No. 17A-1335

In the Supreme Court of the United States

STEPHEN DALE BARBEE,
Petitioner,
v.
LORIE DAVIS , Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

A. Richard Ellis
75 Magee Avenue
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251
a.r.ellis@att.net

Member, Supreme Court Bar
Counsel of Record for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

In *McCoy v. Louisiana*, __U.S.___, 138 S. Ct. 1500 (2018) this Court reaffirmed clearly-established principles of client autonomy and that the client is the master of the case in holding that the defendant's Sixth Amendment rights were violated when trial counsel told the jury that McCoy was guilty, without his permission and against his wishes. This Court also reaffirmed that this was structural error not requiring a showing of prejudice.

In this capital case, Stephen Barbee's lead counsel likewise conceded Barbee's guilt to the jury during closing argument without his permission. The United States Court of Appeals for the Fifth Circuit denied this claim based on the incorrect ineffective-assistance-of-counsel standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which required him to show prejudice.

A grant of *certiorari* is needed to correct these errors; to clarify that *McCoy* is not "new law" but a re-affirmation of the long-standing Sixth Amendment principle that the client is master of the case; and to re-affirm that structural error of this sort does not require a showing of prejudice.

This case therefore presents the following questions:

1. Did the Fifth Circuit impose an improper ineffective-assistance-of-counsel standard, which required him to show prejudice, to Barbee's claim that his Sixth Amendment rights were violated by the unauthorized confession of guilt to his jury by his trial counsel?

2. Whether structural error, raised in post-conviction proceedings, requires a showing of prejudice?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Stephen Dale Barbee, was the Petitioner before the United States District Court for the Northern District of Texas, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Barbee is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The Director and her predecessors were the Respondents before the United States District Court for the Northern District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. Barbee asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

TABLE OF CONTENTS

Index of Appendices

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

In the
Supreme Court of the United States

STEPHEN DALE BARBEE,
Petitioner,
-v-
LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Stephen Dale Barbee respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit affirming his conviction and death sentence.

OPINIONS BELOW

On March 21, 2018, the United States Court of Appeals for the Fifth Circuit issued an opinion denying relief on Barbee's issue of whether he was deprived of his constitutional Sixth Amendment rights because trial counsel rendered ineffective assistance of counsel ("IATC") at the guilt-innocence phase by conceding Barbee's guilt to the jury during closing argument without his permission. This opinion, reported as *Barbee v. Davis*, 2018 WL 1413840 (5th Cir., Mar. 21, 2018) is attached as Appendix A.

The order of this Court granting an extension of 30 days, until July 19, 2018, to file the petition for certiorari is attached as Appendix B. The opinion of the Fifth Circuit granting a certificate of appealability ("COA") on the claim that trial counsel were ineffective in conceding Barbee's guilt to the jury without his permission, *Barbee v. Davis*, 660 F. App'x 293 (5th Cir. 2016), is attached as Appendix C. The opinion of the federal district court which Mr. Barbee sought to appeal, *Barbee v. Stephens,* No. 4:09-cv-074-Y, 2015 WL 4094055 (N.D. Tex. July 7, 2015), is attached as Appendix D.[1] The State court opinion denying this claim is attached as Appendix E. *Ex parte Barbee,* No. WR-71070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009).

STATEMENT OF JURISDICTION

The federal district court had jurisdiction over this habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 2253, the Fifth Circuit Court of Appeals had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability. This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1) over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

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

[1] A petition to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) was filed and was denied by the district court on September 1, 2015; however this petition did not involve or implicate the claim before this Court, the issue of Barbee's attorneys confessing his guilt to the jury without his permission.

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

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

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Factual Background.

i. Introduction.

Stephen Barbee, a 38-year old successful business owner with absolutely no prior criminal record, was arrested and charged with the murder of Lisa Underwood, his ex-girlfriend, and her seven year old son Jayden, on February 19, 2005 in Tyler, Texas, near Fort Worth. The alleged motive was Barbee's fear that the pregnant victim would tell his wife that he was the father of Underwood's unborn child, and his liability for child

support. Because the police threatened Barbee with the death penalty, and out of fear of his co-defendant's threats, Barbee initially said that he caused the deaths, but that they were accidental and un-premeditated. However, Barbee immediately recanted this coerced "confession" and has maintained his innocence ever since.[2] Yet his trial attorneys failed to take any reasonable steps to establish his innocence or investigate the possibility that his co-worker and co-defendant Ron Dodd actually committed the murders, as Barbee has long maintained.[3]

The trial itself was a perfunctory two-and-a-half day affair. The defense case at the guilt phase totaled about three transcript pages. (24 RR 176-179). Against his express wishes and without his consent, Barbee's attorneys, in their final guilt phase argument, told the jury he was guilty. This is the issue under consideration here.

This concession did not afford Barbee any benefit in the penalty phase. Virtually none of his compelling mitigating evidence was investigated or presented. Despite his complete lack of prior criminal conduct, Barbee's attorneys also failed to investigate and present evidence on the crucial special issue of "future dangerousness." The attorneys later claimed that the presentation of this evidence was incompatible with Barbee's

---

[2] Barbee has admitted to helping his co-defendant and employee Ron Dodd in concealing the bodies. At the time of the murders, Dodd was living with Barbee's ex-wife Theresa in Barbee's spacious former home and all three worked at two businesses owned by Barbee, involving tree-trimming and concrete-cutting. [*See* Barbee's declaration at USCA5.3829-3843].

The federal Record on Appeal in the Fifth Circuit Court of Appeals is referred to herein as "USCA5.[page]." The trial transcript (the "Reporter's Record") is referred to as "[volume number] RR [page]."

[3] This was Issue 1 in Barbee's COA application in the court below (pages 11-16); *see* Barbee's declaration [USCA5.3829-3843].

assertions of innocence, although they had refused to investigate or present his case for innocence and had conceded his guilt.[4]

ii. It is undisputed that Barbee did not give permission for the concession of his guilt.

Prior to trial, both defense attorneys attempted to pressure Barbee into accepting a guilty plea, thus avoiding a trial,[5] and one of their first acts was to try to convince Barbee's family that he was guilty. [USCA5.769-72, 777-79, 798]. No effort was made to develop Barbee's claim of innocence prior to trial. After presenting no defense at the guilt/innocence phase of the trial, Barbee's lead counsel Bill Ray told the jury in argument that "as hard as it is to say, the evidence from the courtroom shows that Stephen Barbee killed Jayden Underwood. There is no evidence to the contrary." [25 RR 14]. Ray continued a disjointed presentation by arguing that the killing of Lisa Underwood was accidental. [25 RR 14-18]. In closing, he told the jury that the evidence "does not support an intentional or knowing murder for Lisa Underwood. Was he there? Yes. Did he hold her down? Yes." [25 RR 18]. Barbee was notified that Ray was going to make this statement. Both Barbee [USCA5.3843] and his family [USCA5.3823] were shocked when they heard it.

At the state evidentiary hearing, Ray admitted he conceded his client's guilt without Barbee's permission: "So did I explicitly ask him if I could do that [concede his

[4] *See* Issue 4 in Barbee's COA application in the Fifth Circuit (at pages 32-58).

[5] The conflict-of-interest claim alleged that, in return for the trial judge assigning many cases to Barbee's lead counsel Mr. Ray, the *quid pro quo* was that counsel was expected to move the cases rapidly through that court, resulting in a high case-disposition rate for the judge. Ray received over $700,000 in court-appointed fees from this judge in a six-year span. [USCA5.903].

guilt]? The answer is no. Did he explicitly tell me he didn't want me to do it? The answer is no." [USCA5.4661]. Barbee, of course, did not know that Ray was going to do it.

Mr. Ray and co-counsel Tim Moore have repeatedly admitted that Barbee, from the first stages of their representation, insisted on his innocence.[6] In fact, the attorneys used Barbee's assertion of innocence, what they later termed his "refusal to accept responsibility" [USCA5.3914-15], as justification for their failure to present mitigating evidence of a low probability of future dangerousness at the punishment phase. [USCA5.3908-15].[7] Barbee was thus prejudiced as a direct result of his attorneys' unauthorized concession of guilt.[8]

B. Proceedings Below.

Mr. Barbee is currently unlawfully incarcerated by the Texas Department of Criminal Justice, Institutional Division, on death row at the Polunsky Unit in Livingston, Texas.

---

[6] *See* Ray and Moore's joint declaration: "Applicant consistently stated that Ron Dodd was the real killer [USCA5.3912]; "Applicant was steadfast in his assertion that he was innocent" [*Id.*]; "Applicant maintained that he was completely innocent" [USCA5.3913]; "...a frame up [Petitioner's insistence that Ron Dodd was the actual killer] ...became a controversy that existed from the very beginning of our representation throughout our representation of Applicant" [USCA5.3914-15]. *See also* Memo of Understanding Between Ray, Moore and Barbee: "Client has maintained his innocence to attorneys since the date of appointment." [USCA5.3917].

[7] Before trial, Barbee 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. [USCA5.3514-18].

[8] However, as shown *infra*, no showing of prejudice is required, as this is structural error.

On February 23, 2006, Stephen Barbee was convicted by a jury of capital murder in the 213th Judicial District Court of Tarrant County, Fort Worth, Texas, Judge Robert K. Gill presiding. [USCA5.3537-3542]. On December 10, 2008, the Texas Court of Criminal Appeals ("TCCA") affirmed Barbee's conviction and sentence of death on appeal. *Barbee v. State,* No. AP-75,359, 2008 WL 5160202 (Tex. Crim. App. Dec. 10, 2008) (not designated for publication) [USCA5.3544-75]. Barbee filed his initial state habeas application on March 13, 2008. [USCA5.3620-3650]. The state habeas judge, who did not preside at Barbee's trial, did not conduct an evidentiary hearing and adopted verbatim the State's proposed findings of fact and conclusions of law [USCA5.3757-3788] and denied relief. [USCA5.3791-3792]. On January 14, 2009, the TCCA adopted the trial court's findings and conclusions and denied relief on this claim and all others. *Ex parte Barbee,* No. WR-71,070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009). [USCA5.3574-3575]. (Appendix E).

On October 4, 2010, Barbee filed his petition for writ of habeas corpus in the federal district court [USCA5.115-462] in the Northern District of Texas, Fort Worth Division, along with accompanying exhibits. [USCA5.463-1109]. On May 18, 2011, that Court granted his motion for stay and abeyance to exhaust his claims in state court. [USCA5.1532-39].

Barbee then filed a state subsequent application [USCA5.3194-3497] and on September 14, 2011, the TCCA issued an order finding that a conflict-of-interest claim (Claim 2) satisfied the subsequent writ requirements of TEX. CODE CRIM. PROC. 11.071

Sec. 5(a) and remanded it to the trial court for consideration of that claim. *Ex parte Barbee,* No. WR-71,070-02, 2011 WL 2071985 (Tex. Crim. App. Sept. 14, 2011). [USCA5.4187-88].

On remand, the trial court ordered a live two-day evidentiary hearing on February 22-23, 2012, in Forth Worth, Texas, limited to the conflict-of-interest claim.[9] This claim involved newly-uncovered evidence and media revelations that Barbee's trial judge and his lead trial attorney, both of Fort Worth, had a secret deal between them involving the preferential assignment of many cases to the attorney in return for his speedy disposition of those cases. The state trial court subsequently adopted the State's proposed findings and conclusions verbatim and recommended that relief be denied on that claim. Subsequently, the TCCA also denied relief on the conflict-of-interest claim "[b]ased upon the trial court's findings and conclusions and our own review." *Ex parte Barbee,* No. WR-71,070-02, 2013 WL 1920686 (Tex. Crim. App. May 8, 2013). [USCA5.1560-61]. The other claims (Nos. 1 and 3-21) were dismissed "as an abuse of the writ" because they "do not satisfy the requirements of Article 11.071 Section 5." *Id.*

Barbee returned to the federal district court in Fort Worth, Texas, and filed an amended petition for writ of habeas corpus and supporting exhibits on October 2, 2013, raising the same 21 claims presented in his subsequent state habeas application. [USCA5.1579-2486]. On July 7, 2015, the district court entered a final memorandum opinion and order denying all claims and denying a COA. *Barbee v. Stephens,* No. 4:09-

[9] That claim is not presented herein.

cv-074-Y, 2015 WL 4094055 (N.D. Tex. July 7, 2015). [USCA5.2952-3104] (Appendix D). A motion to alter and amend judgment was subsequently denied by the district court. *Barbee v. Stephens,* 2015 WL 5123356 (N.D. Tex. Sept. 1, 2015). [USCA5.3157-3185].[10]

Barbee filed his application for a COA in the Fifth Circuit Court of Appeals on January 5, 2016 and filed his reply to Respondent's opposition to a COA on March 19, 2016. On November 23, 2016, the Fifth Circuit granted a COA on Issue 3 in his application, the issue of whether trial counsel rendered ineffective assistance of counsel at the guilt-innocence phase by conceding Barbee's guilt to the jury during closing argument without his permission. *Barbee v. Davis,* 660 F. App'x. 293, 300 (5th Cir. 2016) (Appendix C).[11]

Oral argument was held in the Fifth Circuit on October 2, 2017. On March 21, 2018, that Court issued an opinion denying relief on this claim. *Barbee v. Davis*, ___F. App'x___, 2018 WL 1413840 (5th Cir. Mar. 21, 2018) (Appendix A). On June 4, 2018, this Court issued an order extending the time to file the petition for certiorari until July 19, 2018. (Appendix B).

C. How The Issue Was Decided In The Courts Below.

i. The state court holding.

---

[10] As stated *infra*, that motion did not involve the claim presented herein.

[11] Barbee has asserted his innocence. However, that issue is not currently under review. Hence, the terms "conceding his guilt," "confessing his guilt," and the arguments herein refer only to Barbee's attorneys' unauthorized statement to the jury that he was guilty. Barbee continues to assert his actual innocence.

In denying this claim, the Texas Court of Criminal Appeals ("TCCA") adopted verbatim the State's Findings and Conclusions [USCA5.3757-88], so we must look to these findings and conclusions to ascertain the state court's rationale in denying the claim. It was analyzed in the State's "Conclusions of Law" [USCA5.3775-80][12] under the *Strickland v. Washington,* 466 U.S. 668 (1984) standard, which requires a showing of prejudice, but not the *United States v. Cronic,* 466 U.S. 648 (1984) standard under which the claim was brought in state post-conviction proceedings. [USCA5.3633, 3640-42]. The conclusions of law ultimately adopted by the TCCA held the following:

a. Findings of Fact.

> No. 46. During closing argument, Mr. Ray argued the defense theory of accidence rather than a pure innocence defense. *See* Reporter's Record XXV:14-18.
>
> No. 47 Mr. Ray decided to use the accident theory because, in his professional opinion, the applicant's favored 'Ron Dodd did it' theory would not work. See Mr. Ray and Mr. Moore's Affidavit, page 4.
>
> ...
>
> No. 54. Mr. Ray's decision to focus his closing argument on the defensive theory of accident rather than the 'Ron Dodd did it' theory was reasonable in light of the evidence admitted at trial.
>
> No. 55. Mr. Ray and Mr. Moore provided the applicant with adequate counsel regarding closing arguments.
> [USCA5.3763, 3765].

b. Conclusions of Law.

> No. 18. It is not objectively unreasonable for counsel to determine that it would be a more effective approach to focus the jury on a relatively narrow defense, rather than to use a 'shotgun' approach by arguing every defense available...

[12] These were ultimately adopted by the district court and the TCCA.

> No. 19. Judicial review of a defense attorney's summation is therefore highly deferential. *Yarborough v. Gentry,* 540 U.S. 1 at 6 (2003)....
>
> No. 20. Mr. Ray's decision to focus his closing argument on the defensive theory of accident was reasonable in light of the evidence admitted at trial.
>
> No. 21. Mr Ray and Mr. Moore provided the applicant with adequate counsel regarding closing arguments.
> [USCA5.3777].

Thus, the state court holding was essentially that Ray's "defensive theory of accident was reasonable" because chose to focus on "accidental death" rather than innocence. The TCCA in denying this claim adopted verbatim the State's Findings and Conclusions [USCA5.3757-88].

ii. The federal district court holding.

In federal proceedings, this claim was also brought as a Sixth Amendment constitutional claim, and Barbee argued that *Cronic* applied. [USCA5.1814-1820].[13] The district court held that:

> 1) The "state court correctly analyzed the claim under *Strickland* rather than *Cronic*." [USCA5.3024].
>
> 2) "Where, as here, counsel has conceded guilt of a lesser-included offense, Barbee simply bears the burden to prove that this decision was objectively unreasonable under *Strickland*." [*Id.*]
>
> 3) "Barbee mischaracterizes the complained-of closing argument. Counsel did not concede Barbee's guilt when he did not dispute that Barbee killed Jayden. Counsel reiterated that capital murder requires two or more knowing or intentional murders, he reminded the jury of those definitions,

[13] Respondent previously conceded that this claim is exhausted and briefed it on the merits. [USCA5.1202, 1216-26]. So too, the district court agreed that "Respondent does not dispute that the claim is exhausted and subject to review under § 2254(d)." [USCA5.3023].

> and then he argued that Lisa's death was not intentional or knowing-- he simply held her down too long. (25 RR 10, 18)." [USCA5.3025].
>
> 4) "This was a reasonable argument, under Texas law, that Barbee was not guilty of capital murder. See TEX. PENAL CODE ANN. § 19.02(b) (defining murder as causing the death of a person intentionally or knowingly), § 19.03(a)(7) (defining capital murder as two murders committed during the same criminal transaction)." [*Id.*]
>
> 5) Barbee failed to show prejudice. [USCA5.3027].

These holdings are both an unreasonable determination of the law and the facts under both § 2254(d)(1) and (d)(2). There was no concession of a "lesser-included offense" and the argument was not "reasonable" because it was based on a mistaken interpretation of "intentionally" and "knowingly" and TEX. PENAL CODE ANN. § 19.02(b), amounting to *Strickland*-level ineffectiveness. However, as shown *infra*, *Strickland* was not the proper standard with which to evaluate this claim.

iii. The holding of the Fifth Circuit.

The Fifth Circuit Court of Appeals granted a certificate of appealability ("COA") on Issue 3 (Claim 4(b) in the district court), the issue of whether Barbee's counsel were ineffective because they conceded his guilt without his permission at the guilt-phase argument. *Barbee v. Davis,* 660 F. App'x. 293, 300 (5th Cir. 2016).[14]

After oral argument, the Fifth Circuit denied Barbee's petition. *Barbee v. Davis*, __F. App'x___, 2018 WL 1413840. (Appendix A). That Court determined, as had the courts below, that Barbee did not authorize the confession of his guilt to the jury:

> The record does support that Barbee was not 'fully' consulted or, at least, did not expressly consent to the strategy. During the state habeas

[14] This claim was brought in the initial state habeas proceedings as a claim under *Cronic* [USCA5.3640-42] in addition to *Strickland*.

> proceedings, trial counsel testified that he told Barbee that he planned to pursue the accidental-death theory. But counsel also testified that he did not specifically ask for Barbee's permission to proceed with the theory and that Barbee did not want to sign a strategy memo explaining the theory. Barbee stated in a 2010 declaration that he 'was shocked' when he heard counsel's summation because counsel 'never told [Barbee] he was going to say this.' *Barbee* at *6.

The Fifth Circuit first determined that the claim was governed by the ineffective-assistance-of-counsel standards of *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing of prejudice, rather than by *United States v. Cronic*, 466 U.S. 648 (1984), which does not. *Barbee* at *1, *4-*6. "Assuming without deciding that counsel's performance was deficient under these circumstances," *Barbee* at *7, the Fifth Circuit held that the second *Strickland* prong, prejudice, had not been shown. *Id.* at *7-*9. The Fifth Circuit also held that *Florida v. Nixon*, 543 U.S. 175 (2004) "suggests that most tactical decisions by counsel will be subject to the *Strickland* ineffective-assistance-of-counsel analysis...whether or not they involve an admission of guilt." Id. at *4.

In *Barbee*, the Fifth Circuit recognized the pendency of *McCoy v. Louisiana*, ___U.S.___, 138 S. Ct. 1500 (2018), but held that

> AEDPA requires that we evaluate Barbee's application based on the law that was clearly established at the time of the state-court adjudication...As McCoy is a direct appeal...the Court is not likely to shed light on the precise question before us: whether the state habeas court's resolution of Barbee's ineffective assistance of counsel claim was unreasonable in light of clearly established law at the time of its ruling.[15] See § 2254(d). We therefore decline to withhold our judgment pending the Court's decision in *McCoy*.

[15] This claim was first raised in Barbee's initial state habeas petition, which was denied by the Texas Court of Criminal Appeals in 2009. *Ex parte Barbee,* No. WR-71070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009). [USCA5.3574-3575]. (Appendix E). The claim was not raised on direct appeal.

Barbee at *6 n. 6.

As will be shown *infra*, the Fifth Circuit's holdings and predictions were incorrect in virtually every aspect: that this claim should be analyzed as ineffective assistance of counsel under *Strickland*; that *Nixon* was applicable and relevant; that clearly-established law at the time precluded relief; and that prejudice must be shown.

REASONS FOR GRANTING CERTIORARI

In denying this claim regarding trial counsel's unauthorized confession of Barbee's guilt to his jury, the Fifth Circuit Court of Appeals used an incorrect standard, that of ineffective assistance of counsel under *Strickland v. Washington*, and denied his claim on the basis that he had not shown prejudice. Clearly-established law of this Court at the time Barbee's case became final in state habeas proceedings on January 14, 2009, reaffirmed in *McCoy*, hold that this claim should be analyzed under the well-established principle of client autonomy, not under the *Strickland* standard. *McCoy v. Louisiana* also re-affirmed long-standing principles that the denial of a client's Sixth Amendment rights, in the unauthorized confession seen here, is structural error, not requiring a showing of prejudice. A grant of *certiorari* is needed to correct these errors; to clarify that *McCoy* is not "new law" but a re-affirmation of the long-standing Sixth Amendment principle that the client is master of the case; and that structural error of this sort, raised in post-conviction proceedings, does not require a showing of prejudice.

ARGUMENT

I. Based on Clearly-Established Client-Autonomy Law, *McCoy* Re-Affirmed the Principle That the Client Is Master of the Case.

In order to obtain relief under 28 U.S.C. § 2254(d)(1), Barbee must show that this claim "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."[16] He easily meets that standard, as shown herein.

As this Court re-affirmed 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." This Court also re-affirmed 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. The Fifth Circuit's holding here was contrary to both of these principles.

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. Barbee'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

[16] In the court below, Barbee also showed that this claim met the standards of 28 U.S.C. § 2254(d)(2), an unreasonable determination of the facts.

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. Barbee'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. Barbee, McCoy sought to terminate English's representation. *Id*.[17] The Court refused the request. 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 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*. This Court granted *certiorari* on the question of "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.*

[17] As previously noted, before trial, Barbee 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. [USCA5.3514-18].

This Court initially distinguished the situation in *McCoy* from *Florida v. Nixon*, 543 U.S. 175 (2004).[18] *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, Barbee insisted on his innocence throughout the process,[19] whereas in *Nixon*, the defendant declined to participate in his defense. *McCoy* at 1509. Mr. Barbee was not even given the opportunity to object to his attorney's statement, as Mr. McCoy was, and counsel made the admission without consulting Barbee on the matter.

This Court affirmed that "[t]he Sixth Amendment guarantees to each criminal defendant 'the Assistance of Counsel for his defence." *Id*. at 1507. Citing *Faretta v. California*, 422 U.S. 806, 824-828 (1975), *McCoy* held that "[a]s the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized." *Id.* This Court also pointed out that "a defendant's choice in exercising that right 'must be honored out of that respect for the individual which is the lifeblood of the law.'" *McCoy* at 1507, quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970). Also

[18] The applicability of *Nixon* figured heavily in the briefs of both parties in the Fifth Circuit in this matter.

[19] Mr. Barbee repudiated his coerced confession shortly after he made it and has maintained his innocence from the date of the appointment of his counsel.

noted was *McKaskle v. Wiggins*, 465 U.S. 168, 176-177 (1984) which held that "[t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused."

This Court cited *Faretta* for the proposition that "the Sixth Amendment, in 'grant[ing] to the accused personally the right to make his defense,' 'speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *McCoy* at 1508, quoting *Faretta,* 422 U.S. at 819-820. *Gannett Co. v. De Pasquale*, 443 U.S. 368, 382 n. 10 (1979) also held that the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense"). *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).

This Court then reaffirmed 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"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.")

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.

McCoy noted that the defendant's right to decide whether to maintain his innocence did not usurp the attorney's or the court's traditional roles. *McCoy* at 1509, citing *Gonzalez,* 553 U.S., at 249 ("[n]umerous choices affecting conduct of the trial" do not require client consent, including "the objections to make, the witnesses to call, and the

arguments to advance"). "[I]f after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection." *Id*. As happened here, "English could not interfere with McCoy's telling the jury 'I was not the murderer.'" *Id.* "Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way. See *Gonzalez,* 553 U.S., at 254, 128 S. Ct. 1765 (Scalia, J., concurring in judgment) ("[A]ction taken by counsel over his client's objection ... ha[s] the effect of revoking [counsel's] agency with respect to the action in question.')" *McCoy* at 1509-1510.

Nor, in this situation, is counsel hampered by any ethical rules that might prevent counseling a client to engage in fraudulent or criminal conduct, a situation implicated in *Nix v. Whiteside,* 475 U.S. 157, 173–176 (1986). In *Nix*, the defendant told his counsel he would commit perjury, but this was not the case with either Mr. McCoy or Mr. Barbee. Ethical rules might have stopped English from presenting McCoy's alibi evidence if English knew perjury was involved, but that situation was not present in either *McCoy* or the case here. *McCoy* concluded by holding that "[i]n this stark scenario, we agree with the majority of state courts of last resort that counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy* at 1510.

Thus, *McCoy* is grounded and based on clearly-established Supreme Court law of client autonomy that was in effect when the Texas Court of Criminal Appeals denied Barbee's initial state habeas petition in 2009. *Ex parte Barbee,* No. WR-71070-01, 2009

WL 82360 (Tex. Crim. App. Jan. 14, 2009). [USCA5.3574-3575]. (Appendix E). Barbee therefore meets the standards of 2254(d)(1) and the Fifth Circuit's holding was erroneous.

II. The State Courts, The Federal District Court And The Fifth Circuit Used The Wrong Standard In Failing To Distinguish Between Ineffective Assistance Of Counsel And The Sixth Amendment Right Of The Accused To Be Master Of His Own Defense.

The Fifth Circuit decided this case on the basis of the ineffective assistance of counsel standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Barbee v. Davis*, __F. App'x__, 2018 WL 1413840 (5th Cir. Mar. 21, 2018) at *6 ("As Barbee has not shown that he is entitled to habeas relief on the basis of *Cronic* under the deferential standards imposed by AEDPA, we now turn to the reasonableness of the state court's application of *Strickland*.") The state court did likewise. ("The state habeas court determined, without analysis, that *Strickland*, rather than *Cronic*, applied to Barbee's ineffective assistance [for the unauthorized confession of his guilt] claim." *Barbee v. Davis*, *supra,* at *4.

The claim before the Fifth Circuit was that "trial counsel abandoned their duty of loyalty to their client and rendered ineffective assistance of counsel by conceding Barbee's guilt without his permission." *Barbee*, at *3. This claim, although it included discussions of the *Strickland* and *Cronic* standards for ineffective assistance of counsel, implicated the exact same situation as in *McCo*y: counsel's confession of guilt to the jury against the client's wishes. The Fifth Circuit rejected Barbee's argument that *Cronic*

applied and held that he had to meet the *Strickland* standards of deficient performance and prejudice. *Barbee* at *6.

As in *McCoy*, Barbee distinguished his situation from *Nixon* (Fifth Circuit brief at 36-42); and argued that the concession was unconstitutional because it not only deprived him of his Sixth Amendment right to effective counsel, but also was inconsistent with his right to plead guilty or not guilty, and deprived him of his constitutional right to a trial by jury. (*Id*. at 36-41). A major section of Barbee's Fifth Circuit brief also argued that even if the concession was not the functional equivalent of a guilty plea, it was the equivalent of an involuntary confession; was not freely and voluntarily made by Barbee; and argued that Barbee should not be convicted by his attorney's words. (*Id.* at 44-56). And, as this Court pointed out in *McCoy*, McCoy and Louisiana both argued the *Strickland* and *Cronic* standards for ineffective assistance of counsel extensively in their briefs, as did Barbee. *McCoy* at 1511 ("Because a client's autonomy, not counsel's competence is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland*..or *Cronic*...to McCoy's claim. *See* Brief for Petitioner 43–48; Brief for Respondent 46–52"). As Barbee argued both the deprivation of his Sixth Amendment constitutional rights *and* ineffective assistance of counsel under the Sixth Amendment, this claim is squarely before this Court, just as it was in *McCoy*.

This Court decided *Strickland* and *Cronic* on the same day, both of which suggest the approach to prejudice in the context of ineffective-assistance claims is diametric. This is true whether *Strickland* and *Cronic* are considered in tandem or in isolation. These

cases tend to establish the parameters of the debate about the proper standard of prejudice for mistakes of trial counsel.

In *Strickland*, this Court declared that for most attorney errors, a defendant who demonstrates counsel breached a duty must also show prejudice in order to be entitled to relief. 466 U.S. at 693. In order to meet the required showing of prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In *Cronic*, this Court made it clear that in some circumstances, an accused is not required to show *Strickland* prejudice. 466 U.S. at 658–60. Situations where a showing of prejudice is not required for ineffective-assistance-of-counsel claims generally manifest as what have been labeled "structural errors." *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991). Structural error occurs and prejudice is presumed where, under the circumstances, the likelihood of counsel rendering effective assistance is too remote. *See Cronic*, 466 U.S. at 659–61 (citing *Powell v. Alabama*, 287 U.S. 45, 53, 56, 57–58 (1932)). Prejudice has also been presumed for other systemic constitutional violations, such as where members of the defendant's race are excluded from grand jury proceedings, an equal protection violation, *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986), and where a judge has a substantial pecuniary interest in the outcome of a proceeding, a due process violation, *Tumey v. Ohio*, 273 U.S. 510, 531-32, 535 (1927).

Moreover, as *McCoy* points out, there is a line of clearly-established Sixth Amendment cases handed down by this Court establishing a presumption of prejudice for

violations of the accused's right to be master of his defense, which is a right separate and distinct from the right to effective assistance of counsel. These cases pre-date *McCoy* and 2009, when Barbee's case became final on state habeas. *Ex parte Barbee,* No. WR-71,070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009). [USCA5.3574-3575]. (Appendix E).

These cases do not raise questions about what counsel did or did not do to aid the defense. The constitutional concern in these cases is whether the accused was allowed to be master of the defense, the client autonomy standard applied by this Court in *McCoy*. *McCoy*, 138 S. Ct. at 1510-1511. ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence.") And when the accused was not allowed to be the master of his or her defense, that violation was presumptively prejudicial.

Well before Barbee's case became final on state habeas in 2009, in *Faretta*, *supra,* this Court emphasized the ability of the defendant to be master of the defense. *See* 422 U.S. 806 (1975). This Court declared criminal defendants have a constitutional right, under the Sixth Amendment, to represent themselves if they wish. *Id.* at 819. As this Court made clear in *McKaskle v. Wiggins*, *supra,* where a defendant's right to self-representation is denied, no showing of prejudice is required. 465 U.S. at 177 n.8. *Faretta* and *McKaskle* have nothing to do with errors of counsel but everything to do with the ability of the accused to direct his own defense, even if the exercise of that ability does not seem to be in his or her best interest. *See, e.g.*, *id.* ("[T]he right of

self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant...."); *see also* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1154–55 (2010) (Although *Faretta* did not use the word 'autonomy' to describe the interest it was protecting, it is clear that the concept of client autonomy—the right to make and act upon one's own decisions free from government intervention—lay behind the Court's recognition of the right of self-representation. And indeed, the Court has since made clear that '[t]he right to appear *pro se* exists to affirm the dignity *and autonomy* of the accused.'" (Alteration in original) (quoting *McKaskle*, 465 U.S. at 176–77)).

This Court has more recently built on *Faretta*'s and *McKaskle*'s principles in *United States v. Gonzalez–Lopez*, 548 U.S. 140 (2006). In *Gonzalez–Lopez*, the central question was whether the accused was entitled to a reversal of his conviction absent a showing of prejudice from the infringement of his right to select counsel of his own choice. *Id.* at 142, 144–45. The majority, authored by Justice Scalia, emphasized "[t]he right to select counsel of one's choice ... has been regarded as the root meaning of the constitutional guarantee [of the right to counsel]." *Id.* at 147–48. This Court concluded that if the State prevents the accused from being "defended by the counsel he believes to be best," the Sixth Amendment is violated and "[n]o additional showing of prejudice is required to make the violation 'complete.' " *Id.* at 146.

In *Faretta*, this Court stressed the importance of not confusing "the right to counsel of choice—which is the right to a particular lawyer regardless of comparative

effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Id.* at 148. The right to choose counsel rooted in the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided." *Id.* at 146. As noted by Justice Alito's dissent, under the majority's approach, "a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly." *Id.* at 160. (Alito, J., dissenting).

As discussed *supra*, in *McCoy v. Louisiana*, this Court again emphasized the defendant's right to be master of the defense. 138 S. Ct. 1500, 1507–09 (2018). There, the issue was whether "allow[ing] defense counsel to concede guilt over the defendant's intransigent and unambiguous objection" violated the Sixth Amendment. *Id.*, 138 S. Ct. at 1507. This Court held it did because "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id.* at 1505; *see also id.* at 1508 ("[T]he Sixth Amendment 'contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.' " (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979)). Citing to cases such as *Faretta* and *McKaskle* and Justice Scalia's concurrence in *Martinez v. Court of Appeal of California*,[20] this Court grounded its conclusion in respect for defendant autonomy. *McCoy*, 138 S. Ct. at 1510-11.

[20] In his concurrence in *Martinez*, Justice Scalia noted, "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State." 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment).

The majority then concluded the defendant did not need to show prejudice to obtain redress for the constitutional deprivation. *Id.*, 138 S. Ct. at 1511. It noted the violation of the "protected autonomy right was complete when the court allowed counsel to usurp control of an issue within [the defendant's] sole prerogative" and characterized the "[v]iolation of a defendant's Sixth Amendment-secured autonomy" as structural error. *Id.* This Court reasoned the violation was structural error because the right at issue protects "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty" and the effects of the violation "are too hard to measure." *Id.* (quoting *Weaver v. Massachusetts*, 582 U.S. ——, 137 S. Ct. 1899, 1908 (2017)).

Thus, as the Fifth Circuit used the erroneous ineffective-assistance-of-counsel standard of *Strickland*, a grant of certiorari is needed to correct this error.

III. Sixth Amendment Rights and Structural Error.

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.

Based on clearly-established law in effect when Barbee's case became final on appeal— *McCaskle; Gonzalez-Lopez; Faretta, Waller v. Georgia,* 467 U.S. 39 (1984), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) — the error in Barbee's case was structural, not requiring a showing of prejudice or harm, and the Fifth Circuit again erred, *Barbee* at *7, in requiring a finding of prejudice:

> 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.[21]

[21] All of these cases except *Weaver* pre-date 2009, when Barbee's case was denied in state habeas.

This 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.*

Barbee too should not have been required to show prejudice because of the type of claim he presented, contrary to the holding of the Fifth Circuit. *Barbee* at *7, *9 ("Barbee must show that...the deficient performance prejudiced the defense...Barbee has not demonstrated that it was unreasonable for the state habeas court to find that Barbee was not prejudiced by counsel's closing argument.") This Court's holding in *McCoy* that the error was structural was clearly-established law well before that case was handed down. Nor has this 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)).

IV. Application Of Sixth Amendment Structural Error Principles To This Case.

It is important, as this Court emphasized in *Gonzalez–Lopez*, to distinguish between claims of ineffective assistance of counsel and other claims based on the Sixth Amendment right to counsel, such as the right to conduct one's own defense. *See* 548 U.S. at 148; *see also McCoy*, 138 S.Ct. at 1510–11 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence...."). Rather, the underlying claim is the un-counseled and against-his-will admission of his guilt which deprived Barbee 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)."

Similar to Mr. McCoy, Barbee was entitled to be in control of his own defense effort. *Faretta*, 422 U.S. at 833–34, 834 n.45 ("[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."); Hashimoto, 90 B.U. L. Rev. at 1148 (noting the Court's holding in *Faretta* "reflected a broad and powerful principle—namely, that the right to control the defense of one's own case has deep roots in both the text and history of the Constitution"). The right to be master of his defense is a right personal to him. *See Faretta*, 422 U.S. at 834 ("The right to defend is personal.... And although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring))); Note, *Rethinking the Boundaries of the Sixth Amendment Right to Counsel of Choice*, 124 Harv. L. Rev. 1550, 1550 (2011) ("Criminal defense is personal business. For this reason, the Constitution's ample procedural protections for criminal defendants are written not just to provide a fair trial, but also to put the defendant in control of his own defense."). He has the right to defend himself under *Faretta*, *see* 422 U.S. at 819. *See also Caplin & Drysdale*, 491 U.S. at 635; *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("We have long interpreted this [Fourteenth Amendment due process] standard of fairness to require that criminal

defendants be afforded a meaningful opportunity to present a complete defense."); *cf. McCoy*, —— U.S. ——, 138 S.Ct. at 1508 (noting the defendant must be "master of his own defense" even if trial management is within the province of the attorney (quoting *Gannett Co.*, 443 U.S. at 382 n.10).

And where the defendant is deprived of his right to personally conduct his defense, structural error is present. *See, e.g.*, *McCoy*, 138 S. Ct. at 1511 ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'...."and noting an error may be considered structural and thereby presumptively prejudicial " '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' " (quoting *Weaver*, 137 S. Ct. at 1908))); *Gonzalez–Lopez*, 548 U.S. at 150; *McKaskle*, 465 U.S. at 177 n.8; see also *Faretta*, 422 U.S. at 820–21 (emphasizing counsel is merely a defense tool to aid a defendant willing to use such a tool).

V. There Is A Split of Authority On The Issue of Prejudice in Post-Conviction Proceedings Where Mistakes of Trial Counsel Produced Structural Error at Trial.

It is true, of course, that this case is presented in a post-conviction proceeding and *McCoy* was a case on direct appeal. The question thus arises as to whether, in a case involving an unpreserved structural error at trial that is challenged via an

ineffective-assistance claim in post-conviction, a showing of *Strickland* prejudice is required in the proceedings. Clearly-established law indicates the answer is no.

A recent case from this Court on whether *Strickland* prejudice is required in post-conviction proceedings where the underlying error was structural in nature is *Weaver v. Massachusetts*, *supra,* 137 S. Ct. 1899 (2017). In *Weaver*, during the petitioner's trial on state criminal charges, "the courtroom was occupied by potential jurors and closed to the public for two days of the jury selection process." 137 S. Ct. at 1905. Defense counsel did not object at trial and the issue was not raised on direct review. *Id.*

Five years later, Weaver filed a motion for a new trial in state court, claiming his attorney provided ineffective assistance of counsel under the Sixth Amendment by failing to object to the courtroom closure. *Id.* at 1906. The Massachusetts state courts denied the motion because Weaver had not established *Strickland* prejudice from his defense counsel's failure to object. *Id.* at 1906–07. Weaver then appealed to this Court. *Id.* at 1905, 1907.

This Court began its analysis of structural error by noting there are at least three different rationales for structural error. *Id.* at 1908. The first rationale derives from cases where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* The *Weaver* Court cited as an example the defendant's right to conduct his own defense, which while usually leading to unfavorable outcomes, "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." *Id.*

For this type of right, harm from the deprivation thereof "is irrelevant to the basis underlying the right." *Id.*

A second rationale for characterizing an error as structural is when "the effects of the error are simply too hard to measure." *Id.* An example is when a defendant is denied the right to select his or her own attorney. *Id.* In such settings, according to the *Weaver* Court, the efficiency costs of letting the government attempt to make its case are unjustified. *Id.*

A third rationale for structural error involves "error [that] always results in fundamental unfairness." *Id.* Examples of this third type of structural error include "if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction." *Id.*

This Court noted it treats an unconstitutional courtroom closure as a structural error "[i]n the direct review context." *Id.* at 1905. And it assumed, for purposes of the case, that counsel breached an essential duty by failing to object to the unconstitutional lack of public trial. *Id.* Nevertheless, the *Weaver* Court declared that when a public trial claim is raised via ineffective assistance of counsel under the Sixth Amendment, *Strickland* prejudice is not automatically shown. *Id.* at 1911. Rather, the defendant must show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair. *Id.* at 1911 (citation omitted).

In *Weaver*, this Court emphasized the prejudice requirement "derives both from the nature of the error and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim." *Id.* at 1912 (citation omitted). This Court further observed that ordering a new trial in a post-conviction proceeding involves risks of inaccurate witness memories or lost physical evidence due to time lapse and undermines the state's interest in finality. *Id.* However, the holding in Weaver was "only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Id.* at 1907.

Justice Breyer, joined by Justice Kagan, dissented. *Id.* at 1916 (Breyer, J., dissenting). Justice Breyer characterized the majority as holding only those structural errors that lead to fundamental unfairness warrant relief in postconviction proceedings without a showing of *Strickland* prejudice. *Id.* (Breyer, J., dissenting). Justice Breyer, however, asserted all structural errors have features that "make them 'defy analysis by "harmless-error" standards.' " *Id.* at 1917 (quoting *Fulminante*, 499 U.S. at 309).

Weaver on its face is limited solely to post-conviction claims alleging ineffective assistance for failure to assert a right to a public trial. *Id.* at 1907 (majority opinion). The question arises whether the *Weaver* holding should be limited to the right to public trial or be extended to other contexts. Two recent cases show differing approaches.

In *Commonwealth v. Diaz*, a Pennsylvania court held *Weaver* did not apply to a post-conviction case where criminal defense counsel did not understand the defendant

needed a translator at his first day of trial. 183 A.3d 417, 424 & n.6 (2018). Counsel's failure to object to the lack of a translator violated the defendant's right to the assistance of counsel under the Pennsylvania Constitution. *Id.* at 422–24. The Pennsylvania court concluded that "[b]ecause the rights at issue in this case involve Appellee's inability to comprehend the criminal proceedings and not the right to keep the courtroom open during *voir dire*, the rights at issue are wholly and strikingly different from those in *Weaver*." *Id*. at 424 & n.6.

On the other hand, in *Newton v. State*, the Maryland high court also considered a case involving structural error presented in a post-conviction proceeding. 455 Md. 341, 168 A.3d 1, 6–7 (2017). The underlying error was the presence of an alternate juror in the jury's deliberations. *Id.* at 4. The *Newton* court, applying *Weaver*, required a showing of prejudice in the context of a post-conviction-relief challenge. *Id.* at 9–10.

As discussed *supra*, in *McCoy*, this Court, on review of a post-conviction proceeding, did not require a showing of *Strickland* prejudice when the defendant's trial counsel infringed the defendant's Sixth Amendment right to be master of his own defense. 138 S. Ct. at 1510–11. Instead, the Court stated,

> Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence ... to McCoy's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice. 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.
> *Id.* (citations omitted).

Prejudice should be presumed in a post-conviction proceeding for the type of structural error presented in this case, the denial of a defendant's right to be master of his case and denial of client autonomy. All three *Weaver* rationales for structural error are present here: (1) the right of Barbee to conduct his own defense, which is "not designed to protect the defendant from erroneous conviction but instead protects some other interest," *Weaver* at 1908; (2) the effects of the error here are simply "too hard to measure," *Id.*; and (3) the error resulted in fundamental unfairness, the loss of Barbee's right to assert his innocence. *Id.* These rationales were clearly-established at the time that Barbee's claim was denied in state habeas.

The Sixth Amendment rights here, the right to a guilt phase defense, are not minor or inconsequential. Unlike in *Weaver*, the constitutional error here affected the entire proceeding and not just two days of pretrial jury *voir dire. See* 137 S. Ct. at 1905. Further, unlike in *Weaver*, the purposes of the underlying rights are to protect the liberty and autonomy of the criminal defendant and ensure fairness in criminal proceedings. *See* 137 S. Ct. at 1908.

CONCLUSION

For the forgoing reasons, this Court should grant the petition for writ of certiorari to consider the important questions presented by this petition and/or remand it in light of *McCoy*.

Respectfully Submitted,

s/s A. Richard Ellis

* A. Richard Ellis

75 Magee Avenue
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251

* Counsel of Record,
Member, Supreme Court Bar

July 12, 2018.