DOCKET NO. 20-6806

IN THE SUPREME COURT OF THE UNITED STATES

TROY MERCK, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

At Petitioner's trial for first-degree premeditated murder in 1993, his trial attorney pursued a primary defense theory that the State failed to prove its case beyond a reasonable doubt that Petitioner committed the murder. Consistent with Petitioner's own trial testimony that he drank substantial amounts of alcohol and could not recall the details of the murder due to his level of intoxication, counsel additionally briefly argued to the jury that, even if the jury determined that Merck was responsible for committing the fatal stabbing, his voluntary intoxication defeated the element of premeditation necessary for a first-degree murder conviction.

Over twenty-five years after his conviction, Merck filed a third successive postconviction motion in state court alleging, for the first time, that his attorney conceded his guilt against his express wishes in violation of this Court's pronouncements in McCoy v. Louisiana, 138 S. Ct. 1500 (2018). The postconviction court dismissed his motion as untimely under Florida's procedural rules. On appeal, the Florida Supreme Court rejected Merck's claim solely on the merits because the record conclusively refuted his claim that trial counsel conceded his guilt. Thus, the question presented is: Whether this Court

should exercise its certiorari jurisdiction to review an untimely claim under Florida's procedural rules when the Florida Supreme Court rejected the claim based on a factual finding that Petitioner's trial counsel did not concede his guilt.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

CITATION TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND FACTS 2

REASON FOR DENYING THE WRIT 8

THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW AN UNTIMELY SUCCESSIVE POSTCONVICTION CLAIM THAT IS FACTUALLY REFUTED BY THE RECORD AS PETITIONER'S TRIAL COUNSEL DID NOT CONCEDE HIS GUILT IN VIOLATION OF MCCOY V. LOUISIANA, 138 S. CT. 1500 (2018). FURTHERMORE, THE RECORD CLEARLY DOES NOT ESTABLISH THAT PETITIONER RAISED ANY OBJECTION TO THE DEFENSE THEORIES PURSUED BY HIS COUNSEL AT TRIAL. 8

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF CITATIONS

Cases

Hurst v. Florida,
136 S. Ct. 616 (2016) 6

Hurst v. State,
202 So. 3d 40 (Fla. 2016) 6

McCoy v. Louisiana,
138 S. Ct. 1500 (2018) ....passim

Merck v. State,
124 So. 3d 785 (Fla. 2013 5

Merck v. State,
260 So. 3d 184 (Fla. 2018) 6

Merck v. State,
298 So. 3d 1120 (Fla. 2020) 1, 7, 11

Merck v. State,
664 So. 2d 939 (Fla. 1995) 4

Merck v. State,
763 So. 2d 295 (Fla. 2000) 5

Merck v. State,
975 So. 2d 1054 (Fla. 2007),
cert. denied, Merck v. Florida, 555 U.S. 840 (2008) 5, 15

Strickland v. Washington,
466 U.S. 668 (1984) 18

Teague v. Lane,
489 U.S. 288 (1989) 16

Walton v. State,
3 So. 3d 1000 (Fla. 2009) 15

Weaver v. Massachusetts,
137 S. Ct. 1899 (2017) 17

Whorton v. Bockting,
549 U.S. 406 (2007) 16

Other Authorities

28 U.S.C. § 1257(a) 1

Fla. R. Crim. P. 3.851(d)(1) 14, 15

Fla. R. Crim. P. 3.851(d)(1)(B) 15

Fla. R. Crim. P. 3.851(d)(2)(B) 15

Sup. Ct. R. 10 19

CITATION TO OPINIONS BELOW

The decision of the Florida Supreme Court is reported at Merck v. State, 298 So. 3d 1120 (Fla. 2020).

STATEMENT OF JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional provision involved.

STATEMENT OF THE CASE AND FACTS

A grand jury charged Petitioner, Troy Merck, Jr., with the first-degree premeditated murder of James Newton. Petitioner's first trial in November 1992, in which he was represented by the Public Defender's Office, ended in a hung jury and mistrial.[1] (R.1386). Following the mistrial, Petitioner'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, Petitioner 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 to remove his attorneys. (R.2454-55). Thereafter Petitioner filed a grievance with the Florida Bar 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 subsequently dismissed the Public Defender's Office and appointed private counsel Frederic Zinober to represent Petitioner (R.1512) and, as will be discussed in

[1] The records of Petitioner's direct appeal, postconviction proceedings, and successive postconviction proceedings do not contain a transcript of Petitioner's jury trial in November 1992 which resulted in a mistrial. Thus, Respondent cannot accept the accuracy of Petitioner's claim that "[a]t the first trial, Merck solely pursued a voluntary intoxication defense." Petition at 4.

more detail infra, Zinober argued to the jury, 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.[2] Zinober also argued a secondary defense that, even if the jury were "somehow convinced" that the State had proven that Merck committed the murder, Petitioner was unable to form premeditation because of his level of intoxication. (T.1138). The jury convicted Merck of first-degree murder and he was sentenced to death.

The following factual background was taken from the Florida Supreme 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.

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[2] Merck erroneously claims in his petition 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)." Petition at 14. Contrary to Petitioner's assertion, the record does not support his contention regarding any alleged confrontation between Merck and defense counsel Zinober. See Attachment A (copy of transcript page T. 1068).

> 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.

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

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

Petitioner sought postconviction relief in state court, and after conducting an evidentiary hearing, the state circuit court denied Petitioner's motion. (PC-R.300-20). Petitioner claimed in his initial postconviction motion that trial counsel Zinober was ineffective for pursuing two defense theories, (1) reasonable doubt as to the identity of the perpetrator and (2) voluntary intoxication, and for failing to object to the standard jury instructions. The trial court denied these claims and the Florida Supreme Court affirmed this ruling on appeal. See Merck v. State, 124 So. 3d 785, 794-95 (Fla. 2013). As the Florida Supreme Court noted when affirming the denial of Merck's initial postconviction claims, "*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." Id. at 794 (emphasis added).

On May 14, 2013, Petitioner filed a petition for writ of habeas corpus in federal court. During the pendency of his federal habeas proceedings, Petitioner returned to state court and sought relief by filing successive postconviction motions. See Merck v. State, 260 So. 3d 184 (Fla. 2018) (affirming the denial of Merck's first successive postconviction motion based on alleged newly discovered evidence). In his second successive postconviction motion, Petitioner's death sentence was vacated and he was granted a new penalty phase based on Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). After the state court vacated his death sentence, the federal district court dismissed his pending federal habeas petition without prejudice.

On May 10, 2019, Petitioner filed his third successive postconviction motion in state court and alleged that his trial counsel violated his Sixth Amendment rights pursuant to this Court's ruling in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), by allegedly conceding his guilt when arguing a defense theory of voluntary intoxication. The state postconviction court dismissed

Merck's motion as untimely under state procedural rules, and further found that, "even if Merck's motion was timely filed, it likely would have been denied as without merit." Merck v. State, 298 So. 3d 1120, 1121 (Fla. 2020). Merck appealed to the Florida Supreme Court. On July 9, 2020, the Florida Supreme Court issued its opinion, and after reviewing the lower court's dismissal of his motion de novo, the court found that "the record conclusively refutes Merck's allegation that trial counsel conceded Merck's guilt at trial."[3] Id.

On November 10, 2020, Petitioner filed with this Court his petition for writ of certiorari. Given this Court's extension of deadlines due to COVID-19, the petition has been timely filed.

[3] The Florida Supreme Court did not address the lower court's ruling on the timeliness of Merck's motion based on its rejection of his claim on the merits. Merck, 298 So. 3d at 1121.

