

RECEIVED  
06-30-2020  
CLERK OF WISCONSIN  
SUPREME COURT

STATE OF WISCONSIN  
I N S U P R E M E C O U R T  
Case No.: 2019 AP 000411 CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DECARLOS CHAMBERS,

Defendant-Appellant-Petitioner

---

PETITION FOR SUPREME COURT REVIEW

---

MARK S. ROSEN  
ROSEN AND HOLZMAN, LTD.  
State Bar No. 1019297

400 W. Moreland Blvd., Ste. C  
Waukesha, WI 53188  
1-262-544-5804  
Attorney for Defendant-  
Appellant-Petitioner  
Email: roseholz@sbcglobal.net

TABLE OF CONTENTS

ISSUE PRESENTED.....1

CRITERIA FOR REVIEW.....4

STATEMENT OF THE FACTS.....7

ARGUMENT.....13

I. SUBSEQUENT UNITED STATES SUPREME COURT CASE LAW HAS INDICATED THAT A TRIAL COUNSEL MAY NOT ARGUE FOR A DEFENDANT’S GUILT, OR TAKE A POSITION INCONSISTENT WITH ABSOLUTE INNOCENCE, AT A JURY TRIAL OVER THE DEFENDANT’S OBJECTION. SUCH POSITIONS ARE STRUCTURAL ERROR AND MANDATE A NEW JURY TRIAL. A FINDING OF PREJUDICE IS NOT REQUIRED. ALSO, SUCH POSITION ARE NOT SUBJECT TO A HARMLESS ERROR ANALYSIS. NEITHER THE TRIAL COURT’S DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, NOR THE COURT OF APPEAL’S AFFIRMANCE DECISION AND SUBSEQUENT ORDER, ADEQUATELY REBUT SUCH A CONCLUSION.....13

CONCLUSION.....26

APPENDIX.....101

CASES CITED

Bousley vs. United States, 523 U.S. 614, 140 L.Ed.2d 828,  
118 S.Ct. 1604 (1998).....14

Griffith vs. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649, 107 S.Ct.  
708 (1987).....14

McCoy vs. Louisiana, 138 S.Ct. 1500, 200 L.Ed.2d 821,  
(2018).....2, 14-26 (passim)

State vs. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (1980)..22

State vs. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997)...14

State vs. Koch, 175 Wis.2d 684 at 694, 499 N.W.2d 152  
(1993).....14

State vs. Lagundoye, 268 Wis.2d 77 at 88, 674 N.W.2d 526  
(2004).....14

State vs. Michels, 141 Wis.2d 81, 414 N.W.2d 311 (Ct.App.  
1987).....13-14

State vs. Romero, 147 Wis.2d 264, 432 N.W.2d 899 (1988)...22

State vs. Smith, 268 Wis.2d 138, 671 N.W.2d 854 (Ct.App.  
2003).....22

State vs. Turner, 136 Wis.2d 133, 401 N.W.2d 827 (1986)...13

STATE OF WISCONSIN  
I N T H E S U P R E M E C O U R T  
2019 AP 000411 CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent

DECARLOS CHAMBERS,

Defendant-Appellant-Petitioner

---

PETITION FOR REVIEW

---

The Defendant-Appellant-Petitioner (herinafter Defendant) by his attorney Mark S. Rosen, hereby Petitions this Court, pursuant to Wisconsin Statutes 808.10 and Wisconsin Statutes Rule 809.62, to review the Decision of the Court of Appeals in this matter filed on June 2, 2020, and the June 23, 2020 Order denying Defendant's Motion for Reconsideration.

ISSUE PRESENTED

I. Whether the Court of Appeals had erred in affirming the trial court's Decision and Order in denying Defendant's Motion for Postconviction Relief. This, when trial counsel had argued in her Closing Argument that the jury should consider convicting the

Defendant of Second Degree Reckless Homicide. However, the Defendant had not consented to such an argument. Defendant's position throughout the entire case, to include the jury trial, had been that he had not committed the crimes and was absolutely innocent. New subsequent United State Supreme Court case law has indicated that such argument, contrary to the Defendant's wishes, is illegal and constitutes structural error entitling Defendant to a new jury trial. Such an argument illegally both concedes guilt as to the lesser included offense, as well as takes a position inconsistent with absolute innocence. This new case law prohibits either such options. This new case law is McCoy vs. Louisiana, 138 S.Ct. 1500, 200 L.Ed.2d 821, (2018).

The State had originally charged the Defendant with one Count of First Degree Reckless Homicide, Party to a Crime, and a second Count of Possession of Firearm by Person Adjudicated Delinquent. Prior to the jury trial, the Defendant had rejected all plea offers. His trial attorney had indicated to the jury that he was innocent of the charges. A jury trial had subsequently occurred. During the trial, the State had requested a lesser included jury instruction of Second Degree Reckless Homicide. Trial counsel did not object. During her Closing Argument, she had argued in part, that the jury should consider convicting the Defendant of the lesser included offense. Clearly and logically, this had been an argument for guilt on the lesser included offense. However, Defendant had never authorized such concession. As indicated, his entire position throughout the case had been that he was absolutely

innocent and had not committed the charged crimes. Further, such a position is inconsistent with arguing for actual innocence. The jury convicted the Defendant of the lesser included offense. Subsequently, Defendant had submitted a sworn Affidavit, attached to his Motion for Postconviction Relief, corroborating this position.

According to Defendant's Postconviction Motion, the United States Supreme Court had issued case law subsequent to Defendant's conviction that such a concession of guilt by trial counsel, and arguing other than absolute innocence, contrary to the Defendant's position and wishes, deprives the Defendant of his Sixth Amendment right to a jury trial. Under this case law, trial counsel may not override his client's position of actual innocence. This, even if counsel is simply attempting to "cut the client's losses." Furthermore, such a concession is structural error and not subject to a prejudicial error analysis. Accordingly, Defendant had been entitled to a new jury trial.

However, subsequently, the trial court had issued a Decision and Order denying the Postconviction Motion. The trial court had essentially indicated that counsel's conduct had not legally constituted concession of guilt. (123:1-3).

The Court of Appeals had affirmed the trial court's Decision and Order via its own Decision dated June 2, 2020. The Court's Decision had essentially "rubber stamped" the trial court's Decision and Order. The Court had agreed with the trial court that counsel's Closing Argument had not conceded guilt. However, neither

the trial court, nor the Court of Appeals, had addressed Defendant's contention that not only did trial counsel's conduct concede guilt, but that it had also been inconsistent with Defendant's claim of absolute innocence.

Defendant had subsequently filed a Motion for Reconsideration with the Court of Appeals. The Motion had sought reconsideration because the Court's Decision had not addressed Defendant's position that trial counsel's Closing Argument had also been inconsistent with Defendant's position of absolute innocence. However, the Court of Appeals had denied this Motion by Order dated June 23, 2020. The Order had not provided any reason for the denial. The Order had simply indicated that the Court of Appeals did not believe reconsideration to be warranted.

#### CRITERIA FOR REVIEW

The issue presented by this case has not been specifically addressed by any other Wisconsin appellate case. McCoy vs. Louisiana is an extremely new case. The trial court had erred in denying Defendant's Motion for Postconviction Relief. First, trial counsel's conduct had essentially urged the jury to consider convicting the Defendant of a crime, albeit the lesser included offense of Second Degree Reckless Homicide. Counsel had provided reasons to the jury for the jury to convict the Defendant of such a lesser included crime. Such conduct is illegal under McCoy. However, second, counsel's conduct had also violated this case law

by arguing a position inconsistent with absolute innocence. Under this case law, such conduct is also illegal. Further, counsel's conduct had been structural error, not subject to an analysis of prejudice or ineffective assistance. Defendant is entitled to a new jury trial.

Here, the trial court, and subsequently "rubber stamped" by the Court of Appeals, had indicated that counsel's conduct had not conceded guilt, under McCoy. Both of these Courts had indicated that counsel had also argued that Defendant had not committed the crime, and had provided reasons for acquittal. However, regardless of such other arguments arguing for acquittal, counsel had clearly argued that the jury should consider convicting the Defendant of the lesser included offense. Counsel had argued to the jury that the facts of this case had not met the elements of First Degree Reckless Homicide, the charged offense, but had met the elements of Second Degree Reckless Homicide. Nevertheless, both the trial court and the Court of Appeals had disagreed.

Further, Defendant had argued that counsel's Closing Argument had been inconsistent with Defendant's position of absolute innocence. Defendant had made this argument in both his Motion for Postconviction Relief as well as before the Court of Appeals. He had made this argument before the Court of Appeals both in his original Appellant's, and Reply, Briefs. Further, he had also made this argument in his Motion for Reconsideration. This, after the Court of Appeals had ignored this argument in its four page Decision. However, both of these Courts had ignored this argument.

Defendant believes that a Decision from this Court would help clarify the law on when trial counsel violates McCoy vs. Louisiana so as to warrant a new jury trial. This, when counsel argues for/ "asking the jury to consider" conviction of a lesser included offense after Defendant has clearly indicated throughout the proceedings that he is completely innocent and had not committed the crime. Further, a Decision from this Court would help clarify the law as to what consists concession of guilt when counsel argues for a lesser included offense, while also arguing for acquittal during other parts of her case, to include the Closing Argument. Finally, a Decision from this Court would help clarify the law as to when counsel's conduct of arguing for and/or "asking the jury to consider" conviction of a lesser included offense constitutes conduct inconsistent with Defendant's position of absolute innocence, as indicated in this paragraph, such as to warrant a new jury trial under McCoy. Here, contrary to the trial court and the Court of Appeals, counsel's conduct had violated McCoy. This, by arguing that the jury should consider the lesser included offense, and then providing reasons why the jury should make such consideration.

