IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
AND
IN THE 1ST JUDICIAL DISTRICT COURT
OF JASPER COUNTY, TEXAS

EX PARTE	§	**Texas Court of Criminal Appeals**
JOHN WILLIAM KING,	§	**Cause No. WR-49,391-03.**
	§	
Applicant.	§	**First Judicial District Court of**
	§	**Jasper County**
	§	**(Trial Court Cause No. 8869)**
	§	**(Execution Scheduled April 24, 2019)**

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
(Article 11.071 sec. 5(a) of the Texas Code of Criminal Procedure)

THIS IS A DEATH PENALTY CASE

EXECUTION SCHEDULED FOR APRIL 24, 2019

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Applicant John William King is currently confined on death row in the Polunsky Unit of the Texas Department of Criminal Justice, Livingston, Texas, in the custody of that entity. Mr. King is confined in violation of the Constitution and laws of the State of Texas and the United States, and files this subsequent application for a petition for writ of habeas corpus, pursuant to TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a), in order to secure the reversal of his capital murder conviction and sentence of death, and for his release from confinement. His execution is currently scheduled for April 24, 2019.

In support thereof, Mr. King would show the following:

I.

PROCEDURAL HISTORY

A. Introduction.

Petitioner John William King, along with two co-defendants, was indicted for capital murder in conjunction with the kidnaping and death of James Byrd, Jr. In Jasper County, Texas. From the time of indictment through his trial, Mr. King maintained his absolute innocence, claiming that he had left his co-defendants and Mr. Byrd sometime prior to his death and was not present at the scene of his murder. Mr. King repeatedly expressed to defense counsel that he wanted to present his innocence claim at trial. When it appeared that his attorneys intended to concede Mr. King's guilt anyways, Mr. King attempted to replace them.[1] He also wrote multiple letters to the court complaining that his attorneys refused to present an innocence defense. When the court did not intervene, he wrote a letter to a Dallas newspaper outlining his claim of innocence. Yet despite Mr. King's explicit and repeated requests, his counsel conceded his guilt to murder at trial.

Almost twenty years later, the Supreme Court held in *McCoy v. Louisiana*, 138

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[1] As used herein and in the relevant case law, the words "concede" or "confess" refer to the actions of the trial attorneys in telling the jury that the defendant was guilty; they do not refer to or imply any concession or admission of guilt by the defendant himself, either at trial or thereafter.

S. Ct. 1500 (2018) that a defendant has a Sixth Amendment right to insist that his counsel maintain his innocence at trial, and that counsel's concession of guilt over the defendant's objections amounts to a constitutional violation. *See id.* at 1505. This is precisely the violation that occurred in Mr. King's case—his Sixth Amendment rights were infringed when his attorneys conceded his guilt over his express wishes. Because a *McCoy* violation amounts to structural error, a new trial is required in Mr. King's case.

B. Procedural History.

Mr. King was charged with capital murder and convicted for "intentionally while acting together with Lawrence Russell Brewer and Shaun Allen Berry and while in the course of committing or attempting to commit kidnapping of James Byrd, Jr., did cause the death of James Byrd, Jr. by dragging him on a road with a motor vehicle" near Jasper, Texas, on June 7, 1988.[2]

At his trial, defense counsel made no efforts to present King's claim of innocence and, despite his plea of "not guilty," at the guilt phase argument his

[2] *See* Appendix 1 at ROA.684. Page references are either to the federal record pagination on appeal in the Fifth Circuit Court of Appeals, the number at the lower right side of the page after "16-70018," referred to herein as "ROA.[page];" and/or to the state court Reporter's Record ("RR"), Clerk's Record ("CR") or State Habeas Court Record ("SHCR") followed by the page number. Copies of Mr. King's Indictment, Verdict, Judgment, and Sentence are included herein in Appendix 1.

attorneys told the jury he was guilty against his express wishes in violation of *McCoy* and this Court's recent holding in *Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018).

Mr. King was sentenced to death on February 25, 1999, in the First Judicial District Court of Jasper County, Cause No. 8869, Judge Joe Bob Golden presiding. [Appendix 1, ROA.687-691]. On direct appeal, this Court affirmed the conviction and sentence on October 18, 2000. *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000).

Nor did Mr. King have any opportunity to present his claim of innocence in state post-conviction proceedings. Attorney John Heath was appointed to represent King in state habeas. Mr. Heath filed a 21-page writ [SHCR 2-23; ROA.753-774], devoid of any extra-record claims or any evidence of investigation of King's claim of innocence. In a letter sent to Mr. King one month before the due date for filing the application Mr. Heath told Mr. King that "*both the direct appeal and the Writ are based solely on the record of the case. No new evidence can be brought up at this stage*...The purpose of the writ is not to put forth any new defense."[3] [Appendix 4, ROA.3410] (emphasis added). Thus, King's claim of innocence was never presented

[3] Letter of John Heath to John W. King, dated June 19, 2000. [Appendix 4]. The federal district court, in finding that Mr. Heath was not ineffective [ROA.5838], completely ignored this evidence of his incompetence.

in state court, either at trial or in state post-conviction proceedings.

Mr. King refused to sign this incompetent writ [SHCR 23; ROA.774] and filed with the trial court numerous letters, motions and requests advising of the inadequacy of his representation for failure to investigate or present his innocence, asking to proceed *pro se,* alleging a conflict of interest, and asking for alternative counsel who would investigate his claims. [SHCR 37-77; ROA.802-842].[4] However, the trial court did nothing and simply adopted the State's proposed findings and conclusions, without altering a comma, two weeks after they were submitted. [SHCR 177-200; ROA.776-799].[5] This Court adopted the trial court's findings and conclusions and denied the application on June 20, 2001. *Ex Parte John William King,* No. 49,391-01 (unpublished opinion). No evidentiary hearing was held in the state post-conviction proceedings.

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[4] These letters and motions to the trial court clearly expressed King's dissatisfaction both with trial counsel's refusal to investigate his innocence claims and his desire to replace state habeas counsel Mr. Heath for the same reasons. King's filings were actually lengthier than those of Mr. Heath.

[5] Compounding the complete failure of King's attorneys in state court, Mr. Heath failed to file any proposed findings and conclusions. On January 8, 2001, the trial court issued an order determining that there were no controverted factual issues, and ordered both parties to file their proposed findings of fact and conclusions of law within 30 days of the order. [SHCR at 86]. The State filed their proposed findings and conclusions on February 7, 2001. [SHCR at 177-201; ROA.776-799]. Mr. Heath simply disregarded this order.

Mr. King filed a petition for writ of habeas corpus in the Federal District Court, Eastern District of Texas, on September 6, 2002. [ROA.241-675]. On March 29, 2006, the district court granted in part the State's motion for summary judgment as to certain claims [ROA.4098-4116] and also granted Mr. King's motion to stay and hold the case in abeyance while he returned to state court to exhaust his remaining claims. [ROA.4117-4118].

Mr. King timely filed his first subsequent state habeas application in the trial court and in this Court on June 22, 2006. *Ex parte John William King*, No. WR-49,391-02. [ROA.11260-11622]. Without explanation, the trial court denied two motions for King to proceed *in forma pauperis* and for appointment of counsel. [ROA.11687-11700, 11704-11717, 11729]. No hearing was held and King was without appointed counsel during the pendency of his application. After an unexplained delay of over six years, the trial court forwarded the petition to this Court on June 25, 2012 and on September 12, 2012, it was dismissed "without considering the merits of the claims." *Ex Parte John William King,* No. WR-49,391-02 (Tex. Crim. App. Sept. 12, 2012) (not designated for publication). [ROA.11679-11680].

An amended federal petition was filed on January 6, 2013, when Mr. King's case returned to the Federal District Court for the Eastern District of Texas. [ROA.4161-4754]. Motions for discovery [ROA.5584-5654] and an evidentiary

hearing [ROA.5662-5716] were denied [ROA.5802] and the amended petition was denied on June 23, 2016, only a few weeks after the case had been re-assigned to a new judge. The federal district court denied relief on all of the claims raised in the federal petition, finding that they were procedurally barred as a result of the failure to raise them in the initial state court proceedings, and that Mr. King had failed to meet the legal standard for overcoming the procedural bars. That opinion, *King v. Director, TDCJ*, 2016 WL 3467097 (E.D. Tex., June 23, 2016), also denied a certificate of appealability ("COA") on all claims. [ROA.5819-5913].

King timely filed a Notice of Appeal on July 21, 2016. [ROA.5914-5916]; 28 U.S.C. § 2107(a); FED. R. APP. P. 4(a)(1)(A). After briefing, the Fifth Circuit Court of Appeals granted a COA on the claim that trial counsel were ineffective in presenting Mr. King's case for actual innocence, but denied a COA on three additional issues. *King v. Davis*, 703 F. App'x 320 (5th Cir. 2017) (*per curiam*). After further briefing and oral argument in January of 2018, on February 22, 2018, the Fifth Circuit issued an opinion denying relief on King's claim of ineffective assistance of trial counsel for failure to investigate and present his innocence claim. *King v. Davis*, 883 F.3d 577 (5th Cir. 2018). A petition for rehearing was denied on March 23, 2018.

Mr. King filed a petition for *certiorari* in the United States Supreme Court on

June 20, 2018. The petition was denied on October 29, 2018. *King v. Davis*, No. 17-9535.

On December 21, 2018, without notice to Mr. King or his counsel, the District Attorney of Jasper County filed a motion requesting that Mr. King be given an execution date. The same day, within minutes of its filing, and again without prior notice to Mr. King or his counsel, or an opportunity to respond to or oppose the motion, the presiding judge of the First District Court of Jasper County, Texas, the Hon. Craig M. Mixson, granted the State's motion and signed an Execution Order setting April 24, 2019 as Mr. King's execution date. (Appendix 2 herein).

II.

ILLEGAL CONFINEMENT AND RESTRAINT

Mr. King is currently being 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. As stated *supra*, copies of the judgment and sentence in this case are attached as Appendix 1.

III.

SUMMARY OF CLAIM PRESENTED

MR. KING'S DEFENSE COUNSEL IMPROPERLY OVERRODE HIS SIXTH AMENDMENT RIGHT TO PRESENT AN INNOCENCE DEFENSE, RESULTING IN STRUCTURAL ERROR THAT REQUIRES A NEW TRIAL.

From the earliest stages of his case, Mr. King told his attorneys and the court that he was innocent, was not present at the crime scene when the victim was killed, and wanted his counsel to investigate and present his innocence to the jury. However, King's trial counsel utterly failed to present his claim of innocence at the guilt phase of his trial. At the guilt phase final arguments, they told the jury that the only issue was whether or not the victim had been kidnaped and that King was guilty of non-capital murder, but not capital murder. The State's evidence against him for the most part went unchallenged. Even the most damaging piece of evidence presented at the trial went virtually un-controverted, sandals with a drop of the victim's blood on them could have been shown to belong not to King but his roommate.[6]

Mr. King's objective, consistent with his plea of "not guilty," was to present an innocence defense in the guilt phase, not to have his attorney concede guilt for the crimes. Defense counsel overrode that objective—and their client's will—by instead

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[6] However, trial counsel did find time to coerce King into signing a literary and media rights agreement on the day he was sentenced to death, contrary to accepted canons of ethics and professional rules of conduct. [*See* Appendix 3].

presenting no defense or evidence of his innocence at all, conceding his guilt, and telling the jury that he was present at the scene of Mr. Byrd's murder.

While defense counsel has the role and duty of making "strategic choices about how to best *achieve* a client's objectives," the client has the autonomy to decide what those objectives are. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (emphasis in original). In *McCoy*, the United States Supreme Court held that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id.* at 1505. This new declaration about the scope and nature of the defendant's Sixth Amendment rights provides the basis for this subsequent application. The Constitution protects Mr. King's right to insist on a defense and object to the lawyers' "proposal to concede [defendant] committed these murders." *Id.* at 1509. "[I]t was not open to [defense counsel] to override [his] objection." *Id.* at 1509. For that reason, Mr. King is entitled to a new trial.

IV.

APPLICANT'S CLAIM MEETS THE REQUIREMENTS FOR A SUBSEQUENT APPLICATION UNDER TEX. CODE CRIM. PRO. ART. 11.071 Sec. 5

Mr. King shows herein 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. 11.071 sec. 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. King 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 King's initial application in 2000 and his first subsequent application in 2006.

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"). The Supreme Court decided *McCoy* on May 14, 2018, eighteen years after Mr. King filed the state habeas application in which he challenged the jury's guilt-phase verdict and twelve years after his subsequent application in 2006. Plainly, the case was not available when Mr. King filed these earlier applications. The Supreme Court acknowledged in *McCoy* that it is a new Sixth Amendment holding, initially setting out that it derives from circumstances that put it "in contrast to [*Florida v.*] *Nixon* [543 U.S. 175 (2004)]," the 2004 ruling from which it departs. 138 S. Ct. at 1505.

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 upon 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 put the emphasis on 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. King'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).

V.

APPLICANT'S CLAIM

DEFENSE COUNSEL IMPROPERLY OVERRODE MR. KING'S SIXTH AMENDMENT RIGHT TO PRESENT AN INNOCENCE DEFENSE, RESULTING IN STRUCTURAL ERROR THAT REQUIRES A NEW TRIAL.

Mr. King's attorneys violated his Sixth Amendment right to decide upon the objective of the defense when they conceded his guilt at trial, in direct contravention of his repeated and unambiguous expressions of his desire to maintain his actual innocence. Although Mr. King told the trial court in letters and in open court that his attorneys were not investigating or presenting his case for innocence, the trial court did nothing and refused to replace them. The trial attorneys' concession of Mr. King's guilt at the guilt phase arguments violated his constitutionally-protected right to dictate the objective of his defense as articulated by the United States Supreme Court in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

A. Statement of Relevant Facts.

i. The record shows that Mr. King, in a timely fashion, made express statements of his will to maintain his innocence, and timely objected to his counsel's intent to act contrary to that objective.[7]

Mr. King voiced his desired objective—to maintain his innocence—both to defense counsel and to the trial court. He did so unambiguously, repeatedly, and through multiple channels, including through letters to the court and at a pretrial proceeding that took place on January 11, 1999.

Prior to that proceeding, trial counsel Haden "Sonny" Cribbs, Jr., and Brack Jones, Jr. filed a "Motion to Withdraw as Attorney of Record" for Mr. King [CR 143-144; Appendix 5] on January 6, 1999, 19 days prior to jury selection. In a hearing held that day, Mr. King did not appear because he was dissatisfied with his representation. [4 RR 6-7].

In the motion to withdraw, defense counsel cited an "irreconcilable conflict of interest" with Mr. King that require[d] their withdrawal from the case. [CR 143; Appendix 5]. Notably, the Supreme Court in *McCoy* found that the defendant's attempt to replace counsel—and counsel's request to be relieved—shortly before trial

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[7] This was the question posed by this Court in *Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018), at *21 ("The question we confront here, then, is: Does the record show that Appellant, in a timely fashion, made express statements of his will to maintain his innocence?") *Turner*'s implications for this matter are discussed *infra*.

was evidence of a developing rift between the defendant and his attorney. *McCoy*, 138 S. Ct. at 1506; *see also id.* at 1513 (Alito, J. dissenting). In *McCoy*, as here, this request to replace counsel demonstrated the defendant's attempt to take control of his defense, and to remove the lawyers who were unwilling to investigate or assert his innocence claim.

At the hearing on defense counsel's motion to withdraw, held on January 11, 1999, the trial court asked defense counsel Sonny Cribbs if he wanted the court to hear from Mr. King. [5 RR 5; Appendix 6]. Cribbs allowed that King could speak "if he desires to testify." [*Id.*] Mr. King then explained that he had already submitted three separate letters to the court [5 RR 5-6, Appendix 6], each stating the same thing: that he had a conflict with his court-appointed attorneys due to his "dissatisf[action]" with their unwillingness to present a claim of actual innocence; that Mr. Cribbs is in disagreement of my innocence;" and that "on several occasions [Cribbs] has stated that he intends to do no more for my defense than try and ensure that I do no[t] receive the death sentence." [CR 160-161; the letters are at Appendix 7]. In these letters, the first of which was dated November 23, 1998, Mr. King requested that his court-appointed counsel, Mr. Cribbs and Mr. Jones, be replaced. [*Id.*]

At the January 11 hearing, the trial court acknowledged having been put on notice of Mr. King's desire to maintain an innocence defense; both sides

acknowledged the conflict and the subsequent breakdown in communications. [5 RR 5; Appendix 6]. The trial court declined to inquire further into the conflict between Mr. King and defense counsel over his trial objectives and denied counsel's motion to withdraw.

Mr. King also raised his desire to maintain his innocence to the media, in statements he made to the press that the State introduced against him at his trial. Mr. King wrote a letter to a reporter for the Dallas Morning News dated November 12, 1998. [ROA.9771-9777; Appendix 8]. In this letter, which the State introduced in the guilt phase of his trial through the testimony of the reporter, Judith Lee Hancock [20 RR 119-125; ROA.9060-66 (Appendix 10)], King maintained that he was not at the scene of Mr. Byrd's murder. Mr. King stated in the letter that, although he had been driving around with Shawn Berry and Lawrence Brewer in Shawn Berry's pickup truck on the night of the murder, June 6, 1998, he had been dropped off at the apartment he shared with Berry and Brewer while Mr. Byrd was still alive. [*Id.*]

Thus, the reading of this letter before the jury, without any corresponding defense evidence in support, made clear that defense counsel was not contesting guilt, in direct contravention of Mr. King's wishes, subverting and contravening his stated account of his innocence as read to the jury. [20 RR 119-125; ROA.9060-66]. In *McCoy*, the defendant similarly presented an alternative narrative in his testimony at

trial, and the Court found that this was plain evidence of the defendant's desire to further an innocence claim. *McCoy*, 138 S. Ct. at 1507. Likewise, here, State's the introduction of Mr. King's statements to the Dallas Morning News shows that Mr. King wanted to argue that he was not present at the scene of the crime—clearly contrary to the defense presented by his counsel.[8]

Mr. King repeatedly expressed his objection to conceding guilt—in letters to the court, at the January 11 hearing, and through his media statements that the State introduced at trial. The sum of these objections amounts to unmistakable evidence of Mr. King's desire to maintain his innocence.

That King did not expressly object during final argument does not defeat a *McCoy* claim, as other courts have held:

> Further, while defendant did not object during closing argument after his counsel conceded his guilt of voluntary manslaughter, we do not think preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction. Rather, the record must show (1) that defendant's plain objective is to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt. (*McCoy*, *supra*, 584 U.S. at pp. ——, ——, 138 S. Ct. at pp. ——, —— – —— [200 L.Ed.2d at pp. 827, 829-833].) Although such evidence may come in the form of a defendant objecting during argument, on this record we conclude *McCoy* applies here.

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[8] All that was presented at the defense guilt stage were three very brief witnesses who testified regarding King's racial attitudes and the origin of his tattoos. [21 RR 73-111]. None of this testimony went to King's innocence.

People v. Eddy, 2019 WL 1349489 (Ca. Ct. App. 3d Dist, Mar. 29, 2019) at *6.

In interpreting *McCoy*, this Court has held that "[a] defendant makes a *McCoy* complaint with sufficient clarity when he presents express statements of [his] will." *Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018), at *20. Like the defendant in *McCoy*, Mr. King maintained his innocence "at every opportunity . . . both in conference with his lawyer and in open court." *McCoy*, 138 S. Ct. at 1509.

ii. At the guilt phase arguments, Mr. King's counsel conceded his guilt, undermining his constitutional right to determine the objective of his defense.[9]

At the guilt phase arguments defense counsel conceded King's presence at the scene of Mr. Byrd's murder. Defense counsel Brack Jones began by telling the jury that "I think it's clear to the jury that a capital murder is the intentional killing of an individual while in the commission of another felony. In this case, as we talked about [that felony] is kidnapping...Basically kidnapping is an abduction..." [22 RR 23]. Jones then argued that the dragging was not a kidnaping or an abduction, but was the method of death, that there was no restraint, and that the basic "question is was Mr. Byrd kidnapped?" [22 RR 25-27]. He also argued that the dragging was the cause of death and not the abduction and kidnapping [22 RR 27-29] and that Byrd voluntarily

[9] Relevant excerpts from defense counsel's guilt phase arguments are attached herein as Appendix 9 [22 RR 23-32, 35, 38, 44-46; ROA.9249-9258, 9261, 9264, 9270-9272].

got into the pickup. [22 RR 31].[10] Mr. Jones told the jury that "[w]e know at a point there was a terrible, terrible brutal, horrendous, painful death, absolutely no question. The question is was Mr. Byrd kidnapped?" [22 RR 27]. He then argued that "was that an assault or was it a kidnapping? Was that a fight, a killing or a kidnapping?' [22 RR 29]. His argument was that "they have not proved kidnapping" by pointing out that the tattoos and the book on the Ku Klux Klan did not prove a kidnaping. [22 RR 30]. He added

> Don't find the elements of kidnapping because of what he believes or what happened to him in the penitentiary. Find it only based on evidence, based on beyond a reasonable doubt; and please remember you can strongly believe a kidnapping occurred or you can believe he's not guilty of the kidnapping, and that's not enough.
> [22 RR 30-31].

Mr. Jones further stated that the State could not prove kidnaping "because we only have Mr. Byrd voluntarily getting into that pickup...We don't think a kidnapping occurred...The murder and the kidnapping are two separate issues that you've got to reach, and we ask you to consider that." [22 RR 31-32].

Attorney Sonny Cribbs gave the remainder of the defense argument and continued this theme of guilt-but-no-kidnaping. [22 RR 32]. Cribbs argued that "if

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[10] The State's theory was that there was a fight in the truck when the victim Mr. Byrd resisted being forced out at the crime scene [ROA.8286, 8292, 8293, 8297] where the ashtray could have been spilled.

there is a doubt in your mind or reasonable doubt in your mind that it is no proof to you beyond a reasonable doubt that there is a kidnapping, then the law requires you to find him not guilty of capital murder, and then you can proceed with the issue of murder." [22 RR 35]. He said, regarding the cigarette butt that had King's DNA on it, that if he is a racist he would not share it with a black person [22 RR 38], thus conceding his presence at the crime scene and his guilt of non-capital murder. Cribbs argued extensively that the State had not proved capital murder, which required proof of kidnaping:

> [H]as the State proved beyond a reasonable doubt that John William King committed the offense of capital murder? Did he intentionally kill James Byrd Jr. While committing the offense of kidnapping or intentionally or attempting to commit kidnapping? If they fail to prove that element, and that is an element, then you must find him not guilty [of capital murder]. If [you] find him not guilty of capital murder, the alternative then comes to the lseer included offense. [non-capital murder]
> [22 RR 44; ROA.9270]

Cribbs also argued that

> [t]he only thing we're talking about is whether John William King killed James Byrd, Jr. In the commission or attempted commission of kidnapping. And we haven't heard very much evidence about kidnaping. We've heard a lot of evidence about the way Mr. Byrd died and it is absolutely unimaginable to die like that. But the cause of death doesn't make it a capital murder period.
> [22 RR 45-46; ROA 9271-9272].

He then went on to explain that "the State of Texas hasn't proven beyond a

reasonable doubt, the offense of capital murder, as required by proving [the] additional element of kidnapping beyond a reasonable doubt or attempted, then you must find him guilty of [non-capital] murder." [22 RR 46].

Cribbs also conceded Mr. King's presence at the crime scene. Cribbs told the jury that "[t]he one cigarette butt that tends to tie John William King to this offense is a cigarette butt that I remember Mr. Gray saying is that one that somebody else took a drag off" [22 RR 38], forgetting that it was inconclusive as to Byrd and did not necessarily tie Mr. King to the victim or indicate his presence at the crime scene.[11] Defense counsel then argued that Byrd may have taken the butt out of the ashtray "and took a puff because the doctor said that could be how the contamination of the DNA evidence on that cigarette butt got there" [22 RR 39], again ignoring that the DNA was inconclusive as to Byrd. Cribbs told the jury that the charge says "mere presence alone at the scene of the alleged offense, if any, will not constitute one a party to the offense" [22 RR 41] and argued that the State had not proved beyond a reasonable doubt that King committed a murder in the course of a kidnaping. [22 RR 44]. This too was a concession to non-capital murder.

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[11] The cigarette butt was never shown to have Mr. Byrd's DNA on it—the tests were inconclusive. The testimony was that King was the major contributor, and Byrd could not be excluded as a minor contributor but could also not be confirmed. [ROA.8966]. In all, King's DNA was found only on the cigarette butt which contained King's primary and *possibly* Byrd's DNA. [ROA.8993].

At the guilt phase argument, Mr. King's attorneys conceded all elements of the lesser included charge—non-capital murder—in violation of his Sixth Amendment rights. Mr. King's counsel contested only one element of the capital murder charge: to be guilty under the prosecution's capital murder theory, he must have committed murder in the course of committing another felony—in this case, kidnaping. *See* TEX. PENAL CODE ANN. §19.03(a)(2) (Vernon Supp. 1986); *see also* CR 239, 242; ROA.6392 (jury instructions on the capital charge). Trial counsel only contested the kidnaping, but not the non-capital murder charge and repeatedly conceded Mr. King's guilt on all elements of the capital charge except the kidnaping. This strategy—in light of the pile of evidence presented by the prosecution—was a concession of Mr. King's guilt on the non-capital murder charge.

B. Arguments and Authorities.

i. In spite of Mr. King's objections, defense counsel conceded his guilt, undermining his constitutional right to determine the objectives of his defense.

Despite Mr. King's repeatedly-conveyed desire to present an actual innocence defense, his trial counsel presented no evidence to demonstrate that Mr. King was in fact innocent and told the jury he was guilty of non-capital murder. In doing so, trial counsel conceded Mr. King's guilt, directly contrary to his stated objective. This

concession violated Mr. King's Sixth Amendment right to determine the "objective of his defense" as articulated in *McCoy*. *Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018).

This concession, contrary to Mr. King's clear and unwavering wishes to the contrary, violated his Sixth Amendment rights as articulated by the Supreme Court in *McCoy* and this Court in *Turner*. As the Supreme Court held, defense counsel "could not interfere with McCoy's telling the jury 'I was not the murderer.'" *McCoy*, 123 S. Ct. at 1509. When counsel is "[p]resented with express statements of the client's will to maintain innocence," as Mr. King's counsel was here, "counsel may not steer the ship the other way." *McCoy,* at 1510.

Further, during trial, defense counsel made no attempt to present evidence that Mr. King was not present at the scene of the Mr. Byrd's death. Such evidence would have been crucial to an innocence claim, since Mr. King was convicted under the law of the parties, meaning that his presence and any action in furtherance of the crime would be enough to convict. By conceding King's presence at the crime and contesting only the fact that a kidnaping had occurred, the defense effectively conceded King's guilt.

Further, Mr. King's counsel presented only three witnesses at the guilt phase, none of whom could speak to the events of the night in question or cast doubt on the

prosecution's narrative of the alleged murder. Instead, the defense's case only and exclusively sought to explain the trauma Mr. King experienced from a prior incarceration, and to refute claims that he held long-ingrained racist attitudes. The entirety of the testimony brought forth by defense counsel went to mitigation, rather than innocence; the defense merely sought to *explain* Mr. King's behavior, rather than to *deny* it.

In light of *McCoy*'s requirement that counsel not concede guilt over a defendant's clear desire to the contrary, trial counsel's concession violated Mr. King's Sixth Amendment right to be master of his own defense.

ii. The Supreme Court's holding in *McCoy* compels a reversal.

As the Supreme Court held in *McCoy v. Louisiana*, 138 S. Ct. 1500, 1503 (2018), 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." That Court also 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.

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, as it did with Mr. King's attorneys, and McCoy sought leave to represent himself until his parents retained new counsel, Mr. Larry English. *Id*. New counsel concluded that the evidence against his client was overwhelming, and that a death sentence was inevitable. *Id.* English told McCoy this two weeks prior to trial, and McCoy was "furious" when told that English planned to concede McCoy's commission of the murders to the jury. *Id*. McCoy told English not to make that concession and wanted him to pursue acquittal. *Id*. Part of English's strategy, as with Mr. King's attorneys, 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.*

Just as with Mr. King, McCoy sought to terminate English's representation. *Id*.[12] The Court refused the request, as it did with Mr. King. At his opening statement at the guilt phase, English said that the evidence conclusively showed that McCoy was guilty. McCoy protested. English continued his opening statement, telling the jury that the evidence was unambiguous and that his client committed the three

[12] As previously noted, before trial, King brought his concerns about his trial attorneys' failure to investigate his claims of innocence to the attention of the trial court and asked for their dismissal. [Appendix 7].

murders. *Id.* at 1507. In his closing argument, English 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.* The Supreme Court 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.*

The 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* at 1505, 1509. Here too, King insisted on his innocence throughout the process, whereas in *Nixon*, the defendant declined to participate in his defense. *McCoy* at 1509.

McCoy distinguished between duties traditionally the province of counsel and those of the defendant:

> 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." *Gonzalez v. United States,* 553 U.S. 242, 248 (2008)...Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.
> *McCoy* at 1508, citing *Jones v. Barnes,* 463 U.S. 745, 751 (1983).

The Supreme Court then affirmed the principle that

> [a]utonomy 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*.

McCoy at 1508, *citing Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty").

The *McCoy* Court recognized 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 1508-1509.

The U.S. Supreme Court's opinion in *McCoy* constitutes a new, important, and broad pronouncement about the defendant's personal right to dictate the objectives pursued at trial. It is not an opinion that should be read in the narrowest possible terms—the terms the State will advance here. In recognizing that "[s]ome decisions [] are reserved for the client," the Court did not limit the defendant's decisional right to extend only to maintaining absolute innocence. *McCoy*, 138 S. Ct. at 1508. Instead, it wrote about the defendant's "[a]utonomy to decide [] the objective of the defense." *Id.* The opinion cites the American Bar Association's Model Rule of Professional Conduct 1.2(a), which provides that a "lawyer shall abide by a client's decisions concerning the objectives of the representation." *Id.* at 1509. Thus, the concession

by King's attorneys that he was guilty of the lesser-included offense of non-capital murder violates the holding of *McCoy* and he must be granted a new trial.

iii. This Court's holding in *Turner v. State* also compels a reversal and new trial for Mr. King.

This Court in *Turner* pointed to the similarities between that case and Mr. McCoy's and reversed and remanded for a new trial. *Turner* at *20-*21. Many of the same similarities are present in Mr. King's case.

The question this Court asked in *Turner* was "Does the record show that Appellant, in a timely fashion, made express statements of his will to maintain his innocence? We answer that question "yes." *Turner* at *21. Here too, the answer is "yes."

Just as Mr. King did before trial, Mr. Turner "asked the trial court to change his defense team because he felt that he was 'being avoided and not defended.'" *Turner* at *16. And just as in Mr. King's case, at a pre-trial hearing, Turner "told the trial court, 'I don't want them representing me...'" *Id*. And identically to Mr. King's case, Mr. Turner's attorneys "argued that, although guilty of 'two terrible horrible crimes,' Appellant was not guilty of capital murder." *Id.* Mr. Turner testified at trial, *Id*. at *17, but Mr. King had even less autonomy and was more prejudiced, as his version of his innocence was only read to the jury by the Dallas Morning News reporter. [20 RR 119-125; ROA.9060-66]. Before closing arguments, Mr. Turner

attempted to fire his attorneys, *Turner* at *17, just as Mr. King did prior to trial, in his letters to the trial court. [Appendix 7]. And similarly to Mr. King's case, the trial court denied Mr. Turner's request to replace his attorneys. *Turner* at *18.

Most importantly, similar to Mr. King's case, Turner's attorney at closing arguments "again conceded that Appellant was the killer...McCann nevertheless argued that Appellant was not guilty of capital murder because the killing of the second victim was not intentional." *Id*. at *18. Mr. King's attorneys, as discussed *supra*, similarly argued that King was guilty of non-capital murder, a lesser-included offense. And as in Mr. King's case and McCoy, "the defense attorney's strategy was to concede that the defendant...was guilty of a lesser offense and that he should not get a death sentence." *Turner* at *20.

And as in Mr. King's case, Turner's "attorneys knew at the beginning of trial that their strategy was contrary to Appellant's." *Turner* at *21. King's letters to the Court requesting new counsel, his statements at the pre-trial hearing, his letter to the Dallas Morning News, which the State introduced into evidence through the testimony of the reporter, clearly put Mr. King's attorneys on notice that he wished to pursue his innocence.

As in Mr. McCoy's case, from well before the start of trial, Mr. King's attorneys "clearly knew [they] were still at odds [with Mr. King] on how to proceed,

and that fact would have been apparent to the judge and jury as well." *Turner* at *21. King's jury knew this because of the testimony of the Dallas Morning News reporter who read portions of King's letter where he expressed his innocence. [Appendix 10].

King's attorneys sought to have him found guilty of non-capital murder, as did Mr. McCoy's and Mr. Turner's. The charge to the jury was that King was to be found guilty of capital murder if they found beyond a reasonable doubt that "by dragging the complainant on a road with a motor vehicle, and the defendant was then and there in the course of committing the offense of kidnapping of James Byrd, Jr., you shall find the defendant guilty of the offense of Capital Murder." [CR 242; ROA.6395]. If kidnaping was not found, "you shall find the defendant not guilty of capital murder and proceed to consider the lesser included offense of murder." [*Id*.]

In *McCoy*, defense counsels' objective was to have the defendant found guilty of a lesser-included-offense, *McCoy* at 1506 n.1, as this Court pointed out in *Turner*, at *20 n.66. This Court concluded that "[t]here is a substantial argument that Appellant's case would fall within the ambit of *McCoy* even if he had received a lesser-included-offense instruction, but we need not reach that question." *Turner* at *20 n.66. This was because "maintaining innocence and not admitting causing the death of a family member [were] discussed as objectives of the representation under [Mr. Turner's] control" *Id.* Here too, King's objective was to maintain his innocence

of a horrific crime, not to admit that he was guilty but that the victim was not kidnaped.[13]

Other courts have similarly held that concession to a lesser-included offense constitutes a *McCoy* violation. *See, e.g., State v. Horn*, 251 So. 3d 1069, 1074 [c]ounsel specifically told the jury he was not asking them to find the defendant 'not guilty,' and further stated that the facts fit second-degree murder or manslaughter");[14] *Eddy*, 2019 WL 1349489 at *6 (finding a *McCoy* violation where "counsel conceded his [client's] guilt of voluntary manslaughter" in a first-degree murder case).

Mr. King "should not be expected to object with the precision of an attorney," especially where the evidence reflects that he did assert his objective and the lawyers simply overrode it, and despite a colloquy with the court, he did not make a voluntary, knowing, and intelligent waiver of this right to assert the insanity defense. *Turner* at *20.

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[13] That discussion in *Turner* and the holding of *McCoy* itself, involving a lesser-included offense, would obviate any relevance of the case cited, *State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010), for the proposition that "in this Court's actual-innocence jurisprudence, 'the term 'actual innocence' shall apply...only in circumstances in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses') (emphasis added). *Turner* at *20 n.66.

[14] The Supreme Court of Louisiana in *Horn* also held that "*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *Id.* at 1075.

iv. This Sixth Amendment error is structural, not requiring a showing of prejudice.

McCoy held that

> "[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), or *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984), to McCoy's claim. See Brief for Petitioner 43–48; Brief for Respondent 46–52. To gain redress for attorney error, a defendant ordinarily must show prejudice. *See Strickland,* 466 U.S., at 692, 104 S. Ct. 2052. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.
> *McCoy* at 1510-1511.

The Supreme Court further elaborated as to why a finding of prejudice was not required:

> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, *e.g., McKaskle,* 465 U.S., at 177, n. 8, 104 S. Ct. 944 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); *United States v. Gonzalez–Lopez,* 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (choice of counsel is structural); *Waller v. Georgia,* 467 U.S. 39, 49–50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (public trial is structural). Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the

> fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver,* 582 U.S., at ——, 137 S.Ct., at 1908 (citing *Faretta,* 422 U.S., at 834, 95 S.Ct. 2525). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U.S., at ——— – ———, 137 S.Ct., at 1908 (citing *Gonzalez–Lopez,* 548 U.S., at 149, n. 4, 126 S.Ct. 2557, and *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).
> *McCoy* at 1511.

The Supreme Court found two rationales for this finding: (1) that counsel's override of his client's wishes negated McCoy's constitutional rights and created a structural defect in the proceedings; and (2) that it blocked the defendant's right to make the fundamental choices about his own defense. *Id.* "McCoy must therefore be accorded a new trial without any need first to show prejudice." *Id.*

As this Court has similarly held in *Turner*, *McCoy* error is structural, not requiring a showing of prejudice or harm. ("Because the error is structural, we conduct no harm analysis, and a reversal and remand for a new trial is required." *Turner* at *21.

Nor has the Supreme Court always required a showing of actual prejudice where a defendant's constitutional rights have been infringed. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (citing cases of structural error); *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (finding actual prejudice not required when

members of defendant's race were excluded from grand jury); *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984) (noting structural error in the denial of a public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (finding the right to self-representation at trial "is not amenable to 'harmless error' analysis"); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (finding the total deprivation of the right to counsel warranted reversal of defendant's conviction); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (reversing defendant's conviction where judge was not impartial at trial).

In some circumstances—for example where counsel has been completely denied, where counsel fails to subject the prosecution's case to meaningful adversarial testing, or where circumstances justify a presumption of prejudice, such as where counsel has an actual conflict of interest in representing multiple defendants—structural error is present and no showing of *Strickland* prejudice is required. *See also Cronic*, 466 U.S. 648, 659 (1984)).

The underlying claim here is the un-counseled and against-his-will admission of his guilt which deprived King of his right to plead not guilty and prevented him from being the master of his own defense in violation of the Sixth Amendment. *See McCoy*, 138 S. Ct. at 1510–11; *cf.* Corrected Brief for Petitioner at 43, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (No. 16-8255), 2017 WL 6885223, at *43 (McCoy

also argued that "[w]ere this Court to...analyze counsel's admission of guilt as an issue of ineffective assistance of counsel, McCoy would still be entitled to a new trial. England's admission of McCoy's guilt...constituted ineffective assistance under *United States v. Cronic*, 466 U.S. 648 (1984)."

VI.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Mr. King prays that this Honorable Court:

1. Stay his scheduled execution, currently set for April 24, 2019.

2. Vacate his vacate his death sentence and conviction and grant relief on his claims and remand to the trial court for further proceedings;

3. Alternatively, Mr. King requests that this Court remand to the trial court and authorize the trial court to consider the claims raised in this subsequent application, and instruct the trial court to conduct an evidentiary hearing for the purpose of examining the merits of his claims;

4. 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 sentencing hearing, and

5. Grant any other relief that law or justice may require.

Dated: April 10, 2019.

Respectfully submitted,

/s/ A. Richard Ellis

A. Richard Ellis
Attorney at Law
Texas Bar No. 06560400
75 Magee Avenue

Mill Valley, CA 94941
Attorney for Applicant

MOTION FOR APPOINTMENT OF COUNSEL

Pursuant to TEX. CODE CRIM. PROC. 11.071 Sec. 5(b), the convicting court will forward this subsequent application to the Texas Court of Criminal Appeals. Should that Court determine that this application meets the requirements for subsequent applications under Sec. 5(a), pursuant to TEX. CODE CRIM. PROC. 11.071 Sec. 6(b-1)

> [i]f the convicting court receives notice that the requirements for consideration of a subsequent writ have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:
>
> (1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment...

If the Court of Criminal Appeals determines that this application meets the 11.071 Sec. 5 requirement, Applicant John William King, who is not proceeding *pro se* and does not have retained state counsel, requests that the convicting court appoint undersigned counsel who has represented him in these successive application proceedings, pursuant to TEX. CODE CRIM. PROC. 11.071 Sec. 6(b-1).

Dated: April 10, 2019.

Respectfully submitted,
/s/ A. Richard Ellis

A. Richard Ellis
Attorney at Law
Texas Bar No. 06560400
75 Magee Avenue
Mill Valley, CA 94941

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that on April 10, 2019, I have served electronically a true and correct copy of the foregoing "Subsequent Application for a Writ of Habeas Corpus, Motion for Appointment of Counsel and Appendices" upon opposing counsel, Ms. Anne Pickle, Criminal District Attorney, Jasper County, Texas and Assistant Attorney General Katherine D. Hayes, Office of the Attorney General of Texas:

Ms. Anne Pickle
Criminal District Attorney, Jasper County, Texas
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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ A. Richard Ellis

A. Richard Ellis
Attorney at Law
Texas Bar No. 06560400
75 Magee Avenue
Mill Valley, CA 94941
Attorney for Applicant

STATE OF CALIFORNIA)
)
COUNTY OF MILL VALLEY)

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared A. Richard Ellis, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas (Bar No. 06560400).

2. I am the duly authorized attorney for John William King, having the authority to prepare and to verify his Subsequent Application for Post-Conviction Writ of Habeas Corpus.

3. I have prepared and have read the foregoing Subsequent Application for Post-Conviction Writ of Habeas Corpus, and I believe all the allegations therein to be true and correct.

A Richard Ellis April 8, 2019

A. RICHARD ELLIS

SUBSCRIBED AND SWORN TO BEFORE ME on _____, 2019.

_____

Notary Public, State of California

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of MARIN

Subscribed and sworn to (or affirmed) before me on this 8 day of APRIL, 20 19, by A. RICHARD ELLIS, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Faati Maroofi
Signature (Notary Seal)
NOTARY PUBLIC

FAATI MAROOFI
NOTARY PUBLIC - CALIFORNIA
COMMISSION # 2149163
MARIN COUNTY
My Comm. Exp. May 13, 2020