No. _____

In The

Supreme Court of the United States

GARY MCCLAIN,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), that defense counsel may not concede his client's guilt in the guilt phase of trial if the client insisted that the defense was the client was not guilty. If defense counsel conceded his client's guilt in closing argument during the guilt phase of trial, without the client's permission, does that concession violate the client's Sixth Amendment secured autonomy constituting structural error and warranting a new trial by blocking the client's right to make fundamental choices about his own defense?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

State of Texas v. Gary Christopher McClain,
Cause No. No. 941903,
178th District Court, Harris County, Texas,
Judgment entered January 28, 2004

Gary Christopher McClain v. State of Texas,
No. 14-04-00114-CR,
Fourteenth Court of Appeals,
Judgment entered August 25, 2005

Gary Christopher McClain v. State of Texas,
No. PD-1705-05, Texas Court of Criminal Appeals,
Judgment entered on March 9, 2006

Ex Parte Gary Christopher McClain,
Writ No. 941903-A
178th District Court, Harris County, Texas,
Judgment entered March 12, 2020

Ex Parte Gary Christopher McClain,
No. WR-91, 298-01,
Texas Court of Criminal Appeals,
Judgment entered on November 17, 2021

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals appears at App. 1 to the petition and is unpublished. The order of the 178th Judicial District Court, Harris County, Texas appears at App. 2 to the petition and is unpublished.

JURISDICTION

The date on which the Texas Court of Criminal Appeals denied habeas relief on this case was November 17, 2021. A copy of that decision appears at App. 1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On March 9, 2003, McClain shot and killed Helen Kirklan, during a heated argument against a troubled and deteriorating romantic relationship. At the time of the shooting, McClain and Kirklan had been dating for more than a year and were engaged to be married. (4 R.R., 51, 53, 96-97; 5 R.R., 96). In the weeks prior to the shooting, Kirklan's demands increased; she repeatedly demanded that McClain buy new furniture for her. (5 R.R., 94-95, 128). Kirklan was unemployed with three children, and McClain largely supported her, and provided for her children. (4 R.R., 52). McClain frequently gave Kirklan money, gifts, and jewelry – including two engagement rings, and six other rings, which she wore on both hands. (4 R.R., 52-53; 5 R.R., 96). Because he was behind on his own bills, and felt that he had already provided enough, he told Kirklan no. (5 R.R., 94-95).

On the Monday prior to the shooting, McClain tried to break up with Kirklan, but on Wednesday, the

two reconciled, went to the movies together, then had their photographs taken at the mall. (5 R.R., 90-91). That Saturday, McClain had his hair cut, and had his barber cut Kirklan's nephew's and children's hair. (5 R.R., 92). That night McClain took his young daughter, Kerria, and Kirklan's daughter, Roneshia, to the home of Kate and Kamesia Parker for babysitting. (*Id*.). McClain spent the night with Kirklan, and drove her to church the next morning. (4 R.R., 18; 5 R.R., 93-94). On the way, Kirklan again demanded that McClain buy new furniture for her. (5 R.R., 94-95). McClain dropped Kirklan off at church, went home to shower, and changed clothes. (5 R.R., 95). On the way back to church, McClain called the Pastor to see if he would meet with him and Kirklan for counseling. (4 R.R., 24; 5 R.R., 96). The Pastor agreed and, after church, the two had a long meeting in the Pastor's office to air out their differences. (5 R.R., 96-97). After the counseling session, Kirklan sat in McClain's car and continued to talk. (4 R.R., 25; 5 R.R., 98). Kirklan planned to ride home with her cousin, Charlotte Johnson. (*Id*.) McClain gave Kirklan forty dollars and told her he would see her later. (5 R.R., 98). Over the next hour, he and Kirklan called each other back and forth, and continued to talk about their issues. (5 R.R., 99). Around 5:00 p.m., McClain called the Parker home to check on Kerria. (*Id*.) McClain spoke to Kerria, who told him she didn't want to go to Kirklan's apartment because Kirklan had hit her on the side of her head with a phone. (5 R.R, 99-100). McClain could not believe that Kirklan mistreated his daughter, but was concerned and wanted to talk to Kirklan about it. (5 R.R., 100-01). For

this reason, he drove over to her apartment complex. (5 R.R., 101).

When McClain arrived at Kirklan's, he found her in the passenger seat of Johnson's car, talking on a cell phone to Rowe – a man with whom she had had a one night stand. (5 R.R., 101-02). Kirklan told McClain that she wanted to be with Rowe. (*Id.*) McClain was surprised, upset, and angry–he believed they were still together at the time they left church. (5 R.R, 102). Shocked, angry, and surprised, McClain went to his car, retrieved the photographs they had just taken together, and tore them up where Kirklan was sitting. (5 R.R., 102). McClain told Kirklan that he wanted his life back and wanted his rings back. (5 R.R. 102, 136). Kirklan then got out of the car and threw the rings into his car. (5 R.R., 102-03, 136). McClain wanted to know why Kirklan had been using him. (5 R.R., 103). McClain tried to persuade Kirklan to stay in the relationship with him, but when she refused, he began begging her, promising to buy her whatever she wanted. (5 R.R., 25-26). Kirklan told McClain that she had never loved him, that she had used him, and that he had only been a "trick" to her. (5 R.R., 103). It was at this point that McClain's mind went blank and he snapped. (5 R.R., 103). It was then that he got his gun from the trunk of his car and shot Kirklan. (5 R.R., 103-04).

The Appellant was indicted for murder. (C.R., 10).[1] The Appellant pleaded not guilty and the jury found

[1] The Clerk's Record from the trial will be referred to by volume and page as above The Reporter's Record will be referred to

the Appellant guilty as charged and sentenced the Appellant to imprisonment for 99 years. *Id.* at 110-13. At the conclusion of the guilt/innocence phase in this murder case, however, defense counsel told the jury without qualification to "go back in there and find Gary McClain guilty." (5 R.R., 151). Defense counsel further stated in closing argument, "So, ladies and gentlemen, it is my position that the only sensible thing for any jury to do in this circumstance is to go back, read through this charge, answer the top section which says 'find him guilty.' Gary McClain knows that and expects that. I know that and expect that." (5 R.R., 151-52). In his Affidavit, Mr. McClain states that he was "shocked and stunned when [counsel] told the jury to find [him] guilty . . . [and] said nothing to the jury in [his] behalf, or about the facts and circumstances [he] testified to, though this was the reason [he] had gone to trial." (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 15).

A motion for new trial was not filed. Notice of appeal was filed. *Id*. at 117. The unpublished opinion of the Fourteenth Court of Appeals affirming the judgment and sentence was dated August 25, 2005. *McClain v. Texas*, No. 14-04-00114-CR (Tex. App. – Houston [14th Dist.], August 25, 2005, pet. denied). The Texas Court of Criminal Appeals denied review on February 15, 2006. *In re McClain*, PD-1705-05 (Tex. Crim. App., February 15, 2006). The Appellant filed a

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by volume and page as, *e.g*., (3 R.R., p.). Exhibits to Mr. McClain's Application will be to *Writ Exhibit* number. Deposition Testimony will be referred to by the name of the witness and the page number as, *e.g.*, (*Downey* at p.).

post-conviction writ of habeas corpus on July 19, 2017 alleging ineffective assistance of counsel, depositions were taken, the 178th District Court entered without a hearing an order recommending denial of relief, and the Texas Court of Criminal Appeals without written order denied relief on November 11, 2021.

REASONS FOR GRANTING THE PETITION

The Texas Court of Criminal Appeals has entered a decision in conflict with this Court. The Sixth Amendment guarantees a defendant secured autonomy to make fundamental choices about his own defense guarantees. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). In this murder case, however, defense counsel elicited a confession from Mr. McClain on direct examination and then instructed the jury to "go back in there and find Gary McClain guilty" during closing argument. (5 R.R., 151).

I. Defense Counsel's errors at trial illustrate counsel's *McCoy* error

In *McCoy v. Louisiana*, *supra*, defense counsel conceded his client's defendant's guilt in the guilt phase of trial during opening statement over his client's strenuous objections. McCoy testified at trial and maintained his innocence, asserting an alibi defense. *Id*. at 1507. In closing argument, counsel reiterated that McCoy was the killer, and he had taken the burden off the prosecutor. *Id*. McCoy was convicted of capital

murder. *Id*. At the punishment phase, his counsel asked for mercy based on McCoy's "serious mental and emotional issues." *Id*. This Court held that, "[w]hen a client expressly asserts that his objective of '*his* defence' is to maintain his innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id*. (emphasis added). Where an attorney fails to honor the defendant's express objective to assert innocence at trial, it is structural error and prejudice need not be shown. *Id*. at 1511.

In *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), the Supreme Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects," *id.* at 178, 125 S. Ct. 551, 160 L. Ed. 2d 565. *McCoy v. Louisiana*, *supra*, at 1505. "In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. *Id.* at 186, 125 S. Ct. 551, 160 L. Ed. 2d 565. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, *id.* at 181, 125 S. Ct. 551, 160 L. Ed. 2d 565, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy, *id.* at 192, 125 S. Ct. 551, 572, 160 L. Ed. 2d 565." *Id.* at 1505.

Unlike *Nixon*, *supra*, in the case at bar, we have a *McCoy* situation where Petitioner wanted to contest

the charge at trial, wanted to testify, and was unaware of any alleged trial strategy where guilt would be conceded by his defense counsel in closing argument or anywhere else in trial. In evaluating the *McCoy* error in this case, it is instructive to view the ineffective assistance of counsel case law, both before and after *McCoy*, where courts have made the distinction between arguments by counsel which hold the State to its burden of proof, and arguments which do not. For example, in *McNeal v. Wainwright*, 722 F.2d 674, 675 (11th Cir. 1984), the defendant killed the complainant following a scuffle in a bar, then went to the police station where he gave a full confession. *Id*. He pleaded not guilty and went to trial. In closing argument, his counsel argued that the State had, at most, "proven beyond a reasonable doubt . . . the offense of manslaughter," arguing that McNeal had acted out of "rage, anger, and resentment . . . so intense as to overcome the judgment and to render this defendant incapable of any type of calm reflection." *Id*.

The Eleventh Circuit noted that "it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position." *Id*. at 676. The Court concluded that counsel's arguments concerning manslaughter were not a concession of McNeal's guilt, but were "tactical and strategic" where counsel stressed his client's emotional state in an effort to negate

premeditation. *Id*. Counsel never stated his client was guilty of murder. *Id*. at 677.

Instead, he argued that, "at best," the government had proved only manslaughter because they did not prove premeditation–the proposition around which the majority of the case was centered. *Id*. *See also Rubio v. State*, 596 S.W.3d 410 (Tex. App. – Dallas, 2020) (counsel did not concede the defendant's guilt in closing argument and held the State to its burden of proof where he at no time stated that his client committed murder, and did not concede facts that showed his client was guilty of an element of the offense of murder); *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995) (counsel did not concede guilt in closing argument by stating he did not dispute testimony from three police officers even though the defendant testified they were lying); *Duffy v. Foltz*, 804 F.2d 50, 52 (6th Cir. 1986) (counsel's admission that his client committed the acts alleged but was not guilty by reason of insanity is a permissible trial tactic); *cf*. *Wiley v. Sowders*, 647 F.2d 642, 644-45 (6th Cir. 1981) (counsel was ineffective by repeatedly stating that his clients were guilty of the offenses charged, asking only that the jury show leniency); *Turner v. State*, 570 S.W.3d 250, 271-77 (Tex. Crim. App. 2018) (defense counsel conceded guilt in violation of *McCoy* by stating that defendant killed his wife in a "jealous rage," he was guilty of "two terrible horrible crimes," "he can't admit what he did, to himself or anybody else," he "snapped," "he literally cannot accept what happened"); *United States v. Swanson*, 943 F.2d 1070, 1072, 1074 (9th Cir. 1991) (counsel's

concession in argument that there was no reasonable doubt his client was the bank robber was not a strategy to gain a favorable result that misfired, but "tainted the integrity of the trial").

