No. 21-5093

In the
Supreme Court of the United States

STEPHEN DALE BARBEE,
Petitioner,
-v-
THE STATE OF TEXAS,
Respondent.

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

REPLY BRIEF OF PETITIONER

CAPITAL CASE

(Petitioner is scheduled for execution after 6:00 PM Central Time on October 12, 2021)

A. Richard Ellis
Texas Bar No. 060560400
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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONER 1

I. Introduction 2

II. The Grounds For The Texas Court of Criminal Appeals' Decision Were Not Adequate And Independent Of Federal Constitutional Law 1

III. The Legal Basis For The *McCoy* Claim Was Not Previously Available 3

IV. The State's Arguments That a *McCoy* Violation Was Not Factually Established Are Contrary To Both Law And Fact 7

A. Defense counsel overrode the petitioner's defense objective 8

B. Barbee clearly expressed his objective of the defense and had no opportunity to oppose the concession of guilt 11

C. Barbee consistently maintained his innocence 12

V. Conclusion 14

CERTIFICATE OF SERVICE . . . . separate sheet

TABLE OF AUTHORITIES

FEDERAL CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 2, 3

Barber v. Dunn, 2019 WL 1979433 (N.D. Ala. May 3, 2019) 6

Barber v. Dunn, 2021 WL 2623159 (11th Cir. 2021)) 6

Christian v. Thomas, 982 F.3d 1215 (9th Cir. 2020) 5, 9

Coleman v. Thompson, 501 U.S. 722 (1991) 2, 10

Edwards v. Vannoy, 141 S. Ct. 1547 (2021) 5

Faretta v. California, 422 U.S. 806 (1975) 4, 7

Florida v. Nixon, 543 U.S. 175 (2004) . . . . . *passim*

Jones v. Barnes, 463 U.S. 745 (1983) 4

McCoy v. Louisiana, 138 S. Ct. 1500 (2018) . . . . . *passim*

Morris v. Pennsylvania, 2018 WL 5453585 (E.D. Pa. Oct.29, 2018) 5, 6

Rivera v. Quarterman, 505 F.3d 349 (5th Cir. 2007) 3

Rocha v. Thaler, 619 F.3d 387 (5th Cir. 2010) 2

Rocha v. Thaler, 626 F.3d 815 (5th Cir. 2010) 2

Ruiz v. Quarterman, 504 F.3d 523 (5th Cir. 2007) 2

Smith v. Stein, 982 F.3d 229 (4th Cir. 2020) 5

Strickland v. Washington, 466 U.S. 668 (1984) 4, 5, 6

Teague v. Lane, 489 U.S. 288 (1989) 5

Thompson v. United States, 791 F. App'x 20 (11th Cir. 2019). 10

United States v. Audette, 923 F.3d 1227 (9th Cir. 2019) 10

United States v. Cronic, 466 U.S. 648 (1984). 4

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 4

United States v. Holloway, 939 F.3d 1088 (10th Cir. 2019). 10

United States v. Read, 918 F.3d 712 (9th Cir. 2019) 11

United States v. Rosemond, 958 F.3d 111 (2nd Cir. 2020). 9, 10

STATE CASES

Broadnax v. State, 2019 WL 1450399 (Tenn. Crim. App. March 29, 2019) 14

Ex Parte Barbee, 616 S.W.3d 836 (Tex. Crim. App. 2021) 1, 3, 4

Cooke v. State, 977 A.2d 803 (Del. 2009). 11

People v. Chen, 2019 WL 5387465 (Cal. App. 2nd Dist. Oct. 22, 2019). 13, 14

People v. Eddy, 2019 WL 1349489 (Cal. Ct. App. Mar. 26, 2019) 11

State v. Carter, 270 Kan. 426, 14 P.3d 1138 (2000). 11

State v. Horn, 251 So. 3d 1069 (La. 2018) 10, 11

FEDERAL STATUTES

Fed. R. Civ. P. 59(e) 6

Fed. R. Civ. P. 60(b)(6). 6

I. Introduction.

In framing the questions presented almost identically to those in Mr. Barbee's Petition for Certiorari (hereafter, "Petition"), the State's Brief in Opposition (hereafter, "BIO") does not challenge or counter Petitioner's articulation of the issues this case presents to the Court. (Petition at ii; BIO at 2). Nor does it meaningfully contest Petitioner's showing that those issues require this Court's attention. The lower court's opinion reveals a deep misunderstanding of or resistance to crucial developments involving a defendant's Sixth Amendment autonomy rights—a flaw necessarily reproduced in the State's BIO. This Court's opinion in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) demands more of those responsible for seeking justice and ensuring the protection of the rights of individuals accused of a criminal offense, no matter how serious the offense.

II. The Grounds For The Texas Court Of Criminal Appeals' Decision Were Not Adequate And Independent Of Federal Constitutional Law.

In Section I, the BIO puts most of the State's eggs in the independent and adequate state-law ground basket. But the State failed to check the integrity of the weave. The determination that Petitioner's claim did not meet the requirement of being previously-unavailable turned on the Texas Court of Criminal Appeals (hereafter, "CCA")'s analysis of *Florida v. Nixon*, 543 U.S. 175 (2004). *See Ex Parte Barbee*, 616 S.W.3d 836, 844-845 (Tex. Crim. App. 2021) (App.006-007) (deciding the claim was previously available because "*McCoy* was a logical extension of *Nixon*"). In no way could the state court's interpretation of *Nixon* have been *independent* of the federal question; indeed, it entailed a serious, albeit

flawed, analysis of federal constitutional law and the meaning of the Sixth Amendment.

This Court must presume "that there is no independent and adequate state ground for a state court decision when the decision fairly appears to rest primarily on federal law, or to be interwoven with federal law . . . ." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (internal quotations omitted); *see also Ake v. Oklahoma,* 470 U.S. 68, 75 (1985); *Rocha v. Thaler*, 619 F.3d 387, 400 (5th Cir.), *clarified on denial of reconsideration*, 626 F.3d 815 (5th Cir. 2010). That conclusion is reinforced by the CCA's failure to state that it was ruling based on state law. *See, e.g.*, *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007) (observing "the CCA did not make clear whether it relied on state or federal law in dismissing [defendant's] application").

Indeed, the BIO seems to tacitly admit that the CCA's decision cannot be considered independently of state law. Instead, it emphasizes that there was "at least one purely state-law factor," conceding that other factors in the overall analysis were not purely state-law and were thus interwoven with federal law. (BIO at 15-16). More damning, the BIO explains that the CCA's "prior availability analysis *was not totally based on federal law*." (*Id.* at 16) (emphasis added). Of course, there is no requirement of total reliance on federal law to permit this Court's review of the issues at hand. Non-independence is sufficient, and here there is simply no way to characterize the CCA's ruling as independent of federal law. Interpreting one federal case, *McCoy*, as a "logical extension" and capable of being "reasonably fashioned" (App.007) from another federal case, *Nixon*, shows clear reliance on federal law.

Offhandedly, the State argues that the CCA's determination that the Petitioner did not allege sufficient facts to entitle him to relief was an independent and adequate state-law ground. (*See* BIO at 16, section I(B)). This argument is not a winning one. "[W]here the threshold a state sets turns on a merits determination of federal law . . . that decision is reviewable." *Rivera v. Quarterman*, 505 F.3d 349, 359-60 (5th Cir. 2007). To decide whether there were sufficient facts to establish a *prima facie* case of a *McCoy* violation is to interpret *McCoy* (federal law). The CCA's ruling thus "steps beyond a procedural determination to examine the merits of a[] [federal constitutional] claim." *Id.* at 360. Simply put, the necessity of examining the merits of the federal law issue to decide the applicability of the state procedural rule means that "the state-law prong of the court's holding is not independent of federal law." *Ake,* 470 U.S. at 85. Try as it might, the State's independent and adequate state-law ground basket does not carry its cargo.

III. The Legal Basis For The *McCoy* Claim Was Not Previously Available.

The CCA determined that the legal basis for Mr. Barbee's Sixth Amendment autonomy claim was previously available under *Nixon* when he filed his original state court writ application. *Ex parte Barbee*, 616 S.W.3d at 844-845 (App.006-007). This holding fundamentally contradicts *McCoy*. Following the CCA, the State's argument in Section II that the claim could have reasonably been formulated from this Court's prior holdings (BIO at 17-21) cannot stand, because it lacks colorable support, defies logic, and misconstrues an important question of federal law in a capital case. The CCA's incorrect determination that *McCoy* did not qualify as previously-unavailable law under Article 11.071 is worthy of

review, both because this Court has a legitimate interest in insuring the correct application of *McCoy*, and because a life is at stake.

Arguing that Mr. Barbee's *McCoy* claim could have reasonably been formulated from this Court's prior precedent, the State leans most heavily on *Nixon*. (BIO at 17-21). Both *McCoy* and *Nixon* are based on "familiar legal principles" as they derive from the Sixth Amendment to the United States Constitution. But the right recognized in *McCoy* derives from the Sixth Amendment autonomy right, whereas *Nixon* was grounded in the right to effective assistance of counsel. As one of the CCA judges noted in concurring with the majority in *Barbee*, "*McCoy* could not have been reasonably formulated by factually distinguishing *Nixon*," because "[a]n 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 (1984), should be presumed under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984)." *Ex parte Barbee*, 616 S.W.3d 836 at 846 (Walker, J., concurring) (App.008).

Further, the argument that Mr. Barbee's *McCoy* claim "comes directly from" (and thus could have been reasonably formulated from) *Faretta v. California*, 422 U.S. 806 (1975) and its progeny also fails. (BIO at 18). *Faretta* addressed the right to self-representation, and *Jones v. Barnes*, 463 U.S. 745 (1983) and *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), other cases the State relies upon as precursors to *McCoy* (BIO at 18), derive from the recognition of a client's authority or autonomy to make certain decisions related to his defense. However, *McCoy* recognized an autonomy right that *Faretta* and its progeny did

not: the right not to have counsel concede guilt over a client's express objection. The State's reliance on these cases is inapposite.

First, this Court has already decided that under the federal non-retroactivity doctrine articulated in *Teague v. Lane*, 489 U.S. 288 (1989), "no new rules of criminal procedure can satisfy the [previously-articulated] watershed exception." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559 (2021). But the question of whether or not *McCoy* announced a new rule of criminal procedure, or whether that rule met the now-defunct "watershed" exception is a wholly different question from whether *McCoy* was "previously unavailable" for the purposes of meeting Article 11.071's requirement of legal unavailability.[1] Thus, the Fourth Circuit's analysis in *Smith v. Stein*, 982 F.3d 229, 233-34 (4th Cir. 2020), *cert. denied*, 2021 WL 1520899 (April 19, 2021), and the Ninth Circuit's analysis in *Christian v. Thomas*, 982 F.3d 1215, 1223-25 (9th Cir. 2020) (BIO at 20, 21, 24) are irrelevant here. Questions of whether *McCoy* established a watershed rule justifying retroactive application or collateral review applicability simply do not apply. Instead, *Smith v. Stein* (BIO at 20,21) supports Mr. Barbee's argument that *McCoy* was not a "logical extension" of *Nixon.*[2]

Morris v. Pennsylvania, 2018 WL 5453585, at *3-4 (E.D. Pa. October 29, 2018,

---

[1] As Mr. Barbee argues in his petition for writ of certiorari, states remain free, if they choose, to retroactively apply new procedural rules as matters of state law in post-conviction proceedings, and the CCA has interpreted the Texas law governing subsequent state habeas applications to permit the retroactive application of new procedural rules. (Petition at 6.)

[2] "The *McCoy* majority did not cite any controlling precedent as dictating its holding. However, unlike *Nixon*, which had followed the logic of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984), *McCoy* rejected arguments that the ineffective-assistance-of counsel line of cases governs when a client voices his objection." *Smith v. Stein*, 982 F.3d at 234. (*See* Petition at 18).

appeal filed) (BIO at 20), a memorandum opinion by a district court disposing of a FED. R. CIV. P. 60(b)(6) motion, also does not apply here. The district court merely addressed the question of whether counsel had actually conceded guilt (a requirement for establishing a *McCoy* violation), where counsel called his client to testify in his own defense, but the client would have preferred to remain silent and proceed upon a theory of duress. Again, in so holding, the district court noted that "ineffective assistance of counsel jurisprudence played no part in [this Court's] decision [in *McCoy*] because it was a client's autonomy—not counsel's competence—that was at issue." *Morris*, at *4, citing *McCoy*, 138 S. Ct. at 1510-11.

Finally, *Barber v. Dunn*, 2019 WL 1979433, at *4-5 (N.D. Ala. May 3, 2019) (affirmed, __ Fed. App'x. ___, 2021 WL 2623159 (11th Cir. 2021) (BIO at 20) also lacks applicability. In *Barber*, the federal district court, ruling on a FED. R. CIV. P. 59(e) motion, addressed whether it was wrong to decide an ineffective assistance of counsel claim under *Strickland,* with reference to *McCoy*, which had not been decided at the time of the petitioner's trial. That is not the question here, whether *McCoy* is a logical extension of *Nixon* and was legally available when Mr. Barbee filed his first state writ application in 2008.

There is no colorable support for the CCA's holding and the State's argument that *McCoy* was available to Mr. Barbee in 2008. The State's argument fails because the CCA interpreted *McCoy* to say something it simply did not say. The State argues that *McCoy* was legally available because it was grounded in such "familiar legal principles" as 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. (BIO at 17). But this Court interpreted the Sixth Amendment right to client autonomy in a fundamentally different way in *McCoy* than it had in *Faretta.* And in *Nixon* this Court did not address client autonomy at all, interpreting instead the Sixth Amendment right to the effective assistance of counsel.

Article 11.071 of the Texas Code of Criminal Procedure sets out a mechanism for litigants, like Mr. Barbee, to raise a claim in a successive application for state post-conviction relief if the "legal basis of [the] claim is unavailable" at the time. The State has interpreted this to mean that the 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 that the initial application was filed. The CCA's determination that Mr. Barbee's *McCoy* claim did not qualify as "previously unavailable" because it could have been reasonably formulated from *Nixon* decides "an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10c. The Court should intervene.

IV. The State's Arguments That A *McCoy* Violation Was Not Factually Established Are Contrary To Both Law and Fact.

In Section III of their BIO, the State argues that the CCA "correctly determined that the petition did not factually establish a *McCoy v. Louisiana* violation." (BIO at 21-29). Essentially, this argument attempts to portray Barbee's *McCoy* claim as going beyond "the decision to maintain innocence or concede guilt." (BIO at 22 n. 6). This errs in both fact and

law.

A. Defense counsel overrode the petitioner's defense objective.

The State first argues in Section III(A) that defense "counsel did not override the petitioner's defense in offering a different theory for acquittal." (BIO at 23-25). This misconstrues both *McCoy* and the facts. Contrary to the State's arguments, *McCoy* asks not whether counsel presented the best, most reasonable, or most plausible defense, but whether counsel presented a defense in accordance with his client's objectives. *McCoy*, 138 S. Ct. at 1505. In no way can it be construed that Mr. Barbee's objective was to be found guilty of the non-capital murder of the victims. His clearly-stated objective was to be found innocent. As this Court held in *McCoy*, "[t]hese are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy* at 1508 (emphasis in original). As this Court elaborated:

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration...When a client expressly asserts that the objective 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* at 1508-1509 (emphasis in original).

The Sixth Amendment requires that, when a defendant insists on presenting a claim of actual innocence, his counsel must set aside his informed, experience-based judgment and present that innocence claim. *See McCoy* 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.”). The consideration is not whether the defendant’s desired objective is the most likely to succeed, or whether it is even plausible; indeed, counsel in *McCoy* was required to present a narrative of innocence that was “difficult to fathom.” *See id*. at 1507.

The State argues that a *McCoy* violation does not occur when the defense argues that “the State has not proved an essential element of its case or even a concession to a lesser offense.” (BIO at 24-25). However, all the cases the State cites are unavailing. Their heavy reliance on *Christian v. Thomas*, 982 F.3d 1215 (9th Cir. 2020) (BIO at 20, 21, 24) is again inapposite here, as discussed *supra* in Section III. In *Christian*, “trial counsel never conceded Christian’s guilt, he “argued that Christian was innocent and contested the state’s identification of Christian.” *Id.* at 1225. The alternative self-defense argument offered by the defense was not an admission of guilt, as it was argued “as relevant only if the jury concluded that Christian had stabbed [the victim].” *Id.* Self-defense in *Christian* was an alternative theory to the innocence argument, but there was no such alternative theory of innocence given in Mr. Barbee’s case.

Similarly, in *United States v. Rosemond*, 958 F.3d 111 (2nd Cir. 2020) (BIO at 24) the Second Circuit held that “the right to autonomy is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged.” *Id* at 122. In *Rosemond*, the defendant “was comfortable admitting to the jury that he paid for a kidnapping,” *Id*. at 124, the lesser offense. The Second Circuit held, in words that have relevance here, “[h]ad Rosemond asserted his right to autonomy to prevent

his attorney from conceding any crime because of the 'opprobrium' that accompanies such an admission, *McCoy*, 128 S. Ct. at 1508, his argument might carry more weight." *Id*. at 124.

The other cases the State cites, *United States v. Holloway,* 939 F.3d 1088 (10th Cir. 2019)*; United States v. Audette*, 923 F.3d 1227 (9th Cir. 2019); and *Thompson v. United States*, 791 F. App'x 20 (11th Cir. 2019) (BIO at 24-25) are cited in *Rosemond*, 958 F.3d at 123, for the same inapplicable proposition: tactical decisions are not covered by *McCoy.* For instance in *Audette*, "the [attorney-client] dispute was not over the objectives of Audette's defense...but instead over the ways to achieve those objectives. Such tactical decisions are within the attorney's province." *Id* at 1236. Similarly, *Holloway* and *Thompson* involve strategic disputes, which are not present here and are not covered by *McCoy,* 138 S. Ct. at 1509-1510. The additional cases cited by the State (BIO at 25) similarly involve strategic decisions to argue for a lesser offense.

Nor could Mr. Ray's concession be characterized as a "strategic dispute[] about whether to concede an element of a charged offense," *McCoy* at 1501, which is outside the purview of *McCoy*. There was no pre-trial dispute and no shared strategy as Barbee was never informed beforehand of Ray's proposed argument, as Ray himself admitted. (ROA.4661).

Even so, other courts have held that a concession to a lesser-included offense constitutes a *McCoy* violation. *See, e.g., State v. Horn*, 251 So. 3d 1069, 1074 (La. 2018) ("counsel specifically told the jury he was not asking them to find the defendant 'not guilty,'

and further stated that the facts fit second-degree murder or manslaughter");[3] *People v. Eddy*, 2019 WL 1349489, at *6 (Cal. Ct. App. Mar. 26, 2019) (finding a *McCoy* violation where "counsel conceded his [client's] guilt of voluntary manslaughter" in a first-degree murder case); *United States v. Read*, 918 F.3d 712, 720-721 (9th Cir. 2019) (counsel's concession of guilt and presentation of insanity defense instead of innocence violated *McCoy*). Two pre-*McCoy* cases cited in *McCoy* (at 1507) do the same thing. *Cooke v. State*, 977 A.2d 803, 842-846 (Del. 2009) (counsel's pursuit of a "guilty but mentally ill" verdict violated defendant's right to make the fundamental decisions in his case); *State v. Carter*, 270 Kan. 426, 440, 14 P.3d 1138, 1148 (2000) (counsel's admission of client's involvement in murder when client adamantly maintained his innocence contravened Sixth Amendment right to trial and due process).

B. Barbee clearly expressed his objective of the defense and had no opportunity to oppose the concession of guilt.

In Section 3(B) the State asserts that Barbee "expressed no affirmative opposition to counsel's different theory for acquittal." (BIO at 25-26). As Barbee was unaware that his counsel was going to make the concession of guilt, and was not informed beforehand of the proposed "accidental" death strategy, he could not have "expressed affirmative opposition" or objected before the trial, as the State claims he should have. (BIO at 26).

Requiring Mr. Barbee to interrupt the argument or the proceedings during the trial or voice his objections to the trial court goes well beyond what *McCoy* requires. And requiring

---

[3] The Supreme Court of Louisiana in *Horn* also held that "*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *Id.* at 1075.

him to object "soon after the trial" (BIO at 26), when it was futile, would be absurd. Mr. Barbee told his lawyers, repeatedly and unambiguously, that he was innocent and that he did not want to enter a guilty plea. This clearly shows that the objective of his defense was to maintain his innocence. *McCoy* sets no requirement that a defendant voice an objection in open court before or after his or her conviction. The record here shows what *McCoy* requires, (1) that Barbee's plain objective was to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregarded that objective and overrode Barbee by conceding guilt. *McCoy* at1507–11.

The State and the CCA's requirement of a specific statement to his trial attorney that the *objective of his defense* is to maintain his innocence, after he has told his attorneys he is innocent and has pled not guilty, is both unrealistic and redundant. A defendant expects his attorneys to speak for him in court as that is their principal function. And in all likelihood, the defendant knows, or has been told, not to interrupt the proceedings. Moreover, Barbee had already repeatedly told his attorneys he was innocent as they admit. (ROA.3912-3917). That was his trial objective and he should not be required to repeat it in order to preserve his autonomy rights under *McCoy*. In practical terms, a defendant telling an attorney that he innocent and telling them that the objective of his defense is to show his innocence are exactly the same thing.

C. Barbee consistently maintained his innocence.

The third part of the State's argument in Section 3(C) is that "petitioner has not consistently maintained his innocence." (BIO at 26-29). The State asserts that Barbee's

initial confession and his "ever-changing version of how Lisa and Jayden Underwood died and his specific involvement therein" show that he has not consistently maintained his innocence. (BIO at 28-29). This too errs in both law and fact.

Barbee repudiated his confession the day after he gave it, before his attorneys were appointed. The confession was a result of threats and police coercion. The trial attorneys themselves, Bill Ray and Tim Moore have admitted that their client, from the first stages of their representation, has *always* insisted on his innocence. They state this repeatedly in their affidavit submitted for the state habeas proceedings: "Applicant consistently stated that Ron Dodd was the real killer (ROA.3912); "Applicant was steadfast in his assertion that he was innocent" [*Id.*]; "Applicant maintained that he was completely innocent" (ROA.3913); "...a frame up [Petitioner's insistence that Ron Dodd was the actual killer] ...became a controversy that existed from the very beginning of our representation throughout our representation of Applicant" (ROA.3914-15). *See also* Memo of Understanding Between Ray, Moore and Barbee: "Client has maintained his innocence to attorneys since the date of appointment." (ROA.3917). This is hardly the "ever-changing version" the State asserts. (BIO at 29).

Here too, the State's cases provide no support for the proposition that "[a] defendant who admits his criminal involvement to the police has not consistently maintained his innocence." (BIO at 28). The unpublished and non-citable *People v. Chen*, 2019 WL 5387465 (Cal. App. 2nd Dist. October 22, 2019) (BIO at 28) was a case in which "Chen did not object to his counsel's decision to concede guilt on the marijuana cultivation charge," and had never repudiated that confession, *Id.* at *4, unlike Mr. Barbee. In *Broadnax v. State*, 2019

WL 1450399 (Tenn. Crim. App. March 29, 2019) (BIO at 28), another unpublished opinion, the "decision to partially admit involvement was an agreed-upon trial strategy likely made due to the identification of the Petitioner and his own statement to the police." *Id.* at *6. Counsel had met with Broadnax several times "and developed a defense strategy to attempt to minimize [the] [P]etitioner's role." *Id.* at *6. Here, there was no agreed-upon strategy and Mr. Barbee was not consulted in any way.

V. Conclusion.

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

August 18, 2021.

Respectfully submitted,

s/s A. Richard Ellis

A. RICHARD ELLIS
Texas Bar No. 06560400
75 Magee Drive
Mill Valley, CA94941
(415) 389-6771
FAX: (415) 389-0251
a.r.ellis@att.net
Attorney for Petitioner Stephen Dale Barbee