No. 21-5093

In the
Supreme Court of the United States

STEPHEN DALE BARBEE,
PETITIONER

v.

STATE OF TEXAS,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

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Petitioner is scheduled for execution after 6:00 p.m. (CST)
Tuesday, October 12, 2021

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

The petitioner was convicted of capital murder for intentionally causing the deaths of Lisa Underwood and Jayden Underwood during the same criminal transaction and sentenced to death in February 2006. After thirteen years of post-conviction litigation, the trial court scheduled Barbee's execution for October 2, 2019.

On August 6, 2019, the petitioner filed a subsequent application for writ of habeas corpus alleging that his trial counsel improperly overrode his Sixth Amendment autonomy right to insist that counsel maintain his innocence in violation of *McCoy v. Louisiana*.[1] The Texas Court of Criminal Appeals stayed the petitioner's execution to address whether he was entitled to any relief under *McCoy*. ***Ex parte Barbee***, 2019 WL 4621237, at *2 (Tex. Crim. App. September 23, 2019) (not designated for publication). The Court of Criminal Appeals dismissed the petitioner's claim holding that his claim was legally available when he filed his earlier writ applications and that, even if not previously legally available, he had not alleged sufficient facts entitling him to relief. ***Ex parte Barbee***, 616 S.W.3d 836, 846 (Tex. Crim. App. 2021).

This Court is presented with the following questions:

1. Whether the state court's decision to foreclose habeas review of a capital defendant's claim under *McCoy v. Louisiana* contravenes federal law because it held that the Sixth Amendment autonomy right recognized in *McCoy* was a "logical extension" of the Sixth Amendment right to counsel at issue in *Florida v. Nixon*?[2]

2. Whether the state court's holding that the petitioner failed to make a *prima facie* case under *McCoy* violates core Sixth Amendment principles where there is no dispute that the individual insisted to his counsel that he is innocent, but counsel nevertheless conceded his guilt?

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1 See ***McCoy v. Louisiana***, ___ U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018).

2 See ***Florida v. Nixon***, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

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BRIEF IN OPPOSITION

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The State of Texas respectfully submits this brief in opposition to the petition for writ of certiorari filed by Stephen Dale Barbee.

STATEMENT OF THE CASE

The petitioner was convicted of capital murder and sentenced to death for killing his pregnant former girlfriend Lisa Underwood and her seven-year-old son Jayden in the same criminal transaction. The Court of Criminal Appeals summarized the facts as follows:

> Lisa [Underwood] owned a bagel shop in Fort Worth with her friend Holly Pils. Pils testified that appellant, who was married, had been a customer at the bagel shop and that he and Lisa began a personal relationship in Fall 2003. They stopped seeing each other at the end of 2003, and Lisa began dating another man at the beginning of 2004. She was still dating the other man when she resumed her relationship with appellant in July 2004, and she became pregnant around that time. She informed both men that she was pregnant but told appellant that she believed he was the father of the unborn child. She told Pils that she wanted her baby to have health insurance and that she had discussed the matter with appellant.
>
> Pils testified that Lisa, who was more than seven months pregnant, stayed home from work on Friday, February 18, 2005, because she had a cold. Pils planned to host a baby shower for Lisa at the bagel shop the next day. Lisa told Pils that she was feeling better, that she was excited about the baby shower, and that she planned to arrive at the bagel shop shortly before 4:00 p.m. on Saturday, February 19th.
>
> At approximately 3:00 on Saturday morning, Denton County Deputy Sheriff David Brawner saw a man walking along the service road of Interstate Highway 35. Brawner stopped his patrol car behind the man and activated his overhead emergency lights and his “in-car video camera system.” It was cold outside, and it had been raining. Brawner testified that the man’s clothes were “very wet” and that he was “covered in mud.” When Brawner asked the man for identification, he said that he had left his wallet at his friend’s residence

nearby. He gave the officer a false name and date of birth and "took off running on foot" when Brawner spoke with dispatch in an effort to verify the information. Brawner ran after the man, but he disappeared into a thickly wooded area. Brawner and other officers searched the area for hours but were unable to locate the man. Brawner later identified the man as appellant in a photo spread.

The police were contacted after Lisa failed to show up for her baby shower later that day. There were no signs of forced entry at Lisa's house. Jayden's shoes were on top of the fireplace hearth, and his glasses had been left next to his bed. There was blood in the living room on the entertainment center, the walls, and a fitted couch cover. It appeared that someone had attempted to clean and conceal a saturation blood stain on the living room floor. Lisa's car was gone, and there was blood on the floor in the garage. Lisa's DNA profile was consistent with the blood stains in the house and the garage. Her personal home computer showed that she logged on to the internet at 11:22 p.m. on February 18 and logged off at 12:02 a.m. on February 19. The last website she visited was "birthplan.com."

On February 21, Lisa's Dodge Durango was found in a creek approximately 300 yards from where Officer Brawner had encountered appellant two days earlier. The front end of the vehicle was submerged in the creek. The windows were down and the hatchback was up. There was a bottle of cleaning solution in the cargo area of the vehicle. Lisa's car keys and purse were located nearby. On the same day that Lisa's car was found, Detectives Michel Carroll, John McCaskell, and Brian Jamison of the Fort Worth Police Department traveled to Tyler to speak with appellant, his wife Trish Barbee, and his co-worker Ron Dodd. The detectives initially talked to them in the parking lot of a Wal–Mart, but later asked them to come to the Tyler Police Department for further questioning. At the police department, Carroll and Jamison interviewed appellant in one room, and McCaskell interviewed Dodd in another room. Appellant received his *Miranda* warnings and his interview began at about 7:45 p.m. In this interview, which was recorded on a digital video disc (DVD), appellant said that he worked cutting down trees in Tyler during the day on February 19. He said that he drove to his home in Fort Worth that evening and that he went over to Dodd's house later that night to work on the truck that they used as their business vehicle. He left Dodd's house at around 2:00 or 3:00 a.m. It took over an hour for him to drive home because the truck was "sputtering" and "leaking oil." His wife was asleep when he arrived home, and he slept on the couch so he would not wake her. He acknowledged that he had dated Lisa and that she had informed him he might be the father of her unborn child, but he claimed that he had not seen or heard from her in a while. He eventually acknowledged that he had been stopped by a police officer in Denton County at around 3:00 a.m., that he had given the officer a false name and date

of birth, and that he had run away from the officer.

Carroll testified that he excused himself to observe McCaskell's interview with Dodd, then he returned to appellant's interview room and asked, "Does FM 407 sound familiar to you?" He placed photographs of Lisa and Jayden on the table and walked out of the room, leaving appellant alone. Appellant later opened the door and asked to use the men's room. Carroll accompanied him to the bathroom where they had an un-recorded conversation for about forty-five minutes to one hour. Carroll testified that he told appellant that Dodd was "going to lay this whole thing in [appellant's] lap" and that "Lisa's family needed closure." Appellant made comments "about being locked up [for] the rest of his life" and said that he understood the need for closure because he had lost a family member. Appellant told Carroll that "he and Dodd actually created a plan to go kill Lisa" because "Lisa wanted to use his name on a birth certificate or she was trying to take money from him, she was going to ruin his family, his relationship with his wife, Trish, and he did not want that to happen." Appellant said that he dropped his car off at Dodd's house and then Dodd drove him to Lisa's house. Dodd left, and appellant went inside and tried to "pick a fight" with her. He was unable to provoke a fight, so he called Dodd to pick him up. He later had Dodd take him back to Lisa's house. This time, "he was able to get her upset enough that he could start a fight with her." He wrestled her to the ground and "held her face into the carpet until she stopped breathing." Jayden came into the room and was "crying" and "emotional." Appellant said he walked up to Jayden, placed his hand over his mouth and nose, and "held it there until he stopped breathing." Afterwards, appellant "tried to clean up the house" and "tried to cover a blood spot with a piece of furniture." He placed the bodies of Lisa and Jayden into Lisa's car and drove to "a road off of FM 407 where they buried both their bodies." He said that he used a shovel Dodd had given to him and that he buried the bodies in a shallow grave and placed debris on top of it. He then drove Lisa's car to another location and "stopped it just short of the creek." After relating this story, appellant agreed to have another digitally recorded video interview with Carroll.

Carroll testified that he and appellant left the bathroom and went to Detective Richard Cashell's desk where appellant assisted them in mapping out the location where he had buried the victims. They used "MapQuest" to "get a map of that area" and appellant showed them "the roads that he traveled" and where he "put the victims' bodies." Carroll and appellant then went back to the interview room where appellant gave his second digitally recorded video statement shortly after 11:00 p.m.

After Carroll interviewed appellant, he left the interview room and spoke with appellant's wife, Trish Barbee. Carroll told Trish that appellant had confessed to killing Lisa and that he wanted to talk to her. Trish wanted to speak with

appellant, so Carroll brought her to the interview room. Carroll remained outside, and the digital video recorder continued running as appellant and Trish conversed. Trish asked appellant what happened. Appellant explained that Lisa called him and threatened him, so he went to her house and tried to talk to her. He said that Lisa said she would "ruin" him and that she fought with him and kicked him. He explained that he "held her down too long" and that he "didn't mean for her to stop breathing."

Carroll testified that appellant spent that night in the Smith County Jail. The next morning, he rode with Carroll and Officer Mark Thornhill and directed them to the location of the bodies. Carroll testified that appellant stated, "[W]hen I take you to the bodies, I don't want to see the bodies, and I don't want the media to see me." When they got closer to the location, appellant told the officers to take a different exit and "took [them] a back route to the same location." When they arrived, appellant sat in the car and directed them to the grave by yelling out the window. Carroll testified that Dodd had already taken police to "the same area," but that the bodies were not located until appellant arrived. The bodies were located in a shallow grave that had tree limbs placed on top of it.

The medical examiner who performed Lisa's autopsy testified that Lisa suffered facial abrasions and contusions and a broken arm. She had bruises on both sides of her back that could have been caused by being hit or by having "external force applied over a longer period of time." Her injuries were consistent with a person holding her down and stopping her from breathing. The cause of her death was "traumatic asphyxiation," and the manner of her death was homicide. Lisa was pregnant with a healthy female fetus that appeared to be around seven months gestational age. The cause of the fetus' death was "fetal asphyxiation" resulting from "maternal asphyxiation."

The medical examiner who performed Jayden's autopsy testified that Jayden had a large bruise above his right temple that was "due to some sort of impact to the head." He had bruises on his back and abrasions on his back, arm, hip, and leg. He had bruises on his lips and gums that appeared to be "caused by some sort of compression, some object put over the area of the mouth and pressing on the mouth and compressing the lips against the underlying teeth." The medical examiner testified that Jayden's injuries were consistent with: someone placing a hand over Jayden's mouth and nose; someone pressing Jayden's face against a flat surface; or, someone pressing Jayden's face against a surface that "gives if you push against it," like a couch or a carpeted floor. He determined that the cause of Jayden's death was "asphyxia by smothering" and the manner of his death was homicide.

See ***Barbee v. State***, 2008 WL 5160202, at *1-3 (Tex. Crim. App. December 10, 2008)

(not designated for publication) (citations and footnotes omitted), *cert. denied*, 558 U.S. 856, 130 S.Ct. 144, 175 L.Ed.2d 94 (2009).

The Court of Criminal Appeals affirmed the petitioner's conviction and death sentence and denied relief on two prior habeas corpus applications. See ***Barbee v. State***, 2008 WL 5160202, at *14; ***Ex parte Barbee***, 2009 WL 82360, at *1 (Tex. Crim. App. January 14, 2009) (not designated for publication); and ***Ex parte Barbee***, 2013 WL 1920686, at *1 (Tex. Crim. App. May 8, 2013) (not designated for publication). The federal district and circuit courts also considered and denied his requests for habeas relief. See ***Barbee v. Stephens***, 2015 WL 4094055, at *67 (N.D. Tex. 2015) (unpublished); ***Barbee v. Davis***, 660 Fed. App'x. 293, 297, 328 (5th Cir. 2016); and ***Barbee v. Davis***, 728 Fed. App'x. 259, 263, 270 (5th Cir. 2018), *cert. denied*, ___ U.S. ___, 139 S.Ct. 566, 202 L.Ed.2d 406 (2018).

The petitioner filed a third application for habeas corpus relief alleging that his trial counsel improperly overrode his Sixth Amendment autonomy right to insist that counsel maintain his innocence in violation of *McCoy v. Louisiana*. See ***Ex parte Barbee***, 2019 WL 4621237, at *2 (Tex. Crim. App. September 23, 2019) (not designated for publication). The Court of Criminal Appeals dismissed this application because his claim was legally available when he filed his earlier writ applications and, even if not previously legally available, he did not allege sufficient facts entitling him to relief. See ***Ex parte Barbee***, 616 S.W.3d at 846.

REASONS FOR DENYING THE PETITION

The Texas Court of Criminal Appeals properly dismissed the petitioner's *McCoy* claim because it does not meet the Texas standard for considering a subsequent writ application and because it was not supported by sufficient facts entitling him to relief. These are independent and adequate state-law grounds that are outside this Court's jurisdiction.

Alternatively, the Court of Criminal Appeals' determinations that the petitioner's *McCoy* claim was legally available when he filed his earlier state writ applications and that he did not present sufficient facts justifying relief are reasonable applications of this Court's existing standards in interpreting a defendant's constitutional right to effective assistance of counsel.

ARGUMENT IN SUPPORT OF DENYING THE PETITION

I.

The Texas Court of Criminal Appeals relied upon independent and adequate state-law grounds in dismissing the petitioner's *McCoy v. Louisiana* claim.

This Court does not review questions of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. ***Beard v. Kindler***, 558 U.S. 53, 55, 130 S.Ct. 612, 614, 175 L.Ed.2d 417 (2009); ***Lambrix v. Singletary***, 520 U.S. 518, 522–23, 117 S.Ct. 1517, 1522, 137 L.Ed.2d 771 (1997). Even though the

"independent and adequate state ground" is not technically jurisdictional in habeas review, this Court has applied that doctrine to bar review of claims defaulted under state law. ***Lambrix v. Singletary***, 520 U.S. at 523, 117 S.Ct. at 1522

A state-law ground is adequate to preclude federal consideration of a claim if it is firmly established and regularly followed. ***Lee v. Kemna***, 534 U.S. 362, 376, 122 S.Ct. 877, 885, 151 L.Ed.2d 820 (2002). The discretionary nature of a state-law bar does not make it any less "adequate" for a discretionary rule can be firmly established and regularly followed even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others. ***Beard v. Kindler***, 558 U.S. at 60–61, 130 S.Ct. at 617-18. Situations where a state-law ground is found inadequate are limited to a small category of cases. ***Lee v. Kemna***, 534 U.S. at 376, 122 S.Ct. at 885.

A.
Claim did not meet the standard for consideration in a subsequent writ application.

The Court of Criminal Appeals dismissed this third writ application as an abuse of the writ because the petitioner's *McCoy* claim did not meet the statutory requirements for considering its merits in a subsequent writ application. ***Ex parte Barbee***, 616 S.W.3d at 846. The Texas Code of Criminal Procedure directs that a court may not consider the merits of or grant relief based on a subsequent application for writ of habeas corpus unless the applicant can establish that the factual or legal

basis for his claim was unavailable when he filed his initial or any prior state writ applications, or where he can show that, but for the alleged constitutional violation, no rational juror could have convicted him or answered the special issues in the State's favor. See **Tex. Code Crim. Proc. art. 11.071, §5(a)(1)-(3)**.

The Court of Criminal Appeals regularly dismisses subsequent state habeas applications using this well-established procedural bar. See, e.g., ***Balentine v. Thaler***, 626 F.3d 842, 856–57 (5th Cir. 2010), *cert. denied*, 564 U.S. 1006, 131 S.Ct. 2992, 180 L.Ed.2d 824 (2011); ***Hughes v. Quarterman***, 530 F.3d 336, 342 (5th Cir. 2008), *cert. denied*, 556 U.S. 1239, 129 S.Ct. 2378, 173 L.Ed.2d 1299 (2009); ***Kunkle v. Dretke***, 352 F.3d 980, 989 (5th Cir. 2003), *cert. denied*, 543 U.S. 835, 125 S.Ct. 250, 160 L.Ed.2d 56 (2004). Determining whether the facts underlying a claim were available with reasonable diligence or whether a legal basis existed at the time of an inmate's initial or prior state habeas application is a matter of timing, not interpretation of federal law. See ***Moore v. Texas***, 535 U.S. 1110, 122 S. Ct. 2350, 2353, 153 L.Ed.2d 154 (2002) (Scalia, J., dissenting in grant of stay).[3] Thus, its discretionary nature does not undermine its independence or adequacy.

Additionally, the Court of Criminal Appeals applied at least one purely state-

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3 That discretion includes both cases like the petitioner's case where the Court found his claim previously legally available or those where it found the legal ground to be previously unavailable. See e.g. ***Ex parte Riles***, 2021 WL 1397906 *2 (Tex. Crim. App. April 14, 2021) (not designated for publication) (lack of mitigation instruction in capital case claim was previously legally unavailable); ***Chavez v. State***, 371 S.W.3d 200, 206-07 (Tex. Crim. App. 2012) (false/misleading testimony due process claim was previously legally unavailable).

law factor in determining previous legal availability: Does *McCoy* make it easier to establish a claim? See ***Ex parte Barbee***, 616 S.W.3d at 845, *citing* ***Chavez v. State***, 371 S.W.3d at 206-07 (a false/misleading testimony due process claim is a new legal basis distinct from long-standing perjured testimony due process caselaw because it is easier to establish a claim). Thus, its prior availability analysis was not totally based on federal law – demonstrating its independence.

Finally, the United States Code contains a comparable "second or successive" habeas prohibition limiting the number of attempts an inmate may seek to collaterally attack their conviction, subject to certain, few exceptions. Compare **Tex. Code Crim. Proc. art. 11.071, §5(a)**, with **28 U.S.C. §2244(b)**. Federal courts should not disregard state procedural rules when substantially similar rules are given full force in federal courts. ***Beard v. Kindler***, 558 U.S. at 62, 130 S.Ct. at 618. Put simply, the Texas subsequent writ procedural bar provides an independent and adequate state-law ground preventing this Court's review.

B.

Claim was not supported by sufficient facts entitling the petitioner to relief under *McCoy v. Louisiana*.

The Court of Criminal Appeals unanimously found that the petitioner had not alleged sufficient facts entitling him to relief under *McCoy*. ***Ex parte Barbee***, 616 S.W.3d at 845-46, 855-57. Deciding whether an inmate has provided the requisite level of evidence to prove a writ claim does not touch upon federal law. ***Moore v.***

Texas, 122 S.Ct. at 2353. The Court's insufficient facts finding is an independent and adequate state law ground preventing this Court's review.

II.

The Court of Criminal Appeals correctly determined that the legal basis for the petitioner's *McCoy v. Louisiana* claim was previously available when he filed his original state court writ application.

The Court of Criminal Appeals found that the petitioner's *McCoy* claim was previously legally available because:

- *McCoy* was founded on "familiar legal principles" that dealt with the division of labor between attorney and client, the duty of the attorney to consult with his client about important matters, the client's exclusive right to make fundamental decisions about his own defense with the assistance of counsel, and structural error;
- *McCoy* was a logical extension of *Nixon* and "could have been rationally fashioned" from it; and
- *McCoy* did not make it easier to establish a claim.

See ***Ex parte Barbee***, 616 S.W.3d at 844-45 (citations omitted). This decision is a reasonable application of existing constitutional jurisprudence.

McCoy holds that it is a defendant's prerogative to choose the objective of his defense – whether to admit guilt in hopes of gaining mercy at the sentencing stage or to force the State to prove his guilt beyond a reasonable doubt by maintaining his innocence – and that it is structural error for defense counsel to override a defendant's expressed desire to maintain innocence by conceding his guilt. ***McCoy v. Louisiana***, 138 S.Ct. at 1505, 1511-12.

A defendant's retention of his autonomous right to assert innocence as his

defense objective, even when represented by counsel and advised adversely, comes directly from the renowned *Faretta* holding that:

> The right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law.

McCoy v. Louisiana, 138 S.Ct. at 1507-08, *citing*, ***Faretta v. California***, 422 U.S. 806, 834, 95 S.Ct. 2525, 2540-41, 45 L.Ed.2d 562 (1975) (internal quotation marks omitted). The Sixth Amendment guarantee to assistance of counsel does not require a defendant to cede complete control over his defense. See ***McCoy v. Louisiana***, 138 S.Ct. at 1508, *citing* ***Faretta v. California***, 422 U.S. at 819-20, 95 S.Ct. at 2533-34. The finding that certain decisions are reserved to the defendant is not a new constitutional concept. See ***McCoy v. Louisiana***, 138 S.Ct. at 1508, *citing* ***Jones v. Barnes***, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) (an accused has the ultimate authority to make certain decisions such as whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal).

Likewise, the finding that violating a defendant's autonomy is structural error because it affects his fundamental right to choose how to protect his own liberty and because its effects are too hard to measure[4] is not a new legal basis since structural error relating to representation by counsel is long-standing Sixth Amendment jurisprudence. See ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 148-51, 126 S.Ct. 2557, 2563-65, 165 L.Ed.2d 409 (2006) (denial of competent counsel of choice qualifies as structural error); ***United States v. Cronic***, 466 U.S. 648, 659, 104 S.Ct.

[4] See ***McCoy v. Louisiana***, 138 S.Ct. at 1511.

2039, 2047, 80 L.Ed.2d 657 (1984) (complete denial of counsel is structural error making the adversarial process presumptively unreliable).

In other words, *McCoy* did not unfurl a new constitutional right or previously-unavailable legal basis; rather it simply applied existing Sixth Amendment principles to a different factual context. See ***Teague v. Lane***, 489 U.S. 288, 301, 307 109 S.Ct. 1060, 1070, 1073, 103 L.Ed.2d 334 (1989) (a new constitutional rule occurs when a Supreme Court decision is not dictated by existing precedent; applying existing legal principles to a different set of facts does not create a new rule). Given these underpinnings, the Court of Criminal Appeals reasonably concluded that *McCoy* was founded on "familiar legal principles" dealing with a defendant's autonomy or exclusive right to make certain decisions and did not present a new constitutional concept.

Most significantly, this Court broached this issue before the Underwood murders even occurred. See ***Florida v. Nixon***, 543 U.S. at 178, 125 S.Ct. at 555 (while defense counsel need not obtain a defendant's consent to every tactical decision, counsel does have the duty to consult with a client regarding important decisions, including questions of overarching defense strategy). This Court rejected a blanket explicit consent rule for counsel's strategic choice to concede guilt when a defendant remains silent (i.e., neither approving nor protesting the proposed concession strategy), but clearly indicated that guilt could not be conceded over his express objections. See ***Florida v. Nixon***, 543 U.S. at 192, 125 S.Ct. at 563. Even this Court's own opening language in *McCoy* demonstrates that autonomy is not a

new concept:

> In *Florida v. Nixon*, this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial when [the] defendant, informed by counsel, neither consents nor objects, ... In the case now before us, in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt.

See ***McCoy v. Louisiana***, 138 S.Ct. at 1505 (internal citations and quotation marks omitted). Thus, the Court of Criminal Appeals reasonably concluded that *McCoy* was a logical extension of *Nixon* from which the petitioner could have rationally fashioned his current claim.

Multiple courts have reached this same reasoning that *McCoy* did not establish a new constitutional concept justifying retroactive collateral review. See ***Smith v. Stein***, 982 F.3d 229, 233-34 (4th Cir. 2020), *cert. denied*, 2021 WL 1520899 (April 19, 2021); ***Christian v. Thomas***, 982 F.3d 1215, 1223-25 (9th Cir. 2020) (*McCoy* did not establish a watershed rule justifying retroactive application or collateral review applicability; rather it simply extended preexisting watershed cases). See also ***Morris v. Pennsylvania***, 2018 WL 5453585, at *3-4 (E.D. Pa. October 29, 2018, appeal filed) (*McCoy* does not authorize a defendant to bring a successive writ claim that defense counsel unilaterally made the decision to call him to testify at trial against his allegedly explicit and repeated desire to remain silent); and ***Barber v. Dunn***, 2019 WL 1979433, at *4-5 (N.D. Ala. May 3, 2019) (*McCoy* can only mean that the Sixth Amendment has always forbidden capital defense counsel from admitting guilt over their client's express objection since the Supreme Court lacks the power to amend the Constitution), *affirmed*, ___ Fed. App'x. ___, 2021 WL 2623159 (11th Cir.

2021).

In sum, *McCoy* directly applied the long-standing constitutional concept of defendant autonomy to cases where a defendant affirmatively opposes conceding guilt – an application previously suggested in *Nixon*. See ***McCoy v. Louisiana***, 138 S.Ct. at 1505. Thus, the Court of Criminal Appeals reasonably found that this autonomy claim was recognized or could reasonably have been formulated when the petitioner filed his initial writ application in 2008; thereby justifying the dismissal of his subsequent writ application. As such, certiorari review is not warranted.[5]

III.

The Court of Criminal Appeals correctly determined that the petition did not factually establish a *McCoy v. Louisiana* violation.

A defendant has the autonomy to decide that his defense objective is to assert

[5] New constitutional rules of criminal procedure are generally not applicable to those cases which have become final before the new rule is announced. ***Edwards v. Vannoy***, ___ U.S. ___, 141 S.Ct. 1547, 1551, ___ L.Ed.2d ___ (2021); ***Teague v. Lane***, 489 U.S. at 310, 109 S.Ct. at 1075. Retroactivity is limited only to new "watershed" rules of criminal procedure. ***Edwards v. Vannoy***, 141 S.Ct. at 1555. Whether a decision announcing a new rule has prospective or retroactive effect should be made when issued. ***Teague v. Lane***, 489 U.S. at 300, 302, 109 S.Ct. 1070, 1072. This Court did not suggest that *McCoy* applies retroactively, and the term "retroactive" appears nowhere in its decision. See ***McCoy v. Louisiana***, 138 S.Ct. at 1505-18. Multiple courts have found that *McCoy* did not announce a watershed rule of criminal procedure justifying retroactive application to final cases. See ***Smith v. Stein***, 982 F.3d at 233-34; ***Christian v. Thomas***, 982 F.3d at 1223-25. See also ***Johnson v. Ryan***, 2019 WL 1227179, at *2 (D. Ariz. March 15, 2019); ***Honie v. Benzon***, 2019 WL 5066738, at *2 (D. Utah October 9, 2019, appeal filed); ***Elmore v. Shoop***, 2019 WL 3423200, at *10 (S.D. Ohio July 30, 2019).

innocence and maintain his innocence throughout his trial's guilt phase. ***McCoy v. Louisiana***, 138 S.Ct. at 1508. Trial management – including what arguments to pursue, what evidentiary objections to raise, and what agreements to make regarding the admission of evidence – remains the attorney's province. ***McCoy v. Louisiana***, 138 S.Ct. at 1508. Under this system, the defendant chooses his objective, and counsel determines how best to achieve that objective. ***McCoy v. Louisiana***, 138 S.Ct. at 1508.[6]

McCoy requires a defendant to expressly assert that the goal or objective of his defense is to maintain his innocence of the charged offense at trial and not override it by conceding guilt. See ***McCoy v. Louisiana***, 138 S.Ct. at 1508-09. The Court of Criminal Appeals found no evidence that the petitioner expressly informed his

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[6] Removing this clear delineation could have chaotic and untold consequences by converting every disagreement between defendants and their attorneys about how best to seek acquittal into impairments of the defendant's autonomy rights; thereby removing any prejudice requirement that would accompany a similarly-situated ineffective assistance claim. ***United States v. Rosemond***, 322 F.Supp.3d 482, 487 (S.D.N.Y. 2018), *affirmed* 958 F.3d 111 (2nd Cir. 2020), *cert. denied*, ___ U.S. ___, 141 S.Ct. 1057, 208 L.Ed.2d 524 (2021). Likewise, interpreting "objective of the defense" beyond the decision to maintain innocence or concede guilt could substantially impair the finality of jury verdicts in criminal cases due to endless post-conviction litigation concerning what transpired between defendants and their lawyers and how the defendants' unsuccessful defenses were conducted. ***People v. Bezon***, 2018 Guam 28, 2018 WL 6841783, at *2 (Guam December 31, 2018); ***United States v. Rosemond***, 322 F.Supp.3d at 487.

Finality is an essential component to the operation of our criminal justice system and undermining that finality deprives criminal law of much of its deterrent effect. ***Edwards v. Vannoy***, 141 S.Ct. at 1554; ***Teague v. Lane***, 489 U.S. at 307-10, 109 S.Ct. at 1074-75.

lawyers that his defensive objective was to maintain his innocence at trial; only that he told his attorneys that he was innocent. See ***Ex parte Barbee***, 616 S.W.3d at 845.[7] This determination was reasonable and should not invite certiorari review.

Moreover, even if the Court assumes that the petitioner made his objective clear, core Sixth Amendment principles were not violated because:

- Lead trial counsel William Ray did not actually concede the petitioner's guilt in arguing that the State failed to prove intent;
- The petitioner made no express objection or opposition to this closing argument; and
- The petitioner has not consistently maintained his innocence throughout this case.

A.

Counsel did not override the petitioner's defense objective in offering a different theory for acquittal.

The defense presented by trial counsels did not override any innocence objective; rather, it was a cohesive strategy to explain away the State's damning evidence and possibly obtain a capital murder acquittal because the petitioner did not intentionally kill Lisa Underwood.[8] Mr. Ray's closing argument tied this evidence

[7] 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 his identity as Lisa and Jayden's killer; and he was "shocked" when he heard the argument.

[8] Cited examples include:

- Securing testimony by the medical examiner admitting that he could

together justifying acquittal due to a missing element – the State's failure to prove the petitioner committed two intentional murders. See Clerk's Record II:392; Trial Reporter's Record XXVI:14-18.[9]

The presentation of an alternate defense theory, an argument that the State has not proved an essential element of its case or even a concession to a lesser offense, does not equal an admission of guilt and constitute a *McCoy* violation. See ***Christian v. Thomas***, 982 F.3d at 1225 (attorney urging an alternate theory of innocence does not violate a defendant's autonomy rights where he does not concede guilt); ***United States v. Rosemond***, 958 F.3d 111, 122-23 (2nd Cir. 2020) (no *McCoy* violation when attorney makes strategic concessions while still defending his client's innocence), *cert. denied*, ___ U.S. ___, 141 S.Ct. 1057, 208 L.Ed.2d 524 (2021); ***United States v. Holloway***, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019) (defendant's autonomy rights not violated when attorney and defendant had "strategic disputes" about how to achieve same goal); ***United States v. Audette***, 923 F.3d 1227, 1236 (9th Cir. 2019)

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not be sure how long Ms. Underwood was held down, and that it could have been as little as thirty seconds – suggesting a possible accident. See Trial Reporter's Record XXIII:200-01.

- Discrediting Detective Mike Carroll's testimony that the petitioner admitted planning these murders – key evidence of intent. See Trial Reporter's Record XXIV:135-45.
- Using the petitioner's admissions to his wife that Lisa Underwood's death was an accident and that he did not mean to kill her. See Trial Reporter's Record XXIV:119, XXVIII:State's Exhibit PT-2.

[9] Defense counsel's "lack of intent/accident" acquittal strategy differs significantly from *McCoy* where defense counsel had a pre-ordained strategy to fast-track the case to a "mercy" punishment defense by conceding his guilt despite McCoy's express objection and presentation of an alibi defense from the witness stand. See ***McCoy v. Louisiana***, 138 S.Ct. at 1506-07.

(defendant's autonomy rights not violated because he disagreed with his attorney about "which arguments to advance"); ***Thompson v. United States***, 791 F.App'x 20, 26-27 (11th Cir. 2019) (defendant's autonomy rights not violated because attorney conceded some, but not all, elements of a charged crime); ***Anthony v. State***, ___ S.E.2d ___, 2021 WL 1521547 (Ga. April 19, 2021) (defendant's autonomy rights not violated where counsel conceded his guilt to lesser offense in bid to avoid conviction for greater offense); ***Merck v. State***, 298 So.3d 1120, 1121 (Fla. 2020) (defendant's autonomy rights not violated where counsel advances voluntary intoxication defense rather than defendant's preferred strategy of actual innocence because it did not concede guilt), *cert. denied*, 2021 WL 1072356 (March 22, 2021); ***Truelove v. State***, 945 N.W.2d 272 (N.D. 2020) (defendant's autonomy rights not violated by counsel's strategic decision to concede lesser misconduct). See also ***Isom v. State***, ___ N.E.2d ___, 2021 WL 2678553, at *7-8 (Ind. June 30, 2021) (defendant's autonomy rights not violated where defense expert testimony allegedly conceded guilt where not deliberate strategy or made over defendant's objections). Mr. Ray's argument fell precisely within this ambit of permissible means of acquittal arguments that do not overriding a defendant's autonomy to maintain innocence.

B.
The petitioner expressed no affirmative opposition to counsel's different theory for acquittal.

Affirmative opposition to defense counsel's actions is a key component because

McCoy – and its underlying *Faretta* jurisprudence – is predicated on trial court error. See ***McCoy v. Louisiana***, 138 S.Ct. at 1507-12; ***Faretta v. California***, 422 U.S. at 835, 95 S.Ct. at 2541 (trial court violated defendant's Sixth Amendment rights by forcing him to accept appointed counsel after he had unequivocally expressed his desire to represent himself). Vociferous opposition is what factually differentiates *McCoy* from *Nixon*. See ***McCoy v. Louisiana***, 138 S.Ct. at 1505. As this Court noted:

> Once he communicated [his desire to maintain his innocence] to court and counsel, strenuously objecting to [counsel's] proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of [counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment.

McCoy v. Louisiana, 138 S.Ct. at 1512. The petitioner expressed no affirmative complaint before, during or soon after his trial that he was opposed to counsel's "accidental" or "unintentional" death strategy; thus, placing him within the *Nixon* framework and supporting the Court of Criminal Appeals' determination that he has not established a *McCoy* violation.[10]

C.

The petitioner has not consistently maintained his innocence.

Consistent maintenance of innocence is another key component to a *McCoy* claim. See ***McCoy v. Louisiana***, 138 S.Ct. at 1505-06 (McCoy insisted from the

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[10] The petitioner's letters requesting his counsels be dismissed due to a communication breakdown and a lack of updates does not support a finding that he expressly disapproved of counsel's closing argument strategy since they were filed before trial and do not express concern with counsel's trial strategy.

beginning that he did not commit the murders of his in-laws and stepson because he was out of state when the murders occurred and was being framed by corrupt police officers who killed the victims in a drug deal gone bad). The petitioner gave two detailed police confessions – one verbal and one videotaped – admitting that he killed both Lisa and Jayden Underwood in a planned murder and disposed of their bodies. See Trial Reporter's Record XXIV:102-08, 116-17, XXVIII:State's Exhibit PT-2.[11]

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[11] The petitioner verbally told the detective:

- Ms. Underwood wanted to name him as the father of her baby, which would ruin his marriage and his family.
- He arranged for Ron Dodd to drop him off at Ms. Underwood's house where he would start a fight.
- Once Ms. Underwood was dead, he would transport her body in her car with Dodd following to provide him a ride home afterwards.
- He went to Ms. Underwood's house and started a fight.
- During this fight, he wrestled her to the ground and held her face into the carpet until she stopped breathing.
- Seven-year-old Jayden came into the room while he was fighting with Ms. Underwood.
- He placed his hand over Jayden's mouth and nose until he stopped breathing.
- He tried to clean the house with solvent and covered the blood stain with furniture.
- He placed the bodies in Ms. Underwood's car and drove them to the burial place.
- He abandoned Ms. Underwood's car in a creek where it was later found.

He repeated on videotape that:

- Dodd took him to Ms. Underwood's house sometime after 10:00 p.m.
- Ms. Underwood told him that she wanted him to provide insurance and child support.
- Ms. Underwood wanted him to tell his wife about the baby.
- They got into an argument and Ms. Underwood kicked him.
- He punched Ms. Underwood in the nose.
- They started wrestling and he held Ms. Underwood down until she stopped moving
- Jayden came out of his room and started screaming.
- He put his hand over Jayden's mouth until he stopped breathing.
- He bundled their bodies in a blanket and put them in the back of Ms. Underwood's car.

More damning, the petitioner admitted on videotape to his wife that he killed Lisa Underwood by holding her down too long and disposed of her body. See Trial Reporter's Record XXIV:119, XXVIII:State's Exhibit PT-2. By contrast, nothing indicates that McCoy ever fully confessed to killing his three victims[12] or wavered from that position with his defense counsel.

A defendant who admits his criminal involvement to the police has not consistently maintained his innocence. See ***People v. Chen***, 2019 WL 5387465, at *4 (Cal. App. 2nd Dist. October 22, 2019) (not to be published) (defense counsel's decision to admit guilt to marijuana cultivation charge did not violate *McCoy* where defendant had already discussed with police the details of his marijuana cultivation operation including the specific amount of marijuana he was producing and the monthly income it generated); ***Broadnax v. State***, 2019 WL 1450399, at *6 (Tenn. Crim. App. March 29, 2019), *perm. app. denied* (Tenn. July 19, 2019) (defendant's protected right to autonomy not violated by counsel's partial admission of guilt where defendant had admitted his involvement during police interview).

Furthermore, the petitioner did not even consistently maintain his innocence to his trial counsels. Evidence from his prior state court writ proceedings show that

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- There was blood on the carpet from Ms. Underwood bleeding.
- He tried to clean up the blood with some cleaning supplies.
- He used a shovel Dodd brought him to bury their bodies.
- He drove Ms. Underwood's car into creek and abandoned it.

[12] According to the *McCoy* dissent, two friends testified that McCoy confessed to killing at least one person. See ***McCoy v. Louisiana***, 138 S.Ct. at 1513. The dissent does not indicate that these admissions were audiotaped or videotaped and presented to the jury.

the petitioner initially explained that the murders were accidental before providing his counsels with an ever-changing version of how Lisa and Jayden Underwood died and his specific involvement therein before eventually settling on the position that Ron Dodd killed them and that he was not present when it happened. See ***Barbee v. Davis***, 728 Fed. App'x. at 268; ***Barbee v. Davis***, 660 Fed. App'x. at 309.

The petitioner has not established that he affirmatively informed his lawyers that his defensive objective was to maintain his innocence at trial. Moreover, his case does not meet the requirements for establishing a *McCoy* violation because his counsel did not actually concede guilt, he made no express objection or opposition to this closing argument, and he did not consistently maintain his innocence throughout this case.

CONCLUSION

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

Respectfully submitted,

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