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

APPENDIX

Date: June 28, 2021

Respectfully submitted,

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APPENDIX A
Decision of the Texas Court of Criminal Appeals, denying relief,
WR 78,107-03, (Feb. 10, 2021).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,107-03

EX PARTE KOSOUL CHANTHAKOUMMANE, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. W380-81972-07-HC3 IN THE 380TH DISTRICT COURT
COLLIN COUNTY

Per curiam. ***YEARY, J., concurs.***

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071, § 5.[1]

In October 2007, Applicant was convicted of the offense of capital murder for murdering Sarah Walker in the course of committing or attempting to commit robbery. *See* TEX. PENAL CODE ANN. § 19.03(a)(2). Specifically, Applicant was convicted of murdering

[1] Unless we specify otherwise, all references in this order to "Articles" refer to the Texas Code of Criminal Procedure.

and robbing real estate agent Walker in the D.R. Horton model home where she worked in the "Craig Ranch" subdivision in McKinney, Texas. The jury answered the special issues submitted under Article 37.071 and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction on direct appeal. *Chanthakoummane v. State*, No. AP-75,794 (Tex. Crim. App. Apr. 28, 2010) (not designated for publication). On April 5, 2010, Applicant filed in the convicting court his initial Article 11.071 application for a writ of habeas corpus, raising twelve claims. This Court denied Applicant relief. *Ex parte Chanthakoummane*, No. WR-78,107-01 (Tex. Crim. App. Jan. 30, 2013) (not designated for publication).

On January 13, 2017, Applicant filed in the convicting court his first subsequent application, raising four claims. We remanded those claims to the convicting court for a review of those allegations. *Ex parte Chanthakoummane*, No. WR-78,107-02 (Tex. Crim. App. June 7, 2017) (not designated for publication). When the application returned to this Court, we denied relief on the merits. *Ex parte Chanthakoummane*, No. WR-78,107-02 (Tex. Crim. App. Oct. 7, 2020) (not designated for publication).

Applicant filed this, his second subsequent application for habeas corpus relief, in the convicting court on May 13, 2019. Therein, Applicant raises one claim in which he alleges that he is entitled to a new trial under *McCoy v. Louisiana*, 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. Applicant contends that his claim is entitled

to proceed under Article 11.071, § 5(a)(1), because *McCoy* represents a previously unavailable legal basis.

We have reviewed the subsequent application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). *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)). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the merits of the claim.

IT IS SO ORDERED THIS THE 31ST DAY OF MARCH, 2021.

Do Not Publish

APPENDIX B
Petitioner's Writ. No. WR-78,107-03, May 13, 2019).

IN THE 380TH JUDICIAL DISTRICT COURT
OF COLLIN COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
OF AUSTIN, TEXAS

CAPITAL CASE

EX PARTE	**§ Trial Cause No.**
KOSOUL CHANTHAKOUMMANE,	**§ Court of Criminal Appeals § No.**
Applicant.	**§**

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS UNDER TEX. CODE CRIM. PRO. ART. 11.071 §5

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STATEMENT OF THE CASE

I. Procedural History

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). Mr. Chanthakoummane was represented by lead attorney Mr. Steven R. Miears and co-counsel Mr. B. Keith Gore (20 RR 2). Mr. Gregory S. Davis and Mr. Curtis T. Howard of the Collin County District Attorney's Office prosecuted the case for the State. *Ibid*. 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).

On April 28, 2010, the Texas Court of Criminal Appeals affirmed Mr. Chanthakoummane's conviction and sentence. *Chanthakoummane v. State*, 2010 WL 1696789 (Tex. Crim. App. 2010). On November 2, 2010, The Supreme Court denied review on certiorari. *Chanthakoummane v. Texas*, 562 U.S. 1006 (2010).

Mr. Chanthakoummane filed his Application for Post-Conviction Writ of Habeas Corpus in the trial court on April 1, 2010. *Ex Parte Kosoul Chanthakoummane*, 2013 WL 363124, at *1 (Tex. Crim. App. Jan. 30, 2013). On January 30, 2013, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions of law, denying Mr. Chanthakoummane's request for habeas relief. *Ex Parte Chanthakoummane*, 2013 WL 363124 (Tex. Crim. App. 2013).

Mr. Chanthakoummane then filed a timely petition for a writ of habeas in the United States District Court for the Eastern District of Texas on January 26, 2014. That court denied habeas relief on March 20, 2015. Mr. Chanthakoummane then applied to the United States Court of Appeals for the Fifth Circuit for a Certificate of Appealability. That court denied his application on February 25, 2016. Subsequently, Mr. Chanthakoummane petitioned the United States Supreme Court for a writ of certiorari. The Court declined to issue the writ on October 3, 2016.

After the Supreme Court's action, the District Court of Collin County, Texas set an execution date on January 25, 2017. Mr. Chanthakoummane filed his first subsequent application for a writ of habeas corpus on January 13, 2017. In response, the State moved the trial court to modify his execution date to July 19, 2017. The court granted that motion on January 13, 2017. And on June 7, 2017, the Court of Criminal Appeals stayed Mr. Chanthakoummane's July 19 execution date and remanded his application to the trial court for an evidentiary hearing.

Following the evidentiary hearing on July 16-17, 2018 and November 1, 2018, the trial court filed Findings of Fact and Conclusions of Law recommending the denial of Mr. Chanthakoummane's application. The matter is still pending before the Court of Criminal Appeals.

II. Factual Background

A. The two eyewitnesses made flawed identifications based on faulty hypnosis sessions and also based on serious omissions in both their in-court and out-of-court identifications.

