

IN THE SUPREME COURT OF FLORIDA

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

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TROY MERCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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REPLY BRIEF OF APPELLANT

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LINDA McDERMOTT  
Florida Bar No. 0102857  
20301 Grande Oak Blvd.  
Suite 118 - 61  
Estero, FL 33928  
(850) 322-2172  
lindammcdermott@msn.com  
PRO BONO COUNSEL FOR APPELLANT

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## INTRODUCTION

Mr. Merck demonstrated in his Initial Brief that his defense counsel violated his Sixth Amendment autonomy right, as established in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), when counsel conceded to the jury Mr. Merck's guilt by presenting a defense, even if it was a secondary or two-fold defense, that included voluntary intoxication, over Mr. Merck's objection.

As this Court recognized in Merck v. State, 124 So. 3d 785, 794 (Fla. 2013), trial counsel used voluntary defense as a defense to first degree murder. It is axiomatic that a voluntary intoxication defense means that the defendant, here Mr. Merck, committed the crime, but due to his intoxication is guilty of a lesser offense. See Id. (Stating that trial counsel "used the intoxication defense to negate premeditation."). In doing so, trial counsel "usurpe[d] control" of Mr. Merck's autonomy to challenge the State's capital charge, in violation of the Sixth Amendment right announced by the United States Supreme Court in McCoy. 138 S. Ct. at 1511.

ARGUMENT IN REPLY

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).**

**A. Mr. Merck's Motion was Timely**

The State argues that Mr. Merck's motion is untimely under Florida Rule of Criminal Procedure 3.851(d)(2)(B). See Answer Brief at 8, 11-12, hereinafter "AB at \_\_\_". However, the State fails to address the cases cited by Mr. Merck which stand for the proposition that it is entirely appropriate and timely that Mr. Merck brought his claim within one year of the date of the United States Supreme Court's decision in McCoy.

The State's position rests on a literal reading of a clause in Rule 3.851(d)(2)(B). Under the State's interpretation, no defendant can seek relief under a new constitutional right – the express purpose of Rule 3.851(d)(2)(B) – unless the right has already been given retroactive effect. If left to stand, this requirement would upend the entire purpose of Rule 3.851(d)(2)(B) by preventing any capital defendant from being the first to argue that a new "fundamental constitutional right" should apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(B). Where, as here, "a literal interpretation of the language of a statute ... would lead to an unreasonable or ridiculous conclusion," the literal

interpretation is not applied. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). And, that is why this Court does not apply it. See Mosley v. State, 209 So. 3d 1248 (Fla. 2018); see also Walton v. State, 77 So. 3d 639, 644 (Fla. 2011); Walls v. State, 213 So. 3d 340 (Fla. 2016); Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987); James v. State, 615 So. 2d 668, 669 (Fla. 1993).<sup>1</sup> In none of these cases did this Court even question whether its ability to reach the issue of retroactivity for the first time might be curtailed by the Rule's apparent, paradoxical requirement of a pre-existing retroactivity finding. The State does not discuss these cases, and again ignores the fact that this Court could not have decided them as it did if the State's interpretation of the Rule were correct.

**B. McCoy is Retroactive**

The State argues that McCoy is not retroactive. See AB at 13-17. The State concedes that McCoy satisfies the first two of Witt's three prongs: it is a Supreme Court decision and established a constitutional rule. AB at 14. However, the State argues that the McCoy right fails the third Witt prong because it is not a "development of fundamental significance." AB at 14. The State contends that McCoy is not a "development of fundamental significance" because the autonomy right McCoy

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<sup>1</sup>James and Thompson were successive postconviction motions brought under Rule 3.850, the precursor to Rule 3.851(d)(2)(B), but the operative language in the prior rule was identical.

announces is not of "sufficient magnitude." AB at 14. More specifically, the State argues that McCoy fails under two of the three factors for determining "sufficient magnitude": (a) the purpose to be served by the new rule; and (b) the effect on the administration of justice of a retroactive application of the new rule. AB at 16-17. But both factors weigh heavily in favor of retroactivity.

