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

REPLY BRIEF OF APPELLANT

Ross B. Bricker
Florida Bar No. 801951
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456

Pro Bono Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Appellant Harold Lee Harvey, Jr. demonstrated in his Initial Brief that his defense counsel violated his Sixth Amendment autonomy right, as established in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), when counsel conceded to the jury Mr. Harvey's guilt to first-degree murder without ever informing him that counsel would be making such a concession, or obtaining Mr. Harvey's consent. The State's primary response to the merits of this claim *supports* Mr. Harvey's entitlement to relief.

According to the State, *McCoy* is distinguishable because Mr. Harvey's defense counsel told Mr. Harvey that he planned to concede Mr. Harvey's guilt to second-degree murder in his opening statement, and Mr. Harvey "agreed with the strategy." Answer Br. at 28; *see also id.* at 6–7. But as this Court has found, counsel conceded Mr. Harvey's guilt to *first*-degree murder in his opening statement—something never discussed, much less agreed to by Mr. Harvey—and, in doing so, "usurpe[d] control" of Mr. Harvey's autonomy to challenge the State's capital charge, in violation of the Sixth Amendment right announced by the United States Supreme Court in *McCoy*. 138 S. Ct. at 1511.

Nothing in the State's Answer Brief disturbs the conclusion that Mr. Harvey is entitled to relief for this violation of his Sixth Amendment autonomy right. Mr. Harvey's claim is not untimely. *See infra* Section I. The autonomy right

established in *McCoy* is retroactively applicable. *See infra* Section III. There is no procedural bar. *See infra* Section IV. And the required remedy is remand for a new trial—without any inquiry into prejudice. *See infra* Section V.

ARGUMENT

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

As Mr. Harvey explained in his Initial Brief (at 18–21), the Circuit Court erred in concluding that his Rule 3.851 motion was "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. The Circuit Court's position rests on a literal reading of a clause in Rule 3.851(d)(2)(B) that this Court has never once applied. Under the Circuit Court's interpretation, no defendant can seek relief under a new constitutional right—the express purpose of Rule 3.851(d)(2)(B)—unless the right has *already* been given retroactive effect. If left to stand, this requirement would upend the entire purpose of Rule 3.851(d)(2)(B) by preventing any petitioner from being the first to argue that a new "fundamental constitutional right" should apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(B). Where, as here, "a literal interpretation of the language of a statute . . . would lead to an unreasonable or ridiculous conclusion," the literal interpretation is not applied. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

The State offers no answer to this argument. Its entire retort consists of two paragraphs—without any citation to any case from any court—that merely summarize the statute in question. *See* Answer Br. at 7–8. The State asserts that Mr. Harvey "does not satisfy" Rule 3.851(d)(2)(B) because the literal language of that Rule requires this Court or the United States Supreme Court to have "held that *McCoy* applies retroactively" and "neither has done so." *Id.* at 8. There is no support in this Court's precedents for such a literal application of the Rule's text. To the contrary, for more than three decades, this Court has consistently declined to give this language the literal construction that the State advocates. In decision after decision, this Court has conducted a retroactivity analysis in cases brought under Rule 3.851(d)(2)(B) *even though there had been no prior decision holding the new rule to be retroactive*. *See, e.g.*, *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016); *Walton v. State*, 77 So. 3d 639, 644 (Fla. 2011); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987).[1] In none of these cases did this Court even question whether its ability to reach the issue of retroactivity for the first time might be curtailed by the Rule's apparent, paradoxical requirement of a *pre*-existing retroactivity finding. The State does not

[1] *James* and *Thompson* were successive postconviction motions brought under Rule 3.850, the precursor to Rule 3.851(d)(2)(B), but the operative language in the prior rule was identical.

discuss these cases, and again ignores the fact that this Court could not have decided them as it did if the State's interpretation of the Rule were correct.

II. Counsel Violated Mr. Harvey's Sixth Amendment Right to Autonomy, As Established in *McCoy*.

As explained in Mr. Harvey's Initial Brief, two United States Supreme Court decisions are central to the issue of defense counsel's concession of guilt: *McCoy* and *Florida v. Nixon*, 543 U.S. 175 (2004).

In *Nixon*, the Supreme Court held that if defense counsel fully informed the defendant of counsel's plan to concede guilt and the client did not object to that plan, then any claim regarding counsel's concession is to be governed by the *Strickland* test for ineffective assistance, including *Strickland*'s required showing of prejudice. *See id.* at 178–79, 192; *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

In *McCoy*, the Court introduced a new paradigm. The Court established a fundamental autonomy right—separate from the right to effective assistance—which is also implicated when counsel concedes his client's guilt. 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. 138 S. Ct. at 1505, 1511. If counsel does so, counsel has committed a "structural" error, which automatically requires a new trial without any showing of prejudice. *Id.* at 1511.

The State argues that this case should be controlled by *Nixon*, not *McCoy*. *See* Answer Br. at 6–7, 29–30. The State's arguments have no merit, resting on false factual premises and having no support in the law.

A. Contrary to the State's Assertions, The Undisputed Record and Binding Fact Findings Establish that Counsel Never Told Mr. Harvey He Would Concede Guilt to *First*-Degree Murder.

At least ten times in its Brief, the State asserts, in words or substance, that counsel "advised [Mr. Harvey] what was going to be conceded during the opening statement" and Mr. Harvey "adopted" the concession. Answer Br. 42; *see also e.g.*, *id.* at 21, 23, 25, 29, 39. This is false. The undisputed evidentiary record—and the prior findings of both this Court and the Circuit Court—conclusively establish that counsel *never* once discussed with Mr. Harvey that he was going to concede Mr. Harvey's guilt to first-degree murder. The pertinent record is as follows:

- Mr. Harvey raised the issue of counsel's wrongful concession of guilt in his original Rule 3.850 Motion (and has continued to do so throughout the postconviction process). R. Vol. 1, at 85–93.
- On appeal, this Court remanded the concession of guilt issue to the Circuit Court for an evidentiary hearing. R. Vol. 1, at 2–15.
- The relevant testimony at the hearing was conflicting:
  - Mr. Harvey testified that counsel "never said he was going to plead me guilty to second degree murder or first degree murder or any murder." R. Vol. 15, at 934. Mr. Harvey also testified that he did not "agree to the words" counsel used in his opening statement to concede Mr. Harvey was "guilty of murder." *Id.* at 931.

- Trial counsel testified that his defense plan was to "tiptoe[] through Florida case law" and argue "that this was second degree murder **as opposed to first degree murder**," and that "there was no premeditated act." R. Vol. 10, Evid. Hr'g Tr. Aug. 17, 1998, at 100–101 (emphasis added).

- Counsel testified that just "before the opening statement in the courtroom," he told Mr. Harvey he was going to tell the jury that Mr. Harvey "is guilty of murder." *Id.* at 99–100. Counsel did so because he did not want Mr. Harvey to react when he heard such a statement. When asked to describe this conversation, defense counsel testified that he told Mr. Harvey he would **"argue second degree,"** and that Mr. Harvey never "express[ed] any disagreement," and "nodded" to indicate he understood. *Id.* at 100, 117 (emphasis added). Counsel did not tell Mr. Harvey "exactly what words [he was] going to use in [his] opening statement." *Id.* at 100.

- Counsel began his opening statement with these words: "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 then told the jury that, "without question," the killing was done with premeditation, and during the course of a felony. *Id.* at 1864.

- After reviewing the evidence elicited at the hearing, the Circuit Court issued findings of fact and conclusions of law. *See* R. Vol. 9 at 1717, Am. Order on Motion for Post-Conviction Relief, Jan. 28, 1999 [1999 Order].

  - The Circuit Court found that counsel discussed with Mr. Harvey that he "would make an opening statement that Harvey was guilty of murder, but that **it was *second degree murder*** and ***not*** **either premeditated or felony murder**," and that Mr. Harvey "understood this defense tactic." *Id.* at 5 (emphasis added).

  - The Court found "the concession of guilt of murder was not of guilt of first degree murder and thus not an improper admission of guilty plea." *Id.*at 11.

- In 2003, this Court reversed the Circuit Court's finding that counsel's concession of guilt was to only second-degree murder. *Harvey v. State*, No. SC95075, 2003 Fla. LEXIS 1140, at *14 (Fla. Jul. 3, 2003).

- This Court held that "trial counsel **conceded Harvey's guilt to first-degree murder** by stating, in his guilt phase opening statement, that Harvey acted with premeditation[.]" *Id.* (emphasis added).

- This Court further held 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.* (emphasis added).

- This Court concluded that counsel's concession of Mr. Harvey's guilt to first-degree murder—when "at best" counsel informed Mr. Harvey of a strategy to concede only second-degree murder—constituted a Sixth Amendment violation requiring *per se* reversal of Mr. Harvey's convictions, because "prejudice to the defendant is presumed." *Id.*

- In 2006, this Court withdrew its 2003 opinion in light of its interpretation of the United States Supreme Court's decision in *Nixon*. This Court found *Nixon* to require that wrongful concession claims be assessed under the *Strickland* prejudice standard, rather than the *Cronic* structural error standard. *Harvey v. State*, 946 So. 2d 937, 943 (Fla. 2006). However, this Court reiterated that "counsel conceded that Harvey acted with premeditation and, therefore, **conceded Harvey's guilt of first-degree murder**." *Id.* (emphasis added).

Mr. Harvey sets out the above summary of the record because it lays bare the falsity of the State's repeated suggestion that Mr. Harvey was informed of, and agreed to, trial counsel's concession of guilt to first-degree murder. The record in this case conclusively establishes that counsel deprived Mr. Harvey of the "ability to decide" whether the "objective of [his] defense" was to concede guilt to first-degree murder, in direct violation of the Sixth Amendment autonomy right established in *McCoy*. 138 S. Ct. at 1508–09.

B. Counsel's Purported Discussion With Mr. Harvey About His Intended Concession of Guilt to *Second*-Degree Murder Does Not Remove This Case From the Ambit of *McCoy*.

The State argues that *Nixon* and *Strickland*, rather than *McCoy*, control this case because Mr. Harvey was informed of and "adopted" counsel's decision to concede guilt. Answer Br. at 7, 29. But when viewed in light of what counsel *actually* told Mr. Harvey—that he was *not* going to concede Mr. Harvey's guilt to *first*-degree murder—this argument disintegrates, for a number of reasons.

First, the State ignores the crucial distinction between counsel's plan to concede only to second-degree murder and his actual concession, which admitted Mr. Harvey's guilt to first-degree murder—the crime Mr. Harvey was charged with, convicted of, and sentenced to death for. *See Harvey*, 946 So. 2d at 943. The State erroneously asserts that this discrepancy between first-degree and second-degree murder is simply "no matter," Answer Br. 40, a position this Court should find outrageous. To state the obvious, under Florida law, first-degree murder is the only crime for which a defendant may be sentenced to death. *Shere v. Moore*, 830 So. 2d 56, 62 (Fla. 2002); Fla. Stat. § 921.141(1).

Second, the State's assertion that a defendant's consent to concede a non-capital crime authorizes counsel to concede a different, capital crime, directly contradicts this Court's 2003 decision in this case. In that decision, this Court recognized that because counsel conceded Mr. Harvey's guilt to first-degree

murder, but at most discussed with Mr. Harvey the strategic concession of *non-capital* second-degree murder, Mr. Harvey could not have consented to the concession counsel made at trial. *Harvey*, 2003 Fla. LEXIS 1140, at *13–16. The mismatch between what counsel told Mr. Harvey prior to trial and what counsel actually conceded to the jury was precisely what this Court found to be a structural Sixth Amendment violation requiring a new trial.[2] *Id.*

Third, the rule urged by the State—that a capital defendant's consent to a strategic concession of second-degree murder licenses counsel to concede guilt to first-degree murder—would vitiate both the Sixth Amendment and the specific autonomy right recognized in *McCoy*. The Supreme Court directly held that counsel may "not negate [his client's] autonomy by overriding [the client's] desired defense objective." *McCoy*, 138 S. Ct. at 1509. Yet that is exactly what happened here. On the State's version of events, Mr. Harvey expressly "agreed with the strategy to concede guilt to *second*-degree murder," Answer Br. at 28 (emphasis added), but counsel then conceded to the jury Mr. Harvey's guilt to first-degree murder—without ever informing Mr. Harvey and in plain contravention of the concession to which Mr. Harvey previously "agreed." Far from undermining Mr. Harvey's claim to relief under *McCoy*, the fact that Mr. Harvey purportedly

[2] This Court's 2006 decision made no comment on this issue, as relief was denied solely based on the finding that Mr. Harvey's defense was not prejudiced by counsel's concession—a requirement that is eliminated under *McCoy*.

"agreed with Watson's strategy," Answer Br. at 42, proves that counsel's concession of Mr. Harvey's guilt to first-degree murder directly "overr[o]de" Mr. Harvey's asserted defense objective. *McCoy*, 138 S. Ct. at 1509. This stands in sharp contrast to *Nixon*, where the defendant "never asserted any such objective." *Id.*

C. The Fact that Mr. Harvey Did Not Expressly Object to Counsel's Concession of His Guilt to First-Degree Murder Does Not Foreclose Relief under *McCoy.*

The State's assertion that *McCoy* is inapplicable because Mr. Harvey did not "expressly object[]" to counsel's concession of his guilt to first-degree murder is likewise misplaced. Answer Br. at 23. Mr. Harvey never had an opportunity or a reason to protest counsel's concession of his guilt to first-degree murder because counsel never told Mr. Harvey that such a concession was going to be made. To the contrary, counsel expressly told Mr. Harvey he would *not* concede guilt to first-degree murder. *See* 1999 Order at 5; R. Vol. 10, Evid. Hr'g Tr. Aug. 17, 1998, at 100, 117. The State's position would require defendants to prophesy the ways their attorneys might fail to act as promised, and then prophylactically lodge objections to the very things counsel has guaranteed he or she will not do. This is the height of absurdity.

The State cites no support for the proposition that a defendant in Mr. Harvey's position—who had every reason to believe counsel would *not* concede

the charged offense—should nevertheless have protested that concession. There is certainly no support in *McCoy* or *Nixon*. In *Nixon*, the Supreme Court repeated no less than seven times that counsel has a "duty" to "adequately disclose[] to and discuss[] with the defendant" the concession of guilt. 543 U.S. at 179, 189; *see also id.* at 178, 187, 192. The defense attorney in *Nixon* informed the defendant "at least three times" of the concession the attorney then went on to make. *Id.* at 181. Because the attorney "fulfilled his duty of consultation," the absence of any protest from the defendant was construed as permitting the attorney to proceed with the concession. *Id.* at 189, 192.

In *McCoy*, the Supreme Court again confirmed that counsel "must . . . discuss" any concession of guilt "with her client." *McCoy*, 138 S. Ct. at 1509. The defense attorney in *McCoy* did so two weeks before trial. *Id.* at 1506. Because the attorney informed McCoy of the concession well in advance of trial, McCoy (like Nixon) had an opportunity to form a decision and raise any objections. With that opportunity, McCoy was able to file a motion to terminate counsel; air the disagreement with counsel at a pretrial hearing; and raise the issue "out of earshot of the jury." *Id.* Indeed, the trial judge in *McCoy* was apprised of the concession that counsel would make and authorized counsel to proceed notwithstanding McCoy's opposition. *Id.* Mr. Harvey had none of these opportunities to protest. The fact that Mr. McCoy took advantage of the opportunities he was afforded—

because his counsel complied with the duty of consultation—has no bearing on the circumstance here, where Mr. Harvey was caught completely unaware, hearing his attorney concede his guilt to capital first-degree murder for the first time *as it was being delivered* to the jury during counsel's opening statement.

The State suggests that Mr. Harvey should have "made his objection known . . . during the trial" once counsel uttered the first-degree murder concession. Answer Br. at 41. But this too defies reality. The State's position would require defendants to become legal scholars and parse their defense attorneys' statements—which they have never heard before—on a real-time basis during trial, and then rise up and complain to the court and jury when counsel's statements extend beyond the scope of what he or she promised. That cannot be the legal standard or expectation of any defendant.[3]

The *McCoy* Court made clear that a violation of the autonomy right may arise even in the absence of an express objection by the defendant. Specifically, the Supreme Court concluded that "the violation of McCoy's protected autonomy

[3] The State claims this Court must "speculate" to conclude that Mr. Harvey lacked the necessary "mental acuity" to object, Answer Br. at 41, and that pro bono counsel "seems to be dovetailing an ineffective assistance of counsel claim onto [the] *McCoy* analysis." *Id.* at 26. There is no question that trial counsel utterly failed to address a variety of psychological issues in his defense of Mr. Harvey. *See* Initial Br. at 9–10, 32–34. As psychiatrist Dr. Michael Norko testified, Mr. Harvey suffers from "[o]rganic brain dysfunction," which was never assessed or known to defense counsel. *Id.* However, Mr. Harvey recognizes this Court has already considered those issues and does not seek to relitigate them in the context of this postconviction challenge.

right *was complete* when the court allowed *counsel to usurp control* of an issue within McCoy's sole prerogative"—namely, the decision whether to concede guilt. *Id.* at 1511 (emphases added). As Justice Alito observed in dissent, the Court did not "limit [its] decision to the particular (and highly unusual) situation in the actual case before [it]." *Id.* at 1517 (Alito, J., dissenting).

Lower courts applying *McCoy* have thus rejected the argument that *McCoy* is limited to circumstances in which the defendant objected to counsel's concession. As the California Court of Appeals concluded, "[W]e do not think preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction." *People v. Eddy*, 33 Cal. App. 5th 472, 482–83 (Ct. App. 2019) (granting relief under *McCoy* even though "defendant did not object during closing argument after his counsel conceded his guilt of voluntary manslaughter").

Under *McCoy*, the Sixth Amendment "preserv[es] for the defendant the *ability to decide* whether to maintain his innocence" to a charged crime. *Id.* at 1509 (emphasis added). Being deprived of the "ability to decide" has nothing to do with whether one expressly objects in the moment. Here, counsel denied Mr. Harvey the "ability to decide" whether to concede guilt to first-degree murder—and "usurp[ed] control" of that decision—by conceding Mr. Harvey's guilt to first-degree murder (a) without apprising him of this concession, and (b) after Mr.

Harvey previously agreed to a concession that would *not* include first-degree murder. *See* 1999 Order at 5.

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

As explained in his Initial Brief, Mr. Harvey is entitled to retroactive application of *McCoy* under both the retroactivity framework 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). *See* Initial Br. 36–42. The State's arguments to the contrary are unavailing.

A. The *McCoy* Autonomy Right Should Be Given Retroactive Effect Under the Three-Prong *Witt* Framework.

To determine whether a new constitutional rule should apply retroactively, Florida courts generally apply the three-prong test in *Witt*.[4] The State concedes that *McCoy* satisfies the first two of *Witt*'s three prongs: it is a Supreme Court decision and established a constitutional rule. Answer Br. at 11. However, the State argues that the *McCoy* right fails the third *Witt* prong because it is not a "development of fundamental significance." *Id.* at 17. The State contends that *McCoy* is not a "development of fundamental significance" because the autonomy right *McCoy* announces is not of "sufficient magnitude." *Id.* at 12. More

[4] Under *Witt*, a new rule applies retroactively when it: (1) emanates from the United States Supreme Court or this Court, (2) is constitutional in nature, and (3) constitutes "a development of fundamental significance." *Witt*, 387 So. 2d at 931.

specifically, the State argues that *McCoy* fails under two of the three factors for determining "sufficient magnitude": (a) the purpose to be served by the new rule; and (b) the effect on the administration of justice of a retroactive application of the new rule. *Id.* But both factors weigh heavily in favor of retroactivity. With respect to the third "sufficient magnitude" factor—the extent of reliance on the old rule—the State does not provide a single instance of reliance on the pre-*McCoy* rule, thereby conceding that this factor weighs in favor of retroactivity.

a. The Purpose of the Autonomy Right Announced in *McCoy* Weighs in Favor of Its Retroactivity.

McCoy established a defendant's fundamental, substantive, constitutional right to the "[a]utonomy to decide [] the objective of their defense." 138 S. Ct. at 1508. As Justice Alito observed, *McCoy* introduced a "newly discovered fundamental right." *Id.* at 1512 (Alito, J., dissenting). Despite the "foundational" nature of this right, the State summarily characterizes it as a mere "evolutionary refinement in procedural law." Answer Br. at 14. This cannot be squared with the language of the Supreme Court's decision, which held that the violation of the autonomy right is an "error structural in kind," which "blocks the defendant's right to make the fundamental choices about his own defense." 138 S. Ct. at 1511.

The State asserts that, "while perhaps important, [*McCoy*'s rule] has nothing to do with accuracy or fairness in the outcome of a judicial proceeding." Answer Br. at 17. *McCoy* says otherwise. As the Supreme Court explained, the effects of

a violation of *McCoy*'s autonomy right are "immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." 138 S. Ct. at 1511. *McCoy* violations result in structural error, "affect[ing] the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself." *Id.* The fact that *McCoy* violations are "structural" makes clear that such violations "cast serious doubt on the veracity or integrity of the original trial proceeding." *Witt*, 387 So. 2d at 929.

Porter v. McCollum, 558 U.S. 30 (2009), cited by the State, does not support its characterization of *McCoy* as a procedural evolutionary refinement. As this Court has recognized, *Porter* "addressed a misapplication of *Strickland*." *Walton*, 77 So. 3d at 644. Because *McCoy* established that the *Strickland* jurisprudence does not apply to violations of a defendant's autonomy right, *McCoy* cannot possibly be an evolutionary refinement akin to *Porter*. 138 S. Ct. at 1510-11.

b. The Limited Impact That Retroactive Application of *McCoy* Would Have on the Administration of Justice Supports Retroactivity.

In his Initial Brief, Mr. Harvey demonstrated that giving *McCoy* retroactive effect would have minimal impact on the administration of justice, which weighs in favor of retroactivity. Initial Br. at 39. The State's response is puzzling. The State paradoxically argues (1) that *McCoy* claims will be so "rare" that they will fail to "bring about the type of 'jurisprudential upheaval' that compels retroactive

application"; and (2) that making *McCoy* retroactive would disturb finality in judgments, "destroy the stability of the law," and intolerably "burden the judicial machinery of our state." Answer Br. at 12 n.4, 14–15 (quoting *Witt*, 387 So. 2d at 929–30). The State cannot have it both ways. *McCoy* claims cannot be both rare and so numerous that they overwhelm the State's judiciary.

The State offers no evidence that retroactive application of *McCoy* would intolerably burden Florida's judicial machinery. To the contrary, both the State and the dissenting Justices in *McCoy* acknowledged that *McCoy* claims will be "rare." *McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting). The dissent likens the autonomy right to "a rare plant that blooms every decade or so," stating it was "unlikely to figure in another case for many years to come." *Id*. The State agrees. *See* Answer Br. at 12 n.4. Rarity is not an argument against retroactivity; instead, it supports retroactive application by minimizing the impact on the administration of justice. Rarity does not lessen the fundamental nature of each defendant's Sixth Amendment right to determine the object of his defense, especially in capital cases.

After noting the rarity of *McCoy* claims, the State does an about-face. The State speculates—without citing any data or research—that retroactive application of *McCoy* will leave Florida courts flooded with *McCoy* claims, harming the State's interest in the finality of its judgments. Answer Br. at 18–19. The State admits "[w]e simply cannot know" the number of cases affected by *McCoy*'s

retroactive application, but impossibility does not stop the State from summarily concluding "the numbers will no doubt be large." *Id.*

There is no basis for the State's concerns. This is not an area where the parties and the courts must resort to speculation. The frequency of *McCoy* claims is a discernible, empirical fact—and the facts refute the State's concerns. In the seventeen months since *McCoy* was decided, only one other *McCoy* claim has reached this Court. *See Florida v. Poole,* SC18-245. This is unsurprising, given the dissenting Justices' observation that the violation of the autonomy right defined in *McCoy* is "the result of a freakish confluence of factors that is unlikely to recur." 138 S. Ct. at 1512 (Alito, J., dissenting). The "bloom[] every decade or so" of *McCoy* violations is not too great a burden for the Florida courts to bear, especially when weighed against the injustice of individuals serving out sentences based on unconstitutional convictions. *Id*. at 1514 (Alito, J., dissenting).

The purpose of *Witt*'s three-part test "is to determine where finality yields to fairness based on a change in the law." *Mosley,* 209 So. 3d at 1277. Here, fairness counsels that the State's interest in the finality of the "rare" cases in which a *McCoy* violation has occurred must yield to the countervailing interest in safeguarding this fundamental constitutional right. Answer Br. at 12 n.4.

c. The State's Cited Cases and References to the Rarity With Which Other Rights Were Held Retroactive Are Irrelevant and Ignore Florida's Many Retroactive Rights.

In an apparent effort to make up for its weak showing on the *Witt* analysis, the State cites prior cases in which this Court declined to give new constitutional rules retroactive effect. These dissimilar decisions analyzing rules or developments wholly different from the fundamental right set forth in *McCoy* have no bearing on the question of whether the new right announced in *McCoy* is rightfully applied retroactively. That question can only be resolved by an application of the *Witt* factors.

Yet to the extent this Court deems a tally of prior retroactivity decisions to be relevant, the State omits the many cases on the other side of the ledger, in which this Court has given new constitutional rules retroactive effect. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (applying *Hurst v. Florida*, 136 S. Ct. 616 (2016), retroactively to the date of *Ring v. Arizona*, 536 U.S. 584 (2002)); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (applying retroactively *Espinosa v. Florida*, 505 U.S. 1079 (1992)); *Jackson v. Dugger*, 547 So. 2d 1197, 1198 (Fla. 1989) (applying retroactively *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987)); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) (applying retroactively *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987)); *Tafero v. State*, 459 So. 2d

1034, 1035 (Fla. 1984) (applying retroactively *Enmund v. Florida*, 458 U.S. 782 (1982)).

B. Fundamental Fairness under *James* Entitles Mr. Harvey to Retroactive Application of *McCoy*.

In his Initial Brief, Mr. Harvey demonstrated that, apart from the *Witt* analysis, he is entitled to retroactive application of *McCoy* under the fundamental fairness doctrine set forth in *James v. State*, 615 So. 2d 668 (Fla. 1993). *See* Initial Br. at 39–42. The State provides no argument as to the merits of Mr. Harvey's contention that this doctrine should apply. Instead, the State offers only a procedural response, asserting that Mr. Harvey cannot invoke this doctrine because he raised the issue of counsel's concession of guilt for the first time in postconviction proceedings, rather than at trial or on direct appeal. Answer Br. 20–21.

The State's response fails for at least two reasons. First, none of this Court's precedents suggest, much less hold, that the fundamental fairness doctrine is limited to cases in which the defendant raised the issue at trial or on direct appeal. Nor does the State explain how such an arbitrary, inflexible rule would be consistent with the equity interests that underlie the fundamental fairness doctrine. Second, even if this were a principle that generally applied, it certainly would be inapplicable here, where the constitutional claim arises from the conduct of trial counsel. As this Court well knows, claims involving trial counsel's conduct

typically cannot be raised for the first time until postconviction proceedings, which is exactly when Mr. Harvey raised the Sixth Amendment claim based on counsel's wrongful concession of guilt. "The general rule is that the adequacy of a lawyer's representation may not be raised for the first time on a direct appeal. The rationale for the rule is that that issue has not been raised or ruled on by the trial court." *Dennis v. State*, 696 So. 2d 1280, 1282 (Fla. Dist. Ct. App. 1997). The State's argument seeks to penalize Mr. Harvey simply for following the rules.

IV. Mr. Harvey's Autonomy Claim under *McCoy* Is Not Procedurally Barred.

The State argues that Mr. Harvey's *McCoy* claim "closely resembles [his] previous claims of ineffective assistance of counsel," and therefore the *McCoy* claim is procedurally barred. Answer Br. at 21. This argument has no merit.

The State's procedural-bar argument has no place in the context of a Rule 3.851(d)(2)(B) motion. The entire purpose of Rule 3.851(d)(2)(B) is to allow defendants to seek relief under a newly established constitutional right even though the facts are likely similar (if not identical) to a previous claim asserted under the then-existing law. This Court has repeatedly held that a claim based on a new, retroactively applicable rule of constitutional law is not subject to the doctrine of procedural bar. *See Mosley*, 209 So. 3d at 1276 n.13 ("[A]ny defendant who falls within the ambit of [] retroactivity [] would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment

argument."); *Hall v. State*, 541 So. 2d 1125, 1126 (Fla. 1989) ("We do not agree with the trial court's ruling that our denial of relief in [petitioner's prior postconviction motion] constitutes a procedural bar . . . . [A]s we have stated on several occasions, *Hitchcock* is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings."); *Cooper v. Dugger*, 526 So. 2d 900, 901 (Fla. 1988) (same). The State has cited not a single case to the contrary.

Even if claims asserted under Rule 3.851(d)(2)(B) were subject to the doctrine of procedural bar, there is no procedural bar here. Mr. Harvey's Sixth Amendment autonomy claim does not "closely resemble" the ineffective-assistance claim he previously litigated. Answer Br. at 21. As the Circuit Court recognized, 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." 2019 Supp. R. 56, Order at *1.

Autonomy claims and ineffective-assistance claims are distinct not only because they assert violations of different Sixth Amendment rights, but also because they consist of entirely different legal elements. *See* Initial Br. 22–26. In Mr. Harvey's case, the difference in the requirements for relief is not a theoretical distinction. When this Court rejected Mr. Harvey's ineffective-assistance claim in

2006, it did so based solely on *Strickland*'s requirement that the defendant establish prejudice. *See Harvey*, 946 So. 2d at 943. The State repeatedly argues that this holding creates a procedural bar. *See*, *e.g.*, Answer Br. 21–22. But the fact that this decision denied relief for failure to show prejudice is precisely why it does not control or preclude the autonomy claim asserted here, for which no showing of prejudice is needed. *See McCoy*, 138 S. Ct. at 1511.

V. This Court Should Remand For A New Trial Without Any Inquiry Into Prejudice.

McCoy leaves no ambiguity as to the remedy that must be granted when a violation of the Sixth Amendment autonomy right is established. As mentioned above, the Supreme Court pronounced the violation a "structural" error, meaning that a new trial is required "without any need first to show prejudice." *Id.*

In a breathtaking attempt to skirt the dictates of *McCoy*, the State fabricates a new limitation on the remedy of *per se* reversal that the Supreme Court established. The State urges this Court to invent an exception to *McCoy*'s structural error rule by carving out cases in which the autonomy violation was raised for the first time on postconviction review as opposed to direct appeal. Answer Br. 30–34. When raised "for the first time in postconviction," the State argues, the alleged autonomy violation "should be addressed under the standards announced in *Strickland*" and thus should be subject to *Strickland*'s prejudice requirement. *Id.* at 33–34. This argument is baseless.

Nowhere does the State explain how a rule that would funnel a subset of *McCoy* claims into the *Strickland* standard based on their procedural context can be reconciled with the Supreme Court's unqualified substantive holding that, "[b]ecause a client's autonomy, not counsel's competence, is in issue, *we do not apply our ineffective-assistance-of-counsel jurisprudence*." *McCoy*, 138 S. Ct. at 1510–11 (emphasis added). Nor does the State cite any case in which a court has stripped a constitutional violation of its "structural" status based on whether the violation was raised on direct or postconviction review.

The State relies on *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), but *Weaver* provides no support for the State's argument. *See* Answer Br. 30–32. *Weaver* does not address whether a structural error may be subject to prejudice analysis (*i.e.*, harmless-error review) if raised for the first time in postconviction proceedings. It addressed whether an *ineffective-assistance claim* based on counsel's failure to object to a structural error remains subject to *Strickland*'s prejudice requirement, even though the structural error would not have been subject to review for prejudice had the error been challenged directly (rather than as the predicate to an ineffective-assistance claim). 137 S. Ct. at 1905, 1907. The Court held that such ineffective-assistance claims cannot "escape" *Strickland*'s prejudice requirement simply because the alleged ineffectiveness was counsel's

failure to object to a structural error.[5] *Id.* at 1915 (Alito, J., concurring); *see also id.* at 1913.

The prejudice requirement applied in *Weaver* has no bearing on *McCoy* claims—whether on direct appeal or postconviction review. The basis for requiring prejudice in *Weaver* was that the substantive right at issue was effective assistance of counsel.[6] *See id.* at 1910. In contrast, Mr. Harvey's *McCoy* claim is grounded in the right to autonomy—the violation of which is "complete" when counsel "usurp[s] control" of the defendant's decision to concede guilt, and is "not subject to harmless-error review." *McCoy*, 138 S. Ct. at 1511.

CONCLUSION

For all of the foregoing reasons, Mr. Harvey respectfully requests that this Court vacate the Circuit Court's Order, grant Mr. Harvey's successive motion to vacate his death sentence based on structural error, and order a new trial.[7]

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[5] In fact, the holding was even narrower. The Court expressly limited its holding to only the type of ineffective-assistance claim presented in *Weaver*: "trial counsel's failure to object to the closure of the courtroom during jury selection." 137 S. Ct. at 1907.

[6] The same is true of the two lower court decisions that the State cites. *See* Answer Br. at 32–33. The State cites no decision in which *Weaver* has been applied outside the context of ineffective assistance of counsel.

[7] Mr. Harvey's entitlement to relief is conclusively established on the existing record. However, in the event this Court determines that additional evidence is needed to resolve the merits of Mr. Harvey's *McCoy* claim, or that a showing of prejudice is necessary, Mr. Harvey respectfully requests that this Court remand for an evidentiary hearing to allow him an opportunity to present such evidence.

Respectfully submitted November 4, 2019.

/s/ *Ross B. Bricker*
Ross B. Bricker
Florida Bar No. 801951
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456

Pro Bono Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an electronic copy of the foregoing Reply 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 November 4, 2019.

By: s/ *Ross B. Bricker*
Ross B. Bricker
Florida Bar No. 801951

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.

By: s/ *Ross B. Bricker*
Ross B. Bricker
Florida Bar No. 801951