *See* STATEMENT OF THE CASE, Part II.B.2., *supra*. Counsel also tried to locate King's unnamed alibi witness, but their efforts were unsuccessful. SHCR 144 (ROA.10039).

King's complaint to the trial court that counsel "is in disagreement with my innocence" does not establish that defense counsel were planning to concede guilt. Nor is such a statement sufficient to alert the trial court that counsel were overriding King's objective of maintaining innocence, especially when King did not add any further details regarding his complaint during the pre-trial hearing and King agreed to meet with counsel after the hearing to talk. 5 RR 5-7 (ROA.6867-69). Unlike *McCoy*, where the defendant adamantly objected both before and during trial to any admission of guilt, 138 S. Ct. at 1506, King made no further objection during pre-trial or trial regarding counsel's continued representation or to the defense strategy that was ultimately pursued. The record thus contains no challenge to show that counsel's strategy was not in line with the defendant's objectives. *See id.* at 1505 ("[W]hen counsel confers with the defendant and the defendant remains silent, neither approving not protesting counsel's proposed concession strategy,

'no blanket rule demands the defendant's explicit consent' to implementation of that strategy." (citing *Nixon*, 543 U.S. at 181).

King's complete failure to protest his innocence during trial is dispositive. Where there is a failure to object to or protest counsel's alleged concession of guilt at any point during trial, King cannot come close to establishing trial court error under the "stark scenario" presented in *McCoy*. *See* 138 S. Ct. at 1510. Furthermore, to the extent King is seeking an extension of *McCoy* to apply to the facts of his case, his request for relief is barred under *Teague*. The instant claim lacks merit, and this Court should not exercise its discretion to review King's petition.

2. King's attorneys did not concede guilt at trial.

In *McCoy*, the record clearly demonstrates that defense counsel conceded guilt at trial over McCoy's objection. During opening statement at the guilt phase of McCoy's capital trial, the court permitted defense counsel to tell the jury "there was 'no way reasonably possible' that they could hear the prosecutor's evidence and reach 'any other conclusion than Robert McCoy was the cause of the individuals' death,'" and that the evidence is "unambiguous," "my client committed three murders." *McCoy*, 138 S. Ct. at 1506-07 (citations omitted). During closing argument, defense counsel reiterated that McCoy was the killer and told the jury he "took [the]burden off of [the prosecutor]." *Id.* at 1507 (citation omitted). During the penalty phase, trial counsel again conceded

that McCoy "committed these murders," but argued for mercy in view of McCoy's "serious mental and emotional issues." *Id.* (citation omitted). In granting certiorari, this Court 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.

Unlike in *McCoy*, the record here does not demonstrate that King's attorneys conceded guilt at trial. King plead not guilty and made no further statement, objection, or complaint before the jury. 17 RR 11 (ROA.8176). Crucially, at no point during pre-trial or trial proceedings did King's attorneys ever expressly admit his guilt to the capital crime or to the lesser included offense of murder. *See generally* 2 RR to 22 RR (ROA.6669-9283). King's counsel gave no opening statement at the guilt phase. 17 RR 17-18; 21 RR 71-72 (ROA.8182-83, 9182-83). During the State's case-in-chief, King's attorneys challenged the kidnapping theory, challenged the admissibility of evidence of King's racial animus, elicited testimony to contest King's consciousness of guilt, and tried to undermine the State's physical evidence. *See* STATEMENT OF THE CASE, Part II.B.2., *supra*. Unlike in *McCoy* where counsel told the jury his client was guilty and that he had taken the burden "off of [the

prosecutor]," *see* 138 S. Ct. at 1507, King's attorneys moved for an instructed verdict of not guilty at the close of the State's case-in-chief, asserting that the State failed to prove its case. CR 217-18; 21 RR 70 (ROA.6370-71, 9181). And during closing arguments, defense counsel never conceded that King was guilty of capital murder or the lesser included offense of murder. 22 RR 22-46 (ROA.9248-72).

While King quotes excerpts from defense counsel's closing argument at the guilt phase, conspicuously absent from his petition is any citation to the record evidencing that counsel affirmatively conceded guilt. *See generally* Pet. 3-39. Instead, King tries to construct or manufacture a concession by making several arguments, none of which place his case under the purview of *McCoy* and each of which raise *Teague*-bar concerns.

a. Failing to present evidence of innocence is not a concession of guilt.

First, King contends that after the State read aloud his letter to the Dallas Morning News during its case-in-chief in which King maintained that he was not at the scene of the murder,[5] his attorneys failed to present "any corresponding defense evidence in support" of King's claim of innocence,[6] thus

[5] 20 RR 119-25; 27 RR at SX-105 (ROA.9057-63, 9767-70); Pet'r App. E.

[6] To date, King has never identified any "affirmative" evidence of innocence and only asserted that different arguments could have been made to challenge the State's case.

making it "clear that defense counsel was not contesting guilt, in direct contravention of" King's wishes. *See* Pet. 13. However, a purported omission by counsel is not an affirmative concession of guilt. *McCoy* certainly did not hold that trial counsel concedes guilt by failing to present affirmative evidence of innocence. Although King asserts that such an omission is sufficient to constitute a violation of *McCoy*, it is clear that what King actually asks this Court to do is to extend—not simply apply—its holding in *McCoy* to encompass the facts of his case. Any such claim for relief is barred by *Teague*.