"What the science did in this case is it made that defense attorney get up in his opening statement and say that my client is guilty and it was a robbery gone bad. He would not have said that if we hadn't had the physical evidence we had in this case." Diana Tilton, McKinney Police Homicide Detective. Forensic Files, *House Hunting*, Season 13, Episode 2 (Broadcast Sept. 19, 2008).

Jessica Allen testified that around noon on July 8, 2006, she was talking on the phone with her cousin Sarah Walker (21 RR 52). When someone walked into the

model home Ms. Walker was showing, she hung up the phone with her cousin (21 RR 52). Andy Lilliston, a manager in the information technology department at FedEx, testified that he and his wife were looking at model homes that same day (21 RR 57). Around 1:20 p.m., he and his wife discovered the body of Ms. Walker in the kitchen of a model home (21 RR 62). The couple immediately called 911 (21 RR 62).

Mamie Sharpless, a realtor with Keller Williams, testified at trial that on the morning of July 8, 2006, she received a phone call from a person she believed was a potential client (21 RR 87-8). The caller identified himself as Chan Lee and stated that he was interested in looking at a house she advertised (21 RR 89). The caller stated that he was calling from a pay phone because he was from North Carolina, staying at a local hotel (21 RR 90). Before the phone call cut off, Ms. Sharpless gave the man directions but could not confirm a time to meet (21 RR 94). Ms. Sharpless and her husband, Nelson Villavicencio, went to the subdivision and attempt to meet up with the caller. *Ibid*.

After arriving at the advertised unit, the couple parked their car and waited for the caller to arrive (21 RR 98). A little while later, a white Mustang with one male driver passed them in their car. *Ibid*. The man got out of the car, and the couple asked him if he was Chan Lee (21 RR 98-9). He responded that he was not (21 RR 100). Ms. Sharpless observed that the man was dressed in a blue colored "muscle shirt," was not tall, was of Asian descent, muscular build, and had a "buzz cut" hairstyle

(21 RR 101). She never described the person as having prescription eyeglasses nor did she describe any tattoos. At trial, Ms. Sharpless made an in-court identification stating that the only difference she noticed was that Mr. Chanthakoummane's hair was longer than the day she believes she allegedly saw him outside the model home (21 RR 102).

Nelson Villavicencio, Ms. Sharpless' husband, testified that he accompanied his wife to the model home for sale and waited to see if Chan Lee would arrive (21 RR 112). After the man in the white Mustang arrived, Mr. Villavicencio asked if he was Chan Lee (21 RR 114). He responded that he was not. *Ibid*. The couple drove away and went into the advertised unit to prepare for another customer (21 RR 115). They waited a little while for the second customer, and when he never showed up, they left and get something to eat (21 RR 119).

Later that week, the police contacted Mr. Villavicencio to help them complete a facial composite (21 RR 121). He could only complete the composite after he underwent the hypnosis session conducted by Texas Ranger Richard Shing (21 RR 121-22). Mr. Villavicencio testified that he saw the man's face outside the model home and he described the individual as being of Asian descent (21 RR 114). Additionally, Mr. Villavicencio spoke about his description of the man outside the model home, "He had a T-Shirt no sleeves, jeans, very athletic." Forensic Files, *House Hunting*, Season 13, Episode 2 (Broadcast Sept. 19, 2008). Like his wife, who was the only other eyewitness to see the man outside the home, Mr. Villavicencio

did not describe the person as wearing prescription eyeglasses or any tattoos. Similarly, at trial, Mr. Villavicencio made an in-court identification stating the only difference he noticed was that Mr. Chanthakoummane had longer hair in-court (21 RR 123).

Richard Shing, a Texas Ranger, testified outside the presence of the jury that he hypnotized Ms. Sharpless and Mr. Villavicencio (21 RR 66-70). He claimed that he was trained in hypnosis and while under hypnosis Ms. Sharpless and Mr. Villavicencio described the individual they saw outside of the model home (21 RR 68-9). After the hypnosis session, Mr. Villavicencio met with a sketch artist, who could only produce the composite after the hypnosis session (21 RR 120-21). Mr. Chanthakoummane's trial counsel called no witnesses during the hearing to rebut Mr. Shing's hypnosis practice and procedures; nor did they cross-examine any of the identification witnesses during the trial. Thus, during the open-court proceedings, the identification witnesses' testimony was tenable rather than faulty and unreliable.

According to the sketch artist, Officer Ray Clark, regarding the hypnosis used, "Nelson [Villavicencio] just had such a brief look at this person, I was hopeful but actually kind of doubtful that it was going to work." Forensic Files, *House Hunting*, Season 13, Episode 2 (Broadcast Sept. 19, 2008). The only two eyewitnesses who provided identifications, in this case, were Ms. Sharpless and Mr. Villavicencio. The couple's help with the sketch composite is what ultimately allowed investigators to focus on Mr. Chanthakoummane after it aired on the local news. Forensic *Files,*

House Hunting. But these identifications were ultimately flawed. The couple not only went through flawed and highly suggestive hypnosis sessions to help the police with the composite sketch, but their in-court versus their out-of-court identifications of Mr. Chanthakoummane are also laden with omissions. Mr. Chanthakoummane wears prescription eyeglasses. In 2006, his left-eye vision was worse than 20/300, and his right-eye vision was 20/400, meaning he cannot walk or drive without his glasses. Ex. 1744-49. Furthermore, Mr. Chanthakoummane had a distinctive sleeve tattoo on his right arm that stretches from the top of his shoulder down to his wrist and is the complete width of his upper arm. Ex. 1751-52. His tattoo is a colorful depiction of a dragon, which would have been noticed when wearing a sleeveless or "muscle" shirt.

