No. 18-8970; 18A1091

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

PETITIONER'S REPLY BRIEF

CAPITAL CASE

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REPLY BRIEF OF PETITIONER

The State's Brief In Opposition ("BIO") is based on assertions regarding the record, Mr. King's arguments, and the law that do not withstand scrutiny. The State argues that review on certiorari is foreclosed by an independent and adequate state procedural bar (BIO at 16-22); that the questions presented are barred by the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989) (BIO at 23-26);that King's case is factually distinguishable from *McCoy v. Louisiana*, 138 S. Ct. 1500) (BIO at 26-36); and that a stay of execution is "unworkable and unwarranted." (BIO at 37-39). These arguments are unavailing as shown in Mr. King's petition and herein.

I. Introduction.

This petition and Mr. King's accompanying application for a stay of execution are important, not just in the context of Mr. King's case, but to give guidance to the lower

courts in applying this Court's new precedent in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Indeed, in this case, the court below, the Texas Court of Criminal Appeals ("TCCA"), in a split five-to-four decision, is plainly asking for that guidance.[1] That is significant because the TCCA is easily the most capital-case intensive court in the nation. Its request should be heeded now in order to forestall erroneous executions based on mis-perceptions of the law, confusion as to the scope of *McCoy*, and, as a result, the execution of innocent defendants whose case for innocence was never presented to the courts through no fault of their own.

II. Certiorari review is not foreclosed by an adequate and independent state procedural bar. (BIO at 16-22).

The State acknowledges that Texas law provides a right to merits review of a claim when the "'legal basis for the claim was unavailable on the date the applicant filed the previous application.'" (BIO 17, (quoting TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1) ("Section 5(a)"). The State acknowledges that Mr. King brought his claim "under new Supreme Court precedent," specifically, *McCoy*. (BIO at 18). The State vociferously argues that *McCoy* is a new rule of criminal procedure. *Id.* at 24 ("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.") The State also acknowledges that Judge Yeary's *decisive fifth vote* in the TCCA rested on his conclusion that whether Section 5(a) bars merits review turned on the application of *Teague v. Lane*, 489 U.S. 288 (1989), but

[1] That does not render any such guidance merely a "prohibited advisory opinion" (BIO at 2) as that argument rests on the State's untenable contentions that "*McCoy* is not applicable to King's case" *(Id.)*

Petitioner failed to argue *Teague*. (BIO at 21-22). Nor did the State in their motion to dismiss in the TCCA. But the State also expresses skepticism about whether *Teague* applied to the state court's application of § 5(a). (*Id.* at 21-22, arguing Petitioner is "mistaken" about *Teague* being "impliedly adopted" by state court because there is "no mention of *Teague* in the TCCA's order of dismissal."). The State appears to concede, if only tacitly, that by making the application of § 5(a) turn on the application of *Teague*, the state court decision, at least the decisive fifth vote was interwoven with federal law. (*Id.* at 22, arguing that because "King cannot show from the face of the TCCA's order of dismissal that federal law was considered" rule was applied independent of federal law).[2] These concessions place the State at odds with itself.

If *McCoy* is new, and King agrees it is, then the legal basis for his claim was not available at the time of his previous application and § 5(a)(1) permitted merited review. If that is the case, under this Court's cases, King complied with state law and the contrary procedural bar is not adequate to preclude review in this Court. *See James v. Kentucky*, 466 U.S. 341, 351 (1984) ("Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect … must be more evident than it is here."). If it is unclear whether *Teague* applied, the "rule" invoked in Judge Yeary's decisive concurring opinion was not firmly established and consistently applied.

[2] This Court has *never* limited adjudication of the federal question of adequacy and independence to the face of a state court's order. *See*, *e.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985) (reviewing state court decisions explaining application of default rule); *Walker v. Martin*, 562 U.S. 307, 321 (2011) (reaffirming "this Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights").

Rather, the decisive vote rested on "novel and unforeseeable requirements without fair or substantial support in prior law." *Walker v. Martin*, 562 U.S. 307, 320 (2011) (internal quotation marks and citations omitted). Therefore, the application of § 5(a) to bar review was not adequate under this Court's cases. *Ford v. Georgia*, 498 U.S. 411, 424 (1991).

The State's primary argument on procedure—that King did not really raise a *McCoy* claim but *merely* reasserted his innocence to avoid execution for a crime he did not commit, BIO 17-18—is sleight of hand for the reasons stated *infra*.

III. King is not re-litigating a previous claim. (BIO at 17-18).

The State asserts that in his subsequent application for habeas relief, Mr. King failed to meet the requirements of Article 11.071, because the legal or factual basis of his claim was available to him earlier. (BIO at 17-18.) The State also asserts that, in his subsequent habeas application, King merely "recycled" a previous claim of ineffective assistance of counsel (BIO at 1) and "relied on the same theory of innocence and the same decisions and actions of trial counsel that he refers to in this petition." (BIO at 18.) The State also complains that King's application "re-cast," "re-characterize[d]," or "re-label[ed]" his claim of ineffective assistance of counsel. (*Id*.)

In *McCoy v. Louisiana*, this Court articulated a new rule that a Sixth Amendment violation occurs when a criminal defendant's counsel concedes the defendant's guilt over his or her express objection. The Sixth Amendment autonomy right articulated in *McCoy* is separate and distinct from the right to the effective assistance of counsel at trial, enshrined in this Court's case law (*see*, e.g. *Strickland v. Washington*, 466 U.S. 668

(1984) and its progeny); although the facts underlying a *McCoy* claim could easily overlap with those that form the basis of a claim of ineffective assistance of counsel under *Strickland*, the two claims are factually and legally distinct. Here, Mr. King's counsel did nothing to maintain King's innocence at trial and conceded Mr. King's guilt in closing argument, over King's express objection. The concession of guilt forms the basis of the *McCoy* violation, but it could also be ineffective assistance of counsel sufficient to meet the legal requirements of *Strickland*. That King raised the ineffective assistance of counsel claim based on some of the facts at issue in the *McCoy* claim (although also based on other, additional facts) does not preclude him from raising a separate, now-cognizable claim that his Sixth Amendment rights were violated when his trial counsel overrode his will and blocked him from making a fundamental choice about the objective of his defense. Nor should the fact that his claims of ineffective assistance of counsel previously were raised and rejected by courts preclude him from raising or prevailing on his *McCoy* claim: just because a court found that King had failed to prove that his trial counsel performed deficiently representing him at trial and that he was prejudiced by his trial counsel's failings, as *Strickland* requires (or that King was procedurally barred from raising such a claim), does not mean that a court should find that no structural error occurred when Mr. King's trial counsel conceded guilt over his objection.

IV. King's petition is not barred by *Teague* as *McCoy* is a "watershed rule." (BIO at 22-26).

Teague defines a watershed rule as one "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313. A rule meets this standard if it affects the "fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484 (1990).

McCoy announced a watershed rule of criminal procedure that falls within the second *Teague* exception because it is a rule clearly designed to ensure the "fundamental fairness and accuracy" of a capital defendant's trial. *McCoy* requires that defense counsel assert their client's innocence at trial if the defendant maintains that he wishes his them to do so. A violation of *McCoy* amounts to counsel directing the jury to return a guilty verdict instead of arguing for innocence. In the wake of an admission of the defendant's culpability by his own counsel, the jury has virtually no choice but to find the defendant guilty. Therefore, a concession of guilt necessarily impacts the "fairness and accuracy" of a trial, by completely foreclosing the jury's ability to weigh the possibility of the defendant's innocence. The State seems to agree. (BIO at 24: "*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.")

In Mr. King's case, notwithstanding his repeated claims of innocence, his counsel conceded his presence at the scene and participation in the murder, effectively closing the door on a possible verdict of not guilty. This concession necessarily affected the

"fundamental fairness and accuracy" of Mr. King's trial. Without the procedural protection of *McCoy*, the likelihood that Mr. King was accurately convicted was "seriously diminished." That is why this Court has held that a *McCoy* violation is a constitutional violation.

This Court has held that a violation of *McCoy* is a structural error requiring a new trial to correct, without first showing prejudice. Although structural error analysis does not entirely fall within the *Teague* watershed rule exception, finding a violation to be structural error is evidence tending to favor that the violation is also a watershed rule. *See United States v. Sanders*, 247 F.3d 139, 150-51 (4th Cir. 2001) ("We merely emphasize that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague*.").

Thus, the new rule announced in *McCoy* meets both prongs of the *Whorton v. Bockting*, 549 U.S. 406 (2007) analysis (*see* BIO at 25). *Whorton* requires that a watershed rule: (1) "must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction[,]", and (2) "'must alter our understanding of the bedrock elements essential to the fairness of a proceeding.'" *Id*. at 418. The *McCoy* rule does both. First, as demonstrated above, a *McCoy* violation necessarily introduces an "impermissibly large risk of an inaccurate conviction" by inhibiting the jury's ability to consider all evidence of innocence. Second, this type of violation "alter[s] our understanding of the bedrock elements essential to the fairness" of a capital conviction by defining a new constitutionally-grounded right for the defendant to dictate the objectives of his trial.

V. This case is not factually distinguishable from *McCoy*. (BIO at 26-36).

The State argues in the BIO that Mr. King's petition is not worthy of a grant of certiorari or a stay of execution because his case is factually distinguishable from *McCoy*. (BIO at 26-36). The State contends that Mr. King allegedly did not maintain his innocence consistently (BIO at 26-30) and trial counsel did not concede King's guilt. (BIO at 30-36). The argument is that, rather than a clear-cut concession of guilt, counsel instead provided the best defense that they could, given the circumstances and the admissible evidence before the jury. (BIO at 30-31).

Here again, the State misconstrues both the record and *McCoy*. Contrary to the State's arguments, the four-judge dissent in the TCCA's opinion, *Ex parte John William King* WR-49,391-03 (Appendix A), 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.) The dissent acknowledges abundant evidence of Mr. King's innocence, *Id*., prompting them to call for a stay of execution. The four-judge dissent counsels that "we ought to take our time and decide this issue unhurriedly," *Ex parte King, supra*, Keasler, J, dissenting at *2, pointing to that Court's unsuccessful attempts to implement this Court's recent death-penalty precedents, such as *Moore v. Texas*, 139 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). Those reasons alone provide abundant justification for a grant of certiorari and a stay of execution.

Indeed, the State's BIO misconstrues *McCoy* as relating to the now-discarded standard of ineffective-assistance-of-counsel. (The State continuously points to trial counsel's alleged effectiveness: BIO at 10 (defense counsel "challenged kidnapping theory;" at 11 (King's counsel "fought back" and elicited helpful testimony); at 12-13 (King's attorneys attacked the physical evidence); at 31-32 (King's attorneys were effective in challenging State's evidence). All of these are irrelevant in the *McCoy* analysis. This conflation of ineffective assistance with *McCoy* results in the State's arguments that King's claims under *McCoy* merely point to the same "theory of innocence and the same decisions and actions" as in his Fifth Circuit appeal, and is merely "relabel[ing] a previously-litigated claim." (BIO at 18). Even one of the concurring opinions in the TCCA (Newell, J., concurring) is based on this fundamental misunderstanding, as Judge Newell "see[s] very little difference between Applicant's claims in federal court and the ones made here despite Applicant's attempt at re-branding." However, King's federal court claims, *King v. Davis*, 883 F.3d 577 (5th Cir. 2018) were based on ineffective assistance of counsel, not the Sixth Amendment right to client autonomy.

This is a fundamental misunderstanding of *McCoy*. "The required analysis is not affected by the reasonableness of counsel's approach or the competency of their representation." *People v. Flores*, 2019 WL 1577743, Cal. Ct. App., 4th Dist., April 12,

2019 at *7. *See also McCoy*, 138 S. Ct. at 1510–1511; *People v. Eddy*, 2019 WL 1349489 (Ca. Ct. App. 3d Dist, Mar. 29, 2019) at *6 (the choice belongs to the defendant "even in the face of counsel's better judgment and experience") "Instead, we assess whether the record shows that [the defendant] expressed his objective to maintain innocence of the alleged acts and whether counsel acted in accord with that objective." *Flores, supra*, at *7. Mr. King had a right to insist that his attorneys tell the jury that he was not at the scene of this crime and that he was innocent. This Court should not allow an "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 on this important issue by a majority of that Court.

The State also presents a misleading picture of the concession of guilt by defense counsel at final arguments. (BIO at 30-32). Trial counsel's arguments were extensively summarized in Mr. King's petition (at 14-18) and need not be repeated here. Nor does Mr. King argue that "failing to present evidence of innocence is a concession of guilt." (BIO at 32-34). However, the State can point to no place in the record where Mr. King's attorneys ever argued to his jury that he was innocent, and by refusing to assert Mr. King's defense of actual innocence to the jury, Mr. King's counsel "interfere[d] with [Mr. King]'s telling the jury 'I was not the murderer.'" *McCoy* at 1509. Such interference amounted to an infringement upon Mr. King's Sixth Amendment rights, as set forth in *McCoy*, and amounts to a structural error requiring a reversal of Mr. King's conviction and a new trial.

VI. A stay of execution is in the public interest. (BIO at 37-39).

The four-judge dissent in the court below clearly addresses the danger of proceeding with Mr. King's execution and leaving these questions 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.

VI. Conclusion.

For the forgoing reasons, this 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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