STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP411-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DECARLOS K. CHAMBERS,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

A jury found Decarlos Chambers guilty of second-degree reckless homicide and possession of a firearm by a felon. The State charged Chambers with that possession offense and first-degree reckless homicide after a fatal shooting. During closing argument at trial, Chambers' attorney said that the jury should find Chambers not guilty because the State had not proven beyond a reasonable doubt that he was the shooter. Counsel briefly reminded the jury of the circuit court's instruction to "consider" second-degree reckless homicide if the jury could not agree on the first-degree homicide charge. Chambers did not object to that statement. He now argues that he is automatically entitled to a new trial because that statement was a concession of his guilt, impermissible under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

This Court should affirm Chambers' convictions. It should first conclude that Chambers forfeited his claim because he did not timely object to his trial counsel's alleged concession of guilt. This Court should further conclude that Chambers' claim is meritless because trial counsel did not concede Chambers' guilt.[1]

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[1] The State briefly notes four issues that are not before this Court. The State concedes that Chambers may rely on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), because new rules of constitutional criminal procedure apply to all cases while they are pending on direct review. *Davis v. United States*, 564 U.S. 229, 243 (2011). The State assumes the following three points for the sake of argument: (1) *McCoy* applies to non-capital cases; (2) *McCoy* forbids lawyers from conceding their clients' guilt, over objection, to uncharged lesser-included offenses that are submitted to the jury; and (3) Chambers expressly told his trial counsel to pursue an innocence defense, triggering counsel's duty under *McCoy* not to concede Chambers' guilt to the jury. This

(continued on next page)

ISSUES PRESENTED

1. By not timely objecting at trial, did Chambers forfeit his claim that his trial counsel impermissibly conceded his guilt during closing argument?

The circuit court and court of appeals did not address this issue.

This Court should answer "yes."

2. Does Chambers' *McCoy* claim fail on the merits because his trial counsel never conceded his guilt during closing argument?

The circuit court and court of appeals answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

A jury found Chambers guilty of killing Kyle Weary. (R. 140:2.) Weary was shot and killed in Milwaukee in January 2017. (R. 1:1–2.) Weary had a dispute with Chambers because Weary owed Chambers $15 and because Chambers had a pair of Weary's Nike Jordan shoes that Weary wanted back. (R. 137:116–17.) Firefighters found a gun in Weary's hand when they responded to the shooting and tried to perform life-saving measures on him. (R. 1:2.)

Court should not decide these issues because they are not before the Court. If this Court reverses, it should remand for an evidentiary hearing where the State may dispute some or all of those three points.

The State charged Chambers with two counts: (1) first-degree reckless homicide as a party to the crime with use of a dangerous weapon, and (2) possession of a firearm by a person adjudicated delinquent for a felony-level offense. (R. 3.) The State made a plea offer, but Chambers rejected it and opted for a jury trial. (R. 134:3–5.)

One of Chambers' neighbors, Desmond Walton, was a key witness for the State. Walton testified that one evening he saw Chambers standing near some bushes by a driveway. (R. 137:30–31.) Walton testified that Chambers fired a gun at a man in the street while Chambers was near the bushes. (R. 137:30–31, 34–35.) Walton could not see Chambers' face because it was dark outside, but Walton recognized Chambers based on his size, complexion, and body frame. (R. 137:31.) Walton also saw the man in the street shoot a gun, "kind of run off limping," and continue shooting "behind him." (R. 137:28–29.) Walton testified that "Kyle" was the man in the street and was the first person to shoot. (R. 137:34–35.) Chambers ran into his home after the shooting. (R. 137:31.)

Chambers' brother, Cornelius Glover, corroborated Walton's testimony. Glover told a detective that Chambers had told him that Weary was on a street corner talking to Chambers on the phone while Chambers was in some bushes across the street. (R. 136:129.) Glover further told a detective that Chambers had told him that Chambers shot Weary after Weary fired a gun into the air. (R. 136:129–30.)

The jury also saw surveillance video that captured some of the shooting. Video footage showed a man jog to the west across a street. (R. 136:89.) Some bushes were right outside the camera's frame. (R. 136:89.) The video next showed someone who appeared to be Weary crossing a street while talking on a cell phone. (R. 136:92.) Weary then ran into the middle of the street, started shooting, ran back in

the direction from which he came, and continued shooting as he ran away. (R. 136:92.) The video then showed the other man run back across the street to the east. (R. 136:93.) The man appeared to have a gun in one hand while holding a cell phone to his head. (R. 136:95.)

