IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1709

JEFFREY L. ATWATER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Atwater lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Atwater.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are in the form (R[volume number]/[page number]). References to the original postconviction record on appeal are in the form (PC[volume number]/[page number]). References to the successive record on appeal are in the form (SPC[volume number]/[page number]). Generally, Jeffrey Atwater is referred to as Mr. Atwater throughout this brief.

STATEMENT OF THE CASE AND FACTS

1. Procedural History

On September 7, 1989, Mr. Atwater was indicted for first degree murder and armed robbery. (R1/4-5). Mr. Atwater was found guilty on both counts on May 2, 1990 after a jury trial held in the Sixth Judicial Circuit, Pinellas County. (R12/1468). On May 17, 1990, the jury recommended death by a vote of eleven (11) to one (1). (R13/1823). Mr. Atwater was sentenced to death on June 25, 1990. (R15/1865-66).

Mr. Atwater appealed his conviction and sentence to this Court. The Court affirmed both in *Atwater v. State*, 626 So. 2d 1325 (Fla. 1993). The United States Supreme Court denied certiorari. *Atwater v. State*, 511 U.S. 1046 (1994).

Mr. Atwater filed a postconviction motion under Florida Rule of Criminal Procedure 3.850 on August 7, 1995 which was subsequently amended. The trial court granted an evidentiary hearing on only two guilt phase issues. (PC1/238). Related to this appeal, Claim 6 in the Amended Motion to Vacate Judgments of Conviction and Sentences pleaded that "Mr. Atwater was denied Due Process, a fair trial, an adversarial testing and effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Mr. Atwater's guilt, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the

Florida Constitution." (PC1/17-19). This claim alleged that Mr. Atwater was not informed of defense counsel's plan to concede guilt. Had Mr. Atwater been so informed, he would not have agreed to counsel's concession of guilt. (PC1/17).

At the evidentiary hearing three witnesses testified: the two trial attorneys, John Thor White and Michael Schwartzberg, and Mr. Atwater. The trial court entered an order denying all claims for relief. This Court affirmed the trial court's denial of postconviction relief and denied his state habeas petition. *Atwater v. State,* 788 So. 2d 223 (Fla. 2001).

Mr. Atwater filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, Middle District, Tampa Division. The district court summarily denied the habeas petition on October 21, 2003. The Eleventh Circuit Court of Appeals affirmed the denial in *Atwater v. Crosby*, 451 F.3d 799 (11th Cir. 2006), *cert. den*. 549 U.S. 1124 (2007).

Mr. Atwater filed a successive state motion for postconviction relief based on *Ring v. Arizona*, 536 U.S. 584 (2002) under Florida Rule of Criminal Procedure 3.851. The denial of relief was affirmed at *Atwater v. State*, 892 So. 2d 1011 (Fla. 2004). A second successive motion challenging the State's lethal injection method of execution was denied in *Atwater v. State*, 6 So. 3d 51 (Fla. 2009). A third successive motion predicated on the issues raised in *Martinez v. Ryan*, 566 U.S. 1 (2012) was denied in

Atwater v. State, 118 So. 3d 219 (Fla. 2013). A fourth successive motion based on *Hurst v. Florida*, 136 S. Ct. 616 (2016) was denied by the trial court on April 17, 2017 and upheld in *Atwater v. State*, 234 So. 3d 550 (Fla. 2018). The United States Supreme Court denied certiorari. *Atwater v. Fla.*, 139 S. Ct. 182 (2018).

2. This Appeal

This case is an appeal from the denial of Mr. Atwater's Rule 3.851 motion. On May 3, 2019, Mr. Atwater filed, "Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence (*McCoy v. Louisiana*)." The State responded. (SPC1/51-62). On September 26, 2019, the lower court issued an "Order Dismissing Defendant's Fifth Successive Motion to Vacate Judgment of Conviction and Sentence [and} Order Denying Defendant's Motion to Stay Proceedings and Scheduling of Case Management Conference." (SPC1/69-73). Mr. Atwater filed a motion for rehearing (SPC1/76-89) which was also denied (SPC1/90-92).

The lower court found that Mr. Atwater's motion was untimely because *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) has not been held to be retroactive. (SPC1/71). The court went on to find that even if the "motion was timely it would have been denied without merit." (SPC1/71). Both bases for denial are discussed and refuted below.

3. Facts from Trial and Prior Litigation Relevant to the Present Appeal.

John Thor White and Michael Schwartzberg represented Mr. Atwater at trial. These attorneys were appointed less than five months before trial. (R1/25). During closing argument following the guilt phase, Mr. Schwartzberg told the jury that he would attack the premeditation element to first degree murder in rebuttal closing statements:

> [T]he State wants to have their cake and eat it too. All along, the State has told you that we're going to prove it either/or, and they've made a half-hearted attempt to show you that it was a robbery. And when I get up here in the second half of my closing argument, I'll tell you why the State did that. I'll tell you, because the State knows that they could not prove premeditated murder. The State knows that they were hoping that you would boot strap them into a First Degree Murder conviction by returning a verdict of guilty as to Felony Murder.

(R12/1425).

During the rebuttal closing arguments, Attorney Schwartzberg stated three separate times that second degree murder was the proper verdict in this case because "[t]he evidence before you is overwhelming, but the question is degree." (R12/1459). Schwartzberg discusses the physical abuse between the victim Kenneth Smith and Mr. Atwater's aunt, Adele Coderre, and how Mr. Atwater witnessed this abuse to establish that he committed the murder with a depraved mind and not premeditation. (R12/1460). Attorney Schwartzberg states:

> Is this the act of a depraved mind? I submit to you that the only answer is yes. Nine stab wounds to the back, nine stab wounds to the chest. One of them four and a half inches deep . . . Ill will, hated, spite, evil

intent. Second Degree Murder.

(R12/1460). Schwartzberg continued:

> We're not hiding anything from you. We're asking you to do your duty, to render the only verdict that is fair and just, and that is as to Count One of the indictment, that Jeffrey Atwater is guilty of Murder in the Second Degree.

(R12/1461). Finally, he stated: "This is an act of a depraved mind regardless of human life, done out of ill will, spite, hatred or an evil intent. It is the only verdict that you can return and do what you swore to do, do justice." (R12/1461).

On June 25, 1990, the day of his sentencing hearing, but before the sentence was announced, Mr. Atwater informed the trial judge of a pro se motion he brought with him to court. *See* Defendant's Pro Se Motion for New Trial (R8/721-23; SPC1/29-32). Ground 4 of the pro se motion references how the trial attorneys admitted Mr. Atwater's guilt in contradiction to a defense of outright innocence. Mr. Atwater told the trial court: "You know right now I just would like to put a verbal motion before this Court of rule 3.600, grounds for new trial. There is evidence that was available during the trial that wasn't gathered by my attorneys, you know, and I feel that I did not receive a fair and impartial trial because of this." (R15/1864). He further told the Court, "I'm not admitting my guilt, but I am saying if I was sitting on a jury and I heard the evidence that was presented . . . I would have convicted myself too." (R15/1865). Mr. Atwater was

subsequently sentenced to death by the trial court.

On direct appeal, appellate counsel did not raise a claim involving trial counsel's concession of guilt. *Atwater v. State*, 626 So. 2d 1325, 1328 (Fla. 1993). Mr. Atwater raised a postconviction claim that trial counsel was ineffective because counsel conceded guilt without Mr. Atwater's consent, which this Court affirmed the denial of relief. *Atwater v. State*, 788 So. 2d 223, 227 (Fla. 2001). This Court described Mr. Atwater's argument being,

> that during closing arguments, his counsel forcefully argued in favor of second-degree murder, displayed gruesome crime scene photographs to the jury, argued the crime was one of malice, and rejected any consideration of manslaughter because the facts supported a more serious offense. Defense counsel's actions, Atwater argues, were more like those of a prosecutor than a defense attorney. Atwater states that he did not consent to defense counsel's strategy to concede guilt to any crime. He argues that conceding guilt is equivalent to a guilty plea, and defense counsel was required under *Nixon v. Singletary,* 758 So. 2d 618 (Fla. 2000), to secure Atwater's explicit consent before making any concession to any element of the crime charged, even if

Id. at 229. This Court decided this issue without the benefit of *McCoy v. Louisiana*.

SUMMARY OF ARGUMENT

Mr. Atwater was denied a fair and accurate trial and proof beyond a reasonable doubt because his trial counsel abandoned him and conceded guilt against his wishes. This violated Mr. Atwater's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments

of the United States Constitution and corresponding provisions of the Florida Constitution. The lower court denied Mr. Atwater a case management conference at which he could be heard on whether *McCoy v. Louisiana* applied retroactively and argue why his case required relief. Having been denied an adversarial testing at trial, Mr. Atwater was once again denied his rights. This Court should reverse.

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), these claims are mixed questions of law and fact requiring *de novo* review.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING THE MOTION WITHOUT HOLDING THE REQUIRED CASE MANAGEMENT CONFERENCE, THUS DENYING MR. ATWATER HIS RIGHTS UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTIONS.

The lower court failed to hold a case management conference to hear legal arguments and then proceeded to make findings of fact without allowing counsel to argue at the case management conference for relief and for an evidentiary hearing. Mr. Atwater had a right to be heard and right to the procedures contained in Rule 3.851. This Court should reverse the lower court and remand for a case management conference.

The denial of the case management conference violated Mr. Atwater's right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Additionally, this amounted to a violation of state and federal rights to due process, equal protection, the right to counsel, confrontation, a fair trial, and constitutes cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution.

Mr. Atwater filed a successive motion within a year of the United States Supreme Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Before Mr. Atwater's lead attorney went on maternity leave she filed a motion to stay proceedings and scheduling of a case management conference. (SPC/63-65). The State filed a response. (SPC/66-68). The State argued Mr. "Atwater's most recently filed postconviction motion presents a purely legal issue and is fairly limited in scope." (SPC/66). The State held back from overtly arguing that the lower court should not wait for Mr. Atwater's lead attorney to return from maternity leave. (SPC/67).

The lower court, rather than allowing a brief extension of time so that Mr. Atwater's attorney could return from maternity leave for a case management conference, denied the motion for

postconviction relief without a hearing of any kind. In the same order, the lower court denied the motion to stay pending counsel's return from maternity leave. (SPC/73).

Mr. Atwater filed a motion for rehearing, drafted by another attorney. (SPC/76). In addition to taking issue with the court's decision on the merits and the time bar, Mr. Atwater raised the issue of the lower court's failure to hold a case management conference. The lower court found its own error harmless. (SPC/90). The court cited to some cases in which this Court found that the failure to hold a case management conference amounted to harmless error. The lower court went on to deny that the court made findings of fact without hearing from counsel. (SPC/91).

A. The lower court was required to hold a case management conference.

Florida Rule of Criminal Procedure 3.851 (f)(5)(B)provides:

> Successive Postconviction Motion. Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference. At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing. If the trial court determines that an evidentiary hearing should be held, the court shall schedule the hearing to be held within 90 days. If a death warrant has been signed, the trial court shall expedite these time periods in accordance with subdivision (h) of this rule.

The proper procedure as detailed in Rule 3.851 was not

followed by the lower court. Mr. Atwater had a right to a case management conference where he could present legal argument in support of his claims and address the need for an evidentiary hearing.

Requiring the court to conduct a case management conference provides a litigant with notice of the process and the manner in which he can be meaningfully heard on his claim. The touchstone of due process is "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Rule 3.851's requirement that the lower court conduct a case management conference assures Mr. Atwater a fundamentally fair proceeding where he will be put on notice as to any arguments by the State, and will be given an opportunity to respond and set forth his position and legal argument. *See Huff v. State*, 622 So. 2d 982 (Fla. 1993) (the failure to conduct a hearing "leaves the impression that Huff's arguments were not considered.").

Individuals under a sentence of death still retain due process rights, including fair hearings in accord with fundamental fairness. *Panetti v. Quarterman*, 551 U.S. 930, 947-950 (2007)(finding that a violation of state's procedural framework in competency to be executed claim was failure to provide minimum requirements of due process).

The failure of the lower court to hold a case management conference led to a bad decision in this case. The court, in order to effect a denial, went beyond the issue of timeliness and made findings of fact without assuming Mr. Atwater's factual allegations to be true or allowing him to challenge the findings of fact the court would make. Mr. Atwater attached an affidavit to his motion even though he was not required to do so. This affidavit clearly showed that Mr. Atwater vociferously objected to counsel's concession as soon as he could without being held in contempt. To the extent that lower court made finding of facts and delved into the merits without allowing Mr. Atwater to be heard, this violated Mr. Atwater's right to due process and equal protection (when compared to the other cases that followed the requirement of holding a case management conference).

When a right so fundamental as the right to challenge the evidence against oneself and the presumption of innocence are at stake, a mere case management conference would be the least that should occur. Even more so, before the lower court makes any findings of facts both parties should have the opportunity to present evidence and argument.

Mr. Atwater should have been heard on whether it was necessary for him to act as his own attorney and contemporaneously object to his own counsel's concessions in front of the jury, thus discarding Mr. Atwater's presumption of innocence without his consent. It is

highly unlikely that the United States Supreme Court left open a safe harbor for those attorneys sneaking in a concession after not telling their clients of their intent.

The lower court's failure to comply with the mandatory procedures of Rule 3.851 and allow Mr. Atwater to be heard amounted to a suspension of the writ in violation of both the United States and Florida Constitutions. This Court should reverse.

B. The lower court's denial of rehearing based on its own finding of harmless error was both incorrect and disrespectful of the rule of law.

Harmless error may sometimes apply to a case on appellate review, but it should never be used by a court at fault to excuse its own error. Harmless error applies to mistakes, not deliberate and willful violations of law. Here, the lower court after being advised that the Rule required a case management conference decided that its own error was "harmless." (SPC/90).

This Court, under some circumstances, may find that an error is harmless. The lower court is required to follow the law. Failing to correct an error, as seen in this case, because the court making the error deems it harmless, essentially abandons the rule of law. This is especially true when it is considered that the lower court could have easily corrected the error by holding the case management conference the Rule requires. A lower court's finding its own error harmless and failing to correct an error when it is easily possible operates as a license to ignore the law.

Errors will be made in judicial decision making and they can be corrected. Knowingly committing an error because there will be no consequences is not acceptable. Judges have the most power in the criminal justice system and should be held to the highest standard. It would hardly be an acceptable defense to a violation of the Rules of Professional Responsibility to say "sure I did it, but I know that violations such as this lead to very limited discipline so, so what."

Mr. Atwater had to file each and every requirement that Rule 3.851 requires. Mr. Atwater complied with every jot and tittle of the Rule. He filed his motion within one year and included every pleading requirement the Rule mandated. Whether he should prevail is a different question from whether he should be heard. Nevertheless, Mr. Atwater should not be the only party in this system held to the rigorous standards of the rules.

As far as Mr. Atwater is concerned the error was clearly not harmless. First, Rule 3.851, considered as a whole, accounts for a hearing in the overall procedure to be followed in deciding a claim. The Rule requires a response from the State, after which the next step is to hear argument from counsel. While in theory, a defendant can file a reply, this is hardly necessary when there will be a hearing in the near future. Mr. Atwater was not required to, and could not, anticipate every argument that the State would make in its answer and anticipatorily refute them in his initial

successive motion. Moreover, he could not anticipate every theory that the court would use to deny him relief. The Rule allowed him, however, to make his arguments in response at a case management conference. As such Mr. Atwater was denied the right to be heard and confront the findings and arguments that would be used to deny him relief.

C. The lower court's summary denial without a case management conference and an evidentiary hearing denied Mr. Atwater an opportunity to develop the facts necessary to fully present his claim.

This Court made explicit:

> [T]hat a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. *See, e.g., Maharaj v. State*, 684 So. 2d 726 (Fla. 1996); *Anderson v. State*, 627 So. 2d 1170 (Fla. 1993); *Hoffman v. State*, 571 So. 2d 449 (Fla. 1990); Holland v. State, 503 So. 2d 1250 (Fla. 1987); *Lemon v. State*, 498 So. 2d 923 (Fla. 1986); Fla. R. Crim. P. 3.850. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989). However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. *See Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Valle v. State*, 705 So. 2d 1331 (Fla. 1997). We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

Atwater, 788 So. 2d at 229. Mr. Atwater has established a *prima facia* case in addition to showing that he is unequivocally entitled to relief. The lower court erred in denying Mr. Atwater an

evidentiary hearing. This Court should reverse.

The lower court's summary denial denied Mr. Atwater the right to develop facts that existed outside of the record at an evidentiary hearing. The lower court based its decisions on incomplete findings of fact and incorrect factual analysis that would have been corrected at an evidentiary hearing.

Most egregiously, the Court found that, "[t]hus, unlike the defendant in *McCoy*, here Defendant never expressed to his lawyers that his objective was to insist that at no point during the trial were never made aware of his alleged objective to make no concessions of guilt." (SPC1/72). The lower court went on to misread the import of *McCoy* and found that Mr. Atwater, "(at least impliedly) acknowledges, he did not 'vociferously insist[] that he did not engage in the charged acts [or] adamantly object[] to any admission of guilt." (SPC/72, citing *McCoy*, 138 S. Ct. at 1505). The Court found that because of this, *Strickland v. Washington*, 466 U.S. 668 (1984rather than *McCoy* would apply to this claim. Mr. Atwater certainly could have shown at an evidentiary hearing the lower court's factual finding failed to account for the actual dynamics of counsel's representation and nature of the trial and thus he was entitled to relief. He also could have gone into great depth on why the lower court was required to apply *McCoy* retroactively as a matter of state and federal right.

Moreover, the lower court grossly misread *McCoy*. McCoy

himself vociferously objected to the concession of guilt but McCoy's attorneys at least had the decency and professionalism to tell McCoy rather than sandbagging their own client. *McCoy* at 1506. The trial court denied McCoy's request to remove counsel once counsel's intention to concede was communicated to McCoy. *Id*. McCoy managed to let it be known that counsel "was 'selling him out'" although the opinion does not make clear how McCoy had access to the judge outside the presence of the jury. Logistically, Mr. Atwater had no access to protest to the trial court because counsel waited until the rebuttal closing argument.

Mr. Atwater told his attorneys and the trial court that he wished to contest each element of the charges against him when he entered a plea of not guilty and maintained his innocence during attorney consultations. After he did so, the State had the burden of proving each element of the offenses against Mr. Atwater. Counsel had a duty to defend against each and every element and to zealously represent Mr. Atwater. When counsel conceded guilt, counsel were not only ineffective, counsel utterly abandoned Mr. Atwater and left him with no counsel at all. *See Gideon v. Wainright*, 372 U.S. 335 (1963)(clearly establishing the right to counsel). The lower court's creation of some sort of contemporaneous objection requirement eviscerated Mr. Atwater's right to counsel by creating a requirement that Mr. Atwater lodge his own objections. Mr. Atwater could have testified at an

evidentiary hearing that he felt constrained by the rules of courtroom decorum from speaking out and that he feared that he could be held in contempt, would hurt his case, or possibly be physically removed from the his own trial had he objected.

The lower court focused on the lack of an objection at trial. An evidentiary hearing would have allowed Mr. Atwater to testify to any demands he made outside of the trial and his insistence on holding the State to its burden of proof despite counsel's avoidance of discussing strategy with him. He could have also discussed the dynamics of the attorney-client relationship that would have shown that this was a sandbagging and not a case of trial counsel misreading some sort of implied consent. (*See* SPC/34-36).

An evidentiary hearing would have allowed evidence that showed that Mr. Atwater took issue with counsel's concession as soon as he reasonably could. Mr. Atwater filed a proper motion for a new trial, (SPC/29-32) only to be denied, and has raised counsel's concession at every opportunity that was available. Mr. Atwater went so far as to send numerous letters to Florida Bar members to find counsel to challenge the concession. Mr. Atwater knew immediately that his counsel abandoned him and would have testified that he has acted in good faith ever since then to obtain relief from his unconstitutional death sentence and conviction. Mr. Atwater had a right to an evidentiary hearing to show that he

was correct all along.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. ATWATER'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION UNDER *McCOY V. LOUISIANA*. TRIAL COUNSEL VIOLATED THE SIXTH AMENDMENT AND COMMITTEED A STRUCTURAL ERROR BY ADMITTING GUILT AT MR. ATWATER'S TRIAL.

A. *McCoy v. Louisiana* precludes defense counsel from conceding guilt for strategic reasons without the defendant's permission.

In *McCoy v. Louisiana*, the State of Louisiana charged McCoy with murdering three members of his family. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018). Despite McCoy's express instruction not to concede guilt, his defense counsel told the jury that McCoy was the killer – in the hope that the jury would spare McCoy the death penalty. *Id.* at 1506-07.

The United States Supreme Court held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 1505. Although the Sixth Amendment guarantees a defendant the right to assistance of counsel for his defense, "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to

the State to prove his guilt beyond a reasonable doubt." *Id.* The Court likened the right to maintain one's innocence at the guilt phase of a capital trial as the same as a defendant who "steadfastly refuse[s] to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications" because "[t]hese are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *Id.* at 1508.

The Court further explained that *Florida v. Nixon*, 543 U.S. 175 (2004) did not command a contrary result. In *Nixon*, the Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." *Nixon*, 543 U.S. at 178. In that case, there was no Sixth Amendment violation because defense counsel had explained several times to the defendant a proposed guilt-phase concession strategy and the defendant was unresponsive. *Id.* at 186. The Court 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 192.

The *McCoy* Court stated that "[b]ecause a client's autonomy, not counsel's competence, is in issue" the ineffective assistance

of counsel standard under *Strickland v. Washington,* 466 U.S. 668 (1984) or *United States v. Cronic,* 466 U.S. 648 (1984) does not apply and there is no need for the defendant to show prejudice. *McCoy*, 138 S. Ct. at 1510-11. Rather, the "[v]iolation 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 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.* "Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *Id.* For those reasons, the Court awarded McCoy a new trial without any need first to show prejudice. *Id.*

B. Jeffrey Atwater's trial attorneys violated his Sixth Amendment right to maintain his innocence by impermissibly conceding guilt during his guilt phase capital trial.

On September 7, 1989, Mr. Atwater was indicted for first degree murder and armed robbery. (R1/4-5). Initially, the Sixth Judicial Circuit Public Defender's Office was appointed to represent Mr. Atwater. Due to a conflict of interest, the Public Defender's Office withdrew from representation and attorneys John Thor White and Michael Schwartzberg were appointed on December 19,

1989. (R1/25). Less than five months after their appointment, Mr. Atwater went to trial and was found guilty on all counts.[1] (R12/1468).

