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STATE OF WISCONSIN
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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

District I

Case No. 2019AP000411 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DECARLOS CHAMBERS,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON SEPTEMBER 8, 2017, AND THE DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED
ON FEBRUARY 25, 2019, THE HONORABLE JEFFREY WAGNER
PRESIDING ON BOTH MATTERS, BOTH ENTERED IN THE
CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF APPELLANT

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ISSUE PRESENTED

I. Whether the Trial Court had erred in denying Defendant's Motion for Postconviction Relief 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 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.

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 innocent and had not committed the charged crimes. The jury convicted the Defendant of the lesser included offense. Subsequently, he had submitted a sworn Affidavit, attached to his Motion for Postconviction Relief, corroborating his position. The United States Supreme Court has issued case law subsequent to Defendant's

conviction that such a concession by trial counsel, 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 is entitled to a new jury trial.

Trial Court Answered: No

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

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 and 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.

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

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).

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 101-102).

Subsequent to Defendant's conviction, Defendant had served a Motion for Postconviction Relief. This Motion had contained Defendant's supporting Sworn Affidavit, attached as Exhibit 4. Defendant had filed this Motion, with supporting attachments, on December 12, 2018. (113:1-14; 114:1-9; 115:1-8).

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. (123:1-3; A 103-105).

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

Defendant is filing this Appellant's Brief in a timely fashion

and pursuant to the Court's scheduling.

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 101-102).

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. (123:1-3; A 103-105).

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

Defendant is filing this Appellant's Brief in a timely fashion and pursuant to the Court's scheduling.

ARGUMENT

SUBSEQUENT UNITED STATES SUPREME COURT CASE LAW HAS INDICATED THAT A TRIAL COUNSEL MAY NOT ARGUE FOR A DEFENDANT'S GUILT AT A JURY TRIAL OVER THE DEFENDANT'S OBJECTION. SUCH A POSITION IS STRUCTURAL ERROR AND MANDATES A NEW JURY TRIAL. A FINDING OF PREJUDICE IS NOT REQUIRED. ALSO, SUCH A POSITION IS NOT SUBJECT TO A HARMLESS ERROR ANALYSIS. THE TRIAL COURT'S DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF DOES NOT 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 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. 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.

The Decision and Order is materially incorrect. It must be reversed. The Decision and Order's statement that counsel had never conceded guilt is materially erroneous. Trial Counsel's 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 Decision and Order had indicated that trial counsel had been effective for arguing for the lesser included offense. (123:3). However, this statement materially contradicts and undercuts the Decision and Order's assertion 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, the Decision and Order has indicated that trial counsel's concession at Closing Argument had only been part of her general Closing Argument for innocence. The trial court has indicated that one must look at the entire Closing Argument. However, the trial court has provided no 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 the court, McCoy vs. Louisiana materially rebuts this position by the court. 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 Decision and Order has materially erred in declaring that counsel had never conceded guilt.

Here, contrary to the Decision and Order, 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. 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 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 Brief, her argument to the jury that it should "consider" a conviction of the lesser included offense had essentially been an invitation to convict the Defendant of this lesser included offense. Such a

conclusion is obvious. The court 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 court, this argument had been an argument for conviction of the lesser included. Contrary to the court, 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, despite McCoy's objection to such admission, 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. The Decision and Order has materially erred indicating otherwise. Contrary to the trial court, 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.

CONCLUSION

Based upon the foregoing, Defendant is entitled to a new jury trial. The facts and the law clearly support a conclusion that trial counsel had violated Defendant's right to a jury trial. This is structural error. The trial court's Decision and Order denying the Postconviction Motion had been materially erroneous. It must be reversed.

Dated this 24th day of June, 2019.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Brief of Defendant-Appellant 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 one (21) pages.

Dated this 24th day of June, 2019, in Waukesha, Wisconsin.

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

CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as a part of this Brief, is an appendix that complies with Wis. Stats. 809.19(2) (a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of June, 2019, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. DeCarlos Chambers, Case No. 2019AP000411-CR is identical to the text of the paper brief in this same case.

Dated this 24th day of June, 2019 in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant