STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2019AP787

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUANNE D. TOWNSEND,

Defendant-Appellant.

On Appeal from a Decision and Order Denying Motion for Postconviction Relief and Motion for Postconviction Discovery Entered by the Milwaukee County Circuit Court, Hon. Joseph Wall Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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INTRODUCTION

Duanne Townsend was convicted of 1st degree intentional homicide, 1st degree attempted homicide, and possession of a firearm by a felon. He shot Brandon Thomas, Latisha[1] and Jamal. Brandon died.

This appeal concerns Duanne's §974.06 motion, which argued that: (1) Attorney Dan Mitchell (trial counsel) conceded guilt over Duanne's objection in violation of his 6th Amendment autonomy rights, and (2) Attorney Basil Loeb's §809.30 postconviction motion ineffectively presented meritorious claims for ineffective assistance of trial counsel and a new trial in the interest of justice. Both the circuit court and this court of appeals condemned Loeb's motion for conclusory allegations, lack of legal authority, and violation of a court order.

Had Loeb performed effectively, the postconviction court would have learned what the jury should have heard. Duanne beat up Latisha's friend, Rocky, at her apartment. Afterwards, she, Brandon, Jamal and Rocky went to another friend's apartment, where Rocky heard Brandon call for a gun so he could kill Duanne and his family in revenge. Rocky heard Latisha agree with the plan. Brandon, Latisha and Jamal went with a gun to the apartment of Duanne's sister, Simone. They saw Duanne with a gun. They started arguing. They went inside. Jamal threatened Duanne and showed him his gun. Duanne started shooting at Jamal but hit Latisha twice in the chest because she was standing next to him. He shot Brandon because he charged him.

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[1] Pursuant to §809.19(1)(g), this brief uses pseudonyms for the victims: Latisha for LT, Jamal for JW, and Rocky for RW or "Buck Wild."

Due to Mitchell's ineffectiveness, the jury instead heard that Duanne beat up Rocky. Later, Brandon called for a gun to protect everyone but did not get one. Brandon, Latisha, and Jamal just happened to walk by Simone's apartment, saw Duanne with a gun and went inside to talk to him—unarmed. Simone heard Jamal make threats about guns and saw him lift his shirt as if to flash one. Duanne started shooting. He shot Latisha, an unarmed female, 4 times—3 in the back. He also shot Jamal and Brandon. The jury observed Mitchell (trial counsel) promise to prove self-defense and then break that promise and concede Duanne's guilt (over Duanne's instruction). The jury heard Mitchell call his Simone "a liar." The jury also heard the State say they could convict Duanne of intentional conduct because he shot Latisha in the back.

This appeal also concerns Duanne's motion for postconviction discovery of Latisha's medical records, which neither Mitchell nor Loeb request. They will show that she testified falsely that she was shot in the back.

ISSUES PRESENTED

1. Whether Duanne is entitled to a new trial due to structural error—he was denied his 6th Amendment right to determine his own defense?

   The circuit court answered "no."

2. Whether Duanne received ineffective assistance of postconviction counsel due to the way his lawyer briefed and presented meritorious claims for ineffective assistance of trial counsel and a new trial in the interest of justice to the circuit court during his direct appeal?

   The circuit court answered "no" without a hearing.

3. Whether Duanne is entitled to postconviction discovery of Latisha's medical records to show that she testified falsely at trial and the State used her false testimony to argue that Duanne shot with intent rather than in self-defense.

   The circuit court answered "no."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be helpful because the procedural posture and facts of this case are complicated. Wis. Stat. §809.23. This appeal presents Wisconsin's first opportunity to address a claim of structural error under *McCoy v. Louisiana***,** __U.S.__, 138 S.Ct. 1500 (2018). In addition, there do not appear to be any published decisions addressing a claim that a postconviction lawyer was ineffective in the way he briefed and presented a defendant's §809.30 postconviction motion. To provide the bench and bar with guidance on how to resolve these issues, the court of appeals should publish its opinion. Wis. Stat. §809.24.

STATEMENT OF CASE AND FACTS

I. The people and places involved.

This case stems from interactions among 9 different people at three different locations.

- Duanne Townsend is the defendant.
- Antonio Stewart is Duanne's brother.
- Simone Stewart is Duanne's sister. The shooting at issue occurred in her apartment.
- April and Erica Brown are Duanne's and Antonio's girlfriends.

- Latisha was injured in the shooting.
- Rocky is Latisha's good friend. He was beat up at Latisha's apartment.
- Jamal is the godfather of Latisha's child. He was also injured in the shooting.
- Brandon Thomas was Latisha's cousin. He died in the shooting.
- Gregory Hemphill is also Latisha's friend. Brandon, Latisha, Jamal and Rocky were at Gregory's apartment when Brandon called for a gun.

II. The trial

A. Opening statements.

During opening arguments, the State told the jury that Duanne and Antonio beat up Rocky at Latisha's apartment. Jamal was also there, but he did not participate because he was drunk. Afterwards, Latisha, Jamal, and Rocky went to the home of Latisha's friend, Gregory, where Brandon (Latisha's cousin) joined them. Then Latisha, Jamal and Brandon headed to Latisha's apartment complex. They saw Duanne standing outside of Simone's apartment holding a 9-millimeter pistol with an extended clip. They decided to go talk with him, then entered Simone's the apartment where, after a heated discussion, Duanne shot Jamal, Latisha, and Brandon, who died from his wound. Police found Duanne's pistol and a brown and silver revolver at the scene. The State told the jury that the brown and silver revolver may have belonged to Brandon, but he never threatened Duanne with it. (R.270:22-26).

During his opening argument, Mitchell told the jury that Duanne acted in self-defense. He said that the fight with Rocky

prompted Latisha, Jamal, and Brandon to arm themselves and go to Simone's apartment for revenge against Duanne and his family. Indeed, Duanne, Antonio, April, Erica, Simone, and her 3-year-old daughter were all in the apartment when Brandon, Latisha, and Jamal entered it with a gun. They put Duanne's family at risk. Mitchell told the jury: "The judge is going to talk to you at the end about the state of the law for self-defense in 2011. I ask that you pay very careful attention to that." (R.270:29). Mitchell likened Duanne to Clint Eastwood in *The Good, The Bad and The Ugly*. "[N]o one in his family gets injured or shot because he drew first." (R.270:30).

The trial spanned 4 days. The State presented testimony from Latisha, Jamal, Simone, April, numerous policemen, and state laboratory employees. The defense called no witnesses and offered no evidence.

B. Police testimony.

Detective Kevin Klemstein testified that he interviewed Latisha after the shooting. She told him that Brandon was wearing a brown hooded sweatshirt with its zipper open. Duanne shot her and Jamal, and they fell to the floor. Brandon jumped over them. As he ran out the door she could see Brandon's hand on his "Dirty Harry" gun. (R.273:95, 97-100).

> Q. What did [Latisha] say Brandon had?
>
> A. She said when Brandon Thomas jumped over them, he had his left hand inside the jacket that was open on his right side. And when he did this, and [sic] she could see what he described as being a chrome-colored gun with brown on it. (R.273:98-99*; see also* R.273:104)
>
> Q. And what's [Brandon] doing while he's running and he's got his hand by this Dirty Harry gun?

A. Just trying to get out of the apartment, apartment 34. (R.273:99).

Detective Klemstein further testified that Latisha told him that she saw Duanne take 3 Ecstasy pills before the shooting. "She described them as two blue Jaguars and a yellow rolly, which are Ecstasy pills" he said. (R.273:103).

C. Latisha's testimony.

Latisha testified that Duanne and Antonio beat up Rocky at her apartment. Jamal was also there but he was drunk and asleep. Jamal did not make any threats to get his Mossburg gun. (R.271:124-127).

Latisha said that Brandon came to her apartment and then she, Brandon, Jamal, Rocky and her kids went to the home of her friend, Gregory. (R.271:126-128). There she heard Brandon on his phone asking: "Can someone come over here with a banger and assist us 'cause a dude just got jumped in my cousin's hallway and he felt as if they were comin' back to kill us." (R.271:129; *see also* R.271:130-132). Then Latisha, Brandon and Jamal decided to head home. They passed Simone's apartment along the way. (R.271:137-139, 150-152). They did not have a gun with them. However, they saw Duanne, Antonio, Erica, and Simone standing outside, "congregatin', flashing pistols, looking at us." (R.271:135-138, 150-152). In particular, Latisha saw Duanne with a black 9 millimeter pistol with an extended clip. (R.271:135).