A jury trial was held on May 1 and 2, 1990. During the first closing arguments, Attorney Schwartzberg spent the majority of his time attacking the State's lack of evidence to support the armed robbery charge. Schwartzberg informed the jury that he would attack the premeditation element to first degree murder in rebuttal closing statements:

> the State wants to have their cake and eat it too. All along, the State has told you that we're going to prove it either/or, and they've made a half-hearted attempt to show you that it was a robbery. And when I get up here in the second half of my closing argument, I'll tell you why the State did that. I'll tell you, because the State knows that they could not prove premeditated murder. The State knows that they were hoping that you would boot strap them into a First Degree Murder conviction by returning a verdict of guilty as to Felony Murder.

(R12/1425).

During the rebuttal closing arguments, Attorney Schwartzberg stated **three** separate times that second degree murder was the proper verdict in this case because "[t]he evidence before you is overwhelming, but the question is degree." (R12/1459). Schwartzberg discusses the physical abuse between the victim Kenneth Smith and Mr. Atwater's aunt, Adele Coderre, and how Mr. Atwater witnessed this abuse to establish that he committed the

1 The jury returned its verdict on May 2, 1990. (R12/1468).

murder with a depraved mind and not premeditation. (R12/1460). Attorney Schwartzberg stated:

> [i]s this the act of a depraved mind? I submit to you that the only answer is yes. Nine stab wounds to the back, nine stab wounds to the chest. One of them four and a half inches deep . . . Ill will, hated, spite, evil intent. Second Degree Murder.

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> [w]e're not hiding anything from you. We're asking you to do your duty, to render the only verdict that is fair and just, and that is as to Count One of the indictment, that Jeffrey Atwater is guilty of Murder in the Second Degree.

(R12/1461). Finally, he stated: "This is an act of a depraved mind regardless of human life, done out of ill will, spite, hatred or an evil intent. It is the only verdict that you can return and do what you swore to do, do justice." (R12/1461).

On June 25, 1990, the day of his sentencing hearing, but before the sentence was announced, Mr. Atwater informed the trial judge of a handwritten pro se motion he brought with him to court. (R8/721-23; SPC/29-31). Ground 4 of the pro se motion states:

> Counsel was ineffective as he failed to put on a defense that would of convinced the jury of the defendant's innocence of murder in the first degree, ***counsel instead tried to convince the jury that the defendant was guilty of a lesser charge, Counsel stated in his closing argument that the defendant was not guilty of murder in the first degree but murder in the second degree,*** counsel told the jury that the defendant killed the victim Kenneth Smith out of rage and anger, that the defendant did not kill Mr. Smith to cover up a robbery, thus putting into the jurors' minds that the defendant had definitely killed Kenneth Smith.

(R8/723; SPC/31) (emphasis added). Mr. Atwater told the trial court: "You know right now I just would like to put a verbal motion before this Court of rule 3.600, grounds for new trial. There is evidence that was available during the trial that wasn't gathered by my attorneys, you know, and I feel that I did not receive a fair and impartial trial because of this." (R15/1864). He further told the Court, "I'm not admitting my guilt, but I am saying if I was sitting on a jury and I heard the evidence that was presented . . . I would have convicted myself too." (R15/1865). Mr. Atwater was subsequently sentenced to death by the trial court.

After the Florida Supreme Court upheld his conviction and sentence of death in *Atwater v. State*, 626 So. 2d 1325 (Fla. 1993), Mr. Atwater sent hundreds of letters out to Florida attorneys seeking help on his postconviction appeals, particularly because he was concerned that Florida's Capital Collateral Representative ("CCR") office was, at the time, understaffed and dysfunctional. (*See* SPC/34-36, affidavit of Jeffrey L. Atwater, and SPC/38-39, example form letter requesting counsel). In Mr. Atwater's letter requesting pro-bono capital appellate representation, one of the reasons outlined for needing assistance was: "In his closing argument, Counsel conceded guilt *without discussing the matter with me first*." (SPC/3). (emphasis in original).

C. Relevant facts from subsequent postconviction proceedings and appeals.

An original 3.850 postconviction motion was filed on August 7, 1995 and subsequently amended twice. The trial court granted an evidentiary hearing on two guilt phase issues. (R2/238). One of the claims is directly related to this brief. Specifically, Claim 6 in the Amended Motion to Vacate Judgments of Conviction and Sentences states Mr. Atwater was denied Due Process, a fair trial, an adversarial testing and effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Mr. Atwater's guilt, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. (PC1/17-19). This claim alleged that Mr. Atwater was not informed of defense counsel's plan to concede guilt. Had Mr. Atwater been so informed, he would not have agreed to defense counsel's concession of guilt. (PC1/17).

Under the lens of an ineffective assistance of counsel claim, an evidentiary hearing was held on September 11, 1998 where the two trial attorneys, John Thor White and Michael Schwartzberg, and the defendant, Jeffrey Atwater, testified. White testified that he was lead counsel on this case because he was senior and more experienced than Schwartzberg and all decisions in the case were primarily his. (PC3/438-39). White believed "the evidence of guilt was overwhelming," (PC3/433), and he did not think Mr. Atwater had

any chance in getting an outright acquittal. (PC3/454). White said he does not remember whether Mr. Atwater ever conceded guilt to him. (PC3/447). Further, he does not recall any discussions he had with Mr. Atwater about the decision to concede guilt during closing arguments. (PC3/448). Despite being lead counsel, White stated he only had three attorney/client interviews with Mr. Atwater prior to April 26, 1990. (PC3/435). White noted that Schwartzberg had the primary responsibility to interact with Mr. Atwater during trial and "sort of leave me alone so I could strategize and keep an eye on things . . . during the course of the trial, my direct conversations to Mr. Atwater, to my recollection, were minimal." (PC3/456-57).

Attorney Schwartzberg testified that Mr. Atwater maintained his innocence to him and told the attorneys that he did not kill the victim. (PC3/487). Schwartzberg had no communication problems with Mr. Atwater. (PC3/494). Schwartzberg's second-degree murder strategy was done in attempt to save Mr. Atwater's life. (PC3/496). "Sometimes I believe that I have to act in what I believe to be my client's best interest in order to – especially in a capital case – save their life." (PC3/485). Schwartzberg said he has no "independent recollection" of discussing with Mr. Atwater what would be said during the closing arguments. (PC3/483). Schwartzberg further stated "did I discuss whether we were going to go for a second-degree murder as opposed to a finding of not

guilty, I can't answer. I don't have an independent recollection." (PC3/484-85).

Mr. Atwater also testified at the 1998 evidentiary hearing. *See* (PC3/506-32).[2] Mr. Atwater stated that trial strategy was never discussed with him because both attorneys assured him they would not be prepared for trial in May. (PC3/512). In fact, the trial attorneys filed Defendant's Motion to Continue on **April 18, 1990** and again on **April 26, 1990**. (R2/381-82; R3/446-47). The first motion states "Counsel for the Defendant is unprepared for trial as presently scheduled and there are no reasonable prospects that counsel will be prepared for trial on May 1st." (R2/381). The second motion, filed a mere five days before the trial actually commenced, stated "Counsel for the Defendant is unprepared for trial and there is no reasonable likelihood that he will be prepared for trial on May 1, 1990." (R3/446).[3]

Mr. Atwater testified he "was aware that the attorneys filed a motion to continue shortly before my trial date. The day before trial, I called the attorneys' office to learn the status of this motion. White said there is no way we were going to trial tomorrow and he was going to speak with the judge about the continuance that day." (SPC/34). A few hours later, both attorneys came to the

2 Mr. Atwater attached an affidavit executed on April 26, 2019 to his successive postconviction motion elaborating on this prior testimony. See (SPC/34-36).
3 Both of the motions were denied on April 26, 1990. (R3/448).

jail and informed Mr. Atwater they were ready for trial tomorrow. At this same meeting, the attorneys laid out photographs of the victim and suggested that Mr. Atwater plead guilty. (PC3/514). "There were no conversations about conceding my guilt, cross-examining State witnesses, or attacking the forensic evidence." (SPC/34-35).

