**DOCKET NO. _____**

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2020**

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**TROY MERCK, JR.,**

**Petitioner,**

**vs.**

**STATE OF FLORIDA,**

**Respondent.**

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# CORRECTED PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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## QUESTIONS PRESENTED

1. Whether a defendant's "[a]utonomy to decide that the objective of the defense is to assert innocence." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018), is violated by the assertion of a voluntary intoxication defense which by its very nature only negates the specific intent element of first-degree murder.

2. Whether trial counsel "usurp[s] control" in violation of the Sixth Amendment when he presents an affirmative defense conceding his client committed a criminal act rather than "maintain [the defendant's] innocence, leaving it to the State to prove his guilt. Beyond a reasonable doubt", as the defendant had asserted. *See McCoy*, 138 S. Ct. at 1511.

**NOTICE OF RELATED CASES**

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Pinellas County, Florida
*State of Florida v. Troy Merck, Jr.*, Case No. 91-16659 CFANO
Judgement Entered September 9, 1993

Appellate Proceedings:
Florida Supreme Court (Case No. 60-83,063)
*Merck v. State*, 664 So. 2d 939 (Fla. 1995)
Conviction Affirmed; Sentence Set Aside: October 12, 1995

Re-Sentencing Proceedings:
Circuit Court of Pinellas County, Florida
*State of Florida v. Troy Merck, Jr.*, Case No. 91-16659 CFANO
Sentence of Death Imposed: September 12, 1997

Appellate Proceedings:
Florida Supreme Court (Case No. 60-91,581)
*Merck v. State*, 763 So. 2d 295 (Fla. 2000)
Death Sentence Vacated: July 13, 2000

Second Re-Sentencing Proceedings:
Circuit Court of Pinellas County, Florida
*State of Florida v. Troy Merck, Jr.*, Case No. 91-16659 CFANO
Sentence of Death Imposed: August 6, 2004

Appellate Proceedings:
Florida Supreme Court (Case No. SC04-1902)
*Merck v. State*, 975 So. 2d 1054 (Fla. 2007)
Death Sentence Affirmed: December 6, 2007

Initial Postconviction Proceedings:
Circuit Court of Pinellas County, Florida
*State of Florida v. Troy Merck, Jr.*, Case No. 91-16659 CFANO
Judgement Entered August 27, 2010 (denying motion)

Appellate Proceedings:
Florida Supreme Court (Case No. SC10-1830)
*Merck v. State*, 124 So. 3d 785 (Fla. 2013)
Affirmed: January 24, 2013

Successive Postconviction Proceedings:
Circuit Court of Pinellas County, Florida
*State of Florida v. Troy Merck, Jr.*, Case No. 91-16659 CFANO
Judgement Entered December 20, 2018 (denying motion)

Appellate Proceedings:
Florida Supreme Court (Case No. SC18-88)
*Merck v. State*, 260 So. 3d 184 (Fla. 2018)
Affirmed: December 28, 2018

Second Successive Postconviction Proceedings:
Circuit Court of Pinellas County, Florida
*State of Florida v. Troy Merck, Jr.*, Case No. 91-16659 CFANO
Judgement Entered May 4, 2017 (vacating death sentence and order a new penalty phase based on *Hurst v. Florida*, 136 S.Ct. 616 (2016)

Third Successive Postconviction Proceedings:
Circuit Court of Pinellas County, Florida
*State of Florida v. Troy Merck, Jr.*, Case No. 91-16659 CFANO
Judgement Entered September 26, 2019 (dismissing motion)

Appellate Proceedings:
Florida Supreme Court (Case No. SC19-1864)
*Merck v. State*, 298 So. 3d 1120 (Fla. 2020)
Affirmed: July 9, 2020

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**TROY MERCK, JR.,**

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Troy Merck respectfully petitions this Court for a writ of certiorari to review the decision of the Florida Supreme Court.

## CITATION TO OPINION BELOW

The Florida Supreme Court's decision appears as *Merck v. State*, 298 So. 3d 1120 (Fla. 2020). *See* Attachment A.

## STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. Section 1257. The Florida Supreme Court entered its opinion on July 9, 2020.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## PROCEDURAL HISTORY

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, the Florida Supreme 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, the Florida Supreme Court again reversed Mr. Merck's sentence of death and remanded for further sentencing proceedings. *Merck v. State*, 763 So. 2d 295 (Fla. 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, the Florida Supreme 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 state circuit court denied all relief (PC-R. 300-660).

Mr. Merck appealed to the Florida Supreme Court. He simultaneously filed a petition for writ of habeas corpus. The Florida Supreme 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 January 25, 2016, Mr. Merck filed a successive Rule 3.851 motion (PC-R2. 55-76). On January 6, 2017, Mr. Merck filed another successive Rule 3.851 motion relating to *Hurst v. Florida*, 136 S.Ct. 616 (2016).

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

As to the claim set forth in his January 25, 2016, motion,

an evidentiary hearing was held on October 2, 2017. Thereafter, the circuit court denied all relief.

On appeal, the Florida Supreme 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 state circuit court reinstated the motion and dismissed it on September 26, 2019 (PC-R3. 26-29). Mr. Merck appealed.

On July 9, 2020, the Florida Supreme Court affirmed the denial of relief. *Merck v. State*, 298 So. 3d 1120 (Fla. 2020).

**FACTS RELEVANT TO QUESTIONS PRESENTED**

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 of liquor.

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).[1]

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

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

that was impermissibly suggestive.[2]

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[2]At 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).

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.

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 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

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822).

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).[3]

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,

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[3]At 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).

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 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).

**FLORIDA SUPREME COURT'S RULING**

In response to Mr. Merck's claim that his Sixth Amendment rights were violated when trial counsel pursued an intoxication defense over his objection, the Florida Supreme Court held:

> In Merck'a case, as we have previously held, trial counsel 'never admitted Merck's guilt in advancing the intoxication theory.'

*Merck v. State*, 298 So. 3d 1120, 1121 (Fla. 2020), *quoting Merck v. State*, 124 So. 3d 785, 794 (Fla. 2013).

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD REVIEW THE ISSUE OF WHETHER TRIAL COUNSEL'S DECISION TO PRESENT A VOLUNTARY INTOXICATION DEFENSE VIOLATED MR. MERCK'S AUTONOMY TO ASSERT HIS INNOCENCE.

In *McCoy v. Louisiana*, this 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.

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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 and is contrary to *McCoy*.

**B. Legal Analysis**

In *McCoy,* this 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, in Florida, 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.

As the Florida Supreme Court recognized in *Merck v. State*, 124 So. 3d 785, 794 (Fla. 2013), trial counsel used voluntary intoxication 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. *McCoy*, 138 S. Ct. at 1511.

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 this Court 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 this Court's decision in *McCoy*, Mr. Merck's conviction must be vacated as structural error occurred at his capital trial.

Mr. Merck's sentence was vacated and his case is not final, therefore, the principles set forth in *McCoy* apply to his case.

## CONCLUSION

Petitioner, Troy Merck, requests that certiorari review be granted.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail, first class postage prepaid, to Stephen D. Ake, Senior Assistant Attorney General, Office of the Attorney General Concourse Center Rd., 3507 E. Frontage Rd., Tampa, FL 33607, on December 8, 2020.

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