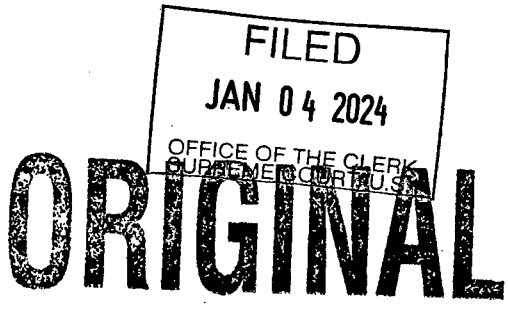
No. 23-6554

IN THE SUPREME COURT OF THE UNITED STATES

Frank R. Stevenson,
Petitioner,

v.



MICHAEL CAPRA, SUPERINTENDENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Frank R. Stevenson (DIN# 13-A-2625),
Pro se, Appellant-Petitioner
Eastern New York Correctional Facility
30 Institution Road
P.O. Box 338
Napanoch, New York 12458-0338

QUESTION PRESENTED

Whether the unconstitutionality of imposing an unwanted defense on the accused, over objection, has long been federally established and is a structural error requiring automatic reversal.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- People v. Stevenson, 129 A.D.3d 998 (2d Dept. 2015), Lv. Denied, 26 N.Y.3d 1092 (N.Y. 2015).
- Stevenson v. Capra, 17-CV-5251 (E.D.N.Y. 2021).
- Stevenson v. Capra, 2023 WL 4118631 (2d Cir. 2023), En Banc denied 10/12/23.

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INTRODUCTION

This Court is presented with a case where the constitutional right at heart is one so central to our justice system it rarely requires explication: a criminal defendant's right to decide whether to admit guilt or instead to pursue acquittal and require the prosecution to prove his commission of the offense beyond a reasonable doubt. It is a choice guaranteed for the accused in a criminal prosecution to make personally for himself granted and procedurally protected by the Constitution. Without such protections of such a right that is crucial to the U.S. Justice system, the Due Process's right to a fair trial doctrine would be reduced to a sham polluted with the foul aroma that "the law contrives against [the accused]," and he is but "an organ of the State." Faretta v. California, 422 U.S. 806, 834, 820 (1975). It still stands that a trial in which the defendant is deprived of this core right is no trial at all.

Through his lawyer, Frank R. Stevenson made it clear to the trial court that he chose to defend against the charges and not to admit guilt. Yet, over defense repeatedly expressed objections (Tr. 274-75, 292), the court itself told the jury six times that Mr. Stevenson in fact committed the acts for which he was on trial for by way of guilt by intoxication explanation (Tr. 359, 360-61, 377, 379). The intoxication defense was requested by the prosecution, based on an erroneously admitted and highly prejudicial ambiguous recorded call he had with his sister while detained in county jail (Tr. 274; People's Ex. 8). Stevenson was convicted on that basis, despite his protests of innocence.

Here, where Stevenson expressly and insistently informed the court that he was innocent—pleading not guilty, and, through his counsel, did not want to admit guilt—even inferentially by way of an intoxication defense, the Trial court was not entitled to overrule that decision and

inferentially tell the jury that Stevenson was admitting guilt by way of an intoxication explanation. The Trial court's error in doing so requires a new trial, regardless of harmlessness.

Because both, a state court of last resort and a United States court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of [the United States Supreme] Court," this Court's certiorari jurisdiction, judicial intervention, and wisdom is humbly needed to resolve the conflict amongst these courts, respectfully. U.S. Sup. Ct. Rule 10(c).

OPINIONS BELOW

The Appellate Division's published opinion (JA: 1a) is reported at **People v. Stevenson**, 129 A.D.3d 998 (2d Dept. 2015). The New York Court of Appeals published opinion (JA: 1b), denying Criminal Leave Application is reported at **People v. Stevenson**, 26 N.Y.3d 1092 (N.Y. 2015). The U.S. Eastern District of New York's unpublished opinion at **Stevenson v. Capra**, 17-CV-5153 (E.D.N.Y. 2021) (JA: 1c) is unreported. The Second Circuit's published opinion (JA: 1d), denying appeal, is reported at **Stevenson v. Capra**, 2023 WL 4118631 (2d Cir. 2023). The Second Circuit's unpublished opinion (JA: 1e), denying En Banc petition, is unreported.

JURISDICTION

The Second Circuit entered judgment on June 22, 2023 and denied the petition for an en banc reconsideration and rehearing on October 12, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. The State's Case

On January 31, 2011, the ten year-old daughter of Stevenson's live-in girlfriend ("the complainant") accused Stevenson of sexually abusing her on one occasion sometime between September 1, 2010 and October 10, 2010, and raping her on January 27, 2011. Stevenson was then arrested later that day, January 31. Stevenson was indicted for one count of rape in the first degree, two counts of sexual abuse in the first degree, and two counts of endangering the welfare of a child.

B. Pretrial

Prior to trial, the state moved in limine to introduce a recorded telephone conversation between Stevenson and his sister, while he was then detained at Rikers Island because Stevenson discussed "smoking some shit," "white stuff" that "made [him] do something that's not right" and that because he also stated that he was "about to admit the truth to [his] family" and would "tell [his] lawyer later" it connected the conversation with the charges (Voir Dire [V.D.] 4-6; People's Ex. 8). Over defense counsel's repeated objections on "relevance" to a "time," "place," or any elements to the crimes charged, that it would "ask the jury to speculate," and that it evinces "bad character" that "cannot be part of the People's direct case...in this State" (V.D. 7-8, 324-325, 329-330), stating that the recording was "*not the most probative*," but "probative to *some degree* of a guilty" conscious, the trial court determined it would admit a portion of the recording, and that it would instruct the jury to not draw a negative inference from Stevenson's *possible* reference to use of a controlled substance (V.D. 11-12). That curative instruction promised was never given, and the recording was played twice, again, over defense counsel's repeated objections (Tr. 230, 232, 373).

The medical examination performed on the complainant on January 31, 2011 was "unremarkable" (Voddi: 254); there was "no physical findings" (Voddi: 260). The evidence at trial primarily consisted of: 1. the testimonies of i). the complainant (Complainant: 46-126), ii). her teacher, M(r)s. Deborah Beare (Beare: 132-37), and iii). the complainant's mother, Ms. Nerlean Francis (Nerlean: 137-78) as the alleged outcry witnesses, and the State's experts—whom neither interviewed (Meltzer: 204), nor examined (Voddi: 245-46) the complainant iv). Child Psychologist, M(r)s. Anne Meltzer (Meltzer: 199-218), and v). Child Sexual Abuse expert, Dr. M(r)s. Madhu Voddi (Voddi: 238-69), and Rikers Island Custodian of record keeping, investigator M(r)s. Josette McLean (McLean: 219-36). Other evidence admitted consisted of: 2. vi). the Recorded Call of Stevenson with his sister (People's Ex. 8; McLean: 226-30), vii). a voicemail message Stevenson allegedly left on Nerlean's phone (People's Ex. 4; Nerlean: 155), also admitted over defense counsel's repeated objections (Tr. 179-80, 195-96), viii). the medical report of the medical exam conducted on the complainant (People's Ex. 11; Voddi: 245-46), and, lastly, ix). duplicate graduation photographs of the complainant (People's Ex. 5; Nerlean: 158-59), one version of which was surrounded by texts and excerpts that was displayed during the prosecutor's summation (Ct. Ex. 2).

C. Complainant's Testimony

The child-complainant testified that Appellant touched her "vagina" on one occasion between September 1, 2010 and October 10, 2010 and told her not to "tell her mother" (Complainant: 51-56), then raped her on January 27, 2011 while she was taking a shower (Complainant: 62-68). She also stated that on the day of her alleged January 27th rape, there was "no" guests at the apartment, "nobody came over that day" (Complainant: 96, 98-99) and, critical to the issue under review, that *Stevenson did not appear "drunk" that day* (Complainant: 77).

On January 31, 2011, that following Monday at her school, the complainant testified that she "first" told her "friend," "K. Riley," of her alleged rape, *then* her teacher, M(r)s. D. Beare (Complainant: 78-79, 109-111). Subsequently, soon after, the authorities were called and they escorted her to the hospital (Complainant: 79-80, 116).

D. Nerlean Francis' Testimony

Aside from her testimony of, basically, allegedly learning of her daughter's alleged abuse, Nerlean stated that on the day of the alleged January 27th rape, contrary to the complainant's testimony, "there were guests" at the apartment: the babysitter, "Ashley," and Stevenson's friend "Neil," were both there when she arrived home "a little after 7[pm]," whom also stayed for dinner, but his other friend, "Derrick Davis," "was there when [she] left" the apartment earlier that day, in the morning (Nerlean: 147, 167-69). Also critical to the issue under review, Nerlean also stated that *Stevenson did not appear "intoxicated" that day* (Nerlean: 148, 171-72).

E. The Voicemail (People's Ex. 4)

Nerlean testified that, allegedly, after Stevenson was arrested on January 31, 2011 she let his calls go to voicemail and that she received a voicemail message from him (People's Ex. 4; Nerlean: 155-56). She was lead by the prosecutor to state that she received that voicemail on "February 3, 2011." (Id.). There was no evidence as to "the time," or "location" where the call was made from (Tr. 387-89). Again, over defense counsel's noted objection (Tr. 195-196), the voicemail was played before the jury (Nerlean: 156-57). In it, Stevenson, in an apologetic tone, said that the complainant had "taken things the wrong way," "none of it is true," "nothing ever happened," and that he "never meant to hurt the family" (Id.).

F. The Graduation Photographs

During Nerlean's testimony, a "fifth grade" graduation photo of the complainant, allegedly at the age of "ten," was introduced by the prosecutor for "identification" (although the complainant's age or identification was never under dispute), without a single objection from defense counsel (People's Ex. 5; Nerlean: 158-59). Again, a duplicate version of that graduation photo of the complainant, which was surrounded by texts and excerpts, was displayed during the prosecutor's summation (Ct. Ex. 2), also without a single objection from defense counsel.

G. Josette McLean's Testimony

Rikers Custodian of record keeping and Investigator, McLean, in her testimony, authenticated the *recorded call* Stevenson had with his sister only (McLean: 232-33; People's Ex. 8), not the voicemail (Tr. 387-89; People's Ex. 4), where it was introduced and played before the jury, over defense counsel's renewed objections (Id.). Using a Rikers inmate phone-log as a cross-reference (People's Ex. 6), McLean stated that the recorded call Stevenson made to his sister was on February 3, 2011, "start[ing] at 1846 and end[ing] at 1900" (McLean: 226-29). She also stated that there is an automated Spanish/English voice prerecording that warns inmates through the receiver before entering their pin number and the call having first actually being connected that can be recorded and heard, as it actually was in the recorded call (McLean: 224-25).

H. The Recorded Call (People's Ex. 8)

Again, the recorded call Stevenson had with his sister was introduced and played before the jury during the testimony of Rikers Custodian of record keeping and Investigator, McLean, again, over defense counsel's renewed objections (McLean: 232-33; People's Ex. 8). Before the call was connected, and after the recording caught the prerecorded automated voice-inmate-warning, as the phone was ringing, Stevenson was recorded telling another person "I'm about to admit the

truth to my family. I'll tell my [phone ringing] lawyer later." When his sister answered he said "I gotta tell you something" and asked "You sure you're not gonna hate me though?" He further stated, "You gotta hear this. I was smoking some shit. I was trying to quit it on my own. I think it made me do some stuff that wasn't right." When his sister asked what he was smoking, he said something "wet" or "white," "I don't know."

I. The Medical Report (People's Ex. 11)

During the surrogate testimony of the prosecution's substitute Medical expert, Dr. Madhu Voddi, the medical report of the medical examination performed on the complainant was introduced and displayed before the jury, without a single objection from defense counsel (Voddi: 245-46; People's Ex. 11). Although it documented no physical findings, the author's (examining physician Nurse Rose Mary Daniele) noted conclusion was that "[a] normal exam does not preclude sexual abuse" and that her "diagnosis is Child Sexual Abuse." This is despite the lack of physical findings and the exam having been performed just "4 days" after the "penile-genital contact…by her mother's boyfriend," as noted in the exam. (People's Ex. 11).

J. Dr. Madhu Voddi's Testimony

On May 6, 2013, the second day of Stevenson's trial, the prosecutor announced that the physician she "was going to call," Nurse Rose Mary Daniele, "who actually examined the [complainant]," was "not available" due to her having to "monitor her 87-year-old mother's progress in the hospital" because "she broke her hip" and that *"in her stead"* [sic] she "found a Dr. Madhu Voddi" who "works at the Brooklyn Child Advocacy Center" (Tr. 193) with Nurse Daniele (Voddi: 246). Defense counsel did not launch a single objection.

Although *she did not see nor assist in the medical exam of the complainant performed by her "colleague," "Nurse Rose Mary Daniele"* (Voddi: 245-247, 253), Dr. Voddi testified to what

the "examination...consisted of," and "what was done in [the complainant's] case" (Voddi: 247-48). She also testified that "in spite" there having been no findings, "the fact that [the complainant] made a complaint was sufficient alone for [Nurse Daniele's] diagnosis of Child Sexual Abuse" (Voddi: 256). She continued that taking the disclosure "into account," as "part of the medical history...when making a diagnosis" is "standard medical practice[,] protocol" by the "Amercian Academy of Pediatrics." (Voddi: 263-64). Lastly, she reluctantly stated, only after the court inquired in defense counsel's aid, that "no," there was nothing "in the physical exam that corroborates what's alleged in the history" (Voddi: 269), despite having stated repeatedly, "yes," "the physical exam" *alone* "substantiate[d] the child's complaint." (Voddi: 266).

K. The Prosecutor's Summation

During her summation the prosecutor used a six-slide power-point presentation (Ct. Ex. 2). One of the slide's exhibited illustrated a duplicate version of the graduation photo with texts surrounding it that read: "defendant's own words," "details," "no reason to lie," "demeanor," "mother's testimony," "outcry," and "medical exam." So, the jury was then able to view the graduation photo twice, at this point. The final slide displayed phrases that read: "FRANK STEVENSON," "I'm about to admit the truth to my family," "I'll tell my lawyer later," "sure you're not going to hate me," "I was smoking some shit," and "I think it made me do some stuff that wasn't right" (emphasis in original). While all of this was left on display as a backdrop, she continued: "there is no reason to doubt [the complainant]," "there is no reason to doubt [the complainant]," "[the complainant] has no reason to lie" (Summation: 318-20, 329-30, 332-36, 341-43), and that the medical exam *"completely corroborate[d]"* the complainant's testimony, repeatedly (Summation: 318-20, 328, 336, 338, 341-42). While driving this argument home, she

also played the two recordings for a second time during her summation (Tr. 339; People's Ex. 4, and 8). Lastly, she stated that "the phone calls were made when [Stevenson] was on Rikers on February 3rd, 2011," *"Josette McLean testified to that"* [sic] (Summation: 339), although McLean never testified to the voicemail at all, and that Stevenson "makes an excuse. You don't need an excuse if you didn't do anything" referring to the recorded phone call (Summation: 340-41). Still, defense counsel failed to launch one single objection.

L. The Intoxication Instruction

The trial court gave an intoxication instruction to the jury on two of the sexual abuse counts and the child endangerment charges (Tr. 359-60), at the prosecutor's request—based on Stevenson's statement in the recorded call that he had been "smoking some shit" (People's Ex. 8; Tr. 274), over defense counsel's objections—where he argued that the charge was "irrelevant," the "statement was a generalized statement" that "had no reference to a time, place, or occurrence," and that there was "no other indication of intoxication at the time alleged in any of the counts in the indictment" (Tr. 275). The trial court disagreed, stating that "a reasonable inference can be made from...the contents of the statement...that it related to the allegations in the case." (Ibid.).

M. Jury Notes

During their deliberations, the jury requested, inter alia, to see "all photographic exhibits" (Tr. 371; Jury Note #1). Subsequently, they were able to view both versions of the graduation photos for a third time (Tr. 372). The jury also requested to "hear the two audio recordings in evidence" (Tr. 371; Jury Note #2; People's Ex. 4, and 8), which they were allowed to hear for a third time (Tr. 373). The jury also asked for the "date and time of the two phone calls submitted as evidence number 4 and number 8 and the location of the defendant during phone number 4" [sic] (Tr. 387; Jury Note #4). After admitting that "there [was no] evidence as to...#4 [the

voicemail's]...time" or "location," the trial court suggested—and all parties egregiously agreed—that "#4...was made from Rikers" (Tr. 387-390), although it found "there [was] no time as to 4 [the voicemail]" (Tr. 389). Ultimately, the trial court told the jury "there was no testimony or other evidence as to...number 4 [the voicemail's]...time," but "the location was Rikers" (Tr. 391). And, lastly, the jury requested "to hear the charge, specifically the portion relating to beyond a reasonable doubt and the specifics regarding the charges" (Tr. 373; Jury Note #3). Ultimately, the jury was able to hear the intoxication charge an additional three more times, totaling six (Tr. 377, 379-80).

On May 8, 2013, the jury convicted Stevenson of all counts (Tr. 402-06). On May 28, 2013, Stevenson was sentenced to 25 years of imprisonment to be followed by 20 years post-release supervision.

In the interest of brevity, Petitioner-Appellant, Stevenson, declines to print the procedural history of his exhausted post-conviction legal proceedings herein. Rather, he elects to refer to those instances relative to his arguments raised herein, respectfully.

N. Direct Appeal

On direct appeal Petitioner Stevenson argued, inter alia, that the trial court's intoxication instruction, premised solely on the basis of the erroneously admitted recorded call, deprived him of his rights to chart his own defense and a fair trial. The Appellate Division: Second Department agreed with Stevenson that the trial court "erred in granting the People's request to charge the jury, over the defendant's objection, regarding intoxication, as there was insufficient evidence of intoxication in the record." However, the Appellate Division continued, "this error was harmless, as there was overwhelming evidence of the defendant's guilt and there was no significant probability that the error contributed to his convictions." Stevenson, 129 A.D.3d, at

999. The Appellate Division erroneously addressed the "fair trial"—Fourteenth Amendment nature of his claim only not the "right to chart his own strategy"—Sixth Amendment nature of his claim when it applied harmless error.

O. Federal Habeas Corpus Petition

Raising the intoxication issue on the same grounds, by way of a petition for a writ of habeas corpus to the U.S. District Court for the Eastern District of New York, in an unpublished opinion, Petitioner's claim, and petition was denied on the same grounds as the Appellate Division and a COA was granted on that claim, inter alia. Stevenson v. Capra, 17-CV-5251 (E.D.N.Y. August 23, 2021) (Hon. Margo K. Brodie presiding).

Represented by appointed counsel, the intoxication issue—argued on the same grounds was, subsequently, denied by the U.S. Court of Appeals for the Second Circuit on the same grounds as all the lower courts. The Circuit Panel erroneously determined that, it "need not decide whether, in a context in which the AEDPA limitations did not apply, [it] would conclude that the Sixth Amendment right that was decisive in McCoy [v. Louisiana, 138 S.Ct. 1500 (2018)] extends to a case like this." And even though the Panel "assum[ed] without deciding that McCoy...did not break new ground in holding the Sixth Amendment reserves to a criminal defendant an autonomy right to decide the objective of the defense," it still erroneously determined it "could not conclude that the Sixth Amendment right, understood as clearly established, applies" to Stevenson's intoxication claim. Stevenson v. Capra, 2023 WL 4118631, at *4 (2d Cir. 2023).

With regard to the Fourteenth Amendment nature of his claim, although the Circuit panel "assum[ed] without deciding that the challenged jury instruction violated Stevenson's clearly established federal due process right at the time his state conviction became final," it still

erroneously "conclude[ed] that the Appellate Division did not unreasonably apply clearly established law by applying a 'harmless error' rather than a 'structural error' analysis, and did not unreasonably determine the facts in light of the evidence presented in the State court proceeding in concluding the error was harmless." Ibid. The panel arrived at these conclusions after erroneously determining that "Stevenson [did] not argue that he was not able to make his chosen argument to the jury," rather, his "attorney repeatedly emphasized in his closing argument Stevenson's complete innocence defense" (Stevenson, 2023 WL 4118631, at *3), despite the fact that he repeatedly argued that "[t]he intoxication instruction forced onto [him] an entirely inconsistent defense: He did have sexual contact with the complainant, but only because he was intoxicated," (Pet. Br. at 47, see also at 42-43).

SUMMARY OF ARGUMENT

I. When a competent defendant in a criminal proceeding chooses to defend against the charges rather than admit guilt—even inferentially by way of a guilt-based intoxication defense, since the Constitution does not allow his lawyer to, it certainly does not allow neither his presiding judge nor his prosecutor, whom requests a defense for the defendant, to override that choice and tell the jury that he is guilty by way of imposing a guilt-based intoxication defense. This is especially when it's both the defendant and his lawyer's objections to the trial court's imposing of that guilt-based intoxication defense. It is when these adversarial boundaries were crossed in that exact manner Stevenson's trial thus lost "its character as a confrontation between adversaries." U.S. v. Cronic, 466 U.S. 648, 656-657 (1984). If these Sixth Amendment rights cannot be honored why have a trial? The irreducible guarantees of the Sixth Amendment, reflected in its common-law origins is: 1. the defendant's right to make the basic decisions regarding the objectives of his defense—including the decision whether to admit guilt (even inferentially by way of a guilt-based intoxication defense) or to defend against the charges and insist that the prosecution prove its case beyond a reasonable doubt, and; 2. "[o]nce the right to counsel has attached and been asserted, the State must honor it." Maine v. Moulton, 474 U.S. 159, 160 (1985). As this Court has long recognized, it is the accused's liberty – and, in capital cases, his life – at stake in a criminal prosecution. It is "[t]he defendant, and not his lawyer or the State, who will bear the personal consequences of a conviction," Faretta, 422 U.S., at 834, and it is therefore the accused who must have the ultimate authority to decide whether to admit guilt, again, even inferentially by way of a guilt-based intoxication defense.

The Appellate Division's, District Court's and the Second Circuit's determinations were in violation of federal law established by this Court since 1975 in Faretta, 422 U.S., at 819, that

declared "[t]he Sixth Amendment grants to the accused personally the right to make his defense" over everyone in his trial court (Id.), and as it follows, Jones v. Barnes, 463 U.S. 745, 751 (1983) because such Sixth Amendment rights include "certain fundamental decisions regarding the case, as to whether to plead guilty," etc., and McKaskle v. Wiggins, 465 U.S. 168, 177, n. 8 (1984), because "[t]he right is either respected or denied; its deprivation cannot be harmless." They were also in violation of federal law established in Moulton, 474 U.S., at 188, because the state "interfere[d] with [Stevenson's] right to the assistance of counsel" and the "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Strickland v. Washington, 466 U.S. 668, 692 (1984). It is for such reasons the intoxication error was structural and cannot be harmless.

Alternatively, it should not be harmless because it "had a substantial and injurious effect or influence in determining the jury's verdict," Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), resulting in "actual prejudice." U.S. v. Lane, 474 U.S. 438, 439 (1986). The jury's request to hear it an additional three times—totaling six (Tr. 373; Jury Note #3), demonstrates "pervasive effect[s and] inferences to [have been] drawn from the [intoxication charge by the jury], altering the entire evidentiary picture," Strickland, 466 U.S., at 695-696. These U.S. Supreme Court "precedent[s] cannot sensibly be read any other way." Bullcoming v. New Mexico, 564 U.S. 647, 663 (2011).

II. Contrary to the Circuit Panel's determination (Stevenson, 2023 WL 4118631, at *3), "the trial court's decision to give the challenged jury instruction [does, infact,] violate[] the clearly established federal law that McCoy" reinstated that Faretta, Barnes, and McKaskle "embodies" because the personal choice for Stevenson to plead not guilty was upended when the trial court forced him to plead guilty, inferentially, by way of imposing a guilt-based intoxication defense.

The trial court was not obligated to grant the prosecutor's request for an intoxication defense for the defendant, especially without sufficient evidence to support the charge. The charge only served to prejudice the defendant in a number of ways. One major way is by inferring that the petitioner is not only pleading innocent, but also pleading guilty by intoxication. The jury was likely confused into believing petitioner was desperately raising inconsistent defenses. See Mathews v. U.S., 485 U.S. 58 (1988) and People v. Degina, 72 N.Y.2d 768 (N.Y. 1988).

ARGUMENT

I. THE TRIAL COURT'S DECISION TO GRANT THE PROSECUTOR'S REQUEST FOR AN INTOXICATION DEFENSE, WITHOUT SUFFICIENT EVIDENCE TO SUPPORT IT AND OVER DEFENSE'S OBJECTIONS, WAS IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT AUTONOMY RIGHT.

To be concise, the deeply rooted Sixth Amendment guarantee that the petitioner was to enjoy was uprooted by the trial court when it allowed the prosecutor to cross over their party lines and take the dual role of his defense counsel by requesting for an, insufficiently supported, intoxication defense for the petitioner over his actual appointed defense counsel's repeated objections, then granting it (Tr. 274-75). That error was structural and cannot be harmless.

A. AEDPA and the Standard of Review and its Applicability in This Instance...

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides for federal habeas relief when a "person in custody pursuant to a judgment of a State court...is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), subject to certain conditions. Under AEDPA, a federal court may grant a petitioner relief with "respect to any claim that was adjudicated on the merits in State court proceedings" if the State adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts In light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1) and (2).

A state court decision constitutes an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the petitioner's case."

Williams v. Taylor, 529 U.S. 362, 413 (2000). "And a state-court decision is not unreasonable if 'fairminded jurists could disagree' on [its] correctness.'" Davis v. Ayala, 576 U.S. 257, 269 (2015) (quoting Harrington v. Richter, 562 U.S. 86, 101 (2011)). For a petitioner to prove that a state court's decision was unreasonable, as would warrant federal habeas relief, a petitioner "must show that the state court's decision to reject his claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Ayala, 576 U.S., at 269-70 (quoting Richter, 562 U.S., at 103). Basically, the "petitioner must persuade a federal court that no 'fairminded juris[t]' could reach the state court's conclusion under the Supreme Court's precedents." Brown v. Davenport, 596 U.S. 118, 135 (2022) (quoting Ayala, 576 U.S., at 269).

"Similarly, if a petitioner alleges the state court's decision 'was based on an unreasonable determination of the facts' under § 2254(d) (2), it is not enough to show that 'reasonable minds reviewing the record might disagree about the finding in question.' Brumfield v. Cain, 576 U.S. 305, 314 (2015). By contrast, under Brecht a petitioner may prevail by persuading a federal court that it alone should harbor 'grave doubt'—*not absolute certainty*—about whether the trial error affected the verdict's outcome." Brown, 596 U.S., at 135-36 (quoting O'Neal v. McAninch, 513 U.S. 432 (1995)). Additionally, "[u]nder AEDPA too, '[s]tate court decisions are measured against [the Supreme] Court's precedents as of the time the state courts renders its decision' and cannot be held unreasonable *only* in light of later decided cases." Brown, 596 U.S., at 136 (quoting Cullen v. Pinholster, 563 U.S. 170, 182 (2011)).

