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IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Appellant,

v.

CASE NO. SC19-1864
L.T. No. 91-16659 CFANO

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A grand jury charged Appellant, Troy Merck, with first-degree premeditated murder and his first trial in November 1992, in which he was represented by the Public Defender's Office, ended in a hung jury and mistrial. (R.1386). Following the trial, Merck's counsel moved to determine the status of counsel and to inquire with Merck regarding self-representation because he disagreed with trial counsel "as to defense strategy." (R.1471). At a hearing on the motion, Merck indicated that there was a "difference in how we want to go about the defense," but the trial court informed Merck that the disagreement was not sufficient reason to remove his attorneys. (R.2454-55). Thereafter Merck filed a Florida Bar grievance against his attorneys because he wanted "the case tried in a fashion that he would be not guilty opposed to what the case was argued before, that he was perhaps guilty of a lesser." (R.2472).

The trial court appointed private counsel Fred Zinober to represent Merck (R.1512) and, as will be discussed in more detail infra, Zinober argued, without any objection from Merck, a primary defense theory that the jury should find Merck not guilty because the State failed to prove its case beyond a reasonable doubt. Zinober argued that, even if the jury were "somehow convinced" that the State had proven that Merck

committed the charged crime, he was unable to form premeditation because of his level of intoxication. (T.1138). The jury convicted Merck of the first-degree murder of James Newton and he was sentenced to death.

The following factual background was taken from this Court's opinion affirming Merck's conviction, but reversing his death sentence and remanding the case for resentencing:

> Merck was convicted of first-degree murder of the victim, James Anthony Newton. Newton died after Merck repeatedly stabbed him while the two men were in the parking lot of a bar in Pinellas County shortly after 2 a.m. on October 12, 1991. The bar had closed at 2 a.m., and several patrons of the bar remained in the parking lot. The evidence was that several of these individuals, including the victim, Merck, and those who witnessed the murder, had consumed a substantial amount of alcohol during the evening while at the bar.
>
> After closing, Merck and his companion, both of whom had recently come to Florida from North Carolina, were in the bar's parking lot. The two were either close to or leaning on a vehicle in which several people were sitting. One of the car's occupants asked them not to lean on the car. Merck and his companion sarcastically apologized. The victim approached the car and began talking to the car's owner. When Merck overheard the owner congratulate the victim on his birthday, Merck made a snide remark. The victim responded by telling Merck to mind his own business. Merck attempted to provoke the victim to fight; however, the victim refused.
>
> Merck then asked his companion for the keys to the car in which he had come to the bar. At the car, Merck unlocked the passenger-side door and took off his shirt and threw it in the back seat. Thereafter, Merck approached the victim, telling the victim that Merck was going to "teach him how to bleed." Merck rushed the victim and began hitting him in the back with

> punches. The person who had been talking to the victim testified that she saw a glint of light from some sort of blade and saw blood spots on the victim's back. The victim fell to the ground and died from multiple stab wounds; the main fatal wound was to the neck.
>
> Merck was indicted on November 14, 1991, for the first-degree murder of James Anthony Newton. The case went to trial and ended in a mistrial on November 6, 1992, because the jury was unable to reach a verdict. After a second trial, Merck was found guilty as charged. The jury recommended death by a vote of nine to three. The trial judge found two aggravating factors: (1) the murder was especially heinous, atrocious, or cruel; and (2) previous conviction of felonies involving the use or threat of violence. The court found no statutory mitigating factors and two nonstatutory mitigating factors: (1) abused childhood; and (2) alcohol use on the night of the offense. The trial court sentenced Merck to death.

Merck v. State, 664 So. 2d 939, 940-41 (Fla. 1995) (footnotes omitted).

In 1997, Merck was again sentenced to death. However, this Court reversed Merck's death sentence, Merck v. State, 763 So. 2d 295 (Fla. 2000), and remanded for another sentencing hearing. At Merck's third sentencing hearing, the jury recommended the death penalty by a vote of nine to three. The trial court followed the jury's recommendation and sentenced Merck to death, and this Court affirmed his death sentence. Merck v. State, 975 So. 2d 1054 (Fla. 2007), cert. denied, 555 U.S. 840 (2008).

On February 27, 2008, this Court appointed the Office of the Capital Collateral Regional Counsel – Middle Region (CCRC) to handle postconviction proceedings for Merck. Thereafter,

Merck filed a motion for postconviction relief. After conducting an evidentiary hearing on the claims requiring a factual determination, the trial court issued an order denying Merck's motion. (PC-R.300-20). In addition to appealing the lower court's denial of his postconviction motion, Merck also simultaneously filed a Petition for Writ of Habeas Corpus with this Court alleging ineffective assistance of appellate counsel. In a consolidated opinion, this Court denied all relief. Merck v. State, 124 So. 3d 785 (Fla. 2013).

