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

ON REVIEW OF A DECISION OF THE COURT OF APPEALS
DISTRICT I, AFFIRMING A DECISION DENYING
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF IN MILWAUKEE
COUNTY CIRCUIT COURT, THE HONORABLE
JEFFREY WAGNER, PRESIDING.

MARK S. ROSEN
ROSEN AND HOLZMAN, LTD.

400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
1-262-544-5804
Attorney for Defendant-
Appellant-Petitioner

State Bar No. 1019297

TABLE OF CONTENTS

CASES CITED

STATE OF WISCONSIN

I N T H E S U P R E M E C O U R T

Case No.: 2019 AP 000411 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

DECARLOS CHAMBERS,

Defendant-Appellant-Petitioner

ON REVIEW OF A DECISION OF THE COURT OF APPEALS
DISTRICT I, AFFIRMING A DECISION DENYING
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF IN MILWAUKEE
COUNTY CIRCUIT COURT, THE HONORABLE
JEFFREY WAGNER, PRESIDING.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

ISSUE PRESENTED

Whether trial counsel had violated relevant and applicable United States Supreme Court case law that had prohibited a trial counsel from arguing anything inconsistent with absolute innocence? This, in situations where Defendants have expressly indicated that their position at jury trial is for absolute innocence. This, even

when trial counsel had argued a jury to consider conviction for a lesser included offense? Further, fully arguing for such "consideration" is clearly the functional equivalent of conceding guilt to that lesser included offense. Here, counsel had supported her argument with a recitation of the facts of this case. This, in order to support such "consideration."

Here, trial counsel had argued in her Closing Argument that the jury should consider convicting the Defendant of Second Degree Reckless Homicide. She had argued how the facts of this case support such "consideration." He had originally been charged with First Degree Reckless Homicide. He had proceeded to jury trial on this very charge. However, the Defendant had not consented to such an argument for the lesser included offense. Defendant's position throughout the entire case, to include the jury trial, had been that he had not committed the crimes at all and was absolutely innocent. United State Supreme Court case law that had been issued subsequent to the issuance of the Judgement of Conviction 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 subsequent case law is McCoy vs. Louisiana, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018).

As indicated, 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 affirmatively indicated to the trial court that his client was asserting absolute innocence. A jury trial had subsequently occurred. Further, his trial attorney had originally indicated to the jury that he was innocent of the charges. Clearly, this initial indication by counsel had been of one continuously asserting that her client's position had been of absolute innocence. Further, Defendant had never indicated to either the trial court or the jury, at any point, that this position had changed.

However, during the trial, the State itself had requested a lesser included jury instruction of Second Degree Reckless Homicide. Trial counsel did not object. Neither counsel nor the Defendant had ever proposed this lesser included instruction. Neither counsel nor the Defendant had ever agreed to this lesser included instruction. The providing of this instruction had been solely at the State's request. Nevertheless, even though only the State had requested this lesser included jury instruction, during her Closing Argument, trial counsel had argued in part, that the jury should "consider" convicting the Defendant of this very lesser included offense. She had argued to the jury how the facts of this case support such a conviction. Clearly and logically, this had been an argument for guilt on the lesser included offense. This argument had been the functional equivalent of conceding guilt on this lesser included offense. However, Defendant had never

authorized such concession. This, even though counsel had clearly been trying to "cut her client's losses." As indicated, his entire position throughout the case had been that he was absolutely innocent and had not committed the charged crimes. This, both pre-trial as well as during the trial itself. Further, such a position is inconsistent with arguing for actual innocence. The jury had convicted the Defendant of the lesser included offense. Subsequently, Defendant had submitted a sworn Affidavit, attached to his original Motion for Postconviction Relief, corroborating his position.

According to Defendant's Postconviction Motion, the United States Supreme Court had issued case law subsequent to Defendant's conviction holding that such a concession of guilt by trial counsel, and even more broadly holding that 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, in any way, or at any time. Further, this, even if counsel is simply attempting to "cut the client's losses." Furthermore, such a concession/conduct inconsistent with absolute innocence 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; A 106-108).

The Court of Appeals had affirmed the trial court's Decision and Order via its own Decision dated June 2, 2020. 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 functionally and/or directly concede guilt, but that it had also been inconsistent with Defendant's claim of absolute innocence. According to the Defendant, McCoy vs. Louisiana goes farther than simply limiting itself to actual concessions of guilt. This case clearly indicates that any conduct at jury trial by trial counsel that is inconsistent with a Defendant's claim of absolute innocence is illegal and impermissible. Defendant's position is that trial counsel's Closing Argument had also been inconsistent with Defendant's position of absolute innocence. Asking a jury to consider conviction of a lesser included offense is clearly and materially inconsistent with a Defendant's position of actual innocence. Further, she had even argued to the jury how the facts of this present matter had supported such a conviction. In McCoy, trial counsel had conceded guilt, but had argued for a lesser included conviction by the jury. However, as discussed, McCoy goes farther than simply prohibiting an actual concession. Any conduct by trial counsel other than actual innocence is prohibited, and warrants a finding of structural error and a new jury trial. Here, counsel's conduct conceded guilt. This, either directly or functionally. Also, her conduct had clearly been

inconsistent with Defendant's position of absolute innocence.

This Supreme Court should reverse the trial court's Decision affirming the trial court denial of Defendant's Motion for Postconviction Relief. This Decision by this Supreme Court affects the Defendant as well as all similarly situated Defendants in the future.

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. 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). Defendant had never accepted this, or any other, plea offer. Instead, he had proceeded to a jury trial. This, to determine his innocence of the actual offense itself, as trial counsel had indicated at the final pretrial hearing. As trial counsel had indicated, Defendant's position was that "he did not do this."

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. Trial counsel had never agreed to this lesser included offense jury instruction. She had simply indicated that the defense had no objection to this request by the State. 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. There had not been any indication by the

Defendant that his position throughout this case of absolute innocence had changed at all during the entire trial.

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. As indicated in her Closing Argument, she had affirmatively argued to the jury that this lesser included offense had factually applied to the present situation. Such an argument is the functional equivalent of, and/or directly, conceding the Defendant's guilt on the lesser included offense.

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 109-110).

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. This case had been McCoy vs. Louisiana, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018)(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 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; A 106-108).

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 argument 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 argument based upon a clear reading of McCoy. 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 CONCEDE A DEFENDANT'S GUILT, OR TAKE A POSITION INCONSISTENT WITH ABSOLUTE INNOCENCE, AT A JURY TRIAL OVER THE DEFENDANT'S POSITION OF ABSOLUTE INNOCENCE. SUCH POSITIONS ARE STRUCTURAL ERROR AND MANDATE A NEW JURY TRIAL. A FINDING OF PREJUDICE IS NOT REQUIRED. THE PRESENT FACTS SUPPORT A CONCLUSION THAT TRIAL COUNSEL'S CONDUCT HAD BEEN IN CONFLICT WITH THIS CASE LAW. THEREFORE, DEFENDANT IS ENTITLED TO A NEW JURY TRIAL.

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. A trial attorney may not interfere with a Defendant's telling the jury "I was not the murderer." Presented with express statements of the client's will to maintain innocence, counsel may not steer the ship the other way. 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. Lousiana, 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. Counsel had argued for a lesser included conviction of second degree murder. 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 had argued to the jury during Closing Argument how the facts of the shooting fit this lesser included homicide. Clearly and logically, such an argument, presented with a factual underpinning, is an argument for the jury to convict the Defendant of the lesser included offense. There is no other plausible reason for counsel to make such an argument, in such a fashion, to the jury. 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 functionally argued to the jury during Closing Arguments that a conviction of second-degree reckless homicide would be appropriate, and how the facts of the case supported such a conviction 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. This, based upon the facts of the case, as applied to the second degree

homicide jury instruction. She had argued that these facts support a conviction of such a lesser included 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. McCoy had specifically applied to the situation where the trial counsel had argued for conviction of the lesser included offense. Counsel's 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. He had never wavered from this position throughout the trial. 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, maintained throughout the jury trial itself.

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' statements 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. As indicated, trial counsel had even argued how the facts of this present matter had supported such a conviction. She had clearly argued for such a conviction. 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 "consideration" of 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. Further, such a statement concedes that Defendant had functionally conceded guilt to the jury as to the lesser included offense. 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. Further, such an argument is contrary to the Defendant's unequivocal assertions of innocence. Accordingly, the McCoy standard of structural error, and not prejudicial ineffectiveness applies.

As indicated, both the trial court as well as the Court of Appeals had indicated that trial counsel's functional 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, McCoy 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. Hence, under McCoy, any "mixed argument" by trial counsel is insufficient to rebut McCoy. As indicated, counsel may not interfere in any way, and at any time, with Defendant's protestations of innocence. Defendant is captain of his destiny, and counsel may not steer the ship in any way, and at any time, contrary to the Defendant's wishes.

Here, contrary to both the trial court and the Court of Appeals, 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, either actually or functionally, 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. Such must be the holding of this Supreme Court.

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 both (1) convict the Defendant of this lesser included offense; and (2) been inconsistent with absolute innocence. Once again, she had affirmatively argued how the facts and the law to support such a conviction. Hence, she had affirmatively supported her argument to the jury for such "consideration." Accordingly, her argument had conceded guilt. Such a conclusion is obvious. Counsel's request to "consider" had not been an argument for acquittal, as mandated by McCoy. Instead, this argument had been an argument for conviction of the lesser included, and been inconsistent with absolute innocence. 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. Her argument had been tantamount to a concession of guilt as to the lesser included offense. This, for the reasons argued herein. She had affirmatively argued to the jury that it should "consider" the lesser included offense. This, by arguing how the facts and the law support such a conviction. Contrary to both Courts, McCoy vs. Louisiana is completely applicable and binding with respect to this present situation. The fact that she might have argued at other parts of

the trial that the Defendant had been innocent is irrelevant. McCoy prohibits any violation of a Defendant's protestations of innocence. As argued, the Defendant is the captain of the ship, not counsel. This present matter is not one of prejudicial ineffectiveness of counsel. Defendant is entitled to reversal and a new jury trial.

Once again, McCoy vs. Louisiana prohibits 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. 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, 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.

Absolute innocence had been Defendant's sole goal throughout the trial. Also, counsel's Closing Argument had clearly conceded guilt. Hence, she had presented an Argument that had also violated McCoy by arguing inconsistent with absolute innocence. The facts of this present matter support reversal.

CONCLUSION

WHEREFORE, For the Reasons Indicated Above, DECARLOS CHAMBERS, respectfully requests that this Honorable Court reverse the Decision of the trial court denying Defendant's Motion for Postconviction Relief, as well as the Court of Appeal's Decision affirming the trial court's Decision. As argued herein, both of these Courts had materially erred in rendering their Decisions.

Defendant respectfully requests that this Court grant him a new jury trial.

Dated this _____ day of September, 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

INDEX TO APPENDIX

CERTIFICATION

I hereby certify that the Supreme Court 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 five (25) pages.

Dated this 23rd day of September, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

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 23rd day of September, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Defendant-Appellant's Supreme Court Brief 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 23rd day of September, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant