APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A – ORDER OF THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON, FILED AUGUST 31, 2020

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

AKIL JAHI A.K.A. PRESTON CARTER v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 93-09760, 93-09761, P-28413

No. W2020-00944-CCA-R28-PD

ORDER

This matter is before the Court on the Petitioner's application for permission to appeal the post-conviction court's denial of his motion to reopen his post-conviction petition. The State has responded in opposition to the motion.

The Petitioner pled guilty to two counts of felony murder during the perpetration of an aggravated burglary and was sentenced to death by a Shelby County jury in 1995. On appeal, the Tennessee Supreme Court remanded the matter for a new sentencing hearing due to the use of improper verdict forms. *See State v. Carter,* 988 S.W.2d 145 (Tenn. 1999). Upon remand, the Petitioner was again sentenced to death on both counts, which was affirmed by the Tennessee Supreme Court on appeal. *See State v. Carter,* 114 S.W.3d 895 (Tenn. 2003), *cert. denied,* 540 U.S.

1221 (2004). The Petitioner then filed a petition for post-conviction relief in which he alleged, as relevant here, that he received ineffective assistance of counsel at the resentencing hearing. The post-conviction court denied relief, and this Court affirmed on appeal. *See Akil Jahi v. State,* No. W2011-02669-CCA-R3-PD, 2014 WL 1004502 (Tenn. Crim. App. Mar. 13, 2014), *perm. app. denied* (Tenn. Sept. 18, 2014). In addition, the Petitioner previously filed two motions to re-open his post-conviction proceedings, both of which were denied. *See Akil Jahi v. State,* No. W2017-02527-CCA-R28-PD (Tenn. Crim. App. Apr. 24, 2018) (order), *perm. app. denied* (Tenn. Sept. 17, 2018); *Akil Jahi v. State,* No. W2016-02201-CCA-R3-PD (Tenn. Crim. App. Aug. 1, 2017) (order), *no perm. app. filed.*

On May 10, 2019, the Petitioner filed the motion to reopen post-conviction proceedings at issue herein. The Petitioner asserted that the recent United States Supreme Court case of *McCoy v. Louisiana,* ____ *U.S.* ____, 138 S. Ct. 1500 (2018) established a new, retroactively applicable rule of constitutional law that entitled him to relief. *See* T.C.A. § 40-30-117(a)(1). *McCoy* held that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission" and that to do so was a "[v]iolation of a defendant's Sixth Amendment-secured autonomy" to decide the objective of his defense. *Id.* at 1510-11. The post-conviction court denied the motion to reopen, relying on this Court's decision in *Oscar Franklin Smith v. State,* No. M2019-01662-CCA-R28-PD, at *2 (Tenn. Crim. App. Oct. 28, 2019) (order), *perm. app. denied* (Tenn. Jan.

15, 2020), in which this Court held that the holding of *McCoy* "is limited to the theory of defense during the guilt phase of a capital trial." *See McCoy,* 138 S. Ct. at 1505 ("With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: *to admit guilt in the hope of gaining mercy at the sentencing stage,* or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.") (emphasis added). The post-conviction court stated that because *McCoy* was inapplicable to the Petitioner's capital sentencing hearing, it had "no choice but to treat the claims presented in [the Petitioner's] motion to reopen as a second post-conviction claim of ineffective assistance of counsel." The Petitioner filed a timely application for permission to appeal in this Court. *See* T.C.A. § 40-30-117(c); Tenn. Sup. Ct. R. 28, § 10(B).

Under the Post-Conviction Procedure Act, a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited circumstances set out in § 40-30-117." T.C.A. § 40-30-102(c); *see Fletcher v. State,* 951 S.W.2d 378, 380 (Tenn. 1997). As relevant here, a motion to reopen must assert:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United

> States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; [and]
>
> . . . .
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a). This Court will grant an application for permission to appeal only if we conclude that the trial court abused its discretion in denying the motion to reopen. T.C.A. § 40-30-117(c).

Even assuming that *McCoy* establishes a retroactively applicable constitutional right that was not recognized at the time of the Petitioner's resentencing hearing, we conclude that the post-conviction court did not abuse its discretion in determining that the holding of *McCoy* would not entitle the Petitioner to relief. *McCoy* held that when a defendant "expressly asserts that the objective of '*his* defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." 138 S. Ct. at 1509 (emphasis in original). As the Court explained:

> 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 qualifica-

> tions, 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.

Id. at 1508 (emphasis altered). As this Court held in *Oscar Franklin Smith,* "It is clear from a reading of *McCoy* that its holding is limited to the theory of defense during the guilt phase of a capital trial." No. M2019-01662-CCA-R28-PD, at *2.

In this case, the Petitioner pled guilty to two counts of felony murder, and there was never any question that he committed the acts alleged. Indeed, by pleading guilty, the Petitioner was conceding his own guilt rather than adamantly maintaining his innocence. The Petitioner complains about counsel's references to "premeditated" murder during voir dire and to the "cold-blooded" nature of the killings during closing argument, and he insists that his plea to the "lesser" offense of felony murder was an "unambiguous objection" to counsel's concession that the Petitioner was guilty of the "greater" offense of premeditated murder.[1] However, these complaints

[1] We note that "Tennessee has a single first degree murder statute that encompasses both premeditated murder and felony murder. Premeditated murder and felony murder are not designated by that statute as separate and distinct offenses but rather as alternative means by which criminal liability for first degree murder may be imposed." *State v. Ely,* 48 S.W.3d 710, 721 (Tenn. 2001) (citing T.C.A. § 39-13-202). In other words, "felony murder is considered equally culpable as premeditated murder, even though it has a different mental state, because they are

relate to counsel's sentencing-phase strategy of "acknowledging the horrific nature of the offenses" and focusing on the Petitioner's remorse, which strategy the Petitioner previously challenged in his original post-conviction petition. *See Akil Jahi,* 2014 WL 1004502, at *129. The Petitioner's objective in this case was not to assert his innocence but to avoid the death penalty, and *McCoy,* even if applicable to a capital sentencing hearing, did not change the analysis with regard to counsel's strategic decisions on how best to achieve a defendant's objective, specifically stating that decisions regarding "what arguments to pursue" are within "the lawyer's province." 138 S. Ct. at 1508 (quoting *Gonzalez v. United States,* 553 U.S. 242, 248 (2008)).

Because the holding of *McCoy* is not applicable to the facts of this case and would not entitle the Petitioner to relief, we conclude that the post-conviction court did not abuse its discretion in denying the Petitioner's motion to reopen. The application for permission to appeal is therefore DENIED. Because it appears that the Petitioner is indigent, costs associated with this action are hereby taxed to the State.

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contained within the same first degree murder statute," and both are eligible for the death penalty. *State v. Telvin Toles,* No. W2018-01175-CCA-R3-CD, 2019 WL 2167835, at *9 (Tenn. Crim. App. May 17, 2019), *perm. app. denied* (Tenn. Sept. 20, 2019).

J. ROSS DYER, JUDGE
JOHN EVERETT WILLIAMS,
PRESIDING JUDGE
CAMILLE R. MCMULLEN, JUDGE

APPENDIX B – ORDER OF THE CRIMINAL COURT OF TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT, AT MEMPHIS, FILED JUNE 5, 2020

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT,
AT MEMPHIS
DIVISION 10

PRESTON CARTER
Now known as AKIL JAHI, Petitioner

v.

STATE OF TENNESSEE, Respondent.

No. 93-09760 and 93-09761 (trial) P-28413 (post-conviction)

Death Penalty Case Post-Conviction
Motion to Reopen

ORDER DENYING MOTION TO REOPEN
POST-CONVICTION PETITION

I. Introduction

This matter is before this Court on Petitioner's May 10, 2019, motion to reopen his petition for post-conviction relief Petitioner, Akil Jahi (formerly known as Preston Carter), by and through counsel, has filed this motion to reopen pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he is entitled to relief based upon a new

rule of law as announced in *McCoy v. Louisiana,* 138 S. Ct. 1500 (2018). After reviewing the motion, the State's response, the further response by Petitioner,[2] and the relevant authorities, for the reasons stated within this order, Petitioner's Motion to Reopen is hereby DENIED.

II. Procedural History[3]

A. Trial

In 1995, Petitioner pled guilty to two counts of felony murder. A Shelby County jury sentenced Petitioner to death on both counts. On direct appeal, the Tennessee Supreme Court affirmed Petitioner's convictions but remanded the case for a new sentencing hearing. *State v. Carter,* 988 S.W.2d 145 (Tenn. 1999). Following the new sentencing hearing, the Petitioner was again sentenced to death. This time, the Tennessee Supreme Court affirmed the death sentences on direct appeal. *State v. Carter,* **111** S.W.3d 895 (Tenn. 2003).

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[2] The State filed its response to Petitioner's motion May 28, 2019. Counsel for Petitioner filed a reply to the State's response on June 10, 2019.

[3] The Hon. Jon Kerry Blackwood, at the time a Judge of the Twenty-Fifth Judicial District, presided over Petitioner's trial and resentencing hearing by designation. Petitioner's post-conviction case was transferred to Division Ten of Criminal Court. Judge James Beasley, Jr., presided over Petitioner's post-conviction proceedings and ruled on the two earlier motions to reopen. Judge Beasley retired in 2017.

B. Post-Conviction

Petitioner filed a timely petition for post-conviction relief. Following a hearing, the post-conviction court denied relief. The Court of Criminal Appeals affirmed the post-conviction court's ruling. *Akil Jahi a.k.a. Preston Carter v. State,* No. W2011-02669-CCA-R3-PD (Tenn. Crim. App. Mar. 13, 2014). The Tennessee Supreme Court subsequently denied Petitioner's application for permission to appeal.

Petitioner first sought to reopen his post-conviction proceedings based on the United States Supreme Court's ruling in *Hall v. Florida,* 572 U.S. 701 (2014). The post-conviction court denied the motion by written order filed October 24, 2016. The Court of Criminal Appeals dismissed Petitioner's application for permission to appeal based on procedural deficiencies. *Akil Jahi, aka Preston Carter v. State,* No. W2016-02201-CCA-R3-PD (Tenn. Crim. App. Aug. 1, 2017) (order dismissing appeal).

In August 2017, Petitioner again sought to reopen his post-conviction proceedings, this time based on *Moore v. Texas,* 137 S. Ct. 1039 (2017). On November 28, 2017, the post-conviction court denied the motion to reopen. The Court of Criminal Appeals denied permission to appeal. *Akil Jahi AKA Preston Carter v. State,* No. W2017-02527-CCA-R28-PD (Tenn. Crim. App. April 24, 2018). The Tennessee Supreme Court denied Petitioner's application for permission to appeal.

C. Federal Habeas Corpus Proceedings

After the denial of his state post-conviction proceedings, Mr. Jahi filed a timely petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. Mr. Jahi's federal case has been stayed pending the resolution of this motion to reopen. *See Akil Jahi aka Preston Carter v. Tony Mays, Warden,* No. 2:14-cd-02791, "Order for Continued Stay of Habeas Proceedings" (W.D. Tenn. July 15, 2019).

III. Applicable Standards: Motions to Reopen

The Tennessee Supreme Court has summarized the statutes governing motions to reopen:

> Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief . . . within one (1) year of the final action of the highest state appellate court to which an appeal is taken . . . ." Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief" Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, . . . a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." Id. These limited circumstances include the following:
>
>> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a

> constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; [and]
>
> . . . .
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.
>
> Tenn. Code Ann. § 40-30-217(a)(1) [and] (4) [now Tenn. Code Ann. § 40-30-117(a)(1) and (4)].

Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003) (alterations added). *McCoy* was decided May 14, 2018, so Petitioner's motion to reopen is timely.

A motion to reopen *"shall be denied* unless the factual allegations, if true, meet the requirements of [Tenn. Code Ann. § 40-30-117](a)." Tenn. Code Ann. § 40-30-117(b) (emphasis added).

IV. Petitioner's Claims Under *McCoy*

Regarding whether *McCoy* constitutes a new rule of constitutional law that must be applied retroactively, counsel for Mr. Jahi states,

> Mr. Jahi is entitled to reopen his post-conviction proceedings "within one (1) year of

the ruling of the . . . United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial" as long as "retrospective application of that right is required." Tenn. Code Ann. § 40-30117(a)(1). Under Tennessee law, a holding establishes a new rule of constitutional law entitled to retrospective application if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. Tenn. Code Ann. § 4030-122. Mr. Jahi's motion to reopen his post-conviction proceedings on the basis of new constitutional rights recognized by the U.S. Supreme Court in *McCoy v. Louisiana,* 138 S. Ct. 1500 (2018), satisfies that standard.