On May 14, 2013, Merck filed a petition for writ of habeas corpus in federal court. Shortly thereafter, Merck filed a *pro se* motion for substitution of counsel and/or appointment of conflict-free counsel alleging that CCRC performed ineffectively in his state court postconviction proceedings. On February 12, 2014, the federal court granted Merck's motion and Linda McDermott was appointed as counsel pursuant to the Criminal Justice Act (CJA).

In federal court, Merck sought leave to amend his habeas petition with an unexhausted Brady/Giglio claim,[1] and the federal court issued an order deferring ruling on his request until Merck had exhausted his state court remedies regarding the

[1] Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

claim. The federal court stayed the habeas case pending Merck's exhaustion of his state remedies.[2]

On June 15, 2015, Merck's federally-appointed counsel filed a successive motion for postconviction relief in state court pursuant to Florida Rule of Criminal Procedure 3.851. (PC-R2.6-37). The following day, the State moved to strike the successive postconviction motion as Merck's federally-appointed counsel was not counsel of record for Merck in state court and the motion was therefore unauthorized. (PC-R2.38-43). The trial court agreed with the State and issued an order striking Merck's successive motion. (PC-R2.44-46).

Merck appealed the trial court's ruling, and on January 8, 2016, this Court issued an order dismissing without prejudice Appellant's appeal. Merck v. State, SC15-1439, 2016 WL 104164 (Jan. 8, 2016) (dismissing "without prejudice for Linda McDermott to seek substitution of counsel in the circuit court pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014)").

On January 25, 2016, Merck's federally-appointed counsel again filed a successive motion for postconviction relief based on alleged newly discovered evidence, and the lower court struck the pleading as unauthorized as Merck was represented by Capital

[2] Subsequently, after Merck's death sentence was vacated by the state court based on Hurst v. Florida, 136 S. Ct. 616 (2016), the district court dismissed Merck's federal habeas petition without prejudice.

Collateral Regional Counsel (CCRC). (PC-R2.8-29; 81-84). Merck's counsel appealed the order[3] and on May 4, 2017, this Court reversed and directed the lower court to enter an order allowing Linda McDermott to be substituted as counsel for Merck in place of CCRC, and following the issuance of such order, to address the successive postconviction motion. Merck v. State, 216 So. 3d 1285 (Fla. 2017).

Following the re-filing of Merck's successive motion based on alleged newly discovered evidence, the trial court granted an evidentiary hearing. After conducting the hearing, the trial court issued an order denying relief. This Court affirmed the trial court's ruling on appeal. Merck v. State, 260 So. 3d 184 (Fla. 2018).

On January 30, 2019, following the conclusion of appellate review, the trial court appointed the Public Defender's Office to represent Merck in circuit court for his resentencing. On May 10, 2019, Linda McDermott filed the instant successive postconviction motion pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851, and the trial court struck the motion

[3] During the pendency of this appeal, Merck filed a separate successive postconviction motion in the lower court based on Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). On May 4, 2017, the trial court vacated Merck's death sentence and granted a new sentencing hearing.

without prejudice.[4] (PC-R3.3-15; 16-19). Ms. McDermott subsequently filed a motion for substitution of counsel to appear *pro bono*. (PC-R3.20-22). The court thereafter issued a single order granting the motion for substitution of counsel and dismissing the successive motion for postconviction relief. (PC-R3.26-29). This appeal follows.

[4] The trial court noted that CCRC remained on Merck's case and had not been removed as counsel of record and Ms. McDermott had only been granted substitution of counsel for the purposes of the January 26, 2016 postconviction motion. The court did not address the fact that Merck was represented by the Public Defender's Office.

SUMMARY OF THE ARGUMENT

The trial court properly summarily denied Merck's successive postconviction motion based on an alleged violation of the holding recently announced by the United States Supreme Court in McCoy v. Louisiana, 138 S. Ct. 1500 (2018). As the lower court correctly noted, Merck's motion was untimely under Florida Rule of Criminal Procedure 3.851(d)(2)(B) because McCoy has not been held to apply retroactively by the Supreme Court or this Court. Furthermore, as the lower court properly found, even if McCoy applied to this case, Merck would not be entitled to relief. Trial counsel never conceded Merck's guilt, see Merck v. State, 124 So. 3d 785, 794-95 (Fla. 2013) (finding that trial "counsel never admitted Merck's guilt in advancing the intoxication theory"), and certainly, the trial record does not establish that Merck objected to defense counsel's strategy.

ARGUMENT

THE POSTCONVICTION COURT PROPERLY DISMISSED MERCK'S UNTIMELY AND MERITLESS SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF AS McCOY V. LOUISIANA, 138 S. CT. 1500 (2018), HAS NOT BEEN HELD RETROACTIVELY APPLICABLE TO POSTCONVICTION CASES AND, EVEN IF IT HAD, IT WOULD NOT PROVIDE ANY BASIS FOR RELIEF IN THIS CASE AS DEFENSE COUNSEL DID NOT CONCEDE MERCK'S GUILT OVER HIS OBJECTION.

Merck filed a successive motion for postconviction relief and argued that he was entitled to guilt phase relief under McCoy v. Louisiana, 138 S. Ct. 1500 (2018), because his trial counsel allegedly "violated Mr. Merck's '[a]autonomy to decide that the objective of the defense is to assert innocence.'" (PC-R3.7). The circuit court summarily denied the motion because it was untimely under Florida Rule of Criminal Procedure 3.851(d)(2)(B). Additionally, the court found that even if timely filed, his motion lacked merit as trial counsel did not concede Merck's guilt to the charged crime against Merck's intransigent objection. The State submits that the trial court properly summarily denied Merck's successive postconviction motion as McCoy is not retroactive to Merck's case, and even if it is retroactive, Merck failed to establish that he is entitled to guilt phase relief based on McCoy.[5]

[5] "This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record

In McCoy v. Louisiana, 138 S. Ct. 1500 (2018), the defendant was charged with three counts of first-degree murder and the State sought the death penalty. The defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt," yet the trial court allowed McCoy's attorney to inform the jury at the guilt phase that McCoy committed the murders, directly contradicting his client's testimony and theory of defense.[6] Id. at 1505-07. The Court held that counsel cannot admit their client's guilt to the charged crime over the client's intransigent objection, and any such violation of the defendant's Sixth Amendment autonomy constitutes "structural" error that is not subject to harmless-error analysis. Id. at 1510-11.

A. The Lower Court Properly Found Merck's Motion Untimely

In the instant case, Merck filed a successive postconviction motion seeking to vacate his judgment and conviction and alleged that his trial counsel violated the rule announced in McCoy by allegedly conceding Merck's guilt over his objection. However, as the lower court properly concluded,

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conclusively shows that the movant is entitled to no relief." Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

[6] In McCoy, the defendant testified that he was not guilty of the triple homicide and that he could establish an alibi. Id. at 1507.

Merck's motion was untimely and without merit.

Florida Rule of Criminal Procedure 3.851(d)(1) states that a defendant must file a motion to vacate his judgment of conviction and sentence of death within one year after the judgment and sentence become final. A judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed." Id. Subsection (2)(B) specifically provides that a motion may not be filed beyond that time limit unless it alleges "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and *has been held to apply retroactively*." Fla. R. Crim. P. 3.851(d)(2)(B) (emphasis added).

In Merck's successive postconviction motion, he sought to vacate his guilt phase conviction based on the recent case of McCoy. Although Merck's death sentence was vacated by the lower court in 2017, his instant motion sought to vacate his underlying conviction which has been final since the United States Supreme Court denied certiorari review in 2008.[7] See Fla.

[7] This Court affirmed Merck's conviction on direct appeal, but vacated his death sentence. Merck v. State, 664 So. 2d 939 (Fla. 1995). Merck was again sentenced to death in 1997, but this Court reversed his sentence. Merck v. State, 763 So. 2d 295 (Fla. 2000). After Merck was resented to death in 2004, this Court affirmed his death sentence. Merck v. State, 975 So. 2d 1054 (Fla. 2007), cert. denied, 555 U.S. 840 (2008).

R. Crim. P. 3.851(d)(1)(B). For Merck's motion to be considered, either the United States Supreme Court or this Court must have held that McCoy applies retroactively – neither has done so. According to the plain language of the rule, Merck does not satisfy the rule. See Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009) (finding that Walton's "claim is procedurally barred because the Bradshaw [v. Stumpf, 545 U.S. 175 (2005)] Court did not recognize a new fundamental constitutional right that applies retroactively"); Carroll v. State, 114 So. 3d 883, 886-87 (Fla. 2013) (affirming summary denial of successive postconviction claim seeking to extend the rationale of Roper v. Simmons, 543 U.S. 551 (2005), and Atkins v. Virginia, 536 U.S. 304 (2002)).

Even assuming that McCoy announced a new fundamental constitutional right, that rule would not apply to Merck on postconviction. New rules of law articulated by either the Supreme Court or a state supreme court do not usually apply to cases that are final. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding the decision in Crawford v. Washington, 541 U.S. 36 (2004), was not retroactive); Teague v. Lane, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral

review). The Supreme Court in McCoy had no occasion to address retroactivity because the case came to the Court on direct appeal.

In McCoy, the United States Supreme Court held that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt. McCoy did not create a new constitutional right which is retroactive; thus, it does not provide Merck with a new substantive claim. McCoy does not apply retroactively in Florida or in federal court. Moreover, a new decision with constitutional implications is not automatically retroactive; it must meet certain criteria under Florida or federal law.

In Florida, once a criminal conviction has been upheld on appeal the application of a new rule to that conviction is very limited. As noted by this Court in Wuornos v. State, 644 So. 2d 1000, 1007 n.4 (Fla. 1994), "new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise." A new rule of law will not apply retroactively unless it meets the criteria in Witt v. State, 387 So. 2d 922 (Fla. 1980). Hernandez v. State, 124 So. 3d 757, 763-64 (Fla. 2012). In Witt, this Court held that a new rule of law does not apply retroactively to final cases unless 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. While McCoy meets the first two prongs of the analysis, it fails to meet the third prong of Witt, and thus, does not apply retroactively.

The third prong of Witt is a two-part analysis. "A decision is of fundamental significance when it either: (1) places beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) when the rule is of sufficient magnitude to necessitate retroactive application." Hernandez, 124 So. 3d at 764. McCoy did not create a new class of individuals who only now have autonomy regarding their defense. Rather, it recognized that counsel must comply with a defendant who specifically objects to a concession of guilt during trial. This decision is of similar nature in a long line of cases involving Sixth Amendment jurisprudence. See, e.g., Jae Lee v. U.S., 137 S. Ct. 1958 (2017) (defendant may reject a plea and risk trial despite almost certain conviction); Gonzalez v. United States, 533 U.S. 242 (2008) (counsel provides assistance by making decisions regarding evidentiary objections, arguments to pursue, and agreements on evidence); Jones v. Barnes, 463 U.S. 745 (1983) (stating that decisions regarding a plea of

guilt, waiving jury trial, testifying, and waiving appeal are some of the issues left to the defendant).

Additionally, McCoy is not of "sufficient magnitude" to necessitate retroactive application. In making that assessment, the courts consider three factors: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Hernandez, 124 So. 3d at 764. As a general matter, courts have "rarely found a change in decisional law to require retroactive application." Mitchell v. Moore, 786 So. 2d 521, 529 (Fla. 2001) (noting that between 1980 and 2001, the Court had decided over sixty retroactivity cases at that time, and "this Court rarely finds a change in decisional law to require retroactive application").

This Court has recognized that numerous decisions from the United States Supreme Court that provided new developments in constitutional law were not retroactive. Hughes v. State, 901 So. 2d 837, 838 (Fla. 2005) (holding Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively); Walton v. State, 77 So. 3d 639, 644 (Fla. 2011) (holding Porter v. McCollum, 558 U.S. 30 (2009), is not retroactive); Dennis v. State, 109 So. 3d 680, 703 (Fla. 2012) (citing Chandler v. Crosby, 916 So. 2d 728,

729-31 (Fla. 2005), and finding Crawford v. Washington, 541 U.S. 36 (2004), does not apply retroactively).

The application of non-retroactivity to new constitutional decisions that have interpreted even the most sacred of constitutional protections, such as the right to confrontation and fundamental due process, is in keeping with the interest in finality of judgments. This Court has observed:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefitting neither the person convicted nor society as a whole.

Witt, 387 So. 2d at 925. Clearly, making new rules broadly applicable retroactively to all final cases would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Id. at 929-30. The McCoy decision fails under the first two prongs of the "sufficient magnitude" factors: (a) the purpose to be served by the new rule; and (b) the extent of reliance on the old rule.

Furthermore, new rules of law that constitute "evolutionary refinements" with the purpose of "affording new or different standards for procedural fairness and for other like matters," do not require retroactive application. This stands in contrast with "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding;" rules whose purposes require retroactive application. Witt, 387 So. 2d at 929. Here, McCoy is an example of an evolutionary refinement in procedural law akin to Porter's discussion on the appropriate steps in reviewing ineffectiveness claims which raises new undiscovered mitigation. Porter v. McCollum, 558 U.S. 30, 41-43 (2009). If applied using its very unique facts, McCoy simply would not bring about the type of "jurisprudential upheaval" that compels retroactive application. See Walton, 77 So. 3d. at 643. Further, McCoy made no mention of retroactivity. Nor has any subsequent United States or Florida Supreme Court case addressed the issue, much less made McCoy retroactive. Merck has not shown, nor is he able to show, that McCoy has retroactive application.

B. The Lower Court Correctly Found that Merck's Claim Lacked Merit

Even if McCoy is applicable to Merck's case, he is not entitled to any relief because Merck cannot establish that his trial counsel conceded his guilt; much less that it was against

his wishes. In Merck's initial postconviction proceedings, he argued that trial counsel was ineffective for presenting two defense theories at his trial: (1) reasonable doubt of the identity of the perpetrator and (2) voluntary intoxication. In rejecting this claim, this Court stated:

> Here, Merck's defense counsel was not deficient for presenting these two theories ***because counsel never admitted Merck's guilt in advancing the intoxication theory, primarily focused on the theory of reasonable doubt as to the adequacy of the State's case, and used the intoxication defense to negate premeditation.*** As Frederic Zinober, co-counsel during Merck's guilt phase trial, testified during the postconviction evidentiary hearing, based on Merck's and other witnesses' statements regarding how many drinks Merck had consumed on the night of the murder, he believed a secondary voluntary intoxication defense was an appropriate strategy if the jury did not believe the defense's main theory that the State had not proven beyond a reasonable doubt that Merck was the perpetrator. Accordingly, counsel was not deficient for presenting both theories to the jury.

Merck v. State, 124 So. 3d 785, 794 (Fla. 2013) (emphasis added).

Clearly, a review of trial counsel's arguments at Merck's trial refutes any contention that he conceded Merck's guilt. However, of greater importance in the context of a McCoy analysis is the fact that Merck never objected to trial counsel's strategy. Merck erroneously asserts in his brief that "[d]uring the charge conference, when discussing the voluntary intoxication instruction, Mr. Merck *confronted Zinober and*

indicated that he categorically did not want Zinober to put forth such a defense. (See T. 1068)." Initial Brief at 15. At no time during the charge conference did Merck "confront" his trial counsel and indicate that he did not want to pursue such a defense (see T.1064-70), and a review of page 1068 fails to support Merck's contention in *any* fashion.

Likewise, Merck claims in his brief that trial counsel "usurped" Merck's autonomy by arguing that voluntary intoxication negated the element of premeditation:

> Mr. Merck objected to the defense of voluntary intoxication and even went so far as to file a grievance against his *initial* trial counsel. Then after Zinober was appointed, Mr. Merck *again voiced his displeasure* with the defense of voluntary intoxication and *made clear his objective*.

Initial Brief at 22 (emphasis added). While the trial record supports a finding that Merck had a disagreement with his *prior* counsel about the theory of defense presented at his first trial which ended in a mistrial, the trial record does not support Merck's allegation that he "voiced his displeasure with the defense of voluntary intoxication and made clear his objective" to trial counsel Zinober. In fact, other than the erroneous citation to page 1068 of the charge conference noted above, Merck has failed to cite to a single page in the trial record where Merck expressed his disagreement with trial counsel's

strategy.[8] As such, the lower court properly determined that Merck did not establish that his trial counsel "concede[d] guilt over the defendant's intransigent and unambiguous objection" at his trial.

In conclusion, the lower court properly denied Merck's successive postconviction motion as untimely because McCoy has not been held retroactive. Furthermore, under this Court's Witt analysis, McCoy should not be retroactively applied to postconviction cases.[9] Finally, there was no violation of McCoy in the instant case because trial counsel never conceded Merck's guilt and, as the lower court properly found, Merck never "vociferously insisted that he did not commit the murder or adamantly objected to any admission of guilt." Accordingly, this Court should affirm the summary denial of Merck's successive postconviction motion.

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[8] It should further be noted that trial counsel's request of the voluntary intoxication jury instruction was based on Merck's own trial testimony that he drank about 15 beers and 8-11 shots of alcohol and suffered a blackout immediately before the stabbing attack and could not recall any details from that evening until the next morning. (T.822-23, 829, 861-64).

[9] Similarly, Merck's claim that "fundamental fairness" dictates a retroactive application of McCoy is without merit as Merck cannot claim a violation under McCoy because he at no time objected to trial counsel's concession of his guilt at trial nor did he raise this issue on direct appeal.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Merck's successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of January, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Linda McDermott, Esquire, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928 [**lindammcdermott@msn.com**].

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Stephen D. Ake
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