Therefore, this case presents questions of law which have occurred in the past and which are likely to reoccur unless and until they are resolved by this Court. Accordingly, this Petition meets the criteria for review as set forth in Wisconsin Statute Rule 809.62(1)(c)(3).

STATEMENT OF THE FACTS

Mr. DeCarlos Chambers was charged in a two Count Criminal Complaint dated January 12, 2017. Count One charged Defendant with First Degree Reckless Homicide, Party to a Crime (Use of a Dangerous Weapon), contrary to Wis. Stats. 940.02(1), 939.50(3)(b), 939.05, and 939.63(1)(b). Count Two charged Defendant with Possession of Firearm by Person Adjudicated Delinquent of a Felony, contrary to Wis. Stats. 941.29(1m)(bm), and 939.50(3)(g). The charges alleged that Defendant had been in a relatively long standing argument with the victim. This argument had involved some shoes that the victim had borrowed from the Defendant but then would not return. Defendant had also been seeking \$15 for gas money. On the night in question, the Defendant and the victim had been arguing over the phone. Subsequently, the victim had come over to the Defendant's home armed with a pistol. Shortly before the victim had arrived, the Defendant had positioned himself behind some bushes across the street and had waited. After the victim had arrived, the Defendant had shot and killed the victim. At that time, Defendant had previously been adjudicated delinquent of a felony level offense. (1:1-3).

A preliminary hearing had occurred on January 25, 2017. After taking testimony, the Court Commissioner found probable cause and had bound Defendant over for trial. The State did not file an Information. Instead, the State had asked for an adjourned arraignment date. (129:1-20).

On February 7, 2017, the trial court conducted an arraignment. At that time, the State filed a Criminal Information against the Defendant charging the same two Counts, with the same charging language, against him as indicated in the Criminal Complaint. (130:1-5; 3:1-1).

A final pretrial had occurred on August 7, 2017. This, after various adjournments. This had been several months after the State had originally charged the case. Trial attorney Ann Bowe was Defendant's trial counsel. At that final pretrial, Ms. Bowe had indicated the following to the trial court:

MS. BOWE: "But Mr. Chambers has been clear from the day he got arrested that he did not do this and that he wasn't going to plead guilty no matter what. And that's his position today." (134:3).

After this statement from Ms. Bowe, the trial court had then indicated that the offer should be placed on the record. At that time, the State had indicated that it would be willing to amend the charge to Second Degree Reckless Homicide, While Armed, with a potential discussion that the State would be willing to amend the charge to just a Second Degree Reckless Homicide. The State had indicated that it was its understanding that the Defendant did not want to take this proposed plea offer. The State would be willing to just recommend prison up to the court. The State had also agreed to dismiss and read in Count Two. (134:3-5).

Eventually, a jury trial commenced on August 14, 2017. Defendant was on trial for both Counts in the Criminal Information.

On the afternoon of August 15, 2017, the State had rested. At that time, the State had indicated that it, with respect to Count One, would be requesting a lesser-included Second Degree Reckless Homicide jury instruction. At that time, trial counsel had indicated that the defense would not be objecting. (138:68-69). However, this request had been solely at the State's request. At no time did the Defendant indicate that trial counsel had been authorized to argue for a conviction on the basis of the lesser included offense. Any argument on his part that the State could argue for conviction of the lesser-included offense is not an agreement that his counsel could also so argue.

Closing Arguments had occurred on the morning of August 16, 2017. At that time, Ms. Bowe had argued the following:

MS. BOWE: "But the jury instruction tells you to all see if you can agree on first-degree reckless. And only if you can't, then you should go to the second part, which is second-degree reckless, right?"

Second-degree reckless is also criminally reckless conduct. Which I think everybody would agree that should you have a gun, shooting in the direction of a house or a person, is criminally reckless conduct.

And I think that under these circumstances, the second-degree reckless - that does not include utter disregard for human life is something you should consider. There's an actual description.

And the jury instructions from the judge say the difference between first and second-degree reckless homicide is that first-degree requires a proof of one additional element. Circumstances of conduct showed utter disregard for human life.

So again, shooting a gun in the dark, when somebody is shooting a gun already, and it's clear that the

ShotSpotter evidence is that there is overlapping shots, right? It's not like one person or one gun shoots and then stops, and then another gun shoots, does not support first-degree reckless homicide." (139:34-35).

The jury returned its verdicts on the afternoon of August 16, 2017. At that time, the jury found the Defendant guilty of the lesser included Count One of Second-Degree Reckless Homicide, party to a crime, while armed with a dangerous weapon, as well as Count Two. (140:2-3). Once again, the lesser included conviction on Count One had been the same charge that trial counsel Bowe had urged the jury to consider. This, as opposed to the original First-Degree Reckless homicide charge.

On September 7, 2017, the trial court sentenced Defendant on Count One to eighteen years prison, to consist of ten years initial confinement plus eight years extended supervision. On Count Two, the trial court sentenced the Defendant to a consecutive five year sentence, to consist of two years of initial confinement plus three years of extended supervision. (141:19-20) (97:1-2; A 106-107).

Subsequent to Defendant's conviction, Defendant had completed a sworn Affidavit. In this sworn Affidavit, Defendant had indicated that trial counsel's argument that the jury should consider the lesser included offense of Second Degree Reckless homicide had, to him, been a concession of guilt. He had never authorized her to make such an argument. She had never discussed with him, prior to Closing Arguments, that she would make any such argument. He had repeatedly indicated to her that he did not commit the charged

offense of shooting and killing the victim in the matter. His position throughout the matter, to include the jury trial, was that he did not commit the homicide in question. His only position throughout the trial was for his attorney to argue that he was innocent and had not committed the crime at all. This was the only instruction that he had given to his attorney. He had never changed this instruction, nor this position. He had made this position, that he had not committed this crime, clear to his attorney throughout this case and the trial. Defendant had attached this Affidavit to his Motion for Postconviction Relief, attached as Exhibit 4. Defendant had filed this Motion for Postconviction Relief, with the supporting attachments, on December 12, 2018. This Motion had argued that subsequent United States Supreme Court case law had now ruled that counsel's conduct of arguing for guilt over the Defendant's wishes violated his Sixth Amendment right to a jury trial. This case had further indicated that such conduct had been structural error, entitling Defendant to a new jury trial. (113:1-14; 114:1-9; 115-8, Exhibit 4).

The attached Affidavit to the Motion for Postconviction Relief, Exhibit 4, had been consistent with trial counsel's statement at the final pretrial. As previously discussed, this statement had been that the Defendant's position had been that he was innocent of the charge, that he did not commit the crime, and that he was not going to plead guilty, no matter what.

Subsequently, the trial court had issued a briefing schedule. (116:1-1). The trial court later modified this schedule. (119:1-1).

The State filed its Response Brief on February 5, 2019. (120:1-10). Defendant then filed his Reply Brief, also with attachments. (121:1-10; 122:1-5).

The trial court issued a Decision and Order Denying Motion for Postconviction Relief. The trial court issued this Decision and Order on February 26, 2019. The court's short three page Decision and Order had essentially indicated that trial counsel's conduct had not conceded guilt. However, the trial court had not made any decision concerning whether or not counsel's conduct had been inconsistent with Defendant's position of absolute innocence. (123:1-3).

Defendant filed his Notice of Appeal, with attachments, on February 27, 2019. (124:1-2; 125:1-5).

On June 2, 2020, the Court of Appeals had denied Defendant's appeal. With respect to the argument concerning concession of guilt, the Court had indicated that it had agreed with the trial court's analysis. The Court had indicated that counsel's Closing Argument had discussed both the lesser included offense, as well as how Defendant had not committed the crime. Hence, the Court had agreed with the trial court that counsel's conduct had not conceded guilt. Accordingly, the Court had concluded that counsel's conduct had not violated McCoy. However, the Court had never commented nor discussed whether or not counsel's conduct had violated McCoy by taking a position inconsistent with absolute innocence. (A 101-104).

Subsequently, Defendant had filed a Motion for

Reconsideration. Defendant had argued that the Court had never considered Defendant's proffered argument that counsel's conduct had also violated McCoy by taking a position inconsistent with absolute innocence in addition to conceding guilt. Defendant had indicated that he had presented this position to both the trial court as well as the Court of Appeals. Defendant had argued that reconsideration of the Court's June 2, 2020 Decision would be appropriate based upon this position. However, the Court had issued a scant two sentence Order denying this Motion. The Court had simply indicated that after having reviewed the Motion, it did not believe reconsideration to be warranted. (A 105).

#### ARGUMENT

SUBSEQUENT UNITED STATES SUPREME COURT CASE LAW HAS INDICATED THAT A TRIAL COUNSEL MAY NOT ARGUE FOR A DEFENDANT'S GUILT, OR TAKE A POSITION INCONSISTENT WITH ABSOLUTE INNOCENCE, AT A JURY TRIAL OVER THE DEFENDANT'S OBJECTION. SUCH POSITIONS ARE STRUCTURAL ERROR AND MANDATE A NEW JURY TRIAL. A FINDING OF PREJUDICE IS NOT REQUIRED. ALSO, SUCH POSITION ARE NOT SUBJECT TO A HARMLESS ERROR ANALYSIS. NEITHER THE TRIAL COURT'S DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, NOR THE COURT OF APPEALS' AFFIRMANCE DECISION AND SUBSEQUENT ORDER, ADEQUATELY REBUT SUCH A CONCLUSION.

Questions of law require independent appellate review, while questions of constitutional fact are also subject to independent review and require an independent application of the constitutional principles to the facts. State vs. Turner, 136 Wis.2d 133, 401 N.W.2d 827 (1986). Whether any constitutional principles have been

offended involves an independent review by an appellate court. State vs. Michels, 141 Wis.2d 81, 414 N.W.2d 311 (Ct.App. 1987).

A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" from the past. State vs. Koch, 175 Wis.2d 684 at 694, 499 N.W.2d 152 (1993) citing Griffith vs. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987). A new rule of substantive criminal law is presumptively applied retroactively to all cases, whether on direct appeal or on collateral review. State vs. Lagundoye, 268 Wis.2d 77 at 88, 674 N.W.2d 526 (2004); Bousley vs. United States, 523 U.S. 614, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998); State vs. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997).

This present case is part of the direct appeal proceedings. The Court of Appeals did not dispute the applicability of McCoy to the present situation. Defendant is presenting this case law in case the Supreme Court believes that this applicability is at issue.

The Sixth Amendment rights of a Defendant is violated when a trial counsel argues to the jury that Defendant had been guilty of the crimes over the Defendant's vociferous insistence that he did not engage in the criminal acts and had objected to any admission of guilt. A trial counsel may not admit his client's guilt of a charged crime over the Defendant's intransigent objection to that admission. Further, trial counsel may not take a position

inconsistent with absolute innocence in such a situation. Such a violation of a Defendant's Sixth Amendment secured autonomy constitutes structural error, warranting a new trial, because the admission blocked the Defendant's right to make fundamental choices about his own defense. A Defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience based view is that such an admission is in the client's best interest. With individual liberty at stake, it is the Defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt. When a client expressly asserts that the objective of his defense is to maintain innocence of the charge criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. The ABA Model Rule of Professional Conduct 1.2(a)(2016) provide that a lawyer shall abide by a client's decisions concerning the objectives of the representation. McCoy vs. Louisiana, 138 S.Ct. 1500, 200 L.Ed.2d 821, (2018).

In McCoy vs. Louisiana, a 2018 United States Supreme Court case, McCoy had been charged with three homicides. However, he had pleaded not guilty, and had indicated that he had been out of State and that corrupt police had committed the killings when a drug deal had gone wrong. He had vociferously insisted on his innocence and had adamantly objected to any admission of guilt. However, the trial court had permitted his trial counsel to tell the jury that

McCoy had committed the murders. Trial counsel's strategy had been to concede that McCoy had committed the murders, but argue that his mental state had prevented him from forming the specific intent necessary for a first-degree murder conviction. The jury had found McCoy guilty of the three first-degree murder convictions. McCoy vs. Louisiana, 138 S.Ct. 1500 at 1503.

The United State Supreme Court had reversed McCoy's convictions. The Court had indicated that the lawyer's province is trial management, but some decisions are reserved for the client, including whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forego an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in the reserved for the client category. These are not strategic choices. When a client makes it plain that the objective of his defense is to maintain innocence of the charged criminal acts and pursue an acquittal, his lawyer must abide by that objective and may not override it by conceding guilt. Id. at 1503-1504, 1508-1509. The possibility of an acquittal, even if remote, may be more valuable to a Defendant than the difference between a lesser and a greater sentence. Id. at 1508.

Furthermore, the Supreme Court in McCoy had indicated that an ineffective assistance of counsel jurisprudence does not apply here where the client's autonomy, not counsel's competence, is in issue. Here, the violation of McCoy's protected autonomy right was complete when counsel usurped control of an issue within McCoy's sole prerogative. Violation of a Defendant's Sixth Amendment

secured autonomy has been ranked "structural" error; when present, such an error is not subject to a harmless error review. An error is structural if it is not designed to protect Defendants from erroneous conviction, but instead protects some other interest, such as the "fundamental legal principle that a Defendant must be allowed to make his own choices about the proper way to protect his own liberty. Counsel's admission of a client's guilt over the client's express objection is error structural in kind, for it blocks the Defendant's right to make a fundamental choice about his own defense. Under such a situation, a Defendant must be accorded a new trial without any need first to show prejudice. Id. at 1504., 1510-1511.

Here, clearly, trial counsel Bowe had argued that the jury should consider convicting the Defendant of second degree reckless homicide. This, as opposed to first-degree reckless homicide. She can proffer that she was merely trying to "cut the Defendant's potential losses." However, McCoy has rejected such a position. Further, regardless of such a proffer, she had argued to the jury during Closing Arguments that a conviction of second-degree reckless homicide would be more appropriate than a conviction for first-degree reckless homicide. Her argument clearly does not tell the jury that the Defendant is thoroughly innocent and that it should acquit the Defendant of any charge. This, regardless of whether that charge is first-degree or second-degree reckless homicide. On the contrary, her argument argues that a conviction of the lesser included would be more appropriate than a conviction of

the greater offense. Clearly and logically, such an argument thoroughly contradicts Defendant's position that he is innocent of any charge and that he did not commit the offense charged. This argument argues for conviction. Whether or not that conviction is for the original charge, or the lesser included, is irrelevant to the present discussion. Her reasons for arguing for the lesser-included charge are also irrelevant. As McCoy had ruled, trial counsel's failure to argue for acquittal as the Defendant had mandated, and instead propose/argue for conviction, requires reversal and a new jury trial.

Furthermore, Defendant had made his position clear to counsel and the trial court well prior to trial that he was innocent and had not committed the crimes. Counsel had indicated such at the final pretrial. This final pretrial had occurred several months after the alleged incident. Hence, Defendant had plenty of time to change his mind and take a different course. However, clearly, his position had been adamant throughout; he was innocent, he was not pleading guilty, and he had wanted a jury trial to obtain an acquittal. His attached Sworn Affidavit to his Motion for Postconviction Relief had corroborated such a position. The Affidavit also had corroborated counsel's statement at the final pretrial. Hence, the statements in the Affidavit had not been new. Instead, they had been merely corroborative of his well announced and well established pretrial position.

The trial court's Decision and Order had summarily indicated that trial counsel's closing argument had not conceded guilt. The

Decision and Order had indicated that counsel's argument at issue in this present appeal had only been part of a general Closing Argument. The Decision and Order had indicated that trial counsel had otherwise argued for acquittal, and had argued the facts. The Decision and Order had further indicated that trial counsel had never conceded that Defendant had been the shooter. According to the court, counsel in McCoy vs. Louisiana had conceded guilt from the beginning, unlike here. Hence, the Decision and Order had indicated that this case did not apply, and that this case was subject to a prejudicial ineffectiveness standard. The Decision and Order had concluded that trial counsel had not been prejudicially ineffective.

Subsequently, the Court of Appeals had affirmed the trial court's Decision and Order denying Defendant's Motion for Postconviction Relief. The Court had not provided any new reasoning. Instead, the Court had simply indicated that it had agreed with the circuit court's analysis and conclusion. The Court had simply cited a portion of the trial court's Decision and Order as its own Decision. The Court had summarily indicated that it had agreed with the trial court that counsel's Closing Argument, read in its entirety, had shown that trial counsel had not conceded Defendant's guilt. (A 101-104).

Both the trial court's Decision and Order, as well as the Court of Appeals' Decision are materially incorrect. They both must be reversed. Both of these Decisions' statement that counsel had never conceded guilt is materially erroneous. Trial Counsel had

argued that the jury should consider convicting the Defendant of shooting the victim, but to a lesser degree than First Degree Reckless Homicide. This is a clear concession that the Defendant had been the shooter. Logically, counsel should not have argued that the jury should convict the Defendant of anything if he had not been the shooter. Hence, counsel's argument had been a clear concession of guilt, in violation of McCoy vs. Louisiana. Under McCoy, whether guilty of First or Second Degree Reckless Homicide is irrelevant. As in McCoy, the sole issue is not the level of culpability, but simply the matter of arguing for innocence versus arguing for any level of culpability at all.

Furthermore, the trial court had indicated that trial counsel had been effective for arguing for the lesser included offense. (123:3). However, this statement materially contradicts and undercuts both the trial court, and the Court's, assertions that counsel's argument for the lesser included offense had been a minor part of her Closing Argument. A conclusion that she had been effective for "sparing" the Defendant the conviction on the greater is an admission that this argument had been a material part of her entire Closing Argument. Clearly, her argument for the lesser included had been material enough to spare him conviction on the greater. However, a finding of such materiality indicates that her argument for conviction on the lesser included had been material enough for such a conviction. This, contrary to the Defendant's unequivocal assertions of innocence.