Chambers' girlfriend also provided evidence against him. She testified that Chambers went to her home after the shooting. (R. 137:62–63.) When talking about the shooting, Chambers told his girlfriend that "he think he hit him." (R. 137:63.) Chambers put some black clothing that he was wearing under his girlfriend's bed. (R. 137:62.) One day after the shooting, Chambers brought a gun to his girlfriend's house. (R. 137:69.) Chambers said that he had the gun for protection from Weary's family. (R. 137:69.) Chambers thought that Weary's family "might be after him" because he had shot Weary. (R. 137:69–70.)

Law enforcement officers searched Chambers' girlfriend's home with her consent after the shooting. (R. 137:74.) Officers found clothing that Chambers had left there and a .357 caliber revolver. (R. 137:74–76.)[2]

The jury also learned that phone records showed Chambers' phone number making and receiving calls minutes before the shooting. (R. 137:94.) Chambers' cell phone accessed a cell tower near the shooting to make and receive these calls. (R. 137:94–95.) Those outgoing calls from Chambers' phone were made to Weary's phone number. (R. 137:94, 115–16.)

[2] A firearm and tool mark examiner testified that he had not received any .357 shell casings or bullets to review for this case. (R. 137:111.) A revolver requires a person to manually eject shell casings from it after it is fired. (R. 137:109.)

A police detective testified about Chambers' statements to him. Chambers told the detective that he was not the shooter and was not present at the shooting. (R. 117:113, 119.) Chambers initially told the detective that he was "at some bitch's house" during the shooting, but then Chambers said that he was at his girlfriend's house at the time. (R. 137:119.)

Chambers chose not to testify and did not call any witnesses. (R. 138:63–66.)

The circuit court instructed the jury that if it could not unanimously agree on the charge of first-degree reckless homicide, it should consider the lesser-included offense of second-degree reckless homicide. (R. 139:6, 9.) The State requested that instruction, and Chambers did not object to it. (R. 138:68.)

Attorney Bowe gave a closing argument for the defense. (R. 139:26–37.) She told the jury to disregard the aiding-and-abetting/party-to-a-crime aspect of the homicide charge because "who is the shooter is the issue." (R. 139:31.)

Attorney Bowe summarized some of the court's jury instructions. (R. 139:33–35.) In doing so, she noted that "utter disregard for human life" was one element of the first-degree homicide offense. (R. 139:34.) She argued that "whoever shot" Weary did not act with utter disregard for human life because the shooting happened "at night, in the dark, in the rain, a distance away." (R. 139:34.)

Attorney Bowe then explained to the jury how to consider the lesser-included, second-degree homicide offense:

> 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.

(R. 139:34–35.)

Attorney Bowe then told the jury, "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." (R. 139:35.) She reminded the jury that "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." (R. 139:35.) She argued that the utter-disregard element was lacking because there were "overlapping shots" and it was dark outside. (R. 139:35.)

Attorney Bowe then argued that the case was not really about the "utter disregard" element of the homicide charge. She told the jury, "But the real decision you have to make is, is there credible evidence beyond a reasonable doubt that it was Decarlos Chambers who did the crime, right? That's the big decision." (R. 139:35.) Attorney Bowe said that Chambers had consistently "[d]enied each and every element to the crime" when police interviewed him. (R. 139:36.) She said that "there is information that if believed, if it is found to be credible, reliable evidence might support the fact that Decarlos Chambers was the shooter. But that's the problem. It might support it." (R. 139:36.) She said that "this is not a civil case where you think about who's got a little better story than the other." (R. 139:36.) "This is a case," Attorney Bowe said, "where there has to be confidence beyond a reasonable doubt before there should be a conviction." (R. 139:36.) She reminded the jury about alleged

"problems" and "contradictions" in the State's evidence. (R. 139:36–37.)

Attorney Bowe ended her closing argument by saying that "there's not sufficient evidence beyond a reasonable doubt to convict Decarlos Chambers. I think that you should find him not guilty." (R. 139:37.)

The jury found Chambers guilty of second-degree reckless homicide as a party to the crime with use of a dangerous weapon and possession of a firearm by a felon. (R. 140:2–3.)

The circuit court later sentenced Chambers to ten years of initial confinement followed by eight years of extended supervision on the homicide conviction, with a consecutive sentence of two years of initial confinement followed by three years of extended supervision on the felon-in-possession count. (R. 141:19–20.)

Chambers filed a motion for postconviction relief, arguing that he was entitled to a new trial because Attorney Bowe had improperly conceded his guilt during closing argument. (R. 113.) The circuit court denied the motion, reasoning that Attorney Bowe had not conceded Chambers' guilt. (R. 123:2–3.)

Chambers appealed his judgment of conviction and the order denying postconviction relief. (R. 124.) The court of appeals affirmed in a per curiam decision.

Chambers then filed a petition for review, which this Court granted.

STANDARD OF REVIEW

This Court independently reviews whether a defendant adequately preserved an issue for appeal, *State v. Corey J.G.,* 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998), and whether a defendant was denied his constitutional right

to counsel, *see State v. Drexler*, 2003 WI App 169, ¶ 2, 266 Wis. 2d 438, 669 N.W.2d 182.

SUMMARY OF ARGUMENT

I. Chambers forfeited his right to raise a *McCoy* claim on appeal because he did not timely object after his lawyer allegedly conceded his guilt during closing argument. A defendant may forfeit a *McCoy* claim by failing to timely object to an alleged concession of guilt because such a concession is not the functional equivalent of a guilty plea, which requires an express waiver. Applying the forfeiture rule here makes sense because trial counsel's statement at issue was ambiguous, so an objection could have allowed counsel to clarify that she was not admitting Chambers' guilt. There is also a sandbagging concern here because Chambers is raising an unpreserved claim that, if successful, would entitle him to automatic reversal of his convictions.

II. Putting aside the forfeiture issue, Chambers' *McCoy* claim fails on the merits because his trial counsel did not concede his guilt. She instead advanced an innocence defense by asking the jury to find Chambers not guilty, arguing that the State had not met its burden of proof, and disputing the identity of the person who shot the victim. Counsel made a vague statement that might have been an alternative argument implying that Chambers at most was guilty of a lesser-included offense. But counsel never said that Chambers was guilty of that lesser offense. An alternative argument of this sort is not a concession of guilt. Rather, courts have found concessions of guilt only in cases where lawyers clearly admitted their clients' guilt, which did not happen here.

ARGUMENT

I. By not timely objecting at trial, Chambers forfeited his claim that trial counsel impermissibly conceded his guilt.

"The Sixth Amendment guarantees to each criminal defendant 'the Assistance of Counsel for his defence.'" *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018). The *McCoy* Court recognized a defendant's Sixth Amendment "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* at 1508. It thus recognized a defendant's "right to insist that counsel refrain from admitting guilt." *Id.* at 1505.

Because the circuit court denied Chambers' postconviction motion without a hearing, the issue before this Court is whether Chambers is entitled to a hearing. *See State v. Sholar*, 2018 WI 53, ¶ 51, 381 Wis. 2d 560, 912 N.W.2d 89. A circuit court must hold an evidentiary hearing before granting a defendant relief based on attorney error unless the State concedes error. *See State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶ 22, 314 Wis. 2d 112, 758 N.W.2d 806; *see also Sholar*, 381 Wis. 2d 560, ¶¶ 50–51, 53–54. But a defendant is not entitled to a postconviction hearing if his claim is forfeited. *See, e.g.*, *State v. Saunders*, 2011 WI App 156, ¶ 29, 338 Wis. 2d 160, 807 N.W.2d 679.

Relying heavily on *McCoy*, Chambers argues that Attorney Bowe admitted his guilt despite his instructions to pursue an innocence defense. (Chambers' Br. 13–24.) Because Chambers forfeited that claim by not objecting at trial, he is not entitled to a hearing.

The State will first explain why a defendant can forfeit a *McCoy* claim without an express waiver, and then it will explain why Chambers forfeited his *McCoy* claim.

A. A defendant may forfeit a *McCoy* claim by not timely raising it at trial.

Although a litigant cannot forfeit certain claims by failing to object, a *McCoy* claim is not one of them. In other words, a defendant can forfeit a *McCoy* claim without an express waiver.

"Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted). "[S]ome rights are not lost by a counsel's or a litigant's mere failure to register an objection at trial. These rights are so important to a fair trial that courts have stated that the right is not lost unless the defendant knowingly relinquishes the right." *Id.* ¶ 31. Those rights include "the decision whether to plead guilty," "the decision whether to request a trial by jury," and "the decision to obtain the assistance of counsel and to refrain from self-incrimination." *State v. Albright*, 96 Wis. 2d 122, 129–30, 291 N.W.2d 487 (1980), *modified on other grounds by State v. Weed*, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485.

