

**NO. 20-1742**

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**IN THE SUPREME COURT OF THE  
UNITED STATES**

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**AKIL JAHI, aka PRESTON CARTER,  
Petitioner**

**v.**

**STATE OF TENNESSEE,  
Respondent.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS OF TENNESSEE, WESTERN DIVISION**

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## **CAPITAL CASE**

### **RESTATEMENT OF THE QUESTION PRESENTED**

Whether *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018)—which held that an attorney may not, during the guilt phase of a capital proceeding, concede his client’s guilt over the defendant’s express objection—extends to bar counsel’s strategically candid description of the heinous nature of the defendant’s crimes at a capital sentencing hearing when the defendant pleaded guilty, admitted his guilt to the jury, and never objected to counsel’s strategy until after trial.

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## OPINION BELOW

The order of the Tennessee Court of Criminal Appeals denying the petitioner’s application for permission to appeal is unreported. (Pet. App. 1a-7a); *Akil Jahi aka Preston Carter v. State of Tennessee*, No. W2020-00944-CCA-R28-PD (Tenn. Aug. 31, 2020). The Tennessee Supreme Court’s order denying discretionary review is also unreported. (Pet. App. 19a); *Akil Jahi aka Preston Carter v. State of Tennessee*, No. W2020-00944-SC-R11-PD (Tenn. Jan. 14, 2021).

## STATEMENT OF JURISDICTION

The Tennessee Supreme Court denied discretionary review on January 14, 2021. (Pet. App. 19a.) This Court’s order dated March 19, 2020, relating to the COVID-19 pandemic, extended the deadline for filing the petition for writ of certiorari to June 14, 2021. The petitioner filed his petition on June 11, 2021, and invokes this Court’s jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees an accused “the Assistance of Counsel for his defense.”

Tennessee Code Annotated Section 40-30-117(a) authorizes the reopening of state post-conviction proceedings under the following pertinent circumstance:

(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 . . . .

Tennessee Code Annotated Section 40-30-122 provides:

For purposes of this part, a new rule of constitutional criminal law is announced 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. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

## STATEMENT OF THE CASE

The petitioner, Akil Jahi aka Preston Cater (“Jahi”), pleaded guilty to the 1993 murders of Thomas and Tensia Jackson, and a jury sentenced him to death. Jahi and an accomplice went to the Jacksons’ apartment believing it to be the home of a drug dealer they intended to rob. *State v. Carter (Carter I)*, 988 S.W.2d 145, 147 (Tenn. 1999). When Thomas Jackson answered through his door, Jahi realized he was at the wrong apartment. *Id.* Instead of leaving, Jahi abandoned the plan to rob the drug dealer and instead kicked in the Jacksons’ door to rob them. *Id.* Once inside, Jahi and his accomplice ordered Thomas Jackson, at gunpoint, to coax his wife out of her hiding place in a bathroom. *Id.* Jahi’s accomplice then attacked and raped Tensia Jackson. *Id.* While his accomplice raped Tensia Jackson, Jahi retrieved his sawed-off shotgun and searched the apartment for anything of value. *Id.* He shot Thomas Jackson while he “sat huddled in his daughter’s bedroom closet . . . shatter[ing] the skull and explod[ing] the brain.” *Id.*

After shooting Thomas Jackson, Jahi returned to the master bedroom and found Tensia Jackson backed into the bathroom. *Id.* Tensia Jackson begged for her life before Jahi shot her in the head at close range as she tried to shield herself with her hands. *Id.* The shotgun pellets opened a hole in her head measuring three inches by six inches. *Id.* Thomas Jackson’s brother discovered the bodies in a ransacked apartment. *Id.* at 147-48. Tensia Jackson’s brother found the Jacksons’ three-year-old daughter in the closet next to her father’s body, covered in his blood. *Id.* at 148.



That evening, police arrested Jahi, and he admitted that he shot the Jacksons. *State v. Carter (Carter II)*, 114 S.W.3d 895, 899 (Tenn. 2003). Police found the shotgun in Jahi’s apartment. *Id.* He later pleaded guilty to two counts of felony murder during the perpetration of aggravated burglary.<sup>1</sup> *Carter I*, 988 S.W.2d at 148.

At Jahi’s first sentencing hearing, he claimed that he was drunk when he murdered the Jacksons, said he was sorry for what happened, and blamed his accomplice for setting the robbery and double murder in motion. *Carter I*, 988 S.W.2d at 148. The Tennessee Supreme Court reversed and remanded for a new hearing due to the use of outdated verdict forms. *Id.* at 152-53. At Jahi’s resentencing hearing, he again admitted to the murders and asked for forgiveness from the victims’ families. *Carter II*, 114 S.W.3d at 900. He claimed that he had changed his life and accordingly changed his name. *Id.* The jury found that two aggravating factors outweighed any mitigating circumstances and sentenced Jahi to death for both murders. *Id.* at 901. The Tennessee Supreme Court affirmed. *Id.* at 910.

Jahi filed a post-conviction petition claiming that counsel failed to establish a “proper attorney-client relationship” and that counsel was ineffective for admitting to the jury that Jahi’s crimes were “cold-blooded” and heinous. *Jahi v. State*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502, at \*120, \*129 (Tenn. Crim. App. Mar. 13, 2014), *perm. app. denied* (Tenn. Sep. 18, 2014). The Court of Criminal Appeals rejected those arguments, finding counsel engaged Jahi to participate in his own defense and argued, consistent with Jahi’s strategy at sentencing, that death

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<sup>1</sup> Jahi describes this as a “reckless” killing since felony murder does not require specific intent to kill. But it should be noted that, despite Jahi’s repeated suggestions to the contrary, felony murder is not a lesser offense to premeditated murder in Tennessee in terms of punishment or culpability. (Pet. App. 5a n.1.)

was an unnecessary penalty in light of Jahi's remorse and life change—despite the horrific nature of the offenses. *Id.* at \*120-21, \*129.

In 2018, this Court decided *McCoy v. Louisiana*, which held that a trial court may not allow counsel to admit a defendant's guilt of charged offenses during the guilt phase of a capital trial over the intransigent objections of the defendant. 138 S. Ct. 1500, 1512 (2018). Nearly one year later, Jahi filed a motion to reopen his post-conviction petition under Tenn. Code Ann. § 40-30-117(a)(1), alleging that *McCoy* announced a new, retroactive rule of law that entitled him to a new sentencing hearing. (Pet. App. 20a-21a.) In an affidavit submitted as an exhibit to his motion, Jahi said he did not discuss his objectives with counsel and was displeased with counsel's characterization of the murders to which he had pleaded guilty. (Resp. App. 3a-8a, ¶¶ 5-11, 13, 15-17, 19-20.) The post-conviction court denied the motion to reopen.

Jahi sought permission to appeal in the Tennessee Court of Criminal Appeals, which denied his application. The court held that *McCoy* did not apply to the facts of this case because Jahi pleaded guilty and was merely challenging counsel's sentencing-phase description of the offenses, which he had already unsuccessfully challenged in his original state post-conviction petition. (Pet. App. 5a-6a.)

## REASONS FOR DENYING THE PETITION

Jahi asks this Court to summarily reverse the state court's denial of relief but, barring that, to grant review and declare that *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), applies in a capital sentencing phase. But Jahi's petition does not warrant this Court's discretionary review; it should be denied.

He asks the Court to *extend McCoy*, which the state courts could not do under the state procedure he invoked below; regardless, extending precedent would be inappropriate in a summary reversal. Moreover, Jahi's petition does not cite any precedent directly conflicting with the decision below, and this case is a bad vehicle for review because Jahi would not be entitled to relief even under his expanded reading of *McCoy*.

### **I. Jahi Is Seeking an Extension of *McCoy*, But the State Statute He Invoked Below Does Not Permit State Courts to Expand Existing Constitutional Rules.**

*McCoy* held that a trial court may not allow counsel to admit a defendant's guilt of charged offenses during the guilt phase of a capital trial over the intransigent objections of the defendant. 138 S. Ct. at 1512. Applying this narrow holding, the Tennessee Court of Criminal Appeals held that Jahi could not make out a *McCoy* claim because he only attacked counsel's statements at the sentencing hearing and conceded his own guilt by pleading guilty to capital murder and admitting his crimes to the sentencing jury. (Pet. App. 5a-6a.)

Jahi urges the Court to summarily reverse this decision because, he claims, the "text" of *McCoy* suggests that it also applies to the sentencing phase. But he offers little in the petition to support this argument. On the other hand, the state court correctly recognized that the actual holding of *McCoy*—along with its reasoning—was limited to the guilt phase. *E.g.*, *McCoy*, 138 S. Ct. at 1505 ("[I]t is the defendant's prerogative . . . to maintain his innocence, *leaving it to the State to prove his guilt beyond a reasonable doubt.*" (emphasis added)); *id.* at 1508 ("Just as a

defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, . . . so may she insist on maintaining her innocence *at the guilt phase of a capital trial.*” (emphasis added)). Without any controlling language in *McCoy* supporting his position, Jahi resorts to suggesting that the capital sentencing phase at issue here may implicate some of the same principles as the capital guilt phase at issue in *McCoy*. (Pet. 9-10.) In other words, he urges the Court to *extend* the rule in *McCoy* to the sentencing phase.

But Jahi cannot get that extension here because the state statute he invoked below barred the state courts from expanding the constitutional rule announced in *McCoy*. Under state law, a petitioner may reopen his post-conviction proceedings in limited circumstances, including to raise a claim “based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial.” Tenn. Code Ann. § 40-30-117(a). The motion to reopen must be filed within one year of the appellate ruling giving rise to the motion, and even then, a court will only grant the motion “if retrospective application of that right is required” by state law. *Id.*; *see also* Tenn. Code Ann. § 40-30-122. The statute focuses on the specific appellate decision invoked and the narrow rule it announced, not some potential expansion of that ruling. *See, e.g., Perry v. State*, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at \*5 (Tenn. Crim. App. Apr. 7, 2014) (holding that a motion to reopen was properly denied because, “[w]hile the next logical step may be to extend protection to [the type of sentence challenged], that is not the precedent which now exists”), *perm. app. denied* (Tenn. Sept. 18, 2014).

Jahi’s request for an extension of *McCoy* also precludes summary reversal in this case.<sup>2</sup> “[A] summary reversal does not decide any new or unanswered question of law, but simply

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<sup>2</sup> Jahi’s request for summary reversal is not surprising, since his case suffers from insurmountable vehicle problems discussed in Part III, *infra*.

corrects a lower court’s demonstrably erroneous application of federal law.” *See Maryland v. Dyson*, 527 U.S. 465, 467 (1999). “Summary reversal is usually reserved for cases where the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (internal quotation marks omitted). Because Jahi asks the Court to break new ground, summary reversal is inappropriate here.

## **II. Lower Courts Are Not in Conflict on the Application of *McCoy*.**

Jahi also purports to identify a conflict among various lower courts on the scope of *McCoy*. To that end, he cites a smattering of decisions from two state high courts, three state intermediate appellate courts, and a federal district court as establishing a conflict among those courts. None of these decisions conflict with the decision below because they do not concern the conduct of counsel during the sentencing phase of trial. In fact, Jahi does not cite a single decision supporting his reading of *McCoy*.

Only three of Jahi’s cited decisions granted relief to a defendant, and each involved counsels’ guilt-phase concessions of guilt over the defendants’ clear objections. *State v. Horn*, 251 So.3d 1069, 1074-76 (La. 2018); *People v. Flores*, 246 Cal. Rptr. 3d 77, 84-87 (Cal. Ct. App. 2019); *People v. Eddy*, 244 Cal. Rptr. 3d 872, 878-80 (Cal. Ct. App. 2019). One decision cited by Jahi denied relief where the defendant consented to his counsel’s concession strategy. *Malone v. Williams*, No. 80913-COA, 2020 WL 6129818, at \*1-2 (Nev. Ct. App. Oct. 16, 2020). Another decision simply acknowledged *McCoy* and remanded for findings relevant to its holding. *Thompson v. Cain*, 433 P.3d 772, 777-78 (Or. Ct. App. 2018). And another denied relief where counsel did not contest certain facts and elements but pursued a full *mens rea* defense. *United States v. Christensen*, No. CV-18-08235-PCT-DGC, 2019 WL 9240238, at \*14-15 (D. Ariz. Nov. 6, 2019), *adopted by* 2020 WL 1672771, at \*5 (D. Ariz. Apr. 6, 2020), *certificate of appealability*

*denied by* No. 20-16072, 2020 WL 7048609 (9th Cir. Nov. 20, 2020). One other decision did not address counsel’s conduct at all; it concerned the State’s freezing a defendant’s assets, which inhibited the funding of his defense. *Kroggman v. State*, 914 N.W.2d 293, 321 (Iowa 2018).

Accordingly, Jahi has not identified any conflict—and there is no conflict—between the decision below and the decisions of federal courts of appeal or state courts of last resort. U.S. Sup. Ct. R. 10(b); *see Singleton v. C.I.R.*, 439 U.S. 940, 945 (1978) (Stevens, J., opinion respecting denial of certiorari) (“the absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari”). This Court should deny Jahi’s invitation to resolve a conflict that does not exist.

### **III. This Case Is a Poor Vehicle to Extend *McCoy* Because Jahi Would Not Be Entitled to Relief Regardless of *McCoy*’s Scope.**

Even if this Court were inclined to extend *McCoy* beyond its limited holding, Jahi’s case is not a vehicle for doing so. Jahi’s petition seeks clarification of one question: whether *McCoy* applies to the sentencing phase of a capital trial. (Pet. 6-7, 9, 13-14.) But deciding that question will not settle Jahi’s case because he cannot make out a successful *McCoy* claim in his motion to reopen even if *McCoy* were extended to apply to the sentencing phase.

First, Jahi’s central allegation—that counsel improperly conceded his guilt to *premeditated* murder—is inaccurate. In his petition before this Court, Jahi simply quotes this allegation from his motion to reopen. But in that motion, Jahi cited a misstatement by one of his attorneys during voir dire that the petitioner had pleaded guilty to premeditated, rather than felony, murder. (Resp. App. 115a-116a.) After this misstatement, the prosecutor and the trial court immediately corrected counsel, who acknowledged his misstatement. (Resp. App. 115a-116a.) Counsel then asked the juror if the facts of the case met *the juror’s* definition of premeditated murder because the juror stated in his questionnaire that the death penalty should be automatic for premeditated murderers.

(Resp. App. 118a-119a.) Contrary to the admission in *McCoy*, this was not a strategic admission of guilt.

Nor do the other statements that the petitioner challenges—e.g., the reference to the “cold-blooded” murders—amount to an admission of guilt like the one in *McCoy*. *McCoy* distinguished between trial tactics within “the lawyer’s province” (“what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence”) and objectives reserved for the defendant (“whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal”). 138 S. Ct. at 1508.

Jahi, therefore, had a protected choice between admitting guilt and maintaining innocence. *Id.* at 1508-10. Jahi admitted his guilt before the jury in order to pursue a sentence less than death. *Jahi*, 2014 WL 1004502, at \*22 (“The goal of the defense was to convince the jury that death was not appropriate.”). Now before this Court, Jahi second-guesses counsel’s sentencing-phase strategy of conceding the horrific nature of these murders. As the lower courts recognized (Pet. App. 5a-6a), however, that is just a repackaged claim of ineffective assistance, which the petitioner has already litigated and lost, *see Jahi v. State*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502, at \*120, \*128-29 (Tenn. Crim. App. Mar. 13, 2014), *perm. app. denied* (Tenn. Sept. 18, 2014).

Second, Jahi has admitted he did not object to counsel’s strategy until after trial. (Pet. App. 38a; Resp. App. 3a-8a, ¶¶ 5-11, 13, 15-17, 19-20.) This Court in both *Florida v. Nixon*, 543 U.S. 175 (2004), and *McCoy*, 138 S. Ct. at 1509, refused to allow a defendant who never objected to counsel’s concession strategy to claim a violation of autonomy after trial. Instead, this Court limited *McCoy*’s application to cases where counsel is “[p]resented with express statements of the client’s will to maintain innocence.” *Id.*; *see id.* at 1510 (“counsel may not admit her client’s guilt

of a charged crime *over the client's intransigent objection* to that admission”) (emphasis added); *id.* at 1511 (“counsel’s admission of a client’s guilt *over the client’s express objection* is error structural in kind”) (emphasis added). Given Jahi’s failure to object to counsel’s strategy, no extension of *McCoy* could save his claim.

Third, for Jahi to succeed on his *McCoy* claim under Tennessee law—even under a significantly broadened version of *McCoy*—he first must demonstrate that *McCoy* should be applied retroactively. Tenn. Code Ann. § 40-30-117(a)(1). The state statute he invoked permits retroactive application of new “substantive” rules or new “watershed procedural rules of criminal procedure. Tenn. Code Ann. § 40-30-122; *see Bush v. State*, 428 S.W.3d 1, 20 (Tenn. 2014) (holding Tenn. Code Ann. § 40-30-122 incorporated the “watershed rules of criminal procedure” standard of *Teague v. Lane*, 489 U.S. 288 (1989)). In this case, Jahi has only ever alleged that *McCoy* was a watershed rule. (Resp. App. 174a.) The Court of Criminal Appeals chose not to decide this question because *McCoy* clearly did not prohibit the sentencing strategy employed by Jahi’s counsel. (Pet. App. 4a.)

But even if this Court extended *McCoy* to cover Jahi’s case, Jahi would still need a holding that *McCoy* announced a watershed rule of criminal procedure. (*See* Pet. App. 36a-37a.) This Court cannot provide that holding since it recently decided that it will no longer declare any new watershed procedural rules. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562 (2021). So, only a Tennessee court could declare, as a matter of state law, that *McCoy* applies retroactively to Jahi’s case. *New York v. Ferber*, 458 U.S. 747, 767 (1982) (“the construction that a state court gives a state statute is not a matter subject to [this Court’s] review”). And this Court typically denies review if a petition would require it “to resolve issues that may turn on the correct interpretation of antecedent questions under state law.” *NCP Mktg. Grp. v. Star*, 129 S. Ct. 1577, 1578 (2009)



(Kennedy, J., concurring); *see* Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Pa. B. Ass'n Q. 393, 399-400 (1960).

For these reasons, no extension of *McCoy* would ultimately entitle Jahi to relief. “While this Court decides questions of public importance, it decides them in the context of meaningful litigation.” *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). Jahi’s case is a poor vehicle to extend *McCoy*; the Court should deny his petition.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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