As indicated, both the trial court as well as the Court of

Appeals had indicated that trial counsel's concession at Closing Argument had only been part of her general Closing Argument for innocence. Both Courts had indicated that one must look at the entire Closing Argument. However, neither Court has provided any case law to support its position. This position being that, arguing for acquittal in one part of a case may override a concession in another part of that same case. Further, contrary to both Courts, McCoy vs. Louisiana materially rebuts this position by these Courts. This case did not compare concession parts of a case to non-concession parts of that case. Instead, this case clearly indicates that, when a Defendant asserts his innocence and that his defense is innocence, then his lawyer must abide by that objective and may not override it by conceding guilt. Autonomy to decide that the objective of the defense is to assert innocence belongs in the category of decisions reserved solely for the Defendant. A Defendant has the right to maintain innocence throughout the guilt phase of a trial. This is the Defendant's objective. McCoy vs. Louisiana 138 S.Ct. 1500 at 1508-1509. Hence, contrary to the court, this case does not qualify this ruling in a comparison of concession parts of a case to non-concession parts. Under McCoy, when a Defendant declares his innocence, then trial counsel must assert such a position. This, throughout the entirety of the trial. As discussed, the trial court's Decision and Order, and the Court's subsequent Decision, have materially erred in declaring that counsel had never conceded guilt.

Here, contrary to both Courts, trial counsel had failed to

maintain Defendant's innocence throughout the entire jury trial. Contrary to the State, counsel had conceded guilt, albeit to a lesser included offense, in an extremely significant portion of the trial, the Closing Argument. Further, counsel had taken a position contrary to Defendant's position of absolute innocence. Wisconsin Courts are extremely sensitive to the important nature of Closing Arguments. Errors in parts of Closing Arguments have led to reversals of verdicts on multiple occasions. See State vs. Smith, 268 Wis.2d 138, 671 N.W.2d 854 (Ct.App. 2003); State vs. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (1980); State vs. Romero, 147 Wis.2d 264, 432 N.W.2d 899 (1988). Hence, the fact that trial counsel had conceded guilt, and/or taken a position contrary to absolute innocence, to the lesser included offense, yet argued for acquittal during the remainder of her Closing Argument, did not negate the structural error argued herein.

True, counsel had not used the words "concede guilt" during her Closing Argument. However, as discussed in this Petition, her argument to the jury that it should "consider" a conviction of the lesser included offense had essentially been an invitation to both (1) convict the Defendant of this lesser included offense; and (2) been inconsistent with absolute innocence. Such a conclusion is obvious. The Courts had materially erred in indicating otherwise. Counsel's request to "consider" had not been an argument for acquittal, as mandated by McCoy. Instead, contrary to the Courts, this argument had been an argument for conviction of the lesser included, and been inconsistent with absolute innocence. Contrary

to the Courts, trial counsel had relieved the State of its burden of proof of this lesser included offense. Her conduct had been illegal. Her failure to argue for acquittal throughout the entire trial had been structural error.

As argued herein, McCoy vs. Louisiana does not negate its ruling simply because a trial counsel may argue for acquittal in part of the case, yet concede guilt in another part. This case simply stands for the conclusion and ruling that, when a Defendant asserts innocence, then a trial counsel must fully abide by that assertion. As previously discussed, this assertion is solely the Defendant's decision, not counsel's. Counsel must not override this assertion in any way. Otherwise, counsel has deprived Defendant of his Sixth Amendment right to a jury trial. In McCoy, trial counsel's admission of McCoy's guilt, and arguing inconsistent with absolute innocence, despite McCoy's objection to such conduct, was incompatible with the Sixth Amendment. Id. at 1512. This is the present situation.

As indicated, Ms. Bowe's Closing Argument supporting a conviction on the lesser included offenses, under the circumstances presented herein, constitutes structural error. Both Courts have materially erred indicating otherwise. Contrary to both Courts, McCoy vs. Louisiana is completely applicable and binding with respect to this present situation. This present matter is not one of prejudicial ineffectiveness of counsel. Defendant is entitled to reversal and a new jury trial. Both Courts have materially erred indicating otherwise.

Further, neither the trial court nor the Court of Appeals had ever indicated that it had considered Defendant's position that counsel's conduct had also been inconsistent with Defendant's position of absolute innocence, as prohibited by McCoy. Hence, Defendant had filed a Motion for Reconsideration with the Court of Appeals indicating that he had presented such arguments, to both the trial court as well as the Court of Appeals.