But a defendant can lose the right to assert an innocence defense without knowingly waiving it. Because a lawyer's concession of a client's guilt is *not* "the functional equivalent of a guilty plea," the client's explicit acceptance of a concession strategy is not required. *Florida v. Nixon*, 543 U.S. 175, 188 (2004) (citation omitted). A defendant still "retain[s] the rights accorded a defendant in a criminal trial" when his lawyer concedes his guilt. *See id.* (citation omitted). This Court has likewise held that a lawyer's admission of a defendant's guilt at trial did not waive the defendant's trial rights and was not the functional equivalent of a guilty plea. *State v. Gordon*, 2003 WI 69, ¶ 24, 262 Wis. 2d 380, 663 N.W.2d 765.

In addition, the *McCoy* Court repeatedly emphasized the importance of a defendant's objection to a concession of guilt.[3] The *McCoy* Court distinguished *Nixon* because the defendant in *McCoy* "adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. The defendant in *McCoy* objected pretrial when he learned of his attorney's proposed strategy to concede guilt to avoid the death penalty. *Id.* at 1506. The defendant later objected at trial, "out of earshot of the jury," when his lawyer conceded his guilt during opening statement. *Id.* The defendant in *Nixon*, by contrast, could not fault his lawyer for conceding his guilt because he "complained about the admission of his guilt only after trial." *Id.* at 1509 (citing *Nixon*, 543 U.S. at 185).

So, *Nixon* and *McCoy* show that a defendant can forfeit his Sixth Amendment right to insist on innocence without an explicit, knowing waiver of that right. A lawyer's concession of guilt is not the functional equivalent of a guilty plea, which does require a defendant's knowing waiver. The right recognized in *McCoy* can thus be forfeited where, as here, a defendant fails to timely object to counsel's alleged concession of guilt at trial.

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[3] *See, e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) (concluding that "McCoy disagreed with [trial counsel's] proposal to concede McCoy committed three murders, [and] it was not open to [counsel] to override McCoy's objection"); *id.* at 1510 (holding that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission"); *id.* at 1511 (holding that "counsel's admission of a client's guilt over the client's express objection is error structural in kind"); *id.* at 1512 (concluding that "[t]he trial court's allowance of [trial counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment").

To be clear, the State is not arguing that a contemporaneous objection is a required element of a *McCoy* claim. *McCoy* prohibits a lawyer from conceding a client's guilt "[w]hen a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts." *McCoy*, 138 S. Ct. at 1509 (emphasis in original) (quoting U.S. Const. Amend. VI). So, a *McCoy* claim has two elements: (1) a defendant's express instruction to pursue an innocence defense, and (2) a concession of guilt by his lawyer to the fact-finder.[4] A defendant may satisfy that first element even without objecting after his lawyer makes a concession of guilt. *See United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2644 (2020). To satisfy that first element, a defendant must object to a lawyer's proposed concession strategy before the lawyer concedes guilt to the jury. *See In re Smith*, 263 Cal. Rptr. 3d 63, 73 (Cal. App. Ct. 2020), *review filed* (July 1, 2020). A defendant cannot meet that element by first objecting after the concession has occurred. *See id.*

So, there is a difference between *proving* a *McCoy* violation and *preserving* a *McCoy* claim, though each requires a defendant's objection. To prove a *McCoy* violation, a defendant must show that he expressly opposed his lawyer's strategy to concede guilt before the concession occurred. To preserve a *McCoy* claim for judicial review, a defendant must object to a concession of guilt shortly after it occurs. A court need not reach the merits of a claim that is forfeited due to a defendant's failure to timely object.

[4] Again, at this point in the litigation, the State does not dispute that Chambers expressly told Attorney Bowe to pursue an innocence defense. *See supra* note 1. The State instead disputes whether Attorney Bowe conceded Chambers' guilt.

Mitchell v. State, 84 Wis. 2d 325, 339, 267 N.W.2d 349 (1978).

In short, Wisconsin's contemporaneous-objection forfeiture rule can apply to a *McCoy* claim. A *McCoy* claim is not one of the few constitutional issues that are exempt from this forfeiture rule. *Nixon* supports this conclusion because it recognizes that a concession of guilt is not akin to a guilty plea or a waiver of the right to a trial. And *McCoy* supports this conclusion because it recognizes the importance of a defendant's objection to a concession of guilt. When a defendant forfeits a *McCoy* claim by not timely objecting at trial, a court need not consider the merits of the claim. In that situation, a court need not decide whether the lawyer conceded guilt or whether the defendant instructed her not to do so.

B. Chambers forfeited his *McCoy* claim by not timely objecting to his trial counsel's alleged concession of guilt.

"[A] specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490. "The [forfeiture] rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727. "It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* This rule also "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* (citation omitted).

This Court should enforce this forfeiture rule here. Chambers could have avoided the need for this appeal had he raised his concession issue at trial. Had Chambers objected to the alleged concession at trial, Attorney Bowe could have clarified that she was not conceding Chambers' guilt. The circuit court could have instructed the jury to disregard any possible implication that Attorney Bowe was conceding Chambers' guilt. And the circuit court could have developed the record on this claim during the trial, eliminating the potential need for a postconviction evidentiary hearing. A contemporaneous objection by Chambers thus could have preserved scarce judicial resources.

Applying the forfeiture rule here especially makes sense because Attorney Bowe's alleged concession of guilt was an ambiguous statement that only suggested the jury should consider the lesser-included offense. Chambers' own affidavit seems to acknowledge this ambiguity. His affidavit states that "Ms. Bowe had argued to the jury during Closing Arguments that the jury should consider second degree reckless homicide as a lesser included offense to the original charge of first degree reckless homicide. *This, to me, was a concession of guilt*." (R. 115:7–8 (emphasis added).) Because Chambers interpreted Attorney Bowe's ambiguous statement to be a concession of guilt, he should have raised this issue with Attorney Bowe or the circuit court before the jury returned its verdict. Raising an objection could have allowed Attorney Bowe to clarify her ambiguous statement.

There is also a substantial "sandbagging" concern here because Chambers is seeking automatic reversal. "[C]ounsel's admission of a client's guilt over the client's express objection is error structural in kind," which means that "such an error is not subject to harmless-error review." *McCoy*, 138 S. Ct. at 1511. Allowing a defendant to seek

"automatic reversal" without a timely objection would "encourage[] gamesmanship." *State v. Pinno*, 2014 WI 74, ¶ 61, 356 Wis. 2d 106, 850 N.W.2d 207. The fact that Chambers is asserting a structural error supports the conclusion that he forfeited his *McCoy* claim by not timely raising it at trial. This Court should help reduce future opportunities for gamesmanship and sandbagging by holding that Chambers forfeited his *McCoy* claim.[5]

II. On the merits, trial counsel did not concede Chambers' guilt.

Regardless of whether Chambers forfeited his *McCoy* claim, he is not entitled to a hearing because his claim fails on the merits. "[A]n evidentiary hearing [on a postconviction motion] is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *State v. Sulla*, 2016 WI 46, ¶ 29, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). The record conclusively shows that Chambers' claim is meritless because Attorney Bowe did not concede Chambers' guilt.

A. Courts find concessions of guilt only when a concession is clear.

"When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy*, 138 S. Ct. at 1509 (emphasis in original) (quoting U.S. Const. Amend. VI).

[5] Of course, the contemporaneous-objection rule might apply differently in other situations. If a defendant alerts a circuit court to a *McCoy* problem before trial but does not object after a concession of guilt happens at trial, the pretrial objection could be sufficient to preserve the *McCoy* claim for appeal.

Many courts adopted that holding long before *McCoy*. *See id.* at 1507, 1510. Precedent from other jurisdictions shows what kinds of statements are concessions of guilt. This Court should look to those decisions for guidance because the *McCoy* "Court did not explain what kinds of concessions count as 'conceding guilt.'" *United States v. Wilson*, 960 F.3d 136, 143 (3d Cir. 2020).

When courts find an admission of guilt by trial counsel, the admission is clear. In one case, for example, the Illinois Supreme Court concluded that "[t]he concession of defendant's guilt by his attorneys was unequivocal. In the opening statement, one of defendant's attorneys told the jury, 'We are not asking you to find Charles Hattery not guilty. . . . [Y]ou will find him guilty of murder.'" *People v. Hattery*, 488 N.E.2d 513, 518–20 (Ill. 1985) (second and third alterations in original). A federal appellate court found a concession of guilt in a similar case where, "[t]hroughout the closing arguments, both attorneys for [the defendant] repeatedly stated to the jury that [the defendant] was 'guilty,' 'guilty as charged,' and 'guilty beyond reasonable doubt.'" *Wiley v. Sowders*, 647 F.2d 642, 649–50 (6th Cir. 1981) (per curiam). Other courts have found concessions of guilt when lawyers told the jury to find the defendant "guilty but mentally ill." *Cooke v. State*, 977 A.2d 803, 843 (Del. 2009); *People v. Fisher*, 326 N.W.2d 537, 538 (Mich. Ct. App. 1982) (per curiam). Another court found a concession of guilt, in violation of *McCoy*, where "[c]ounsel specifically told the jury he was *not* asking them to find defendant 'not guilty,' and further stated that the facts fit second-degree murder or manslaughter." *State v. Horn*, 251 So. 3d 1069, 1074 (La. 2018) (emphasis added).