It should be noted that AEDPA "does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule applies," and it likewise does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of

facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (citation and quotation marks omitted). Faretta, Barnes, McKaskle, and Strickland announced Sixth Amendment principles that were not followed by any of the lower courts.

To be clear, all fairminded jurists would agree[1] that, here in this instance, the Appellate Division's erroneous harmless determination was unreasonable and in violation of 28 U.S.C. § 2254(d) (1), and—as it follows—so was the District Court's and the Second Circuit's because, in light of Faretta, Barnes, McKaskle, and Strickland, the error was structural and cannot be

[1] Faretta, 422 U.S., at 819, 834 (Holding that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense," and that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law."); Barnes, 463 U.S., at 751 (Holding that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); McKaskle, 465 U.S., at 168 (Holding that "[t]he Counsel Clause of the Sixth Amendment implies a right in the defendant to conduct his own defense."); Dean v. Superintendent, 93 F.3d 58, 62 (2d Cir. 1996) ("Assuming that a criminal defendant possesses a fundamental right to accept or reject a defense, that is derivative to the 'making of a defense.'" (quoting Faretta, 422 U.S., at 818)); Petrovich v. Leonardo, 229 F.3d 384, 386-87 (2d Cir. 2000) ("The decision to assert [a] defense is akin to other fundamental trial decisions, such as the decision to plead to a lesser charge or to assert a plea of insanity. See Jones, 463 U.S. at 751."); U.S. v. Rosemond, 958 F.3d 111, 123 (2d Cir. 2020) ("[W]e hold that McCoy is limited to a defendant's right to maintain his innocence."); U.S. v. Marble, 940 F.2d 1543, 1547-48 (D.C. Cir. 1991) (Holding it "can no longer distinguish the decision to plead insanity from other aspects of a defendant's right, established in Faretta, to direct his own defense." Concluding that a "court must honor the choice of a competent defendant not to raise the insanity defense," and it "was under no duty to impose the insanity defense over [defendant's] competent objection."); U.S. v. Read, 918 F.3d 712, 719 (9th Cir. 2019) (Holding "that a...court commits reversible error by permitting defense counsel to present a defense of insanity over a competent defendant's clear rejection of that defense."); Lowenfield v. Phelps, 817 F.2d 285, 292 (5th Cir. 1987) (Finding "circumstances extremely rare when counsel is not required to follow his client's instructions on a [defense] decision."); Foster v. Strickland, 707 F.2d 1339, 1343, n. 3 (11th Cir. 1983) (Same); Snider v. Cunningham, 292 F.2d 683, 685 (4th Cir. 1961) (Same); Cuevas-Espinoza v. Hatton, 2020 WL 4344269 (S.D.Cal. 2020) (Same); Musaid v. Kirkpatrick, 2021 WL 9969436, at *66 (S.D.N.Y. 2021) (Same); U.S. v. Campbell, 266 F.Supp.3d 624, 631-32 (E.D.N.Y. 2017) (Same); U.S. v. Davis, 2019 WL 2146584, at *4 (D.Idaho 2019) (Same); People v. DeGina, 72 N.Y.2d 768, 777 (N.Y. 1988) (While holding that "a defendant unquestionably has the right to chart his own defense," the court also found that while the "defendant is not forbidden" from raising contradictory defenses, such a "hazardous tactic" that a Supreme Court Justice aptly termed 'self-penalizing,'" "it is not a strategy that should be thrust on a defendant." (quoting Mathews, 485 U.S., [at 67-68] [Scalia J., concurring].); State v. R.T., 205 N.J. 493, 512 (N.J. 2011) (Finding that "instruction intoxication on voluntary intoxication should not have been given."); People v. Bergerud, 223 P.3d.686, 691 (Colo. 2010) (Noting, in holding, "those fundamental choices [that are] given directly to criminal defendants by the United States...Constitution[,]" i.e., decisions that affect their defense.); Cooke v. State, 977 A.2d 803 (Del. 2009) (Same); State v. Carter, 207 Kan. 426 (2000) (Same); Brodgen v. State, 384 Md. 631 (Maryland 2005) (Same); Johnson v. Comm. Of Corr., 222 Conn. 87, 94-95 (1992) (Same); State v. Bean, 171 Vt. 290 (2000) (Same); Treece v. State, 958 F.3d 111 (1988) (Same).

harmless, for it affected 'substantial rights' (e.g., Sixth Amendment Autonomy rights and to the effective assistance of counsel). Fed. R. Crim. P. 52 (a); see also Arizona v. Fulminante, 499 U.S. 279, 306 (1991). Not only did the imposing of the intoxication defense deprive Stevenson of his right to a defense of his choice or to plead not guilty, but it also, at minimum, "interfere[d] with [Stevenson's] right to the assistance of counsel." Moulton, 474 U.S., at 188. The "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland, 466 U.S., at 686. The prosecutor and the trial court imposing a guilt-based intoxication defense on Stevenson, over defense objection, is that sort of government interference. To be clear, the "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Strickland, 466 U.S., at 692.

Alternatively, it should not be harmless because it "had a substantial and injurious effect or influence in determining the jury's verdict," Brecht, 507 U.S., at 623, resulting in "actual prejudice." Lane, 474 U.S., at 439. The jury's request to hear the intoxication charge an additional three times—totaling six (Tr. 373; Jury Note #3), demonstrates "pervasive effect[s and] inferences to [have been] drawn from the [intoxication charge by the jury], altering the entire evidentiary picture," Strickland, 466 U.S., at 695-696. These U.S. Supreme Court "precedent[s] cannot sensibly be read any other way." Bullcoming, 564 U.S., at 663.

They would also agree[1] that such erroneous and unreasonable determinations were also in violation of 28 U.S.C. § 2254(d) (2) because the record facts clearly demonstrate that it "affected the verdict's outcome." Brown, 596 U.S., at 136.

Contrary to the District and Circuit Court's determinations, this instructional error has, infact, alternatively, "vitiate[ed] all the jury's findings," Hedgepeth v. Pulido, 555 U.S. 57, 61

(2008), because by the trial court forcing petitioner to plead guilty, inferentially, by way of imposing a guilt-based intoxication defense "the jury was instructed on alternative theories of guilt and may have relied on an invalid one." Pulido, 555 U.S., at 58. Indeed, upon their request (Jury Note #3; Tr. 373), the jury was able to hear the intoxication charge an additional three more times (Tr. 377, 379-80), totaling six. This demonstrates "actual prejudice." Lane, 474 U.S., at 439.

B. The Sixth Amendment Guaranteed Stevenson the Right to Autonomy in Choosing His Own Defense.

This Court has long held that "the Sixth Amendment...grants to the *accused personally the* ***right to make his*** *defense*." Faretta, 422 U.S., at 819. This right, which is one of the many, would later be categorized as secured "autonomy" rights (McKaskle, 465 U.S., at 168). Mr. Stevenson was deprived of that right to reject the intoxication defense and make the defense of his personal choosing by the trial court's imposing of the intoxication defense, over his repeated objections.

As another autonomy right, "an accused may insist upon representing herself[, for 't]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused.'" McCoy, 138 S.Ct., at 1504 (quoting and citing McKaskle, 465 U.S., at 176-177). In this pro se/autonomy right, this Court has advised that "although *he* may *conduct* his own defense," it is "to his own detriment." Faretta, 422 U.S., at 834.

Other autonomy rights include the accused decisions of "whether to plead guilty, waive a jury, testify in his own behalf, or take an appeal." Barnes, 463 U.S., at 751. The other way Mr. Stevenson was deprived of his Sixth Amendment right to make his defense is by the trial court forcing petitioner to plead guilty, inferentially, by way of imposing a guilt-based intoxication defense; he was not allowed to plead not guilty.

A reviewing court must not forget, "[a]s this Court has [reinstated in McCoy,] '[t]he 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.'" McCoy, 138 S.Ct., at 1507 (quoting Faretta, 422 U.S., at 834).

As demonstrated above, this Court has reaffirmed these long standing principles, distinctively, in McCoy.[2] These are rights that the accused is guaranteed to enjoy, personally, over every member in the court room, including his lawyer whom, "'however expert, is still an assistant.'" McCoy, 138 S.Ct., at 1503 (quoting Faretta, 422 U.S., at 819-820). Mr. Stevenson had the right to choose his own defense and plead not guilty and subject the state to its burden of proof. These rights he was to enjoy should not have been "dictated by the State." McCoy, 138 S.Ct., at 1508 (citation and quotation marks omitted).

C. The Law Regarding Structural Errors and its Applicability in This Instance.

In 1967, "[i]n Chapman v. California, 386 U.S. 18[,] this 'Court adopted the general rule that a constitutional error does not automatically require reversal of a conviction.' []Fulminante, 499 U.S.[, at] 306 [] (citing Chapman, Supra). If the government can show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' the Court held, then the error is deemed harmless and the defendant is not titled to reversal. [Chapman, 386 U.S.,] at 24[.] The Court recognized, however, that some errors should not be deemed harmless beyond a reasonable doubt. [Chapman, 386 U.S.,] at 23, n. 8[.] These errors came to be known as structural errors. See Fulminante, 499 U.S., at 309-310[.] The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it

[2] "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of counsel despite the defendant's own experience and lack of professional qualifications, so may she insist on maintaining her innocence at...trial." McCoy, 138 S.Ct., at 1508.

'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.' [Fulminante, 499 U.S.,]at 310[.] For the same reason, a structural error 'def[ies] analysis by harmless error standards.'" Weaver v. Massachusetts, 582 U.S. 286, 294-295 (2017) (quoting Fulminante, 499 U.S., at 309).

Most recently in Weaver this Court reaffirmed *four* of its already established "broad rationales," while articulating why certain errors are not amenable to harmless error analysis, and, therefore, why these errors are properly "deemed as structural." Id., at 295. Arguably, two, at minimum—if not all of these reaffirmed rationales support petitioner Stevenson's argument that the intoxication error was structural and cannot be harmless. The "[f]irst rationale, which applies to the issue presented in this instance—for obvious reasons, reaffirms federal law it already established in McKaskle, and it reads: "an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. *This is true of the defendant's right to conduct his own defense*, which, when exercised, 'usually increases the likelihood of a trial outcome unfavorable to the defendant.'" Weaver, 582 U.S., at 295 (quoting McKaskle, 465 U.S., at 177, n. 8). Here, Stevenson was deprived of his right to a defense of his choice; one without the intoxication defense and, rather, a simple plea of not guilty. Again, here, where the trial court imposed a guilt-based intoxication defense on Stevenson, at the prosecutor's request, over defense objection the "State has...interfere[d] with [Stevenson's] right to the assistance of counsel." Moulton, 474 U.S., at 188. See Strickland, 466 U.S., at 686 (The "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.").

The "[s]econd" reaffirms Vasquez v. Hillery, 474 U.S. 254 (1986), and it reads: "*if the effects of the error are simply too hard to measure.* For *example*, when a defendant is denied the right to select his or her own attorney, the precise 'effect of the violation cannot be ascertained.'" Weaver, 582 U.S., at 295-296 (quoting Vasquez, 474 U.S., at 263). This rationale also applies to the intoxication issue presented in this instance because it produced "consequences that are necessarily unquantifiable and indeterminate." Sullivan v. Louisiana, 508 U.S. 275, 282 (1993). Stevenson's alternative argument that "the jury was instructed on alternative theories of guilt (one being guilty by intoxication) and may have relied on [that] invalid one," Pulido, 555 U.S., at 58 (Tr. 359-60), and that the jury's request to hear the charge again (Jury Note #3; Tr. 373) also suggesting that the "error had a substantial and injurious effect or influence in determining the jury's verdict" (Brecht, 507 U.S., at 623) cannot be simply discredited. Without that curative instruction the trial court promised (V.D. 11-12), that request by the jury also demonstrates "prejudicial effect[s] that [should have] outweigh[ed] ordinary relevance," and that's that "risk that the jury [may have] convict[ed] for crimes other than those charged" (Old Chief v. U.S., 519 U.S. 172, 181 (1997)) that the trial court cautioned about (V.D. 4-6). Apparently, this instructional error has, infact, "vitiate[ed] all the jury's findings," Pulido, 555 U.S., at 61. Although petitioner demonstrates the variety of ways the intoxication error may have prejudiced him in the alternative below (i.e., confusing and, or, misleading the jury into thinking he elected the intoxication defense), it is "difficult[] to assess[] the effect of the error." U.S. v. Gonzalez-Lopez, 548 U.S. 140, 149, n. 4 (2006).

The "[t]hird" reaffirms Gideon v. Wainwright, 372 U.S. 335 (1963), and Sullivan, 508 U.S. 275, and it reads: "*if the error always results in fundamental unfairness.* For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt

instruction, the resulting trial is always a fundamentally unfair one. See Gideon, 372 U.S.[, at] 343-345[] (right to an attorney); Sullivan, 508 U.S.[, at] 279[] (right to a reasonable-doubt instruction)." Weaver, 582 U.S., at 296. For all alternative prejudicial purposes demonstrated herein, this rationale applies to the intoxication issue: because the error always results in that fundamental unfairness, even if the effects were measurable.

For the fourth, the Weaver Court first explained that the above-mentioned "categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. See [Sullivan, 508 U.S.], at 280-282[]." Weaver, 582 U.S., at 296. It went on to declare that "[f]or these purposes, however, one point is critical: *An error can count as structural even if the error does not lead to fundamental unfairness in every case*. See Gonzalez-Lopez, supra, at 149, n. 4 (rejecting as 'inconsistent with the reasoning of our precedents' the idea that structural errors 'always or necessarily render a trial fundamentally unfair and unreliable')." Weaver, 582 U.S., at 296. For all alternative prejudicial purposes demonstrated herein, again, this rationale also applies to the intoxication issue, even if the effects were measurable.

Wherefore, because "[v]iolation of a defendant's Sixth Amendment-secured autonomy has been ranked 'structural' error; when present, such error is not subject to harmless error review," McCoy, 138 S.Ct., at 1504 (quoting and citing McKaskle, 465 U.S., at 177, n. 8.), and "[since] an objection [was] made at trial and the issue [was] raised on direct appeal[, Stevenson was] entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" Weaver, 582 U.S., at 287 (quoting Neder v. U.S., 527 U.S. 1, 7 [1999]). U.S. Const. Amend. VI, and XIV.

D. The Intoxication Charge Requested by the State, Over Stevenson's objections, Was Clearly Unwarranted.

New York state law provides that "[a]n intoxication charge is warranted if, *viewing the evidence in the light most favorable to the defendant*, there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis. A defendant may establish entitlement to such a charge if the record contains evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant's ability to form the necessary criminal intent. Although a relatively low threshold exists to demonstrate entitlement to an intoxication charge, *bare assertions by a defendant concerning his intoxication, standing alone, are insufficient.*" People v. Sirico, 17 N.Y.3d 744, 745 (N.Y. 2011). See also N.Y. Penal Law § 15.25 ("[I]n any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged").

There is no mention, anywhere (whether in New York State or Federal law), of a prosecutor's right to an intoxication instruction. Infact, this "viewing the evidence in the light most favorable to the defendant" language clearly establishes a favorable deference presumption for the accused that never changes (even after trial), and a right that a defendant enjoys that must be honored by the trial court and any reviewing court regarding any issues that arose with the intoxication defense. Sirico, 17 N.Y.3d, at 745. The trial court failed to honor that when it was to consider what evidence supports the instruction. Also, for the reviewing court's appealed to, to deny this claim, itself, evinces their discard to this principle.

"[B]are assertions by a defendant concerning his intoxication, standing alone, are insufficient" (Sirico, 17 N.Y.3d, at 745). Clearly this means that Stevenson's recorded statements in the admitted calls that he was "smoking some shit" (People's Ex. 8) was

insufficient to support the charge. Just as defense counsel argued, that comment was too "ambiguous," the "statement was a generalized statement" that "had no reference to a time, place, or occurrence," and that there was "no other indication of intoxication at the time alleged in any of the counts in the indictment" (Tr. 275). Indeed his ambiguous statement was thee only evidence of intoxication relied on for the charge. Both the complainant (Complainant: 77) and her mother, Nerlean (Nerlean: 148, 171-72), denied Stevenson being intoxicated on the date of the alleged, January 27, 2011, rape. Furthermore, even the prosecutor admitted that it was unclear what substance Stevenson was referring to in the call (V.D. 8). What should be kept in mind is the fact that the state could not even establish a date to when the first alleged assault occurred and that the complainant testified to having been assaulted in that first alleged assault sometime during a six week period between September 1, 2010 and October 10, 2010. Clearly, Stevenson could not have been intoxicated at all times for six weeks straight. Nor was there any record evidence suggesting that he was intoxicated at any point during that time.

This was not an attempt, or an act in good faith by the prosecutor to request an instruction that was sufficiently supported or inferentially argued by the defense in her attempt to avoid a red herring. To be clear, the defense never argued intoxication, nor requested it as a defense, rather, it was repeatedly objected to (Tr. 275), so there was no red herring to avoid. Alternatively, because there was no support for it, the intoxication instruction could not have been relevant to "negative an element of the crime charged." N.Y. Penal Law §15.25. In any event, it certainly could not have applied to the rape charge because it is a strict liability offense based on the complainant's age and it carries no element of intent.

It is clear that the prosecutor's motivation for requesting the intoxication charge was to strengthen the connection between the tape recording and the charges in this case and not to

negate intent. The prosecutor's motivation was evinced by her, ultimately, demolishing the intoxication defense she asked for during summation, labeling it as "an excuse," and further stating, "you don't need an excuse if you didn't do anything" (referring to the recorded phone call). She further argued, "the stuff he did is definitely not right and smoking some shit does not excuse it," implying that therefore, Stevenson committed the crimes charged because he offered an intoxication defense as an "excuse" (Summation: 340-41). This clearly demonstrates that she obviously did not believe Stevenson was actually intoxicated or that his intoxication mitigated his culpability and that her true purpose in requesting the charge was to bolster the proof of guilt by linking the ambiguous recorded conversation to the charges. "[P]rosecutor's [should] not stoop to improper litigation conduct to advance prospects for gaining a conviction." Banks v. Dretke, 540 U.S. 668, 694 (2004).

Bad enough that the trial court admitted the ambiguous, and irrelevant, prejudicial, recording, stating "it's not the most probative," rather, it is "probative to some degree of a guilty" conscious (V.D. 11-12), but the intoxication charge only served to compound the prejudicial effects of that recording call (People's Ex. 8). "[W]ell established rules of evidence," as held by this Court, is clear: due to its ambiguity, lack of "relevance" and "probative value [having, clearly, been] outweighed by [its] unfair prejudice, confusion of the issues, or potential to mislead the jury," both, the recorded call and the intoxication charge should have been "exclude[ed]." Holmes v. S. Carolina, 547 U.S. 319, 320 (2006). See also Strickland, 466 U.S., 695-696. It's not like the jury was given a curative instruction that it was not the defense who elected the intoxication defense; so the jury was misled to infer that Stevenson elected the intoxication defense. "A charge should not be misleading." Bollenbach v. U.S., 326 U.S. 607, 614 (1946).

Wherefore, because there was nothing to support the intoxication defense, it was rejected and objected to by defense counsel, and it was "genuine[ly] inconsisten[t]" with Stevenson's defense strategy, the intoxication charge, requested by the State, over Stevenson's objections, was clearly unwarranted. Mathews, 485 U.S., at 68. "[T]o impose a particular defense upon an accused, in essence...makes not only appointed counsel but the defendant himself 'an organ of the State,'" Marble, 940 F.2d, at 1546 (quoting Faretta, 422 U.S., at 820), and it gives a bad aroma that "the law contrives against him." Faretta, 422 U.S., at 834.

E. All Fairminded Jurists Would Agree That All the Lower Courts' Decisions Were:

1a). Unreasonable and Contrary to Clearly Established Federal Law and,

To be clear, Stevenson did not elect to plead guilty by way of intoxication. He elected to plead not guilty and subject the State to its burden of proof. He did not choose the intoxication defense, and it was, infact, objected to repeatedly. The jury was misled to think Stevenson elected to plead guilty by way of an intoxication explanation and, again, "[a] charge should not be misleading." Bollenbach, 326 U.S., at 614. It is because of such, all fairminded jurists would agree[1] that, here in this instance, the lower courts' erroneous harmless determinations were: 1a). unreasonable and in violation of 28 U.S.C. § 2254(d) (1), in light of Faretta, Barnes, McKaskle, and Strickland, because the error was structural and cannot be harmless.

To determine if the Appellate Division's determination was unreasonable and contrary to federal law, established by this Court in Faretta, Barnes, McKaskle, and Strickland, this Court should look at New York State's leading case that governs this exact issue, People v. DeGina, 72 N.Y.2d 768 (N.Y. 1988), although in its denial to the intoxication issue it cited, "People v. Blouin, 223 A.D.2d 650 (2d Dept. 1996), and People v. Crimmins, 36 N.Y.2d 230 (N.Y. 1975)." Stevenson, 129 A.D.3d, at 999.

DeGina was based on a defendant's Sixth Amendment "unquestionabl[e...]right to chart his own defense," DeGina, 72 N.Y.2d at 776, similar to Faretta, Barnes, and McKaskle. Difference is, as established in McKaskle, "its denial is not amenable to harmless error analysis. The right is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S., at 177, n. 8. See also, McCoy, 138 S.Ct., at 1504. DeGina never declared such error to ever be harmless, rather, it declared "jury instructions have singular significance in criminal trials, where a charge error may well result in the deprivation of a fair trial and require reversal." DeGina, 72 N.Y.2d at 776. So, to the question that this Court should ask when a petitioner argues, as herein, that the last state court's determination was contrary to clearly established federal law, which is "not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold" (Schriro v. Landrigan, 550 U.S. 465, 473 (2007)), this demonstrates an obvious "yes!" The intoxication error in Stevenson's case was structural error because by forcing the intoxication defense on him and by, inferentially, pleading guilty by intoxication, it deprived him of his Sixth Amendment rights to conduct/make his own defense of his choice.

In any event, again, the intoxication error cannot be harmless because it affected 'substantial rights' (e.g., Sixth Amendment Autonomy rights and to the effective assistance of counsel). Fed. R. Crim. P. 52 (a); see also Fulminante, 499 U.S. 279, 306 (1991). Not only did the imposing of the intoxication defense deprive Stevenson of his right to a defense of his choice or to plead not guilty, but it also, at minimum, "interfere[d] with [Stevenson's right to the assistance of counsel." Moulton, 474 U.S., at 188. The "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland, 466 U.S., at 686. The

prosecutor and the trial court imposing a guilt-based intoxication defense on Stevenson, over defense objection, is that sort of government interference. "[T]o impose a particular defense upon an accused, in essence...makes not only appointed counsel but the defendant himself 'an organ of the State,'" Marble, 940 F.2d, at 1546 (quoting Faretta, 422 U.S., at 820), and it gives a bad aroma that "the law contrives against him." Faretta, 422 U.S., at 834.

1b). Alternatively, Should Not Be Harmless Because It Had a Substantial and Injurious Effect or Influence in determining the Jury's Verdict, And;

Alternatively, to be clear, all fairminded jurists would also agree[1] that, here in this instance, the lower courts' erroneous, and unreasonable, harmless determinations, in violation of 28 U.S.C. § 2254(d) (1), alternatively; 1b). should not be harmless because it "had a substantial and injurious effect or influence in determining the jury's verdict," Brecht, 507 U.S., at 623, also in violation of Stevenson's Due Process right to a fair trial "which was guaranteed...by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146 (1973). Basically, "the jury was instructed on alternative theories of guilt (one being guilty by intoxication) and may have relied on [that] invalid one," Pulido, 555 U.S., at 58 (Jury Note #3; Tr. 373), and the jury's request to hear the charge again also suggests that the error had a substantial and injurious effect or influence in determining the jury's verdict. It's not like the jury was given a curative instruction that it was not the defense who elected the intoxication defense; so the jury was misled to infer that Stevenson elected the intoxication defense. Again, "[a] charge should not be misleading." Bollenbach, 326 U.S., at 614. Contrary to all the lower courts' determinations, this instructional error has, infact, "vitiate[ed] all the jury's findings," Pulido, 555 U.S., at 61, because by the trial court forcing petitioner to plead guilty, inferentially, by way of imposing a guilt-based intoxication defense "the jury was instructed on alternative theories of guilt and may have relied on an invalid one." Pulido, 555 U.S., at 58. Indeed, upon their request (Jury Note #3; Tr. 373),

the jury was able to hear the intoxication charge an additional three more times (Tr. 377, 379-80), totaling six. The lower courts' ignored these facts that demonstrates "pervasive effect[s and] inferences to [have been] drawn from the [intoxication charge by the jury], altering the entire evidentiary picture," Strickland, 466 U.S., at 695-696.

Additionally, without that curative instruction the court promised (V.D. 11-12), that request by the jury also demonstrates "prejudicial effect[s] that [should have] outweigh[ed] ordinary relevance," and that that "risk that the jury [may have] convict[ed] for crimes other than those charged" (Old Chief, 519 U.S., at 181) has occurred, just as the trial court cautioned (V.D. 4-6). Again, demonstrating that this instructional error has, infact, "vitiate[ed] all the jury's findings," Pulido, 555 U.S., at 61.

At minimum, "the [intoxication] defense...produce[d] the formal inconsistency of the defendant's simultaneously denying the crime and asserting [intoxication] which assumes commission of the crime...[T]hat kind of genuine inconsistency here, as elsewhere, [would be] self-penalizing," Mathews, 485 U.S., at 68, had Mr. Stevenson elected such a " hazardous tactic." DeGina, 72 N.Y.2d, at 777.

2). They Would Also Agree That Such an Unreasonable Determination Was Error, In Light of the Facts.

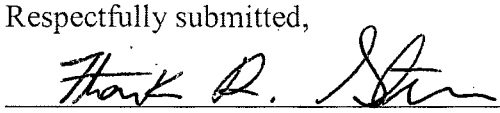
They would also agree[1] that: 2). such an unreasonable determination was error, in light of the facts, in violation of 28 U.S.C. § 2254(d) (2), because, again, the record facts clearly demonstrate that it "affected the verdict's outcome." Brown, 596 U.S., at 136. Again, the jury's request to hear the charge again--totaling six times (Tr. 373; Jury Note #3), suggests that the error "had a substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S., at 623. Again, intoxication "assume commission of the crime," Mathews, 485 U.S., at 68, and its charge, coupled with the jury's request to hear it an additional three times,

CONCLUSION

For all reasons demonstrated above, respectfully, Stevenson is entitled to a new trial.

Date: 1-5-24

Respectfully submitted,



Frank R. Stevenson (DIN# 13-A-2625),
Pro se, Petioner-Appellant
Eastern New York Correctional Facility
30 Institution Road
P.O. Box 338
Napanoch, New York 12458