No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KOSOUL CHANTHAKOUMMANE,
Petitioner,

VS.

TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Trial Cause No. W380-81972-07-HC2
Writ Cause No. WR-78,107-03

PETITION FOR CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

I.

A. Whether Mr. Chanthakoummane is entitled to a new trial because trial counsel ignored his unequivocal direction to challenge his guilt during the culpability phase of his trial in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

PARTIES TO PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is corporation, a corporate disclosure statement is not required.

LISTED RELATED PROCEEDINGS
(in chronological order)

State of Texas vs. Kosoul Chanthakoummane, Case Number 38008262906 in the 380th Judicial District Court, Collin County, Texas (2006) (Trial).

Chanthakoummane v. State, 2010 WL 1696789 (Tex. Crim. App. 2010) (direct appeal).

Ex Parte Kosoul Chanthakoummane, 2013 WL 363124 (Tex. Crim. App. 2013) (State habeas).

Chanthakoummane v. Texas, 562 U.S. 1006 (Nov. 1, 2010) (certiorari denied on direct appeal).

Chanthakoummane v. Stephens, Director, TDCJ-CID, 2015 WL 1288443 (E.D. Tex, March 20, 2015) (federal habeas decision denying COA).

Chanthakoummane v. Stephens, 816 F.3d 62 (5th Cir. 2016) (affirming denial of COA).

Chanthakoummane v. Davis, Director, TDCJ-CID, ___ U.S. ___, 137 S.Ct. 280 (Oct. 3, 2016) (certiorari denied).

Ex Parte Kosoul Chanthakoummane, 2017 WL 2464720 (Tex. Crim. App., June 7, 2017) (subsequent habeas writ denied).

Ex Parte Kosoul Chanthakoummane, 2020 WL 5927442 (Tex. Crim. App., Oct. 7, 2020) (second subsequent habeas writ denied).

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PETITION FOR WRIT OF CERTIORARI

Kosoul Chanthakoummane respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

October 17, 2007, a Texas jury convicted Petitioner of capital murder. That same jury sentenced Petitioner to death. On April 28, 2010, the Texas Court of Criminal Appeals ("T.C.C.A") affirmed Petitioner's conviction and sentence. *Chanthakoumanne v State,* 2010 WL 1696789. On November 2, 2010, the Supreme Court of the United States denied his writ of certiorari. *Chanthakoumane v Texas*, 562 U.S. 1006 (2010).

Mr. Chanthakoumane filed his petition for a post-conviction writ of habeas corpus in the trial court on April 1, 2010. *Ex Parte Kosoul Chanthakoumanne*, 2013 WL 363124 (2013). On January 30, 2013, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions of law and denied the Petitioner's request for habeas relief. *Ex parte Chanthakoumanne*, *2013* WL 363124 (Tex. Crim. App. 2013).

On January 13, 2017, Petitioner filed a successor writ of habeas corpus in the State trial court. Petitioner thereafter filed a second subsequent application for writ of habeas corpus on May 13, 2019. *Ex Parte Kosoul Chanthakoumane*, Cause No. WR-78,107-02. Petitioner asserted that the State's conviction was based largely

upon discredited sciences, including bite-mark evidence, hypnotically induced eye-witness identification and DNA. On October 7, 2020, the T.C.C.A. issued an order denying relief as to Petitioner's subsequent State writ. *See Ex parte Chanthakoummane*, No. WR-78,107-02 (Tex. Crim. App. Oct. 7, 2020).

On December 31, 2020, Petitioner filed a petition for writ of certiorari with this Court. *See Kosoul Chanthakoummane v. Texas*, Case No. 20-6799 (Jan. 8, 2021). Petitioner's writ of certiorari was denied on April 26, 2021. *Id.* On May 13, 2019, Petitioner filed a second subsequent application for habeas corpus relief. *See Ex parte Chanthakoummane*, No. WR-78,107-03 (Tex. Crim. App. May 13, 2019) (APPENDIX B). Petitioner raised one claim in which he alleges that he is entitled to a new trial under *McCoy v. Lousiana*, 138 S. Ct. 1500 (2018) because trial counsel violated Applicant's Sixth Amendment right to autonomy by overriding his stated trial objective to maintain his innocence. *Id.*