Less than a year ago, on May 14, 2018, the U.S. Supreme Court's announced in *McCoy* that depriving a defendant of the right to make "fundamental choices about his own defense" and "to decide on the objective of his defense" is a "structural" error in "violation of a defendant's Sixth Amendment-secured autonomy." *McCoy,* 138 S. Ct. at 1506, 1511. Prior to *McCoy,* the U.S. Supreme Court had ruled that a defendant did not have such a right-at least when the defendant remained silent and did not object after conference with defense counsel. *Florida v. Nixon,* 543 U.S. 175, 181 (2004). Three dissenters observed that the majority had announced a "newly discovered fundamental right" and a "newly discovered constitutional right." *McCoy,* 138 S. Ct. at 1512, 1518 (Alito, J., dissenting).

Clearly, *McCoy* was not dictated by prior precedent, and reasonable minds (including those

of three dissenting Supreme Court justices) debated its conclusion. Insofar as Mr. Jahi's sentencing hearing violated the rules articulated in *McCoy,* he is entitled to reopen his post-conviction proceedings.

[. . . .]

The new rule of *McCoy v. Louisiana* establishes that a criminal defendant possesses a Sixth Amendment secured right of autonomy, which gives the defendant-not defense counsel-the right to set the objectives of his defense. *McCoy,* 138 S. Ct. at 1505-10. To gain the assistance of counsel-something an intellectually disabled defendant such as Akil Jahi surely needed-a defendant "need not surrender control entirely to counsel. For the Sixth Amendment . . . speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* at 1508 (internal citations deleted). "With individual liberty-and, in capital cases, life-at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id.* at 1505; *see Hashimi v. United States,* No. 18.5184, 139 S. Ct. 377, 377 (2018) (granting certiorari, vacating, and remanding a case in light of *McCoy* where counsel conceded guilt on two counts during closing argument); *see also* (Ex. 12, Hashimi Petition for Writ of Certiorari).

McCoy makes clear that a component of a defendant's autonomy is the right to be consulted with prior to substantive decisions being made. "Counsel, in any case, must still develop a trial strategy and discuss it with her client." *McCoy,* 138 S. Ct. at 1509. If "after consultation," a client

> disagrees with his lawyer's objectives, the lawyer is not free to "override" the client. *Id.* A lawyer cannot "negate [the defendant's] autonomy by overriding [the defendant's] desired defense objective." *Id.* A defendant's silence will only permit a lawyer to make unilateral decisions, if the lawyer first discusses those decisions and the trial strategy with the defendant. *Id.*[4]

Petitioner's Motion to Reopen, at 16-18 (alterations added).

V. Review of Petitioner's Claims

The Court has reviewed Mr. Jahi's claims and concludes they should be denied. This case is similar to that of another Tennessee death row inmate whose *McCoy* claim was rejected by the Court of Criminal Appeals. Davidson County death row inmate Oscar Franklin Smith filed a McCoy-based motion to reopen his post-conviction proceedings, claiming his trial attorney conceded Mr. Smith's guilt during sentencing-phase closing argument. During the guilt-innocence phase, Mr. Smith's attorneys presented an alibi defense. The post-conviction court denied the motion to reopen. On appeal, the Court of Criminal Appeals affirmed the post-conviction court's ruling, concluding the issue of whether *McCoy* announced a new rule of law need not be addressed because the *McCoy* holding was not applicable to Mr. Smith's case:

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[4] Petitioner's "Motion to Reopen" at 16-18 (alterations added)

This Court need not decide whether *McCoy* announced a new rule of constitutional law requiring retroactive application because the holding in that case is inapplicable to the facts of the Petitioner's case. In *McCoy,* the Supreme Court held that an attorney cannot admit guilt over a defendant's objection during the guilt phase of a capital trial. *Id.* at 1505. "When a client expressly asserts that the objective of *'his* defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (emphasis in original). It is clear from a reading of *McCoy* that its holding is limited to the theory of defense during the guilt phase of a capital trial: "With individual liberty — and, in capital cases, life — at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: *to admit guilt in the hope of gaining mercy at the sentencing stage,* or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *Id.* at 1505 (emphasis added). The Court emphasized that an attorney "may not admit her client's *guilt of a charged crime* over the client's intransigent objection to that admission." *Id.* at 1510 (Emphasis added).

The Petitioner contends his attorney repeatedly conceded the Petitioner's guilt during closing argument in the sentencing stage of his capital trial. Indeed, the Defendant presented an alibi defense during the guilt phase of his trial which, by their verdict, the jury ultimately rejected. *Smith,* 868 S.W.2d at 568; *Smith,* 1998 WL 345353 at *6. His attorneys did not concede the Petitioner's guilt during the guilt phase.

> Thus, the holding in *McCoy* is inapplicable to the facts of this case.
>
> Accordingly, we conclude that the trial court did not abuse its discretion in denying the Petitioner's motion to reopen. The application for permission to appeal is, therefore, denied.

Oscar Smith v. State, No. M2019-01662-CCA-R28-PD, at 2 (Tenn. Crim. App. Oct. 28, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020).

Similarly, this case does not involve attorneys who asserted their client's guilt during the guilt-innocence phase of trial over the client's wishes. Mr. Jahi pleaded guilty, so there can be no contention that Mr. Jahi wished to assert his innocence only to have counsel assert his guilt during the first phase of trial. Because the Court of Criminal Appeals has concluded *McCoy* applies only to the guilt-innocence phase of a criminal trial, *McCoy* is inapplicable to the Petitioner's case, in which there was no guilt-innocence phase of trial. *McCoy* does not entitle Mr. Jahi to relief

In light of the Court of Criminal Appeals' conclusion that *McCoy* is inapplicable to a capital sentencing hearing, this Court has no choice but to treat the claims presented in Mr. Jahi's motion to reopen as a second post-conviction claim of ineffective assistance of counsel. Mr. Jahi has already had an opportunity to litigate his ineffective assistance claim in his original post-conviction proceedings, and Tennessee statutes prohibit a second or successive

post-conviction petition. *See* Tenn. Code Ann. § 40-30-102(c). This Court is barred from considering Mr. Jahi's claims and therefore must dismiss his motion to reopen.

VI. Conclusion

For the reasons stated above, Mr. Jahi's motion to reopen his petition for post-conviction relief is DENIED.

In light of the stay in federal court, the Criminal Court Clerk is instructed to forward a copy of this Order to counsel for the Petitioner and the State in the federal court proceedings so as to keep those attorneys informed of the progress of this matter.

IT IS SO ORDERED this the 5th day of June, 2020.

