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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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<u>CAPITAL CASE</u>

QUESTIONS PRESENTED

In *McCoy v. Louisiana*, __U.S.___, 138 S. Ct. 1500 (2018) this Court held that the Sixth Amendment protects a defendant's "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id*. at 1508. Throughout the pre-trial period when represented by counsel, Petitioner, who was facing a death sentence, refused to plead guilty. He insisted to his counsel that he was innocent and that another person committed the crimes. At trial, however, counsel conceded Petitioner's guilt without notifying him beforehand, and the jury sentenced him to death.

In light of this Court's holding in *McCoy*, Petitioner presented a subsequent application to the Texas Court of Criminal Appeals raising the claim that trial counsel violated his Sixth Amendment right to insist upon his innocence at his capital trial. Although Texas law permits review of the merits review of a claim raised in a subsequent application when the legal basis for that claim was not previously available, the Texas Court of Criminal Appeals dismissed Petitioner's application. It determined that *McCoy* had been available because it was a "logical extension" of *Florida v. Nixon*, 543 U.S. 175 (2004), and found that Petitioner failed to make a *prima facie* case of a *McCoy* violation. These circumstances present the following questions:

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

2) Whether the state court's holding that 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?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Stephen Dale Barbee, was the Applicant before the Texas Court of Criminal Appeals and the State of Texas was the Respondent. In a previous related proceeding, Mr. Barbee was an Applicant and an Appellant in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit. Mr. Barbee is a prisoner sentenced to death and in the custody of Bobby Lumpkin, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The Director and his predecessors were the Respondents before the United States District Court for the Northern District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit and in this Court.

Mr. Barbee asks that the Court issue a Writ of Certiorari to the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

PRIOR PROCEEDINGS

State v. Barbee, No. 1004856R, 213th District Court, Tarrant Co., Feb. 27, 2006 (conviction of capital murder and sentence of death)

Barbee v. State, 2008 WL 5160202, Tex. Crim. App. Dec. 10, 2008 (affirming conviction and sentence on direct appeal)

Barbee v. Texas, 558 U.S. 856, Oct. 5, 2009 (denial of petition for writ of certiorari)

Ex parte Barbee, No. WR-71070-01, 2009 WL 82360, Tex. Crim. App. Jan. 14, 2009) (denial of original state habeas application)

Ex parte Stephen Dale Barbee, No. WR-71,070-02, Tex. Crim. App. May 8, 2013 (denial of subsequent state habeas application)

Barbee v. Stephens, 2015 WL 4094055 (No. 4:09-cv-00074-Y, N.D. Tex. July 7, 2015 (district court denial of habeas petition)

Barbee v. Davis, 660 F. App'x 293, 5th Cir. Nov. 23, 2016 (granting certificate of appealability)

Barbee v. Davis, 728 F. App'x 259, 5th Cir. March 21, 2018 (denying appeal of habeas petition)

Barbee v. Davis, 2018 WL 3497292, Nov. 19, 2018 (denying petition for writ of certiorari)

Ex Parte Barbee, 2019 WL 4621237 (Tex. Crim. App. Sept. 23, 2019) (*per curiam*) (opinion staying execution and ordering further briefing on *McCoy v. Louisiana*)

Ex Parte Barbee, 616 S.W.3d 836, Tex. Crim. App. Feb. 10, 2021 (denying state habeas application) (decision below)

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Appendix E: CCA opinion denying that claim. *Ex parte Barbee,* No. WR-71070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009)...App.057-058

Appendix F: The trial court order of July 6, 2021 setting an execution date of October 12, 2021 for Mr. Barbee, and the death warrant..App.059-067

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PETITION FOR WRIT OF CERTIORARI

Stephen Dale Barbee respectfully petitions for a writ of certiorari to review the judgment and decision of the Texas Court of Criminal Appeals dismissing the application and affirming his conviction and death sentence.

OPINIONS BELOW

On February 10, 2021, the Texas Court of Criminal Appeals (hereafter, "CCA") issued an opinion denying relief on Mr. Barbee's issue under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the question of whether he was deprived of his constitutional Sixth Amendment rights because trial counsel conceded Barbee's guilt to the jury during closing argument without his permission. This opinion, reported as *Ex Parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021) is attached as App. A. The unpublished opinion of the CCA staying Mr. Barbee's execution, ordering his case filed and set for an opinion,

and ordering further briefing on certain questions related to this issue, is attached as App. B. *Ex Parte Barbee*, 2019 WL 4621237 (Tex. Crim. App. Sept. 23, 2019) (*per curiam*). On March 21, 2018, the United States Court of Appeals for the Fifth Circuit issued an opinion denying relief on a pre-*McCoy* claim that trial counsel were ineffective in conceding Barbee's guilt to the jury without his permission. This opinion, reported as *Barbee v. Davis*, 728 F. App'x 259 (5th Cir. 2018), is attached as App. C. The Fifth Circuit opinion granting a certificate of appealability ("COA") on that related claim, *Barbee v. Davis*, 660 F. App'x 293 (5th Cir. 2016), is attached as App. D. That ineffective-assistance claim was first raised in state habeas and the CCA opinion denying that claim in 2009 is attached as App. E. *Ex parte Barbee,* No. WR-71070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009). The trial court order of July 6, 2021 setting an execution date of October 12, 2021 for Mr. Barbee, and the death warrant are attached as App. F.

STATEMENT OF JURISDICTION

The CCA had jurisdiction over this habeas case under Texas Code of Criminal Procedure Article 11.071 Sec. 5. The federal district court had jurisdiction over the previous habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 2253, the Fifth Circuit Court of Appeals had jurisdiction over uncertified issues presented in that case in the Application for a Certificate of Appealability. This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1) over all issues previously presented to the state and federal courts under 28 U.S.C. §§ 1291 & 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Introduction.

The CCA dismissed Mr. Barbee's subsequent application for a writ of habeas corpus, premised on a violation of this Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), on two grounds: (1) that the legal claim was not previously unavailable "because *McCoy* was the logical extension of *Florida v. Nixon*, 543 U.S. 175 (2004);" and (2) the application did "not allege facts that would entitle him to relief." *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (App.003). While a state court's

gatekeeping of its own habeas apparatus does not typically or necessarily implicate legal questions that would concern this Court, this case is different. Both grounds for the CCA's dismissal involve its interpretation of federal constitutional law. And both grounds for dismissal reveal a profound misunderstanding and misapplication of this Court's Sixth Amendment decision in *McCoy*. Unfortunately, the CCA's cramped reading of *McCoy* reflects and continues a broader trend of intransigence by that court, signaling a need for another intervention.

In recent years, this Court has twice engaged with Texas's administration of the constitutional mandate which prohibits the execution of individuals with intellectual disabilities, first pronounced in *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Moore v. Texas*, 137 S. Ct. 1039 (2017) [hereinafter *Moore I*], this Court vacated the denial of the petitioner's *Atkins* claim and remanded for further proceedings. *See id.* at 1053. It held that "several factors" the CCA used as "indicators of intellectual disability" were "an invention of the CCA untied to any acknowledged source." *Id.* at 1044 The Court prohibited the CCA from using those factors "to restrict qualification of an individual as intellectually disabled." *Id.* Two years later, this Court again reviewed the same case. *See Moore v. Texas*, 139 S. Ct. 666 (2019) [hereinafter *Moore II*]. Again, it reversed. "[T]he [CCA]'s determination is inconsistent with our opinion in *Moore*. We have found in its opinion too many instances in which, with small variations, it repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion." *Id.* at 670.

The CCA's misgivings about applying this Court's holding in *Moore I* do not appear to be isolated. This Court recently remanded an ineffective assistance of counsel claim because the CCA's ruling left unclear "whether [it] adequately conducted that weighty and record-intensive [prejudice] analysis in the first instance . . . ." *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020). In a recent ruling, the CCA again denied relief. *See Ex parte Andrus*, No. WR-84,438-01, 2021 WL 2009580, at *11 (Tex. Crim. App. May 19, 2021). The dissenting opinion of four judges laid bare the CCA's views about the tension it is experiencing in complying with this Court's precedent. "The United States Supreme Court unquestionably made mistakes regarding this Court's original order denying post-conviction relief in this case." *Id.* at *11 (Newell, J., dissenting, joined by Hervey, Richardson and Walker, JJ). The dissenters would have reluctantly granted relief because "the United States Supreme Court does not care" if it makes such mistakes. *Id.* Regardless of whether this assertion is true, even that cynical view of precedent did not carry the day. The four CCA dissenting judges recognize that "[t]his Court is not free to 're-characterize that evidence contrary to the United States Supreme Court's holding." *Id.* As a result, the majority of the CCA did not "properly apply controlling Supreme Court precedent . . . ." *Id.* at *12.

With the utmost confidence, the same can be said in this case. There is no colorable support for the CCA's determination that *McCoy* was a "logical extension" of *Nixon*. (App.003). Additionally, to find that Petitioner failed to state a claim for relief under *McCoy* is to ground the Sixth Amendment right to dust. Review should be granted

because the CCA has decided "an important question of federal law...in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10©.

Similar decisions by courts in state post-conviction proceedings have garnered this Court's attention, particularly where a state court applies a federal constitutional rule or standard "in name only." *E.g., Maryland v. Kulbicki*, 577 U.S. 1, 2 (2015) (summarily reversing state court's grant of relief on Sixth Amendment ineffective assistance of counsel claim).[1] Petitioner's case marks another "ultimately unsuccessful" attempt by the CCA to implement new Supreme Court precedent. *Ex parte King*, No. WR-49,391-03, 2019 WL 1769023, at *2 (Tex. Crim. App. Apr. 22, 2019) (Keasler, J., dissenting).

The questions raised in this case have heightened significance in light of this Court's recent decision in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). That opinion held that under the federal non-retroactivity doctrine, "no new rules of criminal procedure can satisfy the [previously-articulated] watershed exception." *Id.* at 1559. In other words, no new procedural rules—however fundamental—will be applied to final cases on federal review. The Court noted, however, that "States remain free, if they choose, to retroactively apply [new procedural rules] as a matter of state law in state post-conviction proceedings." *Id.* at n.6. The CCA has interpreted the Texas law governing subsequent state habeas applications to permit the retroactive application of new procedural rules.

[1] *See also* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 188 (2021) ("Although states can provide protections greater than the federal constitutional floor, when they apply federal law as federal law, the Court has an interest in ensuring its correct application and development. As the collateral dialogue moves to states in post-conviction proceedings, we can expect that those states employing the floor will invite direct review.").

See, e.g., *Ex parte Riles*, No. WR-11,312-01, 2021 WL 1397906, at *2 (Tex. Crim. App. Apr. 14, 2021) (granting capital sentencing relief on a subsequent application and finding that a claim based on this Court's *Penry v. Lynaugh*, 492 U.S. 302 (1989) decision met the state statute's previously-unavailable-law requirement). Although the CCA's briefing order in Petitioner's case squarely contemplated the question of whether state law permitted *McCoy*'s retroactive application, the dismissal sidestepped the issue. This Court's decision in *Edwards* underscores the need for the CCA and other state courts to make considered determinations of whether and when claims raised on the basis of new procedural rules are cognizable in state post-conviction proceedings. Litigants deserve a "candid answer," not a cloaked one, especially where federal review has just been foreclosed. *Edwards*, 141 S. Ct. at 1559.

B. Factual Background.

Stephen Barbee, a 38-year old successful business owner with absolutely no prior criminal record, was arrested and charged with the murder of Lisa Underwood, his ex-girlfriend, and her son Jayden, on February 19, 2005. The alleged motive was Mr. Barbee's fear that the pregnant victim would tell his wife that he was the father of Underwood's unborn child and his liability for child support. Because the police threatened Mr. Barbee with the death penalty, and fearing his co-defendant's threats, Mr. Barbee initially said that he caused the deaths, but that they were accidental and un-premeditated.[2] However, he immediately recanted this coerced "confession" and has

[2] Barbee has admitted helping his co-defendant and employee Ron Dodd conceal the bodies. At the time of the murders, Dodd was living with Barbee's ex-wife Theresa in Barbee's spacious

maintained his innocence ever since.[3] Yet Mr. Barbee's trial attorneys failed to take any reasonable steps to establish his innocence or investigate the possibility that his co-worker and co-defendant Ron Dodd actually committed the murders, as Barbee has long maintained.[4]

The trial itself was a perfunctory two-and-a-half-day affair, virtually unprecedentedly short for a capital case. The defense presentation at the guilt phase totaled about three transcript pages. (24 RR 176-179). In final argument, Mr. Barbee's attorneys, against his express wishes, told the jury he was guilty, the issue under consideration here. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Barbee had repeatedly told his counsel he wanted to maintain his innocence, and this concession came as a complete surprise when defense counsel presented it to the jury in guilt phase final argument.

This concession afforded Mr. Barbee no benefit in the penalty phase. Virtually none of his compelling mitigating evidence was presented. Despite his complete lack of prior criminal conduct, Mr. Barbee's attorneys failed to investigate and present a wealth

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former home and all three worked at two businesses owned by Barbee, involving tree-trimming and concrete-cutting. (*See* Barbee's declaration at 3 CR 604-618; ROA.3829-3843).

As used herein, "CR" refers to the Clerk's Record of Mr. Barbee's previous subsequent state writ application, with the volume number preceding the page number. Where the document also appears in the federal court record, or only appears there, a citation to "ROA" followed by a number refers to the pagination of the Record on Appeal in the Fifth Circuit Court of Appeals.

[3] No DNA or forensic evidence from the crime scene (24 RR 31-32), the victim's car (24 RR 46-50) or the victim's clothing (24 RR 53) connected Mr. Barbee to the murders. ("RR" refers to the Reporter's Record, the trial transcript, with the volume number preceding the page number).

[4] *See* Barbee's declaration (3 CR 604-618; ROA.3829-3843).

of favorable and readily-available evidence on the crucial special issue of "future dangerousness." The attorneys claimed that this evidence would have been incompatible with Barbee's assertions of innocence, although they had refused to investigate or present his case for innocence and conceded his guilt to the jury.[5]

C. It Is Undisputed That Barbee Did Not Give His Permission For The Concession Of His Guilt.

Prior to trial, both defense attorneys attempted to pressure Barbee into accepting a guilty plea, thus avoiding a trial,[6] and one of their first acts was to try to convince Barbee's family that he was guilty. (ROA.769-72, 777-79, 798). No effort was made to develop Barbee's claim of innocence prior to trial. After presenting no defense at the guilt/innocence phase of the trial, Barbee's lead counsel Bill Ray told the jury in argument that "as hard as it is to say, the evidence from the courtroom shows that Stephen Barbee killed Jayden Underwood. There is no evidence to the contrary." (25 RR 14). Ray continued a disjointed presentation by arguing that the killing of Lisa Underwood was accidental. (25 RR 14-18). In closing, he told the jury that the evidence "does not support an intentional or knowing murder for Lisa Underwood. Was he there? Yes. Did

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[5] As used herein and in the relevant case law, the words "concede" and "confess" and the terms "conceding his guilt" and "confessing his guilt," and the arguments herein refer only to Barbee's attorneys' unauthorized statements to the jury that he was guilty. They do not refer to or imply any concession or admission of guilt by the defendant himself, either at trial or thereafter. Mr. Barbee continues to assert his innocence.

[6] A conflict-of-interest claim alleged that, in return for the trial judge assigning many cases to Barbee's lead counsel Mr. Ray, the *quid pro quo* was that counsel was expected to move the cases rapidly through that court, resulting in a high case-disposition rate for the judge. Ray received over $700,000 in court-appointed fees from this judge in a six-year span. [ROA.903].

he hold her down? Yes." (25 RR 18). Barbee was not notified that Ray was going to make this statement and consequently he had no prior opportunity to object. Both Barbee (ROA.3843) and his family (ROA.3823) were shocked when they heard it.

At a state evidentiary hearing on the conflict of interest claim, Ray admitted he conceded his client's guilt without Barbee's permission: "So did I explicitly ask him if I could do that [concede his guilt]? The answer is no. Did he explicitly tell me he didn't want me to do it? The answer is no." (ROA.4661). Barbee, of course, did not know that Ray was going to concede his guilt so he could not have told Ray not to do it.

Mr. Ray and co-counsel Tim Moore have repeatedly admitted that Barbee, from the first stages of their representation, insisted on his innocence.[7] In fact, the attorneys used Barbee's assertion of innocence, which they later termed his "refusal to accept responsibility" (ROA.3914-15), as justification for their failure to present mitigating evidence of his low probability of future dangerousness at the punishment phase. (ROA.3908-15).[8] Barbee was thus prejudiced as a direct result of his attorneys' unauthorized concession of guilt.[9]

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7 *See* Ray and Moore's joint declaration: "Applicant consistently stated that Ron Dodd was the real killer (ROA.3912); "Applicant was steadfast in his assertion that he was innocent" [*Id.*]; "Applicant maintained that he was completely innocent" (ROA.3913); "...a frame up [Petitioner's insistence that Ron Dodd was the actual killer] ...became a controversy that existed from the very beginning of our representation throughout our representation of 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).

8 Before trial, Barbee brought his concerns about his trial attorneys' failure to investigate his claims of innocence to the attention of the trial court and asked for their dismissal. (ROA.3514-18).

9 However, as *McCoy* holds, no showing of prejudice is required, as this is structural error.

D. Procedural History.

Stephen Dale Barbee was indicted in 2005 for the murder of his former girlfriend Lisa Underwood and her son, Jayden. On February 23, 2006, Mr. Barbee was convicted by a jury of capital murder and sentenced to death in the 213th Judicial District Court of Tarrant County, Fort Worth, Texas. On December 10, 2008, the CCA affirmed Barbee's conviction and sentence of death on appeal. *Barbee v. State,* No. AP-75,359, 2008 WL 5160202 (Tex. Crim. App. Dec. 10, 2008) (not designated for publication). Barbee filed his initial state habeas application on March 13, 2008. (2 CR 399-429; ROA.3620-3650). The state habeas judge, who did not preside at Barbee's trial, did not conduct an evidentiary hearing and adopted verbatim the State's proposed findings of fact and conclusions of law (3 CR 533-564; ROA.3757-3788) and denied relief. (3 CR 567-568; ROA.3791-3792). On January 14, 2009, the CCA adopted the trial court's findings and conclusions and denied relief on all claims. *Ex parte Barbee,* No. WR-71,070-01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009) (App.058).

On October 4, 2010, Barbee filed his petition for writ of habeas corpus (ROA.115-462) in the federal district court for the Northern District of Texas, Fort Worth Division, along with accompanying exhibits. (ROA.463-1109). On May 18, 2011, that Court granted Barbee's motion for a stay and held the case in abeyance in order to allow him to exhaust his claims in state court. (ROA.1532-39).

Mr. Barbee then filed a state subsequent application (1 CR 2-279; ROA.3194-3497) in the trial court and in the CCA. The CCA found that a claim regarding a conflict

of interest on the part of his trial counsel satisfied the subsequent writ requirements of TEX. CODE CRIM. PROC. 11.071 Sec. 5(a). After an evidentiary hearing in the state court on that claim, and the denial of the claim by the CCA, Barbee returned to the federal district court and filed an amended petition for writ of habeas corpus on October 2, 2013. On July 7, 2015, the district court entered a final memorandum opinion and order denying relief on all claims and denying a certificate of appealability ("COA"). *Barbee v. Stephens,* No. 4:09-cv-074-Y, 2015 WL 4094055 (N.D. Tex. July 7, 2015).

Barbee appealed to the Fifth Circuit Court of Appeals and on November 23, 2016, the Fifth Circuit granted a COA on the issue of whether trial counsel rendered ineffective assistance of counsel at the guilt-innocence phase by conceding Barbee's guilt to the jury during closing argument without his permission. *Barbee v. Davis,* 660 F. App'x. 293, 300 (5th Cir. 2016) (App.031-055). That issue, presented prior to the grant of *certiorari* in *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018), was based on the then-prevailing ineffective-assistance-of-counsel standard under *Strickland v. Washington*, 466 U.S. 668 (1984).[10] Hence, the issue presented in Mr. Barbee's initial state habeas application and previously in federal court is not the same issue presented herein.[11]

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[10] Prior to *McCoy*, the courts consistently analyzed claims regarding a defense lawyer's overriding a client's trial objective using the ineffective assistance test of *Strickland*. However, *McCoy* held that "[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." *McCoy*, 138 S. Ct. at 1510-11. This claim is now considered under the Sixth Amendment right to counsel.

[11] Indeed, Mr. Barbee's federal ineffective-assistance-of-counsel claim was denied in part because the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") "requires that we evaluate Barbee's application based on the law that was clearly established at the time of the state-court adjudication," *Barbee v. Davis*, 728 F. App'x 259, 267 n. 6 (App.026), and *McCoy* was not clearly-established at

On March 21, 2018, the Fifth Circuit issued an opinion denying relief on that claim. *Barbee v. Davis*, 728 F. App'x 259 (5th Cir. 2018) (App.021-029). Mr. Barbee filed a petition for writ of *certiorari* in the Supreme Court of the United States on May 29, 2018. *Barbee v. Davis*, No. 18-5289. The Supreme Court denied the petition on November 19, 2018. *Barbee v. Davis*, 139 S. Ct. 566 (2018). On November 28, 2018, the State submitted a "Motion for Court to Enter Order Setting Execution Date" to the trial court. On May 9, 2019, the trial court judge, Hon. Chris Wolfe, signed an "Order Setting Execution Date" of October 2, 2019 for Mr. Barbee.

Mr. Barbee filed a subsequent state habeas application in the CCA based on the *McCoy* claim presented here, and on September 23, 2019 the CCA stayed Mr. Barbee's scheduled execution. *Ex parte Barbee*, 2019 WL 4621237 (Tex. Crim. App. Sept. 23, 2019) (App.018-019). In that order, the CCA requested further briefing on *McCoy*: whether the legal basis could have been recognized or reasonably formulated previously and whether *McCoy* is "retroactive to convictions that are already final upon direct review?" (App.019). On February 10, 2021, the CCA issued an opinion denying Mr. Barbee's application on two grounds: that the legal basis for the claim was previously available and that Barbee failed to allege sufficient facts supporting his claim. *Ex Parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021) (App.002-016). The question of *McCoy*'s retroactivity went unanswered, as did anther question posed by the CCA about the meaning of "objectives of the defense." (App.019)

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that time, a requirement for relief under 28 U.S.C. § 2254(d)(1).

On July 6, 2021, the trial court judge, Hon. Chris Wolfe, signed an "Order Setting Execution Date" of October 12, 2021 for Mr. Barbee.[12]

REASONS FOR GRANTING CERTIORARI

In denying this claim regarding trial counsel's confession of Barbee's guilt to his jury, the CCA used an incorrect standard, that of ineffective assistance of counsel under *Strickland v. Washington*, and denied his claim on the basis that he had not shown prejudice. However, *McCoy v. Louisiana* explicitly held that this claim should be analyzed under the well-established principle of client autonomy, not under the *Strickland* standard. *McCoy* also re-affirmed long-standing principles that the denial of a client's Sixth Amendment rights, in the concession of guilt seen here, is structural error, not requiring a showing of prejudice, contrary to the prejudice requirement under *Strickland*.

Secondly, the CCA erred in dismissing this claim for failure to state a *prime facie* case of a *McCoy* violation. The CCA found that, while the "facts demonstrate that [Barbee] 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." (App.007). The record unequivocally shows that Mr. Barbee insisted to his counsel that he was innocent and that he did not want to plead guilty, because another person had committed the crimes. Mr. Barbee did not explicitly object to his attorney's concession of guilt during closing arguments because he had no opportunity to do so. By trial counsel's own admission, he never told Mr. Barbee beforehand that he was going to tell the jury that Mr.

[12] Copies of the "Order Setting Execution Date" and the "Death Warrant" are included herein as App. F(App.060-067).

Barbee was guilty. (ROA.4661). Mr. Barbee maintained his innocence throughout trial counsel's representation of him and he was "shocked" when his attorney made the concession. (ROA.3843). He should not be held to have had a duty to disrupt the oral argument when he had no right to do so, as his counsel was his only legitimate mouthpiece. To hold otherwise would encourage and legitimize disruptive behavior whenever a litigant felt that his or her attorney was not speaking for their interests.

Texas state law permits a court to consider the merits of a death-sentenced individual's subsequent application for habeas corpus in limited, statutorily-specified circumstances. *See* TEX. CODE OF CRIM. PROC. ART. 11.071 § 5. One circumstance arises when "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 . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." *Id.* at (a)(1). The statute sets out that a "legal basis of a claim is unavailable . . . if [it] 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.* at (d). When a litigant raises a legal claim based on previously-unavailable law and allege facts "which, if true, entitle him to relief," the CCA authorizes review of the claim and either remands it to the convicting court for further consideration or considers the merits itself. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

On its face, and in its application, Article 11.071 enables a petitioner to litigate newfound legal rights recognized after his conviction is final, so long as that claim could not have been raised in an earlier application. Under the statute, the CCA has repeatedly authorized claims and granted relief to individuals subjected to a "*Penry* violation." *Riles*, *supra*, at *2. It has also authorized claims that an individual cannot be executed under the Eighth Amendment due to intellectual disability. *See, e.g.*, *Ex parte Gutierrez*, No. WR-70,152-03, 2019 WL 4318678, at *1 (Tex. Crim. App. Sept. 11, 2019) ("This cause is remanded to the habeas court to consider all of the evidence in light of the *Moore v. Texas* opinion . . . ."); *Ex parte Williams*, No. WR-71,296-03, 2018 WL 2717039, at *1 (Tex. Crim. App. June 5, 2018) (same). However, rather than authorize Petitioner's *McCoy* claim as apparently required by the statute, the CCA instead determined: (1) that *McCoy* did not qualify as law that was previously unavailable under Article 11.071; and (2) that Petitioner did not allege facts sufficient to warrant relief under *McCoy*. (App.003, 007). Both determinations render *McCoy* unrecognizable.

A grant of *certiorari* is needed to correct these errors; to clarify that *McCoy* is not based on ineffective assistance of counsel and that structural error of this sort, raised in post-conviction proceedings, does not require a showing of prejudice.

A. *McCoy* Is Not An Extension Of *Nixon v. Florida.*

In *McCoy v. Louisiana*, this Court found that it was "unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." 138 S. Ct. at 1507. It held that the Sixth Amendment protects a defendant's

"[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* at 1508. Reversing the Louisiana Supreme Court's decision to affirm Mr. McCoy's conviction, the Court wrote, "[w]hen a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509.

McCoy marked the first time this Court held that a client represented by counsel has the right to insist on maintaining his innocence. The majority opinion acknowledged that it was articulating a new Sixth Amendment right. From the start, it made clear that the decision emerges from circumstances "in contrast to [*Florida v.*] *Nixon*," the 2004 ruling from which it departs. *Id.* at 1505. *McCoy* is also the first case in which the Court held that the defendant's Sixth Amendment rights include the personal right to "decide on the objective of his defense" at trial. *Id.*; *see also id.* at 1517-18 (Alito, J., dissenting) (observing that the Court "discovered a new right" and "decide[d] this case on the basis of a newly discovered constitutional right").

In *Nixon*, this Court decided that a capital defendant who "neither consents nor objects" to counsel's disclosed plan to concede guilt as a way to "avert a sentence of death" and then later challenges the concession of guilt must satisfy the legal requirements of a Sixth Amendment ineffective-assistance-of-counsel claim set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). 543 U.S. at 178. Put simply, on the facts presented, "if counsel's strategy . . . satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." *Id.* at 192.

The ineffective assistance framework the Court deployed in *Nixon* was not utilized in *McCoy*. Instead, *McCoy* changed the law by holding that "[b]ecause a client's autonomy, not counsel's competence, is in issue, *we do not apply our ineffective-assistance of counsel jurisprudence*." *McCoy*, 138 S. Ct. at 1510-11 (emphasis added). *See also Smith v. Stein*, 982 F.3d 229, 234 (4th Cir. 2020), *cert denied*, No. 20-7192, 2021 WL 1520899 (U.S. Apr. 19, 2021) ("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.")

The *McCoy* opinion explained the sharp divergence between the two cases: "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective." *Id*. at 1509. The cases implicate distinct Sixth Amendment rights: *McCoy* implicates client autonomy; *Nixon* implicates ineffective assistance of counsel.[13] Thus, it is clear that, for purposes of Texas's statute governing subsequent state habeas applications, *Nixon* did not provide a basis for asserting the claim that the Sixth Amendment protects the client's autonomy to maintain innocence.

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[13] *See also* Kenneth Williams, *The Ultimate Dilemma: Conceding A Client's Guilt to Avoid A Death Sentence*, 52 CONN. L. REV. ONLINE 1, 11 (2019) noting that *McCoy* and *Nixon* address "separate constitutional grounds").

Even worse, in striving to make that finding, the CCA violated the explicit dictates of that statute: "*McCoy* was a logical extension of *Nixon*...*Carter* and *Cooke* demonstrated as much." (App.006). However, *State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (2000) and *Cooke v. State*, 977 A.2d 803 (Del. 2009) are both cases from out-of-state appellate courts. Tex. Code Crim. Pro. Art. 11.071 sec. 5(d) holds that the legal basis of a claim is unavailable only "if the legal basis was not recognized by or could not be 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..." Out-of-state courts of appeal such as *Carter* and *Cooke*, relied upon by the CCA, are outside the purview of the statute as cases from which the legal basis could be recognized or formulated.

The earlier proceedings in Mr. Barbee's case show the misguided nature of the CCA's holding. In his amended federal habeas petition, Mr. Barbee argued that trial counsel's admission of his guilt over his express desire to maintain his innocence constituted a Sixth Amendment violation under *United States v. Cronic*, 466 U.S. 648 (1984). The federal district court held that the state court did not unreasonably decide the claim under *Strickland*. It determined that "Barbee simply bears the burden to prove that this decision [to concede guilt] was objectively unreasonable under *Strickland*." *Barbee v. Stephens*, 2015 WL 4094055, at *33 (N.D. Tex. July 7, 2015). The Fifth Circuit also dealt with this claim in terms of its *Strickland* ineffectiveness jurisprudence. *See Barbee v. Davis*, 728 F. App'x 259, 267 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 566 (2018) (citing *Strickland*).

Despite the glaring differences between *McCoy* and *Nixon*, the CCA declined to authorize Petitioner's subsequent application on the ground that "*McCoy* was the logical extension of *Florida v. Nixon*." (App.003). Although the two cases involve separate Sixth Amendment rights, the CCA concluded that it is only "factual distinctions—not legal ones—between the two cases" that distinguish them. (*Id.*; *see also id.* at App.007). On this faulty reading, the CCA determined that Petitioner's "claim could have been reasonably formulated from existing precedent." (App.003). The CCA's logic—that an applicant must raise all claims where any precedent failed to identify the legal basis for the claim—renders the previously-unavailable-law gateway meaningless.

One of the judges below recognized the problem with the CCA's analysis of *McCoy* and *Nixon*. In a concurring opinion, Judge Walker explained:

> *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.
> (App.008) (Walker, J., concurring).

This Court itself recognized in *McCoy* that its holding was not a logical extension of precedent. For a state court of last resort to close the courtroom door on a capital defendant's *McCoy* claim in the fashion the CCA did here is troubling. The CCA's determination below is not about state law; it is about the basic import of the Sixth Amendment autonomy right. The CCA's disfiguring reading undermines this Court's jurisprudence in a case that could result in an execution.

B. The CCA's Finding That Mr. Barbee's Application Did "Not Allege Facts That Would Entitle Him To Relief" Profoundly Misunderstands And Grossly Misapplies *McCoy*.

Mr. Barbee's application alleged facts that substantiate the two key elements of a *McCoy* claim: first, that he made clear to his attorneys that he wanted to maintain his innocence at trial, and second, that his counsel conceded his guilt to the jury anyway. The CCA nonetheless determined that Mr. Barbee had failed to meet the low standard of establishing a *prima facie* case under *McCoy*, because, while "these facts demonstrate that [Mr. Barbee] told his attorneys that he was innocent, they do not demonstrate that he told them his defense objective was to maintain his innocence at trial." (App.007). The record solidly refutes this holding. Even more, this holding defies logic, borders on absurdity, and so misreads *McCoy* so as to render it meaningless. This misinterpretation of *McCoy* as a logical extension of *Florida v. Nixon* unacceptably weakens the Sixth Amendment constitutional protection that *McCoy* recognized.

Although it dismissed Mr. Barbee's application, in part for failure to state a *prima facie* case for relief under *McCoy*, the CCA did admit that Barbee's application included evidence that:

● Mr. Barbee "told various people, including his attorneys, that he was innocent, that he would not plead guilty, and Dodd killed Lisa and Jayden Underwood;"

● Barbee told a "forensic psychiatrist that he would rather be executed than have his mother see him "plead guilty;""

● Barbee "complained to the trial court about a 'breakdown in communication' with his attorneys."

(App.007)

The CCA also accepted that Barbee presented evidence, in the form of testimony at a state post-conviction proceeding, that "his attorney did not 'explicitly' tell him that his closing argument would concede [Barbee's] identity as Lisa and Jayden's killer." *Id*. Barbee also presented evidence that he "was 'shocked' when he heard the argument." *Id*. These facts, taken together, establish a quintessential *prima facie* claim for relief under a fair reading of this Court's decision in *McCoy* and warranted, at the very least, authorization for further proceedings in the convicting court.

This Court in *McCoy* required only two things of a defendant seeking to claim a Sixth Amendment violation of his right to maintain a defense of innocence: first, the defendant must clearly express such a desire to his counsel. *McCoy*, 138 S. Ct. at 1509 ("When a client expressly asserts that the objective of his defense is to maintain his

innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it...") The second element a defendant must establish in order to prove a *McCoy* violation is that his attorney acted contrary to his expressed objective.

This Court in *McCoy* held that a client's assertion to counsel alone is enough to give rise to the Sixth Amendment issue: "Presented with express statements of the client's will to maintain innocence, [] counsel may not steer the ship the other way." *Id.* Put differently, preservation of the Sixth Amendment right to maintain a defense of innocence does not turn on whether a defendant objects in court before his or her conviction. Nor does it turn on whether she testifies in her own defense.

The CCA read Mr. Barbee's application to allege that he told his attorneys that he was innocent and did not want to plead guilty. (App.007). They also read it to assert that his attorney was not forthcoming with Mr. Barbee about his intention to concede guilt at closing argument. (*Id.*) If these facts are insufficient to make out a *prima facie* case of a *McCoy* violation, then it is hard to see what is. Here, a defendant told his lawyers, repeatedly and unambiguously, that he was innocent and that he did not want to enter a guilty plea. If this does not clearly show that the objective of his defense is to maintain his innocence, the burden on a defendant is set impossibly high, and the autonomy right this Court recognized in *McCoy* is rendered meaningless.

While it is true that Mr. Barbee did not object during closing argument when counsel conceded his guilt to the jury, preservation of the Sixth Amendment right this Court recognized in *McCoy* does not turn on whether a defendant objects in court before

his or her conviction. Rather, the record must show (1) that defendant's plain objective is to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt. *McCoy*, 138 S. Ct. at 1507–11. Although such evidence may come in the form of a defendant objecting during argument, *McCoy* applies here, even if Barbee did not.

The CCA's finding that Mr. Barbee had failed to make a *prima facie* case under *McCoy* defies logic. Requiring a defendant who has pled not guilty and asserted his innocence to make an unrealistically specific and redundant statement to his trial attorney that the *objective of his defense* is to maintain his innocence, not merely that he is, actually, innocent and that he does not wish to plead guilty makes no sense. In practical terms, they are exactly the same thing. *McCoy* was never intended to be limited to situations where the client did exactly as Mr. McCoy did: object on the record, in front of the trial court, and testify in front of the jury to contradict his attorney's concession of guilt. Here, Mr. Barbee was not afforded that opportunity.

Requiring an on-the-record objection conflates issue preservation with the elements of the *McCoy* claim, improperly limiting the scope of the Sixth Amendment right recognized in *McCoy*. If a trial record does not contain evidence that establishes a defendant expressed to his or her trial counsel the desire to maintain her innocence, the defendant alleging a *McCoy* violation must be allowed to adduce such evidence in post-conviction. That was done here.

Mr. Barbee presented voluminous evidence establishing that he expressed to his counsel that he was innocent of the killings of Lisa and Jayden Underwood and that he wanted to maintain his innocence at trial. *See* Applicant's Second Subsequent Application ["SSA"] at 20-24, 33-35, 40-41; *see also* 3 CR 687, ROA.3912, Appendix 5 to SSA (trial counsel's joint declaration) ("Applicant was steadfast in his assertion that he was innocent"); *id*. at 688, ROA.3912 ("Applicant maintained that he was completely innocent"); *id*. at 689-90, ROA.3914-15 ("a frame-up [Barbee'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 [Mr. Barbee]"); *see also* 3 CR 692, ROA.3917, Appendix 5 to SSA (Memo of Understanding between Ray, Moore, and Barbee) ("Client has maintained his innocence to attorney since the date of appointment."). At the state post-conviction evidentiary hearing, trial counsel admitted that Barbee had told him "all along" that he was innocent: "Mr. Barbee told me unequivocally, in no uncertain terms, that he was completely innocent of what he was charged with." 3 Habeas Hearing 31-32, ROA. 4661, Appendix 9 to SSA.

Thus, Mr. Barbee's assertion to his counsel that he was innocent was "repeated," "adamant," and "intransigent," like McCoy's, even if it did not occur on the record, during trial, and in open court. By the terms of the holding this Court set forth in *McCoy*, when faced with this assertion, "a concession of guilt [to Mr. Barbee's jury] should have been off the table." *McCoy*, 138 S. Ct. at 1512.

This evidence was voluminous and consistent, and there are no doubts about its credibility. All of it was developed and submitted prior to this Court's decision in *McCoy* and before Mr. Barbee had any reason to predict that this Court would "discover[] a new right" to determine the objective of his defense. *McCoy*, 138 S. Ct. at 1517 (Alito, J., dissenting).

What the CCA did in Mr. Barbee's case, in maintaining that he had failed to establish a *prima facie* case of a *McCoy* violation, limits *McCoy* in ways that contradict and subvert a fair reading of this Court's opinion. For these reasons, the Court should grant review in this case.

CONCLUSION

For the forgoing reasons, 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*.

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Respectfully submitted,

s/s A. Richard Ellis

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