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) On March 31, 2021, the TCCA issued an unpublished opinion dismissing Petitioner's subsequent application pursuant to Article 11.071, § 5(a) of the Texas Code of Criminal Procedure. (APPENDIX A); see also *Ex parte Barbee*, No. WR-71,070-03, S.W.3d ___,

(Tex. Crim. App. Feb. 10, 2021) (holding that *McCoy* does not represent a previously unavailable legal basis for satisfying § 5(a)(1)).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented implicates the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The question also implicates the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

[1] Unless an applicant for a writ of habeas corpus meets a very fine-tuned exception, he is limited to one full and fair opportunity to present any claims that may entitle him to relief from his judgment or sentence. *Ex parte Kerr*, 64 S.W.3d 414, 418-19 (Tex. Crim. App. 2002). "[E]verything you can possibly raise the first time, we expect you to raise it initially, one bite of the apple, one shot." *Id.*

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

The question further implicates the following statutory provisions:

Petitioner filed a subsequent State application for a writ of habeas corpus in a capital case pursuant to Article 11.071(5) of the Texas Code of Criminal Procedure. Under Article 11.071 of the Texas Code of Criminal Procedure, a court can consider the merits of a subsequent application for habeas relief if:

> the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

STATEMENT OF THE CASE

A Grand Jury of Collin County, Texas indicted Mr. Chanthakoummane for capital murder in Cause Number 380-81972-07 on September 21, 2006. Mr. Chanthakoummane was re-indicted on August 21, 2007, in cause number 380-82629-06. The original Indictment alleged that Mr. Chanthakoummane, while committing or attempting to commit the offense of robbery, intentionally and knowingly caused the death of Sarah Walker by "stabbing and cutting deceased with a knife, a deadly weapon." The re-indictment alleged that Mr. Chanthakoummane caused the death of Sarah Walker by "stabbing and cutting deceased with an object, a deadly weapon, whose exact nature and identity is unknown to the grand jurors, and by striking deceased with a plant stand, a deadly weapon" (21 RR 14-5).

Mr. Chanthakoummane entered a plea of not guilty and was tried for capital murder on this charge (21 RR 15). The trial was held on October 8, 2007, in the 380th District Court, Collin County, Texas (20 RR 1). On October 17, 2007, a jury, after answering the special issues, found Mr. Chanthakoummane guilty of capital murder, and the same jury sentenced him to die by lethal injection (28 RR 73-4).

Under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Mr. Chanthakoummane is constitutionally entitled to decide whether to concede his guilt or require the State's case to prove him guilty beyond a reasonable doubt. Mr. Chanthakoummane maintains that his trial counsel allowed him to decide whether to challenge the

State's case during the culpability or sentencing phase. Mr. Chanthakoummane submits that he unequivocally told counsel to challenge his guilt during the culpability phase. Mr. Chanthakoummane further maintains that his counsel agreed to adhere to his decision. But counsel disregarded Mr. Chanthakoummane's clear direction and promptly conceded his guilt during opening statements.

The issue presented is whether Mr. Chanthakoummane is entitled to a new trial because trial counsel ignored his unequivocal direction to challenge his guilt during the culpability phase of his trial. As a consequence of counsel's total disregard for Mr. Chathakoummane's wishes, he is entitled to a new trial. In addition, Mr. Chathakoummane was further prejudiced by the T.C.C.A. refusal to weigh the merits of this claim has properly raised in his successive writ of habeas corpus.

Mr. Chathakoummane takes that position that his trial counsel spoke with him immediately before the first day of his trial (APPENDIX D). In that meeting, counsel gave Mr. Chanthakoummane the choice to litigate the culpability or sentencing phase, telling him he could not litigate both. Mr. Chanthakoummane takes the position that he told counsel to fight the culpability phase and that counsel agreed to do so (APPENDIX D). But then, without informing Mr. Chanthakoummane, counsel immediately conceded guilt in his opening statements. Counsel's actions clearly violate *McCoy*, so Mr. Chanthakoummane is therefore entitled to a new trial.

In his successive state writ, Mr. Chanthakoummane established that he met the requirements for a subsequent writ application under TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a)(1), a well-established exception to the bar on subsequent applications contained in that section. Despite the T.C.C.A.'s holding, Mr. Chathakoummane's subsequent application for a writ of habeas corpus met the criteria articulated under Article 11.071(5) of the Texas Code of Criminal Procedure because his claim involves a claim that could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

REASONS FOR GRANTING THE PETITION

A. Mr. Chanthakoummane is entitled to a new trial because trial counsel ignored his unequivocal direction to challenge his guilt during the culpability phase of his trial in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

The T.C.C.A. refused to consider the merits of Mr. Chanthakoummane's claim on the sole basis that this Court's holding in *McCoy* does not represent a previously unavailable legal basis for satisfying § 5(a)(1) (APPENDIX A). The T.C.C.A. erred in this regard. Mr. Chanthakoummane met his burden under *McCoy* by demonstrating that his trial counsel ignored his unequivocal direction to challenge

his guilt during the culpability phase of his trial. Because Mr. Chanthakoummane was only able to raise this previously un-exhausted claim AFTER this Court issued its holding in *McCoy*, he is entitled to full and fair consideration of this successive claim and a new trial.

Mr. Chanthakoummane meets the requirements for consideration of his claim on the merits under this section because the *McCoy*-based claim presented here has not and could not have been presented in a previous, timely-filed in his initial habeas application. The legal basis of the claim was unavailable on the date of Mr. Chanthakoummane's initial application in 2010 and his first subsequent application in 2017.

McCoy is the first case in which the United States Supreme Court has held that the defendant's Sixth Amendment rights include the personal right to "decide on the objective of his defense" at trial. *Id.*; *see also id.* at 1517-18 (Alito, J., dissenting) (observing that the Court "discovered a new right" and "decide[d] this case on the basis of a newly discovered constitutional right"). Mr. Chanthakoummane could not have been presented this issue because his previous application for a writ of habeas corpus was filed on January 13, 2017. *McCoy v. Louisiana*, 138 S. Ct 1500 (2018), was issued on May 14, 2018, so the legal basis for this claim was unavailable for inclusion into his previous application.

McCoy, a capital case, involved the killing of three victims in Louisiana, where the defendant was appointed counsel from the public defender's office. *Id.* at 1506. However, the attorney-client relationship quickly broke down and McCoy sought leave to represent himself until his parents retained new counsel. Id. New counsel concluded that the evidence against his client was overwhelming, and that a death sentence was inevitable. *Id.* Counsel told McCoy this two weeks prior to trial, and McCoy was "furious" when told that his counsel planned to concede his commission of the murders to the jury. *Id.* McCoy told counsel not to make that concession and wanted him to pursue acquittal. *Id.* Part of counsel's strategy was to argue for an offense less than capital murder, in McCoy's case due to his mental incapacity which prevented him from forming the specific intent necessary for the commission of first-degree murder. *Id.*

McCoy sought to terminate trial counsel's representation. *Id.* The trial court refused the request. At his opening statement at the guilt phase, trial counsel said that the evidence conclusively showed that McCoy was guilty. *Id.* McCoy protested. Trial counsel continued his opening statement, telling the jury that the evidence was unambiguous and that his client committed the three murders. *Id.* at 1507. In his closing argument, counsel reiterated that McCoy was the murderer. *Id.*

On appeal, the Louisiana Supreme Court "affirmed the trial court's ruling that defense counsel had authority so to concede guilt, despite the defendant's opposition

to any admission of guilt" because "counsel reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence." *Id.* This Court granted certiorari on the question of "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.*

This Court initially distinguished the situation in *McCoy* from *Florida v. Nixon*, 543 U.S. 175 (2004). *Nixon* held that "when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy"... '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." *Id.* at 1505, *quoting Nixon* at 192. *Nixon* was not applicable in *McCoy* because McCoy insisted on his innocence and objected to the admission of guilt. *McCoy*, 138 S. Ct at 1505, 1509. This Court affirmed that "[t]he Sixth Amendment guarantees to each criminal defendant 'the Assistance of Counsel for his defence." *Id.* at 1507. *Citing Faretta v. California*, 422 U.S. 806, 824-828 (1975), *McCoy* held that "[a]s the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized." *Id.*

In response to this Court's holding in *McCoy*, Mr. Chanthakoummane filed a successive claim for habeas relief in state court on the basis that this claim for relief was unavailable at the time of the filing of his original state court writ of habeas

corpus. Article 11.071 recognizes that a legal basis for a claim was unavailable where "the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of the state on or before that date" the previous application was filed. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1). Before *McCoy*, neither the Supreme Court, any federal court of appeals, or Texas appellate court had recognized or laid the groundwork for a claim that the defendant has a Sixth Amendment right to decide the objective of the defense. Instead, the relevant cases treated claims about a defendant's trial objectives under the rubric of ineffective assistance of counsel rather than the individual defendant's autonomy.

The previous cases emphasized counsel's role—not the defendant's wishes or objectives. Thus, the relevant courts' decisions consistently analyzed claims arising from a defense lawyer's choice to override a client's trial objective using the ineffective-assistance test the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See, e.g., Haynes v. Cain*, 298 F.3d 375, 379-82 (5th Cir. 2002); *Darden v. United States*, 708 F.3d 1225, 1228-33 (11th Cir. 2013); *United States v. Flores*, 739 F.3d 337, 339-40 (7th Cir. 2014). *McCoy* broke new ground, holding that "[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." *McCoy*, 138 S. Ct. at

1510-11. Because *McCoy* "was the first case in which [a relevant court] explicitly recognized" this type of Sixth Amendment violation, Mr. Chanthakoummane's claim "was unavailable" under the terms of TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a)(1). *Ex Parte Chavez*, 371 S.W.3d 200, 205 (Tex. Crim. App. 2012).

McCoy is the first case to affirmatively recognize that trial counsel must adhere to their client's wishes when deciding whether to concede guilt because the Sixth Amendment guarantees a defendant the right to choose "the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 138 S. Ct. at 1503, 1505, 1508. *See also Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018).

Moreover, Mr. Chanthakoummane's *McCoy* claim amounts to a structural error thereby relieving him from proving prejudice. *Id.* at 1511. This Court held for the first time that "[t]he Court's ineffective-assistance-of-counsel jurisprudence, *see Strickland v. Washington*, 466 U.S. 668 . . . does not apply here, where the client's autonomy, not counsel's competence, is in issue." *Id.* at 1504. If the client remains silent while counsel explain their desired path, however, counsel may use their best judgment. In this case, the appropriate analysis is the ineffective-assistance-of-counsel standard. *Nixon*, 543 U.S. at 178.

The Sixth Amendment requires the assistance of counsel, allowing trial counsel develop trial strategy but not the objectives of the litigation. In *McCoy*, this Court discussed the role of counsel and defendant when deciding trial strategy. The two have distinct roles that revolve around the basic premise that the Sixth Amendment requires the assistance of counsel. *McCoy*, 138 S. Ct. at 1507-08. Accordingly, when the defendant tells counsel that she or he is innocent, the Sixth Amendment requires counsel to argue innocence in the culpability phase. *See Nixon*, 543 U.S. at 178. In *Nixon*, this Court discussed counsel's obligation to discuss trial strategy with the defendant. *Id.* If counsel suggests that they concede guilt while the defendant remains silent, counsel may use his or her best judgment when deciding whether to concede guilt. *Ibid*.

To protect this Sixth Amendment liberty interest, the Court reminded that counsel must form an informed opinion and discuss that opinion with the defendant. *McCoy*, 138 S. Ct. at 1509. This discussion must include whether to concede guilt in hopes of avoiding the death penalty. *Ibid*. And after the defendant listens to counsel's opinions, the Sixth Amendment protects her right to determine whether to concede guilt. *See id.* at 1511.