Jennifer Johnson Mitchell, Judge
Criminal Court, Division 10
30th Judicial District, at Memphis

APPENDIX C – ORDER OF THE SUPREME COURT OF TENNESSEE AT JACKSON, FILED JANUARY 14, 2021

AKIL JAHI AKA PRESTON CARTER v. STATE OF TENNESSEE

Criminal Court for Shelby County
Nos. 93-09760, 93-09761, P-28413

No. W2020-00944-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Akil Jahi and the record before us, the application is denied.

PER CURIAM

APPENDIX D – MOTION TO REOPEN PETITION FOR POST-CONVICTION RELIEF, FILED MAY 10, 2019

"The state is asking you to order the death of Preston Carter.

Does he deserve to die? Probably."

(Argument of Defense Counsel, Coleman Garrett; Resentencing, Ex. 6, Trans. Sentencing Vol. 7, p. 472).

I. Introduction

On May 14, 2018, the United States Supreme Court resolved a previously unsettled question of constitutional criminal law, holding that a defendant may insist that defense counsel refrain from admitting guilt—even when counsel believes that a concession will help avoid a death sentence. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018). But *McCoy* went further than simply answering that question, it also established that under the Sixth Amendment a criminal defendant has autonomy "to decide the objective of the defense." *Id.* at 1508. *McCoy* established a new rule of law not dictated by prior precedent that was susceptible to—and the subject of—debate among reasonable minds, including three sitting U.S. Supreme Court Justices. *McCoy*, 138 S. Ct. at 1512 (Alito, J. dissenting); *see* Tenn. Code Ann. § 40-30-122.

Under this new rule of law, Mr. Jahi is entitled to a new sentencing hearing, where he is represented by defense counsel who takes the time to meet with him, consult with him, and determine his objectives. He is

entitled to a new sentencing hearing, where he is "assisted" by counsel who will advise Mr. Jahi while still allowing Mr. Jahi to define the objectives of the hearing, beginning, most fundamentally, with whether the jury should be asked to spare his life or told that he probably deserves to die. In this case, client-driven decisions would also reverse previous decisions over whether to accept the benefits that accompanied the plea entered or recast the conviction as a more culpable crime, whether to concede or contest aggravating circumstances, whether to advance or waive valid mitigating circumstances, and how to explain to the jury who Akil Jahi is now.

Mr. Jahi was denied his constitutionally protected autonomy to determine these objectives in his capital resentencing by an attorney who declined to speak with him before making fundamental decisions about Mr. Jahi's defense against Mr. Jahi's wishes. Contrary to his objectives, defense counsel agreed that Mr. Jahi deserved to die. Against his wishes, defense counsel told the jury that Mr. Jahi was guilty of a cold-blooded, premeditated murder—which was false, he had pled guilty to a reckless killing during a burglary. Against his desires, defense counsel conceded both aggravators advanced by the prosecution, while waiving the most obvious and compelling mitigator—one that Mr. Jahi testified to—of substantial impairment due to intoxication. Contrary to his dignity, defense counsel refused to use his legal name, misreported the reasons behind his name change—including by assuming that it reflected a conversion to Islam—and mocked "Akil Jahi" in front of the jury that ultimately agreed with defense

counsel's statement that Mr. Jahi probably deserved to die.

Under the unusual circumstances of this case and the new, retroactively applicable rule of constitutional criminal law announced in *McCoy*, Mr. Jahi is entitled pursuant to sections 40-30-117 and 40-30-122 of the Tennessee Code Annotated to reopen his petition for post-conviction relief.

II. Procedural History

Akil Jahi pled guilty to two counts of reckless killing during the perpetration of an aggravated burglary, felony murder, in Shelby County Case Nos. 93-09760 and 93-09761. The Shelby County Court originally sentenced Mr. Jahi to death on January 25, 1995. On direct appeal, the Tennessee Court of Criminal Appeals affirmed the convictions and death sentences. *See State v. Carter*, No. 02-C-01-9601-CR00002, 1997 WL 220918 (Tenn. Crim. App. May 5, 1997).[5] The Tennessee Supreme Court vacated Mr. Jahi's death sentences and remanded the case for a new sentencing hearing, with proper verdict forms. *State v. Carter*, 988 S.W.2d 145 (Tenn. 1999).

In February of 2000, Mr. Jahi was again sentenced to death for both convictions. Mr. Jahi's motion for a new trial was denied. *State v. Carter*, No. 93-09760, 61 (Aug. 31, 2000). On appeal, the Court of Criminal Appeals affirmed the death

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[5] Akil Jahi legally changed his name from Preston Carter in 1996.

sentences. *State v. Carter*, No. W2000-02204-CCA-R3-DD, 2002 WL 1482783 (Tenn. Crim. App. Feb. 8, 2002). The Tennessee Supreme Court affirmed the death sentences. *State v. Carter*, 111 S.W.3d 895 (Tenn. 2003).

Mr. Jahi filed a consolidated Petition for Post-Conviction relief on December 7, 2010. He was subsequently denied relief by the post-conviction court. Mr. Jahi appealed the trial court's decision, and the Tennessee Court of Criminal appeals denied Mr. Jahi any post-conviction relief. *Jahi v. State*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502 (Tenn. Crim. App. March 13, 2014).

III. Statement of Relevant Facts

1. On January 24, 1995, Akil Jahi (then known as Preston Carter) entered a plea of guilty to two counts of first degree felony murder for the commission of "a reckless killing of another" during the perpetration of an aggravated burglary. (Ex. 1, Trans. Trial Vol. II, pp. 188, 194, 196–97). By agreement with the State of Tennessee, he did *not* plead guilty to first degree premeditated murder. (*Id.* at pp. 188–89).

2. Following his guilty plea and an abbreviated sentencing hearing, Mr. Jahi was sentenced to death, however the Tennessee Court of Criminal Appeals, reversed and remanded for a new sentencing hearing using correct verdict forms. *State v. Carter*, 988 S.W.2d 145, 153 (Tenn. Crim. App. 1999).

3. On March 16, 1999, Coleman Garrett was appointed as lead counsel for Akil Jahi and given the

responsibility of conducting his new sentencing hearing. (Ex. 2, Trans. PCR Hrg. Garrett Vol. 23 (hand-corrected from Vol. 22) p. 91(hand-dated Dec. 14, 2010)). That new sentencing commenced on February 14, 2000. (*Id.*).

4. Co-counsel, Howard Manis was also appointed, however, Mr. Garrett considered himself to have final decision-making authority. (*Id.* at p. 169). At resentencing, Mr. Garrett conducted opening statement, the examination of Mr. Jahi, and closing argument. (Ex. 3, Trans. Sentencing Vol. 4 pp. iv–viii).

5. Coleman Garrett spoke to Mr. Jahi for the first time, for approximately 15 minutes via telephone on April 19, 1999—one month after his appointment. (Ex. 2, Trans. PCR Hrg. Garrett p. 97; Ex. 7, Garrett Billing Records). On April 23, 1999, Garrett and his co-counsel, Howard Manis, and an investigator, met with Mr. Jahi in conjunction with a 30 minute court appearance, and this meeting lasted for a period of less than three hours. (Ex. 2, Trans. PCR Hrg. Garrett p. 97; Ex. 7, Garrett Billing Records; Ex. 10, Jahi Affidavit, ¶¶ 2, 4). Mr. Garrett next met with Mr. Jahi, seven months later, on December 21, 1999 at the Riverbend prison in Nashville, Tennessee; this visit, including travel to and from Memphis, was billed at 10 hours. (Ex. 2, Trans. PCR Hrg. Garrett p. 98; Ex. 7, Garrett Billing Records; Ex. 10, Jahi Affidavit, ¶ 4).

6. Mr. Garrett has no recollection of any other meetings with Mr. Jahi prior to trial, though entries for trial preparation in February of 2000, in the days

immediately before resentencing, "could have been with client." (Ex. 2, Trans. PCR Hrg. Garrett pp. 98–99; Ex. 7, Garrett Billing Records). Mr. Garrett did not identify any other times he "could have" met with Mr. Jahi in preparation for trial, between his March, 1999 appointment, and February of 2000. (*Id.*). Mr. Jahi has no memory of any other meetings, outside of the two identified in Garrett's billing records. (Ex. 10, Jahi Affidavit, ¶ 4).

7. When Mr. Garrett met with Mr. Jahi he did not discuss his strategy and did not seek Mr. Jahi's opinion on any decisions he might make. (*Id.* at ¶¶ 4–20). Mr. Garrett did not ask Mr. Jahi what his objectives for the sentencing hearing were. (*Id.* at ¶¶ 4–6, 8–10, 12–16, 18–20). Mr. Garrett acted as if he had exclusive authority to define the objectives of the representation, and he did not see any need to consult with Mr. Jahi for his input. (*Id.* at ¶¶ 19-20).

8. At resentencing, repeatedly, without Mr. Jahi's approval, and contrary to Mr. Jahi's guilty plea to a "reckless killing," Mr. Garrett described his conduct as premeditated, deliberate, planned and/or in cold-blood. Had Mr. Jahi been given the opportunity to decide on this strategy or to articulate the objectives of his defense, he would have insisted that his plea of guilty to a "reckless killing" be honored, and he would have demanded that Mr. Garrett not tell the jury that he was guilty of a more morally culpable form of homicide. (*Id.* at ¶¶ 11–13). It was not his objective that he be sentenced for premeditated murder. (*Id.*).

9. Some specific examples of Mr. Garrett's unilateral decision to portray Mr. Jahi's conduct as intentional and cold-blooded (as opposed to reckless and in a state of intoxicated panic) include:

a. Mr. Garrett submitted a jury questionnaire to prospective jurors that three times described the murders as premeditated, while making no reference to "reckless" killing or felony murder. (Ex. 11, Jury Questionnaire, Q. 42, 45–46).

b. During *voir dire*, Mr. Garrett told the jury that Mr. Jahi had "killed two people in cold blood." (Ex. 3, Trans. Sentencing Vol. 4 p. 56). Later, he expanded on this, and claimed (falsely) that Mr. Jahi had pled guilty to premeditated murder. (*Id.* at *p.* 96). The prosecutor corrected this misstatement, and said, "Excuse me for interrupting, but I think he pled guilty to murder during the perpetration of a felony." (*Id.* at p. 97).

c. Nonetheless, Mr. Garrett and co-counsel, Mr. Manis, continued to describe Mr. Jahi's conduct as premeditated throughout the remainder of *voir dire*, consistently questioning the jurors about their views on premeditated murder, while never explaining (or acknowledging) that Mr. Jahi had pled guilty to a reckless killing in the perpetration of a felony. (*Id.* at pp. 99–100, 103–04, 106, 111, 113, 125, 146; Ex. 4, Sentencing Vol. 5, p. 167).

d. In closing argument, Mr. Garrett again claimed that Mr. Jahi had "cold-bloodedly" killed

the victims. (Ex. 6, Trans. Sentencing Vol. 7, p. 472).

e. Later, in closing, Mr. Garrett claimed that Mr. Jahi had changed his name from Preston Carter, because he didn't want to be "identified as that person that committed that heinous, atrocious, cruel act of cold-blooded murder." (*Id.* at p. 478).

f. Mr. Garrett told the jury during closing that "Preston Carter knew what he was doing." (*Id.* at p. 480).

10. At resentencing, repeatedly, without Mr. Jahi's approval, Mr. Garrett conceded that the legal aggravating circumstance of "heinous, atrocious and cruel" was applicable. Mr. Garrett had not explained the elements of this aggravating factor to Mr. Jahi, had he done so, and had he explained that it required proof of "torture," Mr. Jahi would have objected to this concession. (Ex. 10, Jahi Affidavit, ¶¶7–8). Mr. Jahi would not have willingly agreed to concede such a crucial point. (*Id.*).

11. It was not Mr. Jahi's objective to unnecessarily concede aggravating factors that would justify his execution. (*Id.*). However, as Mr. Garrett never talked to Mr. Jahi about such things, Mr. Jahi was denied any opportunity to object to this concession. (*Id.* at ¶¶ 7–8, 19–20).

12. Some specific examples of Mr. Garrett's unilateral decision to concede that the aggravating circumstance, "heinous, atrocious and cruel" applied include:

a. In *voir dire*, Mr. Garrett told the jury that Mr. Jahi had "engaged in some heinous conduct" and "did this, heinous act—acts." (Ex. 3, Trans. Sentencing Vol. 4 pp. 67, 74).

b. In opening statement, Mr. Garrett conceded the murders were "heinous, atrocious and cruel." (Ex. 4, Sentencing Vol. 5 p. 199).

c. In opening statement, Mr. Garrett conceded that the acts described by the prosecutor were true. (*Id.* at p. 200). The acts vividly described by the prosecutor involved mental torture that, the prosecutor explained, rose to the level of torture sufficient to be "heinous, atrocious and cruel." (*Id.* at p. 197–98).

d. In closing, Mr. Garrett submitted that because the murder was cold-blooded, it must have been heinous, atrocious and cruel. (Ex. 6, Trans. Sentencing Vol. 7, p. 472).

e. In closing, Mr. Garrett claimed that Mr. Jahi had changed his name from Preston Carter, because he didn't want to be "identified as that person that committed that heinous, atrocious, cruel act of cold-blooded murder." (*Id.* at p. 478).

13. At resentencing, Mr. Garrett conceded that Mr. Jahi had been convicted of a prior felony crime of violence—this was the only other aggravating factor advanced by the prosecution—thus he conceded both aggravators. (Ex. 4, Sentencing Vol. 5 p. 197). In closing he stated: "The state is relying upon two aggravating factors that have been articulated by Mr. Henderson. I can't take issue with the existence of

those aggravating factors." (Ex. 6, Trans. Sentencing Vol. 7, p. 472). Mr. Garrett had not discussed with Mr. Jahi any efforts they could make to diminish the significance of the second aggravating factor regarding a prior felony crime of violence. (Ex. 10, Jahi Affidavit, ¶¶ 7–8).

14. Mr. Garrett decided not to present any proof about what had happened during Mr. Jahi's prior felony offense—where he (1) laid a shotgun on the counter (did not point it at anyone), (2) asked for candy for his children's lunch, and (3) rebuffed his co-defendant's attempt to take the clerk elsewhere. (Ex. 2, Trans. PCR Hrg. Garrett p. 157).

15. While, Mr. Jahi is not a lawyer and could not have directed Mr. Garrett as to how to diminish the significance of the second aggravating factor—he knew that he did not want to unnecessarily concede facts that could lead to his execution. (Ex. 10, Jahi Affidavit, ¶¶ 7–8, 14). Mr. Garrett's decision not to attack the second aggravating factor (and to concede both factors) was not consistent with Mr. Jahi's objectives, and not one he would have agreed to, if he had been consulted. (*Id.*).

16. At resentencing, repeatedly, without Mr. Jahi's approval, Mr. Garrett conceded that the following statutory mitigating factor did not apply: "The capacity of the defendant to appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which was insufficient to establish a

defense to the crime but which substantially affected his judgment." Tenn. Code Ann. § 39-13-204.

17. Mr. Jahi strongly believed that he would not have committed the crimes, but for his extreme intoxication. (Ex. 10, Jahi Affidavit, ¶ 9). It was his objective to advance this ground for mitigation (though, of course, he did not know that it was a statutory factor). (*Id.*).

18. Mr. Garrett never discussed with Mr. Jahi his intent to concede that this obviously applicable mitigating factor did not apply, and he did not give Mr. Jahi any opportunity to object to his unilateral decision to waive this factor. (*Id.*). Mr. Jahi did not approve of Mr. Garrett's decision to waive this factor. (*Id.*). Some specific examples of Mr. Garrett's strategic decision to waive the "substantially impaired" mitigating factor, include:

a. In opening statement, Mr. Garrett only articulated two mitigating factors: (1) Mr. Jahi could be of service in the future, and (2) there was no likelihood of him committing similar crimes in the future. (Ex. 4, Sentencing Vol. 5 pp. 199–200).

b. In opening, Mr. Garrett said that the fact that Mr. Jahi was "droned by drugs and alcohol" and was a "raving maniac" was not an excuse for his conduct. (*Id.* at p. 200).

c. In closing, Mr. Garrett firmly disavowed the applicability of the intoxication statutory mitigator:

> Could he have done it if he hadn't been on drugs and full of alcohol? Does it make a difference? It doesn't make a difference in terms of an excuse. Is it a factor to take into consideration? *It's not a factor to take into consideration in terms of why he did this.*
>
> (Ex. 6, Trans. Sentencing Vol. 7, pp. 474–75) (emphasis added).

19. Coleman Garrett conceded that Akil Jahi probably deserved to die. Mr. Jahi does not, did not and would not agree that he probably deserved to be executed; had he been consulted or given any chance to have his voice heard, he would have disagreed with this decision. (Ex. 10, Jahi Affidavit, ¶¶ 14–15). Examples of this remarkable argument are:

a. In closing, Mr. Garrett stated: "The state is asking you to order the death of Preston Carter. Does he deserve to die? Probably." (Ex. 6, Trans. Sentencing Vol. 7, p. 472).

b. Later Mr. Garrett observed, "It's easy to say kill him." (*Id.* at p. 473).

20. Mr. Garrett conceded that nothing in Mr. Jahi's background, "prior to 1991" was relevant as a mitigating factor, arguing that:

> There was no proof that Mr. Carter had a bad childhood—no proof of him being neglected—no proof of him being abused—no proof of anything mitigating in Mr. Carter's life up until 1991 or thereabouts. He was drugging and drinking and

> hanging out with his friends and mad with the world—mad with the world about what?

(*Id.* at, p. 474).

21. Mr. Garrett did not discuss his intent not to investigate, develop, argue or submit any mitigation related to Mr. Jahi's childhood with his client. (Ex. 10, Jahi Affidavit, ¶¶ 9–10, 20). During post-conviction proceedings, Mr. Garrett testified that he was unaware of anything "horrendous" enough to present in mitigation and accepted the prosecutor's suggestion that maybe Mr. Jahi had lost a cousin. (Ex. 9, Trans. PCR Hrg. Garrett Vol. 24 (hand-corrected from Vol. 23) pp. 27–28)). Having only met with Mr. Jahi a couple of times, Mr. Garrett did not know that Mr. Jahi had lost a brother in a terrifying train accident, and that this brother had been his protector and best friend.

22. Similarly, Mr. Garrett was unaware that Mr. Jahi was the primary caregiver for his older sister, who had sickle cell anemia and was often in excruciating pain. (Ex. 2, Trans. PCR Hrg. Garrett p. 149–151).

23. Mr. Jahi, had he been given any opportunity to make the decisions about the objectives of his defense, would have asked that Mr. Garrett present all possible mitigation proof. (Ex. 10, Jahi Affidavit, ¶ 10). Mr. Jahi would not have willingly chosen to waive a powerful mitigating factor that could have saved his life. (*Id.*). Mr. Jahi would not have chosen that the objective of his defense was to rely, solely, on post-crime rehabilitation. (*Id.*).

24. Mr. Garrett without consultation with Mr. Jahi, disparaged and mischaracterized his decision to change his name from Preston Carter; claiming that he made the change because he didn't want to be "identified as that person that committed that heinous, atrocious, cruel act of cold-blooded murder." (Ex. 6, Trans. Sentencing Vol. 7, p. 478). He went on and described what he imagined was Mr. Jahi's thinking:

> I'm changing my name to Akil. I don't know whether it works for him or not because when you wake in the morning you're still Preston Carter. I guess you have to try to get away from yourself, though.
>
> I don't want to even suggest any comparison but to see the only reason I would suggest to you that you would go through these kinds of changes of trying to change your name and realign yourself religiously and what have you is because there is something that's haunting you.

(*Id.* at p. 478).

25. Mr. Jahi's change of name did not represent any religious change—at the time of resentencing he was a Baptist, same as he had been when called Preston Carter. However, the name change was very significant to Mr. Jahi, as Akil meant "one who uses reason" and Jahi means "dignity." (Ex. 10, Jahi Affidavit, ¶ 17). Mr. Garrett did not consult with Mr. Jahi to learn these things, or to allow him to explain the significance of his name. (*Id.*) It was contrary to Mr. Jahi's objectives to claim that he had changed religion, or to denigrate the significance of his name.

(*Id.* at ¶¶ 17, 18). It was contrary to some of Mr. Jahi's most deeply-held and personal beliefs to call him Preston Carter, when that was not who he was. (*Id.*).

26. The decisions described above were made by Mr. Garrett as lead counsel without consultation with Mr. Jahi. Defense counsel treated the decision not to challenge the prosecution's version of the facts (including that the killings were heinous, atrocious and cruel, as they involved torture) as a "trial decision" made by the lead counsel lawyer. (Ex. 8, Trans. PCR Hrg. Manis, Vol. 20 (hand-corrected from Vol. 19) pp. 198–99)). Defense counsel made an allegedly "tactical decision" not to address alcohol and drug use as a mitigator, and to "go with what we believed was a stronger position at the time in showing his improvement since being incarcerated". (*Id.* at pp. 210–211).

27. Mr. Garrett believed that the only mitigating factor that was worth advancing was that "the person who came into prison was not the same person who the jury was looking at in the courtroom." (Ex. 9, Trans. PCR Hrg. Garrett, p. 14). He did not believe that expert testimony regarding the effect of the loss of his brother "would have made a difference." (*Id.* at p. 52). Mr. Garrett never discussed with Mr. Jahi his belief that most grounds for mitigation—including the statutory factor regarding substantial impairment—would not work. (Ex. 10, Jahi Affidavit, ¶¶ 9–10, 19–20). Mr. Jahi was never given a chance by Mr. Garrett to object to this decision waive most possible mitigation. (*Id.*). It was not Mr. Jahi's objective to waive possible mitigation. (*Id.*).

28. While Mr. Jahi did not agree to the various decisions made by Coleman Garrett, or the objectives he advanced, the prosecution certainly found them acceptable; at the start of their "rebuttal argument," they stated: "Ladies and gentlemen, I don't really have a lot to argue with Mr. Garrett about. He's doing a good job." (Ex. 6, Trans. Sentencing Vol. 7, p. 482).

29. Akil Jahi is intellectually disabled—at the time of his resentencing his tested I.Q. placed him in the intellectually disabled range, and he had profound deficits in adaptive behavior. Nonetheless, he had sufficient intellectual functioning to know that he wanted to live, and to know that he did not want to unnecessarily concede facts that would support his execution, and to know that he did not want to waive relevant mitigation. He had sufficient intellectual functioning to know that a "cold-blooded," premeditated murder—which he did not commit—is more likely to receive the death penalty, than a reckless killing by an extremely intoxicated man.

30. At trial, Mr. Jahi sat behind counsel. He was not spoken to, or consulted in any meaningful way during the trial. (Ex. 10, Jahi Affidavit, ¶ 20). From his perspective he was a mere passenger with no control over the course of the trial. (*Id.*).

IV. Law and Argument

A. Tennessee Code Annotated § 40-30-117 grants Akil Jahi the right to reopen post-conviction proceedings.

Mr. Jahi is entitled to reopen his post-conviction proceedings "within one (1) year of the ruling of the . . . United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial" as long as "retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). Under Tennessee law, a holding establishes a new rule of constitutional law entitled to retrospective application if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. Tenn. Code Ann. § 40-30-122. Mr. Jahi's motion to reopen his post-conviction proceedings on the basis of new constitutional rights recognized by the U.S. Supreme Court in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), satisfies that standard.

Less than a year ago, on May 14, 2018, the U.S. Supreme Court's announced in *McCoy* that depriving a defendant of the right to make "fundamental choices about his own defense" and "to decide on the objective of his defense" is a "structural" error in "violation of a defendant's Sixth Amendment-secured autonomy." *McCoy*, 138 S. Ct. at 1506, 1511. Prior to *McCoy*, the U.S. Supreme Court had ruled that a defendant did not have such a right—at least when the defendant remained silent and did not object after conference with defense counsel. *Florida v. Nixon*, 543 U.S. 175, 181 (2004). Three dissenters observed that the majority had announced a "newly discovered fundamental right" and a "newly discovered constitutional right." *McCoy*, 138 S. Ct. at 1512, 1518 (Alito, J., dissenting).

Clearly, *McCoy* was not dictated by prior precedent, and reasonable minds (including those of three dissenting Supreme Court justices) debated its conclusion. Insofar as Mr. Jahi's sentencing hearing violated the rules articulated in *McCoy*, he is entitled to reopen his post-conviction proceedings.

B. Trial counsel violated *McCoy* and deprived Mr. Jahi of the right to make fundamental choices about his defense in no less than five-ways.

The new rule of *McCoy v. Louisiana* establishes that a criminal defendant possesses a Sixth Amendment secured right of autonomy, which gives the defendant—not defense counsel—the right to set the objectives of his defense. *McCoy*, 138 S. Ct. at 1505–10. To gain the assistance of counsel—something an intellectually disabled defendant such as Akil Jahi surely needed—a defendant "need not surrender control entirely to counsel. For the Sixth Amendment . . . speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* at 1508 (internal citations deleted). "With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id.* at 1505; *see Hashimi v. United States*, No. 18-5184, 139 S. Ct. 377, 377 (2018) (granting certiorari, vacating, and remanding a case in light of *McCoy* where counsel conceded guilt on two counts during closing argument); *see also* (Ex. 12, Hashimi Petition for Writ of Certiorari).

McCoy makes clear that a component of a defendant's autonomy is the right to be consulted with prior to substantive decisions being made. "Counsel, in any case, must still develop a trial strategy and discuss it with her client." *McCoy*, 138 S. Ct. at 1509. If "after consultation," a client disagrees with his lawyer's objectives, the lawyer is not free to "override" the client. *Id.* A lawyer cannot "negate [the defendant's] autonomy by overriding [the defendant's] desired defense objective." *Id.* A defendant's silence will only permit a lawyer to make unilateral decisions, if the lawyer first discusses those decisions and the trial strategy with the defendant. *Id.*

The claim being raised here is entirely distinct from a claim of ineffective assistance of counsel under *Strickland v. Washington*. While, some of the acts and omissions of Coleman Garrett may be reviewed (and should be reviewed in Federal Court) under that rubric, the new rule of *McCoy* focuses on the defendant's right to set the objectives of his defense—not on the quality of counsel's representation, even when it is profoundly deficient.

As the statement of facts makes clear, defense counsel only talked to Mr. Jahi three times, including once by telephone, prior to commencement of the resentencing. During those limited conversations, counsel did not question Mr. Jahi to learn what his objectives might be, nor did counsel explain to Mr. Jahi his proposed strategies or the applicable law. Based on this lack of communication, counsel made the following decisions that overrode or conflicted with Mr. Jahi's objectives—without affording Mr. Jahi any opportunity to object.

1. Defense counsel deprived Mr. Jahi of the right to make *the* fundamental choice over *the* fundamental goal in the sentencing hearing by telling the jury that Mr. Jahi probably deserved to die.

Defense counsel told the jury that Mr. Jahi probably deserved to be executed. (Ex. 6, Trans. Sentencing Vol. 7, p. 472). Mr. Jahi did not agree with this statement, and it was contrary to his objective to live and to present himself to the jury as a person who should not be executed. In a hearing where a defendant has pleaded guilty and the jury's only task was to decide life or death, this unauthorized assertion—that Mr. Jahi's own counsel thought he probably deserved to die—violates Mr. Jahi's right to make fundamental choices about the goals of his defense.

2. Defense counsel overrode Mr. Jahi's decision to plead and be sentenced only for reckless felony murder by inviting the jury to sentence him for premeditated murder.

Defense counsel told the jury that Mr. Jahi was guilty of a deliberate, planned, "cold-blooded" premeditated murder after Mr. Jahi entered an agreed plea of guilty to the lesser crime of reckless felony murder. Counsel's argument was contrary to Mr. Jahi's objective of being sentenced for a reckless killing, while under the influence of an extreme amount of alcohol and drugs. While Mr. Jahi is intellectually disabled, he certainly was able to know the profound moral difference between someone who

kills two parents in front of their daughter with premeditation and in cold-blood, and someone who makes the worst mistake of his life in an intoxicated panic. Counsel did not have Mr. Jahi's permission to increase the moral culpability of his crime and abandon the benefits of pleading to a lesser offense. Defense counsel did not have Mr. Jahi's permission to ask a jury to sentence him for a crime he had not pleaded guilty to. Defense counsel overrode Mr. Jahi's guilty plea to reckless felony murder, and converted it into a plea to a more aggravated crime, premeditated murder.

3. Defense counsel deprived Mr. Jahi of the opportunity to contest aggravating factors regarding torture and the circumstances of his prior conviction.

Defense counsel conceded both aggravating factors, despite there being (1) a viable argument that the deaths were not by torture, and thus the heinous, atrocious and cruel aggravating factor did not apply, and (2) a factual basis to minimize the significance of Mr. Jahi's prior felony, as it involved taking candy for his children's lunch. While intellectually disabled, Mr. Jahi still possessed sufficient understanding to know that he did not want to concede his own eligibility for the death penalty, and did not want to waive viable arguments, which would make a sentence of death less likely. Defense counsel's concession of both aggravating factors was contrary to Mr. Jahi's objectives.

4. Defense counsel deprived Mr. Jahi of the opportunity to demonstrate impairments that satisfy a statutory mitigation factor.

Defense counsel waived the statutory mitigating factor that Mr. Jahi was substantially impaired by drugs and alcohol. While, Mr. Jahi's intellectual disability limited his ability to understand complicated law, he had always insisted that the crimes would not have occurred but for his extreme level of intoxication. Despite not being prepared to testify by defense counsel, this was the explanation for the crimes that Mr. Jahi attempted to present (without any assistance from counsel). Defense counsel's waiver of this statutory mitigating factor was contrary to Mr. Jahi's objectives.

5. Defense counsel deprived Mr. Jahi of the opportunity to accurately express his remorse and transformation.

Although Mr. Jahi's remorse and transformation are real and profoundly relevant to his fundamental sentencing goal of asking the jury to spare his life, defense counsel deprived him of the opportunity to accurately present that information to the jury. Instead, defense counsel refused to use Mr. Jahi's name throughout trial, and insisted on calling him "Preston Carter." In closing argument, defense counsel acknowledged that Mr. Jahi's name had changed, but he incorrectly told the jury this reflected a change in religion. He otherwise denigrated the name change. Mr. Jahi's name, with Akil meaning "One who uses reason" and Jahi meaning "dignity," was of great significance to Mr. Jahi. It was contrary

to his objectives to have his name denied, mischaracterized and mocked by his defense counsel. Defense counsel's refusal to use Mr. Jahi's legal name and his inaccurate interpretations of the motivations and meaning of that change reflects a profound denial of Mr. Jahi's constitutionally protected legal autonomy.

C. Violations of Mr. Jahi's constitutional right to choose the objectives of his representation entitle him to a new sentencing hearing.

The denial of Mr. Jahi's right to choose the objectives of his defense is structural constitutional error. *McCoy*, 138 S. Ct. at 1510–11. Defense counsel "block[ed] [Mr. Jahi's] right to make the fundamental choices about his own defense." *Id.* at 1511. In cases of structural error, there is no need to demonstrate prejudice, and harmless error analysis is inapplicable. *Id.* The only remedy for a structural error at sentencing is a new sentencing hearing. *Id.*

CONCLUSION

This Court should reopen Akil Jahi's post-conviction proceedings in light of *McCoy v. Louisiana*, grant a hearing on his claim, grant post-conviction relief, and order that Mr. Jahi be resentenced through a hearing in which he will be represented by an attorney who will allow Mr. Jahi to establish the objectives of his defense consistent with *McCoy*.

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APPENDIX E – TENN. CODE ANN. § 40-30-117. MOTIONS TO REOPEN, EFFECTIVE: MAY 27, 2011

(a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing

evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a). If the court grants the motion, the procedure, relief and appellate provisions of this part shall apply.

(c) If the motion is denied, the petitioner shall have thirty (30) days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion. The state shall have thirty (30) days to respond. The court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion. If it determines that the trial court did so abuse its discretion, the court of criminal appeals shall remand the matter to the trial court for further proceedings.