In the case at bar, Mr. McClain was adamant about pleading not guilty to the charged offense and even testified in his own defense because he needed the truth to come out, as he testified. (5 R.R., 107). Trial defense counsel was on notice that Mr. McClain did not want to concede guilt during his trial and wanted to contest the charge against him and hold the government to their proof beyond a reasonable doubt.

Mr. McClain states in his Affidavit that his counsel did not prepare him to testify. (*Writ Exhibit* 1*, Affidavit of Gary McClain* at 14). Mr. McClain states that his counsel told him the night before that he would take the stand the following day – that he should prepare himself, and he should tell the truth. *Id*. Though counsel testified that he and Mr. McClain practiced the questions counsel would ask him, (*Downey* at 34), the record reflects that counsel never attempted to establish with Mr. McClain an organized time line through which to present McClain's sudden passion evidence. The record reflects that counsel made no attempt to flesh out the many available background facts which would be important to a finding of sudden passion. (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 5-11). Counsel made no effort to develop the essential factual context of the sudden passion defense – the emotional impact of Kirklan's (victim's) harsh putdowns, her rejection of McClain, announcing that the marriage was

off and she wanted to be with Rowe – that she never loved McClain, had never loved his daughter, and he had been nothing but a "trick" to her. (*Id*. at 11). The ultimate theory of the case was that Petitioner was not guilty of murder as charged in the indictment, if he killed Helen in the heat of sudden passion. By telling the jury to find Petitioner guilty of murder, defense counsel undermined the later punishment case where Petitioner could seek reduction of the degree of the offense. What made this even worse is that defense counsel did not call Petitioner at punishment, so the jury never heard any evidence as to nature and degree of his emotional state at the time of the shooting. Petitioner's only defense in this case was never presented.

At the end of the direct testimony, defense counsel elicited from Mr. McClain that he was guilty of murder, without qualification. (5 R.R., 107). Counsel then asked Mr. McClain why he pleaded not guilty. *Id*. Mr. McClain responded it was "*[b]ecause I want everybody to know the truth. Everybody else been telling a bunch of lies and the truth needed to come out*." *Id*. [Emphasis added]. Counsel's follow-up and last question to Mr. McClain was: "Gary, what would you say ***about the fact*** that you killed Helen?" (5 R.R., 107-08) [emphasis added]. Mr. McClain responded with an emotional narrative – "I'm not saying it was right and I'm not saying it was wrong, but sometimes people back you up in a corner." (5 R.R., 108). Counsel asked no follow-up questions to try to refocus and redirect Mr. McClain's attention to the essential facts of sudden passion. Petitioner was left without a defense at trial.

Trial counsel agreed that he did not ask Mr. McClain questions to elicit his feelings and state of mind at the time he shot Kirklan – essential to a claim of sudden passion. (*Downey* at 35). Counsel acknowledged that Mr. McClain's responses were "not the best answers for his case." (*Downey* at 35). Counsel could not explain why he did not try to redirect Mr. McClain's focus other than his fear that Mr. McClain might open the door to evidence regarding his relationships with other women. (*Downey* at 35-36). Mr. McClain states in his Affidavit that counsel did not prepare him for the types of questions he might be asked on cross-examination, and he was surprised by the prosecutor's questions suggesting that he was trying to justify his conduct and avoid responsibility. (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 14). Though counsel testified that he discussed with Mr. McClain the type of questions the prosecutor might ask, and the best way to handle those types of questions, Mr. McClain became combative with the prosecutor and "did grave damage to his own case for sudden passion." (*Downey* at 34-35, 74).

The record reflects that the gist of the prosecutor's cross-examination was to accuse Mr. McClain of blaming Kirklan for her own death. (*Downey* at 50-51). Mr. McClain's responses to the prosecutor's questions were disorganized and highly emotional. (5 R.R., 108-10). The State was able to exploit Mr. McClain's emotional responses, and accused him of admitting guilt only because the evidence against him was overwhelming. (5 R.R., 148). Though counsel recognized that Mr.

McClain had harmed himself on cross-examination, he made no effort to rehabilitate him on redirect examination. (5 R.R., 150). Instead, on rebuttal, counsel elicited from Mr. McClain only that he had never before been convicted of a felony offense in Texas or any other state. *Id*. Counsel could not explain why he failed to elicit evidence of Mr. McClain's feelings and state of mind at the time of the shooting. (*Downey* at 35). Counsel speculated that he may have passed Mr. McClain as a witness to avoid inadvertently opening the door to the admission of extraneous offense evidence involving Mr. McClain's prior girlfriends. (*Downey* at 35-36, 71-72). Yet, trial counsel was aware that the State had been unable to locate Mr. McClain's prior girlfriends. (*Downey* at 71-72).

In *McCoy v. Louisiana*, *supra*, the Supreme Court noted,

> "Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category [decisions reserved for the client]. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*. See *Weaver v. Massachusetts*, 582 U.S. ___, ___, 137 S. Ct.

> 1899, 198 L. Ed. 2d 420 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.")."

McCoy v. Louisiana, *supra*, at 1508. "Action taken by counsel over his client's objection . . . has the effect of revoking agency with respect to the action in question." *Gonzalez*, 553 U.S. at 254, 128 S. Ct. 1765, 170 L. Ed. 2d 616 (Scalia, J., concurring in judgment). Because Mr. McClain's autonomy and not his counsel's competence is at issue in this petition, the ineffective assistance of counsel jurisprudence is inapplicable to the question of whether or not counsel violated *McCoy v. Louisiana* and its progeny, *however*; the facts and circumstances of defense counsel's work at trial remain instructive to illustrate how Mr. McClain's right to assert his innocence and fight the charge was compromised in the instant case and how his agency was lost.

II. Defense Counsel rendered ineffective assistance of counsel

A. Failure to prove sudden passion

In the case at bar, as the jury heard during voir dire, a finding of sudden passion would reduce the degree of the offense to second degree murder in his case. Counsel's failure to address the issue of sudden passion going forward was not a "tactical retreat"; instead, he "surrender[ed] the cause." *Swanson*, 943 F.2d at 1075-76. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt." *United States v. Cronic*, 466 U.S. 648, 656-57, n.19, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Trial counsel assumed the view point that Mr. McClain's case was solely about punishment and that the only legal issue for jury resolution was whether Mr. McClain killed his fiancee, Helen Kirklan, in the heat of a sudden passion arising from an adequate cause under TEX. PENAL CODE § 19.02. (5 R.R., 107; 7 R.R. 22, 24-30; *Downey* at 27-28). Counsel understood that Mr. McClain's focus and desire in the case was to establish that he killed Kirklan in an act of sudden passion. (*Downey* at 29-30, 32-33, 74; *Writ Exhibit* 1, *Affidavit of Gary Christopher McClain* at 12-13). Counsel knew that Mr. McClain wanted a jury to "understand the nuances and circumstances of his relationship" with Kirklan, "was anxious to get his version of events across[,] and . . . want[ed] to testify about the events

that led up to the shooting." (*Downey* at 32-33, 74). As the *McCoy* Court noted, "[w]hen 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. *McCoy v. Louisiana*, *supra*, at 1509; citing U.S. Const. Amdt. 6; also ABA Model Rule of Professional Conduct 1.2(a) (2016) (a 'lawyer shall abide by a client's decisions concerning the objectives of the representation')." That did not happen here.

In his Affidavit, Mr. McClain states that his counsel urged him many times to take a plea bargain, but he refused because he wanted his evidence heard. (*Writ Exhibit 1*, *Affidavit of Gary McClain* at 13). Mr. McClain states he was not advised by counsel that he could plead guilty, then have a jury trial on punishment to present his sudden passion evidence. *Id*. This option was not discussed with Mr. McClain's siblings, Karen McClain and Patrick McClain. (*Writ Exhibit* 2, *Affidavit of Karen McClain* at 3; *Writ Exhibit* 3*, Affidavit of Patrick McClain* at 4). The State made three plea offers to Mr. McClain which he rejected – a sentence of 25 years, an offer of 40 years on the day of trial, or an open plea with the recommendation of a cap of 50 years. (*Downey* at 30, 67; *Writ Exhibit* 1, *Affidavit of Gary McClain* at 13).

Trial counsel testified that he advised Mr. McClain of all his options, including the option of pleading guilty to the jury and arguing the case directly as a matter of sudden passion, which Mr. McClain rejected. (*Downey* at 28). This option was not discussed with Mr.

McClain on the record at a pretrial hearing in which he was formally advised of the State's final plea offers before the Court. (2 R.R., 3-7). Counsel had many discussions with Mr. McClain about the fact that sudden passion was a sentencing issue, not a guilt/innocence issue, but Mr. McClain persisted in pleading not guilty. (*Downey* at 30). During voir dire, the trial court, the State, and trial counsel discussed "sudden passion" as a punishment issue. (C.R., 51, 135-39, 156-69). The court and the prosecutor explained to the venire that a sudden passion murder reduced the degree of the offense to second degree murder, and lowered the range of punishment. (3 R.R., 51, 135-39).

During voir dire, some members expressed problems with the concept of "sudden passion," or would not consider it. (C.R., 158-69). One venire member expressed skepticism, and stated that a person who pleaded not guilty, then asked for a reduced sentence, would lose his credibility. (3 R.R., 165-66). Another venire member described sudden passion as "a dodge to avoid the actions the person committed." (3 R.R., 163). Despite the skepticism expressed toward the issue of sudden passion by many members of venire, trial counsel did not make an opening statement. (*Downey* at 44). He agreed that an opening statement would have been a good opportunity to address the concerns stated during voir dire, and would have prepared the jury to hear that Mr. McClain was going to admit his guilt, but was going to explain the circumstances of the shooting. (*Downey* at 44-45). As a general practice, trial counsel rarely waived opening statement, but he did not give

one in Mr. McClain's case because he was not certain what would ultimately be Mr. McClain's testimony. (*Downey* at 44-46). Counsel wanted flexibility to adjust to Mr. McClain's testimony and thought if he told the jury up front that Mr. McClain was going to admit guilt, "it would cause them to question why we were wasting their time." (*Downey* at 69-70). This was not the only problem with counsel's performance.[2]

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[2] Trial counsel requested and received pretrial notice of the State's intent to introduce evidence under TEX. R. EVID. 404(b), and 609(f), and ARTS. 37.07 & 38.37, TEX. CODE CRIM. PROC. (C.R., 38-42, 80-82). Counsel filed a *Motion In Limine* to exclude such unless such evidence provided by notice, was found to be relevant, and more probative than prejudicial, in a hearing held outside the jury's presence. (C.R., 65-68). At trial, defense counsel failed to ask for a hearing on two irrelevant witnesses with damaging testimony. Counsel candidly admitted that he had no strategic reason for failing to object specifically, and had no strategic reason for not following the rules governing admissibility under *Montgomery v. State*, 801 S.W.2d 372 (Tex. Crim. App. 1991, *on rehearing*). (*Downey* at 39-41). Both state and federal courts recognize that, while counsel's decision to pass over the admission of prejudicial and arguably inadmissible evidence may be strategic, counsel's decision to pass over the admission of prejudicial and clearly inadmissible evidence has no strategic value. *Owens v. State*, 916 S.W.2d 713, 718-19 (Tex. App. Waco, 1996); accord *Jones v. State*, 950 S.W.2d 386, 388 (Tex. App. – Fort Worth, 1997); *see also Blumenstetter v. State*, 135 S.W.3d 234, 247 (Tex. App. – Texarkana, 2004) (same), citing *Ex parte Menchaca*, 854 S.W.2d 128, 132 (Tex. Crim. App. 1993) (citing *Lyons v. McCotter*, 770 F.2d 529, 534 (5th Cir. 1985).

Counsel did not seek to justify his handling of the irrelevant extraneous act testimony of Jeffrey Van Rowe and Patrick McClain as a matter of strategy or tactics. The failure to pursue Petitioner's trial objectives resulted in harm to the client.

B. Failure to make an opening statement, conceding guilt in closing argument

Trial counsel had never before asked a jury to find a client guilty in the trial of a murder case. (*Downey* at 49). Counsel agreed that, if had he made an opening statement, it would potentially have helped prepare the jury for the kind of closing argument made by him. (*Downey* at 48). Clyde Williams, Mr. McClain's habeas lawyer from 2007 to 2010 and called by the State as a witness, testified that in her opinion, trial counsel failed in the pretrial investigation process, and failed to prepare witnesses. (*Williams* at 110, 114). Ms. Williams further opined that trial counsel should have dealt more with the issue of sudden passion. *Id*. at 114.

Mr. Philip Lynch was called by Petitioner, Mr. McClain, as an expert witness for his writ and as to the extraneous offense evidence, Mr. Lynch was of the opinion that counsel's performance was deficient. (*Lynch* at 83). Mr. Philip Lynch believed that Mr. McClain was not properly prepared to testify at the guilt/innocence phase of trial based on his affidavit, and the affidavits of Karen and Patrick McClain. (*Lynch* at 81). Mr. Lynch expressed his opinion that trial counsel was deficient in not making an opening statement. (*Lynch* at 81). Mr. Lynch explained that, once it was decided that Mr. McClain was going to have a trial at guilt/innocence – but just to get his story out – counsel needed to tell the jury that this is where the case was going. (*Lynch* at 82). Particularly where one member of the venire expressed the idea that a defendant should not get "two bites at the apple," counsel was

on notice that he needed to make sure the jury understood what it was going to hear. *Id.*

Mr. Lynch explained that the jury needed a roadmap in Mr. McClain's case, which should have begun in opening statement. *Id*. If counsel intended to use the guilt/innocence phase of trial to start putting on evidence of sudden passion, he should have asked Mr. McClain to testify about his feelings at the time of the shooting, but did not. (*Lynch* at 83). Instead, counsel asked Mr. McClain a vague question as to why he was pleading guilty, which led to Mr. McClain's "extraordinarily damaging" response: "But I'm not saying it's right, I'm not saying it's wrong." *Id*. The whole point of the guilt/innocence phase was to say that killing Kirklan was wrong, but counsel provided the jury with no roadmap. *Id*.

At the conclusion of the guilt/innocence phase in this murder case, defense counsel told the jury without qualification to "go back in there and find Gary McClain guilty." (5 R.R., 151). Defense counsel further stated in closing argument, "So, ladies and gentlemen, it is my position that the only sensible thing for any jury to do in this circumstance is to go back, read through this charge, answer the top section which says 'find him guilty.' Gary McClain knows that and expects that. I know that and expect that." (5 R.R., 151-52). In his Affidavit, Mr. McClain states that he was "shocked and stunned when [counsel] told the jury to find [him] guilty . . . [and] said nothing to the jury in [his] behalf, or about the facts and circumstances [he] testified to,

though this was the reason [he] had gone to trial." (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 15).

Mr. Lynch was of the opinion that counsel's closing argument was prejudicial to Mr. McClain, particularly because counsel had not made an opening statement. (*Lynch* at 85). Not only did counsel fail to make an opening statement, depriving the jury of a roadmap, he put on evidence and witnesses. *Id*. This made it appear that Mr. McClain was fighting the case, even though a member of the venire described this as not a good idea. *Id*. Counsel did not tell the jury that they had heard the evidence, and that they would probably have to find Mr. McClain guilty, but a lot of the evidence was going to go to punishment. *Id*. In short, there was no roadmap for the jury at the beginning of the guilt/innocence phase, or at the end, to suggest that there was something relevant about what the jury had heard. *Id*. Counsel's ineffective assistance was compounded by counsel's *McCoy* error in that counsel did not defend Petitioner in the manner that Petitioner wanted, namely to contest the charge against him. This disregard by Petitioner's defense counsel violated a fundamental right that *McCoy* guarantees Petitioner in this case.

The Sixth Amendment safeguards "the accused['s] . . . right to a speedy and public trial[] by an impartial jury," U.S. Const. amend. VI, and "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Salazar*, 751 F.3d 326, 333 (5th Cir.

2014); citing *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). As the *Salazar* Court noted, "The Sixth Amendment permits a jury to disregard a defendant's confession and still find him not guilty. This conclusion does not depend on when the confession occurs – on the stand or pretrial – or how much the defendant confesses – to one element or to every crime. A defendant's confession merely amounts to more, albeit compelling, evidence against him. But no amount of compelling evidence can override the right to have a jury determine his guilt." *Id.* at 334. In *Salazar*, the Fifth Circuit reversed the conviction because the trial court judge instructed the jury to find Salazar guilty after he confessed on the stand to numerous drug charges during his trial testimony. The Court reasoned, despite his on stand confession, he was still entitled to have a jury decide his guilt and hear his case. In Petitioner's case, the jury did not hear his complete case because of his defense counsel's deficient performance. In the case at bar, even with Petitioner's testimony elicited by defense counsel as to what occurred in this case, Petitioner was still entitled to have a jury determine his guilt and not have his own defense counsel concede guilt for him. As in *Salazar*, nothing in Petitioner's record indicates he wanted to change his plea to guilty or did not want to contest the charge against him.

C. *McCoy* violation mandates a new trial in Petitioner's case

Counsel violated Petitioner's Sixth Amendment secured autonomy. *See McCoy v. Louisiana*, *supra*, at 1511. "Violation of a defendant's Sixth Amendment secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless error review." *McCoy*, *supra*, at 1511. This is because structural error is never harmless. In explaining structural error, the Supreme Court listed a number of trial areas where structural error has been noted in their jurisprudence,

> "Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weave*r, 582 U.S., at ___, 137 S. Ct. 1899, 1908, 198 L. Ed. 2d 420, 432 (citing *Faretta*, 422 U.S., at 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure

> to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U.S., at ___-___, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (citing *Gonzalez-Lopez*, 548 U.S., at 149, n. 4, 126 S. Ct. 2557, 165 L. Ed. 2d 409, and *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993))."

McCoy v. Louisiana, *supra*, *Id.* In the instant case, like *McCoy*, there was no intention by counsel of abiding by the defendant's wishes regarding defense at trial.

In Mr. McClain's case, pleading not guilty, then admitting guilt on the stand, was an unusual tactic – one which a jury would not ordinarily understand. Here, trial counsel agreed that it, if he had made an opening statement, it would potentially have helped prepare the jury for the kind of closing argument he ultimately made. (*Downey* at 48). An opening statement would have given the jury essential context as to what was to follow. Opening statement has a purpose. In opening statement:

> . . . [c]ounsel outlines the theme of her case, discusses legal concepts and applicable principles [of law]. Rather than presenting the prosecution or defense in a kaleidoscope fashion by bits and pieces, the opening statement is the first opportunity to present the whole picture in a logical sequence. . . .

Davis v. State, 22 S.W.3d 8, 17-18 (Tex. App. – Houston [14th Dist.] 2000) (WITTIG, J., concurring and dissenting).

Whether to give an opening statement is discretionary with counsel, and in some circumstances, it may be a legitimate tactical decision – counsel may not wish to reveal a defense strategy. *Standefer v. State*, 928 S.W.2d 688, 697 (Tex. App. – Fort Worth, 1996). Counsel may wish to retain flexibility "to mount unforeseen defenses disclosed by the evidence at trial." *Davis*, 22 S.W.3d at 13. Counsel may also choose to make only a cursory opening statement. *See, e.g.*, *Goodspeed v. State*, 167 S.W.3d 899, 903 (Tex. App. – Texarkana, 2005) (counsel not ineffective for giving only a short opening statement where counsel "concisely articulated Goodspeed's defense strategy as one based on innocence" – a theme that would reappear in counsel's cross-examination of the State's witnesses, in Goodspeed's own testimony, and as part of counsel's closing argument).

Though trial counsel's decision not to give an opening statement is discretionary, it is not immune from scrutiny. *Calderon v. State*, 950 S.W.2d 121, 127-28 (Tex. App. – El Paso, 1997); *Hernandez v. State*, 2002 WL 311465802 at *4 (Tex. App. – San Antonio, 2002). The importance of making an opening statement was discussed in depth by the First Court in *McGowen v. State*, 25 S.W.3d 741 (Tex. App. – Houston [1st Dist.] 2000), where the court denied defense counsel's request to make an opening statement after the State rested its case. *Id*. at 745. There, the defendant had the difficult undertaking of trying to persuade the jury that he acted in self-defense when he shot and killed the decedent. *Id*. at 748. The First Court found that the

trial court reversibly erred by denying counsel's request to make an opening statement–the error was not harmless because "the trial court denied appellant of the valuable opportunity to . . . provide an interpretive matrix for the jury . . . [which] could have aided the jurors' understanding of the defensive theory and allowed them to better assimilate and integrate the defense evidence as it unfolded." *Id*.

In the case at bar, Petitioner suffered from counsel's lack of trial strategy and his disregard for Petitioner's *McCoy* rights. Trial counsel did not articulate an overall strategy in the case beyond trying to keep the jury from hearing evidence of extraneous "bad act" evidence regarding Mr. McClain's purported violent conduct with prior girlfriends. Courts are "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Hill v. State*, 303 S.W.3d 863 (Tex. App. – Fort Worth, 2010), quoting *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999); *see also Carter v. State*, 506 S.W.3d 529, 534 (Tex. App. – Houston [1st Dist.] 2017) (that counsel articulates "the magic word, 'strategy' does not insulate it from judicial scrutiny."). It cannot be an effective trial strategy to forego trial strategy. *Johnson v. State*, 172 S.W.3d 6, 19 (Tex. App. – Austin, 2005, pet. ref'd).

Mr. McClain has shown that counsel's errors were objectively unreasonable under prevailing professional norms. While "[i]solated instances in the record reflecting errors of omission or commission do not render

counsel's performance ineffective," *McFarland v. State*, 845 S.W.2d 842, 843 (Tex. Crim. App. 1992), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994), counsel here was ineffective based on his numerous defaults. *Weathersby v. State*, 627 S.W.2d 729, 730-31 (Tex. Crim. App. 1982); *Ex parte Menchaca*, 854 S.W.2d 128, 133 (Tex. Crim. App. 1993). Where reasonable strategy cannot justify counsel's conduct, his performance falls below an objective standard of reasonableness as a matter of law, "regardless of whether the record adequately reflects trial counsel's subjective reasons for acting as [he] did."). *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

The totality of counsel's representation prejudiced Mr. McClain's case. Counsel's failure to make an opening statement not only failed to provide guidance to the jury as to the purpose of the guilt/innocence phase in the context of Mr. McClain's particular case, counsel's closing argument – asking the jury only to find Mr. McClain guilty without qualification or explanation of any kind – created what counsel expressly wished to avoid, *viz*.: having the jury believe that the defense had frivolously wasted their time. Here, the jurors already knew to be skeptical of someone who was wasting time with a *pro forma* denial. Counsel's failure to object to the irrelevant extraneous act evidence from Jeffrey Van Rowe and Patrick McClain prejudiced Mr. McClain. At the punishment phase, the prosecutor used the objectionable testimony of Rowe and Patrick McClain without limitation as bad character evidence

arguing that Mr. McClain was an angry person with a "fondness for handguns," and it should come as "no shock that he finally shot someone." (7 R.R., 48). The failure to seek or obtain a limiting instruction was felt in the trial.

Counsel's failure to elicit Mr. McClain's sudden passion testimony prejudiced Mr. McClain's case particularly since counsel did not call Mr. McClain to testify at the punishment phase where the issue of sudden passion is to be raised. Counsel candidly agreed that Mr. McClain's testimony in response to the State's cross-examination was very damaging. But counsel's explanation that he did not seek to rehabilitate Mr. McClain because he feared Mr. McClain would open the door to evidence of his history with other girlfriends must be discounted since counsel knew that the State had not located these women.

Counsel's short closing argument, *urging the jury to find Mr. McClain guilty without qualification or explanation of any kind and having not elicited facts to support sudden passion was devastating to Mr. McClain*. As the Ninth Circuit stated:

> "We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment. We recognize that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt

> to one of several charges . . . but [counsel's] conduct was not a tactical admission of certain facts in order to persuade the jury to focus on an affirmative defense of insanity."

United States v. Swanson, 943 F.2d 1070, 1076-77 (9th Cir. 1991).

In closing argument, counsel abandoned the objective of Mr. McClain's case. Petitioner was denied his Sixth Amendment right to a critical stage of trial in his case.[3] This was structural error under *McCoy*. The State's evidence at the punishment phase was short. State's witness Sunni Cox described an argument between Mr. McClain and Kirklan occurring at Mr. McClain's shop a week or two prior to the killing, which had been instigated by Kirklan. (6 R.R., 6, 8-12, 16, 77). McArthur Douglas, Kirklan's brother, was aware of the argument at Mr. McClain's shop, but saw Mr. McClain and his sister together shortly afterwards, and the two appeared to be happy, without any suggestion of relationship problems. (6 R.R., 32, 62). The State called several of Kirklan's family members who gave victim impact testimony. (6 R.R., 18-47). The State offered certified copies of Mr. McClain's criminal history. Mr. McClain had a 1993 conviction for indecent exposure and received a four-day jail sentence; a 2000 conviction

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[3] An ineffective assistance claim should be analyzed under *Cronic*, rather than *Strickland*, if the defendant either "is denied counsel at a critical stage of his trial" or if "*counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.*" *Hunter v. Moore*, 304 F.3d 1066, 1069 (11th Cir. 2002) [Emphasis added]. In *Hunter*, *supra*, the court noted that closing argument is a critical stage of trial. *Id.* at 1070-1071.

for Class A misdemeanor assault, punished by a fine; a 2000 conviction for misdemeanor deadly conduct, for which he received a probated sentence; and a 1997 conviction for a Class A misdemeanor assault, for which he was placed on probation. (6 R.R., 48).

Though counsel admitted he failed to elicit testimony from Mr. McClain at the guilt/innocence phase on his sudden passion facts, and believed that Mr. McClain had damaged his sudden passion case during cross-examination, he did not call Mr. McClain to testify to his feelings to support sudden passion at the punishment phase of trial. Counsel acknowledged that, even if not always necessary, as a practical matter, a defendant should probably testify to sudden passion at punishment. (*Downey* at 49-50).

Counsel acknowledged that the jury did not hear Mr. McClain express remorse beyond what he stated at the guilt/innocence phase, and did not hear him ask for forgiveness and mercy. (*Downey* at 50). Counsel chose not to call Mr. McClain to testify at punishment because he "had a litany of extraneous offenses . . . beyond what was listed in the notice" about which the prosecutor was eager to ask him. (*Downey* at 51-52). Counsel believed that the judge would admit this extraneous offense evidence which counsel thought "would do far more damage to any shot we had at sudden passion than what we had seen so far." (*Downey* at 52).

Counsel called five brief witnesses in Mr. McClain's behalf at the punishment phase. Counsel asked the

witnesses about Mr. McClain in very general terms, and elicited only that Mr. McClain was "capable of being a good person," who had helped his family in some undefined way in the past. (6 R.R., 53-54, 58; 7 R.R., 15). As set out in his affidavit and the affidavits of his siblings, Karen and Patrick McClain, Mr. McClain had a compelling background and substantial mitigating evidence which the jury should have heard. (*Writ Exhibits* 1, 2 and 3). As a child, Mr. McClain suffered severe beatings from his father when he would intercede to try to protect his mother and grandmother when his father became drunk and violent. (*Writ Exhibit* 1*, Affidavit of Gary McClain* at 2; *Writ Exhibit* 2, *Affidavit of Karen McClain* at 4;[4] *Writ Exhibit* 3, *Affidavit of Patrick McClain* at 1). The beatings left Mr. McClain physically and emotionally scarred. (*Writ Exhibit* 2, *Affidavit of Karen McClain* at 4, 7). After the McClain's mother left their father and moved the family to Texas, Mr. McClain worked two jobs while he was in school to support the family, giving his paychecks to his mother. (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 3; *Writ Exhibit* 2, *Affidavit of Karen McClain* at 4, 7; *Writ Exhibit* 3, *Affidavit of Patrick McClain* at 1). Because of the hours he worked, it took Mr. McClain two additional years to complete high school. (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 3; *Writ Exhibit* 2, *Affidavit of Karen McClain* at 4). Mr. McClain's hard work and sacrifice was acknowledged by the principal in front of the

[4] Karen McClain reaffirmed the information set out in her affidavit at the hearing held December 17, 2019. (*Karen McClain* at 131).

entire audience at graduation. (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 3).

Mr. McClain had been awarded full custody of his daughter, Kerria, and he was a loving, devoted, hands-on father. (*Writ Exhibit* 1*, Affidavit of Gary McClain* at 5; *Writ Exhibit* 2, *Affidavit of Karen McClain* at 5; *Writ Exhibit* 3, *Affidavit of Patrick McClain* at 7; *Writ Exhibit* 4, *Affidavit of Benson Terrell* at 3; *Writ Exhibit* 5, *Affidavit of Theron Vallery* at 2;[5] *Writ Exhibit* 6, *Affidavit of Pastor Harold Stanley* at 2). He had longstanding friendships and was loyal and generous. (*Writ Exhibit* 4, *Affidavit of Benson Terrell* at 1, 2; *Writ Exhibit* 5, *Affidavit of Theron Vallery* at 2). Mr. McClain was a hard worker who owned fourteen windshield repair businesses. (*Writ Exhibit* 1, *Affidavit of Gary McClain* at 4-5; *Writ Exhibit* 3, *Affidavit of Patrick McClain* at 1, 7; *Writ Exhibit* 4, *Affidavit of Benson Terrell* at 2). He did not drink or use drugs. (*Writ Affidavit* 1, *Affidavit of Gary McClain* at 2; *Writ Exhibit* 3, *Affidavit of Patrick McClain* at 7). He was deeply in love with Kirklan, was profoundly affected by what he had done, continued to grieve her loss, and had never gotten over it. (*Writ Exhibit* 2, *Affidavit of Karen McClain* at 7; *Writ Exhibit* 3, *Affidavit of Patrick McClain* at 6; *Writ Exhibit* 4, *Affidavit of Benson Terrell* at 3; *Writ Exhibit* 5, *Affidavit of Theron Vallery* at 2).

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[5] Theron Vallery adopted and reaffirmed the information set out in his affidavit at the December 17, 2019, hearing. (*Vallery* at 158-59).

Counsel agreed that mitigation evidence can serve as a basis for a jury to lessen a defendant's punishment and reduce a sentence. (*Downey* at 59). Counsel agreed that the information provided in the affidavits of Karen McClain, Patrick McClain, Benson Terrell, Theron Vallery, and Stanley Harold would have been potentially helpful mitigating evidence at the punishment phase. (*Downey* at 54-59). Counsel recalled asking the family to bring witnesses to a meeting prior to trial who could act as potential punishment witnesses. (*Downey* at 72). He did not recall preparing the punishment witnesses to testify, though that was his general practice. (*Downey* at 73).

Counsel was concerned that testimony from punishment witnesses might open the door to extraneous offense evidence pertaining to Mr. McClain's prior girlfriends. (*Downey* at 76). Counsel did not testify that he sought family history and background evidence from Mr. McClain or his family. In closing argument at the punishment phase, trial counsel asked the jury for a finding of sudden passion. (7 R.R., 36). Counsel did not argue for a lenient sentence if the jury did not find sudden passion. Mr. McClain was sentenced to 99 years in prison, the top of the range.

This effect from counsel's *McCoy* error was catastrophic. The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. *Milburn v. State*, 15 S.W.3d 267, 270 (Tex. App. – Houston [14th Dist.] 2000) (citing *Vela* at 965). Where the potential punishment is life

imprisonment, the sentencing proceeding takes on added importance. *Vela v. Estelle*, 706 F.2d 954, 964 (5th Cir. 1983). In *Milburn*, the jury heard no witnesses in mitigation of punishment. *Id*. at 269. At a hearing on Milburn's motion for new trial, there was evidence that he had a young daughter with severe medical problems, he was a good father, and he was very active in raising her. *Id*. at 269. Milburn's employer had a longstanding relationship with him, and described him as an outstanding employee. *Id*. at 269-70. The Fourteenth Court concluded that counsel's representation was objectively unreasonable, pointing out that his "lack of effort at the punishment phase of trial deprived appellant of the possibility of bringing out even a single mitigating factor." *Id*. The Fourteenth Court further found that Milburn demonstrated prejudice, even though it was sheer speculation that the mitigation the witnesses' testimony would have actually influenced the jury favorably in its assessment of punishment, there was a reasonable probability that Milburn's sentence would have been less severe. *Id*.

The significant mitigating evidence presented by Petitioner at his habeas proceeding was "substantially greater and more compelling than that actually presented [by counsel] at trial." *Ex parte Gonzalez*, 204 S.W.3d at 399, *supra*. This Court cannot say that the aggravating facts in Mr. McClain's case would "clearly outweigh the totality of the applicant's mitigating evidence if a jury had the opportunity to evaluate it again." *Id*. This Court should conclude that there is "at least a reasonable probability that, had this mitigating

evidence been [heard] at the applicant's original punishment hearing, a different result would have occurred, such that it undermines . . . confidence in the outcome." *Id*. at 399-400. In the instant analysis, counsel's disregard for Petitioner's desire to contest the charge was structural error.

In the case at bar, the error is not subject to harmless error review and counsel's many deficiencies highlight the treatment he received at his trial. The structural error complained of by counsel abandoning Petitioner's trial objectives is manifest in the instant case. Petitioner was sentenced to the maximum sentence under the law. Petitioner should receive a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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