According to Latisha, Duanne asked them to come over to talk, so they did. (R.271:135; R.272:6). The conversation became heated because Duanne's group allegedly had accused Rocky of trying to hit Simone with a car and had been beaten him up. (R.272:8). Simone invited everyone into her apartment, so Latisha, Brandon, and Jamal went in—allegedly unarmed.

(R.272:7-11; 37-39, 50-52). At this point, the two groups were arguing over Rocky. (R.272:9).

Latisha testified that inside Simone's apartment Duanne told them to shut up because he had a gun. Jamal replied, "We don't care about your gun, once they gave you a gun they didn't stop making guns." He was like, "if I wanted to I could go get a Mossberg and blow you as well." (R.272:17). Latisha did not say that Jamal actually had a gun. (R.272:60). However, she admitted that Jamal's statement could have been perceived as a threat. (*Id*).

Latisha testified that she was standing facing Jamal trying to calm him down with her back to Duanne. Antonio was facing Duanne trying to calm him down. (R.272:17). That's when Duanne shot her in the back, and she fell down. Then Duanne shot Jamal. He fell next to her and covered her body with his. (R.272:21-24). Meanwhile, Brandon was "[s]tanding there with his hands up [in a surrender posture.]" (R.272:21-24). Latisha said that Brandon remained standing with his hands up while Duanne went in the hallway where he shot Jamal 4 to 5 more times, then returned to the apartment where Brandon hopped over Latisha and Jamal (who supposedly was just shot in the hall) as they lay on the floor:

Latisha denied ever telling Detective Klemstein that she saw a gun on Brandon. (R.272:25).

> Q Ma'am, you told the detectives that [Brandon] had [a gun] in like his waistband or on his person, he didn't have it in his hands but he did have it on his person?
>
> A. Actually, I didn't tell the detectives that he had it on his person because Brandon had on a leather jacket and it was zipped up, so I couldn't see if he had it on his person.
>
> Q. So if he did you don't know?

A. If he did I have no idea. (R.272:26-27).

Q. So you don't recall telling any police detective that as [Brandon's] jumping out, a 38 or Dirty Harry gun drops out of his sweatshirt area?

A. No. And I didn't speak to the police that long for even to make a full statement like that, so no. (R.272:52).

Latisha also qualified her statement that Duanne took Ecstasy before the shooting.

Q. At some point . . . at the end of the evening you talked to the detectives about seeing Duanne popping some pills?

A. Yeah, either him or his brother. I didn't necessarily say him, I said him or his brother. (R.272:42-43).

Q. And before the shooting actually happens how much time before these rollers are consumed and the shooting takes place?

A. I would say about ten . . . fifteen minutes, not even enough time for the rollers to kick in. (R.272:43).

Finally, Latisha testified that Duanne shot her "all over the right side of her body." (R.272:33). She was shot 4 times and 3 bullets remained inside her body, including one lodged in her sternum. (R.272:30). And when asked how she sustained ***chest*** wounds if she was shot from behind, she said that she was shot 4 times in the back and the bullets came into her chest and 3 of those bullets were still there. (R.272:35-36).

D. Jamal's testimony.

Jamal contradicted Latisha on several critical facts. He agreed that he was drunk and asleep during the fight with Rocky at Latisha's apartment. Contrary to Latisha's testimony, he said that when he woke up he told her that he was going to get his gun.

Q. And when you woke up, what did you do?

A. I woke up and everyone, they said, get on the floor. And I said what for? And they said, because somebody's coming back to shoot up the house. So, I said well, I will go and – I will go and get mine, because I don't want to be here naked.

Q. When you say naked are you talking about without clothing or without a firearm?

A. Without a firearm. (R.272:75).

Jamal said that he and Latisha went to Gregory's apartment. But contrary to Latisha, he denied that Brandon ever called for a gun. He also denied ever seeing Brandon with a gun that night.

Q. Okay, now, while you were over at [Gregory's] house, or at any time, this individual [Brandon], the man who died, did he have any discussions about getting a firearm?

A. No.

Q. Do you remember him ever talking about getting a firearm or making a phone call?

A. No.

Q. Do you know if he had a firearm?

A. No. (R.272:80-81).

Like Latisha, Jamal denied having a gun inside Simone's apartment. (R.272:82). But unlike Latisha, he testified that he never threatened to get one while inside Simone's apartment. He made that comment earlier in the day at Latisha's apartment.