Furthermore, once an applicant establishes a *McCoy* violation, she need not prove prejudice. She is entitled to a reversal because the error is structural. *Id.* at 1511-12. In *McCoy*, the Court held that the above errors are not subject to

ineffective-assistance-of-counsel standards. *Id.* at 1510-11. Instead, the violation is complete when the applicant's protected autonomy rights are violated. *Id.* at 1511. The applicant is not only relieved of proving prejudice, the "error is not subject to harmless-error analysis." *Ibid.* Violating an applicant's autonomy to decide the objectives of her case is structural because it "'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.'" *Ibid* (*quoting Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). It protects rights "not designed to protect the defendant from erroneous conviction but instead protects some other interest." Ibid (*quoting Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (*citing Faretta*, 422 U.S. at 834). After explaining this reasoning, the Court held that a *McCoy* violation is structural error and required automatic reversal.

Although the undersigned must concede that the trial record itself is silent on this issue of whether Mr. Chanthakoummane unequivocally told his counsel of his wishes to challenge the guilt-stage of his trial [2], Mr. Chanthakoummane respectfully submits that he maintained his innocence throughout his trial process (APPENDIX

[2] Mr. Chanthakoummane did raise a *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) ineffective assistance of counsel claim during the federal habeas proceedings. He claimed that given the mere circumstantial nature of the State's evidence that Walker was murdered during the commission of a robbery, he was constructively denied his right to counsel under both *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) because defense counsel not only conceded his guilt to Walker's murder, but also conceded his guilt as to capital murder during the commission of an aggravated felony. Both the Untied States District Court and the Fifth Circuit rejected this claim (APPENDIX C at pages 13-15).

D). Mr. Chanthakoummane argues that in his first meeting with his lead appointed trial counsel, Miears, he proclaimed his innocence (APPENDIX D). He told Mr. Miears that he killed no one. Despite being distraught throughout the rest of the meeting, Mr. Chanthakoummane recalls that he was adamant that he was innocent. Mr. Chanthakoummane further maintains that he was steadfast in his efforts to make Mr. Miears understand that he was not the killer. After telling counsel multiple times that he was innocent, Mr. Chanthakoummane became frustrated with counsel's efforts to prepare his innocence claim. His frustration turned into fear when the State made clear it was seeking death. Mr. Chanthakoummane recalls that he believed that trial counsel were not preparing adequately to defend him (APPENDIX D). As a consequence, he maintains that he asked his trial counsel to seek a plea bargain.

Mr. Chanthakoummane recounts that when trial counsel told him that he would have to admit guilt to secure a plea offer, he agreed to be recorded admitting guilt while telling counsel that he was innocent. After the plea negotiations failed, Mr. Chanthakoummane continued to tell counsel that he was innocent and wanted to challenge the State's case during the culpability phase. Finally, Mr. Chanthakoummane submits that he met with both his appointed counsel on the first day of trial and they informed him that he would have to choose between either a strategy of defending him in the culpability or sentencing phases. Counsel said it was Mr. Chanthakoummane's choice. And Mr. Chanthakoummane chose—he

chose the culpability phase. He submits that he told both his counsel to challenge the State's case in the culpability phase (APPENDIX D).

Like in *McCoy*, Mr. Chanthakoummane submits that he repeatedly and unequivocally told his trial counsel that he was innocent and wanted to challenge the State's culpability evidence. As noted supra, he told them he was innocent during their initial meeting. He told them repeatedly during that meeting. Mr. Chathakoummane told counsel he was innocent at multiple meetings throughout the representation. Unlike in *Nixon*, Mr. Chanthakoummane maintains that he never missed an opportunity to proclaim his innocence.

Mr. Chanthakoummane advises that he explicitly told both his trial counsel that he wanted to maintain his innocence during the culpability phase of the trial, requiring the State to prove him guilty beyond a reasonable doubt, but counsel disregarded that direction. As discussed above, both of Mr. Chanthakoummane's trial counsel informed him that they would make every effort to defend him during the culpability phase. But counsel did no such thing. After Mr. Chanthakoummane directed counsel to challenge the State's case during the culpability phase, counsel again told him that they would. But then counsel promptly conceded guilt during opening statements: "[H]e wanted to rob her, and it didn't go the right way, and he killed her" (21 RR 29).

Counsel's decision was more egregious than in *McCoy*. In *McCoy*, trial counsel discussed his decision to concede guilt with his client. In Mr. Chanthakoummane's case, counsel told him they would honor his direction to contest guilt, but then they promptly disregarded that direction without telling Mr. Chanthakoummane. Like in *McCoy*, Mr. Chanthakoummane is entitled to a new trial.

Finally, Mr. Chanthakoummane need not prove prejudice to prevail here. As discussed above, a *McCoy* error is complete when the defendant's directions to challenge his guilt are disregarded. *McCoy*, 138 S. Ct. at 1511. Mr. Chanthakoummane's trial counsel gave him a choice of which phase to litigate. He unequivocally told counsel to challenge his guilt during the culpability phase. Counsel agreed and then promptly conceding his guilt during opening statements (21 RR 29). Because these facts are indistinguishable from those in *McCoy*, Mr. Chanthakoummane is entitled to a reversal without needing to show more.

Here, Mr. Chanthakoummane's trial counsel not only disregarded his instructions to challenge the State's case for guilt, they also disregarded their assurance to Mr. Chanthakoummane that they would do so. Because they told Mr. Chanthakoummane that they would challenge the State during the culpability phase of his trial after Mr. Chanthakoummane's explicit instructions on the first day of trial to do so, they violated his Sixth Amendment right to autonomy in criminal

proceedings. This violation is a structural error, so Mr. Chanthakoummane is entitled to a new trial.

Counsel must adhere to the client's objectives because the Sixth Amendment protects the client's right to autonomy. The Supreme Court's holding in McCoy, discussed above, rested on this constitutional principle. A grant of certiorari is needed to correct the above errors and to clarify that *McCoy* is "new law" that meets the strict requirements required to present a successive claim in Texas state court pursuant to Article 11.071, § 5(a)(1). *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

In the present case, the T.C.C.A. failed to adequately consider whether a *McCoy* claim was previously available to Mr. Chanthakoummane. Instead, and with no analysis, the T.C.C.A. simply held that it reviewed the subsequent application and found that Applicant failed to satisfy the requirements of Article 11.071, § 5(a) (APPENDIX A) (*citing See Ex parte Barbee*, No. WR-71,070-03, __ S.W.3d__ (Tex. Crim. App. Feb. 10, 2021) (holding that McCoy does not represent a previously unavailable legal basis for satisfying § 5(a)(1)). The present case, however, distinguishable from the T.C.C.A.'s holding in *Ex parte Barbee*.

In *Ex parte Barbee,* Applicant claimed that his attorney violated his Sixth Amendment right to assistance of counsel by making a strategic concession of his

guilt over his express objection. *See Ex parte Barbee*, No. WR-71,070-03 at page 4 (Tex. Crim. App. Feb. 10, 2021). Barbee argued that the legal basis for his claim was unavailable until 2018 when the Supreme Court issued its opinion in *McCoy*. *Id.* In contrast to the present case, however, the court in *Barbee* reasoned that the "legal basis for Applicant's claim could have been reasonably formulated from existing precedent because *McCoy* was the logical extension of *Florida v. Nixon*, 543 U.S. 175 (2004), based on the factual distinctions—not legal ones—between the two cases." *Id.* Moreover, the court in *Barbee* held that Applicant does not allege facts that would entitle him to relief under *McCoy*'s terms even if it were a previously unavailable legal basis for his claim. Based upon that reasoning, the Barbee court dismissed his application. *Id.*

As noted supra, the Texas Court of Criminal Appeals failed to consider the merits of Mr. Chanthakoummane's *McCoy* claim. It instead dismissed his claim out of hand as being in violation of the strict constructs of the successive writ doctrine articulated in Article 11.071, § 5(a) (APPENDIX A) (*citing See Ex parte Barbee*, No. WR-71,070-03, __ S.W.3d__ (Tex. Crim. App. Feb. 10, 2021). The T.C.C.A. erred in this respect and that error results in a total deprivation of Mr. Chanthakoummane's rights under the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution. Accordingly, Mr.

Chanthakoummane is entitled to a grant of his petition for certiorari to the Fifth Circuit Court of Appeals in this case.

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to grant certiorari in this case.

Date: June 28, 2021

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