IN THE SUPREME COURT OF FLORIDA

JEFFREY LEE ATWATER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC19-1709
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On September 7, 1989, Jeffrey Atwater was indicted by a grand jury in Pinellas County, Florida for the first-degree murder and armed robbery of Ken Smith. At trial, Atwater was convicted as charged and the jury recommended death by a vote of eleven to one. The trial judge found three aggravating factors and no statutory mitigating factors. § 921.141(5), Fla. Stat. (1989). Atwater was sentenced to death on June 25, 1990.

On direct appeal, this Court affirmed the defendant's convictions and sentence of death. Atwater v. State, 626 So. 2d 1325 (Fla. 1993). Atwater's petition for writ of certiorari was denied by the United States Supreme Court on April 18, 1994. Atwater v. Florida, 511 U.S. 1046 (1994).

Subsequent collateral challenges have been universally rejected. See Atwater v. State, 788 So. 2d 223 (Fla. 2001) (affirming denial of initial motion for postconviction relief and denying state petition for writ of habeas corpus); Atwater v. State, 892 So. 2d 1011 (Fla. 2004) (affirming denial of successive motion for postconviction relief requesting relief based on Ring v. Arizona, 536 U.S. 584 (2002)); Atwater v. State, 6 So. 3d 51 (Fla. 2009) (affirming denial of successive motion for postconviction relief challenging Florida's method of execution by lethal injection); Atwater v. State, 118 So. 3d 219

(Table)(Fla. 2013) (affirming denial of successive motion for postconviction relief claiming ineffective assistance of counsel at the penalty phase based on Martinez v. Ryan, 132 S. Ct. 1309 (2012)); Atwater v. State, 234 So. 3d 550 (Fla. 2018) (affirming denial of successive motion for postconviction relief pursuant to the United States Supreme Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016) [Hurst v. Florida] and the Florida Supreme Court's Hurst v. State, 202 So. 3d 40 (Fla. 2016) [Hurst], opinion); Atwater v. Crosby, 451 F.3d 799 (11th Cir. 2006) (affirming the denial of federal petition for writ of habeas corpus).

During the litigation of Atwater's initial postconviction motion, the circuit court granted an evidentiary hearing on the issues of whether counsel was ineffective for arguing Atwater should be convicted of second-degree murder and whether counsel was ineffective for allegedly not permitting Atwater to testify on his own behalf.

During the evidentiary hearing both of Atwater's trial attorneys testified concerning the decision to argue to the jury that they should find Atwater guilty of a lesser-included offense. John White testified that he and Michael Schwartzberg were co-counsel for Atwater during his 1990 trial. (PCR/431). White testified that he and/or Schwartzberg met with Atwater at

least four or five times for a number of hours each time. (PCR/437). Additionally, White had several telephone conferences with Atwater. Prior to representing Atwater, White had handled five or six death penalty cases and over one hundred criminal jury trials. (PCR437, 450). Based on the State's evidence, White did not believe that Atwater had a chance of being acquitted. Moreover, there was no credible evidence of insanity, alibi, or self-defense. (PCR/454). White recalled that the State's evidence included the facts that Atwater signed in with the night watchman at the victim's apartment, that Atwater was seen with blood all over him after the murders, and that he admitted to killing the victim to at least two people. (PCR/455). In fact, Atwater stated that he enjoyed killing the victim and wished the victim were alive so he could kill him again. (PCR/445, 456). Accordingly, in an attempt to save Atwater's life, a trial strategy of urging the jury to convict of a lesser offense was considered. (PCR/455). White had no reason to believe that he did not discuss this strategy with Atwater prior to trial. (PCR/461). Furthermore, White did not recall Atwater rejecting the proposed strategy. (PCR/461).

During opening statement, counsel presented to the jury background information regarding Atwater's relationship with the victim, and the victim's abusive conduct toward Atwater's aunt,

with whom Atwater had a very close relationship. (PCR/445, 463). The opening argument dovetailed into the closing argument wherein counsel argued that the nature of the relationships and the nature of the injuries suggested that Atwater went into a rage due to the victim's abusive conduct toward Atwater's aunt. (PCR/446). White agreed that it is the client's decision whether or not tO concede guilt. He did not specifically recall Atwater ever admitting to him that he, in fact, killed the victim. Even so, White had no trouble communicating with Atwater and did not recall Atwater ever expressing to him that he was not in agreement with the chosen strategy, although he could not speak to what conversations Atwater may have had with co-counsel. (PCR/456).

Co-counsel, Michael Schwatzberg, testified that Atwater's case was his second death-penalty case, but he had, up to that point, tried approximately fifty criminal jury trial. (PCR/473, 492). After considering all the State's evidence he believed there was a good chance that the jury would convict Atwater of first-degree murder and would recommend a death sentence. (PCR/475-76). Even though Atwater claimed he was innocent, Schwartzberg discussed with Atwater the strong possibility that the jury would find him guilty of first-degree murder and recommend death. (PCR/476, 490). Further, it was his standard

practice to discuss with his clients the closing arguments to get his client's input. (PCR/483). He has never had a case where he did not explain to or discuss with his client the trial strategy. (PCR/493). Atwater expressed no complaints about counsel or the strategy until right before he was to be sentenced. (PCR/494, 517).

At the initial postconviction evidentiary hearing, Atwater testified that the trial strategy was never discussed with him and had his attorneys informed him that the plan was to argue that he was guilty of second-degree murder he would have objected. (PCR/513).

The postconviction court found credible Schwartzberg's testimony that it was his standard practice to discuss all aspects of trial strategy with his clients, although Schwartzberg did not specifically recall discussing with Atwater the strategy of asking for a conviction on a lesser offense. Likewise, the court gave credence to White's testimony that White had no reason to believe that he did not discuss with Atwater the trial strategy. (PCR/366-67). The court denied postconviction relief. This Court affirmed the denial of postconviction relief in Atwater v. State, 788 So. 2d 223 (Fla. 2001).

On May 3, 2019, Atwater filed his fifth successive postconviction motion, which is the subject of this appeal. In it he argued that he was entitled to relief pursuant to the United States Supreme Court's decision in McCoy v. Louisiana, 138 S. Ct. 1500 (2018). Atwater claimed that his attorneys conceded his guilt without his knowledge or permission. (R3). The State of Florida responded on May 23, 2019. In its response, the State argued 1) the motion was untimely because it was filed more than one year after the United States Supreme Court denied certiorari review of Atwater's conviction and sentence and the motion did not meet any of the exceptions to the time bar; 2) the motion was procedurally barred because Atwater was attempting to relitigate a previously denied postconviction claim using a different argument; and 3) the motion was without merit because having been afforded an evidentiary hearing Atwater did not prove that he was not informed of or that he timely objected to counsel's strategy. (R51).

On June 10, 2019, Atwater's counsel filed a motion to stay proceedings and the scheduling on a case management conference because counsel would be out on maternity leave from June 14 through September 20, 2019. (R63). In response, the State notified the court that the motion raised a purely legal issue of limited scope and was untimely. (R66).

Due to an apparent administrative error, the postconviction court was not aware of Atwater filing a fifth successive postconviction motion until the clerk of the court forwarded the State's response to the motion to stay. (R69 n1). On July 26, the postconviction court denied the successive motion and the motion to stay. The postconviction court found the motion untimely. The court also observed that even accepting Atwater's assertions as true, McCoy did not apply to his case. (R71).

Atwater filed a Motion for Rehearing arguing that the postconviction court made factual findings without the benefit of an evidentiary hearing; that the motion was timely; and that McCoy should apply retroactively. Atwater also urged the court to stay the proceedings to allow this Court to determine if McCoy should be applied retroactively. (R76). The postconviction court denied the motion for rehearing. (R90).

SUMMARY OF THE ARGUMENTS

ISSUE I: Atwater's successive motion did not meet any exception to the time-limits of Rule 3.851. An exception to the time bar is permitted if "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and *has been* held to apply retroactively." Neither the United States Supreme Court nor this Court has held that McCoy applies retroactively. A case management conference was not necessary for the court to dispose of Atwater's untimely motion. To the extent a case management hearing should have been held, the failure to do so was harmless.

ISSUE II: Atwater never verbally approved of or protested his counsels' strategy. Instead, he complained that he was not informed of the strategy, a complaint that has already been litigated and found to be false. A factual determination had been made that counsel did, in conformity with usual practice, inform Atwater of the chosen trial strategy. Because Atwater did not expressly object after consultation, McCoy does not apply.

ISSUE III: If McCoy announced a new rule that under no factual scenario may a defense attorney concede guilt to any charge, including a lesser charged offense, that rule simply would not apply to Atwater on postconviction. McCoy is not retroactive

under either a state or federal retroactivity analysis. Regardless, McCoy does not apply to the facts of Atwater's case.

ISSUE IV: None of the purported errors, either individually or cumulatively, entitle Atwater to relief.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY DISMISSED ATWATER'S UNTIMELY SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF WITHOUT A CASE MANAGEMENT CONFERENCE.

Rule 3.851(d)(1), Florida Rule of Criminal Procedure, bars a postconviction motion filed more than one year after a judgment and sentence are final. Atwater's judgment and sentence became final in 1994 when the Supreme Court denied certiorari after his conviction and sentence were affirmed on direct appeal. Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court").

Atwater's successive motion did not meet any exception to the time-limits of Rule 3.851. Rule 3.851(d)(2) provides that "No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1)." An exception to this rule permits otherwise untimely motions if "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and *has been* held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B) (emphasis added). Neither the United States Supreme Court nor this Court has held that McCoy applies retroactively.

According to the rule, untimely motions that do not satisfy the rule's exceptions to the time bar shall not be considered. Fla. R. Crim. P. 3.851(d)(2). An untimely-filed motion is akin to no motion at all.

Further, failure to hold a case management conference is harmless error where the motion is clearly meritless or legally insufficient. This Court's procedure set forth in Huff v. State, 622 So. 2d 982 (Fla. 1993) has been incorporated into Florida Rule of Criminal Procedure 3.851(f)(5)(B). This Court has recently stated that although case management conferences are preferred on all postconviction motions, the failure to hold a case management conference on a meritless successive motion is harmless error. Taylor v. State, 260 So. 3d 151 (2018) citing Groover v. State, 703 SO. 2d 1035 (Fla. 1997). The motion at issue is Atwater's fifth successive motion. And, as will be further discussed, the claim raised therein is meritless. Therefore, any error in not holding a case management conference is harmless.

ISSUE II

THE POSTCONVICTION COURT DID NOT ERR IN FINDING THAT MCCOY V. LOUISIANA IS INAPPLICABLE TO ATWATER'S CLAIM.

Regardless of the procedural hurdles facing this claim, the facts of this case are far different from those in McCoy. In McCoy the defendant was indicted on three counts of first-degree murder and the State sought the death penalty. Id. at 1506. The defendant pleaded not guilty, and throughout the proceedings consistently maintained his innocence. McCoy claimed that he was out of state at the time of the murders and that corrupt police officers killed the victims during a drug deal. Id. The defendant's counsel determined that the evidence against the defendant was overwhelming and that, absent a concession at the guilt stage, a death sentence was inevitable. Id.

McCoy was furious when advised that his attorney would concede guilt. Id. He told counsel "not to make that concession," and counsel was aware of McCoy's "complete opposition" to the concession strategy. Id. Prior to trial, the defendant and counsel sought to end their relationship. Counsel expressed disagreement with the defendant's wish to put on a defense case; however, the trial court refused to relieve counsel of his representation of McCoy. Id. The trial court told counsel, "You are the attorney," and, "You have to make the trial decision of what you're going to proceed with." Id. During

the trial, defense counsel told the jury in opening statement that there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than [the defendant] was the cause of these individuals' death[s]." Id. The defendant protested in court, telling the trial court that counsel was "selling him out" by maintaining the defendant's guilt.[1] Id. The trial court reiterated that counsel was "representing" the defendant and that the court would not permit "any other outbursts" from the defendant. Id. at 1506-07. Continuing his opening statement, counsel told the jury the evidence is "unambiguous" and, "my client committed three murders." Id. at 1507.

The defendant testified in his own defense, maintaining his innocence and pressing a not particularly persuasive or credible alibi. Id. In closing argument, counsel reiterated that the defendant was the killer and told the jury that he "took the burden off of the prosecutor." Id. The jury returned a verdict of guilty for all three counts and subsequently recommended a sentence of death. Id.

In its analysis, the United States Supreme Court contrasted the issue presented in Florida v. Nixon, 543 U.S. 175 (2004), with that in McCoy. 138 S. Ct. at 1509-10. In Nixon the Court

[1] The jury did not apparently hear this outburst.

held "that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." Id. at 1505 (citing Nixon, 543 U.S. at 181). Defense counsel in Nixon had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. McCoy, 138 S. Ct. at 1505 (citing Nixon, 543 U.S. at 186). Trial counsel did not negate Nixon's autonomy by overriding the defendant's desired defense objective because Nixon never asserted any such objective. McCoy, 138 S. Ct. at 1509 (citing Nixon, 543 U.S. at 181).

Significantly, the defendant in Nixon complained about the admission of his guilt only after trial, McCoy, 138 S. Ct. at 1509 (citing Nixon, 543 U.S. at 185), unlike the defendant in McCoy, who "opposed [counsel's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." McCoy, 138 S. Ct. at 1509. In contrast to Nixon, the defendant in McCoy "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505.

The Supreme Court held "that a defendant has the right to insist that counsel refrain from admitting guilt, even when

counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." The Court concluded that counsel may not admit his or her client's guilt of a charged crime over the "client's intransigent objection to that admission." McCoy at 1510. "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." Id. at 1511.

The factual circumstances of this case stand in stark contrast to those of McCoy. Atwater did not intractably or vehemently oppose defense counsel's strategy as did the defendant in McCoy. McCoy testified in his own defense and counsel's concession strategy directly contradicted the defendant's testimony.

In this case, unlike McCoy trial counsel did not concede Atwater's guilt of any charges in opening statement. The argument for second-degree murder was "presented to the jury after the State presented its case and after the State's summation of the evidence in closing argument." Atwater, 788 So. 2d at 231.

Further, despite being afforded a full evidentiary hearing on the issue raised in his first postconviction motion, Atwater

did not establish that he objected to counsels' strategy to argue for a second-degree murder conviction in order to avoid the strong possibility of a death sentence. Both White and Schwartzberg credibly testified that it was their practice to discuss with their clients the trial strategy and closing argument. Atwater, 788 So. 2d at 230. Additionally, both asserted that it was the client's decision as to whether to concede guilt. Furthermore, neither counsel could recall Atwater voicing an objection to any of the strategies discussed. Instead, Atwater complained in postconviction that he was not informed of the strategy, a complaint that has already been litigated. A factual determination had been made that counsel did, in conformity with usual practice, inform Atwater of the chosen trial strategy. Because Atwater did not expressly object, the holding in McCoy is not applicable.

Notably, counsel did not concede that Atwater was guilty of first-degree murder as charged. Rather, counsel argued that based on the evidence the jury should find Atwater guilty of a lesser offense. Furthermore, counsel subjected the State's case to meaningful adversarial testing by arguing that the State failed to prove the elements of premeditation and also failed to prove that a robbery was committed. See United States v. Cronic, 466 U.S. 648, 657 (1984). Regardless, neither attorney would

have argued for a lesser in the face of a client's clear objection to such a strategy.

Even if Atwater could clear the procedural hurdles he faces, McCoy does not apply to Atwater's case.

ISSUE III

MCCOY IS NEITHER SUBSTANTIVE NOR WATERSHED RULE OF PROCEDURE AND IS NOT RETROACTIVE.

Atwater vaguely asserts that fundamental fairness entitles him to retroactive application of McCoy. He cites, without elaboration, James v. State, 615 So. 2d 668 (Fla. 1993). In James, James preserved and raised on direct appeal his objection to the heinous, atrocious, and cruel instruction that the United States Supreme Court found unconstitutional. Atwater did not properly preserve or raise his McCoy claim. The James decision itself is of questionable validity and completely ignored the long-accepted retroactivity analysis this Court applies in virtually all other cases. See Mosley v. State, 209 So. 3d 1248, 1291 (Fla. 2016) (Canady, J. concurring in part and dissenting in part) (stating, "the supposed rule of 'fundamental unfairness' articulated in James is deeply problematic—if not entirely incoherent—when judged by its own terms.)

A Structural Error Requires Automatic Reversal if Preserved and Raised on Direct Appeal.

The United States Supreme Court held that when a defendant insists his attorney not concede guilt and raises his attorney's refusal to abide by that instruction on direct appeal, the resulting error is structural.[2] McCoy, 138 S. Ct. 1511. It does

[2] At the risk of ad nauseum repetition, Atwater's attorneys did

not automatically follow, though, that the same standard applies in postconviction. Likewise, it does not follow that because an error is structural on direct appeal means that a case is retroactively applied.

In Weaver v. Massachusetts, 137 S. Ct. 1899, 1912 (2017), the Supreme Court rejected the notion that an error viewed as "structural" when a claim is raised on direct appeal, is entitled to the same treatment if raised for the first time in postconviction. The Supreme Court stated that finality interests and the passage of time justify putting the burden on a defendant to prove prejudice in postconviction regarding an error that if preserved and presented on appeal would have entitled him to automatic reversal. The Court reasoned:

> . . . when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. For instance, in this case, the factors and circumstances that might justify a temporary closure are best considered in the regular appellate process and not in the context of a later proceeding, with its

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not concede his guilt in the face of his insistence that they do not.

added time delays.

> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, *see Strickland*, 466 U.S., at 693–694, 104 S.Ct. 2052 (noting the "profound importance of finality in criminal proceedings"), and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.
>
> In sum, "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," thus undermining the finality of jury verdicts. *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). For this reason, the rules governing ineffective-assistance claims "must be applied with scrupulous care." *Premo*, 562 U.S., at 122, 131 S.Ct. 733.

Weaver, 137 S. Ct. at 1912.

While the State maintains that there are significant factual differences that render McCoy inapplicable in this case, Atwater nonetheless should not be rewarded, and the State and victims penalized, for his silence on this matter at trial and on direct appeal. Again, there are significant differences between a claim addressed in the trial court and raised on direct appeal, and a claim raised in postconviction. The United States Supreme Court closed with the following appropriate observation in Weaver:

> In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial. As explained above, he has not made the required showing. The judgment of the Massachusetts Supreme Judicial Court is affirmed.

137 S. Ct. 1899, 1913–14.

In United States v. Thomas, 750 Fed. Appx. 120, 128 (3d Cir. 2018) (unpublished), the Third Circuit cited Weaver in holding that denial of a defendant's counsel of choice, while a structural error requiring reversal on direct appeal, is subject to Strickland[3] when raised for the first time in postconviction. The court explained:

> As a preliminary matter, Thomas argues that he need not show prejudice on his ineffective assistance of counsel claim because the denial of a defendant's Sixth Amendment right to counsel of his choice is a structural error that is presumptively prejudicial. While it is true that the "erroneous deprivation of the right to counsel of choice ... unquestionably qualifies as structural error," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (internal quotation marks and citation omitted), the Supreme Court applies that rule to a preserved objection on direct review, *id.* at 142-44, 126 S.Ct. 2557. When a defendant on collateral

[3] Strickland v. Washington, 466 U.S. 668 (1984).

> review raises an ineffective assistance of counsel claim involving counsel's failure to raise a structural error, the defendant will typically bear the burden to show both deficient performance of counsel and prejudice under the familiar *Strickland* framework. The Supreme Court recently addressed a similar situation in *Weaver v. Massachusetts*, --- U.S. ----, 137 S.Ct. 1899, 1911, 198 L.Ed.2d 420 (2017) (plurality).

Thomas, 750 Fed. Appx. at 128.

See also Yannai v. United States, 346 F. Supp. 3d 336, 346 (E.D.N.Y. 2018) (in denying habeas relief, the court observed that although the right to testify at trial is a fundamental right and may have been structural error, the court distinguished between a structural error raised and decided in postconviction, and a structural error like "McCoy" decided "on direct appeal, allowing the Supreme Court to bypass the prejudice analysis and order a new trial[.]") (citing McCoy, 138 S. Ct. at 1507, 1512).

Capital defendants like Atwater cannot escape a Strickland analysis by raising a free-standing McCoy claim in postconviction because McCoy is not retroactive. Postconviction motions are not vehicles to correct trial errors, structural or otherwise, that could have and should have been raised on direct appeal. The only avenue left to a defendant would be to raise the issue as an ineffective assistance of counsel claim; therefore, whether the error is structural is not the relevant

question. Instead, a defendant would have to prove deficient performance and resulting prejudice. Of course, Atwater cannot raise an ineffective assistance claim because it would be untimely and procedurally barred.

In fact, in his initial postconviction motion, Atwater alleged counsel was ineffective for conceding his guilt without his consent. Atwater was afforded an evidentiary hearing and was unable to prove that he objected to counsels' strategy before or during the trial. Furthermore, the postconviction court found credible Schwartzberg's testimony that it was his standard practice to discuss all aspects of trial strategy with his clients, although Schwartzberg did not specifically recall discussing with Atwater the strategy of asking for a conviction on a lesser offense. Likewise, the court gave credence to White's testimony that White had no reason to believe that he did not discuss with Atwater the trial strategy. (PCR/366-67). This Court affirmed the denial of relief.

It has been 29 years since Atwater was convicted and sentenced to death; 26 years since this Court affirmed his conviction and sentence; and 18 years since this Court affirmed the denial of Atwater's initial postconviction motion. This is an appeal of Atwater's fifth successive motion for postconviction relief. He not entitled to any more bites at what

is left of the apple.

Non-Retroactivity of New Rules

If McCoy announced a new rule that under no factual scenario may a defense attorney concede guilt to any charge, including a lesser charged offense, that rule simply would not apply to Atwater on postconviction. New rules of law articulated by either the Supreme Court or a state supreme court do not apply to cases that are final. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding the decision in Crawford v. Washington, 541 U.S. 36 (2004), was not retroactive); Teague v. Lane, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review).

State Retroactivity Law

This Court has recognized that retroactivity decisions often present difficult issues, particularly in capital cases. See Witt v. State, 387 So. 2d 922, 924-25 (Fla. 1980) ("The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post-conviction relief from a sentence of

death."). However, McCoy does not present a difficult decision.

In Witt, this Court provided a framework for determining whether a change in decisional law should be applied retroactively. The Court held that such changes should not be applied retroactively unless the change 1) emanates from this Court or the United States Supreme Court; 2) is constitutional in nature, and 3) constitutes a development of fundamental significance. Id. at 931. When the two prongs are satisfied the relevant question becomes whether the decision constituted a development of fundamental significance.

Developments of fundamental significance are those that either place beyond the authority of the state the power to regulate certain conduct or impose certain penalties or are of sufficient magnitude to necessitate retroactive application as determined by the three-part test provided in Stovall v. Denno, 388 U.S. 293 (1967) and Linkletter v. Walker, 381 U.S. 618 (1965). The Stovall/Linkletter test requires consideration of the following three factors: first, a consideration of the purpose to be served by the rule; second, the extent of the reliance on the old rule; and, third, the effect of retroactive application of the rule on the administration of justice. Witt, 387 So. 2d at 926.

The ruling in McCoy does not place beyond the power of the

State the right to punish any defendant. The rule is clearly not substantive. Nor, is the rule in McCoy a development of fundamental significance. The purpose of McCoy is to preserve the defendant's autonomy in deciding whether to strategically concede guilt in order to avoid a possible death sentence. Such a rule, while perhaps important, has nothing to do with accuracy or fairness in the outcome of a judicial proceeding. Defending the indefensible, while it may be a defendant's prerogative, does nothing to promote accurate and fair outcomes.

In Nixon the United States Supreme Court held that where a defendant neither consents nor objects to the "course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." The reasonableness of counsel's decision in those circumstances is governed by the Strickland standard. Courts and defense attorneys have relied on Nixon in good faith. To claim now that McCoy renders even counseled and unobjected-to decisions to concede guilt structural error strips counsel of the ability to present a defense that might save a client's life. It also allows a capital defendant to "pocket" a McCoy claim in the event his and his attorney's strategic decision is unsuccessful.

If McCoy is read broadly rather than limited to its own

extreme facts, the impact on the system will no doubt be significant. See McCoy, 138 S. Ct. at 1517 ("Is admitting guilt of a lesser included offense over the defendant's objection always unconstitutional? Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter? What about simple assault?") (Alito, J., dissenting). The balance between the important goal of finality and the purpose of the new rule weighs heavily against any retroactive application.

Federal Retroactivity Law

The Supreme Court has recognized that when it articulates a new obligation on an attorney that rule is subject to the general rule of non-retroactivity. See Chaidez v. United States, 568 U.S. 342, 358 (2013) ("This Court announced a new rule in [Padilla v. Kentucky, 559 U.S. 356 (2010)]. Under Teague, defendants whose convictions became final prior to Padilla therefore cannot benefit from its holding.").

Under Teague, new rules are retroactive only if (1) the new rule places an entire category of primary conduct beyond the reach of the criminal law or prohibits imposition of a certain type of sentence for a class of defendants because of their status or because of the offense; and (2) new "watershed rules

of criminal procedure" that are necessary to the fundamental fairness of the criminal proceeding. Teague, 489 U.S. at 311-13.

Atwater's reliance on Montgomery v. Louisiana, 136 S. Ct. 718 (2016) is misplaced. There, the Court's holding regarding retroactive application of Miller v. Alabama, 132 S. Ct. 2455 (2012) was "limited to Teague's first exception for substantive rules . . ." 136 S. Ct. at 729. Substantive constitutional rules are "those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Montgomery, 136 S. Ct. at 729. In Miller, for example, the Court held that life without parole sentences for juvenile offenders is unconstitutionally excessive and violates the Eight Amendment. Miller, 132 S. Ct. at 2460. McCoy, on the other hand, does not preclude the State from imposing a certain punishment on a class of individuals nor does it put certain conduct, as a constitutional matter, out of the reach of criminal law. Teague's first exception does not apply.

As to the question of whether McCoy announced a "watershed" procedural rule, the United States Supreme Court has "repeatedly emphasized the limited scope of the second Teague exception, explaining that 'it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . .

. are implicit in the concept of ordered liberty.'" Beard v. Banks, 542 U.S. 406, 417 (2004) (internal citation omitted). "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Tyler v. Cain, 533 U.S. 656, 670 (2001).

The Court has repeatedly referred to the rule established in Gideon v. Wainwright, 372 U.S. 335 (1963), and only this rule, as the type that *might* fall within this exception. See also United States v. Mathur, 685 F.3d 396, 399 (4th Cir. 2012) ("The only case that the Court has ever suggested might qualify for retroactive application under the second Teague exception is Gideon v. Wainwright, which incorporated the Sixth Amendment right to counsel against the states and held that the right is violated when states fail to appoint defense counsel for defendants who cannot afford representation." (internal citation omitted)).

One would expect that if McCoy was the second case that the Court believed *might* fall within Teague's second exception the Court would have said so. The Court has yet to make such a proclamation. Likewise, the Court has not stated that McCoy is

retroactive under the first Teague exception either. Therefore, the Supremacy Clause does not come into play. Indeed, the United States Supreme Court, and only that court, that can definitely declare McCoy retroactive as a matter of federal law.

Manifest Injustice

In addition to being time-barred, the issue raised in the successive motion is procedurally barred. The same substantive issue was raised in Atwater's previous postconviction motion although using a different argument. Nonetheless, claims that were raised in previous proceedings are procedurally barred in subsequent postconviction motions. See Schoenwetter v. State, 46 So. 3d 535, 561 (Fla. 2010) (stating it is not appropriate to use a different argument to relitigate an issue previously raised and decided.)

Similarly, Atwater has not presented this Court with any exceptional circumstances to reconsider its previous decision affirming the denial of postconviction relief. State v. Owen, 696 So. 2d 715, 720 (Fla. 1997). He has suffered no manifest injustice.

ISSUE IV

THERE WERE NO PROCEDURAL OR SUBSTANTIVE ERRORS SUFFERED BY ATWATER, EITHER INDIVIDUALLY OR CUMULATIVELY.

Atwater's conclusory assertion that he suffered the denial of fundamental constitutional rights and other errors is an insufficient basis to afford relief. More importantly, though, the assertion is simply incorrect. Atwater did not suffer any deprivation of his constitutional rights despite his multiple attempts to prove otherwise. Further, in the more than 25 years since Atwater was convicted and sentenced he has failed to prove any error in the proceedings that would entitled him to relief of any kind.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal which will send a notice of electronic filing to the following: James L. Driscoll, , Julie A. Morley, Tracy M. Henry, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, at **driscoll@ccmr.state.fl.us, morley@ccmr.state.fl.us henry@ccmr.state.fl.us and support@ccmr.state.fl.us.**

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Marilyn Muir Beccue
COUNSEL FOR APPELLEE