Mr. Atwater did not know the attorneys planned on conceding guilt until he heard the rebuttal closing arguments. (PC3/513; SPC/34-35). Mr. Atwater did not know he could stand up and object while his attorneys spoke to the jury. (PC3/514-15). In addition, "I was told the night before the trial, when we get into the courtroom tomorrow, we [the attorneys] are in charge." (PC3/511). Mr. Atwater has always maintained his innocence to his attorneys and never expressed a desire to concede guilt. (PC3/513). "There was never a discussion of any such magnitude about conceding guilt. If there had been a discussion about conceding guilt, I would have told them point blank, no, you are not to do it." (PC3/513).

The trial court denied Mr. Atwater's claim that his attorneys rendered ineffective assistance of counsel because they conceded his guilt during closing arguments. (PC2/366-67). The court noted that the guilt concession during rebuttal closing arguments "was a trial strategy fashioned to try to save the defendant's life, in light of the strong and detailed evidence presented by the State against him." (PC2/366-67). Further, the trial court found "that

the defendant's plea to the jury to consider a second degree murder verdict was an attempt to save the defendant's life. ***Such a strategy is a legitimate trial strategy even without the defendant's knowledge or consent.***" *Id.* (emphasis added).

This Court upheld the denial of this claim in *Atwater v. State*, 788 So. 2d 223 (Fla. 2001) and also analyzed the claim under the *Strickland* ineffective assistance of counsel standard. Specifically, this Court found *Nixon v. Singletary*, 758 So. 2d 618 (Fla. 2000)[4] and *McNeal v. State*, 409 So. 2d 528 (Fla. 5th DCA 1982) controlling.[5] The Court held:

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4 In *Nixon v. Singletary*, the Florida Supreme Court found that the presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of a defendant's affirmative, explicit acceptance of that strategy. *Nixon*, 758 So. 2d 618, 624 (Fla. 2000). After an evidentiary hearing and subsequent appeal, this case went to the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175 (2004). The Supreme Court reversed and held that counsel's failure to obtain defendant's express consent to a strategy of conceding guilt did not automatically render counsel's performance deficient. Rather, 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." *Florida v. Nixon*, 543 U.S. at 192.

5 In *McNeal*, the Fifth District Court of Appeals stated "we do not think courts should review any specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness of counsel." *McNeal v. State*, 409 So. 2d at 529. The Court went on to say that to gain credibility with the jury and appear reasonable, sometimes it is considered good strategy for a defense counsel to make concessions. *Id.* This opinion was later upheld by the Eleventh Circuit Court of Appeals in *McNeal v. Wainwright*, 722 F.2d 674 (11th Cir. 1984), which found in light of overwhelming evidence against the defendant in a first-degree murder prosecution, argument by defense counsel

> Defense counsel properly made a strategic decision to argue that the facts showed Atwater's acts constituted second-degree murder, and not first-degree murder as was charged. This argument was presented to the jury after the State presented its case and after the State's summation of the evidence in closing argument. As we stated in our opinion on the direct appeal of this case, there was overwhelming evidence of guilt . . . In light of the evidence against Atwater, defense counsel properly attempted to maintain credibility with the jury by being candid as to the weight of the evidence. Faced with the prospect of a guilty verdict for first-degree murder and in light of the State's evidence, defense counsel's concession, which was made only in rebuttal to the State's closing argument, was reasonable and does not amount to a constitutional violation. The concession was made to a lesser crime than charged, during rebuttal closing argument, and after a meaningful adversarial testing of the State's case.

Atwater, 788 So. 2d at 230-231. Further, the Court found that "[i]neffective assistance of counsel is not measured by the result of counsel's efforts . . . Indeed, defense counsel did subject the State's case to meaningful testing, and only after the State's case was presented and fully argued did defense counsel resort to making some concession - a trial strategy intended to save Atwater's life. Under the circumstances, this strategy was reasonable." *Atwater*, 788 So. 2d at 232. Thus, the claim was denied as the court found that regardless of Mr. Atwater's knowledge, the trial strategy was reasonable under the circumstances. *Id.* The Court states that "defense counsel properly attempted to maintain

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which suggested that defendant was guilty of manslaughter was a tactical decision which did not constitute ineffective assistance of counsel. *McNeal v. Wainwright*, 722 F.2d at 676-77.

credibility with the jury by being candid as to the weight of evidence." *Id.* The attorney's decision to concede guilt in rebuttal to the State's closing arguments was "reasonable and does not amount to a constitutional violation." *Id.*

This claim was also raised in Mr. Atwater's federal habeas petition. The United States District Court, Middle District summarily denied Atwater's habeas petition in its entirety on October 21, 2003. The Eleventh Circuit Court of Appeals relied on *Strickland*, *McNeal v. Wainwright*, and *Florida v. Nixon*, in denying this claim. The Eleventh Circuit stated "Atwater's counsel subjected the state's case to 'a meaningful adversarial testing,' conducting 'meaningful cross-examination of fifteen of [the state's twenty] witnesses.'" *Atwater v. Crosby*, 451 F. 3d 799, 808 (11th Cir. 2006), citing *Atwater*, 788 So. 2d at 231. Further, the trial attorney testified "he did not believe Atwater had a chance at getting an acquittal, and his strategy was to save Atwater's life. Given these considerations, we cannot conclude that the Florida Supreme Court unreasonably applied, or reached a decision contrary to, clearly established federal law." *Atwater v. Crosby*, 451 F. 3d 799, 809.

D. *McCoy v. Louisiana* directly applies to Mr. Atwater's case. The structural error present in *McCoy* is also present in Mr. Atwater's trial and thus, Mr. Atwater must be awarded a new guilt trial without the need to show prejudice.

Mr. Atwater's trial attorneys violated his sacred right to autonomy and ability to maintain his innocence contrary to the holding of *McCoy*. Mr. Atwater must be awarded a new trial based on this grave structural error.

It is undisputed that the trial attorneys conceded Mr. Atwater's guilt during his trial. It is further undisputed that the concession occurred for the first time during rebuttal closing arguments. Attorney Schwartzberg stated three separate times that second degree murder was the proper verdict in this case. The Florida Supreme Court likewise agreed that guilt was not conceded until the rebuttal closing arguments: "At no point during the opening statement or during any of the testimony did defense counsel concede Atwater's guilt." *Atwater*, 788 So. 2d at 231-32. This Court stated that "[f]aced with the prospect of a guilty verdict for first-degree murder and in light of the State's evidence, defense counsel's concession, which was made only in rebuttal to the State's closing argument, was reasonable." *Id*. at 231.

Like the trial counsel in *McCoy*, both of Mr. Atwater's trial attorneys testified at the 1998 evidentiary hearing that conceding guilt was a strategy employed to obtain a second-degree murder conviction and spare Mr. Atwater the death penalty. Attorney White testified: "it was not a whodunit case . . . so we had to figure out something viable that we could do, and that was the second-

degree murder pitch. And that's how we got there." (PC3/455). Attorney Schwartzberg testified: "[s]ometimes I believe that I have to act in what I believe to be my client's best interest in order to – especially in a capital case – save their life." (PC3/485).

But just like Mr. McCoy, Mr. Atwater did not agree with the defense strategy to concede guilt. *See McCoy*, 138 S. Ct. at 1503 ("Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty . . . [b]ut the client may not share that objective."). Mr. Atwater never plead guilty to the charged crimes and always maintained his innocence to his lawyers throughout their representation of him. (PC3/513). Attorney Schwartzberg clearly testified that Mr. Atwater maintained his innocence to him and told the attorneys that he did not kill the victim. (PC3/487).

However, the trial court below denied Mr. Atwater's *McCoy* claim stating:

> [U]nlike the defendant in *McCoy*, here Defendant never expressed to his lawyers that his objective was to insist that at no point during the trial were the attorneys to make any concessions of Defendant's guilt. It cannot be said that trial counsel violated Defendant's right to autonomy when they were never made aware of his alleged objective to make no concession of guilt . . . Defendant never asserted his objective to counsel and it was not until after trial that he expressed any dissatisfaction with counsel's concession.

(SPC/72) (internal citations omitted). This is a misconstruction

of the trial facts. Mr. Atwater never explicitly expressed his objective was to insist that the attorneys not make any guilt concessions because he was never afforded the opportunity to do so. Mr. Atwater learned of the concession strategy at the same time as the jury – during rebuttal closing arguments. (R3/513). Prior to that moment, neither attorney discussed with Mr. Atwater the strategy of conceding guilt or any trial strategy for that matter. (SPC/34-35).[6] Mr. Atwater could not even anticipate or suspect a concession strategy as the attorneys did not substantively discuss any aspect of the trial, including how to attack the forensic evidence, cross-examination of State witnesses, or Mr. Atwater's right to testify on his own behalf. *Id.*

Both trial attorneys had only minimal contact with Mr. Atwater during the five short months from appointment to trial. Despite being lead counsel, Attorney White states he only had three attorney/client interviews with Mr. Atwater prior to April 26, 1990. (PC3/435). During these short jail visits or phone calls, Mr. Atwater always felt rushed by the attorneys. (SPC/34). The attorneys themselves could not even recall discussing the

6 Mr. Atwater testified at the 1998 evidentiary hearing that "[t]here was never a discussion of any such magnitude about conceding guilt. If there had been a discussion about conceding guilt, I would have told them point blank, no, you are not to do it." R3/513

concession strategy with Mr. Atwater. Attorney White testified he does not recall any discussions he had with Atwater about the decision to concede guilt during closing arguments. (PC3/448). Attorney Schwartzberg stated "did I discuss whether we were going to go for a second-degree murder as opposed to a finding of not guilty, I can't answer. I don't have an independent recollection." (PC3/484-85).

In fact, any time Mr. Atwater tried to inquire about strategy, he was told not to worry because the attorneys were unprepared for trial and a continuance would be granted. R3/512. This testimony is clearly supported by the record. The trial attorneys filed Defendant's Motion to Continue on April 18, 1990 (R2/381-82) and again on April 26, 1990 (R3/446-47). The latter motion was filed a mere **five days** before the trial was set to begin on May 1, 1990. In the second motion to continue, Attorney White stated: "Counsel for the Defendant is unprepared for trial and there is no reasonable likelihood that he will be prepared for trial on May 1, 1990." (R3/446). He then specifically outlined several outstanding issues which required completion in order to be properly prepared for guilt phase. (R3/447). This motion was denied by the trial court on April 26, 1990. (R3/448).

Thus, Mr. Atwater's trial attorneys, expecting a continuance before trial, were unprepared and left to cobble together a strategy at the eleventh hour that was never discussed with Mr.

Atwater. This is further supported by the fact that the trial attorneys had less than five months from the time of their appointment until the capital trial began and had only minimal contact with Mr. Atwater during that time. Mr. Atwater continually maintained his innocence to his attorneys and had he been told about their proposed legal strategy, he would have adamantly objected. (R3/513).

In Mr. Atwater's case, he was given no opportunity to object to the guilt concession because he only learned of this strategy during rebuttal closing arguments. Mr. Atwater was provided no chance to lodge an objection with his attorneys and immediately after closing statements, he was placed in a holding cell and had no contact with counsel. (SPC/35). Mr. Atwater objected at the first opportunity available – during the one attorney client meeting held between the guilty verdicts and penalty phase. *Id.* At this meeting, he informed Attorney Schwartzberg how angry he was over the concession of guilt. *Id.* Further, Mr. Atwater took action by filing his pro se motion for new trial with the trial court and verbally informed the court during the sentencing hearing of his dissatisfaction with this strategy. (R8/721-23; SPC/29-31).

The United States Supreme Court's opinion in *McCoy* constitutes a new, important, and broad pronouncement about the defendant's personal right to dictate the objective pursued at

trial. This opinion should not be read narrowly.[7] *McCoy* does not require the defendant to act out in court, interrupting closing arguments to assert an objection to the concession of guilt in real time. In fact, such a tactic would be looked down upon by the trial judge and/or lose favor with the jury. Nor does *McCoy* require Mr. Atwater to anticipate every possible defense his attorneys may assert during trial so that he can lodge a preemptory objection prior to such unknown strategy being employed. Although Mr. Atwater had a prior criminal record, this was his first criminal trial.[8] Absent the attorneys sharing trial strategy with him, Mr. Atwater simply expressed his trial objectives the only way he knew how - by continually maintaining his innocence to his attorneys.

The trial court below further erred stating that *Florida v. Nixon* is controlling in this case because the "[d]efendant never asserted his objective to counsel and it was not until after trial that he expressed any dissatisfaction with counsel's concession." (SPC/72). In *Nixon*, there was no Sixth Amendment violation because defense counsel had explained several times to the defendant a proposed guilt phase concession strategy and the defendant was

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7 The Supreme Court of Louisiana in *Horn* held that "*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *State v. Horn*, 251 So. 3d 1069, 1075 (La. 2018).

8 At the evidentiary hearing, Mr. Atwater testified: "I didn't know I could stand up in the courtroom and say, hey, that's not the way I want things to be happening. I figured if I did that, I would be held in contempt." (PC3/514-15).

unresponsive. *Nixon*, 543 U.S. at 186. The Court 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 192.

In Mr. Atwater's case, there is absolutely no testimony or evidence to suggest that he stood silent when approached with this concession strategy. As noted above, both attorneys testified that they did not recall discussing the strategy with Mr. Atwater. Thus, there is no testimony that, upon discussing a concession strategy with Mr. Atwater, he was unresponsive. In fact, there is testimony that Mr. Atwater was cooperative or responsive during all prior attorney discussions. Attorney Schwartzberg testified to having no communication problems with Mr. Atwater during his representation of him. (PC3/494). Thus, it is more than plausible that had the trial attorneys simply discussed strategy with Mr. Atwater as they are constitutionally required to do, he would have communicated his displeasure with any admission of guilt.[9] In this case, Mr. Atwater could not speak up against a strategy he knew nothing

9 "Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles . . . Counsel, in any case, must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option." *McCoy*, 138 S. Ct. at 1509 (internal citations omitted).

about. Once the strategy was made apparent during the closing arguments, Mr. Atwater lodged his objections to his attorneys at the next opportunity possible.

The *McCoy* Court stated that "[b]ecause a client's autonomy, not counsel's competence, is in issue" the ineffective assistance of counsel standard under *Strickland* or *Cronic* does not apply and there is no need by McCoy to show prejudice. *McCoy*, 138 S. Ct. at 1510-11. Rather, "[v]iolation 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. *McCoy*, 138 S. Ct. at 1511.[10] The *McCoy* Court held that admissions of guilt "blocks the defendant's right to make the fundamental choices about his own defense" and thus "the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *McCoy*, 138 S. Ct. at 1511. McCoy was granted a new trial without any need first to show prejudice. *Id.* Likewise,

10 "[A]n error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest" such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 137 S. Ct. 1899, 1908 (2017). An error might also count as structural "if the effects of the error are simply too hard to measure" like when a defendant is denied the right to select his or her own attorney. *Id.* Third, an error can be deemed structural "if the error always results in fundamental unfairness" like when a trial judge fails to give a reasonable-doubt instruction. *Id.*

the trial attorneys' actions in Mr. Atwater's case violated his sacred right to autonomy and ability to maintain his innocence. Mr. Atwater's case fits squarely within the *McCoy* spectrum and he should be granted a new guilt phase trial.

E. The structural error that occurred in Mr. Atwater's case invalidates all of his guilty convictions.

The trial attorneys committed a structural error that can only result in the invalidation of both of Mr. Atwater's convictions. *See McCoy*, 138 S. Ct. at 1510-11; *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (stating that structural error "will always invalidate the conviction"). As in *McCoy*, the violation of Atwater's protected autonomy right was complete when the trial attorneys "ursurp[ed] control of an issue within [Atwater's] sole prerogative." *McCoy*, 138 S. Ct. at 1511. A new trial is necessary for the homicide and non-homicide convictions. The very nature of a structural error is that it "pervades the entire trial." *Kaley v. United States*, 571 U.S. 320, 336 (2014), and "undermine[s] the fairness of a criminal proceeding as a whole." *United States v. Davila*, 569 U.S. 597, 611 (2013). In the face of a structural error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991).

Moreover, it would be illogical to consider the first degree

murder and armed robbery charges in isolation. Beyond the fact that the "effects of the admission [of guilt]" on the jury are "immeasurable," *McCoy*, 138 S. Ct. at 1511, "a concession on one count might increase the chances of conviction on others." *United States v. Gomes*, 177 F.3d 76, 83 (1st Cir. 1999). To see that the non-homicide and homicide counts in this case are inextricably intertwined, such that the structural error tainted all counts, this Court need look no further than the State's own words. In its closing arguments, the State linked the capital offense to the non-capital crime, the armed robbery, because that link could be used to convict Mr. Atwater of felony murder. (R12/1444, 1449-50).[11] Thus, since the trial attorneys impermissibly conceded Mr. Atwater's guilt for the homicide charge, under *McCoy*, both convictions must be vacated and a new trial awarded.

ARGUMENT III

MCCOY IS "SUBSTANTIVE" AND A "WATERSHED RULE OF PROCEDURE" THAT SHOULD BE APPLIED RETROACTIVELY TO MR. ATWATER UNDER BOTH THE STATE AND FEDERAL STANDARDS OF RETROACTIVITY.

The lower court erred in finding that *McCoy* was not retroactive in order to avoid remedying the constitutional error

11 "So he beats him, he stabs him, he kills him as he's laying there in his blood, he takes his money. That's all part of the course of events. That is the taking by force of violence. So there is absolutely a robbery here, and that he was killed in the course of the robbery was consequence of it and he is absolutely guilty of Felony Murder with the robbery theory." (R12/1450).

in Mr. Atwater's case. Mr. Atwater asserts that *McCoy* should apply retroactively under the fundamental fairness approach of *James v. State*, 615 So. 2d 668 (Fla. 1993) and the approach of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Moreover, this Court is required to apply *McCoy* retroactively under Federal law.

A. The Nature of the Error is Structural.

Weaver v. Massachusetts, 137 S.Ct. 1899 (2017) discussed the difference between issues subject to harmless error and to those which are not because they are structural. Based on the nature of the error in *McCoy*, such error is not subject to harmless error analysis because it is structural. Defining the error as structural requires that the rule of *McCoy* be applied retroactively to Mr. Atwater's case based on the nature of the constitutional violation at issue.

After appeal, Weaver raised a claim of ineffective assistance of counsel based on trial counsel's failure to object to the closing of the courtroom. *Id*. at 1906. Deciding an ineffectiveness claim, the trial court found "that defense counsel failed to object because of 'serious incompetency, inefficiency, or inattention.'" *Id*. (citations omitted). The trial court found that the claim failed because of a lack of prejudice. *Id.* Weaver appealed and the state high court found consolidated it with Weaver's direct appeal. The issue was not raised on direct appeal because there was no objection at the time of the violation. *Id*. at 1907. The court

affirmed the lower court's decision because Weaver "had "failed to show that trial counsel's conduct caused prejudice warranting a new trial." *Id.* (citations omitted). Weaver then sought certiorari in the United States Supreme Court.

On review before the United States Supreme Court, the Court considered two doctrines: structural error and ineffective assistance of counsel. When the state can "show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' . . . the error is deemed harmless and the defendant is not entitled to reversal." *Id.* Some errors are not subject to harmless error and are considered structural errors. *Id.* The Court found three rationales for deeming an error structural and not subject to harmless error:

> First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, "usually increases the likelihood of a trial outcome unfavorable to the defendant." *McKaskle v. Wiggins*, 465 U.S. 168, 177, n. 8, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984). That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. *See Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975). Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n. 4, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006).
>
> Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For

> example, when a defendant is denied the right to select his or her own attorney, the precise "effect of the violation cannot be ascertained." Ibid. (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S. Ct. 617, 88 L.Ed.2d 598 (1986)). Because the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt," *Chapman*, supra, at 24, 87 S. Ct. 824, the efficiency costs of letting the government try to make the showing are unjustified.
>
> Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. *See Gideon v. Wainwright*, 372 U.S. 335, 343–345, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963) (right to an attorney); *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness.

Id. at 1908. The Court explained further that "[t]hese categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed structural. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id*. (citations omitted).

The Court distinguished Weaver's case from cases requiring the automatic reversal of a structural error objected to at trial and raised on direct appeal because Weaver raised an ineffective assistance of counsel claim in the state courts. Because Weaver raised ineffective assistance, Weaver was required to show that he was prejudiced because counsel's deficiency rendered his trial

"fundamentally unfair." *Id.* at 1913. The Court held that Weaver did not make this showing because none of the "harms flowing from a courtroom closure came to pass . . . ." *Id.* The Court concluded, "[i]n sum, petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object, and he has not shown that counsel's shortcomings led to a fundamentally unfair trial. He is not entitled to a new trial." At issue in Mr. Atwater's case, however, was the right to autonomy which encompassed the right to counsel and proof beyond a reasonable doubt.

McCoy v. Louisiana, found trial counsel's concession of guilt was structural:

> Because 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, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), or *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984), to McCoy's claim. See Brief for Petitioner 43–48; Brief for Respondent 46–52. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *Strickland*, 466 U.S., at 692, 104 S. Ct. 2052. Here, however, 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. 1510–11.

> 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. *See, e.g., McKaskle*, 465 U.S., at 177, n. 8, 104 S.Ct. 944 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either

> respected or denied; its deprivation cannot be harmless"); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006) (choice of counsel is structural); *Waller v. Georgia*, 467 U.S. 39, 49-50, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984) (public trial is structural). 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." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U.S., at ----, 137 S. Ct., at 1908 (citing *Faretta*, 422 U.S., at 834, 95 S. Ct. 2525). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U.S., at ---- - ----, 137 S. Ct., at 1908 (citing *Gonzalez-Lopez*, 548 U.S., at 149, n. 4, 126 S.Ct. 2557, and *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993)).
>
> Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. *See Cooke*, 977 A.2d, at 849 ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole."). Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.

McCoy, 138 S. Ct. at 1511.

The error in Mr. Atwater's case was all three of the types of

structural error discussed in *Weaver*. Essentially, Mr. Atwater received no trial at all and no proof beyond a reasonable doubt when trial counsel conceded guilt against Mr. Atwater's will.

B. State Law

This Court recently explained the *Witt* and *James* standards in *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016). *McCoy* is retroactive to Mr. Atwater under the fundamental fairness approach of *James* because Mr. Atwater raised the issues concerning counsel's concession of guilt against Mr. Atwater's wishes under then available case law in Mr. Atwater's previous postconviction motion. Mr. Atwater raised it as soon as he could and the courts got it wrong.

Second, the *Witt* standard grants retroactive application of changes in the law if,

> the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931. Determining the retroactivity of a holding "requir[es] that [this Court] 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." *Id*. at 924-25. Put simply, balancing fairness versus finality is the essence of a *Witt* retroactivity analysis. See *id*. at 925.

Id. McCoy emanated from the United States Supreme Court and was constitutional in nature. As a structural error it is not subject to harmless error analysis, thus making it a development of

fundamental significance. Lastly, the balance of fairness weighs in favor of retroactively applying *McCoy* to Mr. Atwater because the denial of adversarial testing and his right to make autonomous decisions renders Mr. Atwater's conviction and death sentence unreliable and unworthy of confidence. Granting relief will not have a widespread effect on the criminal justice system but it will remedy an injustice in Mr. Atwater's case.

C. Federal Law

This Court is required to apply the federal law of retroactivity:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987). As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, see *Bousley v. United States,* 523 U.S. 614, 620-621, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, see *Saffle v. Parks,* 494 U.S. 484, 494-495, 110 S. Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane,* 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him. *Bousley, supra,* at 620, 118 S. Ct. 1604 (quoting *Davis v. United States,* 417 U.S. 333, 346, 94 S. Ct. 2298, 41 L.Ed.2d 109 (1974)).
>
> New rules of procedure, on the other hand, generally do

> not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle, supra,* at 495, 110 S. Ct. 1257 (quoting *Teague,* 489 U.S., at 311, 109 S. Ct. 1060 (plurality opinion)).
>
> That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished." *Id.,* at 313, 109 S.Ct. 1060 (emphasis added). This class of rules is extremely narrow, and "it is unlikely that any ... 'ha[s] yet to emerge.' " *Tyler v. Cain,* 533 U.S. 656, 667, n. 7, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (quoting *Sawyer v. Smith,* 497 U.S. 227, 243, 110 S. Ct. 2822, 111 L.Ed.2d 193 (1990)).

Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004).

The federal test, however, does not prohibit a state from granting greater retroactivity to its own cases. *Danforth v. Minnesota*, 552 U.S. 264, 277, 282 (2008). Florida traditionally has done so. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (holding that *Hitchcock* claims should be raised in Rule 3.850 motions); *Meeks v. Dugger*, 576 So. 2d 713, n.1 (Fla. 1991). ("Because this petition was filed prior to our disposition of *Hall* . . . we will allow the instant claim to be raised in a petition for a writ of habeas corpus."). Florida's test from *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) is distinct from the federal retroactivity

test established in *Teague v. Lane*, 489 U.S. 288 (1989). *See Falcon v. State*, 162 So. 3d 954, 956 n.1 (Fla. 2015) (recognizing that determining retroactivity under *Witt* and *Teague* requires separate inquiries).

A state, however, is not free to deny retroactive application of a new law that should be found retroactive under the federal standard of retroactivity. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 725, (2016), the Louisiana state courts denied relief under *Miller v. Alabama,* 567 U.S. 460(2012) based on a finding of non-retroactivity under state law. *Montgomery,* at 727. On certiorari review, the United States Supreme Court considered whether *Miller* adopted a new substantive rule that applies retroactively on collateral review and whether the state court could refuse to give retroactive effect to the *Miller* decision. *Id*. The Court reversed the state denial based on retroactivity grounds because:

> Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." *Yates,* 484 U.S., at 218, 108 S.Ct. 534. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.

Id. at 731–32. Accordingly, based on *Montgomery*, a state court may not constitutionally refuse to give retroactive effect to a

substantive constitutional right. While *Danforth* allows a state court to extend more retroactivity than federal constitutional law requires, a state may not refuse to apply new law retroactively when the new law meets the requirements for retroactive application.

As made clear by the Court in *McCoy*, the error was structural. Having been denied an adversarial testing at a jury trial, Mr. Atwater cannot be subject to any sanction, let alone a death sentence, thus placing him outside the class of individuals who may be convicted and sentenced to death. Moreover, because *McCoy* restored such a significant right that the United States Supreme Court found the right to be structural, it is undeniable that under the second type of case retroactive under *Teague*, "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding" the right to adversarially test the State's evidence is likewise retroactive under federal law. There can be no greater risk of an inaccurate verdict than defense counsel admitting a client's guilt without a client actually admitting guilt. Mr. Atwater had every right to maintain his innocence and hold the State to its burden of proof. *Montgomery, supra,* makes clear that this Court must apply *McCoy* retroactively as the Supremacy Clause of the United States Constitution demands that state rules must yield to federal law.

D. The Law Of The Case Should Be Overcome To Prevent A Manifest

Injustice And McCoy Should Be Held To Apply Retroactively To Mr. Atwater.

To the extent that Mr. Atwater raised similar issues before *McCoy*, the law of the case is overcome because having raised these claims, adhering to the law of the case would result in a manifest injustice. This Court explained in *State v. Owen*, 696 So. 2d 715 (Fla. 1997):

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue,* 452 So. 2d 550, 552 (Fla.1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. *See Strazzulla v. Hendrick,* 177 So. 2d 1, 3 (Fla. 1965) (explaining underlying policy). This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Preston v. State,* 444 So. 2d 939 (Fla. 1984).
>
> An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner,* 452 So. 2d at 552*; Strazzulla,* 177 So. 2d at 4.

Id. at 720. Mr. Atwater was convicted and sentenced to death after being denied his right to adversarially test the State's case and autonomy. Allowing him to remain under a sentence of death without having been able to challenge the State's case was a manifest

injustice that should not stand. This Court should now apply *McCoy* retroactively and find that relief is appropriate.

ARGUMENT IV

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DURING THE GUILT AND PENALTY PHASE TRIALS DEPRIVED MR. ATWATER OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING RIGHTS IN THE FLORIDA CONSTITUTION.

Mr. Atwater has suffered multiple constitutional violations that have gone without a remedy. As *McCoy* has shown, Mr. Atwater has suffered a great denial of a fundamental right to autonomy and to counsel. If this were not enough, the other errors in Mr. Atwater's case, in combination with the *McCoy* error, surely render his conviction and death sentence unmaintainable. With consideration of the *McCoy* error added to the previously raised errors, this Court should grant Mr. Atwater a new trial with counsel that will not concede that which Mr. Atwater had the right to contest.

CONCLUSION AND RELIEF SOUGHT

Based on the arguments in this brief and the record on appeal, Mr. Atwater respectfully urges this Honorable Court to reverse the trial court's order denying his claims under *McCoy v. Louisiana*, vacate his judgments of guilt and conviction of death, and grant a new guilt phase trial, or such other relief at this Court deems proper.

CERTIFICATE OF SERVICE

We certify that a copy hereof has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Initial Brief on Assistant Attorney General Marilyn M. Beccue, Office of the Attorney General, at Marilyn.Beccue@myfloridalegal.com and capapp@myfloridalegal.com on this 19th day of November, 2019.

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We hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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