B. The suspect was originally identified as Chan Lee and when this person was found he was summarily dismissed as a suspect.

Allen P. Davidson, a sergeant with the Texas Rangers, testified that he contacted the University of North Carolina at Charlotte, who reported no records existed for a student named Chan Lee (21 RR 180). Mr. Davidson also located a record for a man with the name of Chan Lee (21 RR 174). He responded to the man's address and knocked on the front door. (21 RR 175). A young Asian male answered the door, and he asked him if he knew a man named Chan Lee. *Ibid.* The man answered that it was his brother. *Ibid*. The young man called his brother on the telephone, and Mr. Davidson spoke with him. *Ibid*. After the brief conversation, Mr.

Davidson ruled out Chan Lee because Mr. Lee's accent sounded like an Asian accent as opposed to an accent of a "black male" (21 RR 176).

C. Trial counsel disregarded Mr. Chanthakoummane's objectives of his defense, conceding his guilt after he directed counsel to contest his guilt during the culpability phase.

After Mr. Chanthakoummane was arrested, the trial court appointed two attorneys to represent him, Attorneys Miears and Gore. When Mr. Chanthakoummane met with his attorneys, he told them multiple times that he was innocent. He was adamant that his attorneys understand he was innocent.

After that meeting, Mr. Chanthakoummane continued to tell his attorneys that he was innocent. He told them at every meeting. Counsel told Mr. Chanthakoummane that they would contest his guilt.

Finally, counsel met with Mr. Chanthakoummane on the first day of his trial. In the meeting room, both attorneys told him that they could not contest both phases of the trial. They told Mr. Chanthakoummane that he would have to decide whether to challenge the culpability or sentencing phase of his trial. Mr. Chanthakoummane directly answered them: He told them that he was innocent and to challenge his guilt during the culpability phase.

Despite this clear directive on his objectives of the litigation, counsel disregarded Mr. Chanthakoummane. At the beginning of his opening statement, counsel told the jury that Mr. Chanthakoummane was guilty (21 RR 29). Counsel did not discuss this decision with him before conceding his guilt. Mr.

Chanthakoummane did not know that counsel would break his promise and disregard Mr. Chanthakoummane's directive to respect his objectives of the litigation until he heard counsel do so.

Additional facts are included below.

ILLEGAL CONFINEMENT AND RESTRAINT

Mr. Chanthakoummane is currently illegally confined and restrained of his liberty by the State of Texas on death row in the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division, in Livingston, Texas. *See* Article 11.14, TEX. CODE CRIM. PROC.

SUMMARY OF CLAIM PRESENTED

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. His trial counsel allowed Mr. Chanthaoummane to decide whether to challenge the State's case during the culpability or sentencing phase. Mr. Chanthakoummane unequivocally told counsel to challenge his guilt during the culpability phase. 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.

Mr. Chathakoummane is entitled to a new trial here. His trial counsel spoke with him immediately before the first day of his trial. 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 told counsel to fight the culpability phase. Counsel agreed. But then, without informing Mr. Chanthakoummane, counsel immediately conceded guilt in his opening statements. Counsel's actions clearly violate *McCoy*, so Mr. Chanthakoummane is entitled to a new trial.

REQUIREMENTS FOR A SUBSEQUENT APPLICATION UNDER TEX. CODE CRIM. PRO. ART. 11.071 Sec. 5

Mr. Chanthakoummane shows that he meets 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. Art. 11.071sec. 5(a)(1) reads as follows:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) 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 sec. 5(a).

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 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.

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. TEX. CODE CRIM. PROC.

art. 11.071, §5(d). 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).

Therefore, Mr. Chanthakoummane's claim is properly before the Court.

CLAIM FOR RELIEF

Mr. Chanthakoummane is entitled to a new trial because his trial counsel violated his Sixth Amendment right to autonomy when overriding his stated trial objective to maintain his innocence.

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 v. Louisiana*, 138 S. Ct. 1500, 1503, 1505, 1508 (2018). *See also Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018). These *McCoy* claims are structural error, relieving the defendant from proving prejudice. *Id.* at 1511. The 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. *Florida v. Nixon*, 543 U.S. 175, 178 (2004).

The Sixth Amendment requires the assistance of counsel, allowing trial counsel develop trial strategy but not the objectives of the litigation. In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Supreme 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. *Id.* at 1507-08. The Court then discussed some of those roles. Counsel has a limited role related to trial tactics:

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'

Id. at 1508. The other decisions are reserved for the defendant:

> Some decisions, however, are reserved for the client – notably, whether to plea guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs [to the defendant].

Ibid (internal citations omitted). This reasoning revolves around a defendant's constitutional right to autonomy:

> Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. 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*.

Ibid. Accordingly, when the defendant tells counsel that she or he is innocent, the Sixth Amendment requires counsel to argue innocence in the culpability phase.

And in *Florida v. Nixon*, 543 U.S. 175 (2004), the Court discussed counsel's obligation to discuss trial strategy with the defendant. *Id.* at 178. 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*.

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. There, the Court discussed a defendant's right to decide the objectives of her trial in terms of her liberty interests:

> With individual liberty – and, in capital cases, life – at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

McCoy, 138 S. Ct. at 1505. To protect this Sixth Amendment liberty interest, the Court reminded that counsel must form an informed opinion and discuss that opinion with the defendant. *Id.* 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. Even if this decision is foolish, the constitution protects it, and counsel must respect it. *See id.* at 1508. Indeed, the Court determined that:

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any

> hope, however small, of exoneration.; Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. Rev. 1147, 1178 (2010) (for some defendants, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence"); cf. *Jae Lee v. United States,* 582 U.S. ——, ——, 137 S. Ct. 1958, 1969, 198 L.Ed.2d 476 (2017) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certai[n]" conviction (emphasis deleted)). When a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U.S. Const. Amdt. 6 (emphasis added); *see* 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").

McCoy at 1508-09.

Further, 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 *McCoy* 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 v. California*, 422 U.S. 806, 834 (1975)). After explaining this reasoning, the Court held that a *McCoy* violation is structural error and required automatic reversal.

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.

Mr. Chanthakoummane maintained his innocence throughout his trial process. In his first meeting with his lead appointed trial counsel, Attorney Miears, Mr. Chanthakoummane proclaimed his innocence. He told Mr. Miears that he killed no one. Despite being distraught throughout the rest of the meeting, Mr. Chanthakoummane was adamant that he was innocent. 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. Because Mr. Chanthakoummane believed that trial counsel were not preparing adequately to

defend him, Mr. Chanthakoummane asked them to seek a plea bargain. When counsel told him that he would have to admit guilt to secure a plea offer, Mr. Chanthakoummane 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 met with both his appointed counsel on the first day of trial. Counsel informed him that he would have to choose between 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 told both his counsel to challenge the State's case in the culpability phase.

Like in *McCoy*, Mr. Chanthakoummane repeatedly, unequivocally told his trial counsel that he was innocent and wanted to challenge the State's culpability evidence. 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 never missed an opportunity to proclaim his innocence.

Mr. Chanthakoummane 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.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons discussed above, Mr. Chanthakoummane asks this Honorable Court to

1. Vacate his conviction and sentence of death, grant relief on his claim, and remand to the trial court for further proceedings;
2. Alternatively, remand to the trial court with authorization to consider the claims raised in this subsequent application, and instruct the trial court to conduct an evidentiary hearing to examine the merits of his claim;
3. Enter Findings of Fact and Conclusions of Law recommending that his conviction and sentence of death be vacated and that his case be remanded for a new trial; and
4. Grant other relief that law or justice may require.

Respectfully submitted,
KOSOUL CHANTHAKOUMMANE

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DATED: May 13, 2019

ART. 11.14(5) OATH

I, Carlo D'Angelo, affirm that I represent Applicant Kosoul Chanthakoummane. I further affirm that I have discussed this case with Mr. Chanthakoummane and investigated the facts contained in this Application. I prepared and reviewed this Application, and to my knowledge, all facts and allegations in this Application are true.

_____
Carlo D'Angelo

SUBSCRIBED AND SWORN TO BEFORE ME on this _____ day of _____ 2019.

_____
Notary Public

APPENDIX C
Opinion of the Fifth Circuit Court of Appeals denying
a certificate of appealability,
Case No 15-70007 (February 25, 2016).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70007

United States Court of Appeals
Fifth Circuit
FILED
February 25, 2016
Lyle W. Cayce
Clerk

KOSOUL CHANTHAKOUMMANE,

Petitioner–Appellant,

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Defendant–Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

Before PRADO, OWEN, and GRAVES, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

In 2007, a Texas jury convicted Petitioner–Appellant Kosoul Chanthakoummane of capital murder and sentenced him to death. After unsuccessfully seeking state habeas relief, Petitioner filed a federal habeas corpus petition asserting 16 constitutional errors. The district court denied his petition and declined to grant a certificate of appealability ("COA").

Petitioner now seeks a COA to appeal the district court's dismissal of his federal petition on two grounds: (1) his trial counsel was ineffective for failing to sufficiently investigate, develop, and present mitigating evidence and (2) his trial counsel was ineffective for failing to challenge whether the murder was

committed during the commission of a robbery. After careful consideration of his arguments and the record, we deny his application for a COA.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The guilt phase of Petitioner's trial

On July 8, 2006, real estate agent Mamie Sharpless received a call from a man identifying himself as "Chan Lee" who said he wanted to look at a townhome listed in the Craig Ranch neighborhood of McKinney, Texas. According to Sharpless, the man said he had just moved to the area from North Carolina. He also said he was calling from a pay phone at a 7-Eleven near the intersection of "Midway and Park" because he did not have a cell phone.

Sharpless arrived at the Craig Ranch neighborhood with her husband between 11:30 a.m. and noon. Sharpless stated that they waited in their car until a man in a white Ford Mustang drove by and parked in front of the D.R. Horton model home near the listed townhome. They approached the car and asked if he was "Chan Lee," to which he replied, "No." Sharpless described the person in the white Mustang as a muscular man of Asian descent, who was about 5'4" or 5'5" tall and had a buzz cut. During the trial, Sharpless identified Petitioner as the man she saw that day. Shapless's husband stated that while Sharpless showed the townhome to another potential buyer, he looked out the window and saw Sarah Walker, another real estate agent, arrive in the neighborhood and enter the D.R. Horton model home where she worked.

At roughly 1:10 p.m., a couple entered the D.R. Horton model home to find it "ransacked" and noticed a large pool of blood in the dining room. A trail of blood led to the kitchen where they found Walker's body lying face up, her upper body covered in blood. An autopsy found that while Walker exhibited some defensive injuries indicating a struggle, she had sustained several blunt force traumas to her head resulting in a broken nose and fractured teeth and

had been stabbed 33 time, 10 of which penetrated her vital organs. Walker also had a bite mark on her neck.

According to Walker's ex-husband, who saw her the morning of the day she was killed, she showed him a new Rolex watch she had recently purchased. Photos from a Bank of America branch that Walker visited at approximately 11:45 a.m. that morning showed Walker wearing a watch and a ring. When Walker's body was discovered, both were missing. When police later searched Walker's home, while they found a box to a Rolex watch and its receipt, the watch was never located.

