No. ______

In the Supreme Court of the United States

EX PARTE STEPHEN DALE BARBEE,
Petitioner

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

APPENDICES

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

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APPENDIX A

616 S.W.3d 836
Court of Criminal Appeals of Texas.

EX PARTE Stephen Dale BARBEE, Applicant

NO. WR-71,070-03
|
Delivered: February 10, 2021

Synopsis

Background: After conviction for capital murder and sentence to death was affirmed, 2008 WL 5160202, and following denial of prior applications for writ of habeas corpus, applicant filed second subsequent application for writ of habeas corpus.

Holdings: The Court of Criminal Appeals, Keel, J., held that:

legal basis for claim was previously available, precluding relief on subsequent application, and

applicant failed to allege sufficient facts supporting claim, precluding relief on subsequent application.

Application dismissed.

Yeary and Newell, JJ., joined in part and concurred in part.

Walker, J., filed concurring opinion.

***838 ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM TARRANT COUNTY**

Attorneys and Law Firms

Allen Richard Ellis, for Applicant.

OPINION

Keel, J., delivered the opinion of the Court in which Keller, P.J., and Hervey, Richardson, Slaughter, and McClure, JJ., joined.

This is a subsequent application for writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. Applicant seeks relief under *McCoy v. Louisiana*, ––– U.S. ––––, 138 S. Ct. 1500, 200 L.Ed.2d 821 (2018), which he claims was a previously unavailable legal basis for his claim. We filed and set his application to address whether he is entitled to relief under *McCoy*. We conclude that the legal basis for the current claim was previously available, and even if it were not, Applicant fails to allege facts that would entitle him to relief under *McCoy*. Consequently, we dismiss this subsequent application as an abuse of the writ. Tex. Code Crim. Proc. art. 11.071 § 5(c).

I. Article 11.071, Section 5

Unless an applicant for a writ of habeas corpus meets a very fine-tuned exception, he is limited to one full and fair opportunity to present any claims that may entitle him to relief from his judgment or sentence. *Ex parte Kerr*, 64 S.W.3d 414, 418-19 (Tex. Crim. App. 2002). "[E]verything you can possibly raise the first time, we expect you to raise it initially, one bite of the apple, one shot." *Id.* (quoting S.B. 440, Acts 1005, 74th Leg., codified at Tex. Code Crim. Proc. art. 11.071 (Presentation by Representative Pete Gallego at second reading of S.B. 440 on the floor of the House of Representatives, May 18, 1995)).

Applicant relies on the "previously unavailable legal basis" exception to the bar against subsequent applications. Under that exception, we may consider the merits of a subsequent application if it contains sufficient specific facts establishing that the claim has not been and could not have been previously presented because the legal basis for the claim was unavailable when the previous application was filed. The exception says:

> ***839** (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]

Tex. Code Crim. Proc. art. 11.071 § 5(a)(1).

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A legal basis was previously unavailable if it "was not recognized by or could not have been reasonably formulated from a final decision of" a relevant court "on or before" the date the previous application was filed. Tex. Code Crim. Proc. art. 11.071 § 5(d). A legal basis was previously available if it "could have been rationally fashioned" from relevant precedent, *Ex parte Navarro*, 538 S.W.3d 608, 615 (Tex. Crim. App. 2018) (construing same language as found in Texas Code of Criminal Procedure Article 11.07, Section 4(a)(1) and rejecting challenge to adequacy of juvenile transfer order), or if it is founded on "familiar principles articulated in earlier cases" from relevant courts. *See Ex parte St. Aubin*, 537 S.W.3d 39, 45 (Tex. Crim. App. 2017) (rejecting multiple-punishments, double-jeopardy claim in subsequent writ because legal basis was previously available). The likelihood of a claim's success is irrelevant to determining whether its legal basis was previously unavailable. *Navarro*, 538 S.W.3d at 615. But a legal basis was previously unavailable if subsequent case law makes it easier to establish the claim and renders inapplicable factors that had previously been weighed in evaluating its merits. *See Ex parte Chavez*, 371 S.W.3d 200, 207 (Tex. Crim. App. 2012) (holding that the legal basis for a due process violation based on the State's unknowing use of false testimony was previously unavailable).

In addition to establishing the previous unavailability of the legal basis for his claim, the applicant must allege facts that, if true, would entitle him to relief on that basis. *See Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005) (per curiam).

Applicant claims that his attorney violated his Sixth Amendment right to assistance of counsel by making a strategic concession of his guilt over his express objection. He argues that the legal basis for his claim was unavailable until 2018 when the Supreme Court issued its opinion in *McCoy*, 138 S. Ct. 1500. But the legal basis for Applicant's claim could have been reasonably formulated from existing precedent because *McCoy* was the logical extension of *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), based on the factual distinctions—not legal ones—between the two cases. Furthermore, Applicant does not allege facts that would entitle him to relief under *McCoy*'s terms even if it were a previously unavailable legal basis for his claim. Consequently, we must dismiss his application. Tex. Code Crim. Proc. art. 11.071 § 5(c).

II. Applicant's Confessions and Trial

Applicant was charged with capital murder for killing his pregnant ex-girlfriend, Lisa Underwood, and her seven-year-old son, Jayden, in the same criminal transaction.

Lisa was reported missing when she failed to show up for her baby shower. At her home, police found no signs of forced entry, but blood—later identified as hers—was on the walls, the furniture, and the ***840** floor in the living room. More blood was on the floor of the garage, and her car was gone.

Early that same morning, a deputy saw Applicant on foot, wet and covered in mud, near a creek. Applicant gave him a false name and fled into the nearby woods. Two days later, Lisa's car was found in the creek near which the deputy had encountered Applicant.

Applicant became a suspect in Lisa and Jayden's disappearance when police learned that Applicant could be the father of Lisa's unborn child. Lisa had been asking Applicant to tell his wife about the pregnancy and to provide insurance for the child, but Applicant refused to do so without a DNA test confirming that he was the father.

Applicant confessed to the police that he had killed Lisa and Jayden and showed them where he had buried the bodies. He also met with his wife, Trish Barbee, in the interrogation room, and that meeting was recorded. Trish asked Applicant how he killed Lisa, and he tearfully explained that he "held her down too long" and "it was an accident." He also admitted to his ex-wife that he had killed Lisa and Jayden but that he had not meant to do so.

Before trial, Applicant wrote a letter to his appointed attorneys recanting his confessions. He stated that he initially told the police that he did not know what happened to Lisa and Jayden, he was not there, and he did not do it. He told defense counsel that the detective threatened him with the death penalty if he did not talk, so he said the killings were an accident: he and Lisa got into an argument, she kicked him, he hit her in the nose, he held her down too long, and he put his hand over Jayden's face until he stopped screaming. Applicant recanted his confessions and changed his story, ultimately claiming that he was innocent of the murders. Applicant said he helped bury the bodies after his ex-wife's boyfriend and Applicant's employee, Ron Dodd, killed Lisa and Jayden.

Faced with Applicant's confessions, defense counsel concluded that the "Dodd did it" theory would not work at trial, and they instead pursued the theory that Lisa's death

was accidental. This theory was supported by Applicant's confessions and by the medical examiner's testimony.

Dr. Marc Krouse, the medical examiner who performed the autopsy on Lisa, testified that Lisa's death resulted from traumatic asphyxiation, possibly caused by smothering. He testified on cross-examination that, because Lisa was in a late stage of pregnancy, she was susceptible to smothering and might have stopped breathing after as little as thirty seconds of being held down.

The defense attorney summarized the theory in closing argument:

> 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 25-year veteran of the medical examiner's office, Dr. Marc Krouse. Dr. Krouse told you that he could not be sure when Lisa Underwood lost consciousness ... And Stephen Barbee's own words to his wife, it matches. 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 Dr. Marc Krouse. And as hard as it is to do, I submit to you that the evidence in this ***841** 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.

The trial court charged the jury on the lesser-included offenses of murder and manslaughter, but the jury found Applicant guilty of capital murder. Pursuant to the jury's answers to the special issues, the trial court sentenced Applicant to death.

Applicant did not testify at trial or object to the defense strategy.

III. Relevant Procedural History

We affirmed Applicant's conviction and sentence on direct appeal. *Barbee v. State*, No. AP–75,359, 2008 Tex. Crim. App. Unpub. LEXIS 900 (Tex. Crim. App., Dec. 10, 2008).

In his 2008 initial writ application, Applicant claimed that his Sixth Amendment right to the assistance of counsel was violated by trial counsel confessing his guilt to the jury during closing argument without his knowledge or consent. Applicant alleged that he was abandoned by counsel at the trial stage and that it was structural error, meaning that prejudice should be presumed, citing *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The trial court recommended that relief be denied and entered findings of fact and conclusions of law, including that the right to effective assistance of counsel extends to closing arguments, counsel's decision to focus closing argument on the defensive theory of accident was reasonable in light of the evidence admitted at trial, and Applicant was provided adequate counsel in closing arguments. We agreed with the trial court's recommendation and denied relief with written order. *Ex parte Barbee*, No. WR-71,070-01, 2009 Tex. Crim. App. Unpub. LEXIS 5 (Tex. Crim. App., Jan. 14, 2009). The Supreme Court denied certiorari. *Barbee v. Texas*, 2009 U.S. LEXIS 5631 (Oct. 5, 2009).

Applicant filed a subsequent writ in 2011, complaining that his ineffective assistance claim was analyzed under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), rather than the *Cronic* standard under which the claim was brought. We dismissed the 2011 subsequent application as an abuse of the writ. *Ex parte Barbee*, No. WR-71,070-02, 2013 Tex. Crim. App. Unpub. LEXIS 526 at *2 (Tex. Crim. App., May 8, 2013).

Applicant also raised this issue in his 2015 federal habeas petition. He claimed that counsel provided ineffective assistance by conceding his guilt to the jury without his permission, and he characterized it as abandonment by counsel subject to the Sixth Amendment standard in *Cronic*. *Barbee v. Stephens*, No. 4:09-CV-074-Y, 2015 U.S. Dist. LEXIS 88060 at *86 (N.D. Tex., July 7, 2015). The District Court determined that the claim was properly analyzed under *Strickland* rather than *Cronic* and denied the claim. *Barbee v. Stephens*, 2015 U.S. Dist. LEXIS 88060 at *87 ("For *Cronic* to apply, the attorney's failure to subject the state's case to meaningful adversarial testing must be complete.") (citing *Wright v. Van Patten*, 552 U.S. 120, 124 n.1, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008)).

After the Supreme Court issued its 2018 *McCoy* opinion, Applicant filed this second subsequent application for writ of habeas corpus, claiming that his trial attorney overrode his

Sixth Amendment autonomy right to insist on his innocence. Because this is a subsequent writ, the merits of ***842** Applicant's claim cannot be considered unless it meets the requirements of Article 11.071, Section 5.

IV. *McCoy v. Louisiana*

McCoy applied longstanding jurisprudence related to defendant autonomy and structural error to a "stark scenario," holding that a capital murder defendant has the right to insist that his counsel refrain from admitting guilt of the charged offense. *McCoy*, 138 S. Ct. at 1510-11. The violation of that right "was complete when the [trial] court allowed counsel to usurp control of an issue within McCoy's sole prerogative[,]" thus foreclosing any need to demonstrate prejudice. *Id.*

McCoy was accused of having killed his estranged wife's son, mother, and stepfather, and the evidence against him was strong. *Id.* at 1505-06. But he maintained that he was innocent and that the victims had been killed by police in a drug deal gone bad. *Id.* at 1506. McCoy instructed his attorney to pursue an outright acquittal and not to concede guilt, but the attorney saw that as a futile effort that would make the death penalty inevitable. *Id.* McCoy protested to the trial court before and during trial that he was innocent and that his attorney was "selling him out" by making the concession. *Id.* McCoy's protestations were futile. The trial court instructed the defense attorney to try the case as he had planned, refused McCoy's request for time to hire a new lawyer, and cautioned McCoy against making outbursts in front of the jury. *Id.* at 1506-07.

In opening statement the attorney told the jury, "my client committed three murders." *Id.* at 1507. In closing argument he said that McCoy was the killer and that he took the burden off the prosecutor on that issue. *Id.* Defense counsel conceded at punishment that McCoy committed the crimes but urged the jury to consider McCoy's mental and emotional issues. *Id.* On appeal McCoy argued that his constitutional rights were violated by his attorney conceding guilt over his objections. *Id.* The Supreme Court agreed.

IV.A. Sixth Amendment Assistance of Counsel

The Supreme Court noted that to gain the assistance of counsel, "a defendant need not surrender control entirely to counsel." *Id.* at 1508. The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 819-20, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Trial management is the attorney's province, but some decisions belong to the defendant, for example: "whether to plead guilty, waive the right to jury trial, testify in one's behalf, and forgo an appeal." *McCoy*, 138 S. Ct. at 1508 (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)).

The Court concluded, "Autonomy to decide that the objective of the defense is to assert innocence" is reserved for the defendant. *McCoy*, 138 S. Ct. at 1508. "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." *Id.* *McCoy* derived the defendant's right to assert innocence against counsel's advice from the defendant's right to decide whether to plead guilty and from his right to reject the assistance of counsel. *Id.* (quoting *Faretta*, 422 U.S. at 819, 95 S.Ct. 2525 and citing *Barnes*, 463 U.S. at 751, 103 S.Ct. 3308).

***843** Such decisions are not "about how best to achieve a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy*, 138 S. Ct. at 1508 (citing *Weaver v. Massachusetts*, ––– U.S. ––––, 137 S. Ct. 1899, 1908, 198 L.Ed.2d 420 (2017), and *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring in judgment)). When a defendant "expressly asserts that the goal of '*his* defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy*, 138 S. Ct. at 1509 (quoting and emphasizing U.S. Const. Amend VI). Once McCoy communicated "to court and counsel" that he "strenuously" objected to counsel's proposed strategy, "a concession of guilt should have been off the table." *McCoy*, 138 S. Ct. at 1512.

The *McCoy* majority dismissed the dissenting opinion's claim about the rarity of attorney-client disagreements over conceding guilt and noted that three state supreme courts other than Louisiana's had addressed the issue. *Id.* at 1510. It pointed out the similarities of those cases to McCoy's case, namely, "the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel's preferred course: concession of the defendant's commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses." *Id.* (citing *People v. Bergerud*, 223 P.3d 686, 690-91 (Colo. 2010); *Cooke v. State*, 977 A.2d

803, 814 (Del. 2009); and *State v. Carter*, 270 Kan. 426, 14 P.3d 1138, 1141 (2000)). *McCoy* said that "these were not strategic disputes" but "intractable disagreements about the fundamental objective of the defendant's representation." *McCoy*, 138 S. Ct. at 1510. "In 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." *Id.* *McCoy* then turned its attention to prejudice.

IV.B. Structural Error/Presumed Prejudice

McCoy said counsel's admission of a defendant's guilt over his express objection was structural error meriting a presumption of prejudice for "at least" two reasons: the effects of the error are too hard to measure, and the right at issue is designed to protect "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.* at 1511 (quoting *Weaver*, 137 S. Ct. at 1908).

McCoy opposed his counsel's assertion of his guilt "at every opportunity, before and during trial, both in conference with his lawyer and in open court." *McCoy*, 138 S. Ct. at 1509. McCoy had an outburst in court, objecting to his own counsel's opening statement. *Id.* at 1506-07. McCoy testified to facts in complete opposition to those raised by his counsel. *Id.* at 1507. Defense counsel relieved the State of its burden to prove guilt beyond a reasonable doubt. *Id.* And the trial court erred in knowingly allowing defense counsel to violate McCoy's Sixth Amendment rights. *Id.* at 1506. The error was structural because it impacted the framework within which McCoy's trial proceeded. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (violation of certain rights is structural error when it impacts the framework within which the trial proceeds). McCoy's trial contrasted with Nixon's, and that contrast justified the different approaches to their cases.

IV.C. *Nixon* vs. *McCoy*

Like McCoy, Nixon claimed that his attorney violated his Sixth Amendment right ***844** to counsel by conceding his guilt without his consent. *Nixon*, 543 U.S. at 185, 125 S.Ct. 551. But Nixon did not expressly object to the strategy; when it was explained to him, he was unresponsive. *Id.* at 181, 125 S.Ct. 551. This unresponsiveness was the key to the Supreme Court's rejection of the Florida court's opinion that the attorney's concession was presumptively deficient performance and prejudicial.

Nixon held that the concession was not unreasonable given Nixon's unresponsiveness. *Id.* at 189, 125 S.Ct. 551. "Nixon's characteristic silence each time information was conveyed to him, in sum, did not suffice to render unreasonable [his attorney's] decision to concede guilt and to home in, instead, on the life or death penalty issue." *Id.* And *Nixon* held that a presumption of prejudice would not be "in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with" him. *Id.* at 181, 125 S.Ct. 551. If Nixon had objected, then, the concession might have been unreasonable and a presumption of prejudice might have been warranted. Presented with such facts, *McCoy* took *Nixon* to its next logical step.

McCoy noted that *Nixon* was not contrary to its holding but was distinguishable because McCoy, unlike Nixon, adamantly objected to the admission of guilt at every opportunity, before and during trial and in and out of court. *McCoy*, 138 S. Ct. at 1509. If a defendant "declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way." *Id.* (citing *Gonzalez v. United States*, 553 U.S. 242, 254, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (Scalia, J., concurring in judgment) (distinguishing "action taken by counsel over his client's objection" from defendant's failure to personally express to the court his consent to waive certain rights)). Counsel "must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option." *McCoy*, 138 S. Ct. at 1509 (citing *Nixon*, 543 U.S. at 178, 125 S.Ct. 551).

Although both Nixon and McCoy claimed that their Sixth Amendment rights were violated by counsel conceding guilt without their permission, the differences between their trials yielded different analyses. McCoy did not have to show prejudice because, unlike Nixon, (1) McCoy told his attorney that his defensive objective was to assert innocence at trial, (2) he told the trial court before and during trial that his attorney was conceding his guilt against his wishes, and (3) the trial court nevertheless allowed defense counsel to make the concession, causing structural error.

V. The Legal Basis for Applicant's *McCoy* Claim Was Previously Available

McCoy was founded on "familiar legal principles" that dealt with the division of labor between attorney and client, *Barnes*, 463 U.S. at 751, 103 S.Ct. 3308, the duty of the attorney to consult with his client about important matters, *Nixon*, 543 U.S. at 189, 125 S.Ct. 551, the client's exclusive right to make fundamental decisions about his own defense with the assistance of counsel, *Faretta*, 422 U.S. at 819, 95 S.Ct. 2525, and structural error, *Gonzalez-Lopez*, 548 U.S. at 150, 126 S.Ct. 2557. *See St. Aubin*, 537 S.W.3d at 34.

McCoy was a logical extension of *Nixon* and "could have been rationally fashioned" from it. *See Navarro*, 538 S.W.3d at 615. *Carter* and *Cooke* demonstrated as much. ***845** *See Carter*, 270 Kan. 426, 14 P.3d 1138 (relying on, e.g., *Faretta* and *Cronic* to hold that guilt-based defense imposed against defendant's wishes violated Sixth Amendment right to counsel); *Cooke*, 977 A.2d 803 (relying on, e.g., *Faretta*, *Nixon*, and *Cronic* to hold that the defendant was denied counsel and presumptively prejudiced when his attorney pursued a guilty-but-mentally-ill strategy over his objection).

McCoy did not make it easier to establish a claim. *See Chavez*, 371 S.W.3d at 207. *McCoy* merely required factually what *Nixon* explicitly lacked: a defendant's express objections to a concession of guilt disregarded by counsel and court and aired before a jury during trial. Since the structural error analysis flowed from those requirements, *McCoy*'s presumption of prejudice was not an abandonment of factors previously weighed, either; it was an addition of factors.

Applicant argues that the legal basis for his claim was previously unavailable because *McCoy* was the first case to uphold a defendant's Sixth Amendment right to decide the objective of his defense, and its focus on the defendant's wishes represented a departure from *Strickland*. Even so, that is not the test for a previously unavailable legal basis. Applicant points to *McCoy*'s purported disclaimer of Supreme Court ineffective-assistance-of-counsel (IAC) jurisprudence where it said, "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our [IAC] jurisprudence, [*Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674] or [*Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657]." *McCoy*, 138 S. Ct. at 1510-11. But that disclaimer related to the showing of prejudice "ordinarily" required for IAC claims. *Id.* at 1511. The violation of McCoy's right was "complete" when the trial court allowed it to occur, and a showing of prejudice was thus unnecessary. *Id.* Significantly, *McCoy* did not cite *Nixon* in connection with its disclaimer and instead contrasted it based on the factual differences between the two cases. *McCoy*, 138 S. Ct. at 1509.

The legal basis for Applicant's current claim was previously available under the terms of Article 11.071, Section 5. Even if it were not previously available, Applicant does not allege sufficient facts to show that his claim meets the requirements of *McCoy*.

VI. Failure to Allege Sufficient Facts

Applicant seeks to distinguish his *McCoy* claim from other such claims that have been dismissed by this Court under Article 11.071, Section 5. Unlike those cases, he argues, his application "contains extensive evidence demonstrating that he informed his lawyers that he wished to maintain his innocence." But it does not. His exhibits include evidence that he told various people, including his attorneys, that he was innocent, he would not plead guilty, and Dodd killed Lisa and Jayden; he told the forensic psychiatrist that he would rather be executed than have his mother see him "plead guilty"; he complained to the trial court about a "breakdown in communication" with his attorneys; his attorney did not "explicitly" tell him that his closing argument would concede Applicant's identity as Lisa and Jayden's killer; and Applicant was "shocked" when he heard the argument. These facts demonstrate that Applicant told his attorneys that he was innocent; they do not demonstrate that he told them that his defensive objective was to maintain his innocence at trial. Thus, the application fails to allege facts that, if true, would entitle him to relief under *McCoy*.

***846 VII. Conclusion**

The legal basis for Applicant's claim was available when his previous applications were filed, and Applicant has not alleged facts that, if true, would entitle him to relief under *McCoy*. This subsequent application does not meet the requirements of Article 11.071, Section 5, and we dismiss it as an abuse of the writ under Section 5(c).

Yeary and Newell, JJ., joined Part VI of the Court's opinion and otherwise concurred.

Walker, J., filed a concurring opinion.

CONCURRING OPINION

Walker, J., filed a concurring opinion.

Today, the Court rejects Stephen Dale Barbee, Applicant's, third application for habeas corpus relief on the basis that it is procedurally barred. The Court decides that *McCoy v. Louisiana*, ––– U.S. ––––, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018), does not constitute a new legal basis for relief because it was a logical extension of *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), based on the factual distinctions—not legal ones—between the two cases.

I disagree. *McCoy* could not have been reasonably formulated by factually distinguishing *Nixon*. An argument factually distinguishing *Nixon* is an argument that counsel's performance was so deficient that prejudice, required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), should be presumed under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). This was illustrated by Applicant's previous applications in which he challenged the effectiveness of counsel's representation and tried to distinguish *Nixon* such that counsel's performance would be presumptively prejudicial under *Cronic*.

McCoy was not a logical extension of *Nixon*, an ineffective assistance of counsel case. *McCoy* expressly disclaimed reliance on ineffective assistance of counsel case law under *Strickland* and *Cronic*, and *Nixon* is part of that case law. Instead, *McCoy* was concerned with the defendant's autonomy under the principles of *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Yet *McCoy* could not have been reasonably formulated from relevant case law such as *Faretta* or its progeny. *McCoy* constitutes a new legal basis.

However, I agree with the majority that Applicant's latest claim does not overcome the statutory procedural bar for subsequent writs because Applicant fails to set out a *prima facie* case that trial counsel usurped his authority to set the goals of his defense. Applicant's evidence in the habeas record shows that he told counsel repeatedly that he was innocent; it does not show that he told counsel to pursue a defense of asserting innocence that counsel then overrode. Accordingly, I concur with the Court's decision to dismiss the application.

I — The Procedural Bar to Subsequent Writ Applications

Because this is Applicant's third application for habeas relief, under article 11.071, § 5, of the Code of Criminal Procedure, the general rule would bar us from considering this subsequent application. *See* Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a) ("If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application...."). There are exceptions, however, and Applicant claims that the new legal basis exception applies to his case. That exception applies if:

> the [subsequent] application contains sufficient specific facts establishing that: ***847** (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application....

Id. § 5(a)(1). A legal basis is previously unavailable:

> if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

Id. § 5(d).

II — *McCoy v. Louisiana*

Applicant claims, as his new legal basis, the Supreme Court's 2018 decision in *McCoy v. Louisiana*, which was handed down seven years after Applicant's previous application filed in 2011. *See Ex parte Barbee*, No. WR-71,070-02, 2013 WL 1920606 (Tex. Crim. App. May 8, 2013). In *McCoy*, the United States Supreme Court held "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." *McCoy*, 138 S.Ct. at 1505.

In *McCoy*, the defendant was charged with three counts of first-degree murder under Louisiana law for murdering his estranged wife's mother, stepfather, and son, and the prosecution gave notice that it would seek the death penalty. *Id.* at 1505–06. McCoy pled not guilty, insisting that he was out of the state at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. *Id.* at 1506. Counsel concluded, however, that the evidence

was so overwhelming that McCoy would be sentenced to death unless he conceded that he was the killer. *Id.* McCoy was furious when told of counsel's strategy. *Id.* McCoy was completely opposed and instructed counsel to pursue an acquittal instead of conceding guilt. *Id.*

At the beginning of counsel's opening statement in the guilt phase of trial, counsel told the jury that McCoy committed the three murders. *Id.* McCoy testified in his own defense, maintaining his innocence and pressing his alibi. *Id.* at 1507. In closing argument, counsel again told the jury that McCoy was the killer, and on that issue counsel told the jury that the burden was taken off of the prosecution. *Id.* The jury found McCoy guilty of all three first-degree murder counts. *Id.* At the penalty phase, counsel repeated that McCoy was guilty but urged mercy in view of McCoy's mental and emotional issues. *Id.* The jury returned three death verdicts. *Id.* On appeal, McCoy argued that his constitutional rights were violated when the trial court allowed counsel to concede that McCoy committed the murders over his objection, but the Louisiana Supreme Court held that counsel had the authority to concede McCoy's guilt despite his opposition. *Id.*

The Supreme Court granted certiorari in view of the split between Louisiana on the one side and decisions by the Delaware and Kansas Supreme Courts on the other side over "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.* (citing *Cooke v. State*, 977 A.2d 803, 842–46 (Del. 2009), and *State v. Carter*, 270 Kan. 426, 14 P.3d 1138, 1148 (2000)).

In deciding the issue, the Supreme Court began with the right to self-representation under *Faretta*. *Id.* at 1507–08 (discussing *Faretta*). Should a defendant choose to be represented by counsel, certain ***848** decisions, such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," are made by counsel, while other decisions, such as "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal," belong to the defendant. *Id.* at 1508 (citing *Gonzalez v. United States*, 553 U.S. 242, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008); and *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). The Supreme Court held, in *McCoy*, that the decision to determine that the objective of the defense is to assert innocence is one of the decisions that belong to the defendant:

> Autonomy 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.*

Id. at 1508 (emphasis in original).

The issues in *McCoy* and in *Faretta*, *Gonzales*, and *Barnes* relate to which decisions belong to the defendant and which decisions belong to counsel, not whether counsel was effective in performing his duties. *See Faretta*, 422 U.S. at 807, 95 S.Ct. 2525 (self-representation); *Gonzalez*, 553 U.S. at 253, 128 S.Ct. 1765 (decision of whether to waive Article III judge at voir dire belongs to counsel); *Barnes*, 463 U.S. at 751, 103 S.Ct. 3308 (decision of which nonfrivolous claims to assert on appeal belongs to counsel). Not surprisingly, then, the Supreme Court declared in *McCoy* that:

> Because 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.

McCoy, 138 S.Ct. at 1510-11.

III — *Florida v. Nixon*, *Strickland*, and *Cronic*

The legal theory behind *McCoy*—a defendant's autonomy to decide that the objective of his defense is to assert innocence—is completely different from the legal theory behind *Florida v. Nixon*. The legal theory behind *Nixon* is that of *Strickland v. Washington* and *United States v. Cronic*, which were concerned with ineffective assistance of counsel. Normally, a defendant alleging that he received ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Cronic, decided the same day as *Strickland*, provides an exception to the *Strickland* ineffective assistance standard. *Strickland*, 466 U.S. at 668, 104 S.Ct. 2052 (decided May 14,

1984); *Cronic*, 466 U.S. at 648, 104 S.Ct. 2039 (decided May 14, 1984); *Nixon*, 543 U.S. at 190, 125 S.Ct. 551 ("*Cronic* recognized a narrow exception to *Strickland*'s holding[.]"). Whereas under *Strickland* a defendant claiming ineffective assistance of counsel must make a two-prong showing of deficient performance and prejudice, *Cronic* recognized that there are circumstances in which prejudice is so likely that a defendant need not prove it. *Nixon*, 543 U.S. at 190, 125 S.Ct. 551. ***849** Stating the general rule that "because we presume that the lawyer is competent to provide the guiding hand that the defendant needs ... the burden rests on the accused to demonstrate a constitutional violation," the Supreme Court in *Cronic* explained:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis v. Alaska* ... because the petitioner had been "denied the right of effective cross-examination" which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' "
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Cronic, 466 U.S. at 658–60, 104 S.Ct. 2039 (citations omitted).

In *Nixon*, the Supreme Court resolved the question of "whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically render's counsel's performance deficient, and whether counsel's effectiveness should be evaluated under *Cronic* or *Strickland*." *Nixon*, 543 U.S. at 186–87, 125 S.Ct. 551. Under the facts of the case, the Supreme Court determined that counsel's concession of guilt did not reach the level of a complete failure to function as the client's advocate, such that *Cronic*'s presumption of prejudice applied. *Id.* at 190, 125 S.Ct. 551. Unlike most cases:

> the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible."
>
> Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in "a useless charade." Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: "I do not know how much salvage there is in these two boys.... I will be honest with this court as I have ***850** tried to be from the beginning. I know that these boys are not fit to be at large."

Id. at 190–92 (citations omitted). Because conceding guilt in a capital case could be a matter of trial strategy, the Supreme Court held that counsel's performance should be evaluated under the normal ineffective assistance of counsel standard of *Strickland*. *Id.* at 192, 125 S.Ct. 551.

IV — *McCoy* Could Not Have Been Formulated from *Nixon*

This Court today determines that the legal basis of Applicant's current *McCoy*-based claim was previously available because *McCoy* could have been reasonably formulated by distinguishing *Nixon* based on the factual distinctions—not the legal ones. But therein lies the rub. Distinguishing *Nixon* on the facts is an argument to apply *Cronic*.

The fact is, Applicant previously formulated an argument that tried to distinguish *Nixon*. In his first application,

Applicant argued that he was effectively abandoned by trial counsel when counsel "confessed" Applicant's guilt to the jury during closing argument, resulting in a failure to subject the prosecution's case to meaningful adversarial testing and consequently a denial of counsel under *Cronic*.[1] Applicant pointed to *United States v. Swanson*, in which the Ninth Circuit held that counsel provides presumptively ineffective assistance, under *Cronic*, when he makes such a concession. *See* *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991). In Applicant's proposed conclusions of law, he further argued that *Nixon*, in which the Supreme Court held that counsel's failure to obtain express consent to such a strategy was not presumptively ineffective under *Cronic*, should be distinguished. *See* *Nixon*, 543 U.S. at 190–91, 125 S.Ct. 551. Specifically, his proposed conclusions of law stated his case differed from *Nixon* because:

> 11. First, when counsel in *Nixon* informed his client of the proposed strategy of conceding guilt, counsel "failed to elicit a definitive response," from the client, thus by implication consenting to the strategy proposed by counsel. 543 U.S. at 186, 125 S.Ct. 551. In contrast to *Nixon*, after his recantation of his allegedly coerced confession, Mr. Barbee consistently maintained his innocence, notwithstanding his counsel's disbelief in Mr. Barbee's claim. *See* State's Answer at 39, Affidavit of William Ray and Tim Moore at 6, Affidavit of Amanda Maxwell at 4.[2]

1 The first application also made two *Strickland* ineffectiveness of counsel claims centered around the supposed failure of counsel to properly challenge Applicant's video recorded confession and in counsel's supposed failure to call certain witnesses in mitigation. Finally, Applicant claimed a *Brady* violation from the State's supposed failure to provide a full, unaltered copy of Applicant's video recorded confession.

2 Applicant's Proposed Findings of Fact, Conclusions of Law and Order, Clerk's R. 243, *Ex parte Barbee*, WR-71,070-01. Applicant also pointed to differences during the punishment phase of trial:

> 13. Second, unlike counsel in *Nixon* who admitted his client's guilt in order to pursue a vigorous mitigation case, Mr. Barbee's counsel totally abdicated their duty to present any meaningful mitigation, based upon the questionable premise that because he refused to "accept responsibility," they were somehow relieved of their legal duty to try and keep their client alive, despite the fact that they were the ones who admitted his responsibility for the murders in the first place.

> *Id.* at 244.

In his second application (his first subsequent application), Applicant asserted, as his fourth claim, that trial counsel provided ***851** ineffective assistance during trial. His fourth claim was itself subdivided into four separate sub-claims. The first sub-claim alleged that he was effectively abandoned by counsel, under *Cronic*, because counsel failed to present medical and neuropsychological evidence that would have supported his innocence. The second sub-claim alleged ineffective assistance under *Cronic* for the same reason stated in the first application: trial counsel effectively abandoned him and failed to subject the prosecution's case to meaningful adversarial testing by "confessing" his guilt to the jury in closing argument. The third and fourth sub-claims asserted that counsel provided ineffective assistance under *Strickland* for failing to explain to the jury the significance of phone records admitted as evidence and for failing to object to testimony provided by a pair of coroners as prejudicially speculative. Applicant's fourth claim, related to trial counsel's alleged ineffective assistance under both *Cronic* and *Strickland*, was dismissed as subsequent.[3]

3 The second application for habeas relief raised twenty-one claims, and we dismissed all but the second, which argued that Applicant was deprived of due process and a fair trial because his trial attorneys had a conflict of interest. After remand and a hearing, we denied relief. *Ex parte Barbee*, No. WR-71-070-02, 2013 WL 1920686 (Tex. Crim. App. May 8, 2013) (not designated for publication).

As described above, then, the pertinent claims made in the previous applications complain of trial counsel's supposed "confession" of guilt to the jury during closing argument. Applicant's current claim for habeas relief under *McCoy* also complains of the same "confession" by counsel during closing argument. They involve the same factual basis.

But the legal basis is not the same. A *Nixon* argument, which is an ineffective assistance of counsel argument, is not a *McCoy* argument. In *McCoy*, the Supreme Court explicitly said:

> Because 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.

McCoy, 138 S.Ct. at 1510-11. That should be the end of it. Although factually similar, *Nixon* and *McCoy* are legally

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dissimilar, and a *McCoy* argument could not be reasonably formulated by distinguishing *Nixon* on the facts. That kind of argument would be *Cronic*-based. Although a *Cronic*-based argument would identify the error as a structural one just as Applicant's current *McCoy*-based argument does today, a *Cronic*-based argument asserts that the error is structural for a different reason. To some extent, all structural error affects the framework in which the trial proceeds. *Id.* at 1511. Ineffective assistance of counsel under *Cronic* is structural because, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, the adversary process itself becomes presumptively unreliable. *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039. Conversely, *McCoy* error is structural for at least two reasons identified by the Supreme Court in *McCoy*: (1) to protect "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 (2) the effects of the error are too hard to measure. *McCoy*, 138 S.Ct. at 1511 (quoting *Weaver v. Massachusetts*, ––– U.S. ––––, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420 (2017)). "[C]ounsel's admission of a client's guilt over the client's express objection ... blocks the defendant's right to make fundamental choices ***852** about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *Id.* The reason for protections provided in a *Cronic* claim are very different from the reasons for protections provided in a *McCoy* claim. Furthermore, a *Cronic* claim is very different from a *McCoy* claim because *Cronic* is an ineffective assistance of counsel claim and *McCoy* is an autonomy claim. The *Cronic* opinion makes no mention of autonomy, and *McCoy* makes no mention of ineffective assistance of counsel except to say that it does not apply. *Id.* at 1510–11. I cannot agree with the majority that *McCoy* could have reasonably formulated by distinguishing *Nixon*.

Indeed, presumptively ineffective assistance of counsel under *Cronic* and overriding the defendant's objectives under *McCoy* do not necessarily overlap. Counsel could be effective under *Cronic* because counsel has subjected the prosecution's case to meaningful adversarial testing by cross-examining the State's witnesses and arguing to the jury why it should render a verdict more favorable to the defendant than that sought by the State. However, if those decisions are contrary to the defendant's objective of asserting innocence, they are nevertheless structural errors under *McCoy*. For example, in *McCoy* and similar cases in which the government seeks the death penalty, where counsel concludes that there is overwhelming evidence of guilt, counsel's best option to avoid the death penalty may be to concede the question of guilt. *See id.* at 1506. If the defendant's objective is to claim innocence despite the evidence, counsel's strategy overrides the defendant's objective of asserting innocence and violates *McCoy*, even though it would not be ineffective under *Strickland* and *Cronic*.

Because a defendant may well have objectives that are incongruent with presenting an effective defense for himself, it is no surprise that the Supreme Court clearly stated that ineffective assistance case law under *Strickland* and *Cronic* was inapplicable in *McCoy*. *Id.* 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, *Strickland v. Washington*, ... or *United States v. Cronic*, ... to McCoy's claim."). This statement, while not strictly a holding, was a requisite component of the analysis and should be determinative.

Accordingly, *McCoy* is not a logical extension of *Nixon* based on the factual differences between them. An argument that *Nixon* should be distinguished on its facts, such that structural error has occurred, is an argument that counsel's performance was deficient and, under *Cronic*, presumptively prejudicial. *McCoy* presents a completely different legal theory, that counsel overrode the defendant's autonomy to decide that the objective of his defense was to assert innocence. *McCoy* could not have been reasonably formulated off of *Nixon*.

V — *McCoy* Could Not Have Been Reasonably Formulated

As explained above, the *McCoy* right—the defendant's autonomy to decide that the objective of his defense is to assert innocence—was founded upon *Faretta*, not *Strickland* or *Cronic* or *Nixon*. But *McCoy* could not have been reasonably formulated from *Faretta*. *Faretta* itself did not hold that a defendant has a right to decide to assert innocence. Instead, *Faretta* held that a defendant has a constitutional right of self-representation and he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so. *Faretta*, 422 U.S. at 807, 95 S.Ct. 2525.

***853** Instead of being directly derived from *Faretta*, the *McCoy* right was implied by one of the underlying principles of *Faretta*, "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *McCoy*, 138 S.Ct. at 1508–

09 (quoting *Weaver*, 137 S.Ct. at 1908); *see also id.* at 1508–09 (quoting *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring) ("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.")).

Those choices, until *McCoy* was decided, were limited to "certain fundamental decisions that the criminal justice system reserves for him to make personally." *Turner v. State*, 422 S.W.3d 676, 690–91 (Tex. Crim. App. 2013) (citing *Barnes*, 463 U.S. at 751, 103 S.Ct. 3308). Those decisions include whether to plead guilty, whether to waive the right to a jury trial, whether to testify on one's own behalf, and whether to forego an appeal. *McCoy*, 138 S.Ct. at 1508; *Barnes*, 463 U.S. at 751, 103 S.Ct. 3308. The decisions that belonged to a defendant did not include the autonomy to decide that the objective of the defense is to assert innocence. Instead, other choices such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence were left to counsel. *Gonzalez*, 553 U.S. 248–49 (quoting *New York v. Hill*, 528 U.S. 110, 115, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000)). When Applicant filed his previous applications for habeas relief, trial counsel's decision to concede guilt, as a strategic decision to avoid the death penalty, could easily be classified as a decision about which arguments to pursue.

In *McCoy* itself, several members of the Supreme Court felt that defendant's right to autonomy to decide that the objective of the defense is to assert innocence was "new." Justice Alito's dissent, joined by Justices Thomas and Gorsuch, considered what the majority did as "having discovered a new right," *McCoy*, 138 S.Ct. at 1517 (Alito, J., dissenting). In Alito's view, the Supreme Court decided the "case on the basis of a newly discovered constitutional right." *McCoy*, 138 S.Ct. at 1518. Though this may be true as a matter of Supreme Court jurisprudence, Justice Alito was perhaps too harsh, because *McCoy* recognized a split between the states and adopted the prevailing view.

Recognizing the factually similar case of *Florida v. Nixon*, the Supreme Court explained that *Nixon* was different because Nixon "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach to admit guilt, and he complained only after trial. *McCoy*, 138 S.Ct. at 1509 (discussing *Nixon*, 543 U.S. at 181, 185, 125 S.Ct. 551). McCoy, in contrast, opposed counsel's assertion of guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. *McCoy*, 138 S.Ct. at 1509. In support of this distinction, the Supreme Court cited *Cooke*, in which the Delaware Supreme Court similarly distinguished *Nixon* because:

> [i]n stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty.

McCoy, 138 S.Ct. at 1509 (quoting *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009)). Relying on the Delaware *Cooke* opinion, Kansas's *Carter* opinion, and Colorado's *Bergerud* opinion, the Supreme Court concluded, ***854** at the very end of Section II of its opinion, that:

> In each of the three cases, as here, the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel's preferred course: concession of the defendant's commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses. These were not strategic disputes about whether to concede an element of a charged offense, they were intractable disagreements about the fundamental objective of the defendant's representation. For McCoy, that objective was to maintain "I did not kill the members of my family." In 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, 138 S.Ct. at 1510 (discussing *Cooke*, 977 A.2d 803; *People v. Bergerud*, 223 P.3d 686 (Colo. 2010); and *State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (Kan. 2000)) (citations omitted).

It is true that the Supreme Court, in *McCoy*, pointed out the factual differences between *Nixon*, the state cases, and the case before it. Yet in doing so, the Supreme Court did not conclude that the differences meant that presumptive prejudice under *Cronic* applied. To the extent the Supreme Court discussed and distinguished *Nixon*, it is important to remember that *Nixon* was concerned with whether counsel, who employs a strategy of conceding guilt without obtaining the express consent of the defendant, provided presumptively ineffective assistance of counsel under *Cronic*. *Nixon*, 543 U.S. at 178, 125 S.Ct. 551. The Supreme Court held that counsel in such a case would not be deemed presumptively ineffective, and the defendant would have to show prejudice under the *Strickland* standard. *Id.* at 192, 125 S.Ct. 551.

The effectiveness or ineffectiveness of counsel is wholly irrelevant to the issue the Supreme Court was concerned with in *McCoy*—which decisions belong to the defendant and which decisions belong to the lawyer. *See 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, *Strickland* ... or *Cronic*, to McCoy's claim.").

Under a fair reading of *McCoy*, the Supreme Court declared that the defendant has a right of autonomy to decide that the objective of his defense is to assert innocence by referencing the fundamental principles of *Faretta* and by identifying the split between Louisiana on the one side and Delaware, Kansas, and Colorado on the other side and opting to adopt the latter position stated in *Cooke*, *Carter*, and *Bergerud*. *See id.* at 1507 ("We granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection.").

Although *McCoy* has its roots in *Faretta* and resolved a split among various states, *McCoy* is the case that recognizes the autonomy-right in the first place. Accordingly, not only could Applicant not have *reasonably* formulated the autonomy-based *McCoy* argument based on *Nixon*, as the majority suggests, he could not have reasonably formulated the autonomy-based *McCoy* argument based on a prior decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state. *McCoy* constitutes a new legal basis for habeas relief.

***855** The majority's assertion that Applicant could have formulated the autonomy-based *McCoy* argument based on *Nixon* appears to be correct. However, I cannot agree that Applicant could have *reasonably* formulated the autonomy-based *McCoy* argument based on *Nixon* as the exception to the article 11.071 § 5 bar requires. The word *reasonably* is included in the statute for a reason. The question is whether, prior to *McCoy*, a reasonably competent Texas attorney representing Applicant would have read the *Nixon* opinion, thought of the possibility of expanding the *Nixon* ineffective assistance of counsel holding to an autonomy issue, contemplated that this Court or the Supreme Court of the United States may buy the argument under the facts of Applicant's case even though no Texas Court or the Supreme Court of the United States had ever done so, and then come to the conclusion that making the argument would be prudent. Again, whether an argument can be formulated and whether an argument can be *reasonably* formulated are very different. As pointed out by the majority in this case, *Carter* and *Cooke*, both state supreme court cases, predicted the United States Supreme Court's holding in *McCoy*. But, would a reasonable, competent, and prudent attorney representing Applicant prior to *McCoy* have, even after contemplating a *McCoy*-esque argument, then researched case law from every state court in the United States to back up an idea that had, at best, a minuscule chance of success? While Appellant could have formulated a *McCoy*-esque argument as was done in *Cooke* out of Delaware, *Carter* out of Kansas, and *Bergerud* out of Colorado, decisions by courts of appellate jurisdiction of other states, he could not have *reasonably* done so. The attempt would have been destined to fail because it would have been based on case law not included in § 5(d). *See, e.g.*, *Ex parte Medellin*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006) (dismissing habeas corpus application as subsequent where the claimed legal bases, a decision of the International Court of Justice and a Presidential memorandum, were not final decisions of a court listed in § 5(d), even though they were not available at the time of the previous application).

VI — No Prima Facie Case

However, it is not enough for a subsequent application for habeas relief to invoke a new legal basis, the application must also allege sufficient specific facts that, if true, entitle him to relief. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985); Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a). As discussed, *McCoy* holds that a defendant has a right of "[a]utonomy to decide that the objective of the defense is to assert innocence." *McCoy*, 138 S.Ct. at 1508; *see also McCoy*, 138 S.Ct. at 1505 ("We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."). While *McCoy*'s full scope has yet to be determined by the Supreme Court, I believe that, at a minimum, *McCoy* requires a showing that the defendant told counsel that he wants to pursue a strategy of asserting innocence.

While Applicant's application for habeas relief and his brief do not allege that Applicant told his attorneys that he wanted to pursue an innocence defense, Applicant, in his application for habeas relief and in his brief, asserts that he had an objective to maintain innocence and counsel overrode that

objective by conceding guilt. The evidence he points to in order to support that claim, however, does not go so far.

Applicant points to the fact that he unsuccessfully sought to have counsel removed, ***856** similar to the unsuccessful pre-trial attempt to remove counsel in *McCoy*. *See McCoy*, 138 S.Ct. at 1506. In support of this, Applicant provides copies of two letters he sent to the trial court. The first letter states that "some serious issues" have occurred between Applicant and counsel, and "[t]here is a complete breakdown in communication."[4] The letter complains that counsel is failing to keep him advised of the proceedings. The letter also states that Applicant is unable to assist in his defense due to a head injury and migraines. Finally, the letter states that counsel informed him of their heavy case loads, and he is afraid that counsel would not have the time to handle his case properly. Applicant's second letter to the trial court only states that "[t]here has and continues to be a serious breakdown in communication."[5] Neither letter even implies that Applicant wished to pursue an innocence strategy that counsel was overriding.

4 Clerk's R. 225.

5 *Id.* at 228.

Letters aside, Applicant points to evidence that he claims shows counsel was aware of his desired objective. In a joint affidavit in response to Applicant's first application for habeas relief, counsel stated:

- Applicant "constantly stated that Ron Dodd was the real killer" and "was steadfast in his assertion that he was innocent;"[6]
- Applicant "took the position that Ron Dodd killed Lisa and Jayden Underwood and ... was not present when that happened;"[7]
- Applicant "maintained that he was completely innocent" and "refused to accept any responsibility;"[8] and
- "It was counsel's decision to call this case an accident, because the 'Ron Dodd did it' theory just wasn't going to work, and had not worked in this case."[9]

A memorandum of understanding prepared by counsel before trial stated that:

- "Client has maintained his innocence to attorneys since the date of appointment."[10]

And at an evidentiary hearing held on Applicant's second application for habeas relief:

- Counsel testified that Applicant "had told me he was innocent" "all along;"[11] and
- Co-counsel confirmed that Applicant told him "all along that he was innocent."[12]

While Applicant's evidence supports his claim that he repeatedly told counsel that he was innocent, the evidence shows nothing of whether Applicant actually told them to pursue a strategy of asserting innocence at trial. Instead, at the evidentiary hearing counsel testified:

> Q. Did you have Mr. Barbee's permission to tell the jury that?
>
> ...
>
> A. Okay. Your question is, did I tell Mr. Barbee or did I ask him if I could do that?
>
> Q. Yes.
>
> ***857** A. We had a conversation on February 21st, which was, I believe the morning of trial. I'm talking about 2006. And I had typed up a memo and I showed it to him, and he didn't want to sign it but we went over it. And the gist of the memo was that that was the only way we could get through this and him be found not guilty was that we take that position.
>
> And it was not a -- it was not an agreement to get his permission; it was just my theory of the case. He didn't sign the memo but he had it explained to him.
>
> So did I explicitly ask him if I could do that? The answer is no. Did he explicitly tell me he didn't want me to do it? The answer is no. It's no to that question, too.[13]

Finally, Applicant argues that even though a defendant's motivations are irrelevant to the autonomy right, counsel was aware of his motivation, heightening the importance of allowing him to make his own decisions. This is so because a defense psychiatrist told counsel that Applicant's chief concern was not disappointing his mother and that:

> [Applicant] appeared fixated on "how his mother will view him" ... He even went so far as to say that he would rather be executed than have his mother see him plead guilty to the charges.[14]

If Applicant's true objective of his defense was to avoid disappointing his mother by not pleading guilty, then counsel met and achieved this objective: there was no guilty plea, and there was a jury trial.

6 *Id.* at 234.

7 *Id.* at 231.

8 *Id.* at 235, 236.

9 *Id.* at 234.

10 *Id.* at 239.

11 *Id.* at 299.

12 *Id.* at 302.

13 *Id.* at 299.

14 *Id.* at 262.

In *McCoy*, the defendant explicitly and repeatedly opposed counsel's strategy of conceding guilt to avoid the death penalty. Applicant's evidence shows, at the most, that Applicant repeatedly told counsel he was innocent. No matter how emphatically he does so, this does not meet the requirements of *McCoy*. I agree with the majority that Applicant's facts do not show a *prima facie McCoy* violation.

VII — Conclusion

Under § 5(d), the legal basis of an applicant's claim is unavailable if it could not have been reasonably formulated based on relevant case law in the applicant's previous applications. The majority errs in determining that the legal basis of his current claim, *McCoy*, could have been formulated by distinguishing *Nixon* on its facts. The majority's conclusion ignores the fact that *Nixon* was an ineffective assistance of counsel case, and the issue in *Nixon* was whether presumptive prejudice under *Cronic* applied to the facts of that case. An argument distinguishing *Nixon* on its facts is an argument that presumptive prejudice under *Cronic* applies. This is clear from Applicant's own previous application making this very argument.

Ineffective assistance of counsel claims under *Strickland*, *Cronic*, and *Nixon* have different legal bases from and are not interchangeable with *McCoy*. Applicant's current *McCoy*-based claim asserts, not that counsel provided presumptively prejudicial ineffective assistance of counsel, but that counsel overrode his autonomy to decide that the objective of his defense is to claim innocence. Applicant could not have reasonably formulated his *McCoy* argument from relevant Supreme Court, federal appellate court, or Texas appellate case law. *McCoy* added a new entry to the list of decisions that belong to the defendant, and in doing so borrowed from Delaware, Kansas, and Colorado case law. A Texas habeas applicant, seeking to get past the procedural bar, is statutorily unable to rely ***858** upon other state court case law. I therefore disagree with the Court's conclusion that *McCoy* does not constitute a new legal basis for habeas relief.

Nevertheless, I agree with the majority that Applicant's claim fails to meet the exception to the § 5 procedural bar because he did not instruct counsel to assert innocence at trial. For *McCoy* to actually apply to the situation at hand, it is necessary that, at the time of his trial, Applicant's objective of his defense was to assert innocence, that Applicant communicated this objective to counsel, and then counsel overrode Applicant's objective. Because Applicant's evidence in support of his claim for habeas relief shows, at the most, that Applicant repeatedly told counsel he was innocent, I concur with the Court's judgment in dismissing the application.

All Citations

616 S.W.3d 836

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APPENDIX B

2019 WL 4621237
Only the Westlaw citation is currently available.

UNDER TX R RAP RULE 77.3, UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Do Not Publish
Court of Criminal Appeals of Texas.

EX PARTE Stephen Dale BARBEE, Applicant

NO. WR-71,070-03
|
SEPTEMBER 23, 2019

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS, IN CAUSE NO. 1004856R, IN THE 213TH DISTRICT COURT TARRANT COUNTY

Attorneys and Law Firms

Allen Richard Ellis, for Stephen Dale Barbee

ORDER

Per curiam.

***1** Before the Court is Applicant's second subsequent post-conviction application for a writ of habeas corpus, filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.[1]

1 Unless otherwise specified, all references to articles in this order refer to the Texas Code of Criminal Procedure.

On February 23, 2006, a jury convicted applicant of the offense of capital murder. Pursuant to the jury's answers to the special issues set forth in Article 37.071, the convicting court sentenced applicant to death. Article 37.071(e). This Court affirmed applicant's conviction and sentence on direct appeal. *Barbee v. State*, No. AP-75,359 (Tex. Crim. App. Dec. 10, 2008) (not designated for publication).

On November 4, 2008, applicant filed his initial post-conviction application for a writ of habeas corpus in the convicting court, raising four claims for habeas relief. In his second claim, applicant asserted that he was

> denied the assistance of counsel in violation of the Sixth and Fourteenth, Amendments of United States Constitution and Article I §§ 10 and 13 of the Texas Constitution and the requirements of [*United States v. Cronic*[2]] by the actions of trial counsel in confessing [Applicant's] guilt to the jury during closing argument without his client's knowledge [or] consent.

We adopted the convicting court's findings of fact and conclusions of law. Based on those findings and conclusions and our own review of the record, we denied habeas relief on all four of applicant's claims. *Ex parte Barbee*, No. WR-71,070-01 (Tex. Crim. App. Jan. 14, 2009) (per curiam) (not designated for publication).

2 466 U.S. 648 (1984).

Applicant filed his first subsequent application for a writ of habeas corpus in the convicting court on July 15, 2011, raising twenty-one claims for relief. Those claims included an actual-innocence claim (Claim One), an attorney-conflict-of-interest claim (Claim Two), and an allegation that "Trial Counsel Rendered Ineffective Assistance of Counsel at the Guilt/ Innocence Portion of the Trial By Completely Abandoning Their Client" (Claim Four). Applicant divided Claim Four into four sub-allegations, only one of which is relevant to his current sub-writ: "Claim Four(b): Abandonment of client and ineffective assistance of counsel for confessing their client's guilt without the client's permission." Following receipt and review of the claims applicant raised in that subsequent application, we determined that his second allegation (the attorney-conflict-of-interest claim) satisfied Article 11.071, Section 5(a). We accordingly remanded that claim to the convicting court for further consideration. *Ex parte Barbee*, No. WR-71,070-02 (Tex. Crim. App. Sept. 14, 2011) (per curiam) (not designated for publication). Upon that matter's return to this Court, we denied habeas relief on all of applicant's claims in a written order. *Ex parte Barbee*, WR-71,070-02 (Tex. Crim. App. May 8, 2013) (per curiam) (not designated for publication).

On May 14, 2018, the Supreme Court of the United States decided *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Therein, the Supreme Court held 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." *McCoy*, 138 S. Ct. at 1505.

***2** On May 9, 2019, the convicting court set Applicant's execution for Wednesday, October 2, 2019. On August 6, 2019, Applicant filed his present subsequent application in the convicting court. Relying on *McCoy*, applicant raises one claim for relief, alleging that his "[trial] counsel improperly overrode [Applicant's] Sixth Amendment right to insist that counsel maintain his innocence, resulting in structural error that requires a new trial."

After reviewing applicant's current subsequent application, we have determined that applicant's execution should be stayed and his case filed and set for an opinion. We additionally order briefing (or further briefing) on the following issues:

(1) Has applicant shown that the legal basis for his current claim "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before [the] date" on which applicant filed a timely initial application or filed a previously-considered application? *See* Art. 11.071,§ 5(d). In other words, is *McCoy* "new law" for purposes of Article 11.071, Section 5(a)(1)?

(2) Is *McCoy* retroactive to convictions that are already final upon direct review?

(3) Assuming that *McCoy* is retroactive and constitutes "new law" for purposes of Article 11.071, Section 5(a)(1), has applicant made a prima facie case of structural error under *McCoy*? In briefing whether applicant has made a prima facie case, the parties should address the following issues:

(a) Can a defendant who confesses his factual or legal guilt multiple times, even if he later recants those confessions, establish a prima facie case of structural error under *McCoy*?

(b) Must there be affirmative evidence in the trial record that a defendant objected to trial counsel's strategy to concede factual or legal guilt? If the trial record is devoid of such evidence, may we consider evidence that emerged in habeas proceedings?

(c) Under *McCoy*, how broad is the meaning of "objectives of the defense"?

The parties shall file such briefing with this Court within thirty (30) days of the date of this order.

IT IS SO ORDERED THIS THE 23RD DAY OF SEPTEMBER, 2019.

Keller, P.J., dissents.

All Citations

Not Reported in S.W. Rptr., 2019 WL 4621237

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APPENDIX C

728 Fed.Appx. 259
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

Stephen Dale BARBEE, Petitioner-Appellant
v.
Lorie DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee

No. 15-70022
|
Filed March 21, 2018

Synopsis

Background: Following affirmance of his conviction in state court for capital murder, 2008 WL 5160202, petitioner filed federal petition for writ of habeas corpus. The United States District Court for the Northern District of Texas, No. 4:09-CV-74, Terry R. Means, J., 2015 WL 4094055, denied petition. The Court of Appeals, 660 Fed.Appx. 293, granted certificate of appealability (COA) on claim that counsel rendered ineffective assistance by conceding petitioner's culpability at summation.

Holdings: The Court of Appeals held that:

state court's determination that *Strickland* standard for ineffective assistance of counsel claims, rather than structural error analysis, applied was not contrary to, or unreasonable application of, clearly established federal law, and

rejection of claim that any deficiency arising from defense counsel's failure to present alternative suspect theory, instead of accidental death theory, prejudiced petitioner was not contrary to, or unreasonable application of, *Strickland*.

Petition denied.

***260** Appeals from the United States District Court for the Northern District of Texas, USDC No. 4:09-CV-74

Attorneys and Law Firms

Allen Richard Ellis, Law Offices of A. Richard Ellis, Mill Valley, CA, for Petitioner-Appellant

George A. d'Hemecourt, Assistant Attorney General, Office of the Attorney General for the State of Texas, Austin, TX, for Respondent-Appellee

Before DENNIS, PRADO, and ELROD, Circuit Judges.

Opinion

PER CURIAM:[*]

[*] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

****1** Capital habeas petitioner Stephen Dale Barbee appeals the district court's denial of habeas relief, contending that he was denied effective assistance of trial counsel inasmuch as lead counsel conceded Barbee's culpability at summation. Barbee argues that his claim is governed by *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), which holds that if there has been such an abdication of advocacy that the prosecution's case was not subjected to meaningful testing, a defendant need not demonstrate that he was prejudiced by counsel's actions. Barbee further argues that even under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires an applicant to show both objectively deficient performance and prejudice, he is entitled to relief. Barbee has not shown that the state habeas court's conclusions that his claim was governed by *Strickland*, rather than *Cronic*, or that he was not prejudiced by counsel's concession, were contrary to, or involved an unreasonable application of, clearly established federal law, or were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d). We thus AFFIRM the district court's denial of habeas relief.

I

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 ***261** 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.

****2** 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 ***262** 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.

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> 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.

****3** 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.[1] 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.

1 Barbee's presentation at the punishment phase is discussed in further detail in this court's COA opinion. *See Barbee v. Davis*, 660 Fed.Appx. 293, 318–19 (5th Cir. 2016).

After unsuccessfully seeking state post-conviction relief, Barbee filed this 28 U.S.C. § 2254 application, and was granted a stay so he could exhaust additional claims that had not been brought in his initial state habeas filing. Barbee filed a second state habeas petition asserting additional claims, all of which were dismissed or denied by the Texas Court of Criminal Appeals (TCCA). Upon return to the district court, the court denied relief and denied a certificate of appealability (COA).

This court granted a COA for Barbee's claim that counsel rendered ineffective assistance by conceding his culpability as to the conduct element of the offense at summation, but denied a COA as to the remainder of the claims he sought to appeal. The parties filed supplemental briefs and presented oral argument, addressing the merits of Barbee's ineffective assistance of counsel claim.

II

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), Barbee can obtain federal habeas relief only if the adjudication of his claims in state court "(1) 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; or (2) 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." *Robertson v. Cain*, 324 F.3d 297, 301–02 (5th Cir. 2003) (quoting 28 U.S.C. § 2254(d)(1)-(2)). "Section 2254(d) thus demands an inquiry into whether a prisoner's 'claim' has been 'adjudicated on the merits' in state court; if it has, AEDPA's highly deferential standards kick in." *Davis v. Ayala*, ––– U.S. ––––, 135 S.Ct. 2187, 2198, 192 L.Ed.2d 323 (2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

***263** "[A] state court's decision will be an unreasonable application of clearly established federal law whenever the state court identifies the correct governing legal principle from the Supreme Court's decisions but applies that principle to the facts of the prisoner's case in an 'objectively unreasonable' manner." *Robertson*, 324 F.3d at 302 (citing *Kutzner v. Johnson*, 242 F.3d 605, 608 (5th Cir. 2001)). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Harrington*, 562 U.S. at 101, 131 S.Ct. 770. "Under § 2254(d), a habeas court must determine what arguments or theories supported[,] or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." *Id.* at 102, 131 S.Ct. 770.

A state court's factual findings are "presumed to be correct," and an applicant has "the burden of rebutting the presumption of correctness by clear and convincing evidence." § 2254(e)(1). "The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). The state court's conclusion that counsel rendered effective assistance "is a mixed question of law and fact." *See Strickland*, 466 U.S. at 698, 104 S.Ct. 2052.

III

****4** Barbee argues that his claim is governed by *Cronic*, which holds that when there is a "breakdown of the

adversarial process," prejudice is presumed. 466 U.S. at 657–58, 104 S.Ct. 2039. Alternatively, Barbee argues that counsel's summation amounted to ineffective assistance of counsel under *Strickland* "because trial counsels' 'strategy' of an accidental death was based on a misunderstanding of the law," was not supported by the evidence, and was not accompanied by evidence of Barbee's low risk of future dangerousness.

A

In *Cronic*, the Supreme Court held that where "counsel entirely fails to subject the prosecution's case" to meaningful testing, "the adversary process itself [is] presumptively unreliable," and a defendant, therefore, need not demonstrate the impact of the failure in order to succeed on his claim. *Id.* at 658–59, 104 S.Ct. 2039. The Supreme Court has described *Cronic* as "a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." *Florida v. Nixon*, 543 U.S. 175, 190, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

The Supreme Court has held that *Cronic* was inapplicable even where counsel failed to adduce mitigating evidence and waived closing argument, explaining, "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." *See Bell v. Cone*, 535 U.S. 685, 696–97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Similarly, this court held that *Cronic* was inapplicable where counsel conceded that a defendant committed murder, but not capital murder, over the defendant's objections, *Haynes v. Cain*, 298 F.3d 375, 381–82 (5th Cir. 2002) (en banc), explaining that "defense counsel must *entirely* fail to subject the prosecution's case to meaningful adversarial testing ***264** for the *Cronic* exception to apply," *id.* at 381 (citing *Gochicoa v. Johnson*, 238 F.3d 278, 285 (5th Cir. 2000)).

In *Florida v. Nixon*, the Supreme Court held that even defense counsel's full concession of guilt is not necessarily an indication that "counsel has entirely failed to function as the client's advocate," and that the *Strickland* standard applies to cases in which counsel informs the client of her strategic decision to concede guilt and focus on the penalty phase. *Nixon*, 543 U.S. at 189–91, 125 S.Ct. 551. *Nixon* suggests that most tactical decisions by counsel will be subject to the *Strickland* ineffective-assistance-of-counsel analysis, rather than the *Cronic* structural-error analysis, whether or not they involve an admission of guilt. *Nixon* also suggests that the fact that a client has not approved of a strategy does not necessarily trigger the application of *Cronic*: "When counsel informs the defendant of the strategy counsel believe[d] to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding defendant's explicit consent." *Nixon*, 543 U.S. at 192, 125 S.Ct. 551.

The state habeas court determined, without analysis, that *Strickland*, rather than *Cronic*, applied to Barbee's ineffective assistance claim. Barbee argues that his counsel's concession of guilt "resembles the complete breakdown in the adversarial process that *Cronic* envisions" inasmuch as counsel's theory was "both unsupported by defense evidence and contrary to the coroner's testimony." He contends that *Nixon* is distinguishable as, in that case, "there was overwhelming evidence of Nixon's guilt and other factors not present here." Finally, Barbee asserts that *Cronic* should apply to his claim because counsel's closing argument in this case was the "functional equivalent" of an involuntary guilty plea or coerced confession.

****5** Barbee attempts to distinguish *Nixon*, inter alia, on the grounds that Barbee "received no meaningful guilt-phase advocacy" and his counsel's concession was the "functional equivalent of a guilty plea." However, as compared with the defendant in *Nixon*, Barbee received at least as much if not more "meaningful" guilt-phase advocacy. Nixon's attorney determined that, "given the strength of the evidence, [his client's] guilt was not subject to any reasonable dispute." *Nixon*, 543 U.S. at 180–81, 125 S.Ct. 551. As a result, counsel "cross-examined [State] witnesses only when he felt their statements needed clarification ... and he did not present a defense case," although he objected to the introduction of crime scene photographs and "actively contested several aspects of the jury instructions during the charge conference." *Id.* at 183, 125 S.Ct. 551.

By contrast, Barbee's counsel hired a false confession expert to analyze Barbee's confessions; sought to discredit the unrecorded bathroom confession and the police report documenting that confession; sought to exclude Barbee's inculpatory statements (successfully, in the case of Barbee's recorded confession to detectives); and extensively cross-examined prosecution witnesses. Moreover, in *Nixon*, counsel

fully conceded his client's guilt as to all elements "beyond any doubt," 543 U.S. at 182, 125 S.Ct. 551, while Barbee's counsel argued that "the evidence in this case, the conclusive beyond-a-reasonable-doubt evidence, does not support an intentional or knowing murder for Lisa Underwood."

Barbee contends that counsel's accidental-death theory would not have removed the possibility of being convicted for capital murder under the jury charge. In Texas, intentional murder requires intent as to ***265** the *result* of the conduct, not just the conduct. *See Martinez v. State*, 763 S.W.2d 413, 419 (Tex. Crim. App. 1988) (en banc) ("Intentional murder ... is a 'result of conduct' offense; that is, not only must an accused be found to have intended to engage in the act that caused the death, he must also have specifically intended that death result from that conduct."). However, the definition of "intentional" in the jury charge included the "conscious objective or desire to engage in the conduct."

While the jury charge definition of "intentional" may have erroneously suggested to the jury that it only needed to find "intent" as to Barbee's conduct, the full jury charge suggested that "intentionally" applied to "cause[d] the death,"[2] indicating that the jury did not apply the instruction in a legally impermissible way. *See Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."). Indeed, the TCCA has rejected a challenge to a jury charge similar to Barbee's, finding that in the phrase "intentionally or knowingly cause the death," "[t]he terms 'intentionally' and 'knowingly' directly modif[ied] the phrase 'cause the death' " and it was therefore "obvious that the 'result of conduct' and 'cause the result' language are the applicable portions of the full code definitions." *Velez v. State*, No. AP-76,051, 2012 Tex. Crim. App. Unpub. LEXIS 607, at *79–80 (Tex. Crim. App. June 13, 2012).

2 The charge instructed the jury to find Barbee guilty if it found that he

> intentionally or knowingly cause[d] the death of an individual, Lisa Underwood[,] by smothering her with the weight of his body or with an object unknown to the Grand Jury or by a combination of the two, and during the same crimonal [sic] transaction, [Barbee] intentionally or knowingly caused the death of another individual, Jayden Underwood, by smothering him with his hand or by means unknown to the Grand Jury or by a combination of the two.

Furthermore, counsel's argument unambiguously reflected a "result of conduct" understanding of mens rea, an understanding that was not contradicted by the prosecutor. *Cf. Kinnamon v. Scott*, 33 F.3d 462, 465–66 (5th Cir. 1994) (finding "no reasonable likelihood that the jury applied" a charge "in a constitutionally impermissible way" where, inter alia, "[t]he prosecutor did not attempt to exploit any uncertainty in the charge"). Therefore, Barbee has not shown it was unreasonable for the state habeas court to conclude that counsel's concession was a "defensive theory," rather than a full concession that Barbee committed capital murder.[3] *See* § 2254(d)(2).

3 Barbee also claims that he could have been found guilty under counsel's theory based on the definition of "knowingly" in the jury charge, which included "aware[ness] of the nature of his conduct" and "aware[ness] that his conduct is reasonably certain to cause the result." However, Barbee does not explain how the jury could have accepted counsel's theory that Barbee accidentally held Lisa down too long and also found that he was "reasonably certain" that he was killing her. Finally, Barbee contends that he could have been convicted of capital murder based on the intentional murder of Jayden, because even Lisa's accidental killing would constitute "murder" under other sections of the Texas Penal Code. However, Barbee's indictment and jury charge stated that both murders were intentional or knowing. Thus, the jury could not have convicted him under this theory. *See, e.g., Ross v. State*, 487 S.W.2d 744, 745 (Tex. Crim. App. 1972) (reversing conviction where jury "charge erroneously authorized the [defendant's] conviction under a theory not charged in the indictment").

****6** Barbee next argues that this case is distinguishable from *Nixon* because the evidence against Barbee was not as strong ***266** as the evidence against Nixon. However here, as in *Nixon*, counsel faced significant evidence of their client's guilt. Such evidence included the testimony of a police detective that Barbee confessed to him and the recorded inculpatory statements Barbee made to his wife, which were played for the jury. Barbee also led the police to the bodies and exhibited specific knowledge about the burial sites. Further, Barbee had a motive to kill Lisa, as he had been unfaithful to his wife and Lisa was pressuring him to admit it. In light of the strength of the prosecution's case, counsel's concession appears to have been a calculated strategy to elicit an acquittal.[4]

4 We note that, under *Nixon*, even counsel's concession that her client committed capital murder may be a strategic decision. 543 U.S. at 190–91, 125 S.Ct. 551 (observing that *Cronic*'s application, vel non, is influenced by "the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure").

As to Barbee's argument that counsel's theory was entirely unfounded, it is not unreasonable to conclude that the record does, in fact, support counsel's theory. *See* § 2254(d). The medical examiner said that he was not sure how long Lisa would have been held down before she asphyxiated, eventually conceding he could not rule out that she had only been held down for thirty seconds. This theory was also consistent with Barbee's recorded statement to his wife, which suggested that he killed Lisa accidentally.

Finally, Barbee makes a number of arguments in support of his assertion that counsel was obligated to obtain his consent before conceding his guilt. The record does support that Barbee was not "fully" consulted or, at least, did not expressly consent to the strategy. During the state habeas 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."

Nixon holds that counsel need not obtain affirmative consent to concede guilt. *See* 543 U.S. at 189, 125 S.Ct. 551. *Nixon* suggests that counsel's consultation played a role in that holding, but does not establish that *Cronic* necessarily applies when counsel pursue a strategy in the absence of full consultation, or in circumstances suggesting that a client would disagree with that strategy. *See id.* (stating counsel "was obliged to ... explain his proposed trial strategy to Nixon"). And Barbee does not cite any Supreme Court case that so held.[5] Given the unsettled nature of the law on this point, we cannot say that the absence of full consultation or consent supports that the state habeas court's adjudication of this claim was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *See* § 2254(d)(1). And, given the ambiguity of the record, we cannot say that the state court made an unreasonable determination of the facts in light of the evidence presented. *See* § 2254(d)(2). 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 ***267** state court's application of *Strickland*.[6]

5 In fact, there is circuit precedent to the contrary. *See* *United States v. Thomas*, 417 F.3d 1053, 1059 (9th Cir. 2005) ("[F]ailure to consult and obtain consent in and of itself does not render [counsel's] strategic decision presumptively prejudicial.").

6 We recognize that the Supreme Court will likely provide additional guidance in its decision in *McCoy v. Louisiana*. *See* *State v. McCoy*, 218 So.3d 535 (La. 2016), *cert. granted*, — U.S. ——, 138 S.Ct. 53, 198 L.Ed.2d 781 (2017). 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. *See* *Greene v. Fisher*, 565 U.S. 34, 38, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011). As *McCoy* is a direct appeal, *see* — U.S. ——, 138 S.Ct. 53, 198 L.Ed.2d 781, 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*.

B

****7** To establish an ineffective-assistance-of-counsel claim under *Strickland v. Washington*, Barbee must "show that counsel's performance was deficient" and demonstrate "that the deficient performance prejudiced the defense." 466 U.S. at 687, 104 S.Ct. 2052. With respect to deficient performance, Barbee "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. To demonstrate prejudice, Barbee "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. Because his claim is governed by AEDPA, Barbee must show that the state habeas court's adjudication of his *Strickland* claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or that it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d).

The state habeas court found that Barbee failed to show deficient performance because, it concluded, counsel's tactic

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was reasonable in light of the evidence and the circumstances. The court further found that Barbee had not established prejudice, finding that Barbee's alternative theory was not supported by the evidence and therefore "was not a viable jury argument."

Assuming without deciding that counsel's performance was deficient under these circumstances, we conclude, as explained below, that Barbee has not shown that it was unreasonable for the state habeas court to determine that he was not prejudiced by counsel's closing argument. *See id.*; *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

Barbee first argues that he was prejudiced by counsel's concession because it removed any "lingering juror uncertainty" about his guilt. He contends that this is one of the most important factors that leads jurors to impose a life sentence rather than death, and that lingering doubt "was an important factor [in his case], as no forensic evidence tied Barbee to the crime and there was evidence of Ron Dodd's culpability." However, Barbee points to no caselaw in support of his position that residual doubt at the punishment phase is a viable prejudice theory, let alone "clearly established Federal law, as determined by the Supreme Court of the United States." *See* § 2254(d)(1). And, in any event, Barbee's case for lingering doubt at the punishment phase is not persuasive given the considerable record support ***268** for his guilt: in addition to the evidence of guilt discussed above, Barbee's ex-wife, Theresa Dowling, testified at the punishment phase that Barbee called her the night of the murders and confessed to accidentally killing Lisa by holding her down too long, and to accidentally killing Jayden in an effort to keep him quiet. Thus, Barbee has not shown it was unreasonable for the state court to conclude he was not prejudiced in this respect. *See* § 2254(d).

Barbee next claims that the accidental-death theory ran counter to the medical examiner's testimony, causing counsel to lose considerable credibility with the jury at the punishment phase. Again, Barbee points to no caselaw in support of his contention that loss of credibility with the jury can support *Strickland* prejudice. Moreover, as discussed above, counsel's strategy was not without support. The medical examiner testified that he was not entirely sure how long Lisa would have been held down before she asphyxiated, eventually conceding he could not rule out that she had only been held down for thirty seconds. While the jury may not have thought it likely that Barbee had accidentally killed Lisa in light of the medical examiner's statements, the theory was not "counter to" his statements. This theory was also consistent with Barbee's recorded statement to his wife that he "held [Lisa] down too long" and with Dowling's testimony that Barbee confessed to accidentally killing Lisa. Barbee's brief argument points to nothing tending to show that the jury's distrust of counsel swayed its decisions at the penalty phase. This argument is, therefore, also unavailing.[7]

7 Barbee contends that, as a result of counsel's concession at summation, counsel failed to present evidence that Barbee would not be a future danger. Barbee argues that this was prejudicial because, at the time, he was "a 38-year old successful business owner with absolutely no prior criminal record." Barbee does not explain how counsel's concession led to their failure to present evidence that Barbee would not be a future danger. Thus, this argument is forfeited for inadequate briefing. *See, e.g.*, *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 784 (5th Cir. 2017).

****8** Finally, Barbee suggests that he was prejudiced by counsel's failure to present the theory that Ronald Dodd committed the murders instead of the accidental death theory. Counsel stated that their efforts to pursue a different defense strategy were hampered by Barbee's shifting version of events and by his "refus[al] to testify." Barbee argued in his COA brief that it was unreasonable for the state habeas court to credit this statement because the record shows that Barbee was always steadfast in his assertions to counsel that he was innocent of both murders. Even if Barbee consistently maintained complete innocence to counsel, the record does show that proceeding with a theory of actual innocence would have been challenging given his recorded conversation with his wife in which he stated, "I held her down too long." Barbee declined to testify to explain what he contends were false confessions. This lends credence to trial counsel's statements that it would have been difficult to present an "actual innocence" theory rather than a "legal innocence" theory.

Moreover, the only alternative defense Barbee proposes is that Dodd committed the murders. The state habeas court found, "The 'Ron Dodd did it' theory was not a viable jury argument." That court pointed to Barbee's confessions, his admitted presence near the place Lisa's car was found, and his knowledge of the location of the bodies as evidence

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inconsistent with the theory that Dodd committed the murders.

***269** Barbee gave the following version of events in a 2010 declaration in support of his alterative theory of the crime: On the evening of February 18, 2005, Barbee was at Dowling and Dodd's house and asked Dodd to accompany him to Lisa's house, as he "wanted to see how she was doing." Dodd drove Barbee to Lisa's house and dropped him off. Barbee later called Dodd, who came to pick him up, and they returned to Dowling's house together. Dodd asked if Barbee wanted Dodd to talk to Lisa about getting a paternity test, and Barbee agreed, so they drove back to Lisa's house together. Barbee stayed in Dodd's truck while Dodd entered Lisa's house because he did not want Lisa to see that he had been crying. Dodd was inside the house for fifteen or twenty minutes, then came out and said, "Your problems are solved, go get her truck."

Barbee claims not to have understood what Dodd meant, but he got out of Dodd's truck, went to the door of Lisa's house, and Dodd drove off. Barbee went into the house and found Lisa and Jayden dead. He "panicked as [he] thought [he] was going to be blamed for it." He put the bodies in Lisa's vehicle and drove away. Barbee called Dodd, who met him and helped him remove the bodies from the vehicle. Dodd threw a shovel to Barbee and left. After burying the bodies, Barbee called Dodd, who agreed to pick him up on the highway. While on the way to meet Dodd, Barbee was stopped by a deputy sheriff. He gave the deputy a false name and fled. He met Dodd and they returned to Dowling's house where Dowling washed Dodd's clothing.

Barbee claims that he has adduced significant evidence in support of this theory, namely: (1) the affidavit of Dowling's father, who said, "[m]y son Danny Dowling told me that Ron Dodd had told him right after the murders that he had to punch Lisa in the face 25–26 times before 'the fucking bitch would go down,' " and a declaration from a post-conviction investigator stating that "both Jerry Dowling and his son Danny Dowling had said that Ron Dodd said he had to punch Lisa Underwood 25–26 [times] in the face before the 'fucking bitch would go down' "; (2) Dowling's statement to the investigator that she washed Dodd's clothes on the night of the murders and Dodd's statement to the investigator that he had his vehicle power-washed shortly thereafter; (3) a statement from Barbee's niece that Dowling, who was living with Dodd, often told her "how much she hated him [Barbee] and wanted him 'gone' "; (4) evidence of Dowling and Dodd's financial motive to frame Barbee for murder;[8] (5) evidence of "financial misdeeds" by Dowling that would have provided additional motive for Dodd to have framed Barbee; (6) Dodd's history of criminal violence; (7) evidence that Barbee would avoid physical confrontations; and (8) evidence that points to the falsity of Barbee's confession. Even assuming that this evidence is properly before us, it does not show that the Dodd theory was more likely to succeed than the accident theory.

8 Barbee obtained a declaration from his mother as well as a statement from an investigator to the effect that Dowling and Dodd had a financial motive to have Barbee out of the way, including a $500,000 "bonding policy" that Dowling purportedly converted to a "universal life insurance policy" with Dowling as the sole beneficiary.

****9** With regard to the purported confession from Dodd to Danny Dowling, there is no first-hand statement from Danny. And it is neither clear that Danny would have testified, nor that his testimony would have been favorable to Barbee's theory: When the post-conviction investigator asked Danny who had made the statement about punching Lisa, Danny said that "he just couldn't remember, and didn't want anything to do with this case."

***270** Dowling's statement that Dodd wanted his clothes washed the night of the murders and Dodd's statement that he had his vehicle power-washed shortly after the murders are just as consistent with Barbee's confession as they are with his exculpatory version of events, as in both versions he alleged that Dodd helped him bury the bodies. These statements are also second-hand, coming from an investigator's report.

The evidence of pecuniary interests and Dowling's dislike of Barbee perhaps tend to show that Dowling and Dodd had a motive to murder Barbee, but not that they had a motive to murder Lisa and Jayden. And even if they had a motive to frame Barbee by killing the Underwoods, Barbee had a more plausible motive to kill Lisa inasmuch as she was demanding that he tell his wife about the pregnancy.

Dodd's criminal history reflects that he had several prior convictions for assault and harassment. But Texas's evidentiary rules, as a general matter, prohibit propensity evidence. *See* Tex. R. Evid. 404(b). And even if it were admissible, this evidence has little probative value.

Barbee's evidence that he would "avoid physical confrontations" also has little probative value,[9] and it is

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contradicted by Dowling's testimony that she and Barbee had multiple physical fights when they were married, and that on one occasion he followed a driver and attempted to "get out to hit" the driver.

9 Barbee points to a statement from a schoolmate saying, "I have had no contact with [Barbee] since high school, [but] based on my knowledge of him when he was young, I do not think [Barbee] has a high probability of committing future violent acts"; a statement from his aunt that he "was never abusive" and would "walk away from any kind of confrontation"; and a statement from the girlfriend of a former roommate, who saw Barbee "every weekend for a period of about 2–3 months" and "never saw [Barbee] angry."

Barbee's evidence with respect to the purported falsity of his confession includes his own declaration that he was coerced into confessing by the police; a declaration from his niece, in which she says that Barbee told her he confessed to protect his family because Dodd threatened to hurt them; and the declaration of an author who states that Barbee confessed because "Dodd had threatened to hurt his family." These statements all originate with Barbee, and none of them fully explains why he would have confessed to his wife.

In light of the weakness of the evidence supporting his alternative-suspect theory and the strength of the evidence against him, it was not unreasonable for the state habeas court to conclude that Barbee's alternative-suspect theory was not a "viable jury argument." Accordingly, 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. *See* § 2254(d).

***

For these reasons, we AFFIRM the district court's denial of habeas relief.

All Citations

728 Fed.Appx. 259, 2018 WL 1413840

Footnotes

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APPENDIX D

660 Fed.Appx. 293
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

Stephen Dale BARBEE,
Petitioner–Appellant
v.
Lorie DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellee

No. 15–70022
|
Date Filed: 11/23/2016

Synopsis

Background: Petitioner sought federal habeas relief from state-court conviction for capital murder. The United States District Court for the Northern District of Texas denied petition. Petitioner requested certificate of appealability (COA).

Holdings: The Court of Appeals held that:

district court did not err in holding that actual innocence could not serve as a gateway for consideration of the merits of petitioner's procedurally defaulted claims;

petitioner was not entitled to COA on conflict of interest claim;

petitioner was not entitled to COA on claim that trial counsel were ineffective in presenting testimony of prison consultant;

petitioner was not entitled to COA on claim that trial counsel were ineffective in failing to present mitigating evidence;

petitioner was not entitled to COA on claim that trial counsel were ineffective in failing to present evidence of head injuries and drug abuse; and

any error in district court's reliance on extra-record information in denying petitioner's motion to alter or amend judgment denying his habeas petition was harmless; but

petitioner was entitled to COA on claim that trial counsel were ineffective by confessing his guilt to the jury during closing argument without his permission.

Ordered accordingly.

***295** Appeals from the United States District Court for the Northern District of Texas, USDC No. 4:09–CV–74

Attorneys and Law Firms

Allen Richard Ellis, Law Offices of A. Richard Ellis, Mill Valley, CA, for Petitioner–Appellant.

Thomas Merrill Jones, Assistant Attorney General, Office of the Attorney General, Postconviction Litigation Division, Austin, TX, for Respondent–Appellee.

Before JOLLY, DENNIS, and PRADO, Circuit Judges.

Opinion

PER CURIAM:[*]

[*] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Stephen Dale Barbee, a businessman in his mid-thirties with no criminal record, was convicted and sentenced to death in Texas for the capital murder of his former girlfriend, Lisa Underwood, who was seven and a half months pregnant,[1] and her seven-year-old son, Jayden. He requests a certificate of appealability (COA) to appeal the district court’s denial of federal habeas relief. We GRANT a COA for his claim that trial counsel rendered ineffective assistance at the guilt-innocence phase of trial by confessing his guilt to the jury during closing argument without his permission, and DENY a COA as to all other claims. We further hold that the district court did not abuse its discretion when it cited extra-record

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evidence in its order denying Barbee's motion to alter or amend the judgment.

1 Lisa was unsure whether Barbee or another man, Ed Rogers, was the father of her unborn child. DNA evidence introduced at trial established that Rogers was the father.

I. Facts and Procedural History

The district court summarized the evidence presented at trial as follows:

> Lisa Underwood owned a bagel shop in Fort Worth. She began dating Stephen Dale Barbee, a customer of the shop. Lisa became pregnant in July of 2004 and told Barbee that she believed he was the father of the unborn child. Lisa's family and friends had planned a baby shower for Lisa at 4 p.m. on Saturday, February 19, 2005, but she never arrived. The Fort Worth police were notified and began an investigation into her disappearance.
>
> Unbeknownst to the Fort Worth detectives at that time, Barbee had been stopped by a deputy sheriff earlier that same morning while walking along a service road near a wooded area in another county. He was wet and covered in mud. He gave the deputy a false name and fled on foot.
>
> Lisa's home, which she shared with her seven-year-old son Jayden, showed no signs of forced entry. Jayden's shoes were on top of the fireplace hearth, and his glasses were next to his bed. Lisa's blood was in the living room, on the rug, and on the furniture. Having learned that Barbee had been in a relationship with Lisa, the police inquired at the ***296** home of Barbee's ex-wife, Theresa. Although divorced, Theresa and Barbee still operated a tree-trimming business and a concrete-cutting business together. Theresa lived in their former marital home with an employee of the concrete business named Ron Dodd. Theresa told Barbee that the police were looking for him and asked what he had done. She urged him to turn himself in.
>
> On Monday, Lisa's Dodge Durango was found in a creek approximately 300 yards from where Barbee had been stopped by the deputy sheriff two days earlier. The windows were down, the hatchback was up, and there was a bottle of cleaning solution in the cargo area. On the same day, Fort Worth detectives traveled to Tyler to speak with Barbee, his wife, Trish, and Dodd. Barbee and Dodd were in Tyler working on a job trimming trees. They agreed to go to the Tyler Police Department for questioning.
>
> Barbee initially gave a recorded interview stating that he had not seen or heard from Lisa in months. He then asked to use the bathroom. While in the bathroom with a detective, Barbee confessed that he killed Lisa by starting a fight with her and then holding her face down into the carpet until she stopped breathing. He also admitted that he held his hand over Jayden's mouth and nose until he stopped breathing. Barbee said he did it because Lisa was going to ruin his family and his relationship with his wife. He said that Dodd had helped him plan the murder, had dropped him off at Lisa's house beforehand, and had picked him up afterwards, near the area where he was stopped by the deputy. This "bathroom confession" was not recorded. Afterwards, Barbee gave another, recorded statement to police, which was ultimately suppressed. He then spoke with his wife, Trish, which was also recorded in the police interview room. The next day, Barbee took the police to the place where he had buried the bodies. Barbee recanted his confession a few days later.
>
> The prosecution's case at the guilt phase relied primarily on Barbee's flight from the deputy sheriff, the bathroom confession, his recorded statement to Trish, and his knowledge of details about the burial site.
>
> At the sentencing phase of trial, the State presented evidence from Theresa that, during the course of their marriage, Barbee had assaulted her on four occasions and had assaulted a driver in a road-rage incident. The State also presented evidence that Barbee had verbally abused a former coworker who had rejected his attempts to have a relationship. The defense presented testimony from a pastor at Barbee's church, Barbee's mother, his aunt, a niece, a church acquaintance, an ex-girlfriend, and the girlfriend of Barbee's ex-roommate. The defense also presented testimony from a prison security expert, a confinement officer who had known Barbee his whole life, and the courtroom bailiff, who described Barbee's behavior in jail.

Barbee v. Stephens, No. 4:09–CV–074–Y, 2015 WL 4094055, at *1–2.

The jury found Barbee guilty of capital murder. The trial court sentenced him to death after the jury answered the special issue on future dangerousness affirmatively and the special issue on mitigation negatively. The Texas Court of Criminal Appeals (TCCA) affirmed his sentence and conviction on

direct appeal, and the Supreme Court denied certiorari. *Barbee v. State*, No. AP–75,359, 2008 WL 5160202 (Tex. Crim. App. Dec. 10, 2008), *cert. denied*, 558 U.S. 856, 130 S.Ct. 144, 175 L.Ed.2d 94 (Oct. 5, 2009).

***297** In his first state habeas application filed in March 2008, Barbee raised four claims:

(1) Trial counsel rendered ineffective assistance at the pretrial stage by failing to properly challenge the veracity of the video recording of Barbee's interrogation and confession;

(2) Trial counsel abandoned him at the trial stage by confessing his guilt to the jury during closing argument without his knowledge or consent;

(3) Trial counsel rendered ineffective assistance at the punishment phase by failing to present significant mitigating evidence of his history of head injuries, failing to prepare witnesses for testimony, and presenting witnesses who challenged the jury's verdict, after defense counsel had admitted guilt in closing argument; and

(4) The police engaged in misconduct by withholding the complete video recording of Barbee's interrogation by the police, and providing a version that had been edited to remove portions of the interrogation in which Barbee was coerced into confessing to the murders.

Along with his habeas application, he submitted affidavits from Amanda Maxwell, the mitigation specialist retained by trial counsel; Dr. Stephen K. Martin, a neuropsychologist; Nancy Cearley, a pastor; and Jackie Barbee, his mother. He also submitted a letter from a psychologist, Dr. Kelly R. Goodness, who had been retained by trial counsel.

The trial court ordered trial counsel to file affidavits responsive to Barbee's ineffective assistance claims. Trial counsel, Bill Ray and Tim Moore, submitted a joint affidavit.

Along with its response, the State submitted a handwritten statement from Barbee; a memorandum of understanding between trial counsel and Barbee; a letter from Barbee to Dr. Richard Leo, a false-confession expert; a letter from Dr. Leo to trial counsel; a letter from Dr. James G. Shupe, a psychiatrist, to trial counsel; a memorandum from Amanda Maxwell to trial counsel; an affidavit from Dr. Jack Randall Price, a psychologist; and an affidavit from one of the prosecutors at trial, Richard Kevin Rousseau.

The state habeas trial judge, who was not the same judge who presided at Barbee's trial, did not conduct an evidentiary hearing. The judge adopted the State's proposed findings of fact and conclusions of law and denied relief. The TCCA adopted the trial court's findings and conclusions and denied relief in 2009. *Ex parte Barbee*, No. WR–71070–01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009).

Barbee filed a petition for federal habeas relief in October 2010, presenting 21 claims for relief, many of which had not been presented in state court. The district court held the proceedings in abeyance and allowed Barbee to return to state court to exhaust the claims that he had not presented to the state court previously.

In his second state habeas application, Barbee presented the following claims:

(1) Actual innocence;

(2) Attorney conflict of interest;

(3) Trial counsel rendered ineffective assistance, pretrial, by (a) failing to properly challenge the veracity of the video recording of his interrogation and confession and to investigate whether it was coerced, and (b) failing to complete DNA testing prior to trial;

(4) Trial counsel rendered ineffective assistance at the guilt-innocence phase and completely abandoned Barbee by (a) failing to effectively present a case for actual innocence through expert testimony, (b) confessing Barbee's guilt without Barbee's permission, (c) failing to explain the cell ***298** phone records introduced into evidence, (d) failing to object to prejudicial speculation by the coroners;

(5) Trial counsel rendered ineffective assistance at the punishment phase by (a) presenting harmful testimony from Susan Evans, (b) failing to present mitigating evidence, (c) failing to present mitigating evidence regarding future dangerousness, (d) failing to present mitigating evidence of head injury and hydrocodone use, (e) failing to present evidence of low intelligence, (f) failing to present medical evidence of frontal lobe impairment, brain impairment, and neuropsychiatric evidence;

(6) His trial was conducted in an atmosphere that rendered it inherently unfair due to pervasive and extremely prejudicial pretrial and trial publicity;

(7) Trial counsel rendered ineffective assistance by failing to file a motion for change of venue;

(8) He was denied due process as a result of the state court's failure to hold an evidentiary hearing on substantial, controverted and unresolved issues of fact;

(9) The trial court erred by refusing to grant a challenge for cause to juror Denise Anderson;

(10) The trial court abused its discretion by denying Barbee's motion to suppress alleged statements made to Detective Carroll;

(11) Texas's 10–12 rule (prohibition against informing jurors that a single holdout juror will cause the imposition of a life sentence) violated his rights under the Eighth and Fourteenth Amendments;

(12) Lethal injection violates the Eighth Amendment;

(13) The second special issue on mitigation is unconstitutional because it omits a burden of proof and makes impossible any meaningful appellate review of the jury's determination;

(14) The trial court erred by denying a motion to inform the jury that failure to answer a special issue would result in a life sentence;

(15) The evidence supporting special issue 1 (future dangerousness) was insufficient;

(16) The jury was unconstitutionally selected because the jurors were death-qualified;

(17) His death sentence violates international law;

(18) Appellate counsel rendered ineffective assistance;

(19) He was deprived of due process and a fair trial when the police provided an edited version of the videotape of his confession and withheld the complete video;

(20) The testimony of the coroners, and their lack of authority to perform autopsies, deprived him of a fair trial; and

(21) The cumulative effect of all of these errors deprived him of due process.

Barbee claimed that his initial state habeas counsel was ineffective in failing to adequately brief claims, failing to investigate and coherently present extra-record evidence, failing to perform research sufficient to understand basic principles of post-conviction practice, failing to present proper post-conviction claims, and failing adequately to communicate with Barbee.

The TCCA remanded the conflict of interest claim to the trial court for an evidentiary hearing. *Ex parte Barbee*, No. WR–71,070–02, 2011 WL 2071985 (Tex. Crim. App. Sept. 14, 2011). The state habeas trial court conducted an evidentiary hearing on the conflict of interest claim on February 22–23, 2012. Following the hearing, the trial court adopted the State's proposed findings of fact and conclusions ***299** of law and recommended that relief be denied on Barbee's conflict of interest claim. The TCCA adopted the trial court's findings and conclusions and denied relief on the conflict of interest claim; it dismissed the remaining claims as abusive. *Ex parte Barbee*, 2013 WL 1920686 (Tex. Crim. App. May 8, 2013).

Barbee filed an amended federal habeas petition on October 2, 2013, raising the same 21 claims that he had presented in his subsequent state habeas application. The district court denied relief and denied a COA. *Barbee v. Stephens*, No. 4:09–CV–074–Y, 2015 WL 4094055 (N.D. Tex. July 7, 2015). The district court also denied Barbee's motion to alter or amend the judgment. *Barbee v. Stephens*, 2015 WL 5123356 (N.D. Tex. Sept. 1, 2015). Barbee timely appealed.

II. Discussion of Claims

Barbee requests a COA from this court for the following claims:

(1) Trial counsel had a conflict of interest;

(2) Trial counsel rendered ineffective assistance at the guilt-innocence phase by confessing his guilt to the jury during closing argument without his permission; and

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(3) Trial counsel rendered ineffective assistance at the punishment phase by (a) presenting the testimony of prison consultant Susan Evans; (b) failing to present mitigating evidence; and (c) failing to present evidence of head injuries and drug abuse.

Barbee contends further that he was denied due process when the district court relied on extra-record evidence to discredit one of his declarants in its order denying Barbee's motion to alter or amend the judgment.

In order to obtain a COA, Barbee must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). With respect to claims dismissed on procedural grounds, the petitioner must show both "[1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*.

When "reviewing [a] request for a COA, we only conduct a threshold inquiry into the merits of the claims [the petitioner] raise[s] in his underlying habeas petition." *Reed v. Stephens*, 739 F.3d 753, 764 (5th Cir. 2014) (citing *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). This "threshold inquiry" is not a "full consideration of the factual or legal bases adduced in support of the claims," but rather "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller–El*, 537 U.S. at 336, 123 S.Ct. 1029. In generally assessing the claims for relief in a COA application, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*. at 342, 123 S.Ct. 1029. And "in a death penalty case, 'any doubts as to whether a COA should issue must be resolved in [the petitioner's] favor.' " *Ramirez v. Dretke*, 398 F.3d 691, 694 (5th Cir. 2005) (alteration in original) (quoting *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000)).

For the reasons that follow, we DENY a COA for claims (1) and (3), because reasonable ***300** jurists would not debate the district court's denial of relief as to those claims. We also hold that the district court did not abuse its discretion by citing extra-record evidence in its order denying Barbee's motion to alter or amend the judgment.

Because this is a death penalty case and we are to resolve in Barbee's favor any doubts as to whether a COA should issue, we GRANT a COA for claim (2). Barbee may file a supplemental brief with respect to the merits of that claim within thirty days of the date of this order. The supplemental brief should address *only* matters, if any, that have not already been covered in his brief in support of the COA application. If Barbee files a supplemental brief, the State may file a response twenty days thereafter, to be similarly limited to matters that have not already been covered in its brief in opposition to Barbee's COA application.

We now turn to address Barbee's claim of actual innocence and the claims for which we deny a COA.

A. Actual Innocence

Barbee claims that he is actually innocent. He explains that this is a "gateway" claim through which any of his otherwise procedurally barred claims may be considered on the merits.

Barbee contends that Ron Dodd, who was living with Barbee's ex-wife Theresa, committed the murders and framed Barbee so that Dodd could take over Barbee's businesses. He maintains that his confession was coerced by police threats of the death penalty, and Dodd's threats to harm his family. Barbee admits that he helped Dodd conceal the bodies. He argues that trial counsel failed to take any reasonable steps to establish his innocence or to investigate the possibility that Dodd had committed the murders.

Barbee's version of the facts is set out in his 2010 declaration: Lisa wanted Barbee to tell his new wife, Trish, about Lisa's pregnancy. Barbee wanted Lisa to have DNA testing to confirm his paternity. On the evening of Friday, February 18, 2005, Barbee asked Dodd to accompany him to Lisa's house. Dodd drove Barbee to Lisa's house and then left to have dinner with Theresa. Barbee later called Dodd to pick him up, and they returned to Theresa's house. When they got there, Dodd asked if Barbee wanted Dodd to talk to Lisa about getting a DNA test, and Barbee agreed. They drove back to Lisa's house. Barbee stayed in Dodd's truck while Dodd entered Lisa's house. Dodd came out after 15–20 minutes and said, "Your problems are solved, go get her truck."

Barbee went to the door of Lisa's house and Dodd left. When Barbee went into the house, he saw Lisa and Jayden dead. He panicked because he thought he was going to be blamed. He dragged Lisa into the garage and put her and Jayden's bodies in her vehicle and drove away. He called Dodd, who met him at a deserted place and helped him remove the bodies from the vehicle. Dodd threw a shovel to Barbee and left. After burying the bodies, Barbee called Dodd, who agreed to pick him up on the highway. While on the way to meet Dodd, Barbee was stopped by a deputy sheriff. He gave the deputy a false name and fled. He met Dodd and they returned to Theresa's house where Theresa washed Dodd's clothing.

As the district court noted, in his federal habeas petition Barbee listed the following as evidence of his innocence and Dodd's guilt:

(1) A 2010 declaration from Theresa's father, Jerry Dowling, in which he stated that his son, Danny Dowling, told him that Dodd had said right after the murders that ***301** he had to punch Lisa in the face 25–26 times before she went down.

(2) The same quote from Jerry Dowling, repeated in the 2010 declaration of Tina Church, an investigator. Although Danny Dowling later stated that Barbee, not Dodd, had made that statement, Church said that would have been impossible because Danny had not been in contact with Barbee at that time.

(3) Theresa's statement to Church that Dodd had his clothes washed at 4:00 a.m. on Saturday, February 19, and Dodd's admission that he power-washed his vehicle that morning.

(4) A 2010 declaration from Jennifer Cherry, Barbee's niece, in which she stated that Theresa had said how much she hated Barbee and wanted him gone, and that Theresa had said in Dodd's presence that she wished Barbee would just die and that there had to be a way to get him out of the office.

(5) Dodd's status as a parolee for aggravated assault, and his cohabitation with Theresa, who stood to gain the businesses as well as half a million dollars upon the demise of Barbee, and Dodd's arrests or convictions for the misdemeanor offenses of telephone harassment, driving with a suspended license, failure to appear, criminal mischief, unauthorized use of a motor vehicle, and assault.

(6) 2010 declarations by Barbee's mother, Jackie, in which she stated that soon after the murders, Theresa had Barbee sign over the businesses to Theresa, that Dodd was instrumental in causing a serious head injury to Barbee about a month before the murders, and that prior to the murders, Theresa had changed a $500,000 company bonding policy to a life insurance policy naming herself as the sole beneficiary.

(7) Church's 2010 confirmation of Theresa and Dodd's financial motive to have Barbee out of the way.

(8) Evidence of financial misdeeds by Theresa which were related to trial counsel, as described in the affidavit of mitigation specialist Amanda Maxwell.

(9) There was no forensic evidence connecting him to the murder.

Barbee submitted with his federal habeas petition the following character evidence as proof of his actual innocence:

(1) A 2010 declaration from the father of his best friend in middle school stating that Barbee was well-behaved.

(2) A 2010 declaration from Barbee's aunt, who said she has always known Barbee to walk away from any kind of confrontation.

(3) A 2010 declaration from a girlfriend of Barbee's former roommate, who said she never saw Barbee angry, that he was crazy about Trish's children, and it was hard to believe he was guilty.

(4) A 2010 declaration from his cousin stating that she did not believe Barbee was capable of such an act and that she believed him when he proclaimed his innocence to her.

Finally, he described in his federal habeas petition the following evidence of the falsity of his confession:

(1) His 2010 declaration, that his confession was false because the police had threatened him with the death penalty.

(2) A 2010 declaration from his niece, Jennifer Cherry, stating that Barbee told her he confessed because Dodd had threatened to hurt his family.

(3) A 2010 declaration from the author of a book about the murders, *Lethal Charmer*, stating that Barbee told her he confessed because Dodd threatened to hurt his family.

***302** (4) A 2005 letter to trial counsel from false confession expert, Dr. Richard Leo, stating that Barbee maintained that the confession was coerced, the circumstances surrounding the bathroom confession were unusual, and the police selectively turned the recording device off and on.

In order to demonstrate actual innocence to excuse a procedural default, the petitioner must offer new, reliable evidence not presented at trial that establishes that, more likely than not, no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). The innocence determination is based on a consideration of "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted" at trial. *House v. Bell*, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (internal quotation marks omitted).

The district court began its analysis by describing the incriminating evidence in the record: Barbee was stopped by a deputy sheriff on the night of the murders about 300 yards from where the victim's vehicle was later found; he was wet and muddy below the waist, gave a false name, and fled on foot. Two days later, Barbee led the police to the place where the victims were buried. Lisa's business partner confirmed that Lisa had been in a relationship with Barbee and believed that he was the father of her unborn child. Barbee confessed to the police that he murdered Lisa because she was going to ruin his marriage to Trish. He explained that Dodd had dropped him off at Lisa's house to pick a fight with her, but she would not take the bait. Dodd picked him up and asked if they needed to hire a hitman. Barbee said no, he could do it, and Dodd took him back to Lisa's house, where he started a fight with her, punched her in the nose, and held her face down in the carpet until she stopped breathing. He said that when Jayden came into the room, he put his hand over Jayden's nose and mouth until the child stopped breathing. He put both bodies in Lisa's vehicle and drove them to a deserted area where he buried them together and said a prayer. He admitted to the police that he had tried to clean the house and had covered a blood stain on the floor with a piece of furniture.

The district court pointed out that the quotation that Barbee had described in his habeas petition as a portion of a letter from Dr. Leo was not in fact part of that letter. The court noted that Dr. Leo actually concluded that Barbee's confession was "far more likely to be true than to be false" because Barbee led the police to the bodies, Dodd had no motive to murder Lisa, Barbee did not recant his confession when his wife, Trish, came into the interrogation room, and Barbee told his ex-wife, Theresa, that he had committed the murders.

The district court then described its review of the recording of Barbee's conversation with his wife, Trish, in the police station immediately after he had confessed:

> It begins with Trish, visibly shocked, stating, "You killed her? You killed her? Friday night?" and asking how Barbee did it. Barbee replies, "I held her down too long." He says that Lisa called and threatened him for months, and states at various times that he "made a bad decision," "it was an accident," and he "can't take it back." Trish silently calculates that Lisa was eight months' pregnant, that she and Barbee were dating eight months ago, and asks, "Why did you cheat on me?" and "How could you sleep with me and sleep with her?" She asks Barbee what she should tell his mom ***303** and dad. Barbee states that his life is over and he will "lose everything now." Near the end, he states that he is "so glad" he told her because it would have eaten him alive. She sits in Barbee's lap throughout most of the recording, holding his head, with Barbee's arms wrapped around her.

The district court found that a reasonable juror could "conclude that their unconstrained crying, moaning, hyperventilating, and Barbee's repeated expressions of regret and anxiety are genuine."

The district court also pointed to Theresa's testimony that Barbee had confessed to her the night after he had confessed to the police, but the following day, in the presence of his family, he said that they "had it all wrong," and that he did not do it.

The district court then turned to the evidence and argument that Barbee presented in support of his claim of innocence. It rejected Barbee's contention that the State's theory made little sense because he could not have "single-handedly placed the pregnant 166–pound Lisa in her SUV," noting that it was refuted by Barbee's own 2010 declaration in which he stated: "I dragged Lisa, who weighed about 170 pounds, into the garage and placed her in the Durango." The court stated that Barbee's claim of innocence made little sense because it did not account for the fact that Dodd could not have known that Barbee would confess.

The district court found that the character evidence that Barbee submitted was not sufficient to show that no reasonable juror would have found him guilty beyond a reasonable doubt.

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The district court stated that Barbee had presented no authority that the double-hearsay statements made by Danny Dowling to Tina Church and to Jerry Dowling are trustworthy evidence contemplated by *Schlup*. The district court pointed out that Danny Dowling had attributed the statement "I had to hit [her] 25–26 times" to Barbee as well as to Dodd and that he ultimately could not remember who said it. Furthermore, when Dowling first saw the "Amber Alert" for the missing victims, he said to himself, "That's probably something that [Barbee] would do."

The district court stated that the fact that Dodd washed his clothing and power-washed his vehicle immediately after the murders did not negate Barbee's involvement or necessarily prove that Dodd did anything more than help Barbee dispose of the bodies.

The court stated that Barbee's headaches and the head injury caused when Dodd dropped the pipe on his head would not prove Barbee did not commit murder. Instead, such evidence provided an excuse for wrongdoing and is therefore inconsistent with a claim of actual innocence.

The court held that the evidence of financial misdeeds by Theresa, the purported motive for Dodd to commit murder, was not new, because Amanda Maxwell had reported it to trial counsel. Even assuming Dodd and Theresa had financial reasons to want Barbee out of the way, it was Barbee, not Dodd, who had the motive for wanting Lisa out of the way, because she was demanding that he tell Trish about her pregnancy even though she refused to take a paternity test.

The district court stated that the post-conviction declarations by a book author and Barbee's acquaintances that Barbee had confessed only because he was threatened merely repeated information originating from Barbee himself and are therefore neither new nor objectively reliable.

The district court stated that even if Barbee's evidence were considered "new," ***304** it was not the sort of compelling evidence required by *Schlup*. The court characterized Barbee's theory of innocence as unsound and in conflict with his own declaration. Considering all the old and new evidence, both incriminating and exculpatory, without regard to its admissibility, the district court concluded that Barbee had failed to demonstrate that, more likely than not, no reasonable juror would find Barbee guilty beyond a reasonable doubt.

In its order denying Barbee's motion to alter or amend, the district court stated that Barbee's argument that his counsel should have presented a "Dodd did it" theory failed to acknowledge that there were no witnesses to say "Dodd did it" because Barbee refused to testify. The court pointed out that Dodd's actions on the night of the murder were not those of a person trying to frame Barbee for murder, nor were Barbee's actions those of a person who fears he is being framed. The court stated that Danny Dowling was not a reliable witness to Barbee's asserted innocence. It pointed out that Danny did not submit an affidavit. Instead, Barbee relied on Church's description of what Danny told her. Although it was obvious from Church's declaration that she believed Danny when he incriminated Dodd but did not believe Danny when he incriminated Barbee, the court found that based on Church's report, Danny was a vacillating witness who ultimately could not remember whether Dodd or Barbee made the incriminating remark. Furthermore, Danny also made a separate statement indicating he believed that the victims' disappearance was "probably something that [Barbee] would do."

Barbee argues that his theory of innocence does not depend on Dodd knowing that Barbee would later confess. He asserts that he would have been the prime suspect even if he had not confessed, because he was known to have been romantically involved with Lisa; he believed and told Dodd that Lisa may have been pregnant with his child; and he was in trouble with his wife because of his extramarital affairs. He contends that Dodd, knowing all of this, did not have to foresee that Barbee would confess in order to have a reasonable belief that an attempt to frame Barbee would be successful. He claims that when he helped Dodd conceal the bodies, he was unaware of Dodd's intention to frame him for the murders. He argues that, to the extent the district court denied the actual innocence claim based on its dismissal of Danny Dowling as a vacillating witness, that holding is debatable, because the district court ignored Church's explanation that Dowling could not have been referring to Barbee because he had not been in contact with Barbee at the time.

The evidence that Barbee offers as proof of his actual innocence, considered together with the evidence of his guilt, fails to establish that, more likely than not, no reasonable juror would have found him guilty beyond a reasonable doubt. Accordingly, we hold that the district court did not err when it held that actual innocence cannot serve as a gateway for

consideration of the merits of Barbee's procedurally defaulted claims.

B. Claim 1—Conflict of Interest

Barbee contends that his lead counsel, Bill Ray, received a large number of probation revocation appointments from Judge Gill, the trial judge in Barbee's case, based on a secret understanding that Ray would move the cases rapidly through the court process. According to Barbee, Judge Gill's appointment of Ray to represent Barbee in the capital murder case was made with the same understanding that ***305** Ray would move the case quickly, either by having Barbee plead guilty or by putting up only a minimal defense. Barbee argues that Ray's financial interest in continuing to receive court appointments from Judge Gill created a conflict of interest that caused Ray to pressure him to plead guilty, fail to move for a change of venue despite prejudicial pretrial publicity, fail to investigate his innocence, confess his guilt to the jury, and fail to present significant mitigating evidence. Barbee asserts that there was no strategic reason for any of these failures and, therefore, the only reasonable explanation is that Ray and his co-counsel, Moore, wanted to move the case quickly through Judge Gill's court so that they would keep getting lucrative court appointments from Judge Gill.

As we have earlier noted, the TCCA remanded Barbee's conflict of interest claim to the trial court for an evidentiary hearing. We will now describe the evidence presented at that hearing.

Amanda Maxwell, the defense mitigation expert, testified that she obtained medical records which showed that Barbee had suffered a series of head injuries, had attempted suicide, and had been diagnosed with bipolar disorder. His most recent head injury occurred shortly before his arrest. He and Dodd were working on a site and Dodd dropped a 400–pound metal pipe on Barbee's head, splitting his hard hat. He was knocked to the ground and taken to the hospital. Maxwell testified that Barbee experienced a lot of pain and suffered intense migraines following that injury and began taking hydrocodone that had been prescribed for his wife. She said that Barbee told her it made him itch all over and kept him wide awake at night. Maxwell thought this history of drug use was of significant mitigating value, primarily due to the reaction he had to it.

Maxwell told trial counsel about hallucinations that Barbee was experiencing in jail (seeing spiders crawling on the walls). Maxwell felt that Barbee's history of head injuries could be of significant mitigating value at the punishment phase and recommended to defense counsel that a functional MRI, a CT scan, and a neuropsychological evaluation be conducted. Trial counsel did not respond to her recommendation.

Maxwell testified that she found out that Barbee's ex-wife, Theresa, who was living with Ron Dodd at the time, had come to the jail and told Barbee that his DNA was all over the crime scene (which was not true) and that he had better sign over both businesses to her or the State would take them. Maxwell also found out that Theresa had been embezzling funds from the business and that she owed tens of thousands of dollars to Jackie Barbee.

Maxwell testified that defense counsel were pressuring Barbee to plead guilty and that was always the overriding issue at all of their meetings. Maxwell stated that Ray and Moore had conveyed to her that they found Barbee disgusting because he cried. She said that Ray wanted the case to be done and to close the books on it. After the case was over he said, "we will all end up in federal court answering for this case."

Maxwell completed her mitigation report at the end of January 2006 and delivered it to Ray. She never heard from him again. Ray had hired another investigator to re-interview all of the witnesses that she had previously interviewed.

Maxwell testified that she was present at trial. In her opinion, the mitigation testimony that was presented was not effective. Maxwell had prepared a document entitled "Crime Week Stressors," that was not presented at trial. It included the following: Barbee was about to default on a tree job because his employees had quit; one of his ***306** employees had been drinking and wrecked one of his tree trucks; he had caught Theresa stealing from the company and gotten into an argument with her about it; his wife Trish threatened to leave him unless he collected the divorce settlement from Theresa and took control of his business; he learned that his father was dying of colon cancer; and he was having migraine headaches and severe pain, for which he was taking a large amount of hydrocodone.

On cross-examination, Maxwell admitted that some of the crime-week stressors could have also been aggravating. She acknowledged that she had learned both good and bad

things about Barbee and that there were some negative things that Ray would not want to place before the jury. She was aware that Barbee's mother was very unhappy with Ray and Moore and that his mother had a lifelong pattern of running interference for Barbee, including paying for his past acts of vandalism and theft. Maxwell stated that she had interviewed Barbee's friend, Jeff Boyd, who provided negative information about Barbee regarding acts of vandalism and setting fires. Boyd also told her that Barbee had told him about pouring gasoline on baby hamsters and setting them on fire when he was a pre-teen.

Maxwell testified that she interviewed Tim Davis on November 12, 2005. She felt that the interview was very prejudicial, so she did not include that information in the Psychosocial History Report she prepared for defense counsel. According to Maxwell, Barbee and Davis were the victims of a road rage incident in which they were attacked by the two men in the other vehicle. She said that Davis did not tell her that Barbee had attempted to kill the driver of the other vehicle. However, she acknowledged that her report to Ray about the interview states that Davis said that Barbee "had no off button" and that "[w]hen he got started he didn't know how to stop." Further, Davis said that he had to pull Barbee off the older man to keep him from hurting the man "real bad."

Maxwell admitted that she had provided Ray and Moore with information about Barbee's girlfriends and a secret cell phone that he used to call another woman while he was married to Theresa. She also gave them information about his behavioral problems in school, and his poor impulse control due to his ADHD diagnosis. Maxwell considered Barbee's acts of vandalism to be youthful mischief, or a grief reaction to the loss of his brother and sister. She considered his robbing of a bait-and-tackle store, his breaking into a concession stand, and his breaking of 47 windows at a school to be acts of teenage mischief.

Tim Davis testified at the state habeas evidentiary hearing that he and Barbee were best friends and co-workers for eight to ten years and that he was the best man at Barbee's wedding to Theresa. He described Barbee as easygoing, friendly, and respectful of others. He was not called to testify at trial but if he had been, he would have given his opinion that Barbee will not be a future danger to society. He said that Maxwell's report of her interview of him in 2005 was not truthful and twisted his words regarding the "road rage" incident. He described the incident, which occurred in 1996 or 1997, as follows: The highway was icy; he and Barbee were in the right lane going slow; a truck with two people came up behind them, and then swerved into them and ran them off the road; the two men got out of the truck and approached; he and Barbee got out to defend themselves; it was a simple fistfight and no one was hurt; the other men were the aggressors, and the police were not called. Davis testified that this is the only incident where he saw Barbee get physical with ***307** anyone. He said that he did not tell anyone on the defense team that Barbee had attempted to kill the driver of the other vehicle, as stated in counsels' joint affidavit presented in the initial state habeas proceeding.

Calvin Cearley, a pastor of a church Barbee attended, testified that he is married to Nancy Cearley, who testified at trial. He was not contacted by defense counsel. He testified that Barbee loved animals and children, and was polite and respectful. Had he been called as a witness at trial, he would have testified that Barbee would not be likely to commit future acts of violence.

Nancy Cearley, Calvin Cearley's wife and co-pastor, testified at the evidentiary hearing that Barbee was the children's church leader and the children loved him. She described him as easy-going, friendly, very likeable, polite, and respectful. When she testified at trial, Barbee's attorneys did not ask her anything about his character. If she had been asked, she would have testified that he is not likely to commit future acts of violence.

Mike Cherry testified at the evidentiary hearing that he was married to Barbee's older sister Kathy, who died at age 20. Barbee's older brother, David, also died at age 20, in a car accident. Barbee was close to his sister and brother and was devastated by their deaths. Cherry never saw Barbee physically abuse Theresa. He never talked to Barbee's attorneys, but would have been willing to testify at trial that Barbee is very reserved and can control himself. He only saw Barbee get into one fight, with a belligerent, drunk man who was behaving inappropriately in front of children at a party and refused to leave.

Jennifer Cherry, Barbee's niece (the daughter of Kathy and Mike Cherry), testified at the evidentiary hearing that she and Barbee are very close and that Barbee is more like a brother than an uncle to her. Barbee was very playful, always wanted to make her laugh, spoiled her, and took care of her. When he ran the children's church program, the kids loved him. She testified that she worked as Theresa's assistant at the Barbees' concrete cutting business from 2002–2004. She said

that Theresa paid personal bills with company money, and deposited large sums of cash. She heard Theresa say that she wished Barbee would die, and also heard her claim falsely that Barbee had hit her. She was aware that Theresa and Barbee had borrowed money from Barbee's parents and that Theresa was still in debt when the murders occurred. She said that Barbee's trial attorneys were not interested in what anyone in the family had to say and did not prepare her to testify. Had she been asked, she would have testified at trial that Barbee would not be likely to commit future acts of violence.

Sharon Colvin, who knew Barbee from church, testified at the evidentiary hearing that Barbee was friendly, jovial, and had a really good attitude. She talked to Barbee's attorneys shortly after he was arrested, and would have been willing to testify at trial, but was not asked to do so. Had she been asked, she would have testified that Barbee would not be likely to commit future dangerous acts.

Robert Gill, the trial judge (who was at that time an assistant criminal district attorney), testified at the evidentiary hearing that he appointed Ray in a lot of probation revocation cases in his court. He liked to appoint Ray because Ray prepared the cases and was available on Friday afternoons, when Gill liked to schedule revocation hearings. He admitted that a newspaper article had reported that a federal judge had criticized the way he handled plea bargaining in the revocation cases and had found that Ray rendered ineffective ***308** assistance in one revocation case. He admitted that Ray had contributed $1000 to his campaign and that Moore had contributed $300. He testified that he did not interfere with Ray and Moore's defense of Barbee and that there was no agreement between him and Ray about how Ray was to handle Barbee's case.

Barbee's mother, Jackie Barbee, testified at the evidentiary hearing that Ray and Moore came to her house once and talked to her on the telephone a couple of times prior to trial. Maxwell came to her house several times to discuss Barbee's background and education, but very little of her work was presented to the jury. Mrs. Barbee testified that Barbee is a giver and has a very loving heart, is a hard worker, was involved with the church, and was in Sunday school since he was three years old. When she called Barbee to wish him a happy 20th birthday, he cried and said it was the worst day of his life. She realized that he thought he would die at age 20 because his only sister and brother had each died at that age. She said that Barbee's problem at school was that he loved to be funny and make people happy. He had some trouble completing his GED. She helped him and Theresa financially, loaning them money to buy a house and build a cabana. When Barbee and Theresa divorced, he let her have everything. Theresa still owed her money.

Mrs. Barbee testified that Ray and Moore wanted to show her the recording of Barbee's confession, but she refused to watch it. They said they might be able to save Barbee's life if he would plead guilty. She testified that she would have liked to have been able to tell the jury that Barbee had a very strong sense of right and wrong, but his lawyers told her to just answer the questions. She was shocked when Ray told the jury that Barbee was guilty. She heard, later on, about the road rage incident involving Tim Davis and thought it "was no big deal." She was aware of Barbee's breaking windows at the school, but was not aware of his involvement in the robbery of a fish and bait shop or breaking into a concession stand. Had she been asked, she would have testified that Barbee would not be a future threat to anyone. She described Barbee as "broken" after his lawyers visited him in jail.

William Ray, Barbee's lead counsel at trial, testified at the evidentiary hearing that about 70–80 percent of his criminal practice in four counties was court-appointed, and that 25–75 percent of his court-appointed practice came from Judge Gill's court. Ray earned $710,000 from his court-appointed work in Judge Gill's court from 2001–2007. He testified that making contributions to judges' campaigns was common practice and that he had contributed to the campaigns of more than ten judges in Tarrant County. He testified that he did not have any agreement or understanding with Judge Gill as to how he was to represent Barbee. He said that Judge Gill did not place any limitations on his handling of the defense, did not deny any requests for experts, and did not make any threats, either implied or direct, that Ray would not receive future appointments.

Billing records introduced as exhibits at the hearing showed that Ray and Moore billed the court for 350 and 260 hours of out-of-court time, respectively. Ray hired Kathy Minnich as an investigator and when she moved out of state, he replaced her with Stanley Keaton. Amanda Maxwell was hired as the mitigation specialist. Ray hired as experts two forensic psychologists, a forensic psychiatrist, an expert on false confessions, a computer investigator, and a DNA expert.

According to Ray, the theory of the defense at the guilt-innocence stage was ***309** that Barbee should be acquitted of capital murder (he was charged with the intentional

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killing of more than one individual during the same criminal transaction) because the killing of Lisa Underwood was an accidental, unintended consequence of her advanced pregnancy. He said that when he talked to the medical examiner, he was told that because Lisa was pregnant, it would not take a lot of force to keep her from being able to breathe because the baby was taking up a part of her stomach and her diaphragm could not move. Because Barbee refused to testify, Ray felt this was the only option available to him. The defense strategy at the punishment phase was to show that the Texas prison system was able to handle violent offenders and that Barbee could live peacefully in prison. In support of that theory, he offered good-character and social-history testimony from Barbee's relatives and friends, testimony about prison security from a prison classification expert, and testimony about Barbee's good behavior in jail from the bailiff.

Ray testified that he and Moore considered a motion for change of venue, but he did not believe that the prejudice against Barbee would have been worse in Tarrant County than anywhere else. He said it has been his experience that when you have a change of venue, if you go to somewhere outside the area, the people in the town get the impression that whoever you are trying is such a notorious criminal that he is actually not treated as fairly there.

Ray testified that he attempted to investigate Barbee's claim of actual innocence and his claim that Dodd committed the murders. He obtained Dodd's criminal records. He was aware that Dodd had served time for aggravated assault and talked to the victim of that offense. He was also aware that Dodd had dropped a pipe on Barbee's head. Ray obtained cell phone records through the use of sealed subpoenas. Those records showed that Barbee had placed a call to Dodd at 1:47 a.m. on the night of the murders, initiated from a cell tower near the Underwoods' home. Those records also showed that Barbee had placed calls to Dodd from a cell tower near the location where the bodies were found.

Ray testified that presenting a defense based on a theory that Dodd committed the murders was made difficult by Barbee's confessions to the police, his wife, and his former wife, by his refusal to testify, by Dodd invoking his Fifth Amendment right not to testify, by Dodd's lack of a motive for killing the victims, and by the lack of credibility in a motive based on Dodd framing Barbee. Although Barbee was steadfast in maintaining his innocence after he recanted his confessions, he had two or three different theories of how it happened. In a letter that Barbee wrote to Ray about his confession to the police, Barbee stated that both of the murders were accidental. The first time Ray met with Barbee in person, Barbee told Ray he did not commit the murders. Ultimately, Barbee said he was not there at all, that Dodd did it, and he only helped Dodd conceal the bodies.

Ray did not think he could prove that Dodd had a motive to kill the victims. He said that he would have wanted someone better than Barbee's niece to testify that Theresa was embezzling money from the businesses. The financial motive evidence was weak, he said, because Dodd was already living with Theresa in Barbee's former home, and Barbee and Theresa were already divorced. Other than Barbee, who refused to testify, the defense had no way to show that Dodd had a motive to commit the murders. He did not want to call Theresa as a witness because he thought if she testified, she would repeat what she ***310** had told him—that Barbee simply "snapped" on the day of the murders. Ray's biggest concern with the "Dodd did it" theory was that it did not take into consideration the fact that Barbee would confess.

Ray was aware that Donald Painter, a prisoner in the Tarrant County Jail, was willing to testify that Dodd had admitted that he committed the murders. However, Ray's investigation revealed that Painter had agreed to give that testimony in exchange for a promise of payment from Barbee. Although Ray thought the payment was Painter's idea, he said that calling Painter as a witness would have been a bad idea.

Ray denied that he pressured Barbee to plead guilty. He testified that he recommended that Barbee consider a plea because Barbee's confessions made an innocence defense difficult. In any event, the State never offered a plea deal. Ray said that he attempted to get Barbee's family to view Barbee's recorded confession because they refused to believe that Barbee had confessed. Ray explained that he was not trying to convince them that Barbee was guilty, but only trying to demonstrate to them that the confessions were a problem.

At Barbee's request, Ray retained false-confession expert, Dr. Leo. Dr. Leo's report was not favorable to the defense because he concluded that Barbee's confession was more likely to be true than false. According to Ray, Dr. Leo's opinion was based on three things: (1) Barbee's leading the police to the bodies; (2) Dodd's lack of a motive; and (3) the fact that Barbee did not recant his confession when his wife, Trish, came into the room after he had confessed to the police.

Ray testified that he consulted with three mental health professionals: psychologists Dr. Kelly Goodness and Dr. Barry Norman, and psychiatrist Dr. James Shupe. He did not get any impression from any of them that a neuropsychological examination, as recommended by Amanda Maxwell, needed to be done.

Dr. Goodness examined Barbee and found no significant symptoms of head injury, no indication that Barbee had bipolar disorder, and no long-term or significant hydrocodone abuse. Dr. Goodness thought that Barbee had Lyme's Disease, which can cause mood swings that mimic bipolar disorder, as well as rage and violent tendencies. Ray did not think Dr. Goodness's testimony would be helpful to the defense. Dr. Shupe examined Barbee and his probable diagnosis was bipolar disorder and polysubstance abuse; some social stressors; history of closed-head injuries; and anti-social personality disorder. Dr. Shupe thought that Barbee was fixated on how his mother would view him and how it would kill her if she thought he had killed the Underwoods. Ray did not believe Dr. Shupe's testimony would be helpful. Dr. Norman examined Barbee twice and found that he suffered some mild depression, but did not think anything was wrong with Barbee, mentally, as a result of his head injury. Ray said that if the defense had called one of the mental health experts to testify, the State would have been entitled to have Barbee examined by its own expert, who would probably reach the same harmful conclusions that the defense experts reached.

Ray testified that he decided not to present evidence of Barbee's head injuries because none of the doctors found anything wrong with Barbee as a result of those injuries. Moreover, evidence of the head injuries, migraine headaches, and hydrocodone use would suggest a reason why Barbee committed the murders and undermine his claim of innocence. Ray said that, even at the punishment phase, he generally ***311** did not believe that "excuse" evidence helped the client when the jury has just rejected the innocence defense and found the client guilty. Ray knew that the defense punishment witnesses were going to say that they believed that the jury had wrongly convicted Barbee, and he thought it would be inconsistent to offer evidence that excused the murders.

Ray testified that he did not call Tim Davis as a character witness because of the "road rage" incident. Ray thought the prosecutor was very well prepared and thought it likely that the prosecutor might know about that incident, as well as some other things that Barbee had allegedly done. Maxwell's report to Ray about her interview of Davis stated:

> Tim recollected that one day some men on the highway got angry because Steve had cut them off. The men gave them the finger and cut in front of their truck motioning them to pull over. Steve said "watch this." Steve pulled over on the median as did the two men. It turned out to be an older man and his son. They walked back to Steve's truck and reached in hitting Tim and Steve. They all ended up on the shoulder fighting. Tim said he had to pull Steve off of the old man to keep him from hurting him really bad. Then Steve started in on the son. Tim pulled Steve off of him as well and the two men left in Steve's truck. Steve had managed to grab the keys to the two men's truck. Steve threw them out the window about two miles down the road. "Steve had no off button. When he got started he didn't know how to stop." Tim had seen Steve fight on a couple of other occasions. "He could take care of himself." Tim also said that Steve was stronger than two men put together. He could lift a tree stump that two men together couldn't lift.

Ray testified that he met with Davis in his office on February 20, 2006, and Davis's story did not differ from what Maxwell had reported. Although Maxwell stated in her report and in her testimony that she still thought Davis would be a good witness for Barbee, and although Davis had testified at the hearing that he did not say the things that Maxwell put into her report, Ray felt that it would be "malpractice or ineffectiveness, per se" to call Davis as a witness.

Ray testified that he did not present any other lay opinion testimony regarding Barbee's lack of future dangerousness, because that would have opened the witnesses up to cross-examination about whether they had heard of Barbee's prior bad acts. In addition to the "road rage" incident involving Tim Davis, Ray had information that Barbee had engaged in acts of vandalism and theft, had poured gasoline on baby hamsters and set them on fire, had killed an animal when on a date, and had offered to pay Painter to testify that Dodd had confessed to the murders.

Ray testified that what he was trying to show through Evans's testimony is that the prison system has the ability to react to inmate violence and had a way to take care of the problem if Barbee were to violate the rules. He also presented evidence that Barbee was going to be able to conform to the prison policies because he had not caused any trouble in the Tarrant County Jail. Ray said that if the jury had believed that, it would have been sufficient to negate the State's ability to prove future danger beyond a reasonable doubt.

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Tim Moore, Ray's co-counsel, testified that he had been appointed by Judge Gill in two or three cases at the time of Barbee's trial, and had made campaign contributions to Judge Gill, as well as to every other criminal judge in Tarrant County. He testified that Judge Gill did not limit or ***312** direct how they conducted Barbee's defense and made no threats about withholding future appointments.

Moore's testimony generally corroborated Ray's testimony with regard to their decision not to file a motion for a change of venue, their investigation of Barbee's claim of innocence and his claim that Ron Dodd committed the murders, their reasons for wanting Barbee's family to view his videotaped confession, the reasons for their decision not to call Tim Davis as a witness and not to present testimony about Barbee's lack of future dangerousness, their reasons for not presenting evidence of head injuries, headaches, and hydrocodone use, and Barbee's refusal to testify.

Dr. Stephen Martin did not testify, but his written statement submitted with Barbee's initial state habeas application was admitted into evidence. Dr. Martin conducted a neuropsychological evaluation of Barbee in 2007 and found frontal lobe damage that would have likely increased Barbee's impulsive tendencies and reduced his ability to fully consider the consequences of his actions. In his opinion, trial counsel were ineffective by not presenting the testimony of an expert such as himself at the punishment phase of Barbee's trial.

Dr. J. Randall Price, a psychologist, testified for the State. He reviewed all of the records and concluded that no expert had found evidence that Barbee had suffered a brain injury. He said that Dr. Martin's test results were scored incorrectly and did not suggest brain impairment or frontal lobe impairment when scored correctly. He pointed out that three mental health professionals conducted face-to-face evaluations of Barbee close to the time of trial and none of them saw evidence of a brain injury. There was material that could have been harmful to the defense if Dr. Martin had been called to testify. Although the psychosocial history contained considerable evidence that was mitigating, it also contained descriptions of past behaviors that were signs of aggression and violence. There were descriptions and characterizations of personality traits that would suggest poor control of his behavior, impulsivity, irresponsibility, and failure to accept responsibility for his actions. There was also a lot of evidence of juvenile delinquency—animal cruelty, vandalism, and stealing, from the age of early adolescence until the age of 20. Barbee was described as being cocky and arrogant. Dr. Price said that those kinds of traits are typically offered as aggravation and would likely be viewed by a jury as aggravating.

The state habeas court made the following findings with respect to Barbee's conflict of interest claim. Judge Gill did not have any arrangement with Ray or Moore about how they would handle Barbee's defense, did not threaten to withhold future appointments if Ray and Moore did not handle Barbee's defense in a certain manner, and did not inhibit or interfere with their defense of Barbee. Trial counsels' decision not to seek a change of venue, and their decisions about which witnesses and evidence to present, were not influenced by their relationship with Judge Gill, but were reasonable tactical decisions. Their decision to rely on a theory that Lisa Underwood's death was accidental rather than a "Dodd-did-it" theory, was a matter of reasonable professional judgment because the Dodd-did-it theory was not consistent with other evidence of Barbee's guilt and would have been difficult because Barbee refused to testify. Their efforts to defend Barbee were harmed by Barbee's changing version of events and his refusal to testify. Their decision not to present evidence regarding mental health, head injuries, and Barbee's use of hydrocodone was a reasonable tactical decision because the defense experts did not find any mental-health ***313** related evidence that would have aided the defense, Barbee lacked significant symptoms from head injuries, and Barbee did not have a history of long-term drug abuse. Tim Davis's testimony about the "road rage" incident at the hearing was not credible. Ray and Moore did not elicit testimony from the defense's punishment phase witnesses about Barbee's low risk of committing future violent acts because they were worried that the prosecution might have known of the road rage incident and would use it to impeach their witnesses. This was a reasonable tactical decision in the light of their knowledge of Barbee's past violence, and was not due to their relationship with Judge Gill. The court concluded that there was no evidence of a conflict of interest; that Ray and Moore did not advance their own interests to the detriment of Barbee's; and that their strategic and tactical decisions were not influenced by their relationship with Judge Gill.

To succeed on his conflict of interest claim, Barbee had to show that "an actual conflict of interest adversely affected" trial counsels' performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348–49, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Beets v. Scott*, 65 F.3d 1258, 1271 (5th Cir. 1995). An "actual conflict"

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exists when counsel "is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests." *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000). An "adverse effect" requires proof that " 'some plausible alternative defense strategy or tactic' could have been pursued but was not because of the actual conflict impairing counsel's performance." *Id.*

The district court stated that Barbee did not argue that the state court's decision is unreasonable in the light of the evidence but rather, "he picks and chooses from the facts in the record to support his claim and simply disagrees with the state-court ruling." The district court, after reviewing all of the evidence, concluded that Barbee failed to demonstrate that the state court's decision was based on an unreasonable determination of the facts. The district court held that Barbee failed to establish the existence of an actual conflict that forced counsel to choose between their self-interest and their duty to Barbee and that he did not present evidence that there was a plausible alternative defense strategy or tactic that could have been pursued but was not because of the alleged conflict. Accordingly, Barbee failed to show that the state court decision was based on an unreasonable application of clearly established federal law.

We conclude that reasonable jurists would not debate the district court's decision that Barbee failed to demonstrate an actual conflict of interest that adversely affected trial counsels' performance. We therefore DENY his request for a COA for this claim.

C. Claim 3, Ineffective Assistance of Counsel at Punishment Phase

Barbee requests a COA for his claims that trial counsel rendered ineffective assistance at the punishment phase of trial by (a) presenting the testimony of prison consultant Susan Evans; (b) failing to present mitigating evidence; and (c) failing to present evidence of head injuries and drug abuse. Barbee did not raise claim 3(a) in his first state habeas application. When he presented it in his second state application, the TCCA dismissed it as abusive. Barbee presented Claim 3(b) in his initial state habeas application, but enlarged it, factually and legally, in his subsequent state habeas application, and the TCCA dismissed it as abusive. Barbee presented Claim 3(c) ***314** in his initial state habeas application, and the TCCA denied relief on the merits.

The IATC claims that were dismissed as an abuse of the writ by the TCCA are procedurally defaulted, and federal review is barred unless Barbee can show cause for the default and actual prejudice as a result of the alleged violation of federal law, or that the failure to consider the claims will result in a fundamental miscarriage of justice (which requires that he show he is actually innocent of the crimes for which he was convicted). *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Sawyer v. Whitley*, 505 U.S. 333, 339–40, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

For the ineffective assistance claims not presented in his initial state habeas application, which the state court found abusive, Barbee claims that he is entitled to the exception to procedural default established in *Martinez v. Ryan*, ––– U.S. ––––, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, ––– U.S. ––––, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). In *Martinez*, the Supreme Court held that a petitioner may establish cause to excuse the procedural default of an IATC claim by showing that (1) his state habeas counsel was constitutionally deficient in failing to include the claim in his first state habeas application; and (2) the underlying IATC claim is "substantial." 132 S.Ct. at 1318. For a claim to be "substantial," the petitioner "must demonstrate that the claim has some merit." *Id.* An IATC claim is "insubstantial" if it "does not have any merit" or is "wholly without factual support." *Id.* at 1319.

To establish ineffective assistance of his initial state habeas counsel, Barbee must show both that habeas counsel's performance—in failing to present the IATC claims in the first state habeas application—was deficient and that he was prejudiced by the deficient performance—that is, that there is a reasonable probability that he would have been granted state habeas relief had the claims been presented in the first state habeas application. *See Martinez*, 132 S.Ct. at 1318; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* standard also applies to Barbee's underlying IATC claims.

Under *Strickland*, "the proper standard for attorney performance is that of reasonably effective assistance." 466 U.S. at 687, 104 S.Ct. 2052. "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse

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> sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

***315** *Id*. at 689, 104 S.Ct. 2052 (internal quotation marks and citations omitted).

With respect to the duty to investigate,

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690–91, 104 S.Ct. 2052; *see also* *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). The Supreme Court has stated that these three post-*Strickland* cases, each of which granted relief on ineffective assistance claims, did not establish "strict rules" for counsel's conduct "[b]eyond the general requirement of reasonableness." *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1406–07, 179 L.Ed.2d 557 (2011). "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 789–90, 178 L.Ed.2d 624 (2011). Barbee's trial counsel, as well as his state habeas counsel, were "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Id*. at 789.

To demonstrate prejudice, Barbee "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S.Ct. at 792 (citation omitted). This showing is intentionally difficult to satisfy: "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome.... Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id*. at 791–92 (citations omitted).

Even if Barbee can establish that ineffective assistance of his initial state habeas counsel constitutes cause for the default of his IATC claims, "[a] finding of cause and prejudice does not entitle [him] to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Martinez*, 132 S.Ct. at 1320.

The district court held that Claim 3(a) is not substantial and therefore the exception to the procedural bar does not apply. Alternatively, the district court denied relief on the merits. With respect to Claim 3(b), the district court observed that much of the evidence adduced in the subsequent habeas proceeding on Barbee's conflict of interest claim was also relevant to an evaluation of counsels' representation with respect to the mitigating evidence claim. The district court concluded that the evidence and the claims developed in the initial and subsequent state proceedings overlapped, making it impractical, if not impossible, to parse the claims and the facts between them. Accordingly, in the interest of addressing counsels' representation thoroughly ***316** and conclusively, the district court resolved Claim 3(b) by looking past any procedural default and reviewing the claim on the merits, de novo.

Because the district court addressed the merits of Barbee's procedurally defaulted IATC claims, it is arguable that Barbee has received the relief available to him under *Martinez* and *Trevino*. *See* *Preyor v. Stephens*, 537 Fed.Appx. 412, 422 (5th Cir. 2013). We now turn to consider whether reasonable jurists would debate the district court's decision that Barbee's IATC claims are without merit.

1. Claim 3(a)—Presentation of Evans's Testimony

At the punishment phase, the defense presented the testimony of Susan Evans, a former Texas prison warden, for the purpose of supporting counsels' argument that Barbee could successfully serve a life sentence. At the state habeas evidentiary hearing, Ray testified that he was trying to show that the prison system has the ability to react to the violence of inmates, that people on death row are not the only people who have committed violent acts and are not the only people who commit violent acts in prison, and that the prison has a system in place to take care of those kind of problems, which are a very small percentage of infractions, considering the inmates housed there.

As the district court noted, Evans's testimony occupies over 90 pages of the trial transcript. The district court summarized her testimony as follows:

> Evans explained the qualifications and training of prison employees, their defensive tactics and training, "use of force" policies, and ongoing testing. She stated that prison employees are professionals trained to handle any type of offender and any type of situation. (26 RR 3–32.) She described the prison classification system and explained that Barbee, if given a life sentence, would never be classified in the least-restrictive category (G1) and would have to serve 10 years before he could be eligible for G2. (26 RR 33–43.) She described the restrictions and privileges related to various levels of security. She testified that the inmates serving life sentences are not always the worst inmates because they are in a controlled environment with less stressors, and she testified that people in prison mellow with age. (26 RR 72.) She also testified that prison rules change over time and often become more restrictive, not less, and that the prison does its best to recognize and address developing patterns among offenders. (26 RR 92–93.)

Barbee argues that trial counsel were ineffective in presenting Evans's testimony because Evans emphasized prison violence and repeatedly pointed out the hazards and risks of placing Barbee in general population, which gave the jury reasons to choose the more secure death row where such incidents can be minimized and controlled, rather than a life sentence in general population. Barbee claims that Evans's testimony about riots, disturbances, hostage situations, assaults on prison officers, gangs in the prison system, inappropriate sexual relations between staff and inmates, sexual assaults, extortion, escapes (including the escape of the "Texas Seven" from the Connally Unit, which ended in the killing of a police officer), and the fact that bad things happen even though there are policies and procedures in place to prevent them, is frequently presented by the prosecution in Texas capital cases to show that death row is the most safe and secure placement. According to Barbee, a jurist who read Evans's complete testimony, without having been informed which ***317** side presented it, would reasonably surmise that she was a prosecution witness.

The district court observed that Barbee's argument "picks and chooses unidentified fragments of Evans's testimony on direct and cross examination and presents them in a list, out of context." The court noted that Barbee failed to acknowledge the overall strategy for Evans's testimony, which was to show that Barbee could successfully serve a life sentence, and what that life sentence would be like. In its opinion denying Barbee's motion to alter or amend, the district court reiterated that under trial counsel's direct examination, Evans presented an overall picture of the prison disciplinary and classification system, the reality of prison violence, and the steps taken to deal with that violence, which focused on employee training. She also testified that murderers often make the best inmates because the triggering circumstances do not repeat themselves in prison. The court reasoned that if trial counsel had failed to acknowledge the violence in prison, as Barbee suggests, the prosecution surely would have done so on cross-examination, with a greater impact on the jury. Further, it may have led the jury to think that counsel were uninformed or trying to hoodwink the jury.

We conclude that reasonable jurists would not debate the district court's decision. A complete reading of Evans's testimony, rather than the snippets Barbee has chosen to present, supports the district court's decision that Barbee failed to present a substantial ineffective assistance claim based on his disagreement with counsel's strategic decision to present Evans's testimony.

2. Claim 3(b)—Failure to present mitigating evidence

Next, Barbee requests a COA for his claim that trial counsel were ineffective by failing to present mitigating evidence and evidence of his lack of propensity for future dangerousness. He contends that counsels' admission that they did not ask the defense punishment witnesses about future dangerousness

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because of the "road rage" incident does not excuse their failure to investigate whether their potential witnesses knew of it. He contends that the jury could have drawn an adverse inference from the fact that none of the defense witnesses at the punishment phase were asked to address specifically the future dangerousness issue. He argues that given his lack of an arrest record, there is a likelihood of a different result had the evidence been investigated and presented.

Although Barbee's claim that trial counsel rendered ineffective assistance in failing to present mitigating evidence was fully litigated on the merits in Barbee's initial state habeas proceeding, the state habeas court allowed Barbee to present similar evidence at the evidentiary hearing on the conflict of interest claim in the subsequent state habeas proceedings, to show the impact of the alleged conflict of interest on counsels' representation. The district court correctly noted that much of the evidence adduced at the state habeas evidentiary hearing on Barbee's conflict of interest claim, discussed in Part II.B., was also relevant in evaluating the mitigating evidence claim. Thus, consideration of this claim requires an examination of all of the evidence presented at trial and in the initial and subsequent habeas proceedings. That evidence is described below.

a. Evidence Presented at the Punishment Phase of Trial

At the punishment phase, the State called Barbee's ex-wife, Theresa. She testified that Barbee had assaulted her four times during their marriage. She also testified about a road-rage incident when ***318** Barbee followed another car to a dead end street and assaulted the driver. She described an argument on July 4, 2003, in which Barbee threatened, as he had in the past, to put her through a wood chipper. She hit him, and he left. She testified that the businesses were in debt and about how she had Barbee sign them over to her after he was arrested. She testified that after she and Barbee divorced, she began dating Dodd, who worked for Barbee. Dodd eventually moved into her house. She said that Dodd was arrested and faced twenty years of imprisonment for his involvement in this case.

Theresa testified that on the Sunday morning after Lisa's disappearance, she saw Barbee at their office and told him that the police had been at her house asking about him, his Corvette, and a girl he used to date who was missing. She said that he cried, said that his life was over, and told her to get the businesses out of his name. She asked him to turn himself in and not make her call the police. She talked to Barbee again on the Monday night after he had confessed to the police, and he told her that he did not mean to kill Lisa and Jayden. She asked him about Dodd's involvement, and he told her Dodd's mistake was picking him up. A day or two later, she visited him in jail with his family, and he told her that she had it all wrong, that he did not do it. Theresa said that she visited Barbee in jail every week for about seven months. On her last visit, he held up a piece of paper saying they could get back together and try to have a baby. He asked her to say that Dodd had "slipped" and was guilty of the murders.

On cross-examination, Barbee's counsel elicited testimony that Barbee was close to his brother and sister, both of whom were dead, and that he had tried to commit suicide while he and Theresa were married. Theresa conceded that she had told the grand jury that she did not take seriously Barbee's threats to put her through the wood chipper and that she had told the grand jury they had three, not four, fights during their marriage. She admitted that not all of the fights were Barbee's fault, and that some of the blame was hers. She also testified about the stressors Barbee was facing the week of the murders: he was upset because he had just learned that his father had colon cancer; he had been having horrible headaches after being struck in the head by a pipe; he was fighting with her and fighting with Trish; and they were having problems with the businesses. She described their work as children's church leaders, including presenting puppet shows and raising money for the church. She said Barbee was good with the children, that the program grew under their leadership, and that "it was a wonderful thing."

The State's second witness at the punishment phase was Marie Mendoza, Barbee's former co-worker. She testified that Barbee called her frequently and claimed that he was not married. She believed him until, during one of their last conversations, she overheard a female voice in the background. She had asked him for an estimate to trim some trees at her home. Instead of giving her an estimate, he trimmed the trees. When he called a few days later, she told him she did not want a relationship with him and offered to pay for the work that he had done. He became verbally abusive, and she had no more contact with him. She thought he was a very mean, cruel person and that he had no respect for women.

The first witness for Barbee at the punishment phase was Pastor Nancy Cearley. She testified that she had known the Barbee family since 1989 and had officiated at Barbee and Theresa's wedding. Barbee and Theresa became leaders of the children's ***319** program at the church and served for about

three years, growing the program from 10–15 children to 75–80 children. She never had any complaints from parents about Barbee. On cross-examination, she testified that she did not believe he had killed Lisa and Jayden Underwood.

Barbee's mother, Jackie Barbee, was the next witness. She testified that he lost his only sister when he was 14 and his only brother when he was 16. Both of them were 20 years old when they died. Barbee "shut down" after his brother died and did not graduate from high school, but obtained his GED. She described an incident when he and his brother were planning to make money by mowing lawns, but came home with nothing, because they had mowed a yard for "a poor little old lady" without charging her. Barbee wanted to become a police officer, so he went to community college and took courses. He worked as a reserve police officer for the Blue Mound Police Department for two and one-half years. She testified that he was a hard worker and described how he started his tree-trimming business after cutting down a tree in her yard that had been struck by lightning. Later, he hired Theresa to help with the business because she needed money and he felt sorry for her. Theresa paid the bills and Barbee did all the work. Mrs. Barbee said that she and her husband, who was undergoing chemotherapy, visited Barbee in jail every week. She testified that they would continue to support him when he goes to the penitentiary. She told the Underwood family that Barbee and she and her husband were very sorry and that she knew their pain because she had been there when she lost her daughter, who was pregnant when she died. She said that she wanted them to be forgiving and not bitter.

Barbee's aunt, Mary Hackworth, testified that Barbee visited her in South Carolina and stayed with her for three or four months while he was looking for a job, before he got his GED. She said that she loves Barbee dearly and was there to support him, notwithstanding her doctor's order not to travel.

Barbee's niece, Jennifer Cherry (the daughter of his deceased older sister), testified that she and Barbee are very close, that he is more like a brother than an uncle, and that she loves him with all her heart. She said that whether he ends up on death row or with a life sentence, she would do anything she could to maintain contact with him.

Ashley Vandever testified that she met Barbee in church when she was 13 and they were good friends for about four years, until she moved away. Her younger sister adored Barbee and he was the reason she looked forward to going to church. She testified that she visits him in jail every week because she loves him, and that he made her feel better every time she visited him.

Denise Morrison, a former girlfriend, testified that she became romantically involved with Barbee after his divorce. They talked about getting married, but Barbee wanted a child and she did not. They have remained close friends and she visited him at the jail almost every weekend. On cross-examination, she admitted that she became romantically involved with Barbee before he was divorced. She also testified that she did not believe he committed the murders.

Following Evans's testimony, described previously in Part II.C.1., Christy McKemson, the former girlfriend of Barbee's former roommate, testified that she visited her ex-boyfriend every weekend for about three months while he was living with Barbee. She was there to support Barbee.

Jerry Jones, a confinement officer for the Tarrant County Sheriff's Department, ***320** testified that he dated Barbee's sister in high school and played baseball with his brother. He is a friend of Barbee's parents, who are people of strong faith, but this case has tested their faith and affected their health.

David Derusha, the court bailiff, was the final witness for Barbee. He testified that he was primarily responsible for transporting Barbee between the jail and court each day. He said that Barbee had not been a problem and had not made any threats.

In rebuttal, the State called Bruce Cummings, Jayden Underwood's soccer coach. He identified Jayden in a photograph of the team.

In closing argument, the State focused on the circumstances of the offense, Barbee's violent and manipulative behavior with Theresa, and his cruelty to his former co-worker. The prosecutor argued that the circumstances of the murders are overwhelming evidence that there is a probability that Barbee will commit more criminal acts of violence. The prosecutor told the jury that a simple paternity test could have prevented the crime, but Barbee did not wait, because violence is how he handles his problems.

Barbee's counsel, Moore, presented the following argument. The State did not meet its burden of proving beyond a reasonable doubt that Barbee would be a continuing threat to commit criminal acts of violence in the penitentiary. Punishment based on revenge has no place in the law. It can

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be guaranteed that Barbee had no criminal history because if it existed, the State would have presented it. Barbee was 37 years old when it happened and for three hours, he was not a very nice human being. But there were 36 years before that when he was not violent. He was raised in a good family with hardworking parents. He lost his brother and sister and that set him back, but he overcame it, got his GED, was a police officer, started a successful business, and was a contributing member of society. Barbee has not caused any problems while in jail, and he will continue to behave well in the penitentiary. Barbee will be almost 80 years old before the parole board can even consider the possibility of releasing him.

Ray argued that Barbee's leading the police to the bodies so that they could have a decent burial, after he had already confessed, was mitigating because it reduces his moral blameworthiness. He reminded them of Evans's testimony that people who have killed are often the best prisoners because the triggering circumstances do not repeat themselves in prison, and argued that is the case with respect to Barbee.

b. Evidence Presented in the Initial State Habeas Proceeding
In his initial state habeas proceeding, Barbee presented the statements of Amanda Maxwell, Dr. Stephen Martin, Nancy Cearley, and Jackie Barbee; and Dr. Goodness's report.

Maxwell's statement covers essentially the same information that she testified about in the state habeas evidentiary hearing, described previously in Part II.B. Dr. Martin's statement was also described previously in Part II.B.

In her statement, Nancy Cearley said that if she had been asked whether Barbee would be a future threat to society, her answer would have been a definite no. Jackie Barbee's statement covers essentially the same information that she testified about at the state habeas evidentiary hearing, described in Part II.B. She said that if she had been asked whether her son would be a future threat to society, her answer would have been "of course not—never."

***321** In her report to Barbee's trial counsel, Dr. Goodness described discussions with corrections officers who told her that Barbee had done nothing to be a problem during his incarceration and that they believed it unlikely that he would be any sort of a security problem within a structured penal institution. She noted that Barbee's medical records indicated that he had been diagnosed with Lyme's disease, which causes rages and mood swings that mimic bipolar disorder, but is treatable with antibiotics. She observed that Barbee's mother had assisted him in remaining immature and emotionally dependent upon her. Dr. Goodness stated that Barbee did not appear to have significant symptoms suggestive of a head injury, that she did not believe he has a bipolar mood disorder, and that his use of hydrocodone does not suggest long-term significant abuse. She identified as secondary themes of mitigation his lack of a criminal history, "good guy" information, and his parents' ill health.

The state habeas court also had before it the joint affidavit of Ray and Moore. In their affidavit, counsel stated that they had tried to show that Barbee had acted in a fit of rage and that such anger was rare. They knew of other incidents of violence in Barbee's past and tried to keep that evidence from the jury. Their affidavit contains essentially the same information that they later testified about at the state habeas evidentiary hearing, which has been described previously in Part II.B. Counsel attached to their affidavit Amanda Maxwell's notes regarding her interview of Tim Davis about the road rage incident.

The state habeas court found that counsels' actions were reasonable, that counsel offered reasonable mitigating evidence and tried to limit damaging evidence, and that counsel presented as thorough and positive a mitigation case as possible. It found, however, that counsels' efforts were undercut by Barbee's unwillingness to accept responsibility for his actions. The TCCA adopted the trial court's findings and conclusions and denied the claim on the merits.

c. Evidence Presented in the Second State Habeas Proceeding
In his second state habeas application, Barbee presented additional declarations attesting to mitigation evidence that could have been presented. In his COA application, he described this evidence as follows:

His mother, Jackie Barbee, if she had been properly prepared, could have offered detailed information about Barbee's reading comprehension problems and academic struggles, his grief at the deaths of his sister and brother, his service as a reserve police officer, his hard work at his businesses, a serious head injury caused by Ron Dodd just a few months prior to his arrest, his suicidal ideation in jail, his history of severe migraine headaches, which were a factor in his "confession", the motivation of Ron Dodd and Theresa to blame the murders on him, and his lack of a history of violence.

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Bobby Boyd, former Assistant Superintendent of the Azle Independent School District, and his wife, Sallie, could have testified to Barbee's good character and low probability of committing future dangerous acts.

Mandy Carpenter, who had known Barbee for 21 years, could have testified to his non-violent character, generosity, lack of anger, and low risk of future dangerousness.

In addition to the testimony that she gave at trial, Barbee's niece, Jennifer Cherry, could have testified about Barbee's non-violent nature and Theresa's aggressiveness, Theresa's embezzlement ***322** from Barbee's company, Theresa's romantic involvement with Ron Dodd and her wishing for Barbee's death, and Barbee's leadership of the church children's program, including putting on puppet shows for the children. In her declaration, Cherry stated that she felt that trial counsel were not interested in what any of them had to say, and that they did not prepare her to testify. Had she been asked her opinion of the likelihood of Barbee committing future acts of violence, she would have testified that the risk was low.

Tina Church, an investigator, offered her services, without charge, to trial counsel, but Ray refused. Church stated in her declaration that she thought trial counsel were more interested in having Barbee plead guilty than in investigating his innocence or mitigating evidence. Church stated that she discovered that Theresa had changed the company bonding policy to a life insurance policy for which she was the beneficiary.

Pastor Calvin Cearley did not testify at trial, but if he had been called, he would have told the jury that Barbee was very congenial, honest, caring, respectful of others, very friendly and outgoing, kind and loving, and that he liked to make people laugh. His wife, Nancy, the former co-pastor of the church that Barbee attended, testified at trial, but could have provided much more detail about Barbee's activities with the church children's group. She stated in her declaration that he was a very hard worker, dedicated to his job, and the children loved him. She felt that trial counsel were just going through the motions, because they did not question her in depth about her knowledge of Barbee's character, family, efforts for the church, and non-violent nature. If asked, she would have testified that she never knew him to commit any acts of violence and she did not think he would be likely to do so.

Mike Cherry, Barbee's brother-in-law, could have testified to Barbee's non-violent nature and his love of animals and children, and could have testified that Barbee was not likely to commit violent acts in the future.

Sharon Colvin, another pastor, was not contacted by the defense. She could have testified to Barbee's friendly, jovial and non-violent nature and would have testified that Barbee probably would not be a future danger.

Tim Davis, Barbee's former business partner and his best friend, was not asked to testify. He could have discredited Theresa's testimony about Barbee's violence and told the jury about Barbee's low propensity for future dangerousness.

Jerry Dowling could have testified to Barbee's family tragedies, good character and work ethic. He also could have testified that Barbee would not be a future threat to anyone.

Mary Hackworth, Barbee's aunt, testified at trial, but was not asked about the death of his brother and sister and his good and generous character. She could have testified that he was a hard worker, was fond of animals, was always a gentleman around women, that children loved him, and that he would not be likely to commit future violent acts.

Christy Mackemson testified at trial, but she was not asked about Barbee's positive rapport with children. She could have testified that she never saw him angry and did not think he had a high risk of committing future acts of violence.

Melody Novak was not called to testify at trial, but would have been willing to testify about Barbee's good character and devastation at the death of his brother and sister. She could have testified that Barbee loved children and they loved him, and ***323** that he would not be a future danger to society.

At the state habeas evidentiary hearing on the conflict of interest claim that Barbee presented in his subsequent habeas application, the state court received testimony from Amanda Maxwell, Tim Davis, Calvin Cearley, Nancy Cearley, Mike Cherry, Jennifer Cherry, Sharon Colvin, and Jackie Barbee, which was described previously in Part II.B. All of them testified that they were not asked about the likelihood that Barbee would commit future violent acts, but if they had been asked, they would have said he did not pose a danger.

As we previously noted in the discussion of the conflict of interest claim in Part II.B., Ray testified at the state habeas

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evidentiary hearing that he did not call Tim Davis as a character witness because of the "road rage" incident, and did not present any other lay opinion testimony regarding Barbee's lack of future dangerousness, because that would have opened the witnesses up to cross-examination about whether they had heard of Barbee's prior bad acts. In addition to the "road rage" incident involving Tim Davis, Ray had information that Barbee had engaged in acts of vandalism and theft; had poured gasoline on baby hamsters and set them on fire; had killed an animal when on a date; and had offered to pay an inmate, Donald Painter, to testify that Dodd had confessed to the murders.

d. The District Court Decision

The district court held that Barbee could not show that trial counsel rendered ineffective assistance by failing to present the testimony of Bobby and Sallie Boyd because Mrs. Boyd stated in her declaration that she was asked to testify at trial but declined, and Mr. Boyd did not state in his declaration that he was available and would have testified at trial.

The district court rejected Barbee's challenge to trial counsel's justification for not calling Tim Davis as a witness, based on the statement in their joint affidavit that Davis said that Barbee had "attempted to kill" the driver of the other vehicle. The district court stated that counsel's choice of words describing Barbee's behavior as an "attempt to kill," even if inaccurate, did not undermine their decision not to call Davis as a witness. Maxwell had reported to counsel that Davis told her that Barbee had no "off button" and that Davis had to pull Barbee off the old man to keep Barbee from hurting the man "really bad." The court stated that counsel could reasonably decide not to risk exposing the jury to evidence that demonstrated Barbee's confrontational and aggressive nature, especially in the light of Theresa's testimony about a similar road rage incident on their first wedding anniversary, because the jury would be unlikely to view two such similar events as anomalies.

The district court held that Barbee's contention that trial counsel should have asked the punishment witnesses their opinion about Barbee's propensity for future dangerousness overlooked the fact that the witnesses could have been impeached with good-faith questions about their knowledge of Barbee's extraneous bad acts, including the road-rage incident, Barbee's setting baby hamsters on fire with gasoline, vandalism of a school building, stealing from a bait-and-tackle store and a concession stand, fire-setting, theft of jewelry and other items from a locker room, killing an animal while on a date with Michelle Cook, and bribing another inmate, Donald Painter, to testify that Dodd had confessed. The court pointed out that as a result of counsels' strategy, the jury did not learn about his acts of vandalism, ***324** theft, and animal cruelty, and counsel were able to argue to the jury that Barbee had no criminal history and was not a juvenile delinquent.

The district court stated that Barbee's criticism of trial counsel for not investigating whether the defense witnesses knew about the road rage incident involving Davis demonstrated a failure to understand Texas law. Whether the defense witnesses knew about the incident was beside the point; if the prosecution knew about it, the State would have been entitled to ask them about it and the jury would have heard the damaging questions. Any witness who maintained the opinion that Barbee was not a future danger could have been impeached as either (1) uninformed, because he did not know Barbee's true behavior, or (2) biased, because he knew about the behavior but it did not affect his opinion. Third, and arguably worse, the witness might have changed his opinion after learning of the prior bad acts on cross-examination.

With respect to Dr. Goodness, the district court noted that the record did not show that Dr. Goodness believed Barbee presented a low risk of future dangerousness. Even assuming she had that opinion and so testified, however, she would have been subject to potentially damaging cross-examination about Barbee's bad acts. Also, it would have allowed the State to have its own expert evaluate Barbee, which counsel did not want to allow, because it would have provided an opportunity for the State to obtain a damaging diagnosis or learn harmful things about Barbee's past. The district court held that Barbee had failed to show that counsels' decision to avoid an evaluation by the State's expert was outside the wide range of reasonable professional assistance.

The district court observed that some of the information that Barbee claimed trial counsel should have presented regarding his good character, his stable family, the loss of his siblings, head injuries, suicidal ideation, the crime-week stressors that Barbee faced, and the negative character evidence about his ex-wife, Theresa, was more of the same information the jury heard at trial. It cited Fifth Circuit precedent holding that courts must be "particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Skinner v. Quarterman*, 576 F.3d

214, 220 (5th Cir. 2009) (internal quotation marks and citation omitted).

The district court characterized some of the mitigating evidence that Barbee criticized counsel for not presenting, such as the opinions of his family and friends that he is of good character and from a stable family, his academic struggles, the loss of his siblings through illness and a car accident, head injuries that no trial expert believed caused any brain damage, voluntary short-term hydrocodone abuse, and evidence discrediting Theresa, as only "mildly mitigating." The court held that experienced counsel reasonably could have decided that the jury would not be impressed with an attempt to humanize Barbee with such evidence.

In addition, the district court noted that some of the declarations presented by Barbee contain harmful information that could have been brought out on cross-examination, such as evidence that reinforced the picture of Barbee as a man who did not commit himself in his relationships with women and supported the State's theory of motive. For example, Barbee's mother stated in her declaration that Barbee previously had a child with a coworker at the ***325** Blue Mound Police Department but gave up his parental rights.

The district court rejected Barbee's contention that trial counsel contradicted themselves in their joint affidavit by claiming that their efforts to prepare and present a defense were hampered by Barbee's ever-changing version of the murders and his involvement in them, while stating in the same affidavit that Barbee consistently maintained his innocence from the beginning of their representation. The district court pointed out that counsel had to contend with Barbee's prior inconsistent statements that were known to the prosecution regardless of whether they had been appointed to represent him when the inconsistent statements were made.

The district court concluded that Barbee had failed to show that counsel performed deficiently in presenting Barbee's mitigation case at punishment. The court pointed out that counsel held the State to its burden of proof and let the lack of evidence speak for itself. Counsel capitalized on Barbee's strongest argument for a life sentence, his lack of criminal history. Counsel guaranteed that Barbee had no prior convictions or juvenile history because the State did not offer any evidence of such. They argued that "three hours" did not define Barbee as a person, emphasizing the good people who had supported Barbee throughout the trial because they knew him as a different person, and summarizing the previous 36 years of his good family life, the tragedies he endured and overcame, his strong work ethic, and his involvement in the church. Counsel presented evidence and argument that Barbee behaved well in the jail and that he would be almost 80 years old before he was even eligible for parole.

The district court held that, even if it presumed deficient performance, Barbee failed to demonstrate a reasonable probability that the additional evidence Barbee presented post-conviction would have undermined confidence in the verdict. The court stated that it is "beyond reasonable" to conclude that the aggravating facts of the offense, in which Barbee took the life of a pregnant woman, the seven-year-old son who came to her defense, and an unborn child who Barbee knew might be his own, greatly outweigh any mitigating effect of the additional evidence counsel allegedly overlooked.

Barbee argues that even if the State had found out about the unreported road rage incident, it was not so threatening as to excuse trial counsels' failure to present evidence regarding the lack of future dangerousness of a 38–year–old successful businessman with no criminal record. He maintains that because the prosecution did not present the "road rage" incident at trial or list it in any pretrial notice of aggravating evidence, the State either did not know about it or did not consider it to be aggravating. He contends that the district court's rejection of this claim on the ground that presentation of mitigating evidence would be inconsistent with his claims of innocence is unreasonable, because his attorneys did not argue innocence but, instead, conceded his guilt and argued that the killing was accidental. Finally, Barbee argues that the district court's inconsistency in praising counsel for relying on Barbee's lack of criminal history, while citing Barbee's violent past behavior to denigrate his argument that the witnesses should have been asked about future dangerousness, strongly suggests that the district court is biased.

Reasonable jurists would not debate the district court's decision, and we therefore deny Barbee's request for a COA for this claim. Barbee's suggestion that the district court was biased overlooks the fact that his counsel probably would not have been ***326** able to rely on his lack of criminal history and juvenile delinquency if they had done what Barbee argues they should have done. If they had presented lay opinion testimony about Barbee's low risk of committing future violent acts, the witnesses would have been subject

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to cross-examination about Barbee's acts of theft, vandalism, and animal cruelty, which would have been very harmful to his case.

3. Claim 3(c)—Failure to present evidence of head injuries and drug abuse

Finally, Barbee requests a COA for his claim that trial counsel rendered ineffective assistance by failing to present evidence of head injuries and hydrocodone use at the punishment phase. He contends that such evidence would have been supportive of the defense argument that the killing of Lisa Underwood was accidental. He argues that trial counsels' decision not to present this evidence because it was inconsistent with his claim of innocence is flawed, because innocent people suffer from head injuries, and an acceptance of responsibility has nothing to do with counsels' duty to thoroughly and completely investigate and present mitigating evidence.

As support for this claim in his initial state habeas proceedings, Barbee submitted mitigation specialist Amanda Maxwell's report in which she stated that Barbee's medical records showed a history of head injuries. The most recent was in January 2005, when Ron Dodd dropped a 400–pound metal pipe on Barbee's head at a work site. The impact split his hard hat and resulted in a loss of consciousness. The frequency and intensity of his migraine headaches increased after that injury, and he began taking hydrocodone that had been prescribed for his wife. Barbee also supported the claim with a report from psychologist Dr. Kelly Goodness, who noted that Barbee had been diagnosed with Lyme's Disease, and a letter from Dr. James Shupe, a psychiatrist, who suggested a probable diagnosis of "polysubstance dependence" and a "history of closed head injuries."

In their affidavit, trial counsel said that they had discussed the information developed by Maxwell, Dr. Goodness, and Dr. Shupe, but concluded that the head-injury and drug-use evidence would have been mitigating only for a guilty man. They decided that the evidence would not be helpful because Barbee refused to accept any responsibility for the murders. Ray testified at the state evidentiary hearing that he did not believe that "excuse" evidence helped a client at the punishment phase, when the jury had just rejected the innocence defense and found the client guilty. Furthermore, Ray knew that the witnesses who were going to testify for Barbee at the punishment phase believed that the jury had wrongly convicted Barbee, and he thought it would be inconsistent with their testimony to offer evidence that suggested a reason why Barbee committed the murders.

The state habeas court held that trial counsels' decision not to present evidence of Barbee's head injuries and drug use was a reasonable tactical decision and was not adverse to Barbee's interests, given Barbee's lack of significant symptoms and his unwillingness to accept responsibility for the murders. It also concluded that he could not show prejudice.

The district court held that the state court reasonably could have decided that counsels' decision not to present evidence of head injuries and hydrocodone use was within the bounds of reasonable professional representation. The district court rejected Barbee's argument that evidence of his head injuries would have supported ***327** the accidental killing theory because trial counsel, who had the assistance of three mental health experts, had no evidence that Barbee was brain-impaired as a result of his head injuries. Dr. Shupe, a forensic psychiatrist, stated in a letter to counsel that Barbee had a history of closed head injuries, but that his failure to accept some responsibility for the offense impaired the use of that evidence for mitigation purposes. Dr. Shupe also stated that Barbee appeared to be "fixated" on how his mother would view him if she thought he was guilty, and had said he would rather be executed than have his mother see him plead guilty. Dr. Goodness reported to counsel that Barbee did not appear to have significant symptoms suggestive of a head injury and that his report of hydrocodone use did not suggest long-term significant abuse.

The district court further noted that counsels' theory that Lisa's death was accidental was based on her physical state rather than Barbee's mental state. Barbee's trial counsel elicited testimony from the assistant medical examiner that Lisa's airway would have likely been more obstructed because her uterus was "bigger than a basketball" and that she would have had less cardiovascular reserve in her third trimester than at other times. The medical examiner agreed that the more pregnant the victim, the less time it would take for her to die. Trial counsel then argued to the jury that Barbee simply held her down too long based on her physical condition, which was consistent with Barbee's confession to Trish. Because the argument was based on Lisa's advanced pregnancy and not Barbee's mental state when he held her down, the district court reasoned that the evidence of Barbee's head injuries would not have supported the argument.

The district court pointed out that Barbee's own post-conviction expert, Dr. Martin, corroborated trial counsels' view that evidence of Barbee's head injuries would not be helpful because he had refused to accept responsibility. Dr. Martin stated that the behavioral effects caused by frontal lobe impairment provided "a broader and more accurate explanation for why Mr. Barbee could have engaged in a violent crime" and that "Barbee's violent actions at the time of the offense would have been mediated by emotional factors as opposed to reason, due to the aforementioned damage to his frontal lobes." The district court stated that Barbee's assertion that "innocent people get head injuries" does not change the fact that a jury in a criminal case would view such evidence as an explanation for the commission of the crime. Without some acceptance of responsibility, the jury might see such evidence as aggravating or a ploy for undeserved sympathy. It held that trial counsel reasonably concluded that the presentation of such evidence might do harm in this case.

In its opinion denying Barbee's motion to alter or amend, the district court stated that Barbee exaggerated the scope of trial counsels' reliance on his refusal to accept responsibility. Trial counsel believed that the head injuries and some of Barbee's mental health diagnosis could have been helpful at punishment only if Barbee had accepted some responsibility for his actions. They also believed, however, that the usefulness of the head injury evidence and mental health diagnosis was outweighed by the diagnosis of anti-social personality disorder and the fact that the State would have been entitled to an expert evaluation, which probably would have yielded the same harmful conclusions as Dr. Shupe. Counsel also did not want to be inconsistent with the punishment witnesses who all believed that Barbee was innocent. The district court held that Barbee failed to ***328** show that these decisions were unreasonable.

Barbee argues that the mitigating evidence would have been offered at the punishment phase, after his guilt had already been determined. Therefore, it was not dependent on, and did not diminish, the claim of innocence that was never presented to the jury and was not dependent on him accepting responsibility for the murders.

Reasonable jurists would not debate the district court's decision. Barbee ignores Ray's explanation for why they did not present evidence of Barbee's head injuries, migraine headaches, and hydrocodone use. Trial counsels' reasons for not presenting this evidence are reasonable, especially their wanting to avoid having Barbee examined by the State's expert. Barbee is essentially just second-guessing their strategy. We therefore deny his request for a COA for this claim.

D. Claim 4—Denial of Motion to Alter or Amend

In his motion to alter or amend, Barbee cited reports from investigator Tina Church, who was described by Barbee as a "disinterested" witness. In its opinion denying Barbee's motion to alter or amend, the district court attached as an exhibit a web page of Church's organization, "The Other Victim's Advocacy," to show that she was not "disinterested" because of her anti-death penalty views. Barbee argues that the district court's reliance on this extra-record information to rule against him violated due process and deprived him of a fair hearing on his claim of actual innocence.

Tina Church's declaration did not play a large role in the district court's denial of Barbee's motion to alter or amend. Furthermore, Barbee arguably invited the court's investigation and comment when he described Church in his motion as "disinterested." In any event, even if we assume that the district court was wrong to cite the extra-record evidence, any error is harmless and does not show that the district court abused its discretion in denying the motion to alter or amend.

III. Conclusion

To sum up, we GRANT Barbee's request for a COA for Claim 2 (ineffective assistance of counsel for confessing guilt during closing argument). With respect to Claims 1, 3(a), 3(b), and 3(c), Barbee has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), because the district court's denial of relief is not debatable and Barbee's claims are not adequate to deserve encouragement to proceed further. We therefore DENY a COA for those claims. We further hold that the district court did not abuse its discretion when it cited extra-record evidence in its order denying Barbee's motion to alter or amend.

COA GRANTED in part and DENIED in part.

All Citations

660 Fed.Appx. 293

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APPENDIX E

2009 WL 82360
Only the Westlaw citation is currently available.

UNDER TX R RAP RULE 77.3, UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

ORDER
Do Not Publish
Court of Criminal Appeals of Texas.

Ex parte Stephen Dale BARBEE.

No. WR–71,070–01.
|
Jan. 14, 2009.

On Application for Writ of Habeas Corpus in Cause No. 1004856r, In the 213 Judicial District the Court Tarrant County.

ORDER

PER CURIAM.

***1** This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

In February 2006, a jury convicted Applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Barbee v. State,* No. AP–Barbee–275,359 (Tex.Crim.App. December 10, 2008).

Applicant presents four allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing. The trial court adopted the State's proposed findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

IT IS SO ORDERED THIS THE 14TH DAY OF JANUARY, 2009.

All Citations

Not Reported in S.W.3d, 2009 WL 82360

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APPENDIX F

FILED
THOMAS A. WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS

JUL 06 2021
TIME 12:07
BY [illegible] DEPUTY

Cause No. 1004856R

THE STATE OF TEXAS	§	**IN THE 213TH JUDICIAL**
	§	
v.	§	**DISTRICT COURT OF**
	§	
STEPHEN DALE BARBEE	§	**TARRANT COUNTY, TEXAS**

ORDER SETTING EXECUTION DATE

Before the Court is the State's Second Motion for Court to Enter Order Setting Execution Date, filed on March 30, 2021. The Court finds that the motion should be **GRANTED** and a date of execution be set in this case.

I.

Defendant Stephen Dale Barbee was convicted of capital murder on February 23, 2006, for intentionally causing the deaths of Lisa Underwood and Jayden Underwood during the same criminal transaction. After the jury returned an affirmative answer to the future dangerousness special issue and a negative answer to the mitigation special issue, this Court sentenced the Defendant to death by lethal injection on February 27, 2006.

The Court of Criminal Appeals of Texas affirmed the Defendant's conviction and death sentence on direct appeal on December 10, 2008, and the Supreme Court of the United States denied his petition for a writ of certiorari on October 5, 2009. *See Barbee v. State*, 2008 WL 5160202 (Tex. Crim. App. 2008) (unpublished), *cert.*

denied, 558 U.S. 856, 130 S.Ct. 144, 175 L.Ed.2d 94 (2009). The Court of Criminal Appeals of Texas denied the Defendant's original state application for writ of habeas corpus on January 14, 2009, and his subsequent application on May 8, 2013. *See Ex parte Barbee*, 2009 WL 82360 (Tex. Crim. App. 2009) (unpublished); *Ex parte Barbee*, 2013 WL 1920686 (Tex. Crim. App. 2013) (unpublished).

The United States District Court for the Northern District of Texas, Fort Worth Division, denied the Defendant's petition for writ of habeas corpus on July 7, 2015. *See Barbee v. Stephens*, 2015 WL 4094055 (N.D. Tex. 2015) (unpublished). The United States Court of Appeals for the Fifth Circuit denied the Defendant's certificate of appealability in part on November 23, 2016, and affirmed the denial of his petition for writ of habeas corpus on March 21, 2018. *See Barbee v. Davis*, 660 Fed. Appx. 293 (5th Cir. 2016); *Barbee v. Davis*, 728 Fed. Appx. 259 (2018). The Supreme Court of the United States denied the Defendant's petition for writ of certiorari on November 19, 2018. *See Barbee v. Davis*, 2018 WL 3497292 (2018). There is currently nothing before this Court to prevent an execution date from being set.

II.

This Court previously set an order for the Defendant's execution on October 2, 2019. *See* Order Setting Execution Date. On September 23, 2019, the Court of Criminal Appeals stayed the Defendant's execution so that it could consider a claim that the Defendant suffered structural error due to his trial counsel improperly

overriding his Sixth Amendment right to insist that counsel maintain his innocence. *See* Order Staying Execution. On February 10, 2021, the Court of Criminal Appeals dismissed the Defendant's claim because it was previously legally available and because it did not allege facts entitling him to relief. *Ex parte Barbee*, ___ S.W.3d ___, 2021 WL 476477, at *8 (Tex. Crim. App. February 10, 2021). Mandate was issued on March 8, 2021.

III.

IT IS THEREFORE EVIDENT that Defendant has exhausted his avenues for relief through the state and federal courts, and further there are no stays of execution in effect in this case.

ACCORDINGLY, IT IS HEREBY ORDERED that the Defendant, Stephen Dale Barbee, who has been adjudged to be guilty of capital murder as charged in the indictment and whose punishment has been assessed by the verdict of the jury and judgment of the Court at **DEATH**, shall be kept or taken into the custody of the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice until the **12TH DAY OF OCTOBER 2021**, upon which day, at the Correctional Institutions Division of the Texas Department of Criminal Justice, at some time after the hour of six o'clock p.m., in a room designated by the Correctional Institutions Division of the Texas Department of Criminal Justice and arranged for the purpose of execution, the said Director, acting by and through the executioner

designated by said Director, as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of the Defendant, Stephen Dale Barbee, until Stephen Dale Barbee is dead. Such procedure shall be determined and supervised by the said Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

IT IS FURTHER ORDERED that the **Clerk of this Court** shall issue and deliver to the **Sheriff of Tarrant County, Texas**, a **Death Warrant** in accordance with this sentence and Order, directed to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, at Huntsville, Texas, commanding the said Director, to put into execution the Judgment of Death against Stephen Dale Barbee.

The Sheriff of Tarrant County, Texas IS HEREBY ORDERED, upon receipt of said Death Warrant, to deliver said Warrant to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, Huntsville, Texas together with Defendant Stephen Dale Barbee.

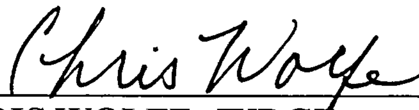
IT IS FURTHER ORDERED that the **Clerk of this Court** shall immediately deliver a copy of this order to:

(a) the attorney who represented the Defendant in the most recently concluded stage of a state or federal post-conviction proceeding,

(b) the Office of Capital and Forensic Writs by first-class mail, e-mail, or fax not later than the second business day after the Court enters the order, *see* **TEX. CODE CRIM. PROC. ART. 43.141(b-1) (1) & (2)**, and

(c) the post-conviction unit of the Tarrant County Criminal District Attorney's Office, all within the same time frame.

SIGNED this 6TH day of July 2021.



CHRIS WOLFE, JUDGE
213TH JUDICIAL DISTRICT COURT
TARRANT COUNTY, TEXAS

THE STATE OF TEXAS	§	IN THE 213TH DISTRICT
	§	
VS.	§	COURT OF
	§	
CAUSE NO. 1004856R	§	TARRANT COUNTY, TEXAS
	§	
STEPHEN DALE BARBEE	§	

DEATH WARRANT

To the Director of the Correctional Institutions Division of the Texas Department Of Criminal Justice at Huntsville, Texas, or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Correctional Institutions Division of the Texas Department of Criminal Justice or in the event of the death or disability or absence of both the Director of the Correctional Institutions Division of the Texas Department Of Criminal Justice and the Warden of the Correctional Institutions Division of the Texas Department Of Criminal Justice, to such person appointed by the Board of Directors of the Correctional Institutions Division of the Texas Department Of Criminal Justice, Greetings:

Whereas, on the 23RD day of FEBRUARY, A.D. 2006, in the 213TH District Court of Tarrant County, Texas, STEPHEN DALE BARBEE was duly and legally convicted of the crime of Capital Murder, as fully appears in the judgment of said Court entered upon the minutes of said court as follows, to-wit: Judgment attached and,

Whereas, on the 27TH day of FEBRUARY, A.D., 2006 the said Court pronounced sentence upon the said STEPHEN DALE BARBEE in accordance with said judgment fixing the time for the execution of the said STEPHEN DALE BARBEE for any time after the hour of 6:00 p.m. on TUESDAY, the 12TH day of OCTOBER, A.D., 2021, as fully appears in the sentence of the Court and entered upon the minutes of said Court as follows, to-wit: Sentence attached.

These are therefore to command you to execute the aforesaid judgment and sentence any time after the hour of 6:00 p.m. on TUESDAY, the 12TH day of OCTOBER, A.D., 2021, by intravenous injection of substance or substances in a lethal quantity sufficient to cause death and until the said STEPHEN DALE BARBEE is dead.

Herein fail not, and due return make hereof in accordance with law.

Witness my signature and seal of office on this the 6TH day of JULY, A.D., 2021.

Issued under my hand and seal of Office in the City of Fort Worth, Tarrant County Texas this 6TH day of JULY, 2021.

THOMAS A. WILDER,
CLERK OF THE DISTRICT COURTS OF
TARRANT COUNTY, TEXAS

BY , Deputy

RETURN OF THE DIRECTOR OF THE TEXAS DEPARTMENT OF CORRECTIONS

Came to hand, this the _____ day of _____________, _____ and executed the ____ day of ____________, ____ by the death of

STEPHEN DALE BARBEE

DISPOSITION OF BODY:

DATE:
TIME:

DIRECTOR OF TEXAS DEPARTMENT OF CORRECTIONS

BY: ______________________________________

1004856R

Death Warrant and Execution Order for STEPHEN DALE BARBEE was hand-delivered by the Sheriff of Tarrant County to Texas Department of Criminal Justice, Classification and Records on this _______ day of ___________________, 20___.

Received by:

____
Bryan Collier, Executive Director
Texas Department of Criminal Justice

Delivered by:

____
Sheriff