Defendant's Motion for Reconsideration had indicated that Appellant's Brief had also argued that McCoy vs. Louisiana had also prohibited any conduct by trial counsel that had been inconsistent with absolute innocence. This case had prohibited any conduct by trial counsel that violates a Defendant's Sixth Amendment objective of his defense. A Defendant has a right to maintain innocence throughout his trial. McCoy vs. Louisiana, 138 S.Ct. 1500 at 1508 (App Brf, pgs 19-20). In the present situation, trial counsel's conduct of arguing that the jury should consider the lesser included offense had also violated this language in McCoy. Hence, Defendant had argued that McCoy vs. Louisiana goes farther than merely conceding guilt. Although the facts of that case had involved a trial counsel who had conceded guilt to the jury, this case's holding had gone farther than that. As indicated and cited, Defendant had made such an argument in his Appellant Brief. Respondent's Brief had failed to rebut this argument. Defendant's Reply Brief had again presented this case law. However, the Court's Decision has completely ignored this legal holding by this case. The Court's Decision has simply relied upon the language, and

conclusion, that trial counsel's conduct in the present matter had not conceded guilt. However, as indicated, the Decision has not mentioned, much less even discussed, this much broader language in McCoy. Defendant submits that this Court must reconsider the Court's Decision, and Order denying Motion for Reconsideration, with consideration of this much broader language.

Further, the Motion for Reconsideration had also indicated that Defendant's own Motion for Postconviction Relief had also indicated that McCoy's holding had gone farther than just prohibiting a trial counsel's concession of guilt. Defendant had indicated in this Postconviction Motion that it is the Defendant's prerogative, not counsel's, to decide on the objective of his defense...to maintain his innocence. (113:9). When a lawyer expressly asserts that the objective of his defense is to maintain innocence of the charge criminal acts, his lawyer must abide by that objective and may not override it... The ABA Model Rule of Professional Conduct provides that a lawyer shall abide by a client's decisions concerning the objectives of his representation. (113:9-10). Autonomy to decide that the objective of the defense is to assert innocence belongs in the reserved for the client category. (113:10). Hence, the trial court as well as the Court of Appeals had been aware of his law. Both the trial court and the Court of Appeals had been aware of Defendant's position concerning the relevance of this broader holding of McCoy in this present matter, and trial counsel's conduct during her Closing Argument. However, both of these Courts had ignored this broader holding.

The Reconsideration Motion had also indicated that Defendant's Appellant and Reply Briefs had argued that trial counsel's conduct in her Closing Argument had violated McCoy by presenting an argument inconsistent with absolute innocence. His Motion for Postconviction Relief had also presented this relevant and applicable case law. Absolute innocence had been Defendant's sole goal throughout the trial. Hence, even if counsel's Closing Argument had not risen to the level of conceding guilt, counsel had still presented an Argument that had still violated McCoy by arguing inconsistent with absolute innocence. The Court's Decision had ignored this conclusion. As discussed, this Court must reconsider the Court's Decision in this present matter. After such reconsideration, reversal of the trial court's Decision and Order denying Defendant's Postconviction Motion, as well as the Courts' Decision, would be warranted. The facts of this present matter support such reversals. This, with consideration of this broader holding of McCoy.

However, the Court had issued a simple two page Order indicating that reconsideration was not warranted. This, after considering the Motion for Reconsideration. (A 105). As indicated, the Court of Appeals had materially erred in denying this Motion.

#### CONCLUSION

WHEREFORE, For the Reasons Indicated Above, DECARLOS CHAMBERS, by and through his attorney Mark S. Rosen of the Law Offices of

Rosen and Holzman, hereby requests that this Honorable Court grant Defendant-Appellant-Petitioner's Petition for Review.

Dated this \_\_\_\_\_ day of June, 2020.

Respectfully Submitted,

---

Mark S. Rosen  
Attorney for Defendant  
State Bar No. 1019297

Rosen and Holzman  
400 W. Moreland Blvd., Ste. C  
Waukesha, WI 53188  
ATTN: Mark S. Rosen  
(262) 544-5804  
email: roseholz@sbcglobal.net

CERTIFICATION

I hereby certify that the Petitioner's Petition for Supreme Court Review of Defendant-Petitioner in the matter of State of Wisconsin vs. DeCarlos Chambers, 2019AP000411-CR conforms to the rules contained in Wis. Stats. 809.19 (8) (b) (c) for a Brief with a monospaced font and that the length of the Brief is twenty seven (27) pages.

Dated this 26th day of June, 2020, in Waukesha, Wisconsin.

---

Mark S. Rosen  
Attorney for Defendant-  
Appellant  
State Bar No. 1019297

CERTIFICATION

I hereby certify that the text of the e-brief of Petitioner's Petition for Supreme Court Review of Defendant-Petitioner in the matter of State of Wisconsin vs. DeCarlos Chambers, Court of Appeals Case No. 2019 AP 0411-CR is identical to the text of the paper brief in this same case.

Dated this 26th day of June, 2020, in Waukesha, Wisconsin.

---

Mark S. Rosen  
Attorney for Defendant-  
Appellant

INDEX TO APPENDIX

June 2, 2020 Court of Appeals Decision.....101-104  
June 23, 2020 Order Denying Motion for Reconsideration.....105  
Judgment of Conviction, September 8, 2017.....106-107