No. 18-5289

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Stephen Dale Barbee was convicted and sentenced to death for suffocating his pregnant ex-girlfriend, Lisa Underwood, and her young son, Jayden. During state habeas, relying on *United States v. Cronic*, 466 U.S. 648 (1984), Barbee asserted that his trial counsel abandoned him by conceding that Barbee committed the crime but arguing that he did not possess the requisite intent for capital murder. The state habeas court and Texas Court of Criminal Appeals (CCA) rejected the claim, finding that counsel were not deficient and Barbee was not prejudiced under the familiar ineffective-assistance-of-counsel standard from *Strickland v. Washington*, 466 U.S. 668 (1984). On federal habeas, Barbee asserted that the state court unreasonably applied *Strickland* instead of *Cronic* to his claim. The federal district court denied his petition. The Fifth Circuit affirmed, holding that *Strickland* applied to the claim and that, assuming deficient performance, Barbee was not prejudiced. Subsequently, this Court decided *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which held that a defendant's Sixth Amendment rights were violated when the trial court permitted his attorney to concede his guilt to the jury over his strenuous objections. Barbee presents the following issue in his petition for writ of certiorari:

1. Does the Court's recent opinion in *McCoy v. Louisiana* render unreasonable—under then-existing, clearly established federal law—the CCA's rejection of Barbee's claim that he was abandoned when his trial counsel partially conceded his guilt without his consent?

2. Does structural error, raised in postconviction proceedings, require a showing of prejudice?

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BRIEF IN OPPOSITION

Petitioner Stephen Dale Barbee was convicted and sentenced to death for the murders of his pregnant ex-girlfriend, Lisa Underwood, and her son, Jayden. Barbee's trial counsel were confronted with a client who confessed multiple times to suffocating the victims, had a motive to commit the crime, was caught burying the bodies, and led the police to where the bodies were buried. In light of this overwhelming evidence, counsel made a strategic decision to argue that Barbee was not guilty of capital murder because the State failed to prove that he intended to kill Lisa Underwood. The strategy was supported by Barbee's recorded, emotional confession to his wife during which he admitted that he held Lisa down too long but that he did not mean for her to stop breathing and; it was also supported by the State's medical examiner's testimony that Lisa could have been held down for as little as thirty seconds.

In addressing his claim that his trial counsel's strategy amounted to abandonment under *Cronic*, the state court applied the *Strickland* standard and determined that trial counsel's actions were neither deficient nor prejudicial. The federal district court and Fifth Circuit agreed that *Cronic* does not apply to Barbee's claim, and held that the

state court reasonably rejected it under *Strickland*. Barbee now asks this Court to retroactively apply its recent opinion, *McCoy v. Louisiana,* to find unreasonable the state court's decision that his counsel's unauthorized, partial confession of guilt did not constitute abandonment. However, review is not warranted because (1) *McCoy,* which is based on a trial court's interference with a defendant's autonomous decision-making, has no effect on the reasonableness of the state court's rejection of Barbee's *Cronic* abandonment claim; (2) application of *McCoy* is barred by the federal habeas standard of review and federal habeas non-retroactivity principles; and (3) regardless of the applicability of *McCoy*'s rule, the circumstances of Barbee's case differ dramatically from and do not run afoul of it. For any or all of these reasons, this Court should not exercise its discretion to review Barbee's claim.

STATEMENT OF THE CASE

I. Barbee's Capital Murder Trial

The Fifth Circuit provided the following summary of the facts of the instant offense:

> On February 19, 2005, Barbee was stopped by a sheriff's deputy walking along a service road in a wooded area. Barbee was wet and covered with mud. He gave a fake name and fled after the deputy questioned his identity. Later that day, police began to investigate the disappearance of Barbee's ex-

girlfriend, Lisa Underwood, and her son, Jayden. Several days later, Lisa's car was found in a creek approximately 300 yards from where the sheriff's deputy had stopped Barbee. Police sought to talk to Barbee as a person of interest, and he agreed to come in to the police station for questioning.

According to a detective who testified at trial, Barbee admitted that he was the person who had run from the sheriff's deputy. In the midst of his recorded interrogation, Barbee took a bathroom break, and the detective escorted him. The detective testified that, while Barbee was in the bathroom, he admitted to conspiring with Ronald Dodd, his employee and the boyfriend of his ex-wife, to kill Lisa. According to the detective's testimony, Barbee, who was married, said that he thought Lisa was going to "ruin his family [and] his relationship with his wife" by disclosing that he had fathered Lisa's unborn child. The detective testified that Barbee said that he and Dodd planned to drive over to Lisa's house together, and Barbee would "try to pick a fight" with Lisa, kill her, and then he and Dodd would use Lisa's car to dispose of her body. According to the detective, Barbee said that he was eventually successful in instigating a fight with Lisa and that he killed her by holding her face in the carpet until she stopped breathing. The detective testified that Barbee said Jayden came in while he was killing Lisa and that he then killed Jayden by holding his hand over Jayden's mouth.

After this unrecorded "bathroom confession," Barbee gave a recorded confession to the police, which was ultimately suppressed. He again admitted guilt while sitting in the interview room with his wife, Trish. Trish asked Barbee how he killed Lisa, and he said, "I held her down too long." Barbee then led the detective to the spot where Jayden and Lisa were buried. Barbee later recanted, saying that he confessed because the detective threatened him with the death penalty, and because Dodd threatened his family.

At trial, one of the prosecution's witnesses was a medical examiner who opined that Lisa had been smothered to death. On cross-examination, the medical examiner stated that a "person has less cardiovascular reserve while pregnant in the third trimester than at other times." He agreed that it was "fair" to say that the more pregnant a woman was, the less time it would take for her to suffocate, depending on how she was held. Defense counsel also elicited from the medical examiner that the fact that the death was ruled a "homicide" did not bear on intent, and that there was no evidence of "what was going on" in the "mind" of the person who held Lisa down until she asphyxiated. The medical examiner said that he was not sure how long Lisa had been held down before she asphyxiated, but he thought it was "most likely at least two to three minutes." He said he could not "rule out" a shorter time frame, but he thought "it would be very unlikely." Counsel pressed him on the point of his uncertainty, eventually eliciting the following: "I think you're getting out of probability realm when you get below two minutes. But yeah, it could be 30 seconds. . . . I cannot absolutely rule that out."

In summation, defense counsel explained to the jury that the charge required them to find that Barbee had committed two knowing or intentional murders in the same transaction. He defined "intentionally" as having the "conscious objective or desire to achieve or cause the result," and "knowingly" as engaging in conduct "reasonably certain to cause the result." After attempting to impugn the testimony of the detective who testified about Barbee's bathroom confession, counsel conceded that Barbee killed both Jayden and Lisa, saying:

> 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.

> The problem in the capital murder case is the evidence in this courtroom that you heard doesn't show that Stephen Barbee had the conscious objective or desire or that he knew his conduct was reasonably certain to cause the result, those two definitions there.
>
> And it is supported by the testimony of [the medical examiner who] told you that he could not be sure when Lisa Underwood lost consciousness . . . .

Counsel concluded:

> There is evidence of a struggle inside that house. . . . It is not a one-sided fight. And Stephen Barbee's own words to his wife, it matches [sic]. That's the problem from their standpoint. What he told Trish Barbee is I held her down too long. That's exactly what matches the testimony of [the medical examiner]. And as hard as it is to do, I submit to you that the evidence in this case, the conclusive beyond-a-reasonable-doubt evidence, does not support an intentional or knowing murder for Lisa Underwood. Was he there? Yes. Did he hold her down? Yes.
>
> Did he know or intend that she was going to die or was that his conscious objective? The answer is no.

On February 27, 2006, the jury convicted Barbee of capital murder.

At the punishment phase, the State presented testimony from Barbee's ex-wife, Theresa Dowling, that Barbee had assaulted her during their marriage. Dowling also testified that Barbee confessed to her shortly after he confessed to the police. The State also presented testimony

> from a former coworker who claimed that Barbee verbally abused her after she refused his advances. Barbee presented testimony from friends, family, and acquaintances attesting to his good deeds and good character. Barbee also presented testimony from a prison security expert who testified that Barbee would be able to successfully serve a life sentence, a confinement officer who knew Barbee well, and a confinement officer who had observed Barbee's good behavior while in jail. The jury ultimately sentenced Barbee to death.

App. A at 2–3 (footnote omitted), *Barbee v. Davis*, 728 F. App'x 259, 270 (5th Cir. 2018).

II. Course of Federal and State Proceedings

Barbee was convicted of capital murder and sentenced to death on January 5, 2007. ROA.3537–42. He unsuccessfully sought appellate and state postconviction relief. *Barbee v. State*, No. AP-75359, 2008 WL 5160202 (Tex. Crim. App. Dec. 10, 2008), *cert. denied*, 130 S. Ct. 144 (Oct. 5, 2009); App. E, *Ex parte Barbee*, No. WR-71070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009).

In his state habeas application, Barbee argued that "he never consented or acquiesced to" counsel's strategy to concede guilt to the lesser included offense of murder; thus, it constituted abandonment under *Cronic*. ROA.3640–42 (citing 466 U.S. at 659 and *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991)). The state court, applying the

Strickland standard, held that counsel's strategy was not deficient and that Barbee was not prejudiced. ROA.3759—80 (convicting court's findings and conclusions); App. E at 2 (adopting findings and conclusions).

After Barbee filed his federal habeas petition, ROA.115–462, the court below allowed him to return to state court to raise previously unpresented claims. ROA.1532–39. Barbee then raised twenty-one claims in a subsequent state habeas application, including his abandonment claim. ROA.3194–494. After remanding a conflict-of-interest claim for a hearing, the CCA denied habeas relief on the remanded claim and dismissed the other claims—including the abandonment claim at issue here—as abusive. *Ex parte Barbee*, No. WR-71,070-02, 2011 WL 4071985 (Sept. 14, 2011); *Ex parte Barbee*, 2013 WL 1920686 (May 8, 2013).

Upon Barbee's return to federal court, he complained that the state court improperly resolved his *Cronic* claim with reference to *Strickland*. ROA.216–22. The federal district court denied his claim, finding that *Cronic* did not apply to the claim and that Barbee could not demonstrate deficient performance or prejudice under *Strickland*. App. D at 24–26,

Barbee v. Stephens, No. 4:09-CV-074-Y, 2015 WL 4094055 (N.D. Tex. July 7, 2015). The district court denied Barbee habeas relief, denied his application for a Certificate of Appealability (COA), and denied his motion to alter or amend judgement. App. D; ROA.3157–83 (*Barbee v. Stephens*, 2015 WL 5123356 (Sept. 1, 2015)).

Barbee then filed an application for COA in the Fifth Circuit alleging four claims. The Fifth Circuit denied COA on three claims and granted COA on Barbee's *Cronic* abandonment claim. App. C at 7, *Barbee v. Davis*, 660 F. App'x 293, 300 (5th Cir. 2016). After subsequent briefing and oral argument, the Fifth Circuit denied Barbee's abandonment claim, agreeing with the district court that *Cronic* did not apply and finding that, even assuming counsel were deficient, the state court reasonably determined that there was no prejudice. App. A at 9. This petition follows.

STANDARD OF REVIEW

The state court applied clearly established, then-existing federal precedent and adjudicated Barbee's present claim on the merits. As such, the claim was subject to review under 28 U.S.C. § 2254(d). *See Harrington v. Richter*, 562 U.S. 86, 98–99 (2011). This section, as

amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), "imposes a highly deferential standard of review for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt," *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam) (quoting *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam)), and such review "is limited to the record that was before the state court," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

As a predicate to federal habeas relief, Barbee was required to show that the state-court decision was (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States under § 2254(d)(1); or (2) that it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding under § 2254(d)(2). As to any state-court fact findings, Barbee carried "the burden of rebutting the presumption of correctness by clear and convincing evidence." § 2254(e)(1).

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit Properly Determined that this Court's Pending Consideration of *McCoy* Could Not Affect the Reasonableness of the State Court's Decision.

Barbee has consistently raised a claim that his trial counsel's unauthorized, partial concession of guilt constituted abandonment under the second *Cronic* scenario in which an attorney "entirely fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. at 659; ROA.3640–42 (initial state habeas application); ROA.220–22 (federal habeas petition); *Barbee v. Davis*, No. 17-70022 (5th Cir.), Application for COA at 26–32; *id.*, Appellant's Brief at 29–57. Each court to address the issue has determined that *Cronic* did not apply and has denied his claim under the *Strickland* standard. ROA.3759–80 (convicting court's findings and conclusions); App. E (CCA Order); App. D (federal district court opinion); App. A (Fifth Circuit opinion).

As the Fifth Circuit explained, the rejection of Barbee's *Cronic* argument was consistent with this Court's opinion in *Florida v. Nixon*, which held that counsel's decision, in a death penalty case, to fully concede guilt without the defendant's consent was governed by

Strickland not *Cronic*.[1] App. A at 4–6 (citing *Nixon*, 543 U.S. 175 (2004)). And, relying on *Nixon*, multiple federal circuit courts have determined that the *Strickland* standard, not *Cronic*, applies to a strategic concession of guilt, even in circumstances where counsel did not consult with the defendant or where the defendant objected to counsel's strategy. *See e.g.*, *Darden v. United States,* 708 F.3d 1225, 1232 (11th Cir. 2013) (holding that counsel's decision to concede guilt to an offense is governed by *Strickland* even if counsel fails to consult with the client about the decision); *Lockett v. Trammell*, 711 F.3d 1218, 1248 (10th Cir. 2013) (same); *United States v. Thomas*, 417 F.3d 1053, 1058 (9th Cir. 2005) (same); *Haynes v. Cain*, 298 F.3d 375, 380 (5th Cir. 2002) (*Strickland* applied to counsel's decision to concede guilt to a lesser-included offense even where defendant objected to counsel and trial court, "specifically request[ing] that his attorneys not make any concessions regarding his guilt for the commission of the offense").

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[1] The Fifth Circuit explained that Barbee received "at least as much if not more 'meaningful' guilt phase advocacy" than in *Nixon*. App. A at 5. In this regard, Barbee's counsel did not fully concede Barbee's guilt; their strategy was aimed at securing a not guilty verdict for capital murder. *Id*.

Perhaps recognizing that a wall of federal precedent stands against his *Cronic* claim, Barbee now switches gears, arguing that this Court's recent opinion in *McCoy* renders the state court's rejection of his claim unreasonable. In *McCoy*, this Court held that the trial court erred structurally when "the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant 'committed three murders. . . . [H]e's guilty.'" *McCoy*, 138 S. Ct. at 1505 (citation omitted). McCoy strenuously objected at least twice to his counsel's strategy to concede guilt: once, at a pretrial hearing during which the trial court told counsel, "you are the attorney . . . you have to make the trial decision of what you're going to proceed with"; and second, during his counsel's closing argument, to which the trial court responded by informing McCoy that his counsel was representing him and that the court "would not permit 'any other outbursts.'" *Id.* at 1506 (citations omitted). McCoy also maintained his innocence during his testimony to the jury. *Id.* at 1507.

This Court specifically reasoned that neither *Strickland* nor *Cronic* applied to McCoy's circumstances. *Id.* at 1510–11. Instead, relying

primarily on *Faretta v. California*, the Court held that McCoy's right to make autonomous decisions about his defense was violated. *Id.* at 1507–12; *Faretta v. California*, 422 U.S. 806, 823 (1975) (trial court violated defendant's Sixth Amendment rights by forcing him to accept appointed counsel after he had unequivocally expressed his desire to represent himself). It concluded, "Once he communicated [his desire to maintain his innocence] to court and counsel, strenuously objecting to [counsel's] proposed strategy, a concession of guilt should have been off the table. The *trial court's allowance* of [counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment." *Id.* at 1512 (emphasis added).

This opinion, however, was issued after both the state court and the lower federal courts decided Barbee's current claim. Aware of the pendency of *McCoy,* the Fifth Circuit, in its opinion affirming the denial of habeas relief, noted:

> We recognize that the Supreme Court will likely provide additional guidance in its decision in *McCoy v. Louisiana*. However, 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. *See* § 2254(d). We therefore decline to withhold our judgment pending the Court's decision in McCoy.

App. A at 7 (citations omitted). Indeed, this Court should not even consider *McCoy* for three reasons: (1) Barbee's argument has never involved *Faretta*; (2) under the AEDPA standard of review, *McCoy* is not the measure by which the state court opinion is judged; and (3) application of *McCoy*'s new rule is barred by federal non-retroactivity principles.

A. Barbee's new argument under *McCoy* cannot prove the state court decision unreasonable and is waived by his failure to present it to the lower federal courts.

While at the time the it issued the decision on Barbee's claim, the Fifth Circuit was not aware of it, *McCoy*'s holding ultimately provided no guidance related to, and did not alter the scope of, *Cronic* or *Strickland* claims. Nonetheless, Barbee attempts to avail himself of *McCoy*'s *Faretta*-based rule even though he relied on *Cronic* in state court and the lower federal courts. But, notwithstanding his efforts to shoehorn his claim into the issue, Barbee's argument does not even fit *McCoy*'s framework.

A claim under *Cronic* blames trial counsel for abandoning his or her client; a violation of *Faretta*, and likewise *McCoy*, faults the trial court for failing to respect the defendant's autonomous decision-making. *Compare Cronic*, 466 U.S. at 659, *with Faretta*, 422 U.S. at 823. Here, as explained further below, unlike *McCoy* and *Faretta*, there was no objection made to, or ruling by, the trial court related to the complained of conduct. *See infra* Section II(A). Indeed, in state court, federal district court, and the Fifth Circuit, Barbee did not rely on the theory upon which *McCoy* is based. Despite providing extensive and constantly updated briefing, he did not even cite *Faretta*, *McKaskle v. Wiggins*,[2] *United States v. Gonzalez-Lopez*[3] or any of the self-representation or choice-of-counsel cases relied upon by *McCoy*.

Plainly, the CCA could not have unreasonably failed to find a constitutional violation based on a theory that was not presented to it. *See* § 2254(d); *Pinholster*, 563 U.S. at 181. In other words, its

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[2] 465 U.S. 168 (1984) (explaining that the denial of right to self-representation is structural).

[3] 548 U.S. 140 (2006) (trial court's denial of defendant's right to choice of counsel was structural error).

determination that Barbee was not abandoned by counsel under *Cronic* could not have been unreasonable on grounds that it should have determined the trial court deprived him of his autonomy under *Faretta*.[4] *See id*.

The same is true for the lower federal courts. While Barbee points out that, in his Fifth Circuit merits brief, he argued that his plea was the equivalent of an involuntary confession, it was in support of his contention that *Cronic*, not *Strickland*, applied to his case.[5] Petition at 22 (citing *Barbee v. Davis*, No. 17-70022 (5th Cir.), Appellant's Brief at 44–56). Indeed, as required by AEDPA, his claim was confined to his argument exhausted in state court. *See* § 2254(b). Barbee has thus waived his assertion of a violation of his right to make autonomous trial decisions under *McCoy* and *Faretta*. *Meyer v. Holley*, 537 U.S. 280, 292 (2003) ("But in the absence of consideration of that matter by the Court

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[4] To the extent his *McCoy* argument represents a new claim, it is unexhausted, procedurally barred, and still waived in federal court. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *Meyer*, 537 U.S. at 292.

[5] In any event, his "involuntary confession" argument was made for the first time in the Fifth Circuit. Even if the argument rested on a predicate similar to the basis of *McCoy*'s holding—which it did not—it could not have affected the reasonableness of the state court decision. *See* § 2254(d).

of Appeals, we shall not consider it."); *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

Accordingly, even if *McCoy* were simply an application of this Court's prior jurisprudence—which, as explained below, it was not—Barbee's argument in this Court cannot be considered because it is the first time he has made it.

B. The federal habeas standard of review precludes consideration of *McCoy*.

As the Fifth Circuit explained, even if *McCoy* had shed light on the applicability of *Cronic* to an attorney's decision to partially concede guilt, it could not have affected the outcome of Barbee's federal habeas case. App. A at 7. After a claim has been exhausted in the state courts and a decision has been obtained, § 2254(d) supplies the federal habeas standard of review—a showing that the state court's ruling was contrary to or an unreasonable application of this Court's precedent. *Pinholster*, 563 U.S. at 181. Importantly, § 2254(d) has restrictions that honor the delicate balance between state and federal court systems. *Id*. at 182. The applicable restriction here is that "§ 2254(d)(1) focuses on what a state

court knew and did. State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" *Id*. (quoting *Lockyer v. Andrade*, 583 U.S. 63, 71–72 (2003)).[6] Here, *McCoy* was issued after the CCA ruled on Barbee's present claim; thus, as the Fifth Circuit explained, it is not the "measure" by which the CCA's decision can be evaluated.

Nonetheless, Barbee argues that *McCoy* simply reaffirmed previous clearly established federal law. Petition at 15. However, the reasoning of *McCoy* itself belies that assertion as it explicitly set-out to resolve a split among state courts. 138 S. Ct. at 1507.

Further, as explained above, multiple federal circuit courts have determined that the *Strickland* standard applies to circumstances similar (but not identical to) McCoy's. *See e.g*., *Darden,* 708 F.3d at 1232; *Lockett*, 711 F.3d at 1248; *Thomas*, 417 F.3d at 1058; *Haynes*, 298 F.3d

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[6] For example, in *Greene v. Fisher*, the state inmate was tried for murder having his co-defendants' redacted confessions admitted against him. 565 U.S. 34, 36 (2011). Three months after the relevant state-court adjudication, this Court held in *Gray v. Maryland* that the use of co-defendants' redacted confessions violated the Confrontation Clause. *Id*. at 36–37 (citing *Gray*, 523 U.S. 185, 195 (1998)). Though three months may seem slight, that timing mattered and it was conclusive in *Greene*—"*Gray* was not 'clearly established Federal law' against which it could measure the [state court]'s decision." *Id*. at 40.

at 380.[7] And it is telling that Barbee's argument rests almost entirely on his attempt to compare his case to *McCoy*, not cases preceding it.[8]

Finally, as explained above, even Barbee did not propound this theory in the state and lower federal courts. Nor did he rely on the cases

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[7] These cases addressed circumstances where counsel either conceded guilt without consulting the defendant or partially conceded guilt over the defendant's express objection. None of them confronted the same facts as *McCoy* where the Court found that counsel fully conceded guilt over the defendant's consistent, express objections. Nor does Barbee's case. Indeed, *McCoy*'s circumstances were unique and its ruling was expressly and narrowly tailored to its "stark scenario." 138 S. Ct. at 1510. It thus did not overrule the federal precedent cited above. Nonetheless, the absence of any discussion of *Faretta* or other self-representation or choice of counsel cases by these federal courts, and their ultimate holdings that *Strickland* applied, establishes that the rule in *McCoy* is new.

[8] Barbee notes that many of the examples of structural error cited by *McCoy* predated the CCA's adjudication of his claim. Petition at 28, 28 n. 21. Specifically, Barbee refers to *McKaskle*, 465 U.S. at 177 n.8; *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984); and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Petition at 28. But none of these cases in any way compelled the extension of structural error to a strategic decision made by counsel to concede guilt. And all of the cited language relates to trial court error. The cited language from *McKaskle* simply held that the denial of the right to self-representation is structural error. 465 U.S. at 177 n. 8. But, ultimately, the *McKaskle* Court held that the trial court's appointment of standby counsel did not violate the defendant's right to self-representation. *Id*. at 184. *Waller* held that the trial court's denial of the right to a public trial is not subject to a "specific prejudice requirement." 467 U.S. at 49–50. And *Sullivan* held that the trial court committed structural error by providing a deficient reasonable-doubt instruction in a jury charge. 508 U.S. at 280–81. The fact that the concept of structural error existed prior to *McCoy* does not mean that *McCoy*'s recognition of structural error in the specific circumstances before it was simply an application of prior case law.

discussed by *McCoy*. This is likely, at least in part, because *McCoy*'s legal basis did not exist at the time. That is, prior to *McCoy*, a defendant's right to autonomous decision making under these cases had never previously been extended to circumstances where counsel makes a strategic decision to concede guilt. If Barbee himself could not raise an argument that the reasoning from *McCoy* applied to his case, certainly, the CCA was not required to foresee *McCoy*'s holding. Thus, unquestionably, *McCoy* was not simply an application of prior case law, and AEDPA precludes consideration of its new rule.

C. Non-retroactivity principles also bar the federal courts from considering *McCoy*.

In addition to § 2254(d), the non-retroactivity principles this Court established in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), prohibit the lower court from considering *McCoy* because it enunciated a new rule. *Teague* arose to facilitate federal and state-court comity by "validat[ing] reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKeller*, 494 U.S. 407, 414 (1990). The *Teague* test follows three steps:

> First, the date on which the defendant's conviction became final is determined. Next, the habeas court considers whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution. If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine. The first, limited exception is for new rules forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. The second, even more circumscribed, exception permits retroactive application of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Whatever the precise scope of this [second] exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.

O'Dell v. Netherland, 521 U.S. 151, 156–57 (1997) (alterations in original) (citations omitted) (internal quotation marks omitted). Following *Teague*, it is clear that the federal courts cannot apply *McCoy* to the CCA's adjudication of Barbee's claim.

Barbee's conviction became final well before this Court's holding in *McCoy*. *See Barbee v. Texas*, 130 S. Ct. 144 (Oct. 5, 2009) (cert. denied); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (defining "final" as, inter alia, when "the time for a petition for certiorari has elapsed or a

petition for certiorari is finally denied"). The question is, then, whether *McCoy* announced a new rule. As explained above, it undoubtedly did.

Finally, McCoy's rule is not substantive. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) ("[R]ules that regulate only the manner of determining the defendant's culpability are procedural."). Nor is it watershed. *See Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (explaining that "[f]irst, the rule must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction[,]" and, "[s]econd, the rule 'must alter our understanding of the bedrock elements essential to the fairness of a proceeding.'" (internal quotation omitted)). Because *McCoy* represents a new rule and Barbee fails to prove an exemption from or exception to *Teague*, the federal courts are precluded from considering *McCoy* in their assessment of the state court decision.

II. The State Court's Application of *Strickland* was Reasonable, Even in Light of *McCoy*.

A. Unlike in *McCoy*, Barbee did not vociferously object to a partial admission of guilt.

This Court distinguished McCoy's circumstances from its prior holding in *Nixon*—which held that a strategic decision to concede guilt is governed by *Strickland*—on the basis that McCoy "opposed counsel's

assertions of guilt at every opportunity before and during trial, both in conference with his lawyer and in open court." *McCoy*, 138 S. Ct. 1509 (citing *Nixon*, 543 U.S. at 181, 185). It noted that McCoy "adamantly objected to any admission of guilt" both to counsel and directly to the trial court; he also testified at trial that he did not commit the crime. *Id.* at 1505–07. Despite these persistent objections, the "trial court permitted" counsel to concede McCoy's guilt. *Id.* at 1506. The *McCoy* court found structural Sixth Amendment error in "this stark scenario." *Id.* at 1510.

In state court, Barbee argued that counsel abandoned him at a critical stage of his trial because "he never consented or acquiesced to allowing his attorney to confess his guilt in final argument." ROA.3640–42. And he continues to contend that after initially confessing, he consistently "insisted on his innocence" to his attorneys.[9] Petition at 19.

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[9] In response to Barbee's initial state habeas petition, trial counsel provided an affidavit explaining that after initially confessing, Barbee changed stories and consistently maintained that his friend, Ron Dodd, was the real killer. Counsel stated that there was no evidence to support the theory and that Barbee refused to testify. ROA.3912. They also explained that it was difficult to develop a defensive theory because Barbee refused to testify and was "continuously changing his version of events." ROA.3909. Counsel also attached a memorandum of understanding, which they had Barbee sign prior to trial. ROA.3917. The memorandum reflects that Barbee maintained that Ron Dodd committed the crime and details counsel's extensive investigation into presenting an innocence defense. ROA.3917. As the federal district court explained, while Barbee's assertions of innocence to counsel may have been

In his petition, he asserts that he did not "give permission" for the partial concession of guilt, and that it was "unauthorized." Petition at ii, 5, 6, 9 n. 11, 12, 14. But he has never alleged that he objected to counsel's strategy; nor is there *any* evidence in the record of such an objection.[10]

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consistent, his assertions to police and to his family were not; counsel was aware that Barbee had confessed (1) in the bathroom of the police station; (2) in a recorded confession to his wife; and (3) to his ex-wife Theresa. App. D at 25.

[10] Barbee maintains that his situation is like *McCoy* because counsel did not fully consult with him about the strategy. Petition at 17. However, he did not make this argument in state court; he simply asserted that counsel did not obtain his consent. ROA.3640–42. Thus, the state court could not have unreasonably rejected his claim based on counsel's failure to consult with him. *See* § 2254(d).

Moreover, there is no evidence to support the allegation that counsel did not consult appropriately with Barbee—from the initial habeas proceedings or presented thereafter. ROA.3917 (memorandum of understanding describing significant consultation between counsel and Barbee); *see infra* Section II(B) (explaining that evidence related to consultation provided in subsequent state habeas application—which is *Pinholster*-barred—confirms that counsel consulted Barbee and that he did not specifically object to the strategy). In any event, and perhaps most importantly, this Court in *Nixon* explicitly cited *Strickland* when referencing counsel's duty to consult with the defendant prior to conceding guilt. *Nixon*, 543 U.S. at 178–79. In turn, multiple federal circuit courts have determined that *Strickland* applies when counsel concedes guilt without consulting their client. *See* App. A at 6 (Fifth Circuit's explanation that no Supreme Court precedent holds that counsel must consult the defendant before conceding guilt); *Darden,* 708 F.3d at 1232; *Thomas*, 417 F.3d at 1058; *Lockett*, 711 F.3d at 1248. *McCoy* limited its holding to the "stark scenario" before it; the Court did not purport to overrule its prior citation to *Strickland* in *Nixon* or these decisions from multiple circuits.

Moreover, unlike *McCoy*, Barbee did not maintain his innocence during testimony; quite the opposite, he *refused* to testify in support of an innocence defense. ROA.3912 (attorney affidavit); ROA.3917 (pretrial memorandum of understanding). Thus, the only words the jury heard from Barbee were from the recording of his tearful confession to his wife that he had, in fact, committed the crime. Ultimately, there is no evidence that counsel usurped Barbee's autonomy by conceding guilt to the lesser included offense in pursuit of obtaining a not guilty verdict for capital murder. Instead, Barbee's assertion, especially as raised in state court, is almost identical to the claim in *Nixon*, where the defendant did not complain about counsel's strategy until after trial.

Importantly, Barbee never informed the trial court that he was opposed to counsel's strategy.[11] As explained above, *McCoy*—and the *Faretta* jurisprudence upon which it relied—is predicated on trial court error. But, here, the trial court was not aware of Barbee's purported

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[11] Barbee cites letters he filed with the trial court asking that his trial counsel be dismissed because there was a breakdown in communication between Barbee and counsel and because counsel was not keeping Barbee advised of updates in the case. Petition at 6 n. 6 (citing ROA.3514–18). Both letters were filed months before trial; neither letter indicates that Barbee had any concern with counsel's strategy at trial.

disapproval of counsel's argument; thus, it could not have erred by permitting it.

It follows, then, that the new rule created in *McCoy* does not apply to these circumstances. And even if the state court had been required to predict *McCoy*'s holding, its adjudication using the *Strickland* standard still would have been reasonable and appropriate.

B. Much of the evidence upon which Barbee relies is barred from consideration by *Pinholster*; regardless, the expanded record further confirms that Barbee did not object to counsel's strategy.

In his petition, Barbee references at least two pieces of evidence that simply were not before the state court when it adjudicated his claim. First, he cites affidavits and his own declaration indicating that he and his family were shocked when counsel made their closing argument. Petition at 5 (citing ROA.3843, 3823). These documents were attached to his federal habeas petition and his *subsequent* state habeas application.[12]

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[12] While Barbee re-raised his *Cronic* claim in his subsequent state writ, the CCA dismissed it as abusive. *See Ex parte Barbee*, 2013 WL 1920686 at *1; Tex. Code of Crim. Proc., Article 11.071, Section 5; *see Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998) (explaining that Texas's abuse-of-the-writ doctrine is a regularly and strictly applied doctrine that bars federal habeas review). Thus, as Barbee agrees, his claim was properly exhausted and adjudicated in the initial state habeas proceedings, and it is that adjudication that is subject to deference under § 2254(d). Petition at 10–11; ROA.220–22

Second, he cites counsel's testimony during a hearing related to his conflict of interest claim raised during his subsequent state habeas proceedings. *Id.* at 5–6. At the hearing, counsel was asked if he informed Barbee that he was going to make the partial concession of guilt. ROA.4661. Counsel responded that he had typed a memo explaining that "the only way we could get through this and him be found not guilty was to" argue that Lisa's death was unintentional. *Id.* He showed the memo to Barbee on the morning of trial, not in order to get his permission but to explain his theory of the case. *Id.* Counsel explained, "So did I explicitly ask him if I could do that? The answer is no. Did he explicitly tell me not to do it? The answer is no."[13] *Id.*

None of this evidence was provided during Barbee's initial state habeas application in which his current claim was adjudicated. Thus, it

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(arguing that the state court's adjudication of Barbee's *Cronic* claim in the initial state habeas application was unreasonable).

[13] As explained above, federal precedent confirms that counsel has a duty to consult with the defendant about any plans to make a concession; but this duty is governed by *Strickland*. *See supra* n. 10; *Nixon*, 543 U.S. at 178–79. *Darden,* 708 F.3d at 1232; *Thomas*, 417 F.3d at 1058; *Lockett*, 711 F.3d at 1248. Here, even considering the expanded record, Barbee fails to cite any law indicating that counsel failed in their duty to consult with Barbee by informing him of their strategy, but not explicitly asking permission to make the argument. And even if this level of communication were deficient, Barbee would still be required to show prejudice under *Strickland*.

is barred from consideration by this court. *See Pinholster*, 563 U.S. at 181 (review under § 2254(d) "is limited to the record that was before the state court").

Nonetheless, the district court and Fifth Circuit, without considering *Pinholster*'s limitations, analyzed the evidence and determined that it did not help Barbee's *Cronic* argument. App. A at 6; App. D at 25. Likewise, the subsequent proceedings in state court highlight the drastic difference between Barbee's circumstances and *McCoy*. Indeed, the expanded record confirms that Barbee was informed of counsel's strategy and did not object to it either directly to counsel or to the trial court.

C. Unlike *McCoy*, counsel did not fully concede guilt.

In *McCoy*, this Court appeared to hold that counsel's guilt-phase strategy amounted to a full concession of guilt to the charged first-degree murder. In this regard, the Court explained that while McCoy's counsel asserted that mental incapacity prevented him from forming the requisite intent, in actuality, the "second-degree strategy would have encountered a shoal, for Louisiana does not permit introduction of

evidence of a defendant's diminished capacity absent the entry of a plea of not guilty by reason of insanity." *McCoy*, 138 S. Ct. at 1506, n. 1.

In the court below, Barbee pressed a similar argument—that counsel's strategy was untenable under Texas law—and the Fifth Circuit flatly rejected it. App. A at 5–6. Indeed, in order for Barbee to be found guilty of capital murder, the State had to prove that he committed two intentional murders. ROA.3525–26. (jury charge requiring two intentional murders for capital murder); Tex. Penal Code § 19.03(a)(7)(A). Despite the overwhelming evidence proving that Barbee killed both victims, counsel sought to defeat the capital murder charge by taking advantage of Barbee's emotional, recorded confession to his wife, in which he stated that he just held Lisa down too long and did not mean to do it.[14]

[14] In his petition, Barbee also states, "No effort was made to develop Barbee's claim of innocence prior to trial." Petition at 5. The record belies that assertion. The state habeas court delivered findings explaining that counsel arrived at their strategy only after a thorough investigation. ROA.3760–61 (¶¶ 7–18). Specifically, the court explained that trial counsel explored the possibility of arguing that the tape of Barbee's confession was altered by police and retained and interviewed an expert on false confessions; however, neither of these investigations provided any evidence that would have helped counsel attack the reliability of Barbee's confessions. ROA.3761–62 (¶¶ 21–26).

To support the argument, counsel elicited testimony from the State's medical examiner who agreed that he could not be sure how long Lisa was held down and that it could have been as little as thirty seconds. 23 RR 200–01. They also extensively cross-examined prosecution witnesses attempting to discredit police officer testimony that Barbee had admitted to planning the murder prior to being recorded. *See e.g.* 24 RR 135–45. At closing argument, counsel tied it all together, arguing that the medical examiner's testimony matched Barbee's statements in his confession that he had not intended to murder Lisa. 25 RR 8–16.

Thus, unlike in *McCoy*, Barbee's counsel presented an argument that had been developed throughout trial and that could have resulted in Barbee being found not guilty of capital murder.

III. There was no structural error; thus, Barbee was required to show prejudice (Issue 2).

Barbee also asks, "Whether structural error, raised in postconviction proceedings, requires a showing of prejudice?" Petition at ii. This argument is ultimately a straw man. Indeed, *McCoy* explicitly held that prejudice was presumed because the error was structural. 138 S. Ct. at 1511–12. Thus, *if McCoy* applied *and* Barbee's circumstances

violated its rule, he would not have to show prejudice. But as explained above, neither requisite condition applies.

Nonetheless, to manufacture this issue and illusory split of authority, Barbee entirely misrepresents the basis of his claim. He characterizes his argument as relating to "unpreserved error at trial that is challenged via an ineffective assistance of trial counsel claim in post-conviction . . . ." *Id.* at 32. This Court has indicated that a petitioner asserting such a claim still must show resulting prejudice. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–12 (2017).

However, Barbee has not raised a claim of ineffective assistance of counsel for failing to challenge or preserve structural error. Instead, in state court and the lower federal courts, the issue was whether counsel's argument—in and of itself—constituted abandonment, or alternatively ineffective assistance. Now, for the first time in this Court, Barbee argues that counsel's performance—again, in and of itself—constituted structural error under *McCoy*. But, as explained at length above, *McCoy* does not apply here. And the state and lower federal courts properly held *Cronic* did not apply to Barbee's claim—a ruling he does not currently

challenge. Thus, there was no structural error. And Barbee's second issue is not implicated by his claim or worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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