

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1864
LOWER COURT CASE NO. 91-16659 CFANO

TROY MERCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's fact findings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Merck requests oral argument.

STATEMENT OF THE CASE¹

On November 14, 1991, Mr. Merck was indicted with the premeditated first-degree murder of James Newton (R. 17-8).

Mr. Merck's trial commenced on August 31, 1993, and he was found guilty on September 7, 1993 (R. 2010). The following week, Mr. Merck's jury recommended a sentence of death (R. 2054-5), and the trial court imposed a sentenced of death (R. 2129-35).

On direct appeal, this Court affirmed Mr. Merck's conviction, reversed his sentence of death and remanded for further proceedings. Merck v. State, 664 So. 2d 939 (Fla. 1995).

At Mr. Merck's re-sentencing, the jury recommended the death sentence and Mr. Merck was sentenced to death on September 12, 1997 (R2. 597; 762-74).

On direct appeal from the re-sentencing, this Court again reversed Mr. Merck's sentence of death and remanded for further sentencing proceedings. Merck v. State, 763 So. 2d 295 (Fla.

¹The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

- "R. ___" - record on direct appeal to this Court;
- "T. ___" - transcript of trial proceedings;
- "R2. ___" - record on appeal from Mr. Merck's re-sentencing proceeding;
- "R3. ___" - record on appeal from Mr. Merck's second re-sentencing proceeding;
- "PC-R. ___" - record on appeal from the denial of Mr. Merck's initial postconviction motion;
- "PC-R2. ___" - record on appeal from the denial of Mr. Merck's successive motion for postconviction relief;
- "PC-R3. ___" - record on appeal from the denial of Mr. Merck's successive motion for postconviction relief.

2000).

Mr. Merck's second re-sentencing proceeding commenced on March 17, 2004. On March 19, 2004, the jury recommended a sentence of death, by a vote of 9-3 (R3. 251). On August 6, 2004, Mr. Merck was sentenced to death (R3. 310-5).

On direct appeal from the second re-sentencing, this Court affirmed Mr. Merck's sentence of death. Merck v. State, 975 So. 2d 1054 (Fla. 2007).

Mr. Merck filed a Rule 3.851 motion on September 2, 2009 (PC-R. 1-169), and a limited evidentiary hearing occurred on July 20-21, 2010. On August 27, 2010, the circuit court denied all relief (PC-R. 300-660).

Mr. Merck appealed to this Court. He simultaneously filed a petition for writ of habeas corpus. This Court denied all relief. Merck v. State, 124 So. 3d 785 (Fla. 2013).

Mr. Merck filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on May 14, 2013. The petition was dismissed without prejudice on November 22, 2017.

On June 15, 2015, Mr. Merck, through his federally appointed CJA counsel, filed a successive Rule 3.851 motion in the circuit court (PC-R2. 6-37). At the State's behest, the circuit court struck the motion (PC-R2. 38-43; 44-6). Mr. Merck appealed (PC-R2. 47-8).

On January 8, 2016, this Court entered an order dismissing

the appeal, which stated: "The Notice of Appeal is hereby dismissed 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)." See Merck v. State, Florida Supreme Court Case No. SC15-1439 (Jan. 8, 2016).

On January 25, 2016, Mr. Merck filed a successive Rule 3.851 motion (PC-R2. 55-76).

Then, on January 6, 2017, Mr. Merck filed a successive Rule 3.851 motion relating to Hurst v. Florida, 136 S.Ct. 616 (2016).

On May 4, 2017, the circuit court granted Mr. Merck's motion, in part, and granted Hurst relief.

As to his newly discovered evidence claim, an evidentiary hearing was held on October 2, 2017. Thereafter, the circuit court denied all relief.

On appeal, this Court affirmed the denial of relief. Merck v. State, 260 So. 3d 184 (Fla. 2018).

On May 10, 2019, Mr. Merck filed a successive Rule 3.851 motion based upon McCoy v. Louisiana, 138 S.Ct. 1500 (2018) (PC-R3. 3-15).

After initially striking the motion without prejudice to substitute counsel (PC-R3. 16-19), the circuit court reinstated the motion and dismissed it on September 26, 2019 (PC-R3. 26-29). The State did not file a responsive pleading in the circuit court as required by Rule 3.851 (f) (3) (b).

This appeal follows.

STATEMENT OF THE FACTS

Mr. Merck's first capital trial occurred in November 1992, and concluded with a hung jury (R. 1386, 1465). At the first trial, Merck solely pursued a voluntary intoxication defense, contending that on the night of the crime, an underage and slightly built Mr. Merck was highly intoxicated, having had at least 6 beers and several shots.

The fact that the first trial resulted in a hung jury provided Merck an opportunity to hear and see the State's evidence. Mr. Merck realized that his only basis for believing that he had committed the murder was because his friend, Neil Thomas, who was with Mr. Merck on the night of the crime, told him that he (Merck) had killed Mr. Newton. However, the evidence presented at trial suggested that Thomas had killed Mr. Newton, not Mr. Merck.

This evidence included the following: On October 12, 1991, Mr. Merck and Thomas arrived at the City Lights nightclub in Clearwater Beach (T. 740, 820).

While at the bar, Thomas admitted that he provided alcohol to an underage Mr. Merck, though he down played Mr. Merck's level of intoxication.

At closing time, the two proceeded to the parking lot. While individuals milled about, a confrontation occurred relating to Mr. Merck and Thomas leaning against Katherine Sullivan's car.

The confrontation escalated with Mr. Newton being attacked with a knife. Mr. Merck and Thomas fled the scene in their car, a Mercury Bobcat.

Sullivan testified at trial that, after the bar closed, she was sitting in her car with her boyfriend, Glen Sharpenstein when they were joined by Mr. Newton and Don Ward (T. 418). She asked two individuals (Merck and Thomas), who had been leaning on her car to move away from the car and the pair responded by being very sarcastic (T. 421). Sullivan exited her car to speak to Mr. Newton and the shorter of the two individuals made a sarcastic remark to them (T. 422-23). The exchange escalated quickly with the instigator trying to fight Newton and calling him names (T. 422-23). And, even though Sullivan identified Merck as being the attacker, instigating a fight and calling Mr. Newton a "pussy", i.e., the shorter one, according to Thomas, he was in fact the individual bantering with Mr. Newton, calling him a "pussy" and confronting him (T. 744-5; 796).

Sullivan also told law enforcement that the attacker had gone to the other side of the Bobcat, found the doors locked and called for the keys (T. 424). He did so by pounding his open palm on the top of the Bobcat, above the window (T. 424-32). Indeed, a palm print was located in this area of the Bobcat - it belonged to Thomas, not Mr. Merck (T. 612; 621-2).

Also, Sullivan was the only witness who could provide any details as to what the attacker (and his friend) were wearing.

The description was used in the BOLO alert sent to law enforcement. Critically, Sullivan described the attacker as wearing khaki pants and a light colored shirt with rolled up sleeves (T. 425). Sullivan also did not recall the attacker having any tattoos (T. 472-3).²

Merck was wearing blue jeans and a button down shirt that was pink. According to Mr. Merck, Thomas was wearing khaki pants and a light blue button down shirt with the sleeves rolled up. The video tape from law enforcement's search of the vehicle depicts a light blue shirt, with the sleeves rolled up and a pair of khaki pants. The pink shirt, which was also reflected by the video did not have sleeves that were rolled up.

And, while Sullivan identified Mr. Merck as being the attacker, she did so only after being provided with information that was impermissibly suggestive.³

²Mr. Merck had a large tattoo on his forearm (T. 852-3).

³At the first state court evidentiary hearing, Dr. John Brigham, a psychologist, testified as to factors that affect the accuracy of eyewitness memory. Dr. Brigham testified that eyewitness identifications were often inaccurate (PC-R. 800).

According to Brigham, several factors would be relevant to determining whether Sullivan's identification of Mr. Merck as the attacker was reliable. The factors included: that Sullivan had consumed alcohol within hours of the attack (PC-R. 803); that Mr. Newton and Sullivan were friends and there would have been high motivation for her to identify the attacker (PC-R. 803); that Mr. Merck's unique appearance due to the condition of his eyelids make him stand out in a lineup (PC-R. 804); that Sullivan's vision may have been obscured due to her placement in her vehicle (PC-R. 805); and that it would have been more difficult to make an accurate identification after Sullivan had assisted in the drawing of the suspect (PC-R. 809).

In addition, Richard Holton, who witnessed the attack from his truck testified that the driver of the car, who was not the attacker, was taller and skinnier than the person who committed the stabbing (T. 725). Thomas was two inches taller than Mr. Merck, but he was also nearly 40 pounds heavier.

After the attack, Thomas and Mr. Merck left the scene in the Bobcat. According to Thomas, Mr. Merck showed Thomas the knife

Most importantly, Dr. Brigham testified as to his concerns about the way the photo pack was conducted. Specifically, Sullivan was told to pick out the person who most closely fit her description (PC-R. 806). Such a comment "is in complete violation of accepted practices for administering a lineup where you're supposed to make it clear that the person may or may not be in here." (PC-R. 806).

Brigham continued:

There is another factor which - one of the issues is if you're told or led to expect or you lead yourself to expect that the person is in there, then you're likely to treat it like a multiple choice test rather than as a true-false test. Multiple choice says which person is it.

In this case, as I understand from the testimony, she moved, after looking for about two minutes, which is a relatively long time, she moved five photos out and said "these aren't him," and then concentrated on the remaining one, which indicates that she was treating it as a multiple choice situation, which of these six is it? It wasn't those five. So she was left with one. I believe that a police officer told her to close her eyes and concentrate and try to remember. She then positively identified the remaining photograph.

(PC-R. 806-7).

In addition, if Sullivan was instructed to select the suspect, meaning the attacker, versus asking her if she could identify anyone from the scene, law enforcement also may have interfered with the accuracy of the identification (PC-R. 807-8). Thus, the photo-pack was conducted in a suggestive manner (PC-R. 822).

which was covered with blood (T. 751). Mr. Merck also bragged about the attack and threatened to harm Thomas' grandmother if he said anything (T. 751-2).

After a few minutes, Thomas' mind "shifted to evasion" (T. 753). He pulled the car over and started changing clothes and pulled the tag off the car; "[Mr. Merck] started changing his clothes", too (T. 753). They both ran when they saw a police car and hid in the bushes (T. 753). Then, they got a taxi and went to a bowling alley across from their motel (T. 754). At Mr. Merck's suggestion, they played a game of pool (T. 754).

When they got back to the motel, Mr. Merck told the story of the attack "over and over". (T. 754).

Mr. Merck, who had suffered alcoholic blackouts in the past, testified that he did not remember the attack (T. 829). Mr. Merck recalled that Thomas was saying things to Mr. Newton when he dropped a shot glass and he didn't remember anything after bending down to pick it up (T. 829). The next thing Mr. Merck remembered was Thomas standing by the car and telling Mr. Merck that he had to change his clothes (T. 829-30).

The next day, Mr. Merck asked Thomas where the car was; he did not recall what had happened (T. 841). Mr. Merck also presented witnesses who described how Thomas kept telling Mr. Merck what happened that night and that Mr. Merck was the attacker while Mr. Merck seemed not to believe that he (Merck) was the attacker. This was particularly so because Mr. Merck had

not been the one who was acting aggressively toward Mr. Newton, that was Thomas (T. 796-8).⁴

Following the hung jury, a conflict between Mr. Merck and his trial counsel arose (R. 1471). The conflict concerned the defense strategy to be used at the second trial. Mr. Merck insisted that he did not engage in the charged acts and did not want trial counsel to pursue voluntary intoxication as a defense.

On April 6, 1993, the trial court appointed private counsel, Frederic Zinober, to replace prior trial counsel for Mr. Merck's second trial (R. 1512). However, Mr. Merck was repeatedly told that "the defense" of his case was "up to [his] lawyers" (R. 2458).

And, at his second trial, Mr. Merck again did not enjoy the defense that he requested. Instead trial counsel's theory of the

⁴At the October 2, 2017, evidentiary hearing, Thomas explained that he did not testify at Mr. Merck's original trial (PC-R2. 392), but after the mistrial, the State told him that he was needed to testify and if he did not show up he'd "be given a protective custody warrant and [he'd] be held in jail until he testified (PC-R2. 392-3). In fact, the State had obtained an order to hold Thomas as a material witness (PC-R2. 340; 393). It was because of the order that Thomas testified against Mr. Merck (PC-R2. 393).

Thomas also testified that during his trial testimony he recalled: "that when Troy and I were in the car and I was trying to get him to change his clothes, that I was having a hard time getting him to respond." (PC-R2. 397-8). Thomas testified that: "I felt like he needed to change clothes, so I had a hard time getting him out of the car and into the - to change his clothes." (PC-R2. 402). Thomas further stated that following the attack, Mr. Merck was "kind of slumped over" in his seat (PC-R2. 398). It stuck with Thomas that Mr. Merck was "highly intoxicated", and "very, very drunk" at the time of the crime (PC-R2. 398, 399, 414).

defense was two-fold: he attempted to raise an intoxication defense in addition to a defense of reasonable doubt (PC-R2. 421-1). Zinober testified at the 2017 evidentiary hearing and explained his use of the intoxication defense in Mr. Merck's trial:

One, I think it would have supported Troy's testimony that he actually didn't remember what happened as opposed to - and I realize that was an unusual thing to try to sell to the jury that somebody that had actually done, you know, what the State was suggesting Troy had done would not remember. It is an unusual thing.

So basically, if Neil's testimony was more along the line of Troy's, it would support Troy's position that he really didn't remember, that it wasn't a situation which I believed that the State was taking the position that Troy was full of baloney, so to speak, that he really couldn't remember and he just wasn't willing to say that he didn't remember.

So, A, it would have, I believe supported Troy's testimony in my position that it was an alcoholic blackout.

And the second thing is, obviously, to the extent that it was an alcoholic blackout, it was that level of intoxication, it would have gone further to support the secondary defense of voluntary intoxication.

(PC-R2. 424-5).

And, at his capital trial, Mr. Merck's jury was instructed:

The defense asserted in this case is of voluntarily intoxication by use of alcohol. The use of alcohol to the extent that it merely arouses passions, diminishes perception, releases inhibitions, or clouds reason and judgment it does not excuse the commission of a criminal act. However, where a certain mental state is an essential element of a crime and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist, and, therefore, the crime could not be committed. As I have told you, the premeditated design to kill is an essential element of the crime of murder in the first

degree. Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntarily use of alcohol as to be incapable of forming the premeditated design to kill, or you have a reasonable doubt about it, you should find the defendant not guilty of murder in the first degree.

Voluntarily intoxication is not a defense to the crime of murder in the second degree or the crime of manslaughter.

(T. 1213-14) (emphasis added).

At the 2010 evidentiary hearing, trial counsel admitted that he did not clarify during the charge conference that voluntary intoxication was merely one of the defenses (PC-R. 770). Trial counsel confirmed that he could have sought clarification that voluntary intoxication was "a" as opposed to "the" defense in the trial (PC-R. 771).

SUMMARY OF THE ARGUMENT

The defense presented by trial counsel violated Mr. Merck's constitutional rights because it violated Mr. Merck's "[a]utonomy to decide that the objective of the defense is to assert innocence." McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018).

On May 14, 2018, the United States Supreme Court recognized in McCoy that: "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." 138 S.Ct. at 1511.

On the basis of McCoy, Mr. Merck submits that he is entitled to a new trial at which his sixth amendment right to be the

master of his defense will be honored.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DISMISSING MR. MERCK'S CLAIM THAT HIS CONVICTION VIOLATES THE SIXTH AMENDMENT IN LIGHT OF THE UNITED STATES SUPREME COURT'S DECISION IN McCOY v. LOUISIANA, 138 S.Ct. 1500 (2018).

Recently, in McCoy v. Louisiana, the United States Supreme Court explained that "a defendant has the right to insist that counsel refrain from admitting guilt ..." because "the Sixth Amendment demands that he or she be provided with the *Assistance of Counsel for his defense*." 138 S.Ct. 1500, 1505, (2018). When this error is committed it is structural error, not subject to a harmless error analysis or even prejudice. Id. at 1511. This is so because "[s]uch 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.

A. Mr. Merck's Case

Mr. Merck's first capital trial occurred in November 1992, and concluded with a hung jury (R. 1386, 1465). At the first trial, Mr. Merck pursued a voluntary intoxication defense. The fact that the first trial resulted in a hung jury provided Mr. Merck an opportunity to hear and see the State's evidence.

The evidence from the first trial made clear that the

identity of the individual who attacked Mr. Newton was ambiguous, at best. Thus, following the hung jury, Mr. Merck insisted that trial counsel not pursue voluntary intoxication as a defense because that was an admission of his guilt:

THE COURT: Nora, Troy Merck doesn't want you. What is going on?

MS. McCLURE: Troy wants to ask to appoint different counsel to represent him. Let him explain. Basically his contention is we're not representing the defense he wants us to. He has a different idea.

THE COURT: This is 91-16659, State versus Troy Merck. Mr. Merck, I have been advised you're not happy with the attorneys that are representing you. Sir, What is the problem?

THE DEFENDANT: There is just a difference in how we want to go about the defense. Other than that, they're great attorneys.

THE COURT: Well, Mr. Merck, how you go about the defense is up to your lawyers. Sir, unless you graduate from college and law school, and if you have, if you represent yourself, you got a fool for a client. They know the best way to go on this.

THE DEFENDANT: Yes.

THE COURT: And the fact that there is disagreement between the two of you is not, or the three of you, is not sufficient reason for me to have these lawyers withdrawn.

THE DEFENDANT: It's just that the way that this disagreement is not just something petty.

THE COURT: Doesn't matter.

THE DEFENDANT: It's gonna get -

THE COURT: Doesn't matter, sir. They know the best way to go on this, believe me. I am gonna deny the

motion. Public Defender's Office is still on the case.
(R. 2458-9).

After the hearing, Mr. Merck filed a grievance with the Florida Bar against his trial counsel (R. 2469-70). Trial counsel explained to the trial court that Mr. Merck "wants 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).

On April 6, 1993, the trial court permitted the Office of the Public Defender to withdraw and appointed private counsel, Frederic Zinober, to replace prior trial counsel for Mr. Merck's second trial (R. 1512).

However, Zinober, like Mr. Merck's original trial counsel, did not respect his client's "[a]utonomy to decide that the objection of the defense is to assert innocence." McCoy, 138 S.Ct. at 1508. Instead, Zinober explained that while Mr. Merck told him that he did not believe he committed the crime, Zinober refused to give up the "defense of voluntary intoxication" (PC-T. 782).

During 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). However, Zinober ignored Mr. Merck and due to the asserted defense, the jury was instructed:

The defense asserted in this case is of voluntarily intoxication by use of alcohol. The use of alcohol to the extent that it merely arouses passions, diminishes perception, releases inhibitions, or clouds reason and judgment it does not excuse the commission of a criminal act. However, where a certain mental state is an essential element of a crime and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist, and, therefore, the crime could not be committed. As I have told you, the premeditated design to kill is an essential element of the crime of murder in the first degree. Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntarily use of alcohol as to be incapable of forming the premeditated design to kill, or you have a reasonable doubt about it, you should find the defendant not guilty of murder in the first degree.

