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

REPLY BRIEF OF THE APPELLANT

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REPLY TO SUMMARY OF ARGUMENT

Mr. Atwater had the right to be heard at a case management conference, an evidentiary hearing and receive relief.

McCoy v. Louisiana, 138 S. Ct. 1500 (2018) was a very important case that righted a serious misconception that had undermined the basic right to counsel made clear in, and expanded on, *Gideon v. Wainwright*, 372 U.S. 335 (1963). After counsel abandoned Mr. Atwater, he did not even receive a trial. Essentially, counsel pleaded Mr. Atwater guilty to a crime he had entered a plea of not guilty, leaving the jury with no decision to make.

The United States Supreme Court made clear the importance of the rights involved in *McCoy*. Rights of this importance cannot be other than retroactive. Mr. Atwater did not have *McCoy* available as a basis of relief, but he always had the right to decide whether he would hold the State to its burden of proof beyond a reasonable doubt. The retroactivity of *McCoy* allows this Court to right a grievous wrong that has rendered Mr. Atwater's conviction and death sentence not just unconstitutional but also illegitimate.

REPLY 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, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE RIGHT TO SEEK HABEAS CORPUS, UNDER TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTIONS.

The State argued that Mr. Atwater's motion was untimely and thus the denial of his motion without a case management conference was harmless error. AB 10-11. Mr. Atwater's motion was timely; he scrupulously complied with any time limit by filing his motion within one year of the United States Supreme Court's decision in *McCoy*. He could not file the motion he did until *McCoy* was decided. *McCoy* is retroactive based on the nature of the United States Supreme Court's opinion.

Mr. Atwater could not wait for an opinion declaring *McCoy* retroactive with the level of certainty that the State would concede. Inevitably, retroactivity will most certainly be an issue that the State and the party seeking relief would not agree upon. That is why the rule provides for a mandatory hearing at which both sides may argue their position. At a case management conference, Mr. Atwater would have been able to make his arguments on retroactivity and why the lower court was required to apply *McCoy* retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016). The Florida Rules of Criminal Procedure do not overcome

Mr. Atwater's right to retroactive application and the supremacy clause under the United States Constitution. As discussed below, the opinion in *McCoy* leaves no doubt that the rule is retroactive. For a decision to be retroactive there are no magic words needed for a holding that a decision is retroactive.

The lower court and the State's reliance on harmless error, after the lower court was confronted with the requirement of a case management hearing, diminished this Court's important role in adjudicating constitutional issues. First, while this Court can certainly rule in favor of Mr. Atwater on this appeal, the denial of a case management conference requires this Court to decide the case without complete arguments being made and decided by a lower court. While this Court often defers to the findings of a lower court, this is a failed endeavor when the lower court will not even hear from counsel.

Second, it is unfair to allow the lower court to brazenly deny a hearing despite the rule requiring a case management conference. It is even worse when the State, after receiving the benefit of a misreading of the timeliness requirement of the rule, relies on harmless error to affirm the lower court's failure to comply with the rule. While the State incorrectly insists that Rule 3.851 bars relief based on one section, rules should not just apply against the person seeking relief. At the very least, if this Court finds relief is not appropriate at this time, this Court

should remand for a case management conference.

REPLY 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.

Mr. Atwater was sandbagged by his own counsel and unable to respond until after the trial. As soon as he could, he made his objection known. The State argued that the concession in *McCoy* was not the same as in Mr. Atwater's case. The State was half right; trial counsel's concession in Mr. Atwater's case was not the same, it was far worse. Mr. Atwater had the right to contest the State's case against him and to counsel to advocate for him. Mr. Atwater stated without equivocation that he intended to hold the State to its burden of proof and that he conceded nothing when he entered his plea of not guilty at arraignment.

The State's attempts to distinguish Mr. Atwater's case from *McCoy* falls flat. The distinctions that the State does offer are meaningless. The State relied heavily on the notion that Mr. Atwater "did not intractably or vehemently oppose defense counsel's strategy as did the defendant in *McCoy.*" AB 15. Not receiving an evidentiary hearing, let alone a case management conference, the facts pleaded in Mr. Atwater's motion are required to be accepted as true. *See Peede v. State*, 748 So. 2d 253

(Fla.1999); *Valle v. State*, 705 So. 2d 1331 (Fla.1997). As he did plead in the motion, Mr. Atwater never conceded guilt to the attorneys and he surely did not agree to the strategy of concession counsel did not inform him about. The State self-servingly construed the judicially forced silence of Mr. Atwater with acquiescence when, unlike McCoy, Mr. Atwater had no chance to inform the Court that his counsel "were selling him out."

Also meaningless was the State's distinction that "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." AB 15. McCoy had a whole trial after opening statements to protest vehemently during the occasions in which he had access to the judge while outside the presence of the jury; Mr. Atwater had no such opportunity because his counsel sprung the concession while he was forced to be silent, had no access to the judge and could not make his objections known to counsel or the court.

The State argued that Mr. Atwater was "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." AB 15-16. He

could not have had a hearing on whether he was entitled to relief based on *McCoy* because the United States Supreme Court had not issued the opinion at the time. As such the lower court and this Court merely decided an ineffective assistance of counsel claim rather than the structural error claim at issue in this appeal. Whether he strongly objected had no bearing on the ineffective claim that was heard at Mr. Atwater's evidentiary hearing.

This Court's decision in Mr. Atwater's appeal of the denial of his ineffective assistance claim found:

> Even if defense counsel had denied that Atwater was guilty of any crime, there is no reasonable possibility that the jury would have reached a different conclusion given the evidence against him. *See Patton v. State,* 784 So.2d 380 (Fla.2000) (finding the facts counsel conceded were supported by overwhelming evidence and even if counsel had denied these facts, there was no reasonable possibility the jury would have rendered a different verdict). Therefore, the trial court properly denied
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> making certain concessions without Atwater's consent.

Atwater v. State, 788 So. 2d 223, 232 (Fla. 2001). This did not address whether Mr. Atwater was actually informed of counsel's strategy and there was no factual or a legal determination that would preclude relief for Mr. Atwater under his *McCoy* claim. Lastly, neither attorney at the evidentiary hearing, relied upon by the State, stated without equivocation that they talked about the strategy, let alone that Mr. Atwater acquiesced or remained mute.

The postconviction court stated:

> Defendant's second issue, that his counsel were ineffective because they conceded his guilt during closing argument at the guilt phase of the trial, is also without merit. Defense counsel argued to the jury that they should find defendant guilty of second degree murder and no robbery conviction. At the hearing, defendant's attorney testified that the argument, which was used in the rebuttal closing, 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. (Exhibit 3). The attorney testified that he had no reason to believe that he had not discussed that strategy with the defendant, and he could not recall the defendant ever expressing any desire for him not to take that route. (Exhibit 4). Defendant's co-counsel testified that he did not have an independent recollection of discussing the second-degree murder strategy with the defendant, but that his standard practice would have been to discuss all options before going forward. (Exhibit 5). The Court finds that the defense'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 without the defendant's knowledge or consent. *McNeal v. Washington*, 722 F.2d 674(11th Cir. 1984). McNeal v. State, 409 So. 2d 528 (Fla. 5th DCA), *rev. den.*, 413 So. 2d 876 (Fla. 1982).
>
> Therefore, the Court finds that this ground is

PC2/366-67. It was only the opinion of the State that "counsel testified credibly that it was their practice to discuss with their clients the trial strategy and closing argument" AB 16; citing 788 So. 2d at 230. This Court's opinion made no such "credibility" finding. No credibility determination was made by the postconviction court or this Court because there was no need to decide credibility in deciding Mr. Atwater's ineffective assistance of counsel claim.

Furthermore, the State's argument that "regardless, neither attorney would have argued for a lesser in the face of a client's clear objection to such a strategy[ ]" (AB 16-17) assumes that counsel discussed the matter with Mr. Atwater despite his clear pleading that counsel never did so. It strains credulity that two trial attorneys would be able to talk about general procedures but have no recall of specifically discussing the concession. Conceding guilt, even for the most experienced attorneys would have been a unique event that, had it occurred, no counsel would have forgotten the conversation.

The State concluded with an argument that it somehow matters whether the concession was to second degree murder despite this being precisely what happened in *McCoy*:

> Here, the defendant pled not guilty to the three-count indictment. [McCoy's trial counsel]'s strategy was to concede the defendant's guilt, but in an effort to spare him capital punishment he argued that a verdict of second degree murder would be more appropriate, asserting that the defendant's mental incapacity prevented him from
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> degree murder.

State v. McCoy, 218 So. 3d 535, 570 (2016). The United States Supreme Court made clear that it matters not whether the failure to concede would even lead to death because it is clearly within the defendant's autonomy to risk such a sentence if the defendant would rather have death than a life sentence or admit to bad facts. As the Court stated:

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did here. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium attending admission that he killed family members, or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22. Thus, when a client makes it plain that the objective of "his defence" is to maintain innocence of the charged criminal acts and pursue an
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> may not override it by conceding guilt. Pp. 1507 – 1509.

McCoy, 138 S. Ct at 1503–04.

Mr. Atwater showed that he did not concede guilt in the postconviction motion at issue and based on his filings immediately after the trial. Mr. Atwater knew he was wronged and has protested ever since, even though he had no doctrinal basis to do so until *McCoy* corrected ongoing misapprehension of the role of counsel. This Court should reverse.

REPLY 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 State relied heavily on *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The State's reliance fails to account for the difference between the error in *Weaver,* the error in *McCoy* and the different types of structural error. In *Weaver* 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. In *Weaver* the petitioner raised a claim of ineffective assistance of counsel for failing to object to the closing of the courtroom to the public during jury selection. *Id.* at 1905. While

the right to a public trial is important, the Court found that "not every public-trial violation will in fact lead to a fundamentally unfair trial. [] Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome." *Id*. at 1911. *Weaver* would appear to only implicate the first rationale for structural error. The error in Mr. Atwater's case of conceding guilt implicates all three.

First, public trials serve many functions besides fairness to the defendant. Public observation does have some truth ensuring function, but it is mostly to allow the public to view the trial in which the State is exercising the power derived from the public. The part of the trial in which the public was excluded was jury selection, and it was obvious that the trial court did so because of space, not based on any intent to hide the events of jury selection. No juror would have disclosed something essential to jury selection if the public were present; in fact, it is likely that the potential jurors would be less likely to disclose. Because it is difficult to disclose personal information, it is also not uncommon to have individual voir dire in high profile case such as in *Weaver*. Moreover, the entire trial would have been transcribed and accessible to the public. While again the right to a public trial is an important tradition, at least as far as *Weaver* was concerned, it was mostly cosmetic.

The rights denied Mr. Atwater were much more critical. Weaver no doubt received a fair trial whereas Mr. Atwater essentially received no trial once his attorneys conceded guilt. While a full trial complete with adversarial testing serves important systemic and societal functions, the harm fell squarely on Mr. Atwater who was denied a fair trial with the rights that are personal to him. The absence of the public from jury selection did not deny Weaver anything approaching what Mr. Atwater was denied.

Once the defense conceded second degree murder, conviction was a forgone conclusion and a conviction of first-degree murder as certain. The State may point to all of the evidence in the light most favorable to its self-serving interest, but a trial and proof beyond a reasonable doubt require the jury to believe the testimony and evidence and find proof beyond a reasonable doubt. Once trial counsel conceded there was simply no reason for the jury not to do find Mr. Atwater guilty as charged.

The second rationale, that the error is too hard to measure applies to Mr. Atwater's claim because the State is relying on a jury finding that only came after trial counsel's concession. There is no way to know whether the jury defaulted to counsel's concession and accepted the State's version of that or whether the jury was convinced based on the evidence aside from counsel's concession. This Court does not allow juror interviews so it cannot be discerned on what the jury based its decision. When a person

receives a jury trial that is a true adversarial testing, absent extrinsic influences, it is certain that the decision was based on the evidence. Here, no such certainty is available, and it cannot be known whether the jury only believed the evidence because of the concession.

The third rationale, that "the error always results in fundamental unfairness" (*id.* at 1908) clearly applied to Mr. Atwater's claim of structural error. The Court gave as an example of such structural error,

> 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. Like in *Gideon*, Mr. Atwater had no one to advocate for him after his counsel conceded guilt. There cannot be a fair trial when counsel effectively ends the trial by throwing in the towel.

Unlike in *Weaver*, Mr. Atwater did not have the possibility of raising his *McCoy* claim on direct appeal because the United States Supreme Court had not issued *McCoy* yet. *Weaver* involved the right to a public trial which had a robust and long-standing body of case law to rely upon. To the extent that the error was not preserved by counsel, thus requiring the claim to be pleaded as an ineffective assistance of counsel claim, the initial preservation

of the error was not hamstrung by counsel. Weaver's counsel could have objected to the closing of the courtroom without implicating their own actions. To the extent that counsel did not object, it was accordingly possible and efficient to bring an ineffective assistance of counsel claim.

Mr. Atwater had no possibility of making an objection at trial because it was counsel that occasioned the constitutional violation himself. Because counsel conceded Mr. Atwater's guilt without his consent, there was no way to make the needed objection at trial without exposing trial counsel's abandonment of Mr. Atwater. Contrary to an ongoing thread in the State's argument, Mr. Atwater could not make his own objection if he did not know the violation was going to happen before counsel sprung it on him and the jury.

Unlike most constitutional violations that occur at a trial, when counsel concedes guilt, the issue is impossible to preserve and to fully adjudicate on direct appeal. In a case in which counsel at least has forthrightness to inform a client of a concession strategy, and even were the client vociferously objects, these conversations will most often be outside the record. Counsel also can concede guilt if counsel informs the client first which would look the same in the record as if counsel violated the client's rights. To fully determine this type of claim there needs to be further development beyond what will readily be available in

the record unless the court gives the essentially pro se defendant an opportunity to be heard. Mr. Atwater had no such opportunity to be heard thus, in light of *McCoy*, he should be heard now.

The State's reliance on obscure federal cases addressing other types of structural error (see AB at 20-21) again fails to address that the defendants in those cases had the doctrinal basis and the ability to raise the claims at trial and on appeal. Once again, Mr. Atwater had no such path. *McCoy* gave Mr. Atwater this opportunity, and now he is indeed entitled to retroactive application.

The State's appeal to the amount of time Mr. Atwater has remained under conviction and reliance on the apple theory of justice (*see* AB 23-24) misapprehends Mr. Atwater's plea for justice. Mr. Atwater has remained incarcerated on death row for an extensive period of time without the adversarial testing that the Constitution requires. While not all mistakes are corrected in the judicial system, some mistakes are so grave they can and should be remedied whenever they are raised. Mr. Atwater was denied such a fundamental right that his conviction and sentence do not truly reflect the judgment of society.

Mr. Atwater is entitled to a full and fair adversarial testing to remedy the denial of constitutional rights he suffered which should result from retroactive application of *McCoy*. *McCoy* is retroactive under both state and federal law. While the State

recognized that retroactivity is a thing, the State was manifestly wrong in its bold statement that "[n]ew laws articulated by either the Supreme Court or a state supreme court do not apply to cases that are final." (AB at 24). There is no such per se rule. Indeed, *Gideon v. Wainwright*, 372 U.S. 335 (1963) was applied retroactively. Like in *Gideon* Mr. Atwater had no trial counsel, and worse, not a real trial at all, once counsel conceded his guilt.

This Court has held cases to be retroactive, most recently following the *Hurst* decisions. *See Mosley v. State,* 209 So. 3d 1248 (Fla. 2016). Mr. Atwater raised counsel's concession in his motion for retrial, *See* Defendant's Pro Se Motion for New Trial (R8/721-23); (SPC1/29-32). Thus, despite requiring evidentiary development, Mr. Atwater clearly deserves retroactive application under *James*. Under *Witt* the conclusion is the same. The State's sky-is-falling-argument invoking finality (see AB 26) overlooks that if Mr. Atwater was denied a legitimate adversarial testing, there can be no finality because there is no legitimacy.

McCoy also requires retroactive application under *Montgomery v. Louisiana*, 136 S. Ct. 2016 (2016). Retroactive application of *McCoy* is even more compelled because the error addressed in *McCoy* was both substantive because the criminal law cannot reach those who were denied adversarial testing and a "'watershed" procedural rule." As cited by the State there can be no greater rule

"require[ed} in the concept of ordered liberty.'" *See* AB at 29; *citing Beard v. Banks*, 542 U.S. 406, 417 (2004). A concept of ordered liberty requires that counsel not concede guilt. A conviction with a false concession of guilt can never be accurate or stand. *McCoy* also "'alter[ed} our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" AB at 29; citing *Tyler v. Cain*, 533 U.S. 656, 670 (2001). As made clear in *Montgomery*, this Court is required to apply certain types of federal law retroactively without waiting for an opinion to correct the failure to do so.

Lastly, Mr. Atwater is not time-barred. As fully developed throughout the briefing, Mr. Atwater raised his *McCoy* claim within the relevant time frames. The fact that he raised a somewhat similar claim does not bar the raising of the current one. This Court can and should avoid the fundamental miscarriage of justice that would occur if Mr. Atwater were denied relief again.

IV. CUMULATIVE ERROR

Mr. Atwater was convicted and sentenced to death without the trial that he was guaranteed under the Sixth Amendment because his counsel ignored his right to maintain his not guilty plea. Before the State can take liberty or life there must be a trial. When counsel conceded it was the same as if Mr. Atwater had no counsel at all and no trial. Based on all the error at Mr. Atwater's trial, this Court should reverse.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed above and outlined previously in Mr. Atwater's Initial Brief, Mr. Atwater respectfully urges this Honorable Court to reverse the trial court's order denying a new trial

CERTIFICATE OF SERVICE

We certify that a copy of the following reply brief 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 20th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Reply 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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