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

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REPLY BRIEF OF PETITIONER

CAPITAL CASE

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Respondent's Brief In Opposition ("BIO") is based on assertions regarding the record, Mr. Barbee's arguments, and the law that do not withstand scrutiny. In this case involving the trial attorney's unauthorized admission of his client's guilt to the jury, Respondent ("the Director") argues that (1) the Fifth Circuit correctly determined that the pending consideration of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) could not affect the reasonableness of the state court decision (BIO at 10-22); (2) that the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984) was reasonable even in light of *McCoy* (BIO at 22-30); and (3) that the admission was not structural error and

prejudice has to be shown. These arguments are all unavailing and/or are contradicted by both the law and the record, as shown in Barbee's petition and herein.

I. Introduction.

It is undisputed that Mr. Barbee's trial counsel told the jury that he was guilty without consulting him and without his permission.[1] In *McCoy*, this Court considered the same issue, whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's unambiguous objection:

> We hold that a defendant has the right to insist that 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. Guaranteeing a defendant the right "to have the Assistance of Counsel for his defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.
> *McCoy*, 138 S. Ct. at 1505.

This Court reasoned that "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." 138 S. Ct. at 1508. This Court also held that the unauthorized admission and violation of the

[1] The Director argues only that Barbee did not "vociferously object" (BIO at 22-26) or just plain "object." (BIO at 26-28). This ignores the fact that Barbee could not object because trial counsel did not first consult Barbee and inform him of the plan, unlike Mr. McCoy, who was at least afforded that minimal courtesy. *McCo*y, 138 S. Ct. at 1506 n. 2 (McCoy was informed at least "two weeks before trial commenced" and perhaps earlier). Barbee did not have the opportunity to object.

defendant's Sixth Amendment right is a structural error not subject to harmless error review. As this Court explained in *McCoy*:

> 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. Structural error affects the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself. 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. 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.
> *McCoy*, 138 S. Ct. at 1511.

The Director's attempts to avoid the clear implications of *McCoy* are unavailing.

II. The Fifth Circuit Erred In Determining That *McCoy* Could Not Affect The Outcome Of This Case.

Initially, the Director attempts to avoid *McCoy* by arguing that Barbee raised only a claim under *Strickland* and/or *United States v. Cronic*, 466 U.S. 648 (1984). BIO at 10-13. Then the Director asserts that "Barbee now switches gears" because "Barbee's argument has never involved *Faretta* [*v. California,* 422 U.S. 806 (1975)]." (BIO at 12-14). This distorts *McCoy* by terming it a "*Faretta*" holding when it was clearly much broader than that.[2] The actual *McCoy* holding was that "[t]he Sixth Amendment

[2] *See, e.g., State v. Horn,* 251 So. 3d 1069, 1075 (2018) (*"McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense.") In his petition, Barbee showed that *McCoy* was based on Supreme Court case law upholding the principle of client

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 view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 138 S. Ct. at 1503, 1507-12.

The Director attempts to circumvent the holding of *McCoy* by misrepresenting Barbee's arguments in the court below. Before *McCoy* was granted certiorari, the Fifth Circuit granted a COA on 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). That the issue was framed in terms of *Strickland/Cronic* prior to this Court's grant of certiorari and decision in *McCoy* does not mean that Barbee has "switched gears, " as the Director contends. Mr. McCoy likewise cited both *Strickland* (at 16, 21) and *Cronic* (at 16, 21, 23, 27) in his petition for certiorari.[3] And, notably, Mr. McCoy and the State both extensively argued ineffective assistance of counsel in their briefs in this Court, even *after* this Court's grant of certiorari, as the *McCoy* opinion

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autonomy that was well-established in 2009 when Barbee's state habeas petition was denied. These cases included, but were not limited to, *Faretta*. *E.g., Illinois v. Allen,* 397 U.S. 337 (1970); *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Gannett Co. v. De Pascuale*, 443 U.S. 368 (1979); *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006)*;* and *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 165 (2000). Petition at 15-21, 24. The Director thus misrepresents by asserting that "it is telling that Barbee's argument rests almost entirely on his attempt to compare his case to *McCoy*, not cases preceding it." (BIO at 19).

[3] *See* http://www.scotusblog.com/wp-content/uploads/2017/09/16-8255-petition.pdf (last accessed October 26, 2018).

noted. ("[W]e do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington*...or *United States v. Cronic*, 466 U.S. 648...to McCoy's claim." See Brief for Petitioner 43-48; Brief for Respondent 46-52." *McCoy* at 1510-11).

Contrary to the Director's assertions, the Sixth Amendment issue decided in *McCoy* was thoroughly briefed in the Fifth Circuit after the COA grant. Barbee argued extensively in his principal brief (at 36-42) that his case was distinguishable from *Florida v. Nixon*, 543 U.S. 175 (2004), just as this Court distinguished *Nixon* in its opinion. *McCoy*, 138 S. Ct. at 1505, 1509-10. Barbee argued, in Section D(iii) of his brief that "the unauthorized concession of guilt deprived Barbee of his constitutional right to trial by jury" (Brief at 40-42), which is the basis and core of the *McCoy* holding, 138 S. Ct. at 1510 ("Although defense counsel is free to develop defense theories based on reasonable assessments of the evidence...she cannot usurp those fundamental choices given directly to criminal defendants by the United States [Constitution]," quoting *People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010).

In the Fifth Circuit, Barbee also extensively argued *McCoy*'s core holdings in Section II of his brief, under these headings:

- "Even if Ray's concession of guilt was not the equivalent of a guilty plea, it required the constitutional protections given to confessions, which require voluntary consent." (Brief at 49-50)

- "Ray's concession of guilt was the equivalent of an involuntary confession, which cannot be the basis of conviction, regardless of the weight of the evidence against the accused" (Brief at 50-52)

- "The concession of guilt was not freely and voluntarily made by Barbee" (Brief at 52-56)

- "Barbee cannot be convicted by his attorney's words" (Brief at 56-57).

All these Fifth Circuit arguments are implicated by *McCoy* and all refute the Director's assertion that "Barbee has thus waived his assertion of a violation of his right to make autonomous trial decisions under *McCoy* and *Faretta*." (BIO at 16). The Director's argument rests on the untenable premise that not only must Barbee have anticipated this Court's holding in *McCoy* before the grant of certiorari, but he must also have been so prescient as to correctly predict the precise authorities upon which that as-yet-undecided case would hinge....even though *McCoy* did not hinge solely on *Faretta* or the other two cases cited by the Director and even though both parties in *McCoy* also argued the ineffective-assistance-of-counsel theory.[4]

Her argument that "Barbee did not rely on the theory upon which *McCoy* is based" (BIO at 15) misrepresents the record and *McCoy* itself. Both Barbee's briefing, his

[4] In that vein, it is worth noting that McCoy's petition for certiorari also did not mention two of the three cases the Director faults Barbee for not citing (BIO at 15): *McCaskle v. Wiggins*, 465 U.S. 168 (1984) and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The Director also misleads by pointing to the lack of citation to these cases "[d]espite providing extensive and constantly updated briefing." (BIO at 15). This ignores the fact that *all* of this briefing, and indeed the Fifth Circuit's opinion, occurred *prior* to the May 14, 2018 decision in *McCoy*.

arguments in the court below, and *McCoy* are based on the Sixth Amendment. ("Guaranteeing a defendant the right 'to have the Assistance of Counsel for his defence,' the Sixth Amendment so demands" *McCoy* at 1505, 1507; "the Sixth Amendment 'contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense,'" *McCoy* at 1508, quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)); "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)." *McCoy* at 1509.

If *McCoy* was basically a "*Faretta* case," as the Director contends (BIO at 13-16), or if "*McCoy* rel[ies] primarily on *Faretta*" (BIO at 12-13), then it is clear that both the Texas Court of Criminal Appeals decision in 2009[5] and the Fifth Circuit's holding earlier this year[6] erred in denying the claim, as *Faretta* was handed down in 1975.[7] Under 28 U.S.C. § 2254(d)(1), the TCCA's holding, as well as the Fifth Circuit's, would be "contrary to or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States."

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[5] *Ex parte Barbee,* No. WR-70170-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009 (App. E).

[6] *Barbee v. Davis*, 2018 WL 1413840 (5th Cir., Mar. 21, 2018) (App. A).

[7] The other cases upon which *McCoy* relied, cited *supra* in fn. 2, were also well-settled Supreme Court law in 2009.

The Director's entire argument that "the federal habeas standard of review precludes consideration of *McCoy*" (BIO at 17-22) is thus precluded by her own *Faretta* argument. The Director attempts to have it both ways---asserting that "*McCoy* was issued after the CCA ruled on Barbee's present claim" (BIO at 18); that "*McCoy*'s legal basis did not exist at that time" (BIO at 20); and "Barbee's conviction became final well before this Court's holding in *McCoy*" (BIO at 21), to argue that Barbee is not entitled to *McCoy*'s alleged "new rule"---but then repeatedly asserting that *McCoy* is based on *Faretta,* a 1975 case, the legal basis of which did exist in 2009, to argue Barbee did not raise a *Faretta* issue.[8] The Director cannot have it both ways.

Additionally, the Director's argument that application of *McCoy* is precluded because "Barbee has not raised a claim of ineffective assistance of counsel for failing to challenge or preserve structural error" (BIO at 31) is meritless because the structural error claim in *McCoy* was also not decided in state court as the *McCoy* dissent points out. ("The Court concedes that the Louisiana Supreme Court did not decide the structural-error question and that 'we did not grant certiorari to review' that question." *McCoy* at 1517, citing *Id.* at 1511, n. 4 (Alito, J., dissenting).

[8] "[R]elying primarily on *Faretta v. California*, the court held that McCoy's right to make autonomous decisions about his defense was violated" (BIO at 12-13); "Barbee's argument has never involved *Faretta*" (BIO at 14); "Barbee attempts to avail himself of *McCoy*'s *Faretta*-based rule" (*Id.*); "unlike *McCoy* and *Faretta*, there was no objection made" (BIO at 15); he [Barbee] did not even cite *Faretta*..." (*Id.*); the state court holding "could not have been unreasonable on grounds that it should have determined the trial court deprived him of his autonomy under *Faretta*;" (BIO at 16).

Additionally, the Director's argument that "non-retroactivity principles also bar the federal courts from considering *McCoy*" (BIO at 20-22) is contradicted by her own arguments that *McCoy* is based on *Faretta*, as discussed *supra*. Additionally, Barbee has shown that *McCoy* is based on many more cases than simply *Faretta*. *E.g., Illinois v. Allen,* 397 U.S. 337 (1970); *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006)*;* and *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 165 (2000). These fundamental Sixth Amendment cases all predate the CCA's 2009 decision in Barbee's state habeas application or 2008, when the case become final on direct appeal.

III. The Director's Assertion That The State Court's Application of *Strickland* was Reasonable Is Contradicted By The Record.

In Section II of her BIO, the Director presents three arguments: (1) that unlike Mr. McCoy, Barbee did not vociferously object to a partial admission of guilt; (2) that much of Barbee's evidence is barred by *Cullen v. Pinholster*, 563 U.S. 170 (2011); and (3) that unlike *McCoy*, counsel did not fully concede guilt. (BIO at 22-30). All these arguments are unavailing and contradicted by the record.

A. Barbee was not afforded an opportunity to object.

As mentioned *supra* in footnote 1, the Director's "failure to object" argument fails right out of the gate because the record shows that Barbee was not afforded the chance to object, as was Mr. McCoy. After presenting no defense at the guilt/innocence phase, 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 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].

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 guilt]? The answer is no. Did he explicitly tell me he didn't want me to do it? The answer is no." [ROA.4661].[9] Mr. Ray and co-counsel Tim Moore have repeatedly admitted that Barbee, from the first stages of their representation, had insisted on his innocence.[10] In fact, the attorneys used Barbee's assertion of innocence, what they later

[9] This refutes the Director's argument that "there is no evidence to support the allegation that counsel did not consult appropriately with Barbee." (BIO at 24 n. 10). The Director also makes the spurious argument that Barbee failed to make the argument that counsel "did not fully consult with him about the strategy [to confess guilt]...in state court; he simply asserted that counsel did not obtain his consent." (*Id.*) This amounts to the same thing, as without consent, there was no adequate consultation. As shown *supra*, trial counsel himself admitted he did not consult Barbee on his decision. [ROA.4661]. And it is undisputed that the admission came as a complete shock to Barbee and his family. Barbee's mother, Jackie Barbee confirms that she was "shocked" when she heard Ray tell the jury that her son was guilty. [ROA.778]. Barbee himself has also stated that he did not know Ray was going to make the admission, was shocked when he did so, and plainly could not express his disapproval beforehand, as Mr. McCoy could. [ROA.798].

[10] *See* trial attorneys Ray and Moore's joint declaration: "Applicant consistently stated that Ron Dodd was the real killer [ROA.3912]; "Applicant was steadfast in his assertion that he was innocent" [*Id.*]; "Applicant maintained that he was completely innocent" [ROA.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

termed his "refusal to accept responsibility" [ROA.3914-15], as justification for their failure to present mitigating evidence of a low probability of future dangerousness at the punishment phase. [ROA.3908-15].[11] Barbee was thus prejudiced as a direct result of his attorneys' unauthorized concession of guilt.

B. *Cullen v. Pinholster* does not apply.

The Director also misleads in asserting in Section II(B) that, under *Cullen v. Pinholster*, 563 U.S. 170 (2011), "much of the evidence upon which Barbee relies is barred from consideration by *Pinholster*..." (BIO at 26-28). *Pinholster*'s holding that review under § 2254(d) "is limited to the record that was before the state court," *Pinholster*, 563 U.S. at 181 (BIO at 28) has no relevance here. The evidence was presented to the state court in Barbee's subsequent application; the CCA determined that his claim of a conflict of interest was not barred by Texas' abuse-of-the-writ doctrine; and an evidentiary hearing was held on that claim which specifically included evidence of ineffective assistance of counsel as showing the prejudice from the conflict claim.[12]

Applicant" [ROA.3914-15]. *See also* Memo of Understanding Between Ray, Moore and Barbee: "Client has maintained his innocence to attorneys since the date of appointment." [ROA.3917]. However, Barbee gave an initial coerced confession where he said the deaths were accidental.

[11] 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. [ROA.3514-18].

[12] The state post-conviction trial court ruled that, in light of the order of remand from the Court of Criminal Appeals, "it would allow some testimony with regard to the issue of the impact of any alleged conflict of interest upon the attorneys' representation of Mr. Barbee in this matter." [ROA.4495]. The trial court allowed "some latitude" as otherwise "this very issue may have to be readdressed in a second hearing of some sort." [*Id.*]

Indeed, the very testimony that the Director seeks to preclude, trial counsel's admission that he did not tell Barbee he was going to tell the jury he was guilty [ROA.4661] was received by the state court as testimony at that hearing. *Pinholster*'s preclusion does not prohibit federal courts from considering evidence presented in a subsequent application when that evidence was not barred by a state procedural rule, as the Director misrepresents. Additionally, as the Director admits, both the district court and the Fifth Circuit considered this evidence. (BIO at 28). There is no *Pinholster* bar.

C. *McCoy* is not limited as the Director suggests.

The Director argues that *McCoy* is not applicable because "counsel did not fully concede guilt." (BIO at 28-30). This argument again is contradicted by the record, as counsel's argument was neither "strategic" and it *fully* conceded guilt.

The Director cites Tex. Penal Code § 19.03(a)(7)(A) as requiring "two intentional murders for capital murder." (BIO at 29). But the jury charge did not mention any specific section of the Penal Code. [ROA.3524-3528]. In that charge, the jury was instructed that "[a] person commits the offense of capital murder if he intentionally or knowingly causes the death of an individual." [ROA.3524]. "Intentionally" was defined as "[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." [*Id.*] "Knowingly" was defined as "[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct or to the circumstances surrounding his conduct

when he is aware of the nature of his conduct or that the circumstances exist...[or] when he is aware that his conduct is reasonably certain to cause the result." [*Id.*] An "act" was defined as "a bodily movement, whether voluntary or involuntary, and includes speech.' [*Id.*]

Under these definitions, even an "accidental" strangling, would have qualified as capital murder under the definitions of "intentionally" and "knowingly" given to Barbee's jury. "Intentionally," defined as a "conscious desire to engage in the conduct" [ROA.3524], would have included an accidental choking or strangling of Lisa and Jayden. And "knowingly," defined as "aware of the nature of his conduct" and "aware that his conduct is reasonably certain to cause the result" [*Id.*], would also include an accidental choking of either victim, as Barbee's attorney told the jury. Barbee would have been guilty of capital murder even if he did not intend the result of the conduct. The statute speaks to the conduct, not the result. Thus, the Director's argument is unavailing and both the state court, the district court and the Fifth Circuit holdings were an unreasonable interpretation of both the law and the facts under both § 2254(d)(1) and (d)2.

Thus, the Director's argument that *McCoy* does not apply in situations where there was only a "partial admission of guilt" (BIO at 22-26) is unavailing as there was no such "partial admission." Even if there was, this argument has already been rejected, for instance, by the Louisiana Supreme Court:

> After review of the record and considering the Court's decision in *McCoy*, we reject the state's argument and decline to restrict application of the holding in *McCoy* solely to those cases where a defendant maintains his absolute innocence to any crime. *McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense. Although Mr. McCoy's objective was to pursue a defense of innocence by presenting an alibi defense, Mr. Horn's objective was to assert a defense of innocence to the crime charged and the lesser-included offenses, i.e. asserting his innocence to any degree of murder.

State v. Horn, 251 So.3d 1069, 1075-76 (2018).

Similarly, the Director's efforts to limit *McCoy* to situations where the trial court erred in permitting the unauthorized admission of guilt (BIO at 22-26) is unavailing because the trial court had no such opportunity to permit or disallow the argument or any prior knowledge that it was being made against Barbee's wishes.

IV. The Error Was Structural and Barbee Is Not Required To Show Prejudice.

As for the Director's argument that the error is not structural, *McCoy* has held that it is. *McCoy* at 1511 ("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." quoting *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017)) *See also 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).

V. Conclusion.

Here, the Fifth Circuit erred in using the incorrect *Strickland* standard, which required Barbee to show prejudice, to deny his *McCo*y claim. In that case, this Court clarified that the denial of client autonomy and the client's right to present his case for innocence is structural and "not subject to harmless-error review." *McCoy*, 138 S. Ct. at 1511. The Director seeks to avoid *McCoy*'s application—and Mr. Barbee's right to have his case for innocence presented to the jury—although this case is a straightforward application of *McCoy.*

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

Respectfully Submitted,

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