

**IN THE TEXAS COURT OF CRIMINAL APPEALS  
AUSTIN, TEXAS  
AND  
IN THE FIRST JUDICIAL DISTRICT COURT  
OF JASPER COUNTY, TEXAS**

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

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**MOTION FOR STAY OF EXECUTION**

**JOHN WILLIAM KING IS SCHEDULED  
TO BE EXECUTED ON APRIL 24, 2019**

TO THE HONORABLE JUDGES OF THIS COURT:

John William King was convicted of capital murder and is facing an execution date of April 24, 2019. As detailed in his accompanying application for a subsequent writ of habeas corpus, and the appendices attached to that application, his application is based on a claim pursuant to *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) and this Court's recent holding in *Turner v. State*, 2018 WL 5932241 (Tex. Crim. App. Nov. 14, 2018).

Mr. 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.<sup>1</sup> 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* 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

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<sup>1</sup> As used herein and in the subsequent writ application, 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.

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.

Mr. King's objective, consistent with his plea of "not guilty," was to present a defense in the guilt phase, not to have his attorney concede guilt for the crimes.<sup>2</sup> Defense counsel overrode that objective—and their client's will—by instead presenting no defense or evidence of his innocence at all and conceding his guilt by telling the jury that he was present at the scene of Mr. Byrd's murder. At the guilt phase final arguments, they both 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.

In *McCoy*, the U.S. Supreme Court recently held for the first time 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 Mr. King's 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

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<sup>2</sup> As used herein and in the subsequent application, 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.

open to [defense counsel] to override [his] objection.” *Id.* at 1509. For that reason, Mr. King is entitled to a new trial.

This Court in *Turner*, in remarkably similar circumstances, applied *McCoy* and reversed and granted a new trial based on that case. *Turner* at \*20-\*21. Many of the same circumstances in *Turner* are present in Mr. King’s case. The answer to the question this Court asked in *Turner*, “Does the record show that Appellant, in a timely fashion, made express statements of his will to maintain his innocence?,” *Turner* at \*21, is also “yes” here.

In Mr. Turner and Mr. King’s case, both defendants asked for new attorneys prior to trial. *Turner* at \*16. And just as in Mr. King’s case, Mr. Turner’s attorneys “argued that, although guilty of “terrible horrible crimes,” Turner “was not guilty of capital murder.” *Id.* And similarly to Mr. King’s case, the trial court denied Mr. Turner’s request to replace his attorneys. *Turner* at \*18.

Just as in to Mr. King’s case, Turner’s attorney conceded guilt to non-capital murder, *Id.* at \*18, that he “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” wishes. *Turner* at \*21. And in Mr. King’s case, the fact that the defendant and his attorney were at odds “would have been apparent to the judge and jury as well.” *Turner* at

\*21.<sup>3</sup>

Mr. 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 kidnapping was not found, "you shall find the defendant not guilty of capital murder and proceed to consider the lesser included offense of murder." [*Id.*] Mr. King's attorneys focused solely on attempting to find him not guilty of capital murder, but admitted his guilt to non-capital murder.

In *McCoy*, the defense's objective was likewise 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. Here too, King's objective, as was Mr. McCoy's and Mr. Turner's, was to maintain his innocence of a horrific crime, not to admit that he was guilty but that the victim was not kidnaped.

A stay of execution will give this Court the opportunity to examine the record

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<sup>3</sup> 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. [*See* Subsequent application Appendix 10].

and rule on the application of *McCoy* to Mr. King's case without the time-pressure of an impending execution.

In his subsequent writ application, Mr. King has shown that this claim meets the requirements for a subsequent writ application under TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a), a well-established exception to the bar on subsequent applications contained in that section.

### **PRAYER FOR RELIEF**

For the reasons above and for those stated in his Subsequent Application for Writ of Habeas Corpus, Mr. King respectfully requests that this Court:

1. Grant a stay of execution, currently scheduled for April 24, 2019;
2. Enter an order finding that his claim satisfies the requirements of Tex. Code Crim. Proc art. 11.071 sec. 5 and remand this claim and authorize further proceedings in the District Court; or, in the alternative;
3. File and set this case for full briefing and oral argument on the application of art. 11.071 sec. 5 to these proceedings.
4. Mr. King further requests any other relief that law or justice may require.

Dated: April 10, 2019.

Respectfully submitted,  
s/s *A. Richard Ellis*

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**A. Richard Ellis**  
Attorney at Law  
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Mill Valley, CA 94941  
Attorney for Applicant

## 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 “Motion For Stay of Execution” 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  
121 N. Austin, Room 101  
Jasper, Texas 75951  
(anne.pickle@co.jasper.tx.us)

Ms. Katherine D. Hayes  
Office of the Attorney General for the State of Texas  
P.O. Box 12548, Capitol Station  
Austin, TX 78711-2548  
(katherine.hayes@oag.texas.gov)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

*/s/ A. Richard Ellis*

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Attorney for Applicant



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**ORDER GRANTING STAY OF EXECUTION**

On motion for Applicant John William King, and for good cause shown, it is hereby ORDERED that Applicant's Motion for Stay of Execution is hereby granted in the above-captioned matter.

It is so ordered this \_\_\_\_\_ day of April, 2019.

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APPELLATE COURT JUDGE