At the crime scene, McKinney police found a bloody fingerprint on the dead bolt of the model home's front door. Analysis of the DNA found under Walker's fingernails, on the deadbolt, and from other parts of the model home linked Petitioner to the murder. After the police received the results of this DNA analysis, they arrested Petitioner on September 5, 2006.

Texas Ranger A.P. Davidson testified that Petitioner owned a white Ford Mustang and lived approximately three miles from the pay phone at the intersection of Midway and Park where "Chan Lee" had said he was calling Sharpless from. Officer Davidson also stated that he spoke to Petitioner's sister who said that Petitioner had attended school in North Carolina and had moved from Charlotte, North Carolina, to Dallas in February 2006.

Petitioner was questioned at the McKinney Police Department. At first, Petitioner denied having been in McKinney on the day of the murder. He then relented, stating that his car had broken down in front of "a model house." He said that he knocked on the model home's door and took "three or four steps" inside. Finding no one there, he went back outside where he spoke to a man and woman. Petitioner next stated that he went back into the model home to get a drink of water but couldn't figure out how to use the faucet, so he left. He also said that at this time he had "old cuts" on his hands "from work," and

opined that this might explain how his blood could have ended up in the model home.

At trial, the jury heard the testimony of Dr. Brent Hutson, a forensic dentist who examined Petitioner and concluded that "within reasonable dental certainty beyond a doubt" that Petitioner was responsible for the bite mark on Walker's neck. Petitioner's trial counsel called its own dental expert who criticized aspects of Dr. Hutson's analysis and opined that the bite mark found on Walker's neck was not distinctive enough to conclude that it came from Petitioner.

Several experts testified about the DNA analysis done on samples found in the model home and on Walker's body. The State's witness, Dr. Stacy McDonald, testified about the process used to analyze the genetic material found in the model home and under Walker's fingernails and stated that it matched Petitioner's DNA profile. Petitioner's trial counsel cross-examined Dr. McDonald and called its own expert in an attempt to undermine Dr. McDonald's testimony.

After hearing this evidence, the jury found Petitioner guilty of intentionally killing Walker with a deadly weapon while in the course of committing a robbery.

B. The punishment phase of Petitioner's trial

At the punishment phase, the jurors learned about Petitioner's early life, including his interactions with law enforcement and the criminal justice system. This included a conviction for attacking a friend causing six fractured ribs, a concussion, and other injuries. The jury also learned that shortly after this incident, Petitioner attacked another person leaving the victim with a fractured arm.

The jury learned that in 1997, while on furlough from a juvenile facility, Petitioner, along with two friends, broke into a home, robbed the residents at

gunpoint, restrained them using an electrical cord, and then stole a car belonging to one of the victims. He pleaded guilty to kidnapping and robbery and was sentenced to 51 to 71 months imprisonment. The jurors also learned that Petitioner was a member of a gang associated with the Crips, and that while in prison he was punished for possessing a "shank or some type of weapon."

The defense's case on mitigation focused mainly on trying to show that Petitioner did not pose a future risk. The director of one of the facilities that Petitioner had been placed in as a juvenile testified that he had not known Petitioner as someone that "created problems." He also remembered Petitioner as a talented artist who was humble and quiet.

Several corrections officers from North Carolina testified that Petitioner did not have any disciplinary issues, had not caused problems while incarcerated, and that they did not consider Petitioner to be dangerous during the time they knew him. A fellow inmate testified that Petitioner had not caused trouble during the time they were incarcerated together.

A forensic clinical psychologist testified that based on a review of Petitioner's prison disciplinary record, there was not a high probability that he would commit criminal acts of violence while incarcerated or constitute a continuing danger to society. The defense also called Petitioner's case manager from North Carolina, who stated that she remembered him as being "very quiet [and] polite."

After considering this information, the jury sentenced Petitioner to death.

C. Procedural background

Following his conviction and sentence, Petitioner filed a direct appeal to the Texas Court of Criminal Appeals ("TCCA"). The TCCA denied his appeal and affirmed his conviction and sentence. *Chanthakoummane v. State*, No. AP-

75,794, 2010 WL1696789 (Tex. Crim. App. April 28, 2010) (unpublished). Petitioner sought review by the Supreme Court of the United States, which denied his petition for a writ of certiorari. *Chanthakoummane v. Texas*, 131 S. Ct. 506 (2010).

Petitioner filed his state petition for a writ of habeas corpus in April 2010. The state trial court conducted an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that the petition be denied. *Ex Parte Chanthakoummane*, No. WR-78,107-01, 2013 WL 363124, at *1 (Tex. Crim. App. Jan. 30, 2013) (unpublished). On appeal, the TCCA affirmed. *Id.* Petitioner filed his federal petition for a writ of habeas corpus in January 2014, raising 16 grounds for relief. In March 2015, the district court denied the petition and declined to grant a COA.

II. JURISDICTION AND STANDARD OF REVIEW

A prisoner may not appeal the district court's denial of a petition for a writ of habeas corpus without first obtaining a COA. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where, as here, the district court did not grant a COA on any of Petitioner's claims, we have jurisdiction only to determine whether a COA should be granted. 28 U.S.C. § 2253(c)(1); *Miller-El*, 537 U.S. at 335–36.

No COA can issue unless the petitioner has "made a substantial showing of the denial of a constitutional right." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting 28 U.S.C. § 2253(c)(2)). To make such a showing, "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 472, 484 (2000)). In making this determination, we consider only "the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El,* 537 U.S. at 342.

"[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson,* 221 F.3d 741, 772 (5th Cir. 2000). Pursuant to § 2254(d), a prisoner in state custody is not entitled to federal habeas corpus relief unless the state court proceedings either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law . . . or; (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d).