Courts have also found concessions of guilt where, for example, a defense lawyer told the jury that "no reasonable doubt existed regarding the only factual issues in dispute,"

United States v. Swanson, 943 F.2d 1070, 1075 (9th Cir. 1991); a defense lawyer "actually urged the jury to return a verdict of guilty" and told the jury, "I think [the defendant] committed the crime of murder," *Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983) (citation omitted); a defense lawyer argued to the jury that the defendant was guilty of a lesser homicide offense and conceded that he was the perpetrator, directly contrary to the defendant's testimony that he did not kill the victim, *Jones v. State*, 877 P.2d 1052, 1056–57 (Nev. 1994) (per curiam); and a defense lawyer made a "closing argument expressing his personal opinion that his client should not be found innocent but should be found guilty of manslaughter," *State v. Harbison*, 337 S.E.2d 504, 506 (N.C. 1985).

B. Here, trial counsel raised an innocence defense and did not make a clear admission of guilt.

Here, in stark contrast to the case law just discussed, Attorney Bowe did not admit Chambers' guilt. "[A] defendant's counsel's statement must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime." *State v. Perry*, 802 S.E.2d 566, 574 (N.C. Ct. App. 2017) (citation omitted). "Whether such an admission actually occurred is necessarily fact-intensive." *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995). This analysis focuses on "the entire record." *Id.*

Attorney Bowe's alleged concession of guilt was an ambiguous, fleeting remark. The context suggests that this remark was just a reminder about the jury instructions. At most, Attorney Bowe might have been making an alternative argument asking the jury to consider a lesser-included

offense. In either case, Attorney Bowe did not concede Chambers' guilt.

The context of Attorney Bowe's alleged concession indicates that it was a reminder about the jury instructions, not an admission of guilt. Attorney Bowe said to the jury, "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." (R. 139:35.) Attorney Bowe made that statement in the context of discussing the jury instructions that the court had given. (R. 139:34–35.) Attorney Bowe reminded the jury that one instruction had told the jurors to consider second-degree reckless homicide "only if you can't" agree "on first-degree reckless." (R. 139:34.) Attorney Bowe did not admit Chambers' guilt by mentioning this jury instruction any more than the circuit court admitted Chambers' guilt by giving this instruction.

The rest of Attorney Bowe's closing argument shows that she did not concede Chambers' guilt. Attorney Bowe argued that "who is the shooter is the issue." (R. 139:31.) Attorney Bowe never said that Chambers was the shooter or that he was present at the shooting. She said that "whoever shot" the victim did not act with utter disregard for human life, an element of first-degree reckless homicide. (R. 139:34.) After asking the jury to "consider" the second-degree homicide offense, Attorney Bowe said that the jury's "real decision" was deciding whether the State had proven that Chambers committed the shooting. (R. 139:35.) "That's the big decision," Attorney Bowe reiterated. (R. 139:35.) Attorney Bowe said that Chambers had consistently "[d]enied each and every element to the crime" when police interviewed him. (R. 139:36.) Attorney Bowe ended her closing argument by saying, "[T]here's not sufficient evidence beyond a reasonable doubt to convict Decarlos

Chambers. I think that you should find him not guilty." (R. 139:37.)

So, when viewed in context, Attorney Bowe's brief comment about considering second-degree reckless homicide was not an admission of guilt. Attorney Bowe argued that the jury should find first-degree reckless homicide not proven because whoever shot Weary did not act with utter disregard for human life. Because the utter-disregard element was lacking, Attorney Bowe told the jury to consider second-degree reckless homicide. She then urged the jury to acquit Chambers because the State had not proven his identity as the shooter. By disputing the utter-disregard element, Attorney Bowe did not concede Chambers' identity as the shooter. She instead disputed both of those elements. She asked for an acquittal on first-degree reckless homicide because the State had not proven utter disregard or Chambers' identity. On second-degree reckless homicide, she asked for an acquittal because the State had failed to prove Chambers' identity. There was no concession of guilt. Chambers' contrary argument largely ignores the significant facts in the preceding paragraph of this brief.

Even if Attorney Bowe's passing remark to "consider" the second-degree homicide offense was an alternative to her argument for an outright acquittal, it was still permissible. In other words, Attorney Bowe did not concede Chambers' guilt even if the jury thought that she was implying in the alternative that it should consider convicting Chambers of second-degree reckless homicide. "To the contrary, counsel's closing argument is replete with argumentative statements demonstrating counsel's adversarial representation of [Chambers'] interests before the jury." *Williamson*, 53 F.3d at 1511. Attorney Bowe's "primary concern" was obtaining "a verdict of not guilty." *Id.* Given this primary defense, Attorney Bowe's passing comment about considering the

second-degree homicide offense was not an admission of guilt.

Indeed, courts have held that explicit alternative arguments of this nature are not concessions of guilt. As one state supreme court has explained, an "argument that the defendant is innocent of all charges, but if he is found guilty of any of the charges it should be of a lesser crime because the evidence came closer to proving that crime than any of the greater crimes charged, is not an admission that the defendant is guilty of anything." *State v. Harvell*, 432 S.E.2d 125, 128 (N.C. 1993) (citing *State v. Greene*, 422 S.E.2d 730, 733–34 (N.C. 1992)); *accord State v. Gainey*, 558 S.E.2d 463, 476 (N.C. 2002).

Two North Carolina Supreme Court opinions are instructive. In *Harvell*, "the defendant's counsel never conceded that the defendant was guilty of any crime. He merely noted that if the evidence tended to establish the commission of any crime, that crime was voluntary manslaughter." *Harvell*, 432 S.E.2d at 128. The court concluded that "[t]his was not the equivalent of admitting that the defendant was guilty of any crime." *Id.* Similarly, in *Greene*, the defendant's lawyer argued "that the defendant was innocent of all charges but if he were to be found guilty of any of the charges it should be involuntary manslaughter because the evidence came closer to proving that crime than any of the other crimes charged." *Greene*, 422 S.E.2d at 733–34. The court concluded that "[t]his is not the equivalent of asking the jury to find the defendant guilty of involuntary manslaughter." *Id.* at 734.

The Louisiana Court of Appeals reached a similar conclusion in a case that distinguished *McCoy*. The defendant's lawyer told the jury, "[S]econd degree murder

has responsive verdicts.[6] And if you don't want to go along with the justification defense, or the intoxication defense, or the insanity defense, you still have to look at all the elements for each one of those responsive verdicts." *State v. Johnson*, 265 So. 3d 1034, 1048–49 (La. Ct. App.), *writ denied*, 273 So. 3d 314 (La. 2019). After arguing that the defendant had been provoked, counsel told the jury, "if our affirmative defenses are not to your satisfaction, at [worst] [the defendant] is guilty of manslaughter, not second degree murder." *Id.* at 1049 (first alteration in original).

The Louisiana Court of Appeals rejected the defendant's claim that "these arguments by trial counsel amount to an admission of Defendant's guilt to the charge of second degree murder." *Johnson*, 265 So. 3d at 1049. The court concluded that "counsel's arguments are not a specific admission of Defendant's specific intent, but are clearly presented as an alternative argument for the jury to consider a responsive verdict of manslaughter." *Id.*

The alleged concession here did not even go as far as the permissible non-concessions in *Harvell*, *Greene*, and *Johnson*. Like the lawyers in those three cases, Attorney Bowe argued that Chambers was "not guilty." (R. 139:37.) Like the lawyer in *Johnson*, Attorney Bowe asked the jury to consider a lesser-included offense. Attorney Bowe possibly suggested in the alternative that the jury should consider a lesser-included offense if it thought that Chambers was the shooter. The lawyers in *Harvell*, *Greene*, and *Johnson* properly made similar two-fold arguments. But, unlike the lawyers in those three cases, Attorney Bowe did *not* say that Chambers was guilty of the lesser homicide offense if he was

[6] This reference to "responsive verdicts" referred to lesser-included offenses. *See* La. C. Cr. P. art. 814(a)(3).

guilty of anything. She simply told the jury that it "should consider" the lesser homicide offense. (R. 139:35.) That fleeting remark pales in comparison to the lawyers' statements in *Harvell*, *Greene*, and *Johnson*—which all fell short of being admissions of guilt.