REASON FOR DENYING THE WRIT

THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW AN UNTIMELY SUCCESSIVE POSTCONVICTION CLAIM THAT IS FACTUALLY REFUTED BY THE RECORD AS PETITIONER'S TRIAL COUNSEL DID NOT CONCEDE HIS GUILT IN VIOLATION OF MCCOY V. LOUISIANA, 138 S. CT. 1500 (2018). FURTHERMORE, THE RECORD CLEARLY DOES NOT ESTABLISH THAT PETITIONER RAISED ANY OBJECTION TO THE DEFENSE THEORIES PURSUED BY HIS COUNSEL AT TRIAL.

Relying on McCoy v. Louisiana, 138 S. Ct. 1500 (2018), wherein this Court found that a defendant's Sixth Amendment rights were violated when his counsel conceded his guilt against the defendant's insistent objections, Petitioner argued in his third successive postconviction motion that his trial counsel violated the dictates of McCoy by presenting a voluntary intoxication defense over his objection. The state postconviction court dismissed the motion on state law procedural grounds. On appeal, the Florida Supreme Court affirmed the denial of relief on the merits because, contrary to Petitioner's allegations, trial counsel did not concede his guilt at any time.[4]

Petitioner now argues that this Court should exercise its certiorari jurisdiction to review the Florida Supreme Court's decision because it allegedly conflicts with McCoy. However, Petitioner's arguments are factually and legally misplaced and

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[4] Although not addressed by the Florida Supreme Court, Petitioner's claim was untimely under Florida's procedural rules. See Merck, 298 So. 3d at 1121.

do not support this Court's exercise of its certiorari jurisdiction. As the Florida Supreme Court correctly noted, the record in this case clearly establishes that trial counsel *did not* concede Petitioner's guilt at trial, but rather, counsel argued extensively that the State failed to prove its case beyond a reasonable doubt. Consistent with his own client's testimony before the jury, and without any objection from Petitioner, trial counsel additionally briefly argued that, even if the jury determined that Petitioner was the person who committed the fatal stabbing, his level of intoxication prevented him from forming a premeditated intent to kill the victim. Because the Florida Supreme Court's decision does not conflict in any way with McCoy, this Court should deny the petition for writ of certiorari.

A. There was no Sixth Amendment violation of Petitioner's right to maintain his innocence because his trial counsel never conceded his guilt over his objections.

In McCoy, 138 S. Ct. 1500, the defendant was charged with three counts of capital first-degree murder. 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. Id. at 1505-07. This Court held that counsel cannot admit their client's guilt to the charged crime over the client's intransigent objection to the admission, 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.

In the instant case, unlike in McCoy, Petitioner's trial counsel never conceded his guilt, much less over the defendant's intransigent objections. In 1992, Petitioner proceeded to a jury trial on the charge of first-degree murder following the stabbing death of James Newton outside of a bar at closing time. Petitioner's trial ended in a hung jury and mistrial. Petitioner then successfully removed the Public Defender's Office as counsel of record based on a conflict over the defense strategy utilized at his first trial. Thereafter, private counsel, Frederic Zinober, was appointed for Merck for his second trial in 1993. At this trial, defense counsel pursued a primary defense theory that the State failed to prove its case beyond a reasonable doubt and argued extensively that the evidence did not establish that Petitioner was the person responsible for committing the murder. Given the State's evidence and based on his own client's trial testimony, counsel also briefly argued

that, if the jury determined that Petitioner had committed the murder, his level of intoxication prevented him from forming a premeditated intent necessary to support a first-degree murder conviction.[5]

As the Florida Supreme Court noted when denying Petitioner's claim, "[t]rial counsel's concession of the defendant's guilt is central to McCoy. . . . In Merck's case, as we have previously held, trial counsel 'never admitted Merck's guilt in advancing the intoxication theory.'" Merck, 298 So. 3d at 1121 (quoting Merck, 124 So. 3d at 794). Petitioner's assertion that trial counsel's brief advocacy of the voluntary intoxication defense constitutes an automatic concession of guilt is factually and legally incorrect. The record in the instant case clearly establishes that trial counsel never conceded that Petitioner committed the murder. In fact, counsel argued extensively that the State failed to prove beyond a reasonable doubt that Petitioner committed the murder. However, consistent with his client's testimony regarding his substantial alcohol consumption, counsel argued that *if* the jury rejected his argument and found that Petitioner stabbed the victim, his level of voluntary intoxication prevented Petitioner from

[5] At the time of Petitioner's trial, voluntary intoxication was an affirmative defense to first-degree murder in Florida. Merck, 298 So. 3d at 1121 n.1 (citing Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985)).

forming a premeditated intent to kill the victim.

Trial counsel's arguments to the jury clearly focused on the primary defense that the State failed to prove that Petitioner was responsible for the murder. As trial counsel subsequently explained years later at the postconviction evidentiary hearing, given Petitioner's testimony that he drank a substantial amount of alcohol and "blacked out" before the murder, counsel felt obligated to raise a secondary defense of voluntary intoxication to the jury in case they rejected his primary defense. See generally Merck, 124 So. 3d at 794 (Fla. 2013) ("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 main theory that the State had not proven beyond a reasonable doubt that Merck was the perpetrator.").

As the Florida Supreme Court correctly found after reviewing the entire record in this case, trial counsel never conceded Petitioner's guilt. However, of additional importance in the context of a McCoy analysis is the fact that Petitioner never objected to trial counsel's strategy. Although the Florida

Supreme Court did not discuss this aspect of McCoy given its finding that counsel did not concede Petitioner's guilt, Respondent would note that the record establishes that Petitioner never raised any objection to trial counsel Zinober's trial strategy. Petitioner erroneously asserts in his petition 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)." Petition at 14. (emphasis added). At no time during the entire trial did Merck "confront" his trial counsel and indicate that he did not want to pursue such a defense. Specifically, contrary to Petitioner's assertion, a review of the trial transcript at page 1068 fails to show that Petitioner confronted his counsel and objected to the voluntary intoxication defense theory. See Attachment A.

While the trial record supports a finding that Petitioner had a disagreement with his *prior* counsel about the theory of defense utilized at his first trial which ended in a mistrial, the trial record does not support Petitioner's allegation that trial counsel Zinober "did not respect his client's 'autonomy to decide that the objection of the defense is to assert innocence'" at his second trial. Petition at 14 (quoting McCoy, 138 S. Ct. at 1508). In fact, other than the erroneous citation

to transcript page 1068 of the charge conference noted above, Petitioner has failed to cite to a single page in the trial record where Petitioner expressed any disagreement with trial counsel Zinober's strategy. Thus, because the record does not establish that trial counsel Zinober conceded Petitioner's guilt, let alone against Petitioner's objections, this Court should reject Petitioner's claim that the Florida Supreme Court's decision conflicts with McCoy.

B. Neither this Court, nor the Florida Supreme Court, have held that McCoy v. Louisiana, 138 S. Ct. 1500 (2018), is retroactive, and as such, Petitioner's claim is untimely under Florida's rules of criminal procedure.

Before reaching the merits of this claim this Court would have to decide the predicate question of retroactivity. While Petitioner's claim is based on the factually erroneous premise that his trial counsel conceded his guilt in violation of his expressed instructions, an additional reason for this Court to decline to exercise its certiorari jurisdiction is that Petitioner's claim is untimely under Florida's rules of criminal procedure. 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." Fla. R. Crim. P. 3.851(d)(1)(B) Subsection (d)(2)(B) of the rule 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 2019, Petitioner sought, for the first time since his conviction became final in 2008,[6] to vacate his guilt phase conviction based on the recent case of McCoy. Although Petitioner's death sentence was vacated by the lower court in 2017, his instant motion brought in state court sought to vacate his underlying conviction which has been final since this Court denied certiorari review in 2008. See Fla. R. Crim. P. 3.851(d)(1)(B). For Petitioner's motion to be considered timely filed under Florida's procedural rules, either this Court or the Florida Supreme Court would have had to find that McCoy applies retroactively; and neither has ever done so. See generally Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009) (finding that Walton's "claim is procedurally barred because the Bradshaw [v.

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[6] Petitioner's conviction and sentence became final in 2008 following the denial of relief after his second resentencing hearing. See Merck, 975 So. 2d 1054, cert. denied, 555 U.S. 840. Petitioner's death sentence was vacated in 2017, but his guilt phase conviction remains final.

Stumpf, 545 U.S. 175 (2005)] Court did not recognize a new fundamental constitutional right that applies retroactively").

Even assuming that McCoy announced a new fundamental constitutional right, that rule would not apply to Petitioner in his successive postconviction proceedings. New rules of law articulated by either this 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).

This Court in McCoy had no occasion to address retroactivity because the case came to the Court on direct appeal. The McCoy Court held that when a defendant insists his attorney not concede his guilt and raises his attorney's refusal to abide by that instruction on direct appeal, the resulting error is structural. McCoy, 138 S. Ct. at 1511. It does not automatically follow, though, that the same standard applies in postconviction. Likewise, it does not follow that because an error is structural on direct appeal means that a case is retroactively applied. Nor, would McCoy's structural error

analysis even govern the outcome of this case given its different procedural posture.

In Weaver v. Massachusetts, 137 S. Ct. 1899, 1912 (2017), this Court rejected the notion that an error viewed as "structural" when a claim is raised on direct appeal, is entitled to the same treatment if raised for the first time in postconviction. This Court stated that finality interests and the passage of time justify putting the burden on a defendant to prove prejudice in postconviction regarding an error that if preserved and presented on appeal would have entitled him to automatic reversal. The Weaver Court reasoned:

> Furthermore, when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. For instance, in this case, the factors and circumstances that might justify a temporary closure are best considered in the regular appellate process and not in the context of a later proceeding, with its added time delays.
>
> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, see Strickland[v.

> Washington], 466 U.S. [668,] 693-694, 104 S. Ct. 2052 [(1984)] (noting the "profound importance of finality in criminal proceedings"), and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.
>
> In sum, "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," thus undermining the finality of jury verdicts. Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). For this reason, the rules governing ineffective-assistance claims "must be applied with scrupulous care." Premo[v. Moore], 562 U.S. [115,] 122, 131 S. Ct. 733.

Id..

Postconviction motions are not vehicles to correct trial errors, structural or otherwise, that could have and should have been raised on direct appeal. The only avenue left to a defendant would be to raise the issue as an ineffective assistance of counsel claim; therefore, whether the error is structural is not the relevant question. Instead, a defendant would have to prove deficient performance and resulting prejudice. Of course, Petitioner cannot raise an ineffective assistance claim in state court on counsel's perceived concession of guilt because it would be untimely and procedurally barred. And, Petitioner cannot raise his Strickland v. Washington, 466 U.S. 668 (1984) claim for the first time in

this Court. Consequently, Petitioner's case presents procedural hurdles which render it particularly unsuitable for certiorari review.

Thus, because Petitioner's postconviction claim based on McCoy is untimely under state procedural rules given its nonretroactivity, this Court should decline to exercise its certiorari jurisdiction to review the merits of his claim. However, even if this Court were to overlook this procedural hurdle, the Florida Supreme Court's decision does not conflict with McCoy in any manner as Petitioner's trial counsel did not concede his guilt over Petitioner's objections. Accordingly, because Petitioner has failed to offer any compelling reasons for this Court to exercise its discretion in granting certiorari review, see Sup. Ct. R. 10, Respondent urges this Court to deny the petition for writ of certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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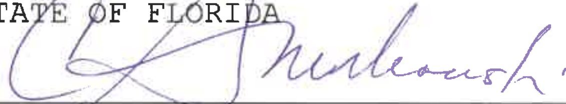
STATE OF FLORIDA



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