III. DISCUSSION

Both of Petitioner's claims on appeal allege that his state trial counsel was ineffective, thus violating his rights under the Sixth and Fourteenth Amendments to the United States Constitution. These claims are governed by the two-prong test provided in *Strickland v. Washington,* 466 U.S. 668 (1984). *Blanton v. Quarterman*, 543 F.3d 230, 235 (5th Cir. 2008). Under the first prong, Petitioner bears the burden of showing that his "counsel's performance was deficient." *Id.* "[E]stablish[ing] deficient performance . . . [requires a] show[ing] that counsel's representation 'fell below an objective standard of reasonableness.'" *Id*. (quoting *Strickland*, 466 U.S. at 688). In evaluating this question, "we make every effort to eliminate the distorting effects of hindsight, and attempt to adopt the perspective of counsel at the time of the representation." *Id.* Further, we apply "a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* Under the second *Strickland* prong, Petitioner bears the burden of showing that "his counsel's deficient performance resulted in prejudice." *Id.* This requires demonstrating that but for counsel's deficient performance, "there is a reasonable probability that the outcome of the proceeding would have been different." *Id*.

A. Whether Petitioner's trial counsel was ineffective for failing to adequately investigate, develop, and present mitigating evidence

Petitioner contends that his trial counsel was ineffective for failing to develop and present the following mitigating evidence: (1) records from the North Carolina Department of Social Services ("NCDSS") showing Petitioner's dysfunctional family life; (2) school records showing that Petitioner suffered from a hearing impairment as a child; (3) the impact of the Laotian immigrant experience on Petitioner's upbringing; and (4) the failure of trial counsel to call Petitioner's family members to testify at the punishment stage of his trial.

On each of the grounds raised by Petitioner, the record does not reflect that his trial counsel's representation fell below the standard of diligence required. For instance, trial counsel requested NCDSS records in Petitioner's name and conducted an investigation into Petitioner's background and upbringing. This included conducting interviews with Petitioner's family members that uncovered the same information about his parents' harsh approach to child rearing that Petitioner claims were contained in the NCDSS records.

Petitioner's trial counsel also requested records from his school and collected information from Petitioner's family regarding Petitioner's hearing problems and the treatment he received. Further, the State provided Petitioner with grand jury testimony given by his sister that mentioned Petitioner's hearing issues. Given the fact that trial counsel had collected evidence of Petitioner's childhood hearing issues, counsel was not unreasonable for failing to locate the particular record Petitioner focuses on here. *See Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999) ("Counsel is 'not required to pursue every path until it bears fruit or until all hope withers.'" (quoting *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980))).

Trial counsel was also aware of Petitioner's immigrant story. Petitioner's father, mother, and sister discussed their immigrant background at length in their interviews with Petitioner's trial counsel. Trial counsel reasonably chose not to present this information to the jury. As trial counsel stated, it was "clear that, as applied to [Petitioner's] life, it was not mitigating." Rather, trial counsel concluded that this information "could easily be seen as an aggravating factor," because it would highlight the fact that his siblings, who grew up in the same environment, "had avoided a life of violent gang involvement and violent crimes." This is precisely the type of strategic decision we have repeatedly said does not form the basis for a claim of ineffective assistance of counsel. *See Hopkins v. Cockrell*, 325 F.3d 579, 586 (5th Cir. 2003) ("[T]his Court has repeatedly denied claims of ineffective assistance of counsel for failure to present 'double edged' evidence where counsel has made an informed decision not to present it." (quoting *Boyle v. Johnson*, 93 F.3d 180, 188 (5th Cir. 1996))).

The same is true of trial counsel's decision not to call Petitioner's family members to testify. Having made the strategic choice to focus their argument on convincing the jury that Petitioner should not be given the death penalty because he did not pose a future threat, trial counsel reasonably concluded that calling Petitioner's family members to the stand would have been detrimental to his case. Specifically, it was feared that permitting Petitioner's family members to testify would have invited the State to introduce evidence of his gang affiliations and his long history of violence. Additionally, at least one of Petitioner's family members—his mother—had expressed the opinion that Petitioner deserved to be put to death. As the state habeas court observed, in light of this risk, trial counsel reasonably concluded that calling his family members to testify would not have been in his best interest.

Petitioner has also failed to raise a debatable question that trial counsel's conduct caused him prejudice. As the state court noted, the evidence contained in the NCDSS records "was weak." Specifically, the records stated that Petitioner's sister had run away from home and made an allegation of abuse but that her allegation was determined to be "unsubstantiated." Further, Petitioner's trial counsel were aware of the allegations of abuse and nevertheless decided that it would not have offered convincing mitigation evidence.

The mitigation value of Petitioner's school hearing test records is weaker yet. While they showed that Petitioner suffered from some minor hearing problems as a child, these issues were resolved by the fifth grade when he was fitted for hearing aids. While Petitioner asserts that the outcome of his trial would have been different had the jury known about his hearing problems and the impact they had on his development as a child, he fails to explain how this would have been the case.

Petitioner has also failed to show that he was prejudiced from his trial counsel's decision not to introduce additional evidence about his family's immigrant story. First, in light of the fact that trial counsel did introduce this aspect of Petitioner's life story through his juvenile counselor, Petitioner has not shown what additional evidence should have been introduced or how it might have changed the outcome. Accordingly, Petitioner has not demonstrated that further evidence of this sort would not have been cumulative. *See Lincecum v. Collins*, 958 F.2d 1271, 1280 (5th Cir. 1992) (holding that no prejudice occurred where the unpresented evidence would have been cumulative of evidence already presented).

Second, on habeas review "the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). That is, "it is necessary to consider *all* the

relevant evidence that the jury would have had before it if [counsel] had pursued the different path—not just the mitigation evidence [counsel] could have presented, but also the [negative] evidence that almost certainly would have come in with it." *Id.* at 20. As trial counsel observed, had they attempted to introduce further evidence of Petitioner's immigrant story, they ran the risk that this evidence would be aggravating rather than mitigating. As his trial counsel stated:

> As the investigation progressed, however, it became clear that, as applied to [Petitioner's] life, it was not mitigating. . . . The horrible immigration experience of [Petitioner's] father and mother was just that–an experience of his father and mother. [Petitioner] was born in the United States, and to my knowledge has never travelled outside the United States. [Petitioner] did not have those experiences himself. If his mother or father had been charged with a crime, it certainly would have been a factor of their background. Indeed the argument existed that he had been rescued by his parents from that experience, but in return he had not taken advantage of this opportunity by his decision to join gangs. This was in juxtaposition from the relatively productive lives his siblings had developed from the same parentage.

Finally, Petitioner has not shown that he was prejudiced by his trial counsel's decision not to call his family members to testify. Much like counsel's decision not to further advance Petitioner's family's immigrant story, counsel recognized the significant risk of allowing his family to testify. As one of his attorneys explained:

> [C]alling family members to testify would have allowed the State to introduce evidence concerning [Petitioner's] Asian gang history and gang affiliation. . . . Gang affiliation is a strong predictor of future violence. . . . It was decided that having family members corroborate this history would be extremely counterproductive to the assertion that [Petitioner] would not be a threat to anyone in prison.

Further, counsel worried that if called to the stand, Petitioner's own mother would opine that Petitioner deserved the death penalty rather than a life sentence: "On the whole it was believed that putting his mother on the stand, when she would say that in her opinion he deserved the death penalty, would not be in [Petitioner's] best interest."

This is precisely the type of "double edged" evidence we have previously said cannot form the basis for a claim of ineffective assistance of counsel. *See Boyle*, 93 F.3d at 188. In light of both "the good and the bad" calling his family members may have done, Petitioner has not shown that his counsel's decision caused him prejudice. *See Wong*, 558 U.S. at 20, 26.

For these reasons, Petitioner has not raised a debatable question as to whether the state court's decision denying his request for habeas relief was contrary to clearly established federal law or made an unreasonable determination of the facts. Accordingly, Petitioner's request for a COA as to this claim is denied.

B. Whether Petitioner's trial counsel was ineffective for failing to challenge that Walker's murder was committed in the course of a robbery

Petitioner argues that the district court erred by failing to find that his trial counsel was ineffective for not challenging the allegation that he murdered Walker while committing a robbery. At trial, Petitioner's counsel made the decision to concede the robbery, stating: Petitioner "wanted to rob [Walker], and it didn't go the right way, and he killed her."

While Petitioner raised this issue as a sufficiency-of-the-evidence challenge on direct appeal before the state court, he failed to raise this issue on state habeas review. Accordingly, Petitioner has failed to exhaust this claim before the state courts. Under The Anti-Terrorism and Effective Death Penalty Act, but for two narrow exceptions that do not apply here, state prisoners

seeking a writ of habeas corpus are required to exhaust available state remedies. 28 U.S.C. § 2254(b)(1).

While Petitioner's failure to exhaust this claim generally would result in the dismissal of his petition, *see Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978), recently, the Supreme Court opened the possibility that an unexhausted claim of ineffective assistance of counsel could be considered for the first time on federal habeas review, *see Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). As we explained in *Preyor v. Stephens*, 537 F. App'x 412 (5th Cir. 2013) *cert. denied,* 134 S. Ct. 2821 (2014):

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [Petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim[s] ha[ve] some merit," and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application.

Id. at 412 (second and third alterations in original) (citations omitted) (quoting *Martinez*, 132 S. Ct. at 1318). "[T]he petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013) (unpublished), *cert. denied,* 134 S. Ct. 1786 (2014).

Petitioner has neither argued nor shown that his state habeas counsel was ineffective. Accordingly, Petitioner has not overcome his burden of showing cause and prejudice for his failure to exhaust this claim before the state court and is barred from raising it here.

Even if Petitioner had established the ineffectiveness of his state habeas counsel, his effort would still fall short. While Petitioner argues he has shown that his ineffective-assistance-of-counsel claim based on the conduct of his trial

counsel has merit, his brief does little but disagree with trial counsel's strategy in light of the fact that it did not work. As the state court observed on direct appeal, there was more than enough evidence for the jury to find that Petitioner had committed the murder in the course of a robbery. *See Chanthakoummane*, 2010 WL 1696789, at *4. Specifically, the court noted that Walker had recently purchased a Rolex, bank surveillance video showed her wearing a watch and ring the morning of the murder, and when her body was discovered both the watch and ring were missing. *Id.* The court also noted that Petitioner had a motive to rob Walker as his bank account was overdrawn, his cell phone had recently been deactivated due to overdue bills, and that Petitioner had recently pawned certain goods. *See id*. Petitioner has not offered any convincing suggestion of how his trial counsel might have raised doubt on this issue.

Petitioner attempts to overcome these deficiencies by arguing that he should be excused from having to show the *Strickland* elements of deficient performance and prejudice because his case falls within the narrow exception recognized in *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, the Supreme Court stated that in circumstances that "are so likely to prejudice the accused," *id.* at 558, "a presumption of prejudice is appropriate without inquiry into the actual conduct at trial," *id*. at 660. *Cronic*, however, limited this exception to the most serious of circumstances such as when there has been a "complete denial of counsel" or where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. This is a far cry from Petitioner's trial. Petitioner was represented by two attorneys who conducted a thorough investigation, made informed strategic decisions about his defense, and called numerous witnesses on his behalf. While this strategy was ultimately unsuccessful, Petitioner's disagreement with it now does not

render it deficient, let alone so deficient as to bring it under the exception in *Cronic*.

Because Petitioner has failed to raise a debatable question as to the effectiveness of either his trial counsel or state habeas counsel, he has neither shown that we should consider his unexhausted claim nor that reasonable jurists could debate the merits of his underlying argument.

IV. CONCLUSION

For the foregoing reasons, Petitioner's application for a certificate of appealability is denied.

Certified as a true copy and issued as the mandate on Feb 25, 2016

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX D

Ex. 1, Affidavit of Petitioner in Support of Petitioner's Writ. No. WR-78,107-03, May 13, 2019).

IN THE 380TH JUDICIAL DISTRICT COURT
OF COLLIN COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
OF AUSTIN, TEXAS

CAPITAL CASE

EX PARTE	**§ Trial Cause No. 380-8197-207**
KOSOUL CHANTHAKOUMMANE,	**§ Court of Criminal Appeals § No.**
Applicant.	**§**

APPLICANT'S EXHIBIT 1 TO
SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
UNDER TEX. CODE CRIM. PRO. ART. 11.071 §5

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Federally Appointed Counsel
Under 18 U.S.C. § 3599
Appearing Pro Hac Vice

Affidavit of Kosoul Chanthakoummane

1.) My name is Kosoul Chanthakoummane. I am over eighteen years of age and sound of mind. I am writing this affidavit without any coercion or threat of harm.

2.) I am presently confined within the Texas Department of Criminal Justice - Institutional Division, at the Allan B. Polunsky unit, in Livingston, Texas.

3.) On September 6TH, I was arrested for Capital Murder by the Mckinney Police Department.

4.) I was appointed two attorneys to represent me during my capital trial. The lead counsel was Steven R. Miears and second counsel was Keith Gore.

5.) Upon my first meeting with counsel Steven Miears at the Collin County Detention Facility, I informed him that I was innocent, that I did not kill anyone. For the remainder of the initial meeting, I was too distraught to continue answering his questions but was adamant that he understood me about being innocent.

6.) The attorneys explained that there were multiple forensic evidence that would be used against me. In light of that, as my criminal background became apparent my attorneys began to commit less time and effort with regards to my innocence claims.

7.) When it became apparent that the state was seeking the Death Penalty, I asked Steven Miears if he had sought on his own initiative to arrange a plea agreement. He asked me if I wanted him to and I said "yes", to inquire if the state would present an offer. I asked this of Steven Miears because of the state's intent to seek the Death Penalty, if I was found guilty, and with the hope of obtaining a plea agreement that would spare my life.

8.) Steven Miears stated that were the state to offer a plea arrangement, would I admit guilt to a charge for which I am not responsible for? Counsel had his voice recorder "on" when he recorded my response. After he briefly recorded my response, he turned it off.

9.) I only did so with the understanding that a plea arrangement in which the Death Penalty would not be sought and to obtain a plea agreement. When he informed me of the state's refusal to offer a plea agreement, I repeatedly told my counsels Steven Miears and Keith Gore that I wanted them to challenge the guilt/innocence phase and that I maintain my innocence throughout.

10.) I was asked by my counsels to give what relevant information I could to support my innocence claims. It became clear to me that my counsels were unprepared for my defense due to their lack of interest in pursuing my claims.

Affidavit of Kosoul Chanthakoummane

11.) I was assured by my trial counsels that they would make every effort to put forth a defense during the guilt/innocence phase to prove my innocence, that if I were guilty the State would have to prove me "guilty".

12.) However, I was not aware of Steven Miears intention to concede guilt during his opening statement on the first day of trial. Nor was I aware of any other such concessions during the remaining course of trial. I have told the McKinney Police Department that I did not kill Sarah Walker. I have told the trial court in my pleadings that I am "not guilty". Because my attorneys went against my wishes of maintaining my innocence, it has caused me irrepairable harm.

13.) Prior to entering the courtroom on the first day of trial, I visited with my counsels in the adjoining attorney visitation room. Steven Miears, in the presence of Keith Gore, asked me directly what I wanted them to focus on. It was either a choice between the guilt/innocence phase or the punishment phase. That they could not commit their resources to both phases and I had to make a choice. I chose the guilt/innocence phase because I AM INNOCENT. It was agreed upon that they would adhere to our agreement and they would defend me during the guilt/innocence phase. During the opening statement for defense, they said that I was "guilty". I had no idea that Steven Miears would say that or Keith Gore during the trial. My trial counsels went so far as to not rebut many of the state's witnesses, and as a result, prejudiced me as the jury had little to nothing in weighing my claims of innocence.

14) In each and every state/federal courts during post-conviction proceedings I have been denied relief as a result of my trial counsels neglect of my wish to defend my innocence.

15.) I am innocent. I did not kill Sarah Walker. I've always said that to my trial counsels Steven Miears and Keith Gore. I wanted the State to prove otherwise.

Jurat

Signature Kosoul Chanthakoummane Date 6.6.19

Printed Name KOSOUL CHANTHAKOUMMANE TDCJ-ID #999529

KERRY COOPER
Notary Public, State of Texas
Notary ID # 131188524
Comm. Exp. 06-22-2021
NOTARY WITHOUT BOND

State of Texas
County of Polk
Sworn and subscribed before me on 06 Day of June, 2019 by:

Signature [signature] Printed Name KERRY Cooper