In short, Attorney Bowe did not concede Chambers' guilt during closing argument. Her fleeting remark about considering second-degree reckless homicide simply meant that the State had not proven the utter-disregard element of first-degree reckless homicide. Disputing that element was not an admission of guilt. And even if the jury construed this fleeting remark to mean that Chambers at most was guilty of second-degree reckless homicide, this type of alternative argument is not a concession of guilt. Instead, Attorney Bowe argued that the jury should find Chambers not guilty because the State had not proven his identity as the shooter beyond a reasonable doubt. A lawyer does not concede her client's guilt when, as here, the lawyer seeks an outright acquittal.

C. Chambers' arguments are not persuasive because *McCoy* does not support his view of the law.

Chambers wants this Court to narrowly focus on Attorney Bowe's passing remark that the jury should consider second-degree reckless homicide. He argues that this remark was a concession of guilt. But *McCoy* does not support Chambers' position.

Chambers suggests that *McCoy* prohibits a court from considering the parts of a closing argument where a lawyer advanced an innocence defense. (Chambers' Br. 20–21.) *McCoy* does no such thing. In *McCoy*, "the attorney immediately conceded that his client was guilty of the charged crime, and never explored arguments that could

have led to acquittal." *United States v. Rosemond*, 958 F.3d 111, 123 (2d Cir. 2020) (citation omitted). The *McCoy* Court thus had no reason to address—and did not address—which parts of a record a court may consider. It did not explain whether a court may consider a closing argument in its entirety when deciding whether a lawyer conceded her client's guilt. As noted, a court must consider a lawyer's statements in context and the entire record when deciding whether the lawyer conceded her client's guilt. *Williamson*, 53 F.3d at 1511; *Perry*, 802 S.E.2d at 574. The *McCoy* Court did not overrule this case law, and Chambers has not cited any contrary authority.

Chambers also suggests that *McCoy* not only prohibits lawyers from conceding their clients' guilt over their objection, but that it more broadly "prohibits *any* conduct by trial counsel that [is] inconsistent with absolute innocence." (Chambers' Br. 24.) Chambers relies on the Supreme Court's language stating that a criminal defendant may "insist on maintaining her innocence at the guilt phase of a capital trial." *McCoy*, 138 S. Ct. at 1508. (Chambers' Br. 24.)

The Court's holding in *McCoy* is not as broad as Chambers suggests. The Court repeatedly and narrowly confined its holding to concessions of guilt, not other attorney conduct. It held that "a defendant has the right to insist that counsel refrain from admitting guilt," *McCoy*, 138 S. Ct. at 1505; a lawyer "may not override [a client's desire to maintain innocence] by conceding guilt," *id.* at 1509; and "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission," *id.* at 1510. The Court did not prohibit lawyers from making alternative arguments like the ones made in *Harvell*, *Greene*, and *Johnson*. It just held that lawyers may not admit their clients' guilt over their objection, and it did not explain what counts as an admission of guilt. Here, Attorney

Bowe did not admit Chambers' guilt for the reasons already stated.

Although not directly applicable here, Chambers' broader view of *McCoy* conflicts with the settled principle that "[c]onceding an element of a crime while contesting the other elements falls within the ambit of trial strategy." *Rosemond*, 958 F.3d at 122. "The majority in *McCoy*, in fact, acknowledged as much." *Id.* (citing *McCoy*, 138 S. Ct. at 1510); *see also Swanson*, 943 F.2d at 1075–76 (making same observation pre-*McCoy*). Chambers is thus wrong to argue that *McCoy* prohibits lawyers from doing anything "inconsistent with absolute innocence." (Chambers' Br. 24.)

To summarize, Attorney Bowe did not violate Chambers' right under *McCoy* because she never admitted Chambers' guilt during closing argument. She disputed the identity of the shooter, argued that Chambers was not guilty, and maintained that the State had not met its burden of proof. Attorney Bowe's alleged concession was likely just a reminder about how the jury instructions applied, given her argument that the State failed to prove utter disregard for human life. Her alleged concession maybe was a vague and short alternative argument implying that Chambers at most was guilty of a lesser-included offense, but she never said that Chambers was guilty of that offense. Nor did she urge the jury to convict Chambers of anything. She instead sought an acquittal. This type of closing argument is not a concession of guilt.

CONCLUSION

This Court should affirm the court of appeals' decision. As noted above in footnote one, if this Court reverses, it should remand for the circuit court to hold an evidentiary hearing.

Dated this 19th day of October 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6773 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 19th day of October 2020.

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