Voluntarily intoxication is not a defense to the crime of murder in the second degree or the crime of manslaughter.

(T. 1213-14) (emphasis added). And, the State, anticipating the jury instruction on voluntary intoxication as the defense spent significant time on arguing that it was not a defense at all:

And intoxication is only a defense of first degree murder. It's not a defense of second degree or manslaughter. And it's only a defense if somebody would be so impaired - their mental process is so impaired from alcohol they would not be able to form the intent to kill. In this case he would just have absolutely have no consciousness of what he was doing, no consciousness of the nature and the quality of his actions of what he was doing.

This wasn't a disorganized sequence of events in the conduct from Troy Merck. Because, like I said, was very deliberate, goal-oriented series of acts that led to that man's death. There wasn't any provocation on the part of Mr. Newton. He wasn't talking to him. He wasn't calling him names. He wasn't - he was standing there saying, "I'm not gonna fight you.

That wasn't good enough for Troy Merck. He decided to get the knife and end his life. So, his very actions show this goal-oriented, purposeful series of conduct. And the testimony of the people in the parking lot that

saw him - you talk more about ridiculous amounts of alcohol. He wants you to believe he drank in that bar. But there is not one single piece of evidence that would be consistent with anybody drinking quantities of alcohol that he indicated or quantity of alcohol that were raised to the extent he would not have any - he wouldn't be able to go through the purposeful action of which you heard.

The witnesses testify that he did. But it's not a defense to the extent that the use of alcohol merely arouses passions, diminishes perception, releases inhibition or clouds reason and judgment. It does not excuse the commission of a criminal act. It has to be from the evidence.

When this trial started, he was presumed innocent. He's not presumed intoxicated. So, if you want to make a finding he was intoxicated, you got to look for reliable creditable evidence to indicate he was impaired from alcohol to the extent - people saw him out in this parking lot and said he was walking. He was talking fine. He was catching keys. He takes the keys. Puts them in the key hole. Puts - takes the shirt off. Going through very normal, easy physical activities that everybody can do when they're sober not showing one bit of impairment.

His speech isn't slurred. He's not staggering. He's not falling down. He's, he's in total control of what he's done. And he knew very well he wanted to do this and that was to end that man's life. Drinking had no affect on him at all. All it did was release his inhibition to that fact he knew very well what he did and what he wanted to do.

Mr. Zinober says we're trying to put a square peg in the round hole. No, no, that's Mr. Square peg in a round hole back there. Because find he didn't intend to kill, find he wasn't the killer, you would have to force a doubt. It goes both ways.

(T. 1200-02). Trial counsel's conduct in disregarding Mr. Merck's objective violated his Sixth Amendment right.

B. Legal Analysis

On May 14, 2018, the United States Supreme Court stated:

Guaranteeing a defendant the right 'to have the Assistance of Counsel for his defence,' the Sixth Amendment so demands. With individual liberty - and, in capital cases, life - at stake, 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.'

McCoy v. Louisiana, 138 S.Ct. 1500, 1505 (2018). In Mr. Merck's case, he made his choice: he chose to "maintain his innocence, leaving it to the State to prove his guilt. Beyond a reasonable doubt." Id. His trial counsel, Frederic Zinober, thwarted Mr. Merck's choice by raising a voluntary intoxication defense.

At the time of Mr. Merck's first and second trials, voluntary intoxication was a defense to premeditated first degree murder. See Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985). However, it was an affirmative defense, requiring "that the defendant come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged." Id. Indeed, the "evidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the giving of jury instructions with regard to voluntary intoxication." Id. Thus, Zinober made the decision and presented evidence of intoxication sufficient to warrant a jury instruction for the defense of voluntary intoxication, contrary to Mr. Merck's decision.

Mr. Merck clearly and unambiguously made a decision about

his defense. He even requested that his original trial counsel be removed from his case and filed a grievance to that end.

Therefore, Zinober was required to "abide by [Mr. Merck's objective]" and violated his rights by conceding his guilt by the use of voluntary intoxication. See McCoy, 138 S.Ct. at 1509.

Furthermore, counsel's violation constituted structural error which is neither subject to a prejudice analysis or harmless error review. As the Court in McCoy held, the error in Mr. Merck's case,

"affects 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. Fulminate*, 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)).

Id. at 1511.

Contrary to the dictates of the Sixth Amendment as well as the United States Supreme Court's decision in McCoy, Mr. Merck's

conviction must be vacated as structural error occurred at his capital trial.

C. The Circuit Court's Order

1. Mr. Merck's Motion Was Timely.

Initially, the circuit court dismissed Mr. Merck's motion as untimely under Rule 3.851(d)(2)(B). However, Mr. Merck, whose case is pending resentencing and therefore, not final, filed his motion within one year of the United States Supreme Court's decision in McCoy which established a fundamental Sixth Amendment right.

The circuit court's order in this regard defies logic and undercuts clear opinions from this Court addressing the retroactivity of United States Supreme Court opinions. See Mosley v. State, 209 So. 3d 1248 (Fla. 2018); see also Walton v. State, 77 So. 3d 639, 644 (Fla. 2011) (proceeding to Witt retroactivity analysis in otherwise untimely Rule 3.851 postconviction motion, despite lack of previous decision holding new rule retroactive); Walls v. State, 213 So. 3d 340 (Fla. 2016) (same).

Specifically, in Mosley, a capital defendant filed a postconviction motion under Rule 3.851, including a claim that the constitutional right announced in Hurst v. Florida, 136 S. Ct. 616, 619 (2016), had been violated in his case. At the time, Hurst had not yet been held to apply retroactively by the United States Supreme Court or this Court; nevertheless, this

Court entertained the issue and granted relief. See Mosley, 209 So. 3d at 1283.

Mosley, Walton, and Walls make clear that Rule 3.851 does not bar a capital postconviction defendant from asserting that a newly established right should apply retroactively, even when no court has yet held that it does. Mr. Merck's McCoy claim is thus timely.

2. Mr. Merck's Claim Is Meritorious.

The circuit court's alternative dismissal on the merits because Mr. Merck did not "vociferously insist[]" on a particular defense or "adamantly object[]" to trial counsel's admission of guilt misapplies McCoy. McCoy establishes that the Sixth Amendment protects a defendant's autonomy to assert innocence and prohibits counsel from usurping the defendant's decision regarding whether to concede guilt. Here, it is undisputed that counsel asserted a voluntary intoxication defense which automatically conceded Mr. Merck's guilt.

Moreover, the fundamental holding of McCoy does not turn on whether the defendant adamantly objects to the defense presented by trial counsel. Rather, the United States Supreme Court concluded, "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. at 1511 (emphases added). Here, counsel "usurp[ed] control" of Mr. Merck's

prerogative to decide whether to concede guilt to first-degree murder by asserting a voluntary intoxication defense.

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. Zinober usurped Mr. Merck's autonomy, Mr. Merck is entitled to relief.

D. Retroactivity

Mr. Merck submits that McCoy is applicable to him because his case is not final, i.e., his sentence of death has been vacated. However, if this Court were to find that finality is based on his conviction rather than his sentence, then under Witt v. State, 387 So. 2d 927 (Fla. 1980), and fundamental fairness McCoy is retroactive.

Indeed, the right established in McCoy is fundamental and, when assessed under the Witt framework, must apply retroactively. Under a correct application of the Witt retroactivity test, it is clear that McCoy represents a development of "sufficient magnitude" to necessitate retroactive application. 387 So. 2d at 929.

Under Witt, a new rule applies retroactively when it: (1) emanates from the United States Supreme Court or the Florida Supreme Court, (2) is constitutional in nature, and (3)

constitutes "a development of fundamental significance." Id. at 931. The third requirement is satisfied when a newly recognized right is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" of Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1965). See Witt, 387 So. 2d at 929. To determine whether a rule is of sufficient magnitude to require retroactivity, this Court employs the Stovall/Linkletter test to consider: "(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." Id. at 926.

The Witt test balances the desire for finality against the interests of fairness and uniformity, both of which are heightened by the "imposition of a penalty as unredeemable as death" in the capital punishment context. Id.

McCoy satisfies all three Witt criteria, and thus the Sixth Amendment autonomy right announced in that case should apply retroactively to Mr. Merck.

The first two prongs of Witt are easily met: McCoy was issued by the United States Supreme Court and is constitutional in nature. And, when properly analyzed, it is clear that the right announced in McCoy is fundamentally significant, thus satisfying Witt's third prong. Indeed, all three prongs of the Stovall/Linkletter test weigh heavily in favor of retroactivity.

First, the purpose of the right established in McCoy is to protect “a defendant’s Sixth Amendment-secured autonomy.” McCoy, 138 S. Ct. at 1511. That autonomy right “protects ... the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” Id. (internal quotation marks omitted). “The right to defend is personal, and a defendant’s choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law.” Id. at 1507 (internal quotation marks omitted). Because this right is essential to a criminal defendant’s entire case, no other purpose could be of higher magnitude.

Witt reserves retroactivity for “fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.” Witt, 387 So. 2d at 929. That is exactly how the United States Supreme Court described the right announced in McCoy when holding that a violation constitutes a structural error and is not subject to harmless-error review. The Court explained that “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.” McCoy, 138 S. Ct. at 1511 (internal quotation marks and citation omitted). The McCoy rule’s core purpose of safeguarding a defendant’s fundamental liberty and the integrity of criminal trials strongly

weighs in favor of retroactive application.

The second and third prongs of the Stovall/Linkletter framework also support retroactive application. The State provided no evidence of reliance interests on the pre-McCoy rule, or argued that retroactive application of McCoy would burden the administration of justice in Florida. While “any decision to give retroactive effect to a newly announced rule of law will have some impact on the administration of justice[,] ... the inquiry is whether holding a decision retroactive would have the effect of burdening the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.” Mosley v. State, 209 So. 3d 1248, 1281 (Fla. 2018) (quotation marks omitted).

The State offered no evidence before the circuit court that retroactive application of McCoy would pose an intolerable burden on Florida’s judicial system. Mr. Merck submits that McCoy claims will be rare. See McCoy, 138 S. Ct. at 1514 (Alito, J., dissenting). The fact that McCoy claims will be rare demonstrates that retroactive application of McCoy will not “destroy the stability of the law, render punishments uncertain and therefore ineffectual, [or] burden the judicial machinery.” Witt, 387 So. 2d at 929. Because McCoy claims will be rare, retroactive application of McCoy will not undermine the interest of ensuring the finality of judgments. Id. at 925.

Because the right established in McCoy satisfies all three prongs of Witt, Mr. Merck respectfully requests that this Court

apply McCoy retroactively to his case, and vacate his conviction.

Alternatively, McCoy should apply retroactively under the doctrine of fundamental fairness because Mr. Merck raised the same substantive issue in his initial 3.851 proceedings, over a decade ago. Mr. Merck argued that trial counsel's actions in highjacking his defense violated his rights under the Sixth Amendment. The United States Supreme Court now agrees. As a result, Mr. Merck should thus enjoy the benefit of McCoy's ruling.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, **TROY MERCK**, urges this Court to reverse the circuit court's order and grant him a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Stephen Ake, Assistant Attorney General, on this 18th day of December, 2019.

/s/.Linda McDermott
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