BEFORE THE GOVERNOR OF THE STATE OF TEXAS
AND
THE TEXAS BOARD OF PARDONS AND PAROLES

In the Matter of:

STEPHEN DALE BARBEE

Applicant.

APPLICATION FOR COMMUTATION OF DEATH SENTENCE TO A LESSER PENALTY OR IN THE ALTERNATIVE A 120-DAY REPRIEVE FROM EXECUTION

(Scheduled for October 12, 2021)

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APPLICATION FOR CLEMENCY
AND MEMORANDUM IN SUPPORT THEREOF

TO THE TEXAS BOARD OF PARDONS AND PAROLES:

STEPHEN DALE BARBEE, through counsel,[1] respectfully submits this application for clemency and petitions the Texas Board of Pardons and Paroles to recommend to the Honorable Greg Abbott, Governor of the State of Texas,

(a) that he commute Mr. Barbee's sentence of death to a lesser penalty.

In the alternative, Mr. Barbee asks the Board to recommend to the Governor

(b) that he grant a reprieve of his execution, now scheduled for October 12, 2021, for a period of **120 days** so that the Board may fully investigate and consider the facts of Mr. Barbee's case and wrongful sentence of death and the merits of this Application.[2]

Unlike a pardon, commutation does not cancel the defendant's guilt, nor does it imply forgiveness. Thus, if the Board and the Governor choose to commute Mr. Barbee's sentence, he will still stand convicted of the most serious offense known to Texas law. Commutation may be granted for a variety of reasons, including a determination that the original sentence was wrongly imposed or excessive, that the applicant is actually innocent, for reasons relating to the rehabilitation of the prisoner, or "for any reason that the commuting authority deems adequate, or as an act of mercy." National Governor's Association, *A Guide to Executive Clemency Among the American States*, 5 (1988). Mr. Barbee presents substantial evidence that his death sentence was wrongly imposed because he was never allowed to present his case for innocence due to his trial attorneys' unauthorized confession of Barbee's guilt to his

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1 Pursuant to TEX. ADMIN. CODE § 143.42(2), undersigned counsel A. Richard Ellis is the applicant's agent presenting this application. *See* enclosed notarized Fee Affidavit Form and Registration Form for Representation of Offender. (Appendix 21 herein.)

2 TEX. ADMIN. CODE § 143.58 provides that "[t]he board shall investigate and consider a recommendation of commutation of sentence in any case, upon the written request of the governor (Texas Code of Criminal Procedure, Article 42.18, §18)."

jury,[3] against his express wishes, and the incompetence and failure of his trial and state habeas attorneys to present evidence that he is innocent. He also presents recently-disclosed evidence that Dr. Marc Krouse, who performed the autopsy on victim Lisa Underwood, has a long history of performing inaccurate and erroneous autopsies. Recent revelations of his repeated incompetence have caused Dr. Krouse to be fired and his autopsies have been found to be flawed and inaccurate. Dr. Krouse's testimony was crucial for the State's attack on the only theory the defense presented to Mr. Barbee's jury.

The executive clemency power in capital cases derives from the recognition by the framers of the Texas Constitution that in imposing the ultimate punishment — the taking of a human life — no legal process, however complex, lengthy, or ingenious, is sufficient in all cases to ensure that a just and reliable result is reached. As the U.S. Supreme Court explained in the case of *Ex Parte Grossman*, 267 U.S. 87, 120-121 (1925):

> Executive clemency exists to afford relief from undue harshness **or evident mistake** in the operation or enforcement of the criminal law. The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

This is such a case. For the rule of law to be respected, the relationship between blameworthiness and punishment must be preserved. Clemency assures that punishment is administered only to those whose moral culpability at the hour of death still justifies the imposition of society's most severe penalty — a necessary predicate to the legitimacy of executions. Clemency also guarantees that some responsible decision-maker — someone accountable for the final decision to extinguish the life of the condemned — will seriously weigh his fundamental humanity before doing so. Both of these historic mandates require that the Board and the Governor take a

[3] As used herein, the words "concede" and "confess" and the terms "conceding his guilt" and "confessing his guilt" refer only to Mr. 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 Mr. Barbee himself, either at trial or thereafter. Mr. Barbee continues to assert his innocence.

few moments to contemplate the life the State is about to take, the life of Stephen Dale Barbee.

TEX. ADMIN. CODE tit. 37, §143.43(k) (2018), authorizes this body to find "good and adequate cause to suspend [§ 143.43]'s provisions and adopt a different procedure which it finds to be better suited to the exigencies of the individual case before it." The circumstances of Mr. Barbee's case, for the reasons explained herein, counsel that the Board at least grant a reprieve in order to give adequate consideration to the matter before placing its imprimatur on his execution.

Attached to this document are a number of appendices. The items required by TEX. ADMIN. CODE tit. 37, §143.42(3) (1996), certified copies of the indictment, judgment, verdict of the jury, and sentence in the case (Appendix 1), and official documentation verifying the scheduled execution date (Appendix 2), are included herein as appendices. A fee affidavit form and registration are included in Appendix .

STATEMENT OF THE OFFENSE AND APPELLATE HISTORY OF THE CASE

(TEX. ADMIN. CODE tit. 37, §143.42(4) & (5) (2018))

A. Brief statement of the offense for which Mr. Barbee has been sentenced to death.

Mr. Barbee is currently unlawfully incarcerated by the Texas Department of Criminal Justice, Institutional Division, on death row at the Polunsky Unit in Livingston, Texas.

At the time of his trial, Stephen Barbee was a 38-year old successful business owner with absolutely no prior criminal record. He was arrested and charged with the murder of Lisa Underwood, his ex-girlfriend, and her son Jayden, on February 19, 2005. Mr. Barbee's alleged motive was his fear that Ms. Underwood would tell his wife that she was pregnant with Barbee's child and that Barbee would be liable for child support. Because the police threatened Mr. Barbee with the death penalty, and out of fear of his co-defendant's threats, Mr. Barbee initially said that he caused the deaths, but that they were accidental and un-premeditated. However, Mr. Barbee immediately recanted this coerced "confession" and has maintained his innocence ever

since.[4] Yet his 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 Mr. Barbee has long maintained.[5] Against his explicit wishes, his lead attorney told the jury that Mr. Barbee had committed the murders but they were accidental in that he held one victim down too long, not intending to cause death.

This totally unauthorized "confession" was the only defense his jury heard. The coroner, Dr. Marc Krouse, testified that it would take a long time to asphyxiate or strangle the victim, and the prosecution told the jury that this testimony negated defense counsel's "accidental death" argument. As a result, Dr. Krouse's testimony was crucial for the State's case against Mr. Barbee. Yet recent revelations regarding Dr. Krouse's incompetence have caused him to be fired and recent investigation has revealed that his incompetence is not limited to these recent cases but goes well back to before the time of Mr. Barbee's trial.

B. Trial proceedings.

The trial itself was a perfunctory two-and-a-half day affair. The transcript of the defense presentation at the guilt phase totaled about three pages. (24 RR 176-179). In final argument, Mr. Barbee's attorney told the jury he was guilty, against his express wishes and without his consent, which the United States Supreme Court has recently held to be a violation of due process and the Sixth Amendment right to counsel. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Despite pleading "not guilty," Mr. Barbee's attorneys arbitrarily and peremptorily denied him his

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[4] Mr. Barbee has admitted to helping his co-defendant and employee, Ron Dodd, to conceal the bodies. At the time of the murders, Dodd was living with Barbee's ex-wife, Theresa, in Barbee's former home and all three worked at Barbee's tree-trimming and concrete-cutting businesses. [*See* Mr. Barbee's declaration in Appendix 7].

Page references herein are to the "ROA" which is the Record on Appeal in the Fifth Circuit Court of Appeals, with the page number after "ROA," or, when the reference appears in the state court record, "CR" refers to the Clerk's Record of Mr. Barbee's previous subsequent state writ application, with the volume number preceding the page number, or to the Reporter's Record ("RR"), the transcript of Mr. Barbee's trial, with the volume number preceding the page number.

[5] *See* Mr. Barbee's declaration (Appendix 7).

constitutional right to have that plea honored and his evidence of innocence asserted to the jury.

Mr. Barbee's trial counsel's concession of his guilt did not afford him any benefit in the punishment phase of his trial. Virtually none of his compelling mitigating evidence was presented and despite his complete lack of prior criminal conduct, Mr. Barbee's attorneys also failed to investigate and present evidence on the crucial special issue of "future dangerousness." The attorneys later claimed that the presentation of this evidence was incompatible with Mr. Barbee's assertions of innocence, although they had refused to investigate or present his case for innocence and conceded his guilt.

Counsel presented almost none of Mr. Barbee's compelling evidence to the jury, and, despite Barbee's complete lack of a prior criminal record, they also failed to investigate and present evidence to rebut "future dangerousness." Counsel attempted to justify their failure to investigate and present mitigating evidence by citing their supposed fear that the prosecution would find out about an alleged incident of "road rage" that was never reported or charged, and in which Mr. Barbee was more the victim than the instigator. The state and district courts ultimately adopted trial counsel's flawed, nonsensical, and post-hoc justifications for their inadequate representation.

This case also involved revelations that the trial judge and Mr. Barbee's lead trial attorney Bill Ray had an agreement designed to move cases quickly through the trial court while pressuring defendants into pleading guilty. This created a conflict of interest between the attorneys and Mr. Barbee. It is also an explanation for the attorneys' abject and otherwise inexplicable ineffective assistance of counsel. Here too, the state and federal district courts denied relief on this claim, uncritically accepting verbatim the State's prepared findings of fact and conclusions of law.

C. Appellate and post-conviction history of the case.

Stephen Dale Barbee was indicted in 2005 for the murder of 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, Judge Robert K. Gill presiding. (Appendix 1).[6] On December 10, 2008, the Texas Court of Criminal Appeals ("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 Mr. 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 Texas Court of Criminal Appeals 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).

On October 4, 2010, Mr. 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 Mr. 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 Texas Court of Criminal Appeals. On September 14, 2011, that Court issued an order finding that the conflict-of-interest claim (Claim 2 in the subsequent application) satisfied the subsequent writ requirements of TEX. CODE CRIM. PROC. 11.071 Sec. 5(a) and remanded it to the trial court for consideration. *Ex parte Barbee,* No. WR-71,070-02, 2011 WL 2071985 (Tex. Crim. App. Sept. 14, 2011).

On remand, the trial court ordered a live two-day evidentiary hearing on February 22-23, 2012, in Forth Worth, Texas, limited to the conflict-of-interest claim. That claim involved newly-uncovered evidence and media revelations that Mr. Barbee's trial judge and his lead trial attorney Bill Ray, both of Fort Worth, had entered into a secret deal involving the preferential assignment of many probation revocation cases to Mr. Ray in return for his speedy disposition of those cases.[7]

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[6] Copies of the indictment, judgment and sentence in this case are attached as Appendix 1.

[7] The conflict of interest explained Mr. Ray's failure to present evidence of Mr. Barbee's innocence or much in terms of mitigation, which resulted in a very short (two-and-a-half day) capital trial. In federal district court and at the state post-

After the conclusion of the hearing, the state trial court adopted the State's proposed findings and conclusions verbatim and recommended that relief be denied on that claim. The Texas Court of Criminal Appeals then denied relief on the conflict-of-interest claim "[b]ased upon the trial court's findings and conclusions and our own review." *Ex parte Barbee,* No. WR-71,070-02, 2013 WL 1920686 (Tex. Crim. App. May 8, 2013). The remaining claims (Nos. 1 and 3-21) were dismissed "as an abuse of the writ" because they "do not satisfy the requirements of Article 11.071 Section 5." *Id.*

Mr. Barbee returned to the federal district court in Fort Worth, Texas, and filed an amended petition for writ of habeas corpus and supporting exhibits on October 2, 2013, raising the same 21 claims he had presented in his subsequent state habeas application. (ROA.1579-2486). On July 7, 2015, the federal 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). A motion to alter or amend judgment was subsequently denied by the federal district court. *Barbee v. Stephens,* 2015 WL 5123356 (N.D. Tex. Sept. 1, 2015).

Mr. Barbee filed his application for a COA in the Fifth Circuit Court of Appeals on January 5, 2016 and filed his reply to Respondent's opposition to a COA on March 19, 2016. On November 23, 2016, the Fifth Circuit granted a COA on Issue 3 in his application, the issue of whether trial counsel rendered ineffective assistance of counsel at the guilt-innocence phase by conceding Barbee's guilt to the jury during closing argument without his permission. *Barbee v. Davis,* 660 F. App'x. 293, 300 (5th Cir. 2016). That 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).[8]

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conviction hearing, Mr. Barbee argued that Mr. Ray disposed of his case in return for preferential assignment of cases by the trial judge.

[8] 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.

The Fifth Circuit heard oral argument on October 2, 2017. On March 21, 2018, that Court issued an opinion denying relief on the ineffective-assistance-of-counsel claim. *Barbee v. Davis*, 728 F. App'x 259 (5th Cir. 2018).

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*, 2018 WL 3497292.

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 Mr. Barbee's execution date for October 2, 2019.

Mr. Barbee filed a subsequent Art. 11.071 application in the trial court and the Texas Court of Criminal Appeals on a *McCoy* claim based on the client's Sixth Amendment autonomy rights, not on ineffective assistance of counsel, the basis of the prior similar claim. On September 23, 2019 the CCA issued an order staying Mr. Barbee's scheduled execution. *Ex parte Barbee*, 2019 WL 4621237 (Tex. Crim. App. Sept. 23, 2019). In that order, the CCA requested further briefing concerning whether the legal basis of the *McCoy* claim could reasonably have been recognized or formulated previously and whether *McCoy* is "retroactive to convictions that are already final upon direct review?"

On September 3, 2019, Mr. Barbee timely submitted an application to the Texas Board of Pardons and Paroles for a 120-day reprieve of execution and commutation of his death sentence to a lesser penalty. On September 23, 2019, the Board received notice that a stay of execution had been granted and the Board discontinued their consideration of Mr. Barbee's application. (Appendix 10)

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 under *Florida v. Nixon*, 543 U.S. 175 (2004), and that Barbee failed to allege sufficient facts supporting his claim. *Ex Parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021). The question of *McCoy*'s retroactivity went unanswered, as did another question posed by the CCA about the scope and meaning of "objectives of the defense."

On March 30, 2021, the State submitted a motion to set an execution date for Mr. Barbee. Briefing on that motion ensued, and on June 29, 2021 the trial court held

a video hearing via Zoom, allowing the parties to present arguments for and against the State's motion. On July 6, 2021, that Court signed an "Order Setting Execution Date" of October 12, 2021 for Mr. Barbee.[9]

On July 10, 2021, a petition for writ of certiorari for Mr. Barbee was filed in the United States Supreme Court. *Barbee v. Texas*, No. 21-5093. The State filed their Brief in Opposition on August 4, 2021 and Mr. Barbee filed his reply brief on August 18, 2021. On August 19, 2021, the Supreme Court announced that the matter will be conferenced on September 27, 2021. Hence, its outcome will not be known by the due date for this clemency application.

LEGAL ISSUES PRESENTED IN THE COURTS

(TEX. ADMIN. CODE tit. 37, §143.42(6))

The legal issues and claims which have been raised during the judicial process of the case include the following:

A. Issues raised on direct appeal.

The following issues were raised on direct appeal:

1. The evidence is legally insufficient to support Appellant's conviction for capital murder because the State failed to prove that the grand jury exercised due diligence in determining the manner and means of Jayden Underwood's death.

2. The evidence is factually insufficient to support the jury's conviction for capital murder pursuant to *Clewis v. State.*

3. The trial court abused its discretion by refusing to grant Appellant's challenge for cause on Juror No. 126, Denise Anderson, pursuant to Art. 35.16(a)(10) of the Tex. Crim. Proc. Code Ann. (Vernon 1995).

4. The trial court abused its discretion in denying Appellant's motion to suppress his alleged statement made to Detective Carroll in the

[9] As required by TEX. ADMIN. CODE tit. 37, §143.42(3), certified copies of the "Order Setting Execution Date" and the "Death Warrant" are included herein as Appendix 2.

bathroom of the Tyler Police Department in violation of Art. 38.22 of the Tex. Crim. Proc. Ann. (Vernon 2001).

5. The trial court abused its discretion in denying Appellant's motion to suppress his alleged statement made to Detective Carroll in an office at the Tyler Police Department in violation of Art. 38.22 of the Tex. Crim. Proc. Code Ann. (Vernon 2001).

6. The trial court abused its discretion in denying Appellant's motion to suppress his alleged statement made to Detective Carroll while traveling to Fort Worth in an automobile in violation of Art. 38.22 of the Tex. Crim. Code Ann. (Vernon 2001).

7. The trial court abused its discretion in denying Appellant's motion to suppress a recorded conversation with his wife, Trish Barbee, taken at the Tyler Police Department, in violation of Rule 504 (a) of the Texas Rules of Evidence.

8. The evidence is legally insufficient to support the jury's affirmative answer to the first special issue that Appellant "would commit criminal acts of violence that would constitute a continuing threat to society."

9. The Texas death penalty sentencing scheme is unconstitutional as applied to Appellant because it failed to require that the jury was charged on the mitigation issue with the "beyond a reasonable doubt" burden of proof.

B. Issues raised on state habeas.

The following issues were raised on state post-conviction review:

1. Ineffective assistance of counsel at the pretrial stage.
2. Abandonment by counsel at the trial stage
3. Ineffective assistance of counsel at the punishment phase
4. Police misconduct (withholding of the complete videotape of the interrogation).

C. Issues raised in the federal district court.

The following issues were raised in federal district court:

CLAIM ONE: MR. BARBEE IS ACTUALLY INNOCENT OF CAPITAL MURDER

CLAIM TWO: MR. BARBEE WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BECAUSE HIS ATTORNEYS HAD A CONFLICT OF INTEREST

CLAIM THREE: MR. BARBEE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PRE-TRIAL STAGE OF HIS TRIAL

Claim Three(a): Ineffective assistance of counsel for failure to properly challenge the veracity of the video recording of Mr. Barbee's interrogation and confession and to investigate whether it was coerced

Claim Three(b): Ineffective assistance of counsel for failure to complete DNA testing prior to trial

CLAIM FOUR: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PORTION OF THE TRIAL BY COMPLETELY ABANDONING THEIR CLIENT

Claim Four(a): Trial counsel completely abandoned their client by failing to effectively present petitioner's case for actual innocence through expert testimony

Claim Four(b): Abandonment of client and ineffective assistance of counsel for confessing their client's guilt without the client's permission

Claim Four(c): Ineffective assistance for failing to explain the phone records.

Claim Four(d): Ineffective assistance for failure to object to prejudicial speculation by the coroners

CLAIM FIVE: TRIAL COUNSEL RENDERED INEFFECTIVE

ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF THE TRIAL

Claim Five(a): Ineffective assistance for presenting harmful testimony from Susan Evans

Claim Five(b): Ineffective assistance of counsel for failure to present mitigating evidence

Claim Five(c): Ineffective assistance of counsel in failing to present mitigating evidence regarding the future dangerousness special issue

Claim Five(d): Ineffective assistance of counsel for failure to present mitigating evidence of Petitioner's head injury and hydrocodone use

Claim Five(e): Ineffective assistance of counsel for failure to present evidence of Petitioner's low intelligence

Claim Five(f): Ineffective assistance of counsel for failure to present medical evidence of frontal lobe impairment, brain impairment and neuropsychiatric evidence

CLAIM SIX: DUE TO PERVASIVE AND EXTREMELY PREJUDICIAL PRE-TRIAL PUBLICITY, ME. BARBEE'S TRIAL WAS CONDUCTED IN AN ATMOSPHERE THAT RENDERED IT INHERENTLY UNFAIR.

CLAIM SEVEN: DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO FILE A MOTION FOR CHANGE OF VENUE

CLAIM EIGHT: PETITIONER WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE FAILURE OF THE STATE COURTS TO HOLD AN EVIDENTIARY HEARING ON SUBSTANTIAL, CONTROVERTED ISSUES OF FACT

CLAIM NINE: TRIAL COURT ERROR IN REFUSING TO GRANT PETITIONER'S CHALLENGE FOR CAUSE TO JUROR #126, DENISE ANDERSON

CLAIM TEN: TRIAL COURT ERROR FOR ABUSE OF ITS DISCRETION IN DENYING PETITIONER'S MOTION TO SUPPRESS HIS ALLEGED STATEMENTS MADE TO DETECTIVE CARROLL

CLAIM ELEVEN: ARTICLE 37.071(e) & (g)'S PROHIBITION AGAINST INFORMING JURORS THAT A SINGLE HOLDOUT JUROR WILL CAUSE THE IMPOSITION OF A LIFE SENTENCE VIOLATED MR. BARBEE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

CLAIM TWELVE: LETHAL INJECTION–AS IT IS CURRENTLY ADMINISTERED IN TEXAS—PRODUCES UNNECESSARY PAIN, TORTURE, AND LINGERING DEATH, AND VIOLATES THE EIGHTH AMENDMENT

CLAIM THIRTEEN: THE SECOND SPECIAL ISSUE IS UNCONSTITUTIONAL BECAUSE IT OMITS A BURDEN OF PROOF AND MAKES IMPOSSIBLE ANY MEANINGFUL APPELLATE REVIEW OF THE JURY'S DETERMINATION

CLAIM FOURTEEN: THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION RELATING TO INFORMING THE JURY THAT THE FAILURE TO ANSWER A SPECIAL ISSUE WOULD RESULT IN A LIFE SENTENCE, IN VIOLATION OF PETITIONER'S RIGHTS AS PROTECTED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

CLAIM FIFTEEN: PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW, AS THE EVIDENCE SUPPORTING SPECIAL ISSUE NUMBER ONE WAS INSUFFICIENT

CLAIM SIXTEEN: PETITIONER'S JURY WAS UNCONSTITUTIONALLY SELECTED BY DEATH QUALIFYING THE JURY MEMBERS

Claim Sixteen(a): Death qualification in Texas is unconstitutional based on the Supreme Court's "evolving standards" jurisprudence

Claim Sixteen(b): Death qualification violated Petitioner's fundamental right to a fair penalty jury under the Equal Protection and Due Process Clauses of the Fourteenth Amendment

Claim Sixteen(c): Death qualification in Texas violates the Eighth Amendment

Claim Sixteen(d): Death qualification is unconstitutional because it results in a jury prone to vote for death

CLAIM SEVENTEEN: PETITIONER'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT

CLAIM EIGHTEEN: APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL

CLAIM NINETEEN: PETITIONER WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY PROVIDING AN EDITED VERSION OF THE VIDEOTAPE OF HIS CONFESSION AND WITHHOLDING THE COMPLETE VIDEO

CLAIM TWENTY: THE TESTIMONY OF THE CORONERS, AND THEIR LACK OF AUTHORITY TO PERFORM THE AUTOPSY DEPRIVED PETITIONER OF A FAIR TRIAL

CLAIM TWENTY-ONE: THE CUMULATIVE EFFECT OF THE ERRORS AT MR. BARBEE'S TRIAL DENIED HIM OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

D. Issues raised in the Fifth Circuit Court of Appeals.

In his application for a certificate of appealability ("COA") in the Fifth Circuit, Mr. Barbee raised the following claims on appeal:

Issue 1: Reasonable Jurists Could Debate The Merits of Barbee's Claim of Actual Innocence

Issue 2: The District Court's Dismissal of The Claim of a Conflict of Interest is Debatable Among Jurists of Reason

Issue 3: Trial Counsel's Abandonment of Their Client and Ineffective Assistance of Counsel for "Confessing" their Client's Guilt Without the Client's Permission Is Debatable Among Reasonable Jurists.

Issue 4: The District Court's Holding on Claims Five (a), (b), (c) and (d) (Ineffective Assistance of Counsel for Failure to Present Mitigating Evidence and for Presenting Damaging Evidence) Is Debatable

Issue 5: Reasonable Jurists Could Debate Whether Barbee Was Deprived Of a Fair Hearing Due To The District Court's Reliance on Extra-Record Evidence

The Fifth Circuit granted a COA on the following issue, upon which there was further briefing:

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

E. Issues raised in the United States Supreme Court in the petitions for certiorari.

Mr. Barbee raised the following issues in the United States Supreme Court in his initial petition in 2019:

1. Did the Fifth Circuit impose an improper ineffective-assistance-of-counsel standard, which required him to show prejudice, to Barbee's claim that his Sixth Amendment rights were violated by the unauthorized confession of guilt to his jury by his trial counsel?

2. Whether structural error, raised in post-conviction proceedings, requires a showing of prejudice?

Mr. Barbee raised the following issues in the United States Supreme Court in his currently pending petition in 2021:

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?

This petition will be conferenced on September 27, 2021, and hence its outcome will not be known at the time this application is due.

F. Issues raised in subsequent and current proceedings.

Mr. Barbee's initial state subsequent application raised the issues he presented in the federal court. Claim Two, regarding the conflict of interest, was deemed to have met the requirements for a state subsequent petition and an evidentiary hearing was held on that claim.

Mr. Barbee's second subsequent state application in 2019 raised the issue discussed herein, that Mr. Barbee's attorneys, in final argument, told the jury he was guilty against his express wishes and without his consent, which the United States Supreme Court has held to be a violation of due process and the Sixth Amendment right to counsel. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). The denial of that issue, *Ex Parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021), as discussed supra, is the issue pending in the United States Supreme Court.

Due to defects in the issuance in the death warrant, on September 9, 2021, a motion has been filed in the state trial court to withdraw the execution date. That motion is currently pending.

As the state courts have refused to appoint state counsel for Mr. Barbee after the denial of his subsequent application in 2013, undersigned counsel A. Richard Ellis has submitted two motions for appointment in the state trial court, the last one unopposed. As of the date of the submission of this application, no action has been taken on those motions.

THE COMMUTATION POWER

This application presents, and a hearing would further establish, compelling reasons for the Board to exercise its power to recommend commutation of Stephen Barbee's death sentence to a lesser sentence. Alternatively, it presents compelling reasons for a 120-day reprieve for further investigation of the new revelations regarding Dr. Marc Krouse. The primary reason is that he was denied his Sixth Amendment right to have his case for innocence presented to his jury. Despite Mr. Barbee's plea of "not guilty," his attorneys told the jury that he was guilty. Additionally, since the submission of his initial clemency application in 2019, unresolved questions and evidence of Mr. Barbee's innocence have arisen, issues that were never investigated and never presented to his jury, including the veracity and accuracy of Dr. Krouse's crucial testimony.

But before the Board commences its review of the factual bases underlying this application, it is appropriate to recall the purpose and history of the commutation power. In Texas, as in other states, the power to commute a death sentence is an unrestricted power vested in the Board and the Governor. [Texas Const. Art. IV., sec. 11 (Except in cases of treason and impeachment, upon recommendation of the board, the governor may grant a commutation of sentence.)] Note the intermingling legal and political components of the clemency power: legal because the authority comes from a constitution; political because an executive can consider factors that judges and juries cannot or did not. The power to grant clemency is broad, and is intended to be so as indicated in the constitutional text creating this discretionary authority.

The executive clemency power is the embodiment of compassion deeply rooted in our Anglo-American criminal justice system. It has its origins in the Judeo-Christian ethics of both punishment and forgiveness. Sculpting this traditional authority into its current democratic form, Alexander Hamilton said that such a power is required "by considerations of justice, of humanity and of public policy."[10] The clemency power is, therefore, an integral component of the American constitutional structure of checks and balances. As the United States Supreme Court said in 1925:

> Executive clemency exists to afford relief from the undue harshness or evident mistake in the operation or enforcement of the criminal law. The

[10] The Federalist No. 74 (Alexander Hamilton).

> administration of justice by the courts is not necessarily always wise or certainly considerate of the circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential to popular governments to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.
> *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

In exercising the review power in a capital case, it is critical that the Board and Governor have at their disposal accurate information not only about the offense, but also about the offender. Chief Justice Warren Burger underscored this constitutional imperative while writing for the Court in the landmark case of *Lockett v. Ohio,* 438 U.S. 586, 605 (1978):

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. A variety of flexible techniques, probation, parole, work furloughs, to name a few, and various post-conviction remedies, may be available to modify an initial sentence of confinement in non-capital cases. The unavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

The respect due this case is, at a minimum, a hearing on the commutation of Mr. Barbee's conviction and death sentence. This is the respect due here because an individualized examination is integral to the proper functioning of the executive clemency power.

GROUNDS FOR COMMUTATION OR ALTERNATIVE RELIEF

(TEX. ADMIN. CODE tit. 37, §143.42(8))

The following is respectfully presented on behalf of applicant Stephen Dale Barbee, who is requesting a commutation of his death sentence to a lesser penalty, or, in the alternative, a 120-day reprieve so that the Board may further investigate the background of this matter at a live hearing and that the ongoing investigation of Dr. Krouse can be completed. Without such a hearing, Mr. Barbee cannot ascertain the areas or issues of significance to individual members, and he can only guess about the Board's concerns and any questions it may have about his request.

Mr. Barbee's grounds for commutation are hereby presented in three sections:

(1) Mr. Barbee's trial was grossly unfair because his attorneys violated his desire to maintain his innocence, disregarded his plea of "not guilty," and, against his wishes, told the jury he was guilty of the murders. There are substantial questions and evidence regarding Mr. Barbee's innocence in this matter. These questions remain open at this late date due to ineffective assistance of trial counsel in refusing to investigate or present evidence of his innocence; the refusal of trial counsel to present mitigating evidence of the lack of future dangerousness on the bogus and self-serving ground that it would have conflicted with his claims of innocence, which they never presented; and the ineffective assistance and incompetence of state habeas counsel which negatively impacted federal review of Mr. Barbee's evidence of innocence.

(2) Clemency is warranted because substantial questions remain regarding Mr. Dodd's guilt and Mr. Barbee's innocence. His trial attorneys never presented this evidence to his jury and instead substituted their unauthorized theory that Mr. Barbee accidentally killed one of the victims and discounted evidence of Mr. Dodd's guilt. This theory was contradicted by Dr. Krouse's testimony. Yet just recently, the State has disclosed startling evidence of Dr. Krouse's incompetent handling of his recent autopsies. Recent investigation has shown that there was abundant evidence of Dr. Krouse's mistakes and errors that precede Mr. Barbee's trial yet were never presented to his jury to discredit Dr. Krouse's testimony.

(3) Given that the Board apparently only rarely, if ever, grants live hearings in capital cases, Mr. Barbee in this section presents questions and answers in areas of

concern that would, in his estimation, be raised if such a hearing were granted. Without a hearing, he can only guess at what those concerns might be.

I. CLEMENCY IS WARRANTED BECAUSE MR. BARBEE'S TRIAL WAS GROSSLY UNFAIR AND HE HAS NEVER HAD HIS EVIDENCE OF INNOCENCE PRESENTED TO A JURY.

Mr. Barbee's attorneys violated his Sixth Amendment right to insist upon his innocence when they conceded his responsibility for the killings. Throughout his relationship with trial counsel, Mr. Barbee made clear his desire to maintain his innocence. He repeatedly rejected his attorneys' suggestions that he concede his guilt to the jury, yet, Mr. Barbee's counsel contravened his express wishes and conceded his guilt at trial.

When a defendant pleads "not guilty," he has a constitutional right to have that plea honored by his attorneys and have his innocence presented to his jury. It is axiomatic that the failure of his attorneys to do so renders his trial unfair. As a result of his attorneys' concession, Mr. Barbee's case for innocence has never been heard by a jury.

Prior to trial, Mr. Barbee repeatedly expressed his desire to maintain his innocence and rejected his attorneys' suggestions of conceding guilt. Both defense attorneys attempted to pressure Mr. Barbee into accepting a guilty plea, thus avoiding a trial,[11] and one of their first acts was to try to convince his family that he was guilty. (ROA.769-72, 777-79, 798). Pretrial efforts to develop his claim of innocence were sorely deficient.

Lead counsel, Bill Ray, and co-counsel, Tim Moore, have repeatedly admitted that Mr. Barbee, from the first stages of their representation, insisted on his

[11] The conflict-of-interest claim alleged that, in return for the trial judge assigning many cases to Mr. Barbee's lead counsel Mr. Ray, the *quid pro quo* was that Ray 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 alone over a six-year span. (ROA.903).

innocence.[12] In fact, the attorneys used Barbee's assertion of innocence, what they later termed his "refusal to accept responsibility" (3 CR 688-689; ROA.3914-15; Appendix 5), as justification for their failure to present mitigating evidence of a low probability of future dangerousness at the punishment phase. (3 CR 683-691; ROA.3908-15; Appendix 5).[13] Most importantly, trial counsel have admitted that it was their idea alone to admit Barbee's guilt, against his protestations of innocence: "it was counsel's decision" to call this case an accident, because the "Ron Dodd did it' theory just wasn't going to work, and had not worked in this case." (*Id.,* 3 CR 687; ROA.3912; Appendix 5). Barbee was thus prejudiced as a direct result of his attorneys' unauthorized concession of guilt.[14]

In a September 19, 2005 letter to Judge Gill, Mr. Barbee stressed that his relationship with counsel was deteriorating and he wanted them removed from the case: "Please be advised that I wish at this time to dismiss both of my attorneys Mr. Bill Ray and Mr. Tim Moore. There has and continues to be a serious breakdown in communication, and I no longer want them to represent me . . . ." (1 CR 48; ROA.3515; Appendix 4). Mr. Barbee also wrote to Mr. Ray asking for outside help (1 CR 49; ROA.3516; Appendix 4), and then again to Judge Gill asking that his attorneys be dismissed from the case because "[t]here has and continues to be a serious breakdown in communication..." (1 CR 54; ROA.3518; Appendix 4).

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[12] *See* Ray and Moore's joint declaration: "Applicant consistently stated that Ron Dodd was the real killer (3 CR 687; ROA.3912; Appendix 5); "Applicant was steadfast in his assertion that he was innocent" [*Id.*]; "Applicant maintained that he was completely innocent" (3 CR 688; ROA.3913; Appendix 5); "...a frame up [Applicant'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" (3 CR 689-690; ROA.3914-15; Appendix 5). *See also* Memo of Understanding Between Ray, Moore and Barbee: "Client has maintained his innocence to attorneys since the date of appointment." (3 CR 692;ROA.3917; Appendix 5). Mr. Barbee repudiated his coerced confession the day after it was made, prior to the appointment of counsel.

[13] 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. (3 CR 689; ROA.3514-18; Appendix 5).

[14] However no showing of prejudice is required, as this is structural error.

Mr. Barbee again asserted his desire to maintain his innocence in a January 17, 2006 memorandum of understanding that trial counsel prepared and that Barbee reviewed and edited. The memorandum states:

> Client has maintained his innocence to attorneys since the date of appointment and has claimed that Ron Dodd is the person wholly and singularly responsible for the deaths of Lisa and Jayden Underwood... Client further maintains that the only reason he confessed to Detectives Carroll and Jamison of the Fort Worth Police Department was due to the fact that the detective [Mike Carroll] threatened him with the fact that they had enough evidence to get client the death penalty.

Memorandum of Understanding (2006) (attached to Trial Counsel Affidavit) at 11 (3 CR 692; ROA.3917; Appendix 5).[15] Mr. Barbee crossed out the following: "Client then said to the detectives that the murders were accidental in that client felt that he would then not be in trouble." He wrote in the correction: "The detective advised client that a accident was a accident (sic) it would be better on me rather than death." (*Id.*).

Trial counsel hired Amanda S. Maxwell, a licensed clinical social worker, to conduct the pretrial mitigation investigation. In her September 2007 affidavit, Maxwell stated that she met with Mr. Barbee, Mr. Ray, Mr. Moore, and a fact investigator on December 28, 2005.[16] "During this meeting Bill [Ray] tried to convince Stephen to take a life sentence should that offer be extended by the DA. Stephen refused to take any kind of a plea and stated emphatically that he was innocent. Stephen had been insisting for months that it was his employee Ron Dodd who had committed the murders." Maxwell Affidavit at 4. (3 CR 573; ROA.3797; Appendix 6).

Trial counsel's joint affidavit of June 10, 2008 included as an exhibit an undated letter from Mr. Barbee to Mr. Ray and Mr. Moore. (3 CR 697-699; ROA.3922-3925; Appendix 5). Mr. Barbee again stated his desire to maintain his innocence. He wrote that he only confessed because Detective Carroll convinced him

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[15] Appendix 5 contains relevant excerpts from the "Affidavit of William H. 'Bill' Ray and Tim Moore," filed in the trial court on June 12, 2008.

[16] Ms. Maxwell's affidavit is attached at Appendix 6.

he would receive the death penalty unless he did so. (3 CR 699; ROA.3924; Appendix 5). Ray and Moore also claimed in their affidavit that Mr. Barbee changed his version of the events and his involvement in them, making it difficult to develop a defense theory. (Trial Counsel Affidavit, 3 CR 684; ROA.3909; Appendix 5).

Additionally, Mr. Ray and Mr. Moore attached as an exhibit to their joint statement an undated letter that Mr. Barbee sent to Dr. Richard Leo, a false confessions expert, several months before trial. *See* Letter to Dr. Leo, (3 CR 700-706; ROA.3925-3931; Appendix 5). In this letter, Mr. Barbee again maintained that he was innocent and that Dodd had killed Lisa and Jayden Underwood.[17] Mr. Barbee again explained he was manipulated into confessing after Detective Carroll convinced him it was the only way he could avoid the death penalty: "They forced me to give them an answer out of fright, and stress. I said what I said to save myself." Letter to Dr. Leo, (3 CR 702-706; ROA.3927-3931; Appendix 5).

Attorneys Ray and Moore also attached to their joint affidavit a letter they received from forensic psychiatrist Dr. James Shupe dated December 27, 2005. *See* Letter from Dr. Shupe (3 CR 713-715; ROA.3938-3940; Appendix 5). The letter contained the results of Dr. Shupe's evaluation of Mr. Barbee earlier that month. Dr. Shupe wrote:

> Mr. Barbee appeared fixated on 'how his mother will view him.' He repeatedly talked about how 'it would kill her' if she thought he had killed the Underwoods. He even went so far as to say that he would rather be executed than have his mother see him plead guilty to the charges. It was more important to him how he was viewed in his mother's eyes . . . .

Id. at 3 CR 715; ROA.3940; Appendix 5). Dr. Shupe's letter recommended that Mr. Barbee take responsibility for the killings in order to receive a life sentence. Mr. Ray and Mr. Moore admitted that, after they showed Mr. Barbee the letter, he remained "steadfast in his assertion that he was innocent." (Trial Counsel Affidavit, 3 CR 687; ROA.3912; Appendix 5).

In his guilt phase closing argument, defense counsel Ray conceded Mr. Barbee's guilt in killing both Jayden and Lisa Underwood, without any prior notice to Mr. Barbee. Ray admitted, "[a]s hard as it is to say, the evidence from the

[17] For more information about the theory that Dodd committed the crimes, *see* Section II, *infra.*

courtroom shows that Stephen Barbee killed Jayden Underwood. There is no evidence to the contrary." (25 RR 14-15) (*See* Appendix 3). Ray then conceded that Mr. Barbee killed Lisa Underwood: "Something happened in that house . . . . There is evidence of a struggle. . . . What [Mr. Barbee] told [his wife] is I held her down too long. That's exactly what matches the testimony of Dr. Marc Krouse [the medical examiner] . . . .*Was he there? Yes. Did he hold her down? Yes.*" (25 RR 18) (emphasis added) (*See* Appendix 3). After admitting Mr. Barbee's guilt for both murders, Ray asserted that Mr. Barbee killed Lisa Underwood accidentally and should not be convicted of capital murder. (25 RR 14-18) (Appendix 3). Mr. Ray did not tell Mr. Barbee that he was going to make these concessions. Both Mr. Barbee (Declaration of Stephen Barbee, 3 CR 618; ROA.3843; Appendix 7) and his family (Declaration of Jackie Barbee, 3 CR 598; ROA.3823; Appendix 8) were shocked when they heard the concessions.

At the state post-conviction evidentiary hearing, Mr. Ray 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). Mr. Ray also admitted he conceded his client's guilt without Mr. 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." (*Id.*). Mr. Barbee did not know that Mr. Ray was going to make the concession, so, of course, he could not have explicitly told him beforehand not to make it.

Clemency is warranted because Mr. Barbee's attorneys violated his right to have a jury hear his assertions of innocence and conceded his guilt, against his express wishes. Mr. Barbee has never had the "day in court" to which he is constitutionally entitled.

II. CLEMENCY IS WARRANTED BECAUSE SUBSTANTIAL QUESTIONS REMAIN REGARDING MR. BARBEE'S GUILT OR INNOCENCE

A. Questions remain regarding Mr. Barbee's claim of innocence.

Mr. Barbee's innocence claim centers on his assertions that Ron Dodd committed the murders and framed Mr. Barbee in order to take over his businesses. Mr. Barbee admits that he helped Mr. Dodd to conceal the bodies, as detailed in his

declaration, but he denies participating in the murders. [ROA.3829-43, Appendix 7]. The state and federal district courts have denied Mr. Barbee's claims of innocence [Claim 1 in the district court, ROA.2962-75] accepting, almost verbatim, trial counsel's self-serving explanations for their inadequate representation at trial and making numerous factual errors in the process.

The federal district court denied Barbee's innocence claim mainly on the assumption that "[t]he innocence theory...makes little sense because it fails to account for the fact that Dodd could not have known that Barbee would confess" [ROA.2932] which is repeated later in the opinion: "his innocence theory...makes little sense." [ROA.3027]. This derives directly from trial counsel's affidavit where they said the "Ron Dodd did it theory" "did not take into account the fact that Applicant would later confess." [ROA.867].

However, this misconstrues the claim. The "Ron Dodd did it" theory did not depend on Dodd knowing that Mr. Barbee would later "confess," nor does it make "little sense" because Mr. Dodd could not know this beforehand. Mr. Barbee was known to be romantically involved with Ms. Underwood and was "prone to drinking and in trouble with his wife because of his extramarital affairs..." [ROA.3600; *see also* ROA.3577-3618, newspaper accounts at the time of Barbee's arrest]. Mr. Barbee would have been the prime suspect in the murder without his "confession." Knowing this, Mr. Dodd did not have to foresee that Mr. Barbee would "confess" in order to harbor a reasonable belief that an attempt to implicate him would succeed.[18]

After denying the ineffective-assistance-of-counsel claim, the federal district court repeated these errors in denying the motion to alter or amend the judgment, concluding that "Barbee's actions were not the actions of a person who fears he is being framed." [ROA.3160]. Indeed they were not; Mr. Barbee had no such fear as he was unaware of Mr. Dodd's intentions when Mr. Barbee assisted Mr. Dodd in concealing the bodies. The district court reiterates that "Dodd could not have relied upon [Barbee's] confessions as [part of his alleged plan]." [*Id.*] Indeed, Dodd could not and did not, as his plan did not depend on Barbee "confessing." Dodd knew that Barbee would be the prime suspect in his ex-lover's death, as shown by his immediate interrogation by the police.

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[18] Even trial counsel Ray agreed that Mr. Dodd was implicated, testifying at the state post-conviction hearing that "I think he [Dodd] had a lot more to do with this than came out," and "I think Ron Dodd is right in the middle of it..." [ROA.4678]. Yet counsel did little, if anything, to substantiate these suspicions.

In denying the ineffective-assistance-of-counsel claim, the federal district court discounted Theresa Barbee's father, Danny Dowling's, statement to investigator Tina Church that Dowling heard Dodd confess to the murder. [ROA.2973]. The Court cited a contradiction with other statements Dowling made to Church, attributing another inculpatory statement ("I had to hit [her] 25-26 times) to *Barbee* as well as Dodd and Dowling "ultimately could not remember who said it." [ROA.2973 (emphasis in original)].

However, this holding omits the crucial next sentence of Ms. Church's statement: "However, Danny [Dowling] had not been in contact with Stephen at this time, and this would have been impossible." [ROA.3860]. Thus, Ms. Church explains that Barbee could not have been the person who made the statement.

The federal district court's observation that Mr. Dowling "ultimately could not remember" who made the statement [ROA.2973] is also misleading. Ms. Church said that Dowling said he could not remember only "when I confronted him with that [that he had not been in contact with Barbee]" and he then said that he "didn't want anything to do with the case." [ROA.3860]. Ms. Church's statement indicates that Mr. Dowling's supposedly faulty memory occurred only when confronted with this fact.[19]

The district court also held that "as discussed in later claims, a head injury or debilitating headaches would **not** prove Barbee did not commit murder; this sort of evidence provides an excuse for wrongdoing and is therefore inconsistent with the actual-innocence assertion." [ROA.2973-74 (emphasis in original)]. This again misconstrues the claim, as the mitigating evidence would have been offered at the punishment phase when Barbee's guilt had already been decided.

Nor was there any actual "innocence defense" or "actual-innocence assertion" [ROA.2973-74, 2991] at the guilt/innocence phase that was "inconsistent" or could be "undermined" by mitigating evidence. Despite Barbee's assertion of his innocence, at the guilt phase of his trial his attorneys made no opening statement, put on no

[19] The district court initially gave no reason for not crediting Ms. Church's statement and then, in the 59(e) opinion, resorted to an internet search and extra-record evidence in an attempt to show that she harbored anti-death penalty views.

testimony,[20] and during final argument told the jury that the evidence was conclusive that Barbee accidentally killed Lisa Underwood. [25 RR 14-16].

The federal district court also denied this claim partly by parroting the State's assertion that "it presents no newly-discovered evidence required by *Schlup* [*v. Delo,* 513 U.S. 298 (1995)]." [ROA.2975, 3100]. *Schlup*'s "new evidence of innocence," *Schlup* at 316, is "new reliable evidence not presented at trial." *Id.* at 324. The district court ignored the fact that much of the evidence that Court itself cited [ROA.2964-65] was newly-discovered and not presented at trial: the declarations of Stephen Barbee, Bobby Boyd, Sallie Boyd, Mandy Carpenter, Jennifer Cherry, Tina Church, Calvin and Nancy Clearly, Mike Cherry, Sharon Colvin, Tim Davis, Jerry Dowling, Mary Hackworth, Christy Mackemson, Melody Tarwater Novak, and Patricia Springer [ROA.3814-3894] were all new to the federal habeas proceedings.

This newly-discovered evidence not presented at Mr. Barbee's trial contained significant support for his innocence, including the following:

> 1) Ron Dodd admitted that he had his clothes washed at 4 a.m. on the night of the murders and also that he had his vehicle power-washed by his son Nathan and Danny Dowling. [ROA.3859, Declaration of Tina Church].
>
> 2) Jennifer Cherry, Mr. Barbee's niece, has stated that Mr. Barbee's ex-wife Theresa Barbee often told her "how much she hated [Barbee] and wanted him 'gone'" [ROA.3852]; and "she wished there was a way to get rid of him." [ROA.3853].
>
> 3) Mr. Dodd's long and well-documented history of violence, which Mr. Barbee's jury never heard. [ROA.3896-3902, criminal records of Dodd].
>
> 4) Mr. Barbee's mother, Jackie Barbee, confirmed that Ron Dodd had a motive to commit the murders. [ROA.3618-24, Declaration of Jackie Barbee].
>
> 5) Tina Church has confirmed that Theresa and Ron Dodd had a financial motive to have Stephen out of the way [ROA.3859, Declaration of Tina Church].

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[20] Save for the investigator Stanley Keaton, the only defense punishment phase witness, who testified very briefly regarding cell phone records and police interrogation procedures. [24 RR 174-177].

6) New evidence of Theresa Barbee's financial misdeeds would have provided a motive for Ron Dodd to have committed the murders. [ROA.3797].

7) Significant un-presented new evidence that Barbee would avoid physical confrontations. [ROA.3845, 3884-85, 3888].

8) Significant new evidence that points to the falsity of Barbee's "confession." [ROA.3814-27, 3852-55, 3893-94, 3904-06].

New evidence was also presented at the state hearing. [ROA.2109-2316]. The federal district court's conclusion that the petition "presents no newly-discovered evidence" [ROA.2975, 3100] is plainly incorrect. To the extent the district court dismissed the additional evidence as "not new," because it did not meet the *Schlup* requirement of newly-discovered evidence, this conclusion once more denied Mr. Barbee his day in court.

B. Recent disclosures regarding the coroner Dr. Marc Krouse buttress Mr. Barbee's claim of innocence, cast doubt on the State's theory of guilt, and raise questions about the fairness of Mr. Barbee's trial.

Since this Board "discontinued" their consideration of Mr. Barbee's application on September 23, 2019 (Appendix 10), new revelations by the State concerning Dr. Marc Krouse have given rise to question the State's theory of Mr. Barbee's guilt.

On March 5, 2021, the Criminal District Attorney of Tarrant County filed a "State's Post-Conviction Disclosure" pursuant to their obligations under *Brady v. Maryland,* 373 U.S. 83 (1963).[21] Therein it was disclosed for the first time that Dr. Marc Krouse, who performed the autopsy of the victim Lisa Underwood and was a signatory to the autopsy report of victim Jayden Underwood, was under investigation by his superior in the Tarrant County Medical Examiner's Office, Dr. Nizam Peerwani, for "possible inconsistencies" in recent autopsy reports. Disclosure at *2. Ten inconsistencies, discrepancies, or omissions were discovered in the case of Mr. Alfredo Olivares Jr. ("Decedent #1) (*Id*. at 2-4). In the case of Jose Moreno III ("Decedent #2) four additional issues were discovered in Dr. Krouse's report. *Id*. at 5. It was also revealed that "on November 10, 2020, Marc Krouse was suspended from performing autopsy examinations on homicide cases" and "Dr. Peerwani and his

[21] Appendix 11.

office will continue to review autopsy examinations completed by Dr. Krouse." *Id.* at 5-6.

Subsequently, on April 1, 2021, *after* the Tarrant County District Attorney had filed their motion to set an execution date, they submitted what was termed the "State's First Supplemental Post-Conviction Disclosure."[22] In that additional disclosure, it was revealed that there were additional inconsistencies, discrepancies, or omissions discovered in the case of Decedent #1 (*Id.* at 2-4), who was disinterred and four additional non-conformities were discovered. *Id.* at 4. Additional issues were also discovered in the case of Decedent #2. *Id.* at 5. Dr. Peerwani conducted an audit of Dr. Krouse's recent autopsies and discovered "three additional autopsies where Dr. Krouse performed them in a manner which left questions unanswered and demonstrated a lack of due diligence." *Id*. at 6-7. Significantly, as of the last disclosure, "Dr. Peerwani's review remains ongoing and may result in future disclosures." *Id*. at 7. Yet Dr. Krouse's errors and negligence were far more widespread than just these recent cases.

In conjunction with the April 1, 2021 disclosures, the Tarrant County District Attorney also disclosed Dr. Peerwani's audit of Dr. Krouse's cases, a 105-page "Executive Summary" dated March 19, 2021, issued by the Tarrant County Medical Examiner's Office, under the direction of Dr. Nizam Peerwani. This report was "prompted by errors discovered in the autopsy report on Alfredo Olivares, Jr." and it covered autopsies classified as homicide and performed by Marc A. Krouse, MD...from January 1, 2020 through November 9, 2020."[23] Forty-one cases were identified.[24] The errors identified in these cases were numerous, critical, and of such magnitude as to cast strong doubt on any earlier autopsies performed by Dr. Krouse, such as those performed at the time of Mr. Barbee's trial, when Dr. Krouse had much less experience and training.

In Mr. Olivares' case, involving a September 19, 2020 shooting, "Krouse failed to recognize and record vascular injury"...and stated "The aorta and major branches are intact."[25] A gunshot would was "misinterpreted as a surgical 'stab' wound."[26] Additionally, the "description of the bullet in the Olivares' body by Krouse may be

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[22] Appendix 12.
[23] Audit at 1
[24] *Id*.
[25] *Id*. at 1-2.
[26] *Id*. at 2.

inaccurate."[27] A bullet was missed by Dr. Krouse and left in the body.[28] Numerous additional deficiencies were identified, such as a failure to submit service requests, no request for the identity of the victim to be verified through fingerprints was made, Dr. Krouse's report listed the location of two vascular stents incorrectly, a right chest tube drain was not reported, and there was a discrepancy regarding personal property of the deceased.[29]

Dr. Peerwani states that on November 9, 2020 "Krouse was suspended from performing autopsies on homicide cases withing the jurisdiction."[30] That same day, the Tarrant County District Attorney was notified of this action by phone, e-mail and a telephone conference with Sharen Wilson, the Tarrant County District Attorney.[31] Yet no disclosures were made to undersigned counsel until four months later, in March of 2021.

Dr. Peerwani's report goes on to relate the errors made in the case of Jose Moreno.[32] Radiographs detected the "documented presence of a bullet in the 2nd lumbar vertebra which Krouse had neglected to detect and retrieve."[33] Mr. Moreno's body was exhumed and "the exhumation autopsy discovered several major and minor non-conformities."[34] These included Dr. Krouse's failure to document catastrophic vascular injury of the aorta; failure to document the second entry gunshot wound, its trajectory and failure to recover the bullet; a failure to perform a thorough dissection; and a failure to report the perforation of the left diaphragm.[35] These errors and others prompted the decision to perform a comprehensive audit of Dr. Krouse's autopsies preformed from January 1, 2020 to November 9, 2020, "the day Krouse was suspended from performing additional jurisdiction homicides [sic] at the TCME Office."[36]

Pursuant to this audit, it was found that Dr. Krouse performed autopsies in 41

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[27] *Id.* at 4.
[28] *Id*. at 6.
[29] *Id.* at 6.
[30] *Id*. at 7.
[31] *Id.*
[32] *Id.* at 7-8.
[33] *Id.* at 8.
[34] *Id*. at 9.
[35] *Id*. at 10-12.
[36] *Id.* at 12.

cases in that period which were classified as homicides.[37] Each of these cases was examined in detail in the rest of Dr. Peerwani's audit.[38] The remainder of Dr. Peerwani's report and expanded audit found that Dr. Krouse "had made 59 mistakes during the autopsies of 40 murder victims over a 10-month period in 2019 and 2020.[39]

Dr. Krouse's competency was questioned both before and at the time of Mr. Barbee's arrest and trial in 2005-2006. Yet this information was either never disclosed to the defense, or was known to them and was not used at trial.

For instance in 2000 Dr. Krouse was performing autopsies for a private company called Forensic Pathology Associates run by Dr. David Hoblit.[40] Lubbock County District Attorney Matt Powell "criticized the services provided by Hoblit's office" because "[q]uestions about Hoblit's office arose following a July [2000] court hearing during which Powell said that Dr. Marc Krouse, who performed some county autopsies, was 'grossly negligent' or untruthful."[41] In the autopsy of a three-year old who died in 1998, "Krouse's autopsy missed bite marks and cigarette burns on the toddler's body."[42] Dr. Hoblit attempted to excuse this as a "misunderstanding" but that "explanation was new to Sowder."[43] After the concerns about Dr. Krouse arose, "prosecutors asked Hoblit not to allow Krouse to perform additional autopsies for the county."[44] Dr. Hoblit's defense of Dr. Krouse was made in the context of attempting to have Lubbock County retain the services of his company in the face of an audit and a proposal to switch the services to Texas Tech University.[45]

Another case questioning Dr. Krouse's competence arose in 2006, the same year as Mr. Barbee's trial, when Dr. Krouse had moved to the Tarrant County Medical

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[37] *Id.* at 13.
[38] *Id*. at 15-105.
[39] Appendix 13, Sandy Malone, "Texas Medical Examiner Suspended After Audit Finds 59 Mistakes In 40 Homicide Cases," The Police Tribune, March 31, 2021, at 1.
[40] Appendix 14, "*Medical examiner contract faces scrutiny,*" Lubbock Avalanche-Journal, Sept. 24, 2000, at 1.
[41] *Id*. at 2.
[42] *Id*.
[43] *Id.* at 3.
[44] *Id*.
[45] *Id*. at 1-4.

Examiner's Office.[46] That case, involved the death of the infant baby Rephayah Isaac Lindsay, the child of parents allegedly belonging to the House of Yahweh sect.[47] The baby's body was brought to the Tarrant County Medical Examiner's Office and the preliminary autopsy performed by Dr. Krouse found that "the boy died of protein malnourishmant and of 'terminal' asphyxiation, which does not mean death was caused bu another human being."[48] As a result, "Abiline police declined to file criminal charges against Rephayah's parents after Krouse, who performed the autopsy, told investigators the baby's death was either accidental or of natural causes."[49] Yet "Rephayah's body was malnourished with almost no fat under the skin and poorly developed muscle, according to the report. His stomach was empty and it was noticed he had 'virtually no contents' within any part of the bowel. Board certified forensic pathologist Dr. Linda E. Norton, who is based in Dallas and practices privately, said after reviewing the autopsy report that Rephayah's death 'clearly is a homicide."[50]

Dr. Norton also added that "[w]hen you starve a child to this degree, I don't see how you can't call this a homicide."[51] The medical examiner's office later changed the cause of death to "traumatic asphyxiation, or sudden or severe compression of the chest or upper abdomen that prevents breathing. 'Traumatic' could mean that the child was purposely suffocated."[52] The Taylor County District Attorney James Eidson said that had they known that "traumatic asphyxiation" was the correct description, rather than Dr. Krouse's "terminal asphyxiation." then "we might have approached the investigation differently."[53]

In 2003 Dr. Krouse's medical license was suspended for failure to pay his registration fee.[54]

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[46] Appendix 15, "Questions linger in 2006 infant death," Abilene Reporter News, June 10, 2007.

[47] *Id*. at 1-2.

[48] *Id*. at 2-3. See also Appendix 16, at 1, Autopsy Report of Rephayah Lindsay, by Dr. Marc Krouse, filed Sept. 25, 2006, finding "evidence of traumatic asphyxiation."

[49] Appendix 15 at 3.

[50] *Id.*

[51] *Id*.

[52] *Id.*

[53] *Id*.

[54] Appendix 17, "Deputy medical examiner tries to get license renewed," myplainview.com.

C. Dr. Krouse's testimony was crucial in Mr. Barbee's case.

Mr. Barbee's defense, as presented to the jury, was wholly predicated on the theory of accidental death. Dr. Krause's testimony disputing that theory was critical to Mr. Barbee's conviction.[55] In the prosecution's opening guilt phase argument, they disputed that theory using the testimony of Dr. Krouse:

> Ladies and gentlemen, this is not an accidental killing followed by an intentional killing. Killing like this takes work. The medical examiner told you that. It takes work. You have got to...You have got to close off that oxygen supply, and you have got to keep it closed off for two to three minutes at a maximum.
> 25 RR 7-8.

The prosecution then repeated that "[t]his was not an accidental killing followed by an intentional killing. This was two identical killings committed in the same exact manner." 25 RR 8.

After presenting no defense at the guilt/innocence phase, Mr. Barbee's lead counsel, Mr. William 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. Ray argued that "[t]he problem in the capital murder case is the evidence in this courtroom that you heard doesn't show that Stephen Barbee had the conscious objective or desire or that he knew his conduct was reasonably certain to cause the result, those two definitions there." 25 RR 14-15. Defense counsel Ray argued that Dr. Krouse "told you that he could not be sure when Lisa Underwood lost consciousness." 25 RR 15. This argument misstated Dr. Krouse's testimony.

In explaining the videotaped conversation between Mr. Barbee and his wife, Ray argued "[w]hat he told Trish Barbee is I held her down too long. That's exactly what matches the testimony of Dr. Marc Krouse." 25 RR 18. The problem was that this too misstated Dr. Krouse's testimony. In closing, Ray told the jury that the evidence "does not support an intentional or knowing murder for Lisa Underwood. Was he there? Yes. Did he hold her down? Yes. Did he know or intend that she was

[55] Dr. Krouse's trial testimony is Appendix 18.

going to die or was that his conscious objective? The answer is no." 25 RR 18.

The prosecution in their rebuttal guilt phase argument again seized on Dr. Krouse's testimony to discredit the "accidental death" defense theory:

> Let's talk about Dr. Krouse's testimony. He told you that Lisa had deep bruising and injury down both sides of her spine. And he said that was from compression. Compression of probably over a hundred pounds. He told you that a person will become unconscious after six to eight minutes of suffocation, of smothering....
>
> But that pressure has to be maintained...That pressure had to remain on her compressing her chest down on the floor for a minimum of two to three minutes, maybe up to six or eight minutes.
>
> I didn't intend? No. That pressure was on there for a long, long time.
>
> 25 RR 21-22.

The findings of fact and conclusions of law ultimately adopted by the CCA held the following, emphasizing the centrality of the "accident" theory:

> i. Findings of Fact.
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> No. 46. During closing argument, Mr. Ray argued the defense theory of accidence rather than a pure innocence defense. See Reporter's Record XXV:14-18.
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> No. 47. Mr. Ray decided to use the accident theory because, in his professional opinion, the applicant's favored 'Ron Dodd did it' theory would not work. See Mr. Ray and Mr. Moore's Affidavit, page 4.
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> ...
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> No. 54. Mr. Ray's decision to focus his closing argument on the defensive theory of accident rather than the 'Ron Dodd did it' theory was reasonable in light of the evidence admitted at trial.
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> No. 55. Mr. Ray and Mr. Moore provided the applicant with adequate counsel regarding closing arguments.
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> 3 CR 539, 541.
>
> ii. Conclusions of Law.
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> No. 20. Mr. Ray's decision to focus his closing argument on the

defensive theory of accident was reasonable in light of the evidence admitted at trial.

3 CR 553.

Although this theory was the entirety of Mr. Barbee's defense, it was negated by the testimony of the medical examiner Dr. Krouse. He testified that five to seven minutes of 100 to 300 or 400 pound force was needed to have caused the type of soft tissue injury on Lisa (23 RR 158-159, 163); that force was applied over a very broad area of her back (23 RR 160-161); and that it could take up to seven minutes for death to occur. 23 RR 184. The prosecution pointed this out at final argument to counter the accident theory. 25 RR 22.

"Accidence" was the only theory presented to Mr. Barbee's jury and it was disputed by Dr. Krouse. Yet the troubling questions regarding Dr. Krouse go far beyond the recent disclosures and were well-known at the time of Mr. Barbee's trial.

D. Findings of Dr. William Anderson cast doubt on Dr. Krouse's autopsy conclusions and testimony.

The recent findings of Dr. William Anderson (Appendix 20) cast further doubt on Dr. Krouse's crucial trial testimony (Appendix 18) and the basis of that testimony, the autopsy he performed on Lisa Underwood. (Appendix 19). Dr. Anderson has had a long history as a pathologist, having graduated from the University of Miami School of Medicine in 1968 and did his residency training at the University of Rochester, Duke University, and the University of North Carolina School of Medicine.[56] As recounted in his resume, Dr. Anderson served as associate and chief medical examiner in North Carolina, California, Georgia and Florida and he has performed over 7000 autopsies and clinical patient examinations in medico-legal cases and has been involved in testimony in over 300 cases in the criminal and civil justice systems.[57]

Dr. Anderson examined the autopsy, the autopsy photos, and the trial transcript testimony of Dr. Krouse relating to the death of Lisa Underwood.[58] Most significantly, he found that "the relatively small amount of pulmonary edema suggests that death occurred relatively quickly, probably only [in] a few minutes...."[59] This

[56] Appendix 20, CV at 1.
[57] *Id.*, CV at 2.
[58] Appendix 20, findings at 1.
[59] *Id.* at 2.

casts doubt on the State's case that the death could not be accidental due to the allegedly long time it would take for death by asphyxiation to occur. Dr. Anderson also found that "the data from his [Krouse's] own autopsy does not appear to have been adequately considered in the determination of the time it would have taken for Ms. Underwood to die–even providing that asphyxiation was the mechanism of death."[60] This again undermines the testimony of Dr. Krouse and the State's use of that testimony to attack the defense theory.

There were additional faults with Dr. Krouse's testimony and autopsy. Dr. Anderson found that "[t]he extent and coloration of the hematoma formation suggests a significant time interval between the traumatic event and cessation of cardiac activity–i.e. the actual death—as much as 6-8 hours or more.[61] This suggests an unexplained interval that does not comport with the State's case. Dr. Anderson adds that the "fact that these injuries appear to have occurred at different times prior to the death of Ms. Underwood raises a serious issue as to the entire presumed theory as to the sequence of events leading to her death—which appears entirely predicated on the assumption that the injuries represented a single event." [62] Dr. Anderson found that regarding the blunt force injury and fracture, "no dissection was conducted to determine the age of this fracture and whether it was related temporally to her death."[63]

Also of significance, "[t]here is minimal evidence of blunt force injury to the neck with only 2 areas of soft tissue hemorrhage described as 1.0 cm in diameter and unspecified hemorrhage in the lower pole of the thyroid gland, strongly mitigating against a manual strangulation scenario."[64] Contrary to normal procedures, "[n]o internal photos were taken and no microscopic analysis of the tissues, essentially meaning that there is no documented evidence that connects that injury to her subsequent death."[65] Dr. Anderson also found that the peri-orbital hematoma (black eye) of the victim was not adequately explained.[66]

In summary, Dr. Anderson opined that many discrepancies were not addressed

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[60] *Id.* at 2.
[61] *Id.* at 1.
[62] *Id.* at 3.
[63] *Id.* at 1.
[64] *Id.* at 2.
[65] *Id.* at 2.
[66] *Id.* at 1.

by Dr. Krouse or the State. He concludes that "[i]t does appear, however, that the scientific forensic evidence casts significant doubt as to the theory upon which the case was developed and presented to the triers of fact during the judicial proceedings, including the testimony of Dr. Krouse—consequently requiring further evaluation."[67]

III. QUESTIONS AND ANSWERS FOR THE BOARD

This section is presented in question and answer format, in the belief that this will best assist the Board in clearly determining the grounds for the requested relief. It is not intended as a substitute for a live hearing, which would be the only adequate means of ascertaining the Board's actual questions and concerns. But as the Board apparently only rarely grants such hearings, Mr. Barbee can only guess at the questions and issues that will be of major concern. This section is therefore presented in the hope that it may help clarify the Board's task in determining the merits of this application.

What is the current status of Mr. Barbee's appeals?

As recounted above, a petition for writ of certiorari is currently pending in the United States Supreme Court and it will be submitted to the conference of September 27, 2021. Hence, this application is due prior to that date and prior to a decision on the petition. This application is mainly based on the claim that Mr. Barbee's Sixth Amendment rights were violated under *McCoy v. Louisiana* when his counsel conceded his guilt to the jury, against his express wishes.

Mr. Barbee is also preparing a state application based on recent revelations regarding Dr. Krouse which cast doubt on his testimony regarding the time it would take to strangle the victim Lisa Underwood. This was crucial testimony for the prosecution, as Dr. Krouse undermined the only theory presented to Mr. Barbee's jury: that the death of one victim was accidental. Additional applications are contemplated based on the fact that Mr. Barbee's current health conditions would render his execution under the current protocol cruel and unusual punishment, and his rights under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").

[67] *Id.* at 3.

Was Mr. Barbee's trial unfair?

Yes. His attorneys told the jury that Mr. Barbee was guilty despite his repeated insistence that he was innocent. Although Mr. Barbee entered a plea of "not guilty," his attorneys never presented his case for innocence, which is a violation of his constitutional rights under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

Compounding the violation of Mr. Barbee's constitutional rights at the guilt phase, his defense failed to present an abundance of mitigating evidence at the punishment phase, based on the premise that the presentation of mitigating evidence would contradict Barbee's protestations of innocence, which defense counsel had effectively shielded from the jury.

Were there additional factors rendering Mr. Barbee's trial unfair?

Yes. Compounding the violation of Mr. Barbee's constitutional rights at the guilt phase, his defense failed to present an abundance of mitigating evidence on the false premise that it would contradict Mr. Barbee's protestations of innocence—even though they never presented his evidence of innocence.

At the punishment phase of the trial, Barbee's attorneys did little to present his case for a life sentence. The defense called Nancy Cearly to show his involvement in church activities [25 RR 122-131]; Barbee's mother Jackie Barbee to provide brief family background [25 RR 134-150]; Mary Hackworth and Jennifer Cherry, Stephen's sister and niece, who both testified that they loved and supported him [25 RR 153-157]; Ashley Vandiver, who testified that they met at church and she had visited him in jail [25 RR 161-164]; Denise Morrison, who testified that she did not believe Stephen committed the murders [25 RR 168-175]; Christy McKemson, who testified that she was there to support Stephen [26 RR 98-99]; Jerry Jones, who testified that Stephen's family's health has been affected by his incarceration on death row [26 RR 101-102]; and David Derusha, a bailiff in the trial court, who testified that Barbee was well-behaved during the trial. [26 RR 105]. The testimony of these witnesses was very brief, only about 40 transcript pages, or perhaps half an hour.

Under Texas law, Barbee could be sentenced to death only if the jury unanimously found that he was likely to commit criminal acts of violence in the future. *See* TEX. CODE CRIM. PROC art. 37.071. Yet defense counsel asked none of the punishment phase witnesses, such as Ms. Hackworth, Ms. Cherry, Ms. Vandiver, and Ms. McKemson, to address the critical issue of future dangerousness. Most

simply testified that they were there to support Mr. Barbee.

Had Jackie Barbee been properly prepared and questioned, she could have offered detailed information regarding Stephen's reading comprehension problems and academic struggles in school [ROA.3818]; his grief at the early deaths of both his sister and brother [ROA.3818-19]; his service as a reserve police officer in the Blue Mound Police Department [ROA.3820]; his hard work at his businesses [ROA.3820-21]; a serious head injury, caused by Ron Dodd, just a few months prior to his arrest, [ROA.22]; his suicidal ideation in jail [*Id.*]; his history of severe migraine headaches, which were a factor in his false "confession" [*Id.*]; the motivation of Ron Dodd and Theresa to blame the murders on Stephen [ROA.3820-24]; and Stephen's lack of a history of violence. [*Id.*] Barbee's arrest-free record prior to his trial would have bolstered a strong argument that he was unlikely to commit criminal acts in the future.

Bobby Boyd, former Assistant Superintendent of the Azle Independent School District, and his wife Sallie Boyd could have both testified as to Barbee's good character and his low probability of committing future dangerous acts. [ROA.3845-47]. Mandy Carpenter, who had known Barbee for 21 years, also would have testified as to his nonviolent character, his generosity, lack of anger and low risk of committing future violent acts. [ROA.3849-50].

Jennifer Cherry, Stephen's niece, did testify briefly at the trial. [ROA.3852]. However she was asked for almost none of the information she could have provided. [ROA.3854]. She could have testified as to Stephen's non-violent nature and his ex-wife Theresa's physical aggressiveness; Theresa's embezzlement from Barbee's company [ROA.4541]; Theresa Barbee's romantic involvement with Ron Dodd and her statements that she wished Barbee was dead [ROA.4543]; and that Barbee ran the church children's program and put on puppet shows for the children. [ROA.4540]. Mr. Barbee's defense counsel failed to prepare Ms. Cherry to testify, beyond telling her to "follow [counsel's] lead." [ROA.4544]. She was not asked about her opinion of the likelihood of Stephen committing future acts of violence, but if asked, she would have said that the risk was low. [*Id.*]

Tina Church, an investigator, offered her services to Mr. Ray on a pro bono basis, yet he refused. [ROA.3858]. She thought the trial attorneys were more interested in having their client plead guilty than in investigating his innocence or mitigating evidence. [*Id.*] Ms. Church also discovered that Theresa Barbee had changed Barbee's company bonding policy to a life insurance policy for which she was the beneficiary. [ROA.3859].

Azle Baptist Church pastor Calvin Cearly did not testify at the trial. [ROA.3867]. If he had, he would have told the jurors about Barbee's being "very congenial, honest, caring of other, respectful of others and very friendly and outgoing....He was always a kind and loving person. Stephen always liked to make people laugh." [*Id.*]

Dr. Nancy Cearly, Calvin Cearly's wife, was the former co-pastor of the church Barbee attended. [ROA.4532]. She knew Stephen for 20 years. [ROA.4535]. Had she been asked to testify, she could have told Barbee's jury about his role as children's church leader [ROA.4532]; growing the program from about ten children to about 75 or 80 [*Id.*]; that he was easy-going, very friendly and likeable, polite and respectful [ROA.4533]; that she never knew Barbee to commit any acts of violence [*Id.*] and did not think he would be likely to commit these acts. [*Id.*]

Mike Cherry, Barbee's brother-in-law, could have testified to Stephen's non-violent nature and love of animals and children. [ROA.3871-72]. Mr. Cherry could have told the jury that Barbee was not likely to commit violent acts in the future. [ROA.4537].

Mr. Barbee's defense attorneys never contacted Sharon Colvin, co-pastor at the Azle Baptist Church [ROA.3874], who could have testified to Stephen's friendly, jovial and non-violent nature and would have said that he "probably wouldn't be" a future danger. [ROA.4546].

Mr. Barbee's defense attorneys failed to contact his best friend and former business partner, Tim Davis [ROA.3876-79], who could have discredited Theresa's testimony regarding Barbee's violence and told the jury about his low propensity for future dangerousness. [*Id.*]

Jerry Dowling, in addition to being able to substantiate Stephen's claim of actual innocence, would have testified to his family tragedies, including the deaths of Stephen's brother and sister, both at the age of 21, and Stephen's good character and work ethic. [ROA.3881-82]. Dowling could have told the jury about Ron Dodd's bad character and that "Stephen would not be a future threat to anyone in prison or in the free world." [*Id.*]

Mary Hackworth, Stephen's aunt, did testify at the trial, but she was not asked about his family adversities in the death of both of his siblings, and his good and generous character. [ROA.3884-85]. Ms. Hackworth would have told the jury that

Stephen was a hard worker, fond of animals, that he was "always a gentleman around women, and children loved him" and that he would not be likely to commit future violent acts. [ROA.3885].

Similarly, Christy Mackemson did testify briefly at the trial but was not asked about Stephen's positive rapport with children. [ROA.3888]. She also could have told the jurors that "I never saw Steve angry...I do not think that Steve would be a high risk of committing future acts of violence.." [*Id.*]

Melody (Tarwater) Novak did not testify at trial but would have been willing to testify about Stephen's good character and devastation at the death of his two siblings. [ROA.3890-91]. She could have told the jury that Stephen "loved children and children loved him....If [asked whether] Stephen would be a future danger to society my answer would have been no." [ROA.3891].

At the state court evidentiary hearing, defense mitigation expert Amanda Maxwell testified that she had discovered medical records showing that Stephen had suffered a series of head injuries, had attempted suicide, and had been diagnosed with bipolar disorder. [ROA.4497] (*See also* Appendix 6). Stephen's head injuries occurred when he was eight months old, 16 years old, and again at the ages of 18 and 36 or 37. [ROA.4498]. This last incident, shortly before his arrest on the capital murder charge, occurred when Ron Dodd, who was living with Barbee's ex-wife, dropped a 400-pound pipe on Barbee's head. [*Id.*] Ms. Maxwell testified that this injury could have been significant mitigating evidence at the punishment phase of the trial. [*Id.*]

Stephen also had a history of abusing drugs, specifically hydrocodone, as a result of severe migraines headaches he suffered in the aftermath of the last head injury. [*Id.*] Ms. Maxwell recommended to Mr. Barbee's attorneys prior to trial that Barbee undergo an MRI, a CAT scan, as well as a neuropsychological evaluation. [*Id.*] Yet trial counsel failed to follow through on these recommendations. [*Id.*] Maxwell also discovered, through her investigation, that Theresa Barbee had been embezzling money from Mr. Barbee's businesses. [ROA.4499]. Ms. Maxwell requested that defense counsel retain a neuropsychiatrist and a psychiatrist but Ray and Moore never responded to these requests. [ROA.4500]. Maxwell never heard from Ray after she submitted her mitigation report to him. [*Id.*]

Trial counsel failed to adequately prepare for trial the mitigation witnesses who did testify at Mr. Barbee's punishment phase, nor did they allow Amanda Maxwell,

the mitigation specialist they had retained, to prepare the witnesses. [ROA.4501]. The numerous documents gathered by Maxwell were not used at trial. [ROA.4503]. Other mitigating factors, such as 1) Barbee's wife pressuring him to recover money from his ex-wife; 2) discovering, just days before his arrest, that his father had terminal cancer; 3) fetal alcohol exposure; 4) multiple suicide attempts; 5) injuries sustained in a car wreck when he was 16; 6) business and financial pressures Barbee was experiencing around the time of the crime; and 7) the head injury Mr. Barbee suffered when Mr. Dodd dropped a 400-pound pipe on his head, shortly before his arrest, were not presented to the jury or developed in the investigation. [ROA.4503-04, 4506].

Documentary evidence that Maxwell gathered through her investigation would have substantiated these mitigating factors and, taken together with the testimony of numerous witnesses, many of whom trial counsel failed to contact, likely would have convinced at least one juror to vote for a sentence less than death.

Mr. Barbee's jury never heard the persuasive mitigating evidence that this Board now has before it—testimony that trial counsel could and should have presented at Mr. Barbee's trial, in making the case to his jury to spare his life. The jury that sentenced Mr. Barbee to death heard a punishment phase case that was, in Ms. Maxwell's estimation, "not effective. Dismal. It was not the information that, had I been allowed to prepare the witnesses, would have come forward." [ROA.4501].

What about Mr. Barbee's appeal?

As shown *supra* (page 10), Mr. Barbee's appeal was superficial and failed to raise the issue of his denial of his right to assert his innocence. Of the nine claims raised, four had to do with the failure to suppress his coerced confession, and others dealt with the legal or factual insufficiency of the evidence.

Were Mr. Barbee's state habeas proceedings fair?

No, not in light of *McCoy v. Louisiana*. Mr. Barbee should not be executed on the basis of findings and conclusions of the State habeas court that a decision of the United States Supreme Court has now invalidated. The significance of the new holding of *McCoy* is that it has rendered erroneous the findings and conclusions previously used to deny Mr. Barbee's claim. The vast majority of the fact-findings and legal conclusions in Mr. Barbee's initial application are no longer valid. This should be a concern for the Board and one of the prime reasons why clemency is appropriate here.

The state habeas court adopted verbatim the prosecutor's proposed findings of fact and conclusions of law (3 CR 533-564; ROA.3757-3788) and denied relief on all of Mr. Barbee's claims. (3 CR 567-568; ROA.3791-3792). On January 14, 2009, the Texas Court of Criminal Appeals adopted the state habeas 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). However, virtually all of these findings and conclusions, which were the basis of the denial, have now been rendered erroneous in light of *McCoy*.

The relevant erroneous state findings of fact were the following:

> No. 46. During closing argument, Mr. Ray argued the defense theory of accidence rather than a pure innocence defense. *See* Reporter's Record XXV:14-18.
>
> No. 47 Mr. Ray decided to use the accident theory because, in his professional opinion, the applicant's favored 'Ron Dodd did it' theory would not work. *See* Mr. Ray and Mr. Moore's Affidavit, page 4.
>
> ...
>
> No. 49. Mr. Ray believed that this theory ["Ron Dodd did it"] was unworkable because Dodd had no motivation to kill two people with whom he had no association and because it did not take into account the applicant's confessions. *See* Mr. Ray and Mr. Moore's Affidavit, page 4.
>
> (3 CR 539-540; ROA.3763-3764).

These findings are erroneous because defense counsel were not at liberty to argue "accidence" in light of Mr. Barbee's plea of "not guilty," and they were not entitled to substitute their "professional opinion" that presentation of Mr. Barbee's innocence "would not work" or "was unworkable." *McCoy*, 138 S. Ct. 1508-1509.

For the same reason, Findings Nos. 50 and 51 are also now rendered erroneous. (3 CR 540; ROA.3764). Those findings hold that the "Ron Dodd did it" theory would not have worked and that consequently it was reasonable strategy under *Strickland* for Barbee's attorneys to fail to pursue or present it. But *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.

The same flawed rationale appeared in additional findings:

> No. 54. Mr. Ray's decision to focus his closing argument on the defensive theory of accident rather than the 'Ron Dodd did it' theory was reasonable in light of the evidence admitted at trial.
>
> No. 55. Mr. Ray and Mr. Moore provided the applicant with adequate counsel regarding closing arguments.
> (3 CR 541; ROA.3765).

These are also erroneous because they use the *Strickland* standard of "reasonableness" instead of *McCoy*'s focus on the defendant's Sixth Amendment right to have his innocence presented, even if counsel believes it will not prevail.

The state habeas court's conclusions of law are also incorrect, as they naturally flowed from the flawed conclusions of fact.

> No. 16. Counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage.
> (3 CR 553; ROA.3777).

This is erroneous because *McCoy* explicitly held that while defense counsel has the role and duty of making "strategic choices about how to best achieve a client's objectives," the client has the autonomy to decide what those "objectives . . . *are*." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (emphasis in original).

Additional conclusions of law are now rendered erroneous in light of *McCoy*:

> No. 18. It is not objectively unreasonable for counsel to determine that it would be a more effective approach to focus the jury on a relatively narrow defense, rather than to use a 'shotgun' approach by arguing every defense available...
>
> No. 19. Judicial review of a defense attorney's summation is therefore highly deferential. *Yarborough v. Gentry,* 540 U.S. 1 at 6 (2003)...

> No. 20. Mr. Ray's decision to focus his closing argument on the defensive theory of accident was reasonable in light of the evidence admitted at trial.
>
> No. 21. Mr Ray and Mr. Moore provided the applicant with adequate counsel regarding closing arguments.
> (3 CR 553; ROA.3777).

Thus, the state court holding was essentially that Mr. Ray's "defensive theory of accident was reasonable" because he focused on "accidental death" rather than innocence. But *McCoy* held that this was not counsel's decision to make and in so doing, Stephen's counsel unconstitutionally infringed on his client autonomy.

The Board should not condone the execution of a man who was denied a chance to present his innocence and whose conviction is based on erroneous findings of fact and conclusions of law.

Did Mr. Barbee receive a fair hearing in federal court?

Because *McCoy*, handed down in 2018, was not "clearly established federal law" at the time Mr. Barbee originally filed his first state habeas application and at the time it was adjudicated, the federal courts were unable to consider *McCoy* in adjudicating his federal proceedings.

Additionally, as discussed in the previous section, the state habeas court's errors carried over to the federal district court's holdings in federal habeas. There, the claim was similarly analyzed and denied under the improper *Strickland* standard (ROA.3024); the courts held that counsel's decision to argue for a lesser degree of guilt was reasonable (ROA.3025) and that Mr. Barbee had to show prejudice to prevail. (ROA.3027). All of these holdings are no longer valid in light of *McCoy*.

Under basic Fifth and Fourteenth Amendment due process provisions, Mr. Barbee should not be executed on the basis of findings and conclusions that are no longer valid. Clemency presents the Board with an opportunity to right these wrongs.

What are the factors about Mr. Barbee's case that distinguishes it from other cases where clemency has been denied?

Mr. Barbee's attorneys completely failed to present his case for innocence and his state habeas attorney was both ineffective and incompetent. Stephen's evidence of innocence has been ignored by the courts to date and the State court denied his original state habeas petition on the basis of flawed and incorrect findings and conclusions. Stephen has never had his "day in court."

What were some items of evidence that the jury never heard at his trial?

The jury that convicted Mr. Barbee and sentenced him to death never heard important evidence that the person responsible for the murders was Ron Dodd, a man who had much to gain by framing Mr. Barbee for the crime. Mr. Barbee maintained that Mr. Dodd, his business associate and partner of his ex-wife, Theresa Barbee, killed Lisa and Jayden Underwood. Mitigation specialist Amanda Maxwell uncovered evidence to support this theory, including that Theresa Barbee, who was then living with Dodd, "was caught embezzling funds from company accounts," and "had long been trying to get majority control of [Mr. Barbee's] businesses[.]" (Maxwell Affidavit at 4, 3 CR 573; ROA.3797; Appendix 6). Further, Theresa Barbee "lied about DNA evidence and coerced Stephen into signing over his interest in the businesses . . . . As she was now sole owner of two multi-million dollar companies, she agreed to keep money on Stephen's jail accounts. She never followed through on this agreement." *Id.* Finally, Theresa "had stopped payment on the loan she owed to Stephen's mother." *Id.* Mr. Ray testified in post-conviction hearings that Dodd lived with Theresa in a house "nicer than the one I live in," "the biggest house in the neighbor[hood]." State Habeas RR Vol. 3 at 97, ROA.4677 (Appendix 9); *see also* State Habeas RR Vol. 3 at 98-99, ROA.4678 (Appendix 9) ("I think [Dodd] had a lot more to do with this than came out. . . . I think Rod Dodd is right in the middle of it."). This evidence could have raised the possibility of Dodd's responsibility for the deaths, bolstering Stephen's innocence claim and potentially raising reasonable doubt about his guilt.

The Fifth Circuit summarized this evidence as follows:

> Barbee claims that he *has adduced significant evidence in support of this theory (that Mr. Dodd committed the murders*), namely: (1) the

affidavit of Dowling (Barbee's ex-wife)'s father, who said '[m]y son Danny Dowling told me that Ron Dodd had told him right after the murders that he had to punch Lisa in the face 25-26 times before 'the fucking bitch would go down,' and a declaration from a post-conviction investigator stating that "both Jerry Dowling and his son Danny Dowling had said that Ron Dodd said he had to punch Lisa Underwood 25–26 [times] in the face before the 'fucking bitch would go down' "; (2) Dowling's statement to the investigator that she washed Dodd's clothes on the night of the murders and Dodd's statement to the investigator that he had his vehicle power-washed shortly thereafter; (3) a statement from Barbee's niece that Dowling, who was living with Dodd, often told her "how much she hated him [Barbee] and wanted him 'gone' "; (4) evidence of Dowling and Dodd's financial motive to frame Barbee for murder; (5) evidence of "financial misdeeds" by Dowling that would have provided additional motive for Dodd to have framed Barbee; (6) Dodd's history of criminal violence; (7) evidence that Barbee would avoid physical confrontations; and (8) evidence that points to the falsity of Barbee's confession.

Barbee v. Davis, 728 F. App'x at 269 (emphasis added).

Since the trial, how has Mr. Barbee lived on death row?

Mr. Barbee has not committed a single act of violence since his incarceration on death row, contrary to the finding of his jury at trial. Since then, he has lived in almost constant pain. His health is bad, Stephen's physical condition has been deteriorating, and he has been in almost constant pain for the past several years. He is now confined to a wheelchair and has very limited ambulatory ability. Contrary to the conclusion of his jury in 2006, Stephen is not a danger to commit future dangerous acts.

In 2013, undersigned counsel wrote to the Polunsky Unit authorities about Stephen's deteriorating medical condition:

> I had the opportunity to visit with Mr. Barbee this week. In the aftermath of his hip replacement surgery, he continues to suffer severe leg and arm problems. He uses a walker to get around and sometimes has to attend visits in a wheelchair. Since his evidentiary hearing in state court one year ago this month, his condition has worsened appreciably.

For that hearing, he was confined to a wheelchair for the entire two days of the hearing.

Much of Mr. Barbee's condition stems from a severe head injury which occurred only shortly before his arrest in which a heavy beam weighing several hundred pounds landed on his head. Since he has been at the Polunsky Unit, he has had extensive treatment for this injury, for which both Mr. Barbee and I are very appreciative. The pain extends to his back and shoulder and neck. His nerve damage in his left arm continues to cause severe pain both night and day. It also extends to his leg when he sits down and tries to straighten it out. He will soon not be able to perform basic self-hygiene if the other arm goes as well. There is a burning sensation in both arms and neck. The current condition is so severe that he continues to be unable to sleep most nights. The cause is likely a pinched nerve or nerves.

Since Mr. Barbee has been at the Polunsky Unit, he has received a hip replacement and, I believe, three MRIs in seven years and another is in process, for a total of four. Although neither I nor Mr. Barbee are trained in the medical field, we feel that what is needed now is neck surgery, due to the progressive nature of the pain and ailments. The pain, especially the arm pain, remains and seems to be getting worse. The necessary procedures to finish his treatment and deal with the likely pinched nerves in his neck would, in all likelihood, be much less extensive and costly than the hip replacement and additional MRIs. He is afraid of being rendered helpless if these problems intensify.

I am respectfully requesting that your medical personnel look into Mr. Barbee's condition, and his current severe pain and consider ordering neck surgery, if it is determined that this is the source of his current problems.

By September of 2015, Mr. Barbee's medical condition had worsened, and undersigned counsel sent another letter to the prison authorities:

I am writing about Mr. Barbee's hip surgery, which was originally scheduled for August 10, 2015 but has now apparently been moved to February, 2016, and that is just an appointment.

Mr. Barbee is currently confined to a wheelchair and, in the aftermath of his initial hip replacement surgery, he continues to suffer pain, and severe leg and arm problems. At the Polunsky Unit, he also uses either a walker or a wheelchair to get around and sometimes has to attend visits in a wheelchair. He is currently unable for care for his basic functions and self-hygiene unaided.

He is in excruciating pain whenever he moves his left leg. He has two hernias in his groin area and cannot spread is legs more than 14-15 inches and cannot raise his feet off the ground more than 6 inches. Although he had treatment for the hernia it is apparently recurring. There is also significant neck pain and pain in the lower right side of his head that is also causing significant pain. His right arm has lost more range of motion.

The pain associated with his multiple conditions has become literally unbearable. It has worsened considerably since my last letter to the Polunsky Unit Warden in late April. As I mentioned then, much of Mr. Barbee's condition stems from a severe head injury which occurred only shortly before his arrest in which a heavy beam weighing several hundred pounds landed on his head. Since he has been at the Polunsky Unit, pain medication has been available only sporadically. This continues to be the case. He is prescribed two Nortripylene capsules 75 mg daily and two non-aspirin 325 mg twice daily, but apparently that medication is not effective. He formerly received Naproxin 500 mg which was at least better then the non-aspirin.

The pain extends to his back and shoulder and neck. His nerve damage in his left arm continues to cause severe pain both night and day. It also extends to his leg when he sits down and tries to straighten it out. There is a burning sensation in both arms and neck. The current condition is so severe that he continues to be unable to sleep most nights. He is unable to cut his own toenails and to extend his arms to properly clean himself. Medical staff have stated they would give him a cortizone shot for his hip, which is bone on bone, but they have still not complied. Mr. Barbee was taken to Galveston Medical Branch but upon his return to the Unit the medical orders from Galveston are ignored.

> I am respectfully requesting that your medical personnel look into Mr. Barbee's condition, and attempt to schedule his surgery at an earlier date.

And in March of 2019, undersigned counsel again wrote to the Polunsky Unit authorities to describe Mr. Barbee's continued and worsening medical problems:

> Mr. Barbee is currently in dire physical condition which continues to deteriorate rapidly. I have written to you in the past about some of these conditions, and I very much appreciate your prompt responses. However, right now, I am fearful that Mr. Barbee's life may be in jeopardy. He cannot extend his arms to clean himself after using the bathroom. He has asked for assistance from his medical provider and was told "no one is going to wait around for you to go to the bathroom and wipe your ass." As a result, Mr. Barbee has written to me and his mother and said that he is not on a hunger strike but is not eating to avoid having a bowel movement. Because of his not being able to clean himself he is in pain and humiliated because of the smell. He has lost 32 pounds. I have been told that a "grabber" has been ordered for him to help him with this situation, but apparently it has not yet been given to him.
>
> Additionally, Mr. Barbee continues to be denied transportation for medical treatment due to the cuffing policy. He is not able to extend his arms to be cuffed per prison policy, so medical appointments are being made at UTMB but being classified as "refuses to go" when in reality he cannot be cuffed.
>
> I am requesting that Mr. Barbee receive prompt medical attention for these disabilities which are getting more dire and serious by the day, especially his inability to clean himself after bowel movements. His present condition is unbearable to him and is causing much grief for his mother and loved ones.

Undersigned counsel's latest visit to Mr. Barbee occurred in June of 2019, before visits were stopped because of Covid, and he continued to be confined to a wheelchair, in constant pain, and unable to perform basic hygiene functions. His physical condition continues to deteriorate.

These conditions are severe, long-lasting and of increasing severity.

Hasn't this case already had a thorough review by many courts?

The case has been reviewed by the trial court, the Texas Court of Criminal Appeals, a federal district court and the Fifth Circuit, and the United States Supreme Court. However, Mr. Barbee's appeal was perfunctory and the federal courts were unable to apply the recent *McCoy* case due to federal procedural hurdles. Recent revelations have cast doubt on the State's theory of the case.

Are there any public policy reasons why Stephen Barbee should not be executed?

Yes. Defendants who plead "not guilty" should be afforded their Sixth Amendment and due process right to have their evidence of innocence presented to the jury. Even a drunk driving charge would merit more due process than Mr. Barbee was afforded in his capital murder trial.

The salient fact is that Mr. Barbee has never had to opportunity to present evidence of his innocence to a jury. This is an obvious and blatant denial of his Sixth Amendment and due process rights. It is contrary to public policy and basic human rights for the State of Texas to execute an inmate who was denied his basic constitutional right to a fair trial.

What is new to this case since the previous clemency application in 2019?

Recent revelations as to a key State's witness, Dr. Marc Krouse, have surfaced only recently. As recounted above, Dr. Krouse's testimony in countering the only defense theory offered to Mr. Barbee's jury: that one of the murders was accidental. Although Mr. Barbee never authorized this statement, it was the only defense he was given at the guilt phase of his trial.

Dr. Krouse told the jury that it would have taken a long time to asphyxiate or strangle the victim, which the prosecution used to discredit the defense theory. Now, Dr. Krouse has been revealed to have made errors in virtually all of his recent homicide cases, investigation has shown that his competency was questioned well before Mr. Barbee's trial. At the very least, a reprieve is warranted to further investigate these recent revelations.

Why is the testimony of Dr. Krouse in question?

The revelations of his incompetence both before and after Mr. Barbee's trial are discussed *supra*. The findings of Dr. William Anderson further discredit Dr. Krouse's testimony and the State's theory of the case.

Has Mr. Barbee's health changed since the last application in 2019?

Yes, it continues to deteriorate. He is in a wheelchair, has serious arm immobility issues, and has had two hip replacements and many other serious ailments.

What is Mr. Barbee requesting in this clemency application?

He is asking for a commutation of his sentence or a reprieve.

Why should this Board overturn the opinions of the courts that have reviewed this case, and overrule the jury's verdict?

This is, in essence, the crucial question for this Board to consider. The reasons are set forth in detail, *supra.* In short, his trial was not fair; his attorneys disregarded his "not guilty" plea; there was substantial evidence of innocence not presented at the guilt phase and substantial mitigating evidence not presented at the penalty phase; significant new evidence regarding Dr. Krouse's incompetence has only recently been disclosed; and the basis of the state courts' denial of his original petition was incorrect.

CONCLUSION

The Board in this case has an opportunity to right a wrong and prevent a tragic miscarriage of justice. Execution, the most extreme and permanent of punishments, simply does not fit the circumstances of this defendant. If the clemency power, as described by Alexander Hamilton, is required "by considerations of justice, of humanity and of public policy," this case presents an opportunity for its exercise. Justice would right the wrong of his execution based on junk science, unreliable testimony, and perjury. These factors give reasons to choose life over death.

WHEREFORE, for the reasons stated herein, and in the appendices submitted herewith, Stephen Dale Barbee convicted in Tarrant County and ordered to be executed on October 12, 2021, by and through his undersigned counsel, respectfully requests that the Texas Board of Pardons and Paroles recommend to the Honorable Greg Abbott, Governor of the State of Texas, that he commute his sentence of death to a lesser penalty, pursuant to Texas Const., Art. IV, sec. 11 and Texas Administrative Code §§ 143.51 and 143.57, *et. seq.* In the alternative, Mr.Barbee asks the Board to recommend to the Governor that he grant a reprieve of his execution for a period of **120 days** so that the Board may fully investigate and consider the facts of his case and wrongful sentence of death and the merits of this Application.

Dated: September 16, 2021.

Respectfully submitted,

s/s A. Richard Ellis

_____

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