I didn't—I didn't say this in [Simone's apartment.] I said this at [Latisha's] house when I first woke up and they told me to

> get on the floor. That's when I mentioned about going to get the gun. (R.272:89).

Jamal said that he may have mentioned having a gun at his house. He couldn't remember. (R.272:89-90).

Whereas Latisha testified that the shooting began while she was facing Jamal trying to calm him down, Jamal recalled the situation differently. He was simply talking loudly with Antonio (not with Latisha) when Duanne started shooting. (R.272:93). Furthermore, Duanne shot him in the apartment, not in the hall. (R.272:94).

> I just hear shots rang out and I found myself on the floor on top of [Latisha]. And as I look, I see Mr. Duanne come and stand over me and shoot me. And then he went back in the hallway because Brandon had—Brandon was the first person out of the apartment, Brandon was already gone. (R.272:93)
>
> Q. You don't know if [Brandon] jumped over you or anything?
>
> A. ***He didn't jump over me***. He was gone when—when Mr. Duanne came and stand over me and shoot me Brandon was already gone. (R.272:94).

Jamal testified that he sustained 13 entry and exit wounds. Seven bullets remain in his body. (R.272:94-95).

E. Simone's testimony.

Simone and her daughter were in the apartment when the shooting occurred. She testified that when people started arguing she took her daughter into a bedroom.

> Q. Did you hear what they were yelling about?
>
> A. I heard [Jamal] saying that we have guns too. (R.272:114).

She did not see Jamal, Latisha or Brandon with a gun. But she heard Jamal saying "we have guns too." (R.272:114; R.273:14).

> I come—I come out of my room because I'm wondering why they talking about guns and not talking. And I come out of the room and [Jamal] and my brother ***are facing each other*** and he has***—[Jamal] has his shirt up***, and--and next thing you know my brother cocked the gun back and he started shooting. Once he started shooting I took my baby in the other room and ran. (R.272:115). (Emphasis supplied).

Simone testified that Jamal lifted his shirt as if to show that he had a gun.

> Q. Is he doing it in the fashion we often see people, like in TV or movies, I got a gun, or is he doing it, like, I'm taking a shirt off. I don't want to get it dirty in a fight.
>
> A. Just like the first one you said. Like he moves, he just lifts it up—(R.273:12).

According to Simone, Duanne shot Jamal while Latisha was standing next to him. After everyone left, Simone found a silver revolver that she did not recognize on the floor. Duanne grabbed it and ran out the door. She and April (Duanne's girlfriend) began cleaning up blood. To protect Duanne, she told police that she saw Jamal with the silver gun in his waistband. She was convicted of obstruction but was sentenced to probation in exchange for testifying truthfully at trial. (R.273:9-11)

F. April's testimony.

April testified that she did not see Duanne "consume any Ecstasy." (R.273:36). She "did not know him to take pills like that." (*Id.*). The State charged April with a felony for cleaning up the scene of the shooting. It agreed to amend the charge to a

misdemeanor and not recommend jail in exchange for truthful testimony. (R.273:33).

G. Mitchell's advice and the self-defense instruction.

At the close of its case, the State argued that there was no evidence to support a self-defense instruction. (R.274: 43-46). The court asked: "Would it be reasonable for a jury to infer that [Duanne] shot because he thought [Jamal] was going to pull out the revolver and shoot him or somebody else in the room?" (R.274:46). The court noted that Brandon was dead, so if Latisha put the second gun on Brandon, "she can protect [Jamal]" who "was holding up his shirt as if to show he had a gun." (R.274:47).

The court observed:

> I don't think there's anything in here which will allow me, as a matter of law, to say that the jury could not believe that [Jamal] was holding up his shirt showing a gun that wasn't in the room previously. (R.274:50).

The court thus gave instructions on self-defense, 1st and 2nd degree intentional homicide, 2nd degree reckless homicide, and 2nd degree reckless endangerment of safety. (R.274:50-51).

At that point, Mitchell conferred with Duanne about testifying. Duanne said that he wanted to testify that: (1) he shot at Jamal first because he was holding a gun and threatened to shoot him; (2) he hit Latisha in the chest by accident because she was standing next to Jamal; and (3) