WR-49,391-03
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. WR-49,391-03
Trial Court Cause No. 8869C

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

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| EX PARTE | § | IN THE 1ST JUDICIAL |
| | § | DISTRICT COURT OF |
| JOHN WILLIAM KING | § | JASPER COUNTY, TEXAS |

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# STATE'S MOTION TO DISMISS APPLICANT'S SECOND SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS AND MOTION TO DENY REQUEST FOR STAY OF EXECUTION

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Respondent, the State of Texas, by and through the Criminal District Attorney of Jasper County, moves the Court of Criminal Appeals to dismiss the applicant's second subsequent state application for writ of habeas corpus and to deny the request for a stay of execution. The State contends that applicant does not satisfy the requirements for the filing of a subsequent writ application under TEX. CODE CRIM. PROC. art. 11.071, § 5. In support, the State would show the following:

## I. PROCEDURAL HISTORY

Applicant John William King is confined pursuant to the judgment and sentence of the 1st District Court of Jasper County, Texas, in cause no. 8869 (hereinafter "the primary case"), in which a jury convicted the applicant of the offense of capital murder. On February 25, 1999, after the jury answered the special issues, the trial court assessed punishment at death.

This Court affirmed Applicant's conviction and sentence on direct appeal, rejecting eight points of error. *King v. State,* 29 S.W.3d 556 (Tex. Crim. App. 2000). Applicant did not file a petition for writ of certiorari. While his direct appeal was pending, Applicant filed a state habeas application on July 5, 2000, raising five claims, all alleging various instances of ineffective assistance of trial counsel. Lead defense trial counsel Haden Cribbs, Jr., provided an affidavit addressing the allegations. The convicting court entered findings of fact and conclusions of law recommending that relief be denied. The TCCA held that the trial court's findings were supported by the record and denied relief. *Ex parte King,* No. WR-49,391-01 (Tex. Crim. App. June 20, 2001) (not designated for publication).

On September 6, 2002, Applicant filed a petition for federal writ of habeas corpus raising twenty-one grounds for relief, several of which alleged various instances of ineffective assistance of counsel. *King v. Dretke*, No.

1:01-cv-00435-MAC (E.D. Tex.) (Pet., ECF No. 30). The United States District Court for the Eastern District of Texas, Beaumont Division, denied relief on several claims but granted Applicant's motion to abate the habeas proceedings to allow him to exhaust claims in state court. *King v Dretke*, 2006 WL 887488 (Mem. Op. of March 29, 2006, ECF No. 64).

Applicant filed a successive state habeas application on June 22, 2006, that was dismissed by the TCCA "as an abuse of the writ without considering the merits of the claims." *Ex parte King*, No. WR-49,391-02, 2012 WL 3996836 (Tex. Crim. App. Sept. 12, 2012) (not designated for publication) (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)).

Returning to federal court, King filed an amended habeas corpus petition that incorporated and expanded on the claims originally raised. *King v. Dretke*, No. 1:01-cv-00435-MAC (E.D. Tex.) (Am Pet., ECF No. 75). On June 23, 2016, the district court denied relief on all claims and declined to certify any issue for appeal. *King v. Director*, TDCJ-CID, 2016 WL 3467097 (E.D. Tex. 2016).

In 2017, the Fifth Circuit Court of Appeals granted King a certificate of appealability ("COA") on one claim of trial counsel ineffectiveness and denied COA on King's remaining claims. *King v. Davis*, 703 F. App'x 320, 2017 WL 3411876 (5th Cir. Aug. 8, 2017). After further briefing from the parties, on February 22, 2018, the

Fifth Circuit affirmed the district court's denial of habeas corpus relief, and subsequently denied rehearing. *King v. Davis,* 883 F.3d 577 (5th Cir. 2018), rhr'g denied, No. 16-70018 (5th Cir. March 23, 2018).

The United States Supreme Court denied King's petition for certiorari review of the Fifth Circuit's decision. *King v. Davis*, 139 S. Ct. 413 (Oct. 29, 2018).

On December 21, 2018, the State moved the convicting court to set a date for King's execution. Presiding Judge Craig M. Mason granted the motion the same day and entered an order setting King's execution for Wednesday, April 24, 2019. State of Texas v. John William King, cause No. 8869 (1st Dist. Ct., Jasper County, Texas, Dec. 21, 2018).

On March 21, 2019, King petitioned the Texas Board of Pardons and Paroles for clemency or commutation of sentence. The District Attorney and Sheriff of Jasper County, the presiding Judge of the 1st Judicial District Court, and the Jasper Police Chief have all filed responses with the Board opposing clemency or commutation.

## II. THE TRIAL ON GUILT/INNOCENCE

Based upon counsel's defense at trial, applicant claimed on appeal that the evidence was legally and factually insufficient to prove that the murder occurred during the course of a kidnapping and to prove that he was a party to the offense. Following is this Court's summary of the evidence presented at trial, excerpted from

the opinion on direct appeal.

> The evidence at trial showed the following: George Mahathy, a life-long acquaintance of the victim, James Byrd, Jr., saw him at a party on Saturday night, June 6, 1998. Byrd left the party around 1:30 or 2:00 in the morning. Byrd asked Mahathy for a ride home, but Mahathy was riding home with someone else. As Mahathy was leaving the party, he saw Byrd walking down the road towards home, which was about a mile from the party. Steven Scott, who had known Byrd for several years, also saw him walking down the road that night. After arriving home a few minutes later, at around 2:30 a.m., Scott saw Byrd pass by in the back of an old model, step-side pickup truck painted primer-gray. Three white people were riding in the cab of the truck.
>
> On June 7, 1998, police officers responded to a call to go to Huff Creek Road in the town of Jasper. In the road, in front of a church, they discovered the body of an African– American male missing the head, neck, and right arm. The remains of pants and underwear were gathered around the victim's ankles. About a mile and a half up the road, they discovered the head, neck, and arm by a culvert in a driveway.
>
> A trail of smeared blood and drag marks led from the victim's torso to the detached upper portion of the victim's body and continued another mile and a half down Huff Creek Road and a dirt logging road. A wallet found on the logging road contained identification for James Byrd Jr., a Jasper resident. Along the route, police also found Byrd's dentures, keys, shirt, undershirt, and watch. At the end of the logging road, the trail culminated in an area of matted-down grass, which appeared to be the scene of a fight. At this site and along the logging road, the police discovered a cigarette lighter engraved with the words "Possum" and "KKK," a nut driver wrench inscribed with the name "Berry," three cigarette butts, a can of "fix-aflat," a compact disk, a woman's watch, a can of black spray paint, a pack of Marlboro Lights cigarettes, beer bottles, a button from Byrd's shirt, and Byrd's baseball cap.
>
> The following evening, police stopped Shawn Berry for a traffic

violation in his primer-gray pickup truck. Behind the front seat, police discovered a set of tools matching the wrench found at the fight scene. They arrested Berry and confiscated the truck. DNA testing revealed that blood spatters underneath the truck and on one of the truck's tires matched Byrd's DNA. In the bed of the truck, police noticed a rust stain in a chain pattern and detected blood matching Byrd's on a spare tire.

Six tires that were on or associated with Berry's truck were examined. Three of the four tires on the truck were of different makes. Tire casts taken at the fight scene and in front of the church where the torso was found were consistent with each of these tires. An FBI chemist detected a substance consistent with fix-a-flat inside one of the six tires.

Shawn Berry shared an apartment with Lawrence Russell Brewer and appellant. Police and FBI agents searched the apartment and confiscated appellant's drawings and writings as well as clothing and shoes of each of the three roommates. DNA analysis revealed that the jeans and boots that Berry had been wearing on the night of the murder were stained with blood matching Byrd's DNA. An analyst with the FBI lab determined that a shoe print found near a large blood stain on the logging road was made by a Rugged Outback brand sandal. Appellant owned a pair of Rugged Outback sandals and had been seen wearing them on the evening of the murder. Shawn Berry also owned a pair of Rugged Outback sandals that were a half size different from appellant's. One of the pairs of these sandals confiscated from the apartment bore a blood stain matching Byrd's DNA. A Nike tennis shoe with the initials “L.B.” in the tongue also was stained with blood matching Byrd's.

DNA analysis was also conducted on three cigarette butts taken from the fight scene and logging road. DNA on one of the cigarette butts established appellant as the major contributor, and excluded Berry and Brewer as contributors, but could not exclude Byrd as a minor contributor. Brewer was the sole contributor of DNA on the second cigarette butt. The third cigarette butt revealed DNA from both a major and minor contributor. Shawn Berry was established as the major contributor of DNA on the third cigarette butt; however, appellant, Brewer, and Byrd were all excluded as possible minor contributors of

the additional DNA.

Tommy Faulk testified that Berry, Brewer, and appellant frequented his home and had played paintball in the woods behind his trailer. Police conducted a search of these woods and found a large hole covered by plywood and debris. Underneath the cover, they discovered a 24–vcfoot logging chain that matched the rust imprint in the bed of Berry's truck.

The State presented evidence of appellant's racial animosity, particularly towards African–Americans. Several witnesses testified about how appellant refused to go to the home of an African–American and would leave a party if an African–American arrived. In prison, appellant was known as the "exalted cyclops" of the Confederate Knights of America ("CKA"), a white supremacist gang. Among the tattoos covering appellant's body were a woodpecker in a Ku Klux Klansman's uniform making an obscene gesture; a "patch" incorporating "KKK," a swastika, and "Aryan Pride"; and a black man with a noose around his neck hanging from a tree. Appellant had on occasion displayed these tattoos to people and had been heard to remark, "See my little nigger hanging from a tree."

A gang expert reviewed the writings that were seized from the apartment and testified that appellant had used persuasive language to try to convince others to join in his racist beliefs. The writings revealed that appellant intended to start a chapter of the CKA in Jasper and was planning for something big to happen on July 4, 1998. The expert explained that to gain credibility appellant would need to do something "public." He testified that leaving Byrd's body in the street in front of a church—as opposed to hiding it in one of the many wooded areas around town—demonstrated that the crime was designed to strike terror in the community.

Appellant neither testified nor made a formal statement to police. But he sent letters concerning the night of the murder to the Dallas Morning News and to Russell Brewer while he and Brewer were in jail awaiting trial. The following portion of the letter to the Dallas Morning

News was read into the record:

> Given a description as to the whereabouts of the dirt trail where an alleged beating of the deceased occurred, it's essential to acknowledge the fact that Shawn Berry co-inherited a small tract of land adjacent to the tram road, which he visited quite frequently.
>
> Therefore, the fact that my cigarette lighter with "Possum" inscribed upon it was found near the scene of the crime, along with other items—i.e., several hand tools with "Berry" inscribed on them, a compact disk belonging to Shawn Berry's brother Lewis, and my girlfriend's watch, as well as items of the deceased—are all verified facts implementing that these items could have fallen from Shawn Berry's truck during a potential struggle with the deceased while on the tram road.
>
> However, unacknowledged facts remain, that I, along with Russell Brewer and Lewis Berry, had been borrowing Shawn Berry's truck to commute to and from an out-of-town land clearing job each day. My girlfriend's watch was kept in Shawn Berry's truck for us to keep track of the time. Lewis Berry had brought along several of his C.D.s for our listening pleasure during our hourly drive each morning and evening, which he had a tendency to leave in his brother's truck.
>
> Furthermore, the aforementioned cigarette lighter had been misplaced a week or so prior to these fraudulent charges that have been brought against Russell Brewer and me. This, so forth, does not prove the presence of my girlfriend, Lewis Berry, Russell Brewer nor myself at the scene of the crime, verifiably only the owners of the property in question. * * *
>
> Several statements and the theories against Shawn Berry, Russell Brewer, and myself, John W. King, for a prospective motive in this hard crime have been presented to the public. Against the wishes of my attorney, I shall share with you objective facts and my account of what happened during the early morning hours of June 7th, 1998.
>
> After a couple of hours of drinking beer and riding up and down rural roads adjacent to Highway 255 off Highway 63, looking for a female's home, who were expecting Shawn Berry and Russell

Brewer, Berry though [sic ] frivolous anger and fun at first, begun [sic ] to run over area residents' mail boxes and stop signs with his truck due to negligence in locating the girl's residence.
Becoming irate with our continued failure to locate the female's house, Shawn Berry's behavior quickly became ballistic as he sped through area residents' yards in a circular manner and made a racket with his truck's tailpipes managing to sling our ice chest from the back of his truck several times.
During his little conniption fit, Shawn Berry then stopped just ahead of a mailbox on Highway 255, took a chain from the back of his truck, wrapped it around the post of the mailbox, and proceeded to uproot and drag the mailbox east on Highway 255, stopping yards short of the Highway 63 north intersection, where he then removed his chain, replaced it, and continued to drive to a local convenience store, Rayburn Superette, to try to call the female who was expecting him and Brewer.
Fortunately no one answered at the girl's house and after repeated requests from me, as well as complaints from Russell Brewer, of a throbbing toe he injured during a recovery of our ice chest, Shawn Berry then agreed to take us to my apartment.
Shawn Allen Berry, driving with a suspended license and intoxicated, while taking Russell Brewer and me home those early morning hours, decided to stop by a mutual friend of ours home located on McQueen Street to inquire as to what the residents and his brother Lewis Berry were doing. On our way there, we passed a black man walking east on Martin Luther King Drive, whom Shawn Berry recognized and identified as simply Byrd, a man he befriended while incarcerated in the Jasper County Jail and, Berry stated, supplied him with steroids.
Shawn Berry then proceeded to stop his truck approximately 10 yards ahead of this individual walking in our direction, exit his vehicle, and approach the man. After several minutes of conversation, Shawn Berry returned to the truck and said his friend was going to join us because Berry and Byrd had business to discuss later and, thus, Byrd climbed into the back of Shawn Berry's truck and seated himself directly behind the cab.
While continuing on to our friend's residence where supposedly

> Lewis Berry was to be, we noticed there were neither lights on nor signs of activity in the trailer as we approached. We decided to proceed on to my apartment; but contrary to Russell Brewer's and my request, Shawn Berry drove to and stopped at another local convenience store, B.J's Grocery, just east of the Jasper city limits. Shawn Berry then asked Russell Brewer if he could borrow 50 to $60 because he needed a little extra cash to replenish his juice, steroid supply.
>
> After Brewer gave Shawn Berry the remainder of what money he had to return to Sulphur Springs, Texas, on, Berry asked if Russell Brewer and I could ride in the back of the truck and let his friend sit up front to discuss the purchase and payment of more steroids for Shawn Berry. Russell Brewer and I obliged on the condition Berry take us to my apartment without further delay, which, after a brief exchange of positions, he did.
>
> Once we arrived at my apartment, Shawn Berry informed Russell Brewer and me that he was leaving so that he could take Byrd to get the steroids and then home. I asked if Brewer or I would bring a small cooler of beer down for him and his friend along with a bottle of bourbon Berry had bought a few days prior.
>
> Russell Brewer and I went up to my apartment and began to fill a small cooler with approximately six to eight beers. Realizing I left my wallet and cigarettes in Shawn Berry's truck, I opted to bring the cooler back down to Berry. After retrieving my wallet, but unable to locate my cigarettes, I then returned upstairs to my apartment, into my bedroom, and proceeded to call an ex-girlfriend before retiring to bed in the predawn hours of June 7th, 1998.

A portion of the note appellant wrote to Brewer was as follows:

> As for the clothes they took from the apt. I do know that one pair of shoes they took were Shawn's dress boots with blood on them, as well as pants with blood on them. As far as the clothes I had on, I don't think any blood was on my pants or sweat shirt, but I think my sandals may have had some dark brown substance on the bottom of them. * * *
>
> Seriously, though, Bro, regardless of the outcome of this, we have

made history and shall die proudly remembered if need be.... Much Aryan love, respect, and honor, my brother in arms.... Possum.

Dr. Tommy Brown, a forensic pathologist, testified that he received Byrd's head, neck, and arm separately from the main torso. The autopsy revealed extensive injuries all over Byrd's body. Nearly all of Byrd's anterior ribs were fractured. He suffered "massive brush burn abrasions" over most of his body. Both testicles were missing and gravel was found in the scrotal sac. Both knees and part of his feet had been ground down, his left cheek was ground to the jawbone, and his buttocks were ground down to the sacrum and lower spine. Some of his toes were missing and others were fractured. Large lacerations of the legs exposed muscle. But his brain and skull were intact, exhibiting no lacerations, fractures, or bruises.

Brown concluded that the lacerations and abrasions around Byrd's ankles were consistent with the ankles having been wrapped by a chain and that the abrasions all over Byrd's body were consistent with him being dragged by his ankles over a road surface. Red regions around the area where Byrd's upper and lower body separated indicated that Byrd's heart was still pumping and that he was alive when his body was torn apart by the culvert. Therefore, Brown determined that the cause of death was separation of the head and upper extremity from the rest of the body. Some of the wound shapes and patterns indicated that Byrd was conscious while he was being dragged and was trying to relieve the intense burning pain by rolling and swapping one part of his body for another. Also, the absence of injuries to Byrd's brain and skull suggested that he was trying to hold his head up while being dragged. [footnotes omitted]

*King v. State,* 29 S.W.3d 556, 558-62 (Tex. Crim. App. 2000).

## III. APPLICANT FAILS TO SATISFY THE PREDICATE REQUIRED BY ART. 11.071, §5(a); THIS SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS MUST BE DISMISSED AS AN ABUSE OF THE WRIT.

Applicant has filed this second subsequent application alleging a single claim, that his "defense counsel improperly overrode his Sixth Amendment right to present an innocence defense, resulting in structural error that requires a new trial." The State contends that applicant has wholly failed to allege "specific facts" sufficient to prove that the current claim has not been and could not have been presented in a previously filed writ application, in this case in the original application filed in July 2000 or in the first subsequent application filed in June 2006, because the factual or legal basis now relied upon to support applicant's claim was unavailable when applicant filed the previous applications.

Applicant does not contend that the factual basis for his current claim was unavailable when the first and second applications for state habeas corpus were filed. He brings no new evidence before this Court on this application, and the factual basis for any current claim - to the extent he bases his claim on any facts at all - was available at the time of trial and immediately after trial.

Applicant instead attempts to satisfy the requirements of section 5(a) by contending that the Supreme Court's decision in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), provides a new, previously unavailable legal basis upon which he may now obtain relief. The State contends that applicant has failed to present to this Court any specific facts which, if true, could establish even a *prima facie* showing of his

entitlement to relief under *McCoy*. [1]

Applicant's claim here is dependent upon his unsupported allegations that defense counsel "conceded" his guilt of the charged offense during the trial of this case. Applicant misstates the record and ignores the facts actually shown in the record in this case. Applicant pleaded not guilty. (RR17: 11). Counsel made no opening statement and did not concede applicant's guilt like McCoy's counsel did. (RR21: 72). Applicant's counsel moved for a directed verdict at the close of guilt/innocence, which was denied. (RR21: 70; CR: 217-19). Defense counsel never conceded guilt in closing arguments, contrary to applicant's claims.

In addition, applicant did not protest or object to defense counsel's continued representation during 11 days of voir dire proceedings (RR6 thru RR16), or during the hearing on motions at the start of guilt/innocence (RR17), nor did he object at trial. Applicant claims that his pre-trial "letters" and the defense pre-trial motion to withdraw were sufficient to preserve his claim of *McCoy* error, but in fact applicant's complaint and the motion were only evidence of a pre-trial failure in communication,

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[1]In addition, the State contends that *McCoy* does not provide a new "legal basis" which was previously unavailable, in that applicant's current claim could reasonably have been formulated from the decisions in *Florida v Nixon*, 543 U.S. 175 (2004); *United States v. Cronic*, 466 U.S. 648 (1984); and various federal appellate cases; the State would urge the Court, however, that the Court need not determine whether *McCoy* provides a newly available "legal basis" as defined by Tex. Code Crim. Proc. article 11.071, section 5(d), since applicant has failed to bring before the Court any specific facts which would show that applicant could be entitled to relief under the holding in *McCoy, i.e.,* which would show that the holding in McCoy is a newly available legal basis for relief for this particular applicant.

which was apparently remedied after applicant agreed during the hearing on counsel's motion to talk to counsel after the hearing. The Motion to Withdraw was heard on January 11, 1999, prior to commencement of voir dire. (RR5). Counsel advised the court that the motion to withdraw was based upon applicant's refusal to talk to defense counsel or to cooperate in preparing for trial. (RR5: 4-5). The court asked applicant if he would like to testify, but applicant stated that he had "already written numerous letters explaining the situation." (RR5: 5). The court confirmed that the court had received two letters, and applicant explained that he actually only wrote *one* letter and then sent multiple copies of it to the court on different dates. (RR5: 5-6). Defense counsel then asked applicant on the record if he would be willing to meet with counsel after the hearing to talk, and applicant agreed. (RR5: 6). After applicant agreed to begin talking to counsel, the trial court denied the motion to withdraw. (RR5: 6-7).

From this record, it appears that counsel and applicant were able to communicate from that point on. In particular it appears from defense counsel Cribbs's affidavit, submitted as State's Exhibit D in the initial state habeas proceeding, that counsel diligently investigated multiple theories of defense prior to trial, and the reasonable conclusion to be drawn is that applicant may have initially misunderstood counsel's intentions when, in the course of their overall investigation, counsel

investigated thoroughly during pre-trial preparation whether any mental health or other mitigating evidence would be available.

In reality and on the plain face of this record, defense counsel did not concede guilt at any point. Counsel provided the best defense that they could, given the circumstances and the admissible evidence before the jury. Trial counsel were substantially limited in their defensive posture by appellant's own pre-trial letter to the Dallas Morning News, in which applicant admitted his presence in the truck with the victim shortly before the offense, as well as his own pre-trial jail note to his co-defendant Brewer in which he discussed the extent of physical evidence and claimed that they had "made history" together. Counsel were also limited by the flagrantly homicidal and deliberate manner and means of death and the unusually graphic photographs of the victim, as well as by the extensive evidence of appellant's violent racist beliefs, including his body art depicting white supremacist symbols and the lynching of a black man, and his many racist writings.

Applicant argues that defense counsel “conceded” guilt because they did not offer affirmative evidence of innocence, (application pp. 17, 23), including failing to present unspecified evidence to rebut the admissions applicant himself made in his letter to the Dallas Morning News. Applicant simply ignores the affidavit of defense counsel Cribbs in this record in which Cribbs detailed his team’s unsuccessful

attempts to locate witnesses who could offer evidence favorable to applicant. (State's writ exhibit D, Cause number 8869A, CR: 140-45). Counsel could not create evidence where none was available, and counsel's failure to manufacture exculpatory evidence where none existed is not equivalent to a "concession" of guilt.

Applicant has attached only 15 pages of the 23 pages of counsel's guilt-innocence arguments and has taken portions of argument out of context to claim that defense counsel conceded applicant's guilt during argument. They did not. Jones opened and made clear that he was going to limit his argument to one aspect of the charge – the aggravating element - and that Cribbs would handle the rest of argument. (RR22: 23). Jones did not "concede" applicant's guilt of murder; he only attempted to focus the jury's attention on the legal requirements for determining whether the offense was committed during the course of kidnapping. Jones's discussion of a particular element of the offense was not tantamount to concession of guilt on any others; it was simply a discussion of a particular element, obviously intended to focus the jury's attention on the legal requirements of the charge, encourage them to engage in a rational and analytic assessment of the case in accord with the court's instructions, and distract them from the emotional and graphic nature of the State's argument they had just heard.

Similarly, when Jones talked about the "three witnesses" who saw the victim

that night or saw him getting into the truck, he was not referring to the three defendants. Rather, in context of his argument, he was talking about witnesses Mahathay and Scott, who saw Mr. Byrd that night before and as he was picked up, as well as applicant, who had unfortunately admitted in his letter to the Dallas Morning News that he was present in the truck when he and his co-defendants picked Mr. Byrd up. (RR22: 25-26). Jones's acknowledgement and discussions of applicant's own admissions do not constitute a "concession" on his part; defense counsel was simply attempting to address and diffuse inculpatory evidence that applicant himself had created. Counsel then continued by explaining that although there was evidence that Mr. Byrd voluntarily got in the truck and that applicant was present at the time, the events that followed were not proven by direct or eye-witness evidence, but instead were dependent upon "opinions" and "conclusions" of police and the prosecutors. (RR22: 26-27). Counsel then devoted his argument to encouraging the jury to see the remainder of the State's case as merely the State's "theory" (RR22: 27), giving the jury hypothetic examples of other scenarios where the State might stretch the meaning of kidnapping to attempt to create proof of an aggravating element where common sense would tell the jury no such element had fairly been proven. (RR22: 28-29).

Defense counsel reinforced the burden of proof and the extreme confidence the

jury must feel to find proof beyond a reasonable doubt. (RR22: 29-30). Defense counsel then argued to the jury that tattoos and beliefs do not prove the aggravating element, in order to remind the jury that the aggravating element rather than mere motive had to be proven. (RR22: 30-31). Jones conceded that "a terrible murder occurred," but he did not concede that applicant committed the murder. Jones could hardly minimize or disregard the evidence of homicidal violence committed against Mr. Byrd, so instead he conceded that a murder did occur (which has never been contested at any stage of the three defendants' trials and post-conviction proceedings), in order to focus the jury on the issues before them: whether applicant participated, and whether the murder occurred with the aggravating circumstance of kidnapping. (RR22: 32).

Jones then turned argument over to Cribbs, who commenced by reinforcing that the jury must differentiate between actual evidence and the attorneys' theories about what that evidence might mean. He was careful to emphasize to the jury that they were only interested at this point with guilt, and that punishment considerations "if there is a punishment," would be a separate part of trial. (RR22: 32-33).

Cribbs acknowledged to the jury that they had all seen extensive graphic evidence that Mr. Byrd died a horrible death; he could hardly deny that a murder was committed here by some person or persons without alienating the jury. (RR22: 34-

35). He then reiterated that the jury was required to follow the instructions in the court's charge, and they were first required to determine whether applicant was guilty of capital murder or, as explained by Jones, whether murder was proven beyond a reasonable doubt. (RR22: 35).

Cribbs then told the jury that they had to use those instructions to determine whether the evidence was strong enough to prove beyond a reasonable doubt that applicant was guilty as a party, "because if they [the State] don't prove beyond a reasonable doubt that [applicant] was a party, that it was not done as alleged, then the law requires you under the presumption of innocence to find the defendant not guilty." (RR22: 36).

Cribbs continued by telling the jury that he understood that it would be difficult, because they had just heard days of testimony about applicant being a racist, but counsel pointed out that people have the right to believe what they may, regardless of whether we like those beliefs, and in fact no civilian witnesses in this case had testified to applicant acting on those beliefs by attempting to recruit anyone in Jasper or the area to his group. (RR22: 36).

Cribbs continued by arguing: "the issue here is very simple: is [applicant] guilty of capital murder? Did he act as a party with Russell Brewer, Shawn Berry as defined in this Charge and go out on that road, Huff Creek Road, and kill James Byrd

by dragging him to death on the road?" (RR22: 37). Counsel then pointed out that it is a very effective tactic to drag the [large logging] chain around the courtroom, but there was no evidence that was the chain used in the offense. (RR22: 37). Cribbs pointed out there was no direct evidence that applicant actually hid the chain. He pointed out that various other people knew where the hole was on the property where the chain was found. (RR22: 37-38). Cribbs pointed out that although there was some evidence that there was a vehicle and a lighter at the crime scene, the evidence also showed that the lighter had been lost and returned to Brewer, and that applicant only "maybe" got it. He agreed that the lighter had been found at the scene. He agreed that there was a cigarette butt on the road "that tends to tie [applicant] to this offense" (the State's heavily emphasized theory), but Cribbs noted that the prosecutor had admitted "somebody else took a drag off" of it. (RR22: 38). Cribbs then pointed out the inconsistency in the State's theory about the cigarette which contained DNA consistent with Mr. Byrd, arguing that "if this man is such a severe racist, he's not going to share a cigarette with a black man." Cribbs argued that it was more sensible to assume that the butt was in an ashtray in the truck after being smoked by applicant at some other time and that the victim might have taken the cigarette out of the ashtray and smoked it; he pointed out that this was a weakness in evidence relied upon by the State. (RR22: 39).

Cribbs urged the jury to consider inconsistencies – doubt – about the ownership of the sandals, which he claimed could have fit Lewis Berry as well as applicant. (RR22: 40).

Cribbs directed the jury's attention to the language in the charge regarding parties that "mere presence alone at the scene of the alleged offense, if any, will not constitute one a party to the offense." He emphasized that presence alone is insufficient to prove guilt, and he contended that even if there was evidence to put applicant at the scene there was no evidence to prove that he promoted, assisted, or otherwise acted as a party. "I say it's not there. The State didn't prove it; and right or wrong, you're going to be an individual. You're going to have to have enough courage, if you believe that, you must return a verdict under the law of not guilty." He continued that "it's got to be proven to each of you as an individual beyond a reasonable doubt, and if it's not, you find him not guilty." (RR22: 41-42). He reminded the jury that each of them had promised to be an individual and follow the law. (RR22: 42).

Cribbs argued yet again to the jury that applicant's body art did not prove the offense and that it was his right to have tattoos regardless of whether others like them. (RR22: 43). He urged the jury to consider that the body art was a "tangent," a rabbit trail, and that proof of the body art did not relieve them of the duty to determine the

real issue: "and that is, has the State proved beyond a reasonable doubt that [applicant] committed the offense of capital murder? Did he intentionally kill James Byrd Jr. While committing the offense of kidnapping or ... attempting to commit kidnapping? If they fail to prove that element, then you must find him not guilty." (RR22: 43-44).

Cribbs continued by arguing that if the jury found applicant not guilty of capital murder, the State must still prove the lesser offense of murder "beyond a reasonable doubt by the law of parties or you must be found guilty of nothing." (RR22: 44). "The law will require him to be found not guilty, and that's going to be one onerous task that you're going to have to do." (RR22: 44).

Cribbs concluded by arguing that the penitentiary may have caused applicant to become a racist, as the prosecutor had argued, but "that doesn't really make any difference." He argued again that the issue before the jury was whether the State proved that applicant killed Mr. Byrd in the course of kidnapping, not whether he was racist. He reiterated that if the jury believed that the evidence proved applicant intentionally took Mr. Byrd's life but did not believe the element of kidnapping, they must find him guilty of murder. (RR22: 45-46). Cribbs finished by reminding the jury that they should not judge applicant because of his appearance, but only because of his behavior, and that the State had "failed to prove his behavior." (RR22: 46).

Nowhere in this argument or elsewhere in the record did defense counsel "concede" applicant's guilt of the charged offense or of the lesser included offense. Applicant simply misstates the record when he makes such a claim. He has presented no specific facts supported by any source which would prove that he is entitled to relief - or even entitled to have his claim considered - under *McCoy*, and his application should be dismissed as an abuse of the writ.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Respondent, the State of Texas, respectfully requests the Court of Criminal Appeals to dismiss the applicant's second subsequent application for writ of habeas corpus and deny the applicant's request for a stay of execution.

Respectfully submitted,


by: _/s/ Sue Korioth_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been served on counsel Richard Ellis, 75 Magee Avenue, Mill Valley, CA 94941, by e-service to a.r.ellis@att.net or any email he has listed with this Court on April 17, 2019.

___/s/ Sue Korioth_____
SUE KORIOTH