McCoy established a defendant's fundamental, substantive, constitutional right to the "[a]utonomy to decide [] the objective of their defense." 138 S. Ct. at 1508. As Justice Alito observed, McCoy introduced a "newly discovered fundamental right." Id. at 1512 (Alito, J., dissenting). Despite the "foundational" nature of this right, the State summarily characterizes it as a mere "evolutionary refinement in procedural law." AB at 17. This cannot be squared with the language of the Supreme Court's decision, which held that the violation of the autonomy right is an "error structural in kind," which "blocks the defendant's right to make the fundamental choices about his own defense." 138 S. Ct. at 1511.

The United States Supreme Court explained, the effects of a violation of McCoy's autonomy right are "immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." 138 S. Ct. at 1511. McCoy violations result in structural error, "affect[ing] the framework within which the trial proceeds, as distinguished from a lapse or flaw that is

simply an error in the trial process itself.” Id. The fact that McCoy violations are “structural” makes clear that such violations “cast serious doubt on the veracity or integrity of the original trial proceeding.” Witt v. State, 387 So. 2d 922, 929 (Fla. 1980).

Porter v. McCollum, 558 U.S. 30 (2009), cited by the State, does not support its characterization of McCoy as a procedural evolutionary refinement. As this Court has recognized, Porter “addressed a misapplication of Strickland.” Walton, 77 So. 3d at 644. Because McCoy established that the Strickland jurisprudence does not apply to violations of a defendant’s autonomy right, McCoy cannot possibly be an evolutionary refinement akin to Porter. 138 S. Ct. at 1510-11.

Furthermore, giving McCoy retroactive effect would have minimal impact on the administration of justice, which weighs in favor of retroactivity. As the McCoy dissent recognized, McCoy claims are “rare.” McCoy, 138 S. Ct. at 1514 (Alito, J., dissenting). Indeed, the dissent likens the autonomy right to “a rare plant that blooms every decade or so,” stating it was “unlikely to figure in another case for many years to come.” Id. Rarity supports retroactive application by minimizing the impact on the administration of justice. And, rarity does not lessen the fundamental nature of each defendant’s Sixth Amendment right to determine the object of his defense, especially in capital cases.

The purpose of Witt’s three-part test “is to determine where

finality yields to fairness based on a change in the law.”  
Mosley, 209 So. 3d at 1277. Here, fairness counsels that the State’s interest in the finality of the “rare” cases in which a McCoy violation has occurred must yield to the countervailing interest in safeguarding this fundamental constitutional right.

Finally, the State cites prior cases in which this Court declined to give new constitutional rules retroactive effect. AB at 15-16. These dissimilar decisions analyzing rules or developments wholly different from the fundamental right set forth in McCoy have no bearing on the question of whether the new right announced in McCoy is rightfully applied retroactively. That question can only be resolved by an application of the Witt factors.

Yet to the extent this Court deems a tally of prior retroactivity decisions to be relevant, the State omits the many cases on the other side of the ledger, in which this Court has given new constitutional rules retroactive effect. See, e.g., Mosley v. State, 209 So. 3d 1248 (Fla. 2016) (applying Hurst v. Florida, 136 S. Ct. 616 (2016), retroactively to the date of Ring v. Arizona, 536 U.S. 584 (2002)); James v. State, 615 So. 2d 668, 669 (Fla. 1993) (applying retroactively Espinosa v. Florida, 505 U.S. 1079 (1992)); Jackson v. Dugger, 547 So. 2d 1197, 1198 (Fla. 1989) (applying retroactively Booth v. Maryland, 482 U.S. 496, 502-03 (1987)); Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987) (applying retroactively Hitchcock v. Dugger, 481 U.S. 393,

398-99 (1987)); Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984) (applying retroactively Enmund v. Florida, 458 U.S. 782 (1982)).

**C. Mr. Merck's Claim has Merit**

The State argues that Mr. Merck's claim lacks merit because trial counsel did not concede his guilt. See AB at 17. That assertion is refuted by the record. First, trial counsel has testified that he raised a voluntary intoxication defense (PC-R2. 424-5). The fact that he characterized that defense as a "secondary defense" makes no difference. By presenting evidence, arguing to the jury and having the trial court instruct the jury on voluntary intoxication, trial counsel conceded Mr. Merck's guilt. Because "it is the defendant's prerogative, not counsel's, to decide [whether] the objective of his defense [is] to admit guilt," counsel may not "usurp control of" that decision. McCoy, 138 S. Ct. at 1505, 1511. If counsel does so, counsel has committed a "structural" error, which automatically requires a new trial without any showing of prejudice. Id. at 1511.

Mr. Merck made it clear to trial counsel that he wanted to pursue a defense that Neil Thomas was the actual killer and Mr. Merck was not guilty of any crime. 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). The United States Supreme

Court directly held that counsel may “not negate [his client’s] autonomy by overriding [the client’s] desired defense objective.” McCoy, 138 S. Ct. at 1509. However, Zinober did override Mr. Merck’s desired defense objective.

The State also argued that Mr. Merck never objected to trial counsel’s concession of his guilt. AB at 18. This assertion is flatly erroneous. Mr. Merck made clear from the moment that trial counsel was appointed that he did not want counsel to assert a voluntary intoxication defense because he did not believe that he had committed the crime. Further, at the charge conference, Mr. Merck and his attorney argued about the voluntary intoxication defense. See T. 1068.<sup>2</sup> Likewise, Mr. Merck had been clear throughout his trial proceedings that he did not want trial counsel to assert a voluntary intoxication defense. It must be noted that Mr. Merck was erroneously told by counsel and the trial court that the decision was trial counsel’s and not his.

Further, the McCoy Court made clear that a violation of the autonomy right may arise even in the absence of an express objection by the defendant. Specifically, the United States

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<sup>2</sup>The State argues that the charge conference does not reflect that Mr. Merck confronted trial counsel. AB at 19. However, the record is clear that trial counsel and Mr. Merck were engaged in a discussion when the trial court was trying to conduct the charge conference. Mr. Merck submits that he adamantly opposed trial counsel agreeing to an instruction concerning voluntary intoxication or any argument on the defense. That fact must be accepted as true. See Peede v. State, 748 So. 2d 253 (Fla. 1999); Valle v. State, 705 So. 2d 1331 (Fla. 1997).

Supreme Court concluded that “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” – namely, the decision whether to concede guilt. Id. at 1511 (emphases added). As Justice Alito observed in dissent, the Court did not “limit [its] decision to the particular (and highly unusual) situation in the actual case before [it].” Id. at 1517 (Alito, J., dissenting).

Lower courts applying McCoy have thus rejected the argument that McCoy is limited to circumstances in which the defendant objected to counsel’s concession. As the California Court of Appeals concluded, “[W]e do not think preservation of the Sixth Amendment right recognized in McCoy necessarily turns on whether a defendant objects in court before his or her conviction.” People v. Eddy, 33 Cal. App. 5th 472, 482–83 (Ct. App. 2019) (granting relief under McCoy even though “defendant did not object during closing argument after his counsel conceded his guilt of voluntary manslaughter”).

Under McCoy, the Sixth Amendment “preserv[es] for the defendant the ability to decide whether to maintain his innocence” to a charged crime. Id. at 1509 (emphasis added). Being deprived of the “ability to decide” has nothing to do with whether one expressly objects in the moment.

Mr. Merck is entitled to a new trial.

**CONCLUSION**

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic service to counsel of record, on this 24th day of January, 2020.

/s/ Linda McDermott  
LINDA McDERMOTT  
Florida Bar No. 0102857  
20301 Grande Oak Blvd.  
Suite 118-61  
Estero, FL 33928  
(850) 322-2172  
lindammcdermott@msn.com

*Pro Bono Counsel for Mr. Merck*

**CERTIFICATION OF TYPE SIZE AND STYLE**

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/s/ Linda McDermott  
LINDA McDERMOTT