IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
AND
THE 213TH JUDICIAL DISTRICT COURT
OF TARRANT COUNTY, TEXAS

EX PARTE	§	**Texas Court of Criminal Appeals**
STEPHEN DALE BARBEE,	§	**Cause No. WR-71,071-04**
	§	
Applicant.	§	**213th Judicial District Court of**
	§	**Tarrant County**
	§	**(Trial Court Cause No. 1004856R)**
	§	**(Execution Scheduled Oct. 12, 2021)**

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
(Article 11.071 sec. 5(a) of the Texas Code of Criminal Procedure)

THIS IS A DEATH PENALTY CASE

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Applicant Stephen Dale Barbee is currently confined on death row in the Polunsky Unit of the Texas Department of Criminal Justice, Livingston, Texas, in the custody of that entity, in violation of the Constitution and laws of the State of Texas and the United States. Mr. Barbee files this subsequent application for a petition for writ of habeas corpus, pursuant to TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a), in order to reverse his capital murder conviction and sentence of death and secure his release from confinement. His execution is currently scheduled for October 12, 2021.

In support thereof, Mr. Barbee would show the following:

I.

PROCEDURAL HISTORY

A. Introduction.

Stephen Barbee, a 38-year old successful business owner with absolutely no prior criminal record, was arrested and charged with the murder of Lisa Underwood, his ex-girlfriend, and her son Jayden, on February 19, 2005. The State alleged that Mr. Barbee killed Ms. Underwood because he thought that Underwood, who was pregnant at the time, would tell Barbee's wife that Barbee was the father of her unborn child, and that he would be liable for child support. Mr. Barbee initially told the police that he had caused the deaths, but that they were accidental and not premeditated.[1] He immediately recanted this false confession, which was the product of fear and coercion, and has maintained his innocence ever since.[2] Yet Mr. Barbee's trial attorneys failed to take any reasonable steps to establish his innocence or

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[1] Barbee has admitted helping his co-defendant and employee Ron Dodd conceal the bodies. At the time of the murders, Dodd was living with Barbee's ex-wife, Theresa, in Barbee's spacious former home, and all three worked at two businesses owned by Barbee, involving tree-trimming and concrete-cutting. (*See* Barbee's declaration at 3 CR 604-618; ROA.3829-3843).

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

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

investigate the possibility that his co-worker and co-defendant Ron Dodd actually committed the murders, as Barbee has long maintained.[3]

The trial itself was a perfunctory two-and-a-half-day affair, uncommonly brief for a capital case. The defense presentation at the guilt phase totaled about three transcript pages. (24 RR 176-179). In final argument, Mr. Barbee's attorneys, against his express wishes, told the jury he was guilty but the death of one victim was accidental because he held her down too long. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Barbee had repeatedly told his counsel that he wanted to maintain his innocence, and his attorneys' concession came as a complete surprise.

The first claim presented herein relates to recently-disclosed evidence that calls into question the critical testimony of the coroner at Mr. Barbee's trial. The only defense argument the jury heard was this unauthorized concession of guilt by defense counsel.[4] The coroner who testified at Mr. Barbee's trial, Dr. Marc Krouse, disputed the defense theory of accidental death and this testimony was critical to Mr. Barbee's conviction. Dr. Krouse testified that five to seven minutes of 100 to 300 or 400

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

[4] After presenting no defense at the guilt/innocence phase, Mr. Barbee's lead counsel told the jury in argument that "as hard as it is to say, the evidence from the courtroom shows that Stephen Barbee killed Jayden Underwood. There is no evidence to the contrary." 25 RR 14. Ray continued a disjointed presentation by arguing that the killing of Lisa Underwood was accidental. 25 RR 14-18. In closing, he told the jury that the evidence "does not support an intentional or knowing murder for Lisa Underwood. Was he there? Yes. Did he hold her down? Yes." 25 RR 18.

pound force was needed to have caused the type of soft tissue injury on Lisa Underwood (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 focused on Dr. Krouse's testimony at final argument to counter the accident theory and argued that such an allegedly long period of time showed that it could not be an accidental death. 25 RR 22.

"Accidence" was the only theory of innocence presented to Mr. Barbee's jury and it was disputed by Dr. Krouse. Yet recent disclosures, revealed only earlier this year, have called Dr. Krouse's reliability and competence into question, both well before Mr. Barbee's trial and after, as detailed herein. Had the jury seen this evidence, which the State had an obligation to disclose, it would have materially called Dr. Krouse's testimony and credibility into question. Additionally, a recent review of the autopsy and Dr. Krouse's testimony by a well-known pathologist, Dr. William Anderson, has identified many errors, flaws and omissions in Dr. Krouse's conclusions as to Lisa Underwood's death and his trial testimony based on those conclusions. Mr. Barbee should at least be granted a stay of execution while given an opportunity to further investigate this issue implicating his claim of innocence.

Also presented herein as the second claim is well-documented evidence of Mr. Barbee's severe lack of range of motion in both arms and his inability to straighten

his arms and lie on the gurney palms-up, per the normal procedure. Forcing him to do so would amount to torture. Despite being well aware of Mr. Barbee's condition and physical limitations for many years, the Texas Department of Criminal Justice has refused to disclose whether they have made any accommodations or modifications to the execution protocol in order to prevent the infliction of cruel and unusual pain and suffering on Mr. Barbee in violation of the Eighth Amendment.

B. Procedural History.

Applicant 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).[5] On December 10, 2008, this Court affirmed Barbee's conviction and sentence of death on appeal. *Barbee v. State,* No. AP-75,359, 2008 WL 5160202 (Tex. Crim. App. Dec. 10, 2008) (not designated for publication). Barbee filed his initial state habeas application on March 13, 2008. (2 CR 399-429; ROA.3620-3650). The state habeas judge, who did not preside at Barbee's trial, refused his request for 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 on all of Mr.

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

Barbee's claims. (3 CR 567-568; ROA.3791-3792). On January 14, 2009, this Court 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, Barbee filed his petition for writ of habeas corpus (ROA.115-462) in the federal district court for the Northern District of Texas, Fort Worth Division, along with accompanying exhibits. (ROA.463-1109). On May 18, 2011, that Court granted Barbee's motion for a stay and held the case in abeyance in order to allow him to exhaust his claims in state court. (ROA.1532-39).

Mr. Barbee then filed a subsequent state habeas application (1 CR 2-279; ROA.3194-3497) in the trial court and this Court. On September 14, 2011, this Court issued an order finding that a conflict-of-interest claim 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 Barbee's trial judge and his lead trial attorney Bill Ray, both of Fort Worth, had a secret deal between them involving the preferential assignment of many cases to Mr. Ray in

return for his speedy disposition of those cases.[6]

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. This Court 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 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 on October 2, 2013. (ROA.1579-2486). On July 7, 2015, the district court entered a final memorandum opinion and order denying relief on all claims and denying a certificate of appealability ("COA"). *Barbee v. Stephens,* No. 4:09-cv-074-Y, 2015 WL 4094055 (N.D. Tex. July 7, 2015). A motion to alter or amend judgment was subsequently denied by the district court. *Barbee v. Stephens,* 2015 WL 5123356 (N.D. Tex. Sept. 1, 2015).[7]

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[6] Although not directly in issue here, that claim and the evidence supporting it explained Barbee's trial counsels' failure to present either evidence of innocence or much in terms of mitigation, which resulted in a very short two-and-a-half-day capital trial. In federal court and in the state evidentiary hearing, Barbee argued that the same pattern of preferential assignment of cases in return for their speedy disposition also existed in this case, not just in the probation revocation cases.

[7] That motion did not involve the claim presented herein.

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

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

Mr. Barbee filed a petition for writ of *certiorari* in the United States Supreme Court 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.

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[8] Prior to *McCoy*, 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.

Chris Wolfe, signed an "Order Setting Execution Date" of October 2, 2019 for Mr. Barbee.

Mr. Barbee filed a subsequent Art. 11.071 application in this Court and the trial court on a *McCoy* claim based on the client's Sixth Amendment autonomy rights, not on ineffective assistance of counsel, which was the basis of the prior similar claim. On September 23, 2019 this Court issued an order staying Mr. Barbee's scheduled execution. *Ex parte Barbee*, 2019 WL 4621237 (Tex. Crim. App. Sept. 23, 2019). In that order, this Court requested further briefing. On February 10, 2021, this Court issued an opinion denying Mr. Barbee's application. *Ex Parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021).

On March 30, 2021, the State moved to set an execution date for Mr. Barbee, although he had not yet filed his petition for certiorari. 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, the trial court signed an "Order Setting Execution Date" of October 12, 2021 for Mr. Barbee.[9]

On July 10, 2021, Mr. Barbee timely filed a petition for writ of certiorari in the

[9] Copies of the "Order Setting Execution Date" and the Death Warrant are included herein as Appendix 2.

United States Supreme Court. *Barbee v. Texas*, No. 21-5093. The State filed their Brief in Opposition on August 4, 2021 and 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.

Upon the setting of an execution date, undersigned counsel again motioned the trial court to be appointed as counsel for Mr. Barbee on July 20, 2021. No ruling has been made on that motion. On August 24, 2021 Mr. Barbee through undersigned counsel submitted an unopposed second renewed motion for appointment of counsel, based mainly on the recent holding of the Fifth Circuit in *Storey v. Lumpkin,* 8 F.4th 382 (5th Cir. 2021) on August 6, 2021, which held that undersigned counsel's current federal appointment cannot cover state subsequent proceedings. No ruling has yet been made on either motion. On September 9, 2021 Mr. Barbee filed a motion to withdraw the death warrant and the order setting an execution date based on defects in the warrant. No ruling has been made on that motion either as Mr. Barbee's execution date approaches.

On September 21, 2021, Mr. Barbee filed a civil complaint under 42 U.S.C. § 1983, alleging that the State of Texas intends to execute him in a manner that unconstitutionally burdens his religious exercise under the First Amendment to the United States Constitution as well as the Religious Land Use and Institutionalized

Persons Act of 2000. *Barbee v. Collier, et. al*, No. 4:21-cv-03077 (SD TX).

C. Note Regarding Timeliness.

This subsequent application is being presented as soon as feasibly possible. The trial court set the execution date on July 6, 2021, barely more than the required minimum 91 days prior to the execution date. The revelations regarding Dr. Krouse's recent incompetence and botched autopsies were revealed only in March and April of this year. Further investigation of Dr. Krouse's past performance, prior and close to the date of Mr. Barbee's trial, were then initiated as a result of those recent disclosures. Additionally, Mr. Barbee has been without appointed counsel since early 2019, except for clemency proceedings. He has submitted three requests for counsel, the latest of which is unopposed and still pending in the trial court. The lack of appointed counsel, which would entail funding for investigation, experts, and document collection has severely hampered the presentation of these issues, especially in the very short time since an execution date was set.

As to the second claim, Mr. Barbee has sought information about the plans for his execution, whether he will be forced to lie on the gurney with arms straight and palms up, which would amount to torture, yet TDCJ has refused to supply any information as to the conditions and plans for his execution. Hence, given the tardy revelation of the facts regarding Dr. Krouse, the stonewalling by TDCJ, and the

denial of appointed counsel and investigative and expert resources by the state court, this application is being presented as soon as feasibly possible.

II.

ILLEGAL CONFINEMENT AND RESTRAINT

Mr. Barbee is currently being illegally confined and restrained of his liberty by the State of Texas on death row in the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division, in Livingston, Texas. *See* Article 11.14, TEX. CODE CRIM. PROC.

III.

SUMMARY OF CLAIMS PRESENTED

Mr. Barbee presents two claims herein. The first is a claim under *Brady v. Maryland*, 373 U.S. 83 (1963) regarding the recent revelations about the trial coroner, Dr. Marc Krouse. His testimony was crucial for the State in discrediting the defense's only theory that the death of one of the victims was accidental. The disclosures by the State, which were revealed only a few months ago, reveal errors and omissions in virtually all his recent autopsies, which led to his firing. Recent investigation has shown that Dr. Krouse's incompetence goes back to well prior to Mr. Barbee's trial. Mr. Barbee should at least be granted a stay of execution while given an opportunity

to further investigate this issue implicating his claim of innocence.

The second claim is brought under the Eighth Amendment and presents well-documented evidence of Mr. Barbee's severe lack of range of motion in both arms and his inability to straighten his arms and lie on the gurney palms-up. Forcing him to be executed in the normal manner would amount to torture as he cannot straighten his arms. Despite their knowledge of these disabilities, the Texas Department of Criminal Justice has refused to disclose whether they have made any accommodations or modifications to the execution protocol.

IV.

APPLICANT'S CLAIMS MEET THE REQUIREMENTS FOR A SUBSEQUENT APPLICATION UNDER TEX. CODE CRIM. PRO. ART. 11.071 Sec. 5

A. Mr. Barbee's Claims Meet the Subsequent Writ Requirements.

Mr. Barbee shows herein that he meets the requirements for a subsequent writ application under TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a)(1), a well-established exception to the bar on subsequent applications. Art. 11.071 sec. 5(a)(1) reads as follows:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application

contains sufficient specific facts establishing that:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application...
> (TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a).)

Mr. Barbee meets the requirements for consideration on the merits of a subsequent writ application under this section because the factual bases of both claims presented have not and could not have been presented in a previous, timely-filed initial habeas application. The facts relating to Dr. Krouse were only revealed earlier this year, well after Mr. Barbee filed his initial state habeas application. Similarly, the Eighth Amendment claim could not have been presented earlier as the execution date was set on July 6, 2021 and since then TDCJ has not responded to Mr. Barbee's inquiries as to any plans for the modification of the execution protocol that will not subject him to torture.

The legal basis of the *Brady* claim was also unavailable when Mr. Barbee's initial application was filed in 2008 and adjudicated in 2009, *Ex parte Barbee,* No. WR-71,070-01 (Tex. Crim. App. Jan. 14, 2009) as it is partly based on *Ex parte Chabot,* 300 S.W.3d 768, 772 (Tex. Crim. App. 2009), which held for the first time that it is a constitutional violation for the State to base a conviction or sentence on

false testimony, whether or not the State knew it was false. This claim involves Mr. Barbee's federal constitutional rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, and corresponding state constitutional rights, under *Brady*, *Giglio v. United States*, 405 U.S. 150, 154 (1972), and *Napue v. Illinois,* 360 U.S. 264 (1959). The claim deals with the State's presentation of false evidence and non-disclosure of material impeachment evidence of a crucial State's witness.

It is well-established in this Court's line of cases that it can be a due process violation for the State to base a conviction or sentence on false testimony, whether or not the State knew it was false. *Ex parte Chabot,* 300 S.W.3d 768, 772 (Tex. Crim. App. 2009); *Ex parte Chavez,* 371 S.W.3d 200, 204-206 (Tex. Crim. App. 2012); *Ex parte Robbins,* 360 S.W.3d 446 (Tex. Crim. App. 2011); *Ex parte Gharremani,* 332 S.W.3d 470, 477-478 (Tex. Crim. App. 2011); *Ex parte Henderson,* No. AP-76,925 (Tex. Crim. App. Dec. 5, 2012).

It is also well-established that any procedural default or failure to bring a claim or present evidence earlier is excused if that failure is a result of the State's failure to produce or concealment of that evidence. As to the first claim, evidence of Dr. Krouse's incompetence and multiple errors was first revealed in March and April of this year. As to the second claim, TDCJ has not, even at this late date, revealed whether or not they will subject Mr. Barbee to cruel and unusual punishment akin to

torture.

In the federal context, many cases have held that prosecutorial or state suppression of evidence, such as occurred and is occurring here, can establish "cause" for any procedural default even under the strict standards of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See, e.g., Strickler v. Greene*, 527 U.S. 263, 282, 289 (1999) (petitioner established "cause" for procedural defaults of failing to raise prosecutorial-suppression-of-evidence claim at trial and in state postconviction proceedings because prosecution withheld exculpatory evidence; such conduct "imped[ed] access to the factual basis for making a *Brady* claim...which is precisely the kind of] factor[] that ordinarily [and in this case] establish[es] the existence of cause for a procedural default"); *Dobbs v. Zant,* 506 U.S. 37, 359 (1993) (per curiam) (petitioner permitted to reopen proceedings and assert new claim based on transcript not previously discovered because delay in discovering it was primarily due to State's erroneous assertions it was not transcribed); *Amedeo v. Zant*, 486 U.S. 214 (1988) (cause is present because evidence revealing violation "was concealed by county officials and therefore was not reasonably available to petitioner's lawyers); *Banks v. Dretke*, 540 U.S. 668, 691-698 (2004) ("a petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence...Banks has shown cause for failing to present evidence in

state court capable of substantiating his...*Brady* claim'); *Price v. Johnston,* 334 U.S. 266, 289 (1948) (allegations of prosecutorial use of perjured testimony establish new facts); *Sanders v. United States,* 373 U.S. 1, 10 (1963) (writ abuse dismissal was inappropriate when "for aught the record disclose[s] petitioner might have been justifiably ignorant of newly alleged facts").

Mr. Barbee was "justifiably ignorant of [the] newly alleged facts," *Sanders,* 373 U.S. at 10, because the State either knew of Dr. Krouse's long history of incompetence performing autopsies or should have known, and any failure to bring these facts in the initial application is excused.

Exception 5(a)(3) also applies, as had the jury been aware that Dr. Krouse's past history and criminal charges, it is at least a reasonable probability that no juror would have found Mr. Barbee guilty.

V.

APPLICANT'S CLAIMS

CLAIM ONE: 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.

A. Facts in Support.

New revelations by the State concerning Dr. Marc Krouse have cast substantial doubt on 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).[10] 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] Appendix 3.

10, 2020, Marc Krouse was suspended from performing autopsy examinations on homicide cases" and "Dr. Peerwani and his 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 moved to set an execution date for Mr. Barbee, they submitted what was termed the "State's First Supplemental Post-Conviction Disclosure."[11] In that additional disclosure, it was revealed that there were more 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. Yet more issues and inconsistencies were 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, as an exhibit, the Tarrant County District Attorney also disclosed Dr. Peerwani's audit of Dr.

[11] Appendix 4.

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."[12] Forty-one cases were identified.[13] 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."[14] A gunshot wound was "misinterpreted as a surgical 'stab' wound."[15] Additionally, the "description of the bullet in the Olivares' body by Krouse may be inaccurate."[16] A bullet was missed by Dr. Krouse and left in the body.[17] Numerous

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[12] Audit at 1

[13] *Id*.

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

[15] *Id*. at 2.

[16] *Id.* at 4.

[17] *Id*. at 6.

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.[18]

Dr. Peerwani states that on November 9, 2020 "Krouse was suspended from performing autopsies on homicide cases within the jurisdiction."[19] 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.[20] 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.[21] Radiographs detected the "documented presence of a bullet in the 2nd lumbar vertebra which Krouse had neglected to detect and retrieve."[22] Mr. Moreno's body was exhumed and "the exhumation autopsy discovered several major and minor

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[18] *Id.* at 6.

[19] *Id*. at 7.

[20] *Id.*

[21] *Id.* at 7-8.

[22] *Id.* at 8.

non-conformities."[23] 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.[24] 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."[25]

Pursuant to this audit, it was found that Dr. Krouse performed autopsies in 41 cases in that period which were classified as homicides.[26] Each of these cases was examined in detail in the rest of Dr. Peerwani's audit.[27] 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.[28]

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[23] *Id*. at 9.

[24] *Id*. at 10-12.

[25] *Id.* at 12.

[26] *Id.* at 13.

[27] *Id*. at 15-105.

[28] Appendix 5, Sandy Malone, "Texas Medical Examiner Suspended After Audit Finds 59 Mistakes In 40 Homicide Cases," The Police Tribune, March 31, 2021, at 1.

In other words, errors or mistakes or omissions were found in 40 of 41 cases.

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.[29] 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."[30] 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."[31] Dr. Hoblit attempted to excuse this as a "misunderstanding" but that "explanation was new to Sowder."[32] After the concerns about Dr. Krouse arose, "prosecutors asked Hoblit not to allow Krouse to perform additional autopsies for the

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[29] Appendix 6, "*Medical examiner contract faces scrutiny,*" Lubbock Avalanche-Journal, Sept. 24, 2000, at 1.

[30] *Id*. at 2.

[31] *Id*.

[32] *Id.* at 3.

county."[33] 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.[34]

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 Examiner's Office.[35] That case involved the death of the infant baby Rephayah Isaac Lindsay, the child of parents allegedly belonging to the House of Yahweh sect.[36] 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."[37] As a result, "Abilene 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

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[33] *Id*.

[34] *Id*. at 1-4.

[35] Appendix 7, "Questions linger in 2006 infant death," Abilene Reporter News, June 10, 2007.

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

[37] *Id*. at 2-3. *See also* Appendix 8, at 1, Autopsy Report of Rephayah Lindsay, by Dr. Marc Krouse, filed Sept. 25, 2006, finding "evidence of traumatic asphyxiation."

natural causes."[38] 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."[39]

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."[40] 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."[41] 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."[42]

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[38] Appendix 7 at 3.

[39] *Id.*

[40] *Id*.

[41] *Id.*

[42] *Id*.

Additionally, in 2003 Dr. Krouse's medical license was suspended for failure to pay his registration fee.[43]

In 1999, over six years before Mr. Barbee's trial, a criminal complaint was filed against Dr. Krouse.[44] Had that case been divulged to Barbee's attorneys or had they been aware of it, it would have cast even more doubt on Dr. Krouse's testimony. On January 17, 1999, police officers were called to Dr. Kroues's residence by his wife for "intentionally and knowingly caus[ing] bodily injury to above listed victim [his wife] that he knows is a family member."[45] According to the allegations, Dr. Krouse returned home inebriated; his wife was angry that he

> did not come home to help her with their daughter. Mr. Krouse became very upset and threw Mrs. Krouse off the bed onto the floor and then he got on top of her. Mr. Krouse placed both of his hands around Mrs. Krouse's neck and began to strangle her until she passed out. When Mrs. Krouse regained conscious (sic) she got up and attempted to flee with her children when Mr. Krouse confronting (sic) her again and started hitting her again...Mrs. Krouse stated that when Mr. Krouse was hitting her and choking her it hurt very much and she was afraid for her life.[46]

Dr. Krouse pled "nolo contendere" and was granted deferred adjudication for

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[43] Appendix 9, "Deputy medical examiner tries to get license renewed," myplainview.com.

[44] Appendix 10 (redacted).

[45] *Id*. at 1.

[46] *Id*. at 3.

what would ordinarily have been treated as a serious offense.[47] Had Mr Barbee's jury known that Dr. Krouse himself had engaged in strangulation, an act very similar to what Mr. Barbee was charged with, it is highly likely that his testimony would have been received with scepticism. The very unusual lenient treatment afforded Dr. Krouse, a differed adjudication on a case involving assault with bodily injury and strangulation to the point of unconsciousness, with no loss of his license, could have been argued by the defense as a factor inclining him to shade his testimony in the State's favor.

B. 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.[48] 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

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[47] *Id.* at 5.

[48] Dr. Krouse's trial testimony is Appendix 11.

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

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 this Court 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.
>
> 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. 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 539, 541.

ii. Conclusions of Law.

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 or should have been well-known at the time of Mr. Barbee's trial.

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

The recent findings of Dr. William Anderson (Appendix 13) cast further doubt on Dr. Krouse's crucial trial testimony (Appendix 11) and the basis of that testimony, the autopsy he performed on Lisa Underwood. (Appendix 12). 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.[49] 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.[50]

Dr. Anderson examined the autopsy, the autopsy photos, and the trial transcript testimony of Dr. Krouse relating to the death of Lisa Underwood.[51] Most significantly, he found that "the relatively small amount of pulmonary edema suggests that death occurred relatively quickly, probably only [in] a few minutes...."[52] This 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

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[49] Appendix 13, CV at 1.

[50] *Id.*, CV at 2.

[51] Appendix 13, findings at 1.

[52] *Id.* at 2.

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."[53] 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.[54] 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." [55] 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

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[53] *Id.* at 2.

[54] *Id.* at 1.

[55] *Id.* at 3.

death."[56]

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."[57] 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."[58] Dr. Anderson also found that the peri-orbital hematoma (black eye) of the victim was not adequately explained.[59]

In summary, Dr. Anderson opined that many discrepancies were not addressed 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."[60]

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[56] *Id.* at 1.

[57] *Id.* at 2.

[58] *Id.* at 2.

[59] *Id.* at 1.

[60] *Id.* at 3.

D. The Legal Standard

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution is required to turn over evidence to the defense because its interest "is not that it shall win a case, but that justice shall be done." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *Brady* was a death-penalty case in which the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "There are three components of a true *Brady* violation: (1) the evidence at issue, whether exculpatory or impeaching, must be favorable to the accused; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Canales v. Stephen*s, 765 F.3d 551, 574 (5th Cir. 2014) (quoting *Strickler*, 527 U.S. at 281–82).

a. The meaning of "favorable" evidence.

Evidence "favorable" to the defense is not limited simply to exculpatory evidence. Impeachment evidence is also *Brady* material. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence that enables the defense to "attack[] the reliability of the investigation" is also *Brady* material. *Kyles v. Whitley*, 514 U.S. 419, 446 (1995). These principles were settled law well before Mr. Barbee was tried in

2006.

b. The scope and nature of the underlying duty owed by prosecutors

Robert Jackson, who was Attorney General of the United States before his appointment to the nation's Supreme Court, aptly captured the unique power wielded by those charged with the privilege of representing the government in criminal proceedings:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed.

Robert H. Jackson, *The Federal Prosecutor* (April 1, 1940).[61] A corollary of this tremendous power is a duty to disclose favorable evidence even if those representing the State are not asked for it. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976) (holding that there is a duty to disclose exculpatory information even if defense does not make specific request). Moreover, individual prosecutors have a duty, not just to disclose favorable evidence they have adduced, but also to learn of favorable evidence known to police and others acting on the government's behalf. *See Kyles*, 514 U.S. at 437. These disclosure duties—which are ongoing—exist because the

[61] This address, given at the second annual Conference of United States Attorneys, is available at https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf (last accessed Jan. 18, 2021).

Constitution does not countenance prosecutors placing the pursuit of victory over the interests of justice and fair play. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("it is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."). *See also Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) (noting that in criminal trials "we have held the prosecution to uniquely high standards of conduct"); *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.")

A *Brady* claim may be proven even when the disclosure failures were inadvertent. *Strickler*, 527 U.S. at 281–82.. Such actions "cast[] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.]" *Brady*, 373 U.S. at 88.

c. The prejudice/materiality element

In the capital case of *Kyles v. Whitley*, the Supreme Court explained that the materiality element is satisfied when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the

verdict." 514 U.S. at 434-35. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* The verdict that might not be "worthy of confidence" can be either the guilt- or punishment-phase verdict. *Id.*

In evaluating whether the evidence in question was material, the evidence is "considered collectively, not item by item." *Id.* at 436. In undertaking a materiality analysis, courts must look at the strength of the case taken to trial and then see if the suppressed evidence would have allowed the defense to undermine confidence in the State's key witnesses. *See Banks v. Dretke*, 540 U.S. 668, 698 (2004).

d. Application of Law to Facts

Mr. Barbee's constitutional rights were violated, and relief is warranted under *Brady* and its progeny, because the State either suppressed or failed to disclose evidence favorable to the defense, including impeachment evidence, and that suppression was material to obtaining a guilty verdict.

It is inconceivable that the State, prior to Mr. Barbee's trial, did not know about Dr. Krouse's errors, incompetence, and the domestic violence case against him for attempting to strangle his wife. Yet he was permitted to testify regarding a very similar act which the defense could not challenge.

Because the state violated these well-settled principles by failing to turn over the evidence implicating Dr. Krouse's credibility, Mr. Barbee's verdict and sentence must be reversed. In the alternative, Mr. Barbee must be granted a stay of execution and an evidentiary hearing to present witnesses and documentary evidence regarding these serious allegations.

A petitioner can prove a *Brady* violation by "showing that the favorable evidence *could reasonably be taken to put the whole case in such a different light* as to undermine confidence in the verdict." *Id*. (footnote omitted) (emphasis added); *see Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (noting that suppressed evidence may have consequences far beyond discrediting a witness's testimony). As the entire defense was the "accidental death" of one victim, and because Dr. Krouse's testimony was used by the State to refute that defense, had he been challenged with his prior acts and omissions, the outcome at the guilt phase could very well have been different.

In *Kyles, supra,* the Supreme Court held that the petitioner is *not* required to prove by a preponderance of the evidence that the suppressed evidence, if known to the defense, would have ultimately resulted in an acquittal or a life sentence. *Kyles*, 115 S.Ct. at 1566-67. The inquiry is more properly whether, in the absence of the suppressed evidence, the defendant received a fair trial. *Id.* at 1566. The Court has

stated that a fair trial is "a trial resulting in a verdict worthy of confidence." *Id.* Accordingly, a "reasonable probability" of a different result occurs when the State's suppression of evidence undermines confidence in the jury's verdict. *Id*.

<u>CLAIM TWO</u>: MR. BARBEE'S WELL-DOCUMENTED ARM IMMOBILITY AND RANGE-OF-MOTION DISABILITIES MEAN THAT TDCJ'S EXECUTION PROTOCOL WILL SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Mr. Barbee's issues with arm immobility have been ongoing for a long time, virtually from when he was first placed on death row. As shown from his medical records, his range of movement in both arms has steadily worsened over the last 15 years and has been extensively documented. He is unable to fully extend his arms, is unable to be handcuffed without extensions, and has submitted numerous I-60 grievances to bring his arm condition and limitations to the attention of the prison authorities. TDCJ, despite being aware for many years of these severe physical disabilities, is acting with deliberate indifference to them and has refused to divulge whether Mr. Barbee will be executed in a manner that would amount to torture and cruel and unusual punishment in violation of the Eighth Amendment.

A. Facts in Support.

i. Mr. Barbee's prison medical records show he has diminished range of

motion and movement in both arms.

As early as May 5, 2006, soon after he arrived on death row, Mr. Barbee's patient chart noted he was "unable to raise arms...w/o pain, numbness to arms." [page 368].[62] On September 9, 2006, Mr. Barbee submitted an I-60 grievance and asked for extended handcuffs because when he was cuffed, "the guards have to pull and twist my arms together...the guards had to twist really hard and now my elbows are swollen and hurting a lot worse." [page 1191]. On the same day, the clinic notes of correctional managed care indicated "both elbows swollen with fluid and painful with usual handcuffs." [page 469]. It was also noted that "bilateral elbows–fluid filled; pain with movement of bilateral elbows...requesting order for extended handcuff pass." [Id.] Thus, Mr. Barbee was experiencing elbow and arm issues at very early stages of his incarceration on death row and he requested extended handcuffs to deal with his arm immobility problems.

Shortly thereafter, on September 23, 2006, Mr. Barbee submitted another I-60 grievance stating that "it's at the point now where I'm having trouble washing my hair, and cleaning myself when I go to the rest room." [page 1190]. On October 26, 2006, Mr. Barbee submitted another I-60 grievance because "the guards are hurting

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[62] Relevant excerpts from Mr. Barbee's prison medical records are at Appendix 14. References to "page" is to the page numbers on the bottom right hand side of the page. For easier reference, they are organized in the Appendix in chronological order and not by their TDCJ page numbering, which is non-chronological.

me more and more because of my shoulders and arms can't be cuffed with the small cuffs...they have to pull and twist to be able to cuff me." [page 1187].

As Mr. Barbee's condition worsened, on August 8, 2008, his medical report noted "atrophy of 1 arm and leg." [page 486]. On August 19, 2008, Mr. Barbee stated that "[m]y left arm is getting where I can't use it very well!" [page 1092]. On July 24, 2009, it was similarly noted that there was "atrophy of 1 arm and leg." [page 483].

On August 15, 2009, on Mr. Barbee's patient chart it was noted that his right arm "does not extend at elbow completely." [page 662]. Again on August 25, 2009, it was noted on Mr. Barbee's patient chart that his right arm does not extend @ elbow completely" and he has to use a walker. [page 659]. On November 11, 2009, it was noted that the extremity pain was first observed on March 7, 2008. [page 628].

On December 8, 2009, Mr. Barbee submitted an I-60 grievance stating that "I have repeatedly asked for medical help for my left arm going on 4 years now! My arm is locked and I need to see why its locked and hurts so BAD! My arm is locked up because of refusal of medical care. Why is medical ignoring my many request. Not only written request(s) but that UTMB wouldn't do anything–why?" [page 1019]. Shortly thereafter, n December 22, 2009, an x-ray was ordered for Mr. Barbee due to "left elbow—chronic pain, decreased ROM (range of motion)." [page 1018].

His arm situation had worsened by April 30, 2010, when it was noted that there

was "worsening radiculopathy in both upper and lower exten (sic) due to c-spine DJD." [page 473]. On June 17, 2010 Mr. Barbee submitted an I-60 grievance because "I need surgery on my neck. I'm losing the range of motion on my last good arm!" [page 995].

On July 21, 2010, Mr. Barbee submitted another I-60 grievance about his arm condition. [page 987]. He stated that despite repeated grievances, he "has lost a great deal of the range of motion in my left arm. I can't touch my face. Well my right arm is starting to do the same as my left. I have symptoms of nerve damage. If medical continues to delay my medical care, I won't be able to take care of myself. My arms will be shot! I'm asking for help in this!" [page 987]. On August 18, 2010, his shoulder disorder and joint pain were again noted. [page 615]. On the same date, Mr. Barbee's patient care chart listed "weakness of left upper extremity" and "muscle weaknesses of lower extremity." [page 349].

Mr. Barbee's arm immobility continued to worsen into 2011. On July 7, 2011, Mr. Barbee's patient chart noted that his "upper extremity pain [is] neuropathic in character" [page 605]. Shortly thereafter, on July 22, 2011, a radiology report from correctional managed care indicated degenerative changes in both the right and left wrists and "destruction of the radioulnar and humeroulnar joints" of the left elbow. [page 346-347]. It was thought to be longstanding and "sclerosis is seen." [page

346]. The overall impression was that "[t]here is an advanced degenerative osteoarthritis with destruction of the radioulnar/radiohumeral joints." [page 346].

Further arm immobility was identified on July 27, 2011 when a UTMB radiology report indicated "[m]ild degenerative changes are seen within the elbow joint." [page 444]. On the same date, July 27, 2011, an expedited referral for treatment noted "multiple joint pain for past 5 years involving shoulders, elbows, wrists, fingers, hips. Patient is losing ROM (range of movement) of his elbows left-right." [page 455].

On August 8, 2011, a UTMB managed care memo noted "polyarticular joint pains, joint swelling, limitations of movement of hips, shoulders and elbows, and prolonged morning stiffness." "The erosions seen on elbow film are unusual (albeit not unheard of) for Lyme arthritis." [page 58].

On September 28, 2011 it was noted that "patient has decrease[d] ROM (range of movement) of left elbow, Right hip joint." [page 450-451]. The next day, September 29, 2011, it was again noted that a provisional diagnosis was "inflammatory arthritis" with "decreased ROM (range of movement) of left elbow." [page 446].

On December 6, 2012, UTMB Health issued a 3-page "office visit" report. [pages 51-53] The report indicated chronic "neck pain, back pain, and extremity

weakness." A diagnosis of "cervicalgia" was noted along with "weakness of left upper extremity." [page 51].

A 4-page "office visit" report by UTMB Health was issued on March 7, 2013. [pages 45-48]. Mr. Barbee reported "worsening weakness in his right arm. He states he has lost the ability to use the left arm.' [page 46]. A cervical collar was ordered. [page 47]. Symptoms were worsening. [page 47]. "Limited ROM" (range of movement) was again noted on July 16, 2013 in a UTMB service referral request. [page 421].

The next month, on August 13, 2013, Mr. Barbee summarized his problems in correctional care nursing notes: "I went to the hospital on the 8th. They said my elbows are now bone on bone. I'm in so much pain and I'm wasting away. Eventually I'm not going to be able to take care of myself...the doctor at HG said the problem with my joints could be due to Lyme Disease." [page 323]. The clinic noted as to his right elbow, "diffuse joint space narrowing is seen, mild joint effusion is present with displacement of the anterior and posterior fat pads." [*Id.*] As for his left elbow, "[s]ince the prior [examination], new marginal osteophytes have developed, the collapse of the joint spaces is still present, joint effusion given by displacement of the anterior posterior fat pads is also identified." [*Id.*] The clinic's impression was "BILATERAL symmetric joint space narrowing of the elbow joints, in keeping with

inflammatory arthritis such as RA." [page 323].

Once again, on September 6, 2013, in a UTMB health service referral request, the clinical findings were "bilateral elbow pain" and the diagnosis was "limited ROM" (range of movement) [page 415]. On the same date, September 6, 2013, a physical therapy clinic note documented that Mr. Barbee "said his elbows are not extend fully and not able to reach his head." [page 37]. His main concern was "his both elbow (sic) and his [left] hip." [*Id*.]

Mr. Barbee's continued lack of arm mobility was again noted in an August 28, 2014 UTMB health service referral request where the clinical findings were "limited rom (range of movement) in elbows." [page 403].

An occupational therapy note on April 3, 2014 (from an April 1 visit) had a provisional diagnosis of "limited ROM (range of movement) both elbows" and "degenerative osteoarthritis both elbows." [page 31]. Mr. Barbee stated "I have limitations in extending my elbows and I have pain in my elbows and shoulders." [*Id*.] Regarding his arm range of movement, his right elbow had only 38-114 degrees of extension and 24 to 109 degrees of flexion. [page 31]. The right arm pronation was 80/85 degrees right and 80/85 degrees left. The left elbow extension was 60 to 100 degrees and the flexion was 50 to 100 degrees. [*Id*.]. Right and left wrist range of movement issues were also noted. Mr. Barbee's limited arm range of movement issue

was this clear by 2014, and has only worsened since then. Even in 2014, he could not extend his arms fully outstretched as they would be on a gurney.

On April 4, 2014, an occupational therapy clinic note assessed "Patient presents with decreased AROM (arm range of movement) both elbows in extension and flexion...He has impaired forearm supination with more limitation on the left." [page 32]. Again on November 17, 2014, a UTMB health service referral request diagnosed "limited ROM (range of movement) in elbows." [page 401].

On March 31, 2015, Mr. Barbee went to the Estelle Unit for treatment and stated that his hands cannot be cuffed behind his back "because my arms are so bad with the loss of range of motion it won't do like [hands cuffed behind him]." (Page 785-786). This had been the procedure for three years because when he was cuffed behind his back :" thought they were going to break my arms. When I got back, there were deep purple impressions which stayed for a few days." Mr. Barbee filed an I-60 at that time which was submitted on April 13, 2015. (*Id*.)

In 2016, Mr. Barbee's arm issues continued to worsen. A correctional managed care radiology report dated August 11, 2016 focused on his "problem extending lt (left) elbow." [page 341]. The "joint space [is] narrowing and subchrondral sclerosis are seen' on the right elbow. [page 341]. The left elbow "is in a semi-flexed position. Severe joint space narrowing and sclerosis is present. Bony

remodeling of the capitellum is suspected. No acute fractures appreciated. Evaluation for joint effusion is limited due to patient positioning." [*Id.*] The diagnostic impression was "severe bilateral osteoarthrosis, more prominent on the left. The left elbow is held in flexion which limits evaluation." [page 341].

On August 15, 2016, Mr. Barbee was told that the medical department had "reviewed the x-rays of your elbows, shows osteoarthritis with joint space narrowing. Continue working on gentle range of motion exercises as we discussed." [page 719] On August 25, 2016, Mr. Barbee submitted an I-60 grievance stating that the medical department said he had severe arthritis and now "osteoartheosis." [page 712]. On December 9, 2016, Mr. Barbee was given a physical therapy protocol "for left trochanteric bursitis." [page 509].

Mr. Barbee submitted an I-60 grievance on September 28, 2017 stating that he was not able to go to his medical appointment because "transportation wouldn't take me because I can't place my arms in a certain direction when they place the handcuffs on me. I have osteoarthritis in my arms." [page 665].

On February 9, 2018, upon return from a medical appointment, it was noted that Mr. Barbee suffered from "multilevel degenerative changes [that] result in up to moderate spinal canal stenosis...Severe neural foraminal narrowing is identified at the same level, mildly progressed from before." [page 500].

On February 15, 2018, Mr. Barbee submitted an I-60 grievance regarding another missed medical appointment which transportation refused because due to his limited range of motion, Mr. Barbee could not turn his arms a certain way. [page 646] He stated "I lack the range of motion in my arms to do it per TDCJ policy. This is not the first time this has happened." [page 646]. On February 21, 2018 Mr. Barbee submitted another I-60 grievance about the missed medical appointment due to his being unable to be cuffed which was a result of his decreased range of motion issues. [page 641].

As Mr. Barbee's arm range of movement continued to decrease, on April 17, 2018 it was noted on a sick call request that he required "no cuff behind back" and "front triple cuffs when using walker." [page 630].

In 2018, Mr. Barbee continued to seek help in regard to his loss of range of motion in his arms. On July 10, 2018 he submitted an I-60 grievance form stating "I need to see whomever '<u>can evaluate</u> and <u>record</u>' the range of motion in both of my arms." [page 623]. He added, "This evaluation will have to be here at Polunsky Unit becasue the transportation people will not take me anywhere, because of my arm's (sic). I need to find out why my arm's (sic) are like this and what range of motion I have. Thank you!" [page 623].

Despite these repeated notices regarding his inability to be handcuffed in the

normal position, these problems were still ongoing in late 2018. In another I-60 grievance filed on October 3, 2018, Mr. Barbee asked why his neurosurgery appointment had been cancelled and once again the answer was "rescheduled due to non-compliance with hand restraints required for transportation." [page 605]. Repeatedly the transportation people failed to receive the information that Mr. Barbee cannot be handcuffed in the normal manner.

Mr. Barbee's lack of arm range of movement worsened to the point that on February 13, 2019, he was "unable to clean [himself] after using the restroom." [page 583]. This was because "my arms can't reach back there anymore." [*Id.*]

As a result of this limited arm mobility and decreased range of motion, on March 14, 2019 a "toilet aid" was ordered for Mr. Barbee. This was to extend his arm so that he would be able to properly clean himself after going to the bathroom. [page 16]. On March 24, 2019, Mr. Barbee requested about this "special tool to help me clean my rear end after I use the restroom because my arm's (sic) have lost the range of motion to do that myself." [page 577]. Once again, on April 11, 2019, Mr. Barbee in an I-60 grievance requested his medical pass "for my walker and no cuffs behind back, no cuff to arm." [page 569].

A mental health outpatient services mental health report of January 26, 2021 noted that due to his disabilities, Mr. Barbee was still in "restrictive housing" and his

"osteoarthritis, unspecified" was still evident. [page 499]. Another mental health report of April 22, 2021 also noted the osteoarthritis [page 481] as did the mental health report of July 15, 2021. [page 473].[63]

On March 14, 2021, Mr. Barbee submitted a request that his medical passes be renewed, including his use of a wheelchair, a walker/rollator, a disability shower, no handcuffs behind his back and no handcuffs to both of his arms as he "can no longer turn arms and or wrist, where palms are face up." [page 488].

As a result of his limited range of motion with his arms, for many years Mr. Barbee was unable to cut his toenails. The report of April 4, 2021 shows that he needed help to do this, as do many earlier reports. [page 489, 496, 507, 531, similar reports from 2018, 2016, 2015].

ii. Mr. Barbee confirms that he cannot extend his arms or straighten them without inflicting torture.

Mr. Barbee has submitted a declaration confirming that his well-documented issues *witId.h* lack of range of motion in his arms will prevent his being placed on the gurney with arms outstretched without inflicting painful torture. (Appendix 15).

Mr. Barbee explains that he was issued a special medical pass on July 23, 2018 because he "no longer could have handcuffs placed on my arms per TDCJ policy

[63] It should be noted that the mental health reports cover only mental health problems, mainly suicidal thoughts or plans or self-harm ideation, and do not cover physical health problems or complaints.

which requires palms of either hand face upward." (*Id.* at 2). He also explains what is documents supra, that "[b]ecause of the loss-of-motion in both arms TDCJ transportation dept. refused to take me to the hospital for my medical appointments. I missed around 14 or so appt's straight, where UTMB quit setting them." (*Id*) Mr. Barbee also explains that "I also have a special medical pass for a tool to clean myself after using the restroom because of the loss of my range-of-motion, I can no longer reach around to my back." (*Id.*)

When sleeping on his back "my arms stand up in the air." (*Id*. at 3.) Mr. Barbee explains that he cannot straighten his arms or hold them out in front of himself, a disability which has caused the many handcuff issues described in his prison records, supra. (*Id*.)

Mr. Barbee states that "If someone wants my arms to straighten out in any way, I guess one would have to break my arms, because even forcing them, they won't straighten. It's been like this for years and it's getting worse." (*Id*. at 4).

iii. Recent investigation confirms Mr. Barbee's lack of range of motion in both arms.

Investigator Adrián de la Rosa of the Western District of Texas Federal Public Defender's Office confirms both the documented history and Mr. Barbee's personal assessment of his arm mobility issues.

On September 3, 2021 Mr. De la Rosa visited Mr. Barbee at the Polunsky Unit.

(Appendix 16 at 1). Mr. Barbee was brought to the visitation area in a wheel chair and had trouble getting into the interview booth. (*Id.*) When they were asked to change booths, he again struggled and "[h]is arms never fully extended out, they were in a constant bent state at the elbow." (*Id.*) "He looked to be in pain throughout" the three and a half hour interview. (*Id.*)

Mr. Barbee told the investigator that he is in almost constant pain. (*Id*. at 2.) "He said his arms constantly hurt." (*Id.*) "Mr. Barbee held out his arms in front of his body to show me his range of motion, and his arms were in a constant bent state. He never once held out his arms straight in front of his body or straight out to his side because he said he is unable." (*Id.*) In another factor that could cause unusual pain and suffering at the execution, "Mr. Barbee said he cannot turn his hands up, with his palms facing up toward the sky." (*Id.*)

When Mr. Barbee first arrived at TDCJ, his condition was normal, but he soon started having "issues and problems with his left arm, then his right leg began to give him grief, then his left lag and then his right arm." (*Id.*) "Stephen noted that his right arm isn't as bad as his left arm, and he has slightly more mobility, but not much." (*Id.*) He has trouble holding a can of soda. (*Id.*)

Mr. Barbee remembered the pain in his left arm starting around 2007 and "started 'drawing up,' tightening in toward his body, resulting in the constant state

of his arm being bent at the elbow." (*Id*.) Although he has been diagnosed with arthritis, he has been taking genetic Cymbalta for nerve damage. (*Id.*)

When transported, "he is supposed to travel with his arms bent in front of his body, left arm under right arm, left palm facing up toward the sky and right palm facing down." (*Id*. at 3, with picture of the position at 4). As a result, Mr. Barbee was given a pass that allowed him to put his arms in front of him without palms facing upward. (*Id*. at 4).

When Mr. Barbee's date was set on July 6, 2021, he was called into Warden Dickerson's office on July 9 and told of his execution date. (*Id*.) At that meeting, Mr. Barbee told the warden of "his inability to straighten his arms out once they'd place him on the gurney." (*Id*.) "Stephen said the warden told him the arm restraints on the gurney come out like a cross. He told Warden Dickerson that he won't be able to straighten out his arms for the needle." (*Id*. at 4-5). The Warden asked Mr. Barbee to stand up and stretch out his arms, but Mr. Barbee was unable to do that." (*Id.* at 5). Mr. Barbee said that the only way they would be able to straighten out his arms would be if they broke them and the Warden laughed and said "That ain't gonna happen." (*Id*. at 5). Mr. Barbee also told about the problems with his palms, that he cannot have them face upward unless his hands were above his shoulders. (*Id.*, with illustration).

Mr. De la Rosa provided another illustration about Mr. Barbee's arm range of motion limitations. (*Id*. at 6). "From left to right, his right arm is bent at 45-degrees, his head would be at 90-degrees, and his left arm would be at 1135-degrees." (*Id*.) When shown the extent of Mr. Barbee's arm immobility, Warden Dickerson took photos as Mr. Barbee "sat in a chair, leaned back, and did his best to raise his palms." (*Id*.)

Despite these serious issues, "Mr. Barbee hasn't heard anything about his concerns or about any sort of contingency plan TDCJ is going to use for his special circumstances. No one has told him anything about what they're going to do." (*Id*.)

Mr. Barbee also mentioned that at one of his medical trips to the Estelle Unit, "they measured his arm movement and radius, They used what looked like a ruler or protractor and took measurements. Stephen said those should be in his medical records." (*Id.*)[64]

iv. Dr. Pamela Blake's recent examination and diagnosis confirm that Mr. Barbee will be subject to torture if he is executed per TDCJ's normal protocol.

Dr. Pamela Blake, a board-certified neurologist with offices in Houston, personally examined Mr. Barbee at the Polunsky Unit on September 24, 2021.[65] She

[64] Mr. Barbee is referring to the April 13, 2014 assessment discussed *supra* [page 31] where his arm mobility was measured.

[65] Dr. Blake's neurological evaluation is Appendix 17.

was asked to provide an opinion "as to the cause and status of the condition [of] the weakness affecting his arms, particularly regarding reduced range of motion in his elbows, and any complicating role that this condition may play in the administration of intravenous medications."[66] She examined Mr. Barbee's prison medical records, Mr. Barbee's declaration and that of Mr. De la Rosa, and conducted an interview and physical examination of Mr. Barbee.

Shortly before his arrest, Mr. Barbee suffered a major injury when a heavy steel pipe fell on his head, which cracked his hard hat and caused him to lose consciousness.[67] Although he recovered from that injury, shortly thereafter Mr. Barbee began to notice weakness in his arms and the "weakness gradually progressed." [68] "Mr. Barbee noted that the muscles of the left arm would occasionally spontaneously contract and the arm would "draw up" (meaning flex at the elbow) involuntarily. Mr. Barbee gradually lost the ability to extend (straighten) the left elbow within about a year."[69]

After that, both his legs began to be affected and the his right arm, "beginning

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[66] *Id.* at 1.

[67] *Id.* at 2.

[68] *Id.*

[69] *Id.*

in about 2018."[70] "The weakness in the arms progressed steadily to the point at which Mr. Barbee lost function of both of his arms. The elbow joints became progressively more fixed, with progressively reduced range of motion, to the point at which Mr. Barbee had almost no functional use of the arms."[71] Dr. Blake noted that Mr. Barbee's "left arm is more affected with regard to reduced range of motion; there is currently almost no movement of the left elbow."[72] Additionally, "there is reduced range of motion in the right elbow and also pain in the right arm, extending from the elbow along the back of the arm..."[73]

Dr, Blake confirmed that Mr. Barbee's records from UTMB showed "that the condition of Mr. Barbee's arms, and the reduced range of motion in them, has been an ongoing and prominent issue for him."[74] He filed numerous I-60 grievances in an effort to bring his arm issues to the attention of the prison authorities.[75] "In May 2006, Mr. Barbee noted that he could not raise his arms without pain."[76] He could not

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 3.

[75] *Id.*

[76] *Id.*

be handcuffed in the normal position and he "was having difficulty with personal hygiene due to progressively limited use of his arms."[77] By July 2010, Mr. Barbee reported to the prison authorities that he could not touch his face.[78] He had "increasing pain and decreasing range of motion in the elbows."[79] And "an x-ray in July 2011 noted joint destruction in the joints in the left elbow."[80]

By September of 2013, "Mr. Barbee was not able to extend his elbows fully and was not able to reach his head."[81] An April 2014 report "reported significantly reduced range of motion in both elbows: the elbow range of motion should normally span from 0 degrees (completely extended) to 180 degrees (completely fixed). The right elbow in April 2014 ranged in motion from 38-114 degrees, and the left elbow ranged in motion from 60-100 degrees. This is significantly reduced range of motion."[82]

Dr. Blake's diagnostic impression was that "Mr. Barbee has a progressive medical condition that has resulted in progressive loss of range of motion of

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* Dr. Blake is referring to page 31 of Appendix 14.

numerous joints, including the bilateral elbow and wrists, and weakness of muscles in the upper and lower extremities."[83] "There is a highly unusual pattern of joint fixation and immobility affecting the bilateral elbows and wrists; both of these joints are in a fixed position which significantly limits the use of the extremities. Neither of the arms can be extended."[84]

Additionally, "[i]nvolvement of the chest muscles may predispose him to respitory failure under light anesthesia, as the muscles involved in breathing may become nonfunctional quickly, leading to asphyxiation prior to loss of consciousness."[85] Mr. Barbee is "not able to lay his arms flat. Multiple sources of information attest to the presence of reduced range of motion in the elbows, and to the prolonged duration of this condition. It does not appear to be possible that intravenous agents could be administered to the veins in the antecubital space (the elbow) without forcefully extending the arms, which would result in significant injury and pain in the elbows."[86]

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[83] *Id.* at 4.

[84] *Id.*

[85] *Id.* at 5.

[86] *Id.*

v. TDCJ has refused to disclose what, if any, contingency measures will be taken to avoid torturing Mr. Barbee on the gurney.

As recounted *supra*, at Mr. Barbee's July 7, 2021 meeting with the Polunsky Unit Warden, Mr. Barbee was not told whether he would be executed in the normal manner with arms outstretched on the gurney, which would cause intolerable pain and suffering.

Undersigned counsel also inquired as to whether TDCJ was planning any measures to avoid the pain and suffering an arms-outstretched execution would entail. On September 9, 2021 undersigned counsel e-mailed a letter to TDCJ General Counsel Ms. Kristen Worman. (Appendix 18). In that letter, Mr. Barbee's counsel requested information as to:

1) whether accommodations have been made or are planned to be made to the gurney that would not involve having his arms stretched out straight at his sides, in a cross-like position

2) whether the arms of the gurney are moveable or adjustable so as to allow for bent-arms

3) whether the execution can proceed without having Mr. Barbee's arms in a palms-up position

4) whether the intravenous injection can be delivered from a spot other than his wrist

5) whether the execution team at the Polunsky Unit have been made aware of the physical limitations of Mr. Barbee regarding his planned execution.

(Appendix 18, letter of A. Richard Ellis to Kristen Worman, General Counsel for TDCJ.

On September 16, 2021, undersigned counsel received a response from Ms. Amy Lee, Project Coordinator, Office of the General Counsel, TDCJ. (Appendix 19). In that response, Ms. Lee stated

> The Texas Department of Criminal Justice (TDCJ) received your correspondence dated September 9, 2021 inquiring about whether any measures have been taken or planned to be taken regarding Mr. Barbee's long-standing arm immobility issues...any concerns or complaints related to health-related matters or other confinement issues within the DCJ's control are addressed by following the process as outlined in the Grievance Procedures for Offenders section of the TDCJ Offender Orientation Handbook. Mr. Barbee will need to follow the procedures as outlined for the TDCJ to aptly provide a response.
>
> E-mail response of September 26, 2021, Ms. Amy Lee, Project Coordinator, Office of the General Counsel, TDCJ. (Appendix 19).

Despite acknowledgment of their knowledge of Mr Barbee's "long-standing arm immobility issues," and many previous attempts to bring this issue to their attention over many years, TDCJ was still unwilling to provide any information or guidance as to how they were going to deal with this issue.

In accordance with the procedures outlined in the Offender Orientation Handbook, on September 15, 2021, Mr. Barbee prepared and submitted a Step 1

Offender Grievance Form. (Appendix 20). In that grievance, Mr. Barbee stated that "I can not extend my arms straight out with my palms up or down. If my arms are forced to be straightened out in any way, it will cause extreme pain and suffering, because I lack the range-of-motion in both arms...Something would break or tear if my arms were to be forced straight out. I've been trying for years for medical to give me medical to help me with this issue." (*Id*.)

B. Legal Argument.

Mr. Barbee's circumstances are unique, and thus, there are specific risks unique to him that TDCJ has not encountered before. The evidence shows that attempting to execute Mr. Barbee per the normal procedures presents more than a "risk" of serious pain and suffering—it is a near certainty. Therefore, attempting to execute Mr. Barbee using TDCJ's usual protocol will violate his Eighth and Fourteenth Amendment rights. Moreover, because TDCJ has refused to provide any information as to the protocol, as applied to Mr. Barbee it violates his right of access to the courts and right to petition for redress of grievances under the First and Fourteenth Amendments to the United States Constitution.

Mr. Barbee asks that the Court stay his October 12, 2021 execution date, and enjoin TDCJ from executing him in a manner that would amount to torture, as discussed *supra*. In the absence of such an Order, Mr. Barbee will suffer irreparable

injury; namely, the loss of rights and freedoms guaranteed by the United States Constitution and an inhumane death. As the Supreme Court noted in *Baze v. Rees*, 553 U.S. 36 (2008) "'[P]unishments are cruel when they involve torture or a lingering death . . . .'" 553 U.S. at 49. This premise was first stated over a century ago in *In re Kemmler*, 136 U.S. 436, 447 (1890). In effect, some methods of executions are unconstitutional per se. An execution protocol violates the Eighth Amendment when it poses a risks that are "'sure or very likely to cause serious illness and needless suffering,' and give rise to sufficiently imminent dangers.'" *See Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 36, 50 (2008); *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)). To prevail on a claim that the state's execution protocol is *facially* invalid, a plaintiff must show that there is a "'substantial risk of serious harm'" or an "'objectively intolerable risk of harm'" when compared to an alternative method of execution to the state's protocol that is "'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 50, 52).

Mr. Barbee does not raise a facial challenge to the protocol. Instead, he argues that the execution protocol *as applied to him* is unconstitutional. After the execution date was set, Mr. Barbee's pro bono counsel worked diligently to bring this as-applied claim as soon as possible. Because this challenge is premised on Mr. Barbee's

current medical conditions, his current medical records needed to be gathered and reviewed by the expert Dr. Blake, and she then had to produce her opinions before counsel could move forward with litigation. Mr. Barbee or his counsel have no control over how long it takes medical providers to produce medical records. And because Mr. Barbee's medical records were so extensive (amounting to thousands of pages), and received less than a week prior to this filing, additional time was needed for the expert to review and assess them.

Mr. Barbee's claim is rooted in his unique constellation of medical conditions and the risks posed specifically to him by mainly his arm immobility issues. He does not seek a judgment that would require Texas to alter its execution protocol for any other inmate. Nothing about his claim questions the lawfulness of capital punishment itself.

Moreover, nothing about Mr. Barbee's claim seeks to "transform courts into boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U.S. at 51 (plurality opinion). Because only Mr. Barbee's execution is at stake, his claim does not ask the Court to displace state officials from their task as designers of a state's protocol for carrying out capital punishment. Instead, the Court should remain focused on a task for which it is well suited: evaluating whether a general state rule (the state's execution protocol) applied to particular facts (the medical

condition of the inmate) satisfies the Constitution's legal standard (the Eighth Amendment's prohibition of cruelty).

Practical considerations also weigh in favor of relieving inmates with rare, complicating medical conditions from having to design their own execution protocol. State officials naturally have a firmer grasp of the modifications to a protocol that the state can accommodate. Inmates would have a very difficult time establishing that obtaining the equipment necessary to accommodate their unique medical needs is or training staff to operate it is "feasible and readily available." Inmates are not familiar with state's budget, procurement process, staff availability and training, or security protocols. Even the most basic information, such as the width of the doorway to the execution chamber is not available either to the inmates or their counsel, so neither can determine with certainty what size wheelchair or walker would fit through the door. Therefore, designing a custom execution protocol that would need to include accommodations for medical conditions places an impossibly high burden on the party with the least resources and information.

A state must take into account a particular inmate's existing physical disability or health condition when assessing the propriety of its execution method. Mr. Barbee has shown that his arm immobility issues are incompatible with a humane execution and that the state's current procedure will prevent the state from executing him in a

constitutional manner. The Court should issue an order preventing TDCJ from using their execution protocol on Mr. Barbee. Such a judgment would leave Texas free to design a protocol that meets Eighth Amendment standards.

VI.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Mr. Barbee prays that this Honorable Court:

1. Stay his scheduled execution, currently set for October 12, 2021.

2. Vacate his death sentence and conviction and grant relief on his claim and remand to the trial court for further proceedings;

3. Alternatively, Mr. Barbee requests that this Court remand to the trial court and authorize the trial court to consider the claims raised in this subsequent application, and instruct the trial court to conduct an evidentiary hearing for the purpose of examining the merits of his claims;

4. Enter Findings of Fact and Conclusions of Law recommending that his conviction and sentence of death be vacated and that his case be remanded for a new trial and sentencing hearing, and

5. Grant any other relief that law or justice may require.

Dated: October 1, 2021.

Respectfully submitted,

/s/ A. Richard Ellis

A. Richard Ellis
Attorney at Law
Texas Bar No. 06560400
75 Magee Avenue
Mill Valley, CA 94941
Attorney for Applicant

CERTIFICATE OF SERVICE

I certify that on October 1, 2021, I have electronically served the foregoing on counsel of record for Respondent,

Mr. Steven W. Conder
Assistant Criminal District Attorney, Tarrant County District Attorney
401 W. Belknap
Ft. Worth, Texas 76196-0201
sconder@tarrantcountytx.gov (and CCAAppellatealerts@tarrantcountytx.gov)

and:

Mr. Stephen Hoffman
Attorney General's Office for the State of Texas
P/O. Box 12548, Austin, TX 78711-2548
(stephen.hoffman@oag.texas.gov)

by the Court's electronic service. All parties required to be served have been served.

s/s A. Richard Ellis

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STATE OF CALIFORNIA)
)
COUNTY OF MARIN)

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared A. Richard Ellis, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas (Bar No. 06560400).

2. I am the duly authorized attorney for Stephen Dale Barbee, having represented him previously in state and federal court. I am currently representing him in his trial court, the 213th Judicial District Court, Tarrant County, Texas. (Cause No. 1004856R).

3. I have prepared and have read the foregoing Subsequent Application for Writ of Habeas Corpus, and I believe all the allegations therein to be true and correct.

A. RICHARD ELLIS

SUBSCRIBED AND SWORN TO BEFORE ME on _____, 2021.

_____
Notary Public, State of California

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of MARIN

Subscribed and sworn to (or affirmed) before me on this 28TH day of SEPTEMBER, 2021, by ALLEN RICHARD ELLIS, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature (Notary seal)

ERICA Y. JOUBERT
NOTARY PUBLIC - CALIFORNIA
COMMISSION # 2223901
MARIN COUNTY
My Comm. Exp. December 3, 2021