In the Supreme Court of Florida

CASE NO.: SC2019-1275

HAROLD LEE HARVEY, JR.,

Appellant,

v.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR OKEECHOBEE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

In 2003, this Court held that a structural error occurred in Appellant Harold Lee Harvey, Jr.'s capital trial when defense counsel conceded Mr. Harvey's guilt to first-degree murder without informing Mr. Harvey that he was going to do so and without first getting Mr. Harvey's approval. *Harvey v. State*, No. SC95075, 2003 Fla. LEXIS 1140 (Fla. Jul. 3, 2003). This Court held that "at best, trial counsel informed Harvey of his strategy to concede guilt to *second*-degree murder." *Id.* at *11, *14 (emphasis added). This Court concluded that by conceding Mr. Harvey's guilt to first-degree murder without informing Mr. Harvey—and thus without allowing Mr. Harvey an opportunity to object—counsel committed a Sixth Amendment violation that required a new trial without any need to show prejudice. *Id.* at *14–16.

Following this Court's order, the State moved for rehearing. While that motion was pending, the United States Supreme Court decided *Florida v. Nixon*, 543 U.S. 175 (2004), which addressed the legal standard for similar claims involving defense counsel's concession of the defendant's guilt. In 2006, in light of its interpretation of *Florida v. Nixon*, this Court withdrew its 2003 decision that had granted Mr. Harvey relief. *See Harvey v. State*, 946 So. 2d 937, 943 (Fla. 2006). The Court's 2006 opinion reiterated that counsel "conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree

murder." *Id.* However, this Court believed it was required to withdraw its previous finding of structural error in light of *Nixon*, which the Court interpreted as rejecting the presumed-prejudice rule the Court had applied in its 2003 opinion.

Last year, the United States Supreme Court made clear that this Court was prescient. In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Supreme Court established a new fundamental right, holding that the Sixth Amendment protects a criminal defendant's "[a]utonomy to decide [whether] the objective of the defense is to assert innocence" or concede guilt. *Id.* at 1508. Because "it is the defendant's prerogative, not counsel's, to decide [whether] the objective of his defense [is] to admit guilt," counsel may not "usurp control of" that decision. *Id.* at 1505, 1511. If counsel nonetheless does so, counsel has committed not only a Sixth Amendment violation, but also a structural error, which automatically requires a new trial without any showing of prejudice. *Id.* at 1511.

In this case, the undisputed facts demonstrate that counsel committed exactly that kind of structural error. According to Mr. Harvey, counsel never had any discussion with him about conceding guilt; according to counsel, he discussed a plan to concede guilt only to second-degree murder. This difference of recollection is of no consequence because, as this Court has found after careful review of the record, it is undisputed that counsel never informed Mr. Harvey that

he was going to concede guilt to *first*-degree murder—the crime of which Mr. Harvey was convicted and for which he was sentenced to death.

By conceding Mr. Harvey's guilt to first-degree murder to the jury without ever informing him, let alone getting his approval for it, counsel denied Mr. Harvey any opportunity to consent or object, thereby "usurp[ing] control" of the concession decision in violation of Mr. Harvey's Sixth Amendment autonomy right. *Id.* *McCoy* establishes that when counsel's concession of guilt violates the defendant's Sixth Amendment right to autonomy, a new trial is required without any further inquiry into prejudice—just as this Court originally held in Mr. Harvey's case.

The Circuit Court below disagreed. But rather than provide an analysis of Mr. Harvey's arguments regarding the *McCoy* violation, the Circuit Court side-stepped the issue by incorrectly holding that Mr. Harvey's claim was untimely and making irrelevant references to the lack of prejudice from trial counsel's violation of Mr. Harvey's Sixth Amendment right. As demonstrated below, the Circuit Court's one-paragraph Order erroneously vitiates both the retroactivity analysis articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and the doctrine of fundamental fairness set out in *James v. State*, 615 So. 2d 668 (Fla. 1993). Under *Witt*, *McCoy* should apply retroactively because it is a development of fundamental significance. Under *James*, *McCoy* should apply to Mr. Harvey's case because Mr.

Harvey raised this issue from the beginning of his post-conviction proceedings, long before the United States Supreme Court recognized the violation in *McCoy*. Under *James*, Mr. Harvey should thus be entitled to the benefits of the *McCoy* decision.

The Circuit Court also erred in adopting the State's suggestion that trial counsel's violation of Mr. Harvey's Sixth Amendment rights be viewed through the lens of harmless error. The violation is structural, meaning that a new trial is required without any inquiry into prejudice. *McCoy* 138 S. Ct. at 1511. But in any case, the prejudice here is plain. In the context of Mr. Harvey's trial, the concession of his guilt to first-degree murder served as a kind of first domino that started a chain of constitutional violations without which the outcome may well have been different.

Mr. Harvey respectfully requests that this Court order a new trial due to the structural error caused by the Sixth Amendment violation, as established in *McCoy*.

STATEMENT OF THE CASE

A. Mr. Harvey's Trial, Conviction, and Sentence.

On March 7, 1985, a grand jury indicted Mr. Harvey for the murders of William Herman Boyd and Ruby Louise Boyd. Following his indictment, Mr. Harvey entered a plea of not guilty to two counts of first-degree murder.

At his capital trial, however, Mr. Harvey's defense counsel began his opening statement with this extraordinary statement to the jury: "Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder." R. Direct Appeal Vol. 12 at 1859:21–23; Trial Tr. vol. 12, 1859:21–23. Counsel did not merely concede guilt to "murder" in vague or generic terms. Rather, he specifically told the jury that Mr. Harvey and his co-defendant discussed the plan to commit the murders before carrying them out. Counsel stated that Mr. Harvey and his older co-defendant "had this conversation" before shooting Mr. and Mrs. Boyd, "and ***without question what was discussed during this conversation was whether or not to kill these two people***. This is a crazy conversation for these two young men to be having but that's what it had gotten to." R. Direct Appeal Vol. 12 at 1864 (emphasis added). During closing argument, counsel again emphasized the conversation Mr. Harvey and his co-defendant had before carrying out the murders:

> [Lee Harvey and his codefendant, Scott Stiteler,] went inside and then they did commit the robbery, an armed robbery. There is no question about that. Subsequent to the robbery . . . **they discussed: What are we going to do? Mrs. Boyd has seen us, seen me, what are we going to do? . . . At that point Scott said to Lee, *"Well, we're going to have to kill them because they have seen you. They know you."*** And at that time Mr. and Mrs. Boyd got up to run and Lee depressed the trigger.

R. Vol. 1 at 87 (emphasis added).

In making these statements to the jury, counsel conceded that Mr. Harvey acted with premeditation—the legal element that separates first-degree murder from second-degree murder. As this Court would later find, Mr. Harvey's counsel "conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder." *Harvey v. State*, 946 So. 2d 937, 943 (Fla. 2006).

In addition to conceding Mr. Harvey's guilt to first-degree murder, counsel also "indicated that Harvey and his codefendant were in the process of robbing the victims when the murders were committed." *Harvey*, 2003 Fla. LEXIS 1140, at *13–14. As this Court would later recognize, counsel "thereby conced[ed] Harvey's guilt to felony murder," which was one of the aggravating factors used to support imposition of the death penalty for Mr. Harvey.[1] *Id.* at *2 n.1 & *13–14.

The jury convicted Mr. Harvey of first-degree murder and proceeded to the sentencing phase, recommending a sentence of death by a vote of eleven to one. The judge then found facts sufficient to establish four aggravating factors. *Harvey v. State*, 529 So. 2d 1083, 1087 & n.4 (Fla. 1988). The judge found two mitigating circumstances: Mr. Harvey's low IQ and poor educational and social skills. After

[1] Among other errors, counsel also failed to strike an admittedly biased juror from the panel or to investigate alternative strategies for Mr. Harvey's defense (*see Wiggins v. Smith*, 539 U.S. 510 (2003)).

balancing the factors, the judge sentenced Mr. Harvey to death.[2] The Florida Supreme Court affirmed on June 16, 1988, *see id.*, and the United States Supreme Court denied certiorari on February 21, 1989, *see Harvey v. Florida*, 489 U.S. 1040 (1989).

B. Mr. Harvey's 3.850 Motion and Evidentiary Hearing.

On August 27, 1990, Mr. Harvey filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Among his claims, Mr. Harvey asserted that his counsel's concession of his guilt constituted ineffective assistance under the standard laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). The Circuit Court denied his claims, and Mr. Harvey appealed to this Court. On February 23, 1995, this Court remanded the case to the Circuit Court for an evidentiary hearing on certain parts of Mr. Harvey's ineffective assistance of counsel claims.

At an evidentiary hearing on August 24, 1998, Mr. Harvey testified that counsel never told him of counsel's strategy to concede his guilt before doing so in the opening statement to the jury. Specifically, Mr. Harvey testified that counsel "never said he was going to plead me guilty to second degree murder or first

[2] Mr. Harvey's co-defendant was older, more sophisticated, and dominated over Mr. Harvey. Notwithstanding these facts, co-defendant's counsel was able to negotiate a plea and a life sentence.

degree murder or any murder." R. Vol. 15, at 934. Mr. Harvey further testified that counsel never discussed the substance of his defense with him before conceding his guilt. R. Vol. 15, at 931–35.

Mr. Harvey's counsel also testified at the hearing. Counsel's testimony differed from Mr. Harvey's in certain respects, but was consistent with Mr. Harvey's testimony on *the* critical issue: counsel never informed Mr. Harvey that he was going to concede guilt to first-degree murder or that he was going to concede facts showing premeditation.

According to counsel's testimony, counsel could not possibly have told Mr. Harvey about these concessions because he did not intend to make them. Counsel testified that his intended strategy was to "tiptoe[] through Florida case law" and argue "that this was second degree murder as opposed to first degree murder." R. Vol. 10, Evid. Hr'g Tr. Aug. 17, 1998, at 100–101. Counsel's intent was to argue "there was no premeditated act." *Id.* at 101. Counsel recalled having a series of discussions with Mr. Harvey about "the general landscape" of this defense strategy. *Id*. at 99–100.

According to counsel, he had one conversation with Mr. Harvey in which he specifically informed Mr. Harvey that he was going to tell the jury "[Mr. Harvey is] guilty of murder." *Id*. But this conversation did not include telling Mr. Harvey that guilt to *first-degree* murder would be conceded. Moreover, this conversation

allegedly took place in the courtroom immediately before opening statements began. *Id.*

Counsel admitted that it was his regular practice to keep notes of his significant conversations with clients, including in Mr. Harvey's case. *See, e.g.*, *id.* at 91, 123; see also R. Vol. 12, Evid. Hr'g Tr. Aug. 19, 1998, at 398–99. However, counsel had no documentation to support his recollection of his discussion with Mr. Harvey. Nor did counsel have any documentation memorializing Mr. Harvey's consent to the concession of guilt. *Id.* at 102.

The evidentiary hearing also included testimony from Dr. Michael Norko, a professor of psychiatry at Yale University and the principal forensic psychiatrist for the State of Connecticut. Dr. Norko conducted a psychiatric evaluation of Mr. Harvey and testified as to his findings. Dr. Norko concluded that Mr. Harvey "suffers from organic brain dysfunction." R. Vol. 11, Evid. Hr'g Tr. Aug. 19, 1998, at 280. While some of the "dysfunction" was likely present since childhood, the "organicity was dramatically compounded by [the] head trauma" that Mr. Harvey suffered in a serious car accident when he was sixteen years old. R. Vol. 3 at 423, Rule 3.850 Mot. to Vacate, Appx. No. 3, at 13 (Fla. Cir. Ct. Aug. 27, 1990). According to Dr. Norko, Mr. Harvey "has been left with a chronic syndrome of frontal lobe dysfunction. This is manifested in an inability to think abstractly, very poor organizational and executive functions, diminished capacity for decision-

making and goal-directed behavior, irritability and mood swings, and lack of foresight and insight." *Id.*[3]

On the particular issue of trial counsel's concession of guilt, Dr. Norko testified that Mr. Harvey would only have been able to understand the strategy of conceding guilt (whether to first- or second-degree murder)—and make a knowing decision about whether to permit counsel to make such a concession on his behalf—if counsel had explained the proposed concession adequately. R. Vol. 12, Evid. Hr'g Aug. 19, 1998, at 441–44. According to Dr. Norko, if counsel had given Mr. Harvey a slow, clear explanation—in a way that made the issue concrete and easy to comprehend—and perhaps also included some kind of illustration or diagram, Mr. Harvey would have understood and could have articulated his objections. *Id.*[4]

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[3] These acute psychiatric issues were never investigated by counsel, and thus were never evaluated as a possible defense. As discussed below, *see* p. 34, counsel failed to retain a psychiatrist to examine Mr. Harvey and instead relied on a "personality evaluation" by a school psychologist who had never before evaluated a capital defendant. *See* Rule 3.850 Mot. to Vacate at 73, 236–37. That very psychologist—after receiving additional training and professional experience—recanted his testimony in its entirety. *See* R. Vol. 15 at 969–82; Appx. in Support of Pet. for Habeas Corpus (S.D. Fl. Jan. 25, 2008) (Doc. 4-2, at 47–50).

[4] Counsel has testified that he was aware that Mr. Harvey was "suicidal, slow to understand," and emotional at the time of his trial." R. Vol. 3 at 403, Affidavit of Robert J. Watson, Aug. 24, 1990, ¶ 3.

Following the 1998 evidentiary hearing, the Circuit Court again denied Mr. Harvey relief. *Florida v. Harvey*, No. 85-75 CF (Fla. Jan. 26, 1999). The court held that counsel's concession of guilt during the opening statement did not amount to ineffective assistance under *Strickland* because the "facts show[ed] a sufficient discussion" between counsel and Mr. Harvey of counsel's strategy to concede second-degree murder. R. Vol. 9 at 1717, Am. Order on Motion for Post-Conviction Relief, Jan. 28, 1999, at 11. Mr. Harvey again appealed to this Court.

C. The Florida Supreme Court Vacates Mr. Harvey's Conviction, But Later Withdraws Its Opinion.

On July 3, 2003, this Court reversed the Circuit Court. *Harvey v. State*, No. SC95075, 2003 Fla. LEXIS 1140 (Fla. Jul. 3, 2003). This Court held that counsel's concession of Mr. Harvey's guilt required that the case be remanded for a new trial. In particular, this Court recognized that counsel conceded Mr. Harvey's guilt to *first*-degree murder (which requires premeditation), rather than to *second*-degree murder. *Id.* at *13–14. This Court further found that, while counsel's concession was to first-degree murder, "at best, trial counsel informed Harvey of his strategy to concede guilt to *second*-degree murder." *Id.* at *14 (emphasis added). This Court held that counsel's unilateral concession of guilt to first-degree murder "rendered [Mr. Harvey's] not guilty plea a nullity." *Id.* at *16. This Court held that counsel conceded the crime of conviction, but at most

discussed concession of a *different* crime (second-degree murder) with Mr. Harvey, so Mr. Harvey could not have consented to the concession.

Because counsel's concession "failed to subject the prosecution's case to meaningful adversarial testing"—and because Mr. Harvey did not "knowingly and voluntarily consent[] to decline meaningful adversarial testing"—this Court concluded that counsel was *per se* ineffective. *Id.* at *11, *15–16. Rather than require Mr. Harvey to demonstrate that he was prejudiced by counsel's deficient performance—as required under *Strickland*—this Court held that the prejudice to Mr. Harvey was presumed. *Id.* at *11 (citing *United States v. Cronic*, 466 U.S. 648 (1984)). This Court remanded with directions that Mr. Harvey's convictions be vacated. *Id.* at *16.

The State then moved for rehearing. While its petition was pending, the United States Supreme Court decided *Florida v. Nixon*, 543 U.S. 175 (2004). In *Nixon*, trial counsel informed the defendant "at least three times" of his intent to strategically concede guilt to the jury, and the defendant did not object. 543 U.S. at 181. The United States Supreme Court held that this conduct did not constitute a complete failure "to subject the prosecution's case to meaningful adversarial testing," and thus *Strickland*—and its required showing of prejudice—applied. 543 U.S. at 190.

In light of *Nixon*, this Court withdrew its 2003 decision vacating Mr. Harvey's convictions. *Harvey v. State*, 946 So. 2d 937 (Fla. 2006). This Court explained that, under its interpretation of *Nixon*, counsel's concession of Mr. Harvey's guilt was subject to the *Strickland* prejudice requirement rather than the presumed-prejudice rule it had applied in its 2003 opinion. *Id.* at 942. Applying *Strickland*'s prejudice test, this Court concluded that Mr. Harvey failed to establish prejudice from counsel's concession because the court denied Mr. Harvey's motion to suppress his earlier confession to police and instead admitted it at trial. *Id.* at 943–44.

This Court's 2006 opinion does not, however, contradict its 2003 holding that counsel conceded first-degree murder, rather than second-degree murder. In fact, this Court's 2006 opinion reiterated that counsel "conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder." *Id.* at 943. The only reason this Court withdrew its earlier opinion was a change in the legal standard governing ineffective assistance claims "based on counsel's concession of guilt . . . without the defendant's consent." *Id.* at 942. As explained above, this Court's presumed-prejudice rule was replaced by a requirement that a defendant show prejudice from his attorney's concession.

D. The United States Supreme Court Decides *McCoy v. Louisiana*.

On May 14, 2018, the law changed again. The United States Supreme Court decided *McCoy v. Louisiana*, which established a new and fundamental Sixth Amendment right of criminal defendants: the right "to decide that the objective of the defense is to assert innocence" and to not have counsel "usurp control" of that decision. 138 S. Ct. 1500, 1508, 1511 (2018). The Supreme Court made clear that this "ability to decide whether to maintain [one's] innocence" is protected under the Sixth Amendment "autonomy right," not the Sixth Amendment right to effective assistance of counsel. *Id.* at 1509–11. As a result, *Strickland*'s prejudice requirement for ineffective-assistance claims is *not* the correct test for evaluating claims that trial counsel violated a defendant's autonomy right. *Id.* Instead, a violation of this right constitutes a structural error, requiring a new trial "without any need first to show prejudice." *Id.* at 1511–12.

E. Mr. Harvey's Rule 3.851 Motion and the Decision Below.

In light of the new right announced in *McCoy*—and the Supreme Court's holding that prejudice must be presumed when the right is violated—Mr. Harvey filed a new request to vacate his conviction and death sentence. On May 13, 2019, Mr. Harvey filed the instant successive motion to vacate his conviction and death sentence under Florida Rule of Criminal Procedure 3.851. On July 2, 2019, the Circuit Court held a hearing on the motion. 2019 Supp. R. 69, Hr'g Tr. (July 2,

2019). The State argued its case for approximately five minutes and the court asked no questions. *Id.*

The next day, on July 3, 2019, the Okeechobee County Circuit Court denied the motion in a four-paragraph order. 2019 Supp. R. 55, Order. The Circuit Court provided four reasons to support its denial. *First*, it held that the petition was untimely because *McCoy* has not yet been held to apply retroactively. 2019 Supp. R. 55–56, Order, at 1–2. *Second*, the Circuit Court concluded that Mr. Harvey failed to "adamantly object to trial counsel's concession of guilt," and noted that Mr. Harvey had made a confession statement to the police following his arrest. *Id.* at 2. *Third*, the Circuit Court cited this Court's 2006 opinion for the purported holding that counsel's "concession of guilt was found not deficient." *Id.* (citing *Harvey*, 946 So. 2d at 940). *Fourth*, the Circuit Court held that the *McCoy* autonomy right is not a development of fundamental significance under *Witt v. State*, 387 So. 2d 922, 928 (Fla. 1980), and therefore should not apply retroactively. *Id.*

Mr. Harvey timely appealed to this Court on July 26, 2019. 2019 Supp. R. 57.

SUMMARY OF ARGUMENT

The Circuit Court erred in denying Mr. Harvey's successive motion to vacate his death sentence. Under *McCoy*, Mr. Harvey's counsel violated his

fundamental Sixth Amendment right to determine the objective of his defense when counsel unilaterally conceded his guilt to first-degree murder, without affording Mr. Harvey an opportunity to object. Accordingly, this Court should reverse the ruling of the Circuit Court and vacate Mr. Harvey's unconstitutional conviction and death sentence.

First, the Circuit Court erred in finding that Mr. Harvey's motion was untimely. Mr. Harvey timely filed his petition within one year of the Supreme Court's May 2018 decision in *McCoy* establishing a new fundamental Sixth Amendment right. The Circuit Court held that a defendant is time-barred from filing a post-conviction motion based on a newly established constitutional right unless the United States Supreme Court or this Court has *already* held that the right applies retroactively. Such a rule would effectively eliminate all post-conviction challenges based on a newly established constitutional right by precluding any petitioner from being the first to argue the issue of retroactivity. The Circuit Court provided no authority to support this proposition. Nor could it, because this Court's precedent supports precisely the opposite conclusion. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2018); *see also Walton v. State*, 77 So. 3d 639, 644 (Fla. 2011) (proceeding to *Witt* retroactivity analysis in otherwise untimely Rule 3.851 post-conviction motion, despite lack of previous decision holding new rule retroactive); *Walls v. State*, 213 So. 3d 340 (Fla. 2016) (same).

Second, on the merits, the Circuit Court misapplied *McCoy*. Specifically, the Circuit Court concluded that *McCoy* requires a defendant to "adamantly object" to counsel's concession of guilt. Order at *2. That is wrong. *McCoy* establishes that the Sixth Amendment protects a defendant's autonomy to assert innocence and prohibits counsel from usurping the defendant's decision regarding whether to concede guilt. Here, it is undisputed that counsel never told Mr. Harvey he was going to concede guilt to first-degree murder. Counsel's decision to concede Mr. Harvey's guilt to first-degree murder without apprising Mr. Harvey and without giving him an opportunity to object deprived Mr. Harvey of his Sixth Amendment right to autonomy over the decision to concede guilt, as established by the United States Supreme Court in *McCoy*.

Third, the right established in *McCoy* is fundamental and, when assessed under the *Witt* framework, should apply retroactively. Under a correct application of the *Witt* retroactivity test, it is clear that *McCoy* represents a development of "sufficient magnitude" to necessitate retroactive application. 387 So. 2d at 929. Alternatively, *McCoy* should apply retroactively under the doctrine of fundamental fairness because Mr. Harvey raised the same substantive issue nearly 30 years ago, before the autonomy right was recognized. Mr. Harvey has consistently raised this issue since the beginning of his post-conviction proceedings, arguing that counsel highjacking a defendant's decision to maintain his innocence violates his

constitutional rights. Now the United States Supreme Court has agreed. As a result, Mr. Harvey should thus enjoy the benefit of *McCoy*'s ruling.

Fourth, as the Circuit Court's order acknowledges, Mr. Harvey's *McCoy* claim presents a new and analytically distinct claim that has never before been litigated. Because prior findings regarding ineffective assistance of counsel do not foreclose Mr. Harvey's *McCoy* claim, no procedural bar exists.

STANDARD OF REVIEW

This Court reviews the Circuit Court's summary denial of a successive Rule 3.851 motion *de novo*. *Gaskin v. State*, 218 So. 3d 399, 400 (Fla. 2017).

ARGUMENT

I. The Circuit Court Erred in Finding Mr. Harvey's Rule 3.851 Motion Untimely.

A capital defendant's motion to vacate his judgment of conviction and death sentence generally must be filed within one year after the judgment and sentence became final. Fla. R. Crim. P. 3.851(d)(1). However, a defendant may file a successive motion to vacate *after* the one-year period from judgment has passed if the "fundamental constitutional right asserted was not established within [one year of the final judgment] and has been held to apply retroactively." *Id.* 3.851(d)(2)(B), (e)(2); *see Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009). Mr. Harvey's petition was timely because it was filed within one year of the United States Supreme Court's decision in *McCoy*.

The Circuit Court nonetheless concluded that Mr. Harvey's Rule 3.851 motion "is untimely because neither the United States Supreme Court nor the Florida Supreme Court have held *McCoy* to apply retroactively." 2019 Supp. R. 55, Order at *1. This was error. If credited, this position would effectively eliminate all post-conviction challenges based on a newly established constitutional right by precluding any petitioner from being the first to argue the issue of retroactivity. That perverse result would be at odds with this Court's case law, the intent of Rule 3.851, and common sense. So too would it present serious due process concerns by erecting artificial barriers to prevent claimants such as Mr. Harvey from enjoying a benefit conferred to them by operation of substantive Florida law. *Cf. Michel v. State of La.*, 350 U.S. 91, 93 (1955) (noting due process concerns with rules that pose an "insuperable barrier" to the vindication of certain rights).

Neither the Circuit Court's order nor the State's brief below cites any authority in support of this interpretation of Rule 3.851(d)(2)(B), and this Court's precedent is directly to the contrary. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2018); *see also Walton v. State*, 77 So. 3d 639 (Fla. 2011) (proceeding to retroactivity analysis in otherwise untimely post-conviction motion, despite lack of previous decision holding new rule retroactive); *Walls v. State*, 213 So. 3d 340 (Fla. 2016) (same). In *Mosley*, for instance, a prisoner filed a post-conviction

motion under Rule 3.851(d)(2)(B), years after the prisoner's judgment had become final, based on the newly established constitutional right announced in *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). *Hurst* had not yet been held to apply retroactively by the United States Supreme Court or this Court; nevertheless, this Court entertained the petition and granted relief. *See Mosley*, 209 So. 3d at 1283.

Mosley, Walton, and *Walls* make clear that Rule 3.851 does not bar a defendant from asserting that a newly established right should apply retroactively, even when no court has yet held that it does. Mr. Harvey's *McCoy* claim is thus timely and falls within Rule 3.851(d)(2)(B)'s provision for post-conviction motions based on newly-established constitutional rights.

The Circuit Court's clear legal error concerning the timeliness of Mr. Harvey's claims infected its entire analysis. Indeed, the Circuit Court listed the untimeliness of the petition as the "first" reason why relief was being denied. Although the Circuit Court then went on to provide alternative bases for its finding, it is clear from the face of the Order that the Circuit Court declined to undertake a thorough analysis of the record because it believed that doing so was unnecessary given the threshold finding of untimeliness.

As explained in detail below (*see* §§ II–IV), the Circuit Court's alternative holdings—like its holding as to timeliness—lack merit. For that reason, this Court

should reverse the decision below and hold that Mr. Harvey is entitled to a new trial.

II. Under *McCoy*, Trial Counsel Violated Mr. Harvey's Fundamental Sixth Amendment Right to Decide Whether the Objective of His Defense Was To Concede Guilt.

A. The Defendant's Sixth Amendment Right to Autonomy Gives the Defendant the Sole Prerogative to Decide Whether to Concede Guilt and Prohibits Counsel From Usurping That Decision.

The Sixth Amendment guarantees a criminal defendant "the assistance of counsel for his defence." U. S. Const. Amend. IV. United States Supreme Court precedent instructs that counsel's "assistance," however expert, is still given as "an assistant" to the defendant. *Faretta v. Cal.*, 422 U.S. 806, 820 (1975). It is the defendant who must remain the "master of his own defense." *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979). As a result, different rights and responsibilities fall to each. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008). Counsel attends to administrative and strategic matters, deciding "what arguments to pursue, what evidentiary objections to raise, and what agreement to conclude regarding the admission of evidence." *Id*. Meanwhile, the defendant retains control of the overall objective of his or her defense. *McCoy*, 138 S. Ct. at 1508. Within that control, the decision "whether to plead guilty" belongs exclusively to the defendant. *Id*.

To make that decision, defendants should be afforded the time and

information necessary to meaningfully reflect on its consequences. Other legal contexts provide instructive guidance. For example, to waive rights under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act, and 42 U.S.C. § 1981, those waiving their rights must be afforded sufficient time to review the decision, advised of their right to seek counsel, and provided an opportunity to ask questions and push back. *See, e.g.*, *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 117 (1st Cir. 1998) (collecting cases). Capital defendants should be entitled to at least as much process. In the context of general criminal pleas, defendants appearing in court to concede guilt are first asked by the court whether they understand the nature of the charges they face, the consequences of pleading guilty to it, and defendants' right to not plead. *See* ABA Standards for Criminal Justice: Pleas of Guilty, 3d ed. (1999). The court must also inquire into the defendants' ability to enter a plea, asking about their mental acuity and understanding of the consequences of the choice.

Before the United States Supreme Court's decision in *McCoy*, claims like Mr. Harvey's—that trial counsel conceded a defendant's guilt against his or her wishes—were treated as ineffective assistance of counsel claims. There are two standards for assessing claims of ineffective assistance. In almost all circumstances, such claims are evaluated under the two-pronged test laid out in *Strickland v. Washington*. That test requires defendants to show (1) that counsel's

performance was deficient, and (2) that the deficiency actually prejudiced the defendant's case. 466 U.S. at 693.

However, there is a narrow exception to the two-prong *Strickland* standard where the circumstances of counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all. *See United States v. Cronic*, 466 U.S. 648, 659 (1984). Where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," there is no need to demonstrate both objective unreasonableness and prejudice; instead, the prejudice is presumed. *Id*. This was the basis for this Court's 2003 decision ordering that Mr. Harvey's conviction and death sentence be vacated. This Court correctly held that by conceding Mr. Harvey's guilt to the crime of first-degree murder without Mr. Harvey's consent, counsel violated Mr. Harvey's Sixth Amendment rights, requiring remand without a showing of prejudice.

Following this Court's 2003 decision, the United States Supreme Court issued *Nixon v. Florida*, 543 U.S. 175 (2004). In *Nixon*, counsel conceded the defendant's guilt to the commission of murder in order to preserve credibility in urging leniency during the penalty-phase proceedings. *Id.* at 178. Counsel informed the defendant of this intended strategy "at least three times." *Id.* at 181. But, after consulting his client multiple times about the proposed strategy, the client gave "no response." *Id.* at 179. The defendant refused to answer inquiries

"put to him by counsel and [the] court" and instead remained "unresponsive." *Id.* at 181, 189. The defendant then refused to enter the courtroom for trial and remained absent throughout the proceedings—waiving his right to be present at trial. *Id.* at 182.

The Supreme Court held that, on these facts, counsel is "not automatically barred" from making the concession of guilt to the jury for strategic purposes. *Id.* at 178. Under *Nixon*, if counsel has "adequately disclosed [] and discussed" the proposed concession with his client, yet the client fails to respond, the client has in effect acquiesced to counsel's plan and counsel has not "entirely failed to function as the client's advocate." 543 U.S. at 189. By refusing to give any response after being adequately informed of the proposed concession, the defendant effectively ceded control of the concession decision back to his attorney. *Nixon* instructs that, in that situation, courts should apply the *Strickland* test, and require a showing of both deficient performance and prejudice, rather than presuming prejudice from the concession. *Id*. at 189–90.

In light of *Nixon*, this Court withdrew its 2003 decision. Based on the language in that decision, this Court interpreted *Nixon* to require that *all* claims of ineffective assistance of counsel based on counsel's concession of guilt be analyzed under *Strickland*'s two-prong test. *See Harvey v. State*, 946 So. 2d 937,

943 (Fla. 2006). This Court concluded that Mr. Harvey was required to demonstrate prejudice and held that he had failed to do so.

But in 2018, the United States Supreme Court changed the analysis for these kinds of claims, vindicating this Court's 2003 decision. In *McCoy*, the Court affirmed what this Court recognized in 2003: that usurping a defendant's decision whether to concede guilt constitutes a structural error with no need to demonstrate prejudice. *McCoy*, 138 S. Ct. at 15111.

Like *Nixon*, McCoy's counsel accurately notified him ahead of time of counsel's intention to concede his guilt to the crime charged for strategic purposes. *Id.* at 1506. Unlike *Nixon*, however, McCoy did not stay silent. McCoy objected strenuously to the concession strategy and even tried to terminate his public defender's representation. *Id.* But the court refused to relieve counsel due to the disagreement over the concession, and permitted defense counsel to go forward with his concession strategy. When counsel made the concession of guilt during his opening statement, McCoy again vocally objected to the judge, but was again unsuccessful. *Id.*

The United States Supreme Court held that these circumstances violated McCoy's Sixth Amendment rights. But rather than rely on the *Strickland* ineffective-assistance standard, as it had done in *Nixon*, the Supreme Court established a new Sixth Amendment *autonomy* right to determine the objective of

one's defense, separate and apart from the right to effective assistance of counsel. *Id.* at 1510–11 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence."). The *McCoy* Court held that "it is the defendant's prerogative, not counsel's, to decide [whether] the objective of his defense [is] to admit guilt." *Id.* at 1505. The "[a]utonomy to decide that the objective of the defense is to assert innocence" is "reserved for the client." *Id.* at 1508. Because the decision to concede guilt is within the defendant's "sole prerogative," the defendant's "protected autonomy right" is violated when counsel "usurp[s] control" of that decision. *Id.* at 1511.

The Supreme Court also concluded that a violation of this constitutional autonomy right amounts to "structural" error. *Id*. "[W]hen present, such an error is not subject to harmless-error review" under the *Strickland* analysis. *Id*. Instead, the effects of the lawyer's concession of his client's guilt and the denial of "the defendant's right to make the fundamental choices about his own defense" necessitate "a new trial without any need first to show prejudice." *Id*.

B. Trial Counsel Violated Mr. Harvey's Sixth Amendment Autonomy Right.

In this case, trial counsel usurped Mr. Harvey's Sixth Amendment autonomy right by conceding his guilt to first-degree murder without first informing Mr. Harvey that he would do so and without giving Mr. Harvey an opportunity to

object. At a minimum, the Sixth Amendment autonomy right established in *McCoy* necessarily requires that criminal defendants be given an *opportunity to object* to counsel's decision to concede guilt to the crime charged. *Id.* at 1509. Yet the undisputed evidence shows that Mr. Harvey's counsel never gave Mr. Harvey that opportunity because he never explained to Mr. Harvey that he was going to concede first-degree murder to the jury. "Counsel . . . must [] develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option." *Id.* (internal citation omitted). Mr. Harvey's counsel never did.

1. Counsel Conceded Mr. Harvey's Guilt to First-Degree Murder Without First Informing Mr. Harvey of The Concession or Getting His Approval.

According to Mr. Harvey's testimony, counsel never had *any* discussion with him about conceding guilt, whether to first- or second-degree murder. R. Vol. 15 at 934. According to counsel's testimony, he told Mr. Harvey of the concession plan while sitting in open court in front of the jury immediately before opening statements began. R. Vol. 10 at 99–100. Yet even if this Court accepts only the testimony of Mr. Harvey's counsel—and assumes that such a cursory, last-minute exchange could have provided meaningful notice to a defendant with acute

cognitive deficits[5]—the dispositive fact remains the same: counsel never told Mr. Harvey he was going to concede guilt to *first*-degree murder. Based on counsel's testimony alone, it is undisputed that counsel never informed Mr. Harvey that he would be conceding the element of premeditation and, as a result, first-degree murder. That is because the concession was unintentional. According to counsel's testimony, he could not possibly have informed Mr. Harvey about the concession of premeditation because counsel did not intend to concede it. *Id*. at 100-101. The *most* counsel told Mr. Harvey was that he was going to "tiptoe[]" his way to conceding "second degree murder *as opposed to first degree murder*." *Id.* (emphasis added). Thus, under counsel's version of the facts—which the State accepts and the Circuit Court adopted—it is undisputed that counsel did not inform Mr. Harvey that he was going to concede Mr. Harvey's guilt to first-degree murder. 2019 Supp. R. 50–51, State Br. at 21–22.

It is also undisputed—and the law of the case—that counsel did in fact concede guilt to first-degree murder. *See Harvey*, 946 So. 2d at 943. Counsel conceded murder in the first degree by conceding the element of premeditation.

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[5] As described above, *supra* p. 9, Dr. Norko testified that Mr. Harvey's organic brain dysfunction and intellectual challenges, as well as his emotional state prior to trial, so severely diminished Mr. Harvey's cognitive capacity that he would have needed multiple "very careful and patient discussions," including illustrations or diagrams, in order to make a knowing and informed decision about the concession of guilt. R. Vol. 12, Evid. Hr'g Aug. 19, 1998, at 444.

Counsel specifically told the jury that Mr. Harvey discussed killing Mr. and Mrs. Boyd in a "crazy conversation" with his co-defendant before Mr. Harvey carried out the act. R. Direct Appeal Vol. 10 at 1864. In closing argument, counsel stated that Mr. Harvey and his co-defendant planned "to kill [the Boyds] because they ha[d] seen" Mr. Harvey and would be able to identify him. R. Vol. 1 at 87 (emphasis added). As this Court explained: "[T]rial counsel admitted that Harvey deliberated his plan to kill the Boyds. By stating that Harvey and [his co-defendant] Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder."[6] *Harvey*, 946 So. 2d at 943.

These undisputed facts establish a *McCoy* violation here. By not informing Mr. Harvey that he would concede first-degree murder, counsel deprived Mr. Harvey of the opportunity "to decide that the objective of [his] defense" was to concede guilt to first-degree murder. *McCoy*, 138 S. Ct. at 1508. Counsel thereby "usurp[ed] control" of the concession decision, violating Mr. Harvey's Sixth Amendment autonomy right. *Id.* at 1511.

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[6] Any testimony or argument about conceding guilt to any crime other than first-degree murder (including second-degree murder) is irrelevant to the only inquiry at issue here: whether counsel usurped Mr. Harvey's control over the decision to concede guilt to the crime of conviction, first-degree murder.

2. Counsel's Usurpation Was More Egregious Than That in Both *Nixon* and *McCoy*.

The Circuit Court held that Mr. Harvey's case is distinguishable from *McCoy* because Mr. Harvey did not "adamantly object to trial counsel's concession of guilt." 2019 Supp. R. 56, Order at *2. The Circuit Court misses the entire point. Although the specific facts of *McCoy* involved counsel's concession of guilt over the defendant's express objection, Mr. Harvey had no such chance. It is absurd to suggest that Mr. Harvey should have objected to the concession, when he was never informed of the concession in the first place.

The fact that Mr. Harvey did not object does not foreclose finding a Sixth Amendment violation. The fundamental holding of *McCoy* does not turn on whether the defendant objects. Rather, the Supreme Court concluded, "the violation of McCoy's protected autonomy right *was complete* when the court allowed *counsel to usurp control* of an issue within McCoy's sole prerogative." *Id.* at 1511 (emphases added). Here, counsel "usurp[ed] control" of Mr. Harvey's prerogative to decide whether to concede guilt to first-degree murder by making the concession without first informing Mr. Harvey—without giving him any opportunity to object. *Id.* By the time Mr. Harvey heard the concession to first-degree murder for the first time, so too had the jury.

Mr. Harvey was deprived of the ability to decide whether to concede guilt, after making clear by his not-guilty plea that his chosen objective was to maintain innocence. Under *McCoy*, the Sixth Amendment "preserv[es] for the defendant the *ability to decide* whether to maintain his innocence." *Id.* at 1509 (emphasis added). The "ability to decide" is precisely what Mr. Harvey was denied due to counsel's failure to inform him that counsel was going to concede guilt to first-degree murder. Counsel's conduct therefore constitutes a clear violation of *McCoy*.

Counsel's lack of consultation in this case makes the deprivation of Mr. Harvey's autonomy right even more egregious than in either *McCoy* or *Nixon*. Indeed, in both *McCoy* and *Nixon*, the defense attorneys informed their clients of their intention to concede guilt to the crime charged. They gave their clients a chance to consent or object. *See Nixon*, 543 U.S. at 189 ("[Counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon. . . . [Counsel] fulfilled his duty of consultation by informing Nixon of counsel's proposed strategy and its potential benefits."); *McCoy*, 138 S. Ct. at 1506. In contrast, Mr. Harvey was never given the opportunity to object to his counsel's decision to concede his guilt to first-degree murder. Instead, counsel acted unilaterally, usurping Mr. Harvey's role as the master of his own defense, by

stating to the jury that "Harold Lee Harvey is guilty of murder." R. Direct Appeal at 1859:21–23. Trial Tr. vol. 12, 1859:21–23.

3. Counsel Committed Structural Error; Any Harmless Error Argument is Inapplicable.

Both the Circuit Court and the State below point to Mr. Harvey's confession during the police interrogation following his arrest to support the notion that Mr. Harvey acquiesced to counsel's concession of guilt. 2019 Supp. R. 45, State Br. at 16; 2019 Supp. R. 56, Order at *2. Although completely irrelevant to the issue before this Court, the implication appears to be that any error from counsel's wrongful concession of Mr. Harvey's guilt is harmless because the jury was going to hear the self-incriminating statement Mr. Harvey made to the police regardless of whether counsel made the concession of Mr. Harvey's guilt. By invoking Mr. Harvey's confession, the Circuit Court and the State below appear to be signaling, directly or indirectly, that the outcome of this case will be no different if Mr. Harvey is granted a new trial. This argument has no merit for three reasons.

First, harmless-error analysis has no place under *McCoy* because the error is structural. *See* 138 S. Ct. at 1511. In light of the Supreme Court's structural-error holding, Mr. Harvey's confession should not factor into this Court's decision at all. Any consideration of what may or may not happen on retrial is irrelevant; an error occurred that requires automatic, *per se* reversal.

Second, Mr. Harvey's statements during police interrogation—immediately after being arrested and without counsel present—have no bearing on whether, sixteen months later, Mr. Harvey gave consent for his counsel to concede his guilt to the jury in open court. After making the confession, Mr. Harvey not only entered a plea of not guilty, but also fought vigorously to have the confession suppressed. R. Direct Appeal Vols. 4, 5. Whether Mr. Harvey consented to counsel's concession of guilt at trial cannot possibly be resolved by looking to a custodial confession Mr. Harvey gave more than a year before trial, especially when the intervening events—a not-guilty plea and a motion to suppress the confession—evince Mr. Harvey's clear intent to assert innocence. Moreover, Mr. Harvey's undisputed testimony is that he did *not* want counsel to concede guilt to first-degree murder at trial. R. Vol. 15, Evid. Hr'g. Tr. 931.

Third, even if the harmless-error standard applied—and it does not—the myriad errors in Mr. Harvey's trial and penalty-phase proceedings demonstrate that a new trial, with representation by the undersigned counsel, might well result in a different outcome. The litany of counsel's failures are documented in the extensive record before this Court and are not repeated here. *See, e.g.*, R. Vol. 1 at 30–40, Rule 3.850 Mot. to Vacate at 7–17; R. Vol. 3 at 403, Affidavit of Robert J. Watson, Aug. 24, 1990, ¶¶ 1, 5–7; R. Vol. 7 at 1308–09.

An example is instructive.

Counsel was aware that Mr. Harvey was "slow to understand" and received a recommendation from a psychologist that a psychiatrist be retained and funds from the trial court to do so. *See* R. Vol. 3 at 403–04, Affidavit of Robert J. Watson, Aug. 24, 1990, ¶¶ 3, 6–7. Yet, rather than retain a psychiatrist to assist in developing a defense based on Mr. Harvey's mental and intellectual capacity, counsel retained a school psychologist with no experience in evaluating capital defendants, who concluded that Mr. Harvey—who stood accused of double murder—had low self-esteem, needed "assertiveness training," and had no intellectual impairment. That testimony has since been recanted in its entirety. R. Vol. 15 at 969–82; *see* Appx. in Support of Pet. for Habeas Corpus (S.D. Fl. Jan. 25, 2008) (Doc. 4-3, at 93); *id.* (Doc. 4-2, at 47–48, 50).

As described above, *see* p. 9–10, the undisputed psychiatric evidence established in post-conviction proceedings shows that Mr. Harvey "suffers from organic brain dysfunction." R. Vol. 11, Evid. Hr'g Tr. Aug. 19, 1998, at 290. Mr. Harvey suffers from an "inability to think abstractly," "diminished capacity for decision-making and goal-directed behavior," and a "lack of foresight." R. Vol. 3 at 427, 3.850 Mot. to Vacate, Appx. No. 3, at 13 (Fla. Cir. Ct. Aug. 27, 1990). The psychiatric findings also show that Mr. Harvey "behaves submissively and passively in response to others, particularly authority figures," and that he was "under the influence of extreme mental or emotional disturbance" at the time of the

crime. R. Vol. 3 at 428, 431, 3.850 Mot. to Vacate, Appx. No. 3, at 13, 17 (Fla. Cir. Ct. Aug. 27, 1990).

None of this was ever investigated or considered by trial counsel in his defense of Mr. Harvey. *See Wiggins v. Smith*, 539 U.S. 510 (2003). But on retrial, the psychiatric evidence would reshape the entire defense. Not only is it powerful mitigation evidence but it also establishes viable grounds to suppress Mr. Harvey's self-incriminating custodial statements because Mr. Harvey's confession and purported waiver of *Miranda* were not voluntary, knowing, and intelligent.

Counsel respectfully suggests that the cumulative effect of trial counsel's errors undermines confidence in Mr. Harvey's capital sentence and suggests that a new trial might well have a different outcome.

***

Because counsel violated Mr. Harvey's Sixth Amendment right to autonomy by usurping control of the decision to concede guilt, Mr. Harvey respectfully requests that this Court order his conviction and sentence vacated and afford him a new trial. *See* 138 S. Ct. at 1511.

III. The Sixth Amendment Right Established in *McCoy* Should Apply Retroactively.

As explained in detail below, Mr. Harvey is entitled to retroactive application of *McCoy* under both (1) *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *see supra* § III.A; and (2) *James v. State*, 615 So. 2d 668 (Fla. 1993), *see supra* § III.B.

A. *McCoy* Should Apply Retroactively to This Case Under *Witt.*

The Circuit Court erred in concluding that *McCoy* "fails to satisfy the last prong of *Witt*." Order at *2. On the contrary, the Sixth Amendment right established in *McCoy* satisfies all three prongs of the framework prescribed in *Witt v. State*, 387 So. 2d at 928, and therefore should apply retroactively.

Under *Witt*, a new rule applies retroactively when it: (1) emanates from the United States Supreme Court or the Florida Supreme Court, (2) is constitutional in nature, and (3) constitutes "a development of fundamental significance." *Id.* at 931. The third requirement is satisfied when a newly recognized right is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" of *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Witt*, 387 So. 2d at 929. To determine whether a rule is of sufficient magnitude to require retroactivity, this Court employs the *Stovall*/*Linkletter* test to consider: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of

justice of a retroactive application of the new rule." *Id.* at 926. The *Witt* test balances the desire for finality against the interests of fairness and uniformity, both of which are heightened by the "imposition of a penalty as unredeemable as death" in the capital punishment context. *Id*.

McCoy satisfies all three *Witt* criteria, and thus the Sixth Amendment autonomy right announced in that case should apply retroactively to Mr. Harvey. As the Circuit Court acknowledged, the first two prongs are easily met: *McCoy* was issued by the United States Supreme Court and is constitutional in nature. And, when properly analyzed, it is clear that the right announced in *McCoy* is fundamentally significant, thus satisfying *Witt*'s third prong. Indeed, all three prongs of the *Stovall*/*Linkletter* test weigh heavily in favor of retroactivity.

First, the purpose of the right established in *McCoy* is to protect "a defendant's Sixth Amendment-secured autonomy." *McCoy*, 138 S. Ct. at 1511. That autonomy right "protects . . . the *fundamental* legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* (internal quotation marks omitted) (emphasis added). "The right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* at 1507 (internal quotation marks omitted). Because this right is essential to a criminal defendant's entire case, no other purpose could be of higher magnitude.

Witt reserves retroactivity for "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." *Witt*, 387 So. 2d at 929. That is exactly how the United States Supreme Court described the right announced in *McCoy* when holding that a violation constitutes a structural error and is not subject to harmless-error review. The Court explained that "structural error affect[s] the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself." *McCoy*, 138 S. Ct. at 1511 (internal quotation marks and citation omitted). The *McCoy* rule's core purpose of safeguarding a defendant's fundamental liberty and the integrity of criminal trials strongly weighs in favor of retroactive application.

The second and third prongs of the *Stovall*/*Linkletter* framework also support retroactive application. Neither the State nor the Circuit Court have provided any evidence of reliance interests on the pre-*McCoy* rule, or argued that retroactive application of *McCoy* would burden the administration of justice in Florida. While "any decision to give retroactive effect to a newly announced rule of law will have some impact on the administration of justice[,] . . . the inquiry is whether holding a decision retroactive would have the effect of burdening the judicial machinery of our state, fiscally and intellectually, beyond any tolerable

limit." *Mosley v. State*, 209 So. 3d 1248, 1281 (Fla. 2018) (quotation marks omitted).

The State offers no evidence that retroactive application of *McCoy* would pose an intolerable burden on Florida's judicial system. To the contrary, the State concedes that *McCoy* claims will be "rare." State Br. at 11 n.4 (quoting *McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting)). The fact that *McCoy* claims will be rare demonstrates that retroactive application of *McCoy* will not "destroy the stability of the law, render punishments uncertain and therefore ineffectual, [or] burden the judicial machinery." *Witt*, 387 So. 2d at 929. Because *McCoy* claims will be rare, retroactive application of *McCoy* will not undermine the interest of ensuring the finality of judgments. *Id.* at 925.

Because the right established in *McCoy* satisfies all three prongs of *Witt*, Mr. Harvey respectfully requests that this Court apply *McCoy* retroactively to his case, and vacate his conviction and death sentence.

B. *McCoy* Should Apply Retroactively to This Case Under *James*.

Mr. Harvey is separately entitled to retroactive application of *McCoy* under the doctrine of fundamental fairness. Under this Court's precedent, "fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that

changes our jurisprudence." *Mosley v. State*, 209 So. 3d 1248, 1274–75 (Fla. 2016). *McCoy* is just such a case.

This Court laid out the fundamental fairness analysis in *James v. State*, 615 So. 2d 668, 669 (Fla. 1993). The question in *James* was whether the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), should apply retroactively. In holding that it should, this Court applied a different kind of analysis from *Witt*, based on the concept of fundamental fairness. This Court reasoned that because James had attempted to assert the right that *Espinosa* recognized before the Supreme Court recognized that right, "it would not be fair to deprive him of" its benefit once the Court later recognized it. *James*, 615 So. 2d at 669.

Similarly, in *Mosley*, the defendant had previously asserted that he was entitled to a unanimous jury verdict. 209 So. 3d at 1274. Because Florida courts had not yet recognized the right that Mosely asserted, they initially and repeatedly denied him relief. *Id.* But when the United States Supreme Court later recognized that very same right, this Court held that "the interests of finality must yield to fundamental fairness" and therefore applied the right at issue retroactively to Mosley's case. *Id*. at 1275.

To enjoy the retroactive benefits of a newly recognized right under the fundamental fairness doctrine, defendants are not required to identify the claim

using the exact same terminology that the subsequent case law uses. "Rather, the proper inquiry centers on whether a defendant preserved his or her substantive constitutional claim to which and for which [the right] applies." *Asay v. State*, 210 So. 3d 1, 30 (Fla. 2016) (Lewis, J., concurring). A defendant who has previously raised the "substantive" issue, regardless of its proper name or framing, is thus entitled to the benefits of its later recognition. *Id.*

Mr. Harvey is one such defendant. Like James and Mosley, Mr. Harvey asserted the claim he brings here at his earliest opportunity and continued to assert it over the past 30 years. In his initial motion for postconviction relief under Rule 3.850, filed on August 27, 1990, Mr. Harvey argued that his counsel's unilateral action in conceding Mr. Harvey's guilt to first-degree murder violated his constitutional rights under the Sixth Amendment. R. Vol. 1, 85–93, Motion to Vacate Judgment and Death Sentences, at 62–70 (Aug. 27, 1990). At the time, Mr. Harvey characterized this violation as ineffective assistance of counsel, but what he described was the very right recognized in *McCoy*: the right to determine the objective of his own defense.

Substantively, Mr. Harvey argued that although "[t]he decision to plead 'guilty' or 'not guilty' is a decision reserved solely for the accused based on his intelligent and voluntary choice," his counsel nullified his decision by conceding his guilt without his consent. *Id.* at 65–67, citing *Boykin v. Alabama*, 395 U.S. 238

(1969). Mr. Harvey argued that his counsel's statements to the jury were the "functional equivalent" of a guilty plea, overriding his earlier choice. R. Vol. 1, at 90; Motion to Vacate Judgment and Death Sentences, at 67.

Although the law before 2018 did not yet recognize Mr. Harvey's right to autonomy under the Sixth Amendment as it is now described in *McCoy*, Mr. Harvey repeatedly raised the same substantive issue animating the *McCoy* decision over the past thirty years. Indeed, the *McCoy* Court echoed Mr. Harvey's arguments by noting that "whether to plead guilty" is a decision reserved for defendants, and not their counsel. *McCoy*, 138 S. Ct. at 1508. The Court thus held that counsel may not take that decision away from a defendant or "override it by conceding guilt" without the defendant's consent. *Id.* at 1509. That is exactly what happened in Mr. Harvey's case.

Further, situations like Mr. Harvey's are not likely to come up very often. As the State admits, wrongful concessions of guilt tend to be rare. State Br. at 11 n.4. Indeed, the number of defendants who raised a *McCoy* autonomy claim before it was recognized as such will be fewer still. Providing Mr. Harvey relief on this basis thus bears no risk of opening any floodgates to other litigants or threatens to overwhelm the administration of justice in any way. But because Mr. Harvey raised this issue during prior proceedings, he should be entitled to the benefits of the *McCoy* holding under the doctrine of fundamental fairness.

IV. Mr. Harvey's Autonomy Claim under *McCoy* Has Never Been Litigated and No Procedural Bar Exists.

The Circuit Court also denied Mr. Harvey's *McCoy* claim on the ground that "in a prior postconviction proceeding counsel's concession of guilt was found not deficient." 2019 Supp. R. 56, Order at *2. This was not only error, but was also contradicted by the preceding paragraph of the Circuit Court's Order. As the Circuit Court explained, Mr. Harvey "does not claim ineffective assistance of counsel but asserts structural error in trial counsel's concession of [Mr. Harvey's] guilt without affording [Mr. Harvey] the opportunity to consent or object." *Id*. at *1. This statement makes clear that Mr. Harvey's claim is not procedurally barred, because it is distinct from an ineffective-assistance claim and requires a different inquiry.

More specifically, an ineffective-assistance claim requires showing both counsel's deficient performance ***and*** prejudice to the defendant. *See Strickland*, 466 U.S. at 668. By contrast, *McCoy* expressly rejected the *Strickland* analysis for the Sixth Amendment autonomy right that Mr. Harvey asserts here. *See McCoy*, 138 S. Ct. at 1510–11. The Court explained that "[b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U.S. 668 (1984), or *United States v. Cronic*, 466 U.S. 648 (1984), to McCoy's claim." *Id.*

Accordingly, *McCoy* held that a violation of the autonomy right constitutes "structural" error that infects the framework of the entire trial—requiring a "new trial *without any need first to show prejudice*." *Id.* at 1511 (emphasis added).

When this Court rejected Mr. Harvey's ineffective-assistance claim, it did so under the prejudice prong of *Strickland*. *Harvey*, 946 So. 2d at 943; *see also* 2019 Supp. R. 43, State Br. at 14 ("[T]his issue did not meet the prejudice prong of *Strickland*."). But *McCoy* does away with *Strickland*'s prejudice requirement, creating a new legal claim and a new basis for relief. Because the autonomy right established in *McCoy* is not subject to the prejudice analysis on which Harvey's ineffective-assistance claim was resolved, this Court's previous holding on the ineffective-assistance claim cannot constitute a procedural bar to relief under *McCoy*. 138 S. Ct. at 1511.

More fundamentally, the Circuit Court mischaracterized this Court's 2006 opinion. The Circuit Court suggested that this Court previously found that Mr. Harvey's counsel's concession was "not deficient" performance. 2019 Supp. R. 56, Order at *2. But that is simply wrong; this Court did not reach the issue of deficient performance because it rejected Harvey's claim on the basis that he failed to show prejudice. *See Harvey*, 946 So. 2d at 943. As explained above, this Court's prejudice-based holding is precisely why the 2006 opinion is irrelevant:

McCoy established that a violation of a defendant's autonomy right is structural error and is not subject to any prejudice analysis.

Mr. Harvey here brings an autonomy claim under *McCoy*—a claim he was unable to raise before 2018, when the United States Supreme Court first recognized the autonomy right and laid out the proper analysis for determining whether that right has been violated. Mr. Harvey contends that by failing to consult with him about conceding guilt, counsel usurped control of a decision within his "sole prerogative," creating a structural error. *McCoy*, 138 S. Ct. at 1510–11. Because his trial was infected by a structural error, Mr. Harvey should "be accorded a new trial without any need to show prejudice." *Id.* at 1511.

In sum, there is no procedural bar that precluded Mr. Harvey from raising his *McCoy* claim in his motion to vacate under Rule 3.851. Because Mr. Harvey's claim is not barred, this Court should vacate Mr. Harvey's conviction.

CONCLUSION

For all of the foregoing reasons, Mr. Harvey respectfully requests that the Court vacate the Circuit Court's Order, grant Mr. Harvey's successive motion to vacate his death sentence based on a structural error, and order a new trial. At a minimum, Mr. Harvey respectfully asks this Court to reverse the Circuit Court's

erroneous time-bar ruling and remand so that the Circuit Court can decide the merits of the *McCoy* claim.

Respectfully submitted September 23, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an electronic copy of the foregoing Initial Brief of Appellant has been e-mailed to e-file@flcourts.org; and a true and correct copy was furnished by U.S. Mail to Donna M. Perry, Assistant Attorney General, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, and by email to Celia Terenzio, Leslie Campbell, and Ryan Butler, on September 23, 2019.

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CERTIFICATE OF TYPEFACE COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210, the undersigned counsel certifies that this Brief is printed in Times New Roman 14-point font.

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