Regardless, any complaint that King might have regarding counsel's failure to present evidence of innocence fits squarely within this Court's ineffective-assistance-of-counsel jurisprudence. *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 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."). Indeed, King's specific allegation—that counsel failed to present evidence of King's innocence—has already been litigated in the state and federal courts as a claim of trial counsel ineffectiveness. *See* ARGUMENT Part II *supra*.

King's argument does not cohere with *McCoy*'s holding that it was *trial court error*—not ineffective assistance—to allow 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). As such, the Court should not extend *McCoy* to find that structural error exists when *trial counsel* fails to present unspecified defense evidence.

b. Allegedly conceding King's presence at the crime scene is not a concession of guilt.

King additionally contends his attorneys conceded his guilt of non-capital murder by conceding his presence at the crime scene. *See* Pet. 14. Initially, King complains that defense counsel followed a "guilt-but-no-kidnapping." Pet. 15. However, conceding that King was present at the crime scene—a concession which did not occur here—is not the same thing as conceding King is guilty of a crime. Considering the cited arguments in context, it is clear from the record that King's attorneys were arguing the State failed to prove the element of kidnapping and thus failed to prove capital murder. *E.g.*, 22 RR 23-30, 31-32, 35-36 (ROA.9249-56, 9257-58, 9261-62). However, in focusing in part on the capital charge, King's attorneys never affirmatively conceded their client was guilty of any crime.

The objectives of King and defense counsel were entirely consistent in this matter, which was to obtain an acquittal of all charges. "While the decision to contest guilt is squarely within the client's control, *see McCoy*, 138 S. Ct. at 1511, the question of how to present an argument of innocence is not, and *McCoy* cannot be read so broadly." *Yanni v. United States*, 346 F. Supp.3d 336, 344 (E.D.N.Y. 2018).

Moreover, it is incontrovertible that King's DNA was found on a Marlboro cigarette butt at the crime scene. Yet King asserts that his attorneys conceded his presence of the crime scene based on two comments made during closing arguments regarding the cigarette butt. Pet. 16-17. Again, even if counsel admitted King was present at the crime scene (which did not occur here), it is not an affirmative concession of guilt, so King's argument fails from the outset. But counsel had to find a way to explain why King's DNA was at the crime scene even if King himself was not. That is what they did.

When the two cited arguments are considered in context, they do not establish that counsel admitted King was guilty of any offense. King discounts that his attorneys offered an explanation for why the cigarette butt was found at the crime scene: the cigarette could have been left by King in the ashtray of the pickup truck which he drove in to work three or four days a week, and that Mr. Byrd may have later taken the cigarette out of the ashtray and taken a puff from it. 22 RR 39 (ROA.9265). Any complaint that King has regarding trial

counsel's closing statements could have been raised, and rejected, as a claim of ineffective assistance of counsel, especially when he raised just such a claim in his amended federal habeas petition. (ROA.4388-91).

Considered in total, King's arguments do not give rise to a claim of trial court structural error under *McCoy*. Because *McCoy* does not apply under the facts of King's case, his reliance on the case is unavailing. The Court has no reason to grant review to render a prohibited advisory opinion clarifying the scope of *McCoy*, as King so requests.

C. In any event, the extension of law King seeks is unworkable and unwarranted.

In *McCoy*, the trial court had ample notice that defense counsel planned on conceding guilt and then did so at trial, and that McCoy vociferously objected before and during trial to any such admission. There was no question in *McCoy* that the objectives of the defendant and his counsel were completely at odds. In sharp contrast is the instant case where King did not consistently maintain his innocence throughout trial and King's attorneys did not concede guilt. By seeking an extension of *McCoy* to the facts of his own case, King apparently wants trial courts to be constitutionally required to micromanage defense counsel and second-guess whether counsel's arguments impliedly concede guilt, and to question defendants whether they agree with counsel's arguments when defendants make no objection. However, as one court 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).

> 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 post-conviction 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 challenges would not be cabined, as they often 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 (footnote omitted). King's argument that *McCoy* should be read to encompass defense objectives beyond acquittal therefore has no basis in law or policy, and this Court should decline to review Kings petition.

III. King 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, King cannot demonstrate a strong likelihood of success on the merits. The Court lacks jurisdiction to review his claim, and the arguments he advances were not preserved for review. 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 imposed for a horrific capital murder that occurred nearly twenty years ago. *See Hill*, 547 U.S. at 584. Indeed, the public's interest lies in executing a sentence duly assessed and for which judicial review has to date terminated without finding reversible error. The public's interest is not advanced by staying King's execution to consider a procedurally defaulted and meritless claim based on a decision handed down two decades after King and his cohorts terrorized and lynched James Byrd, Jr.

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 King's application for stay of execution.

CONCLUSION

The Court should deny King's petition for writ of certiorari and application for stay of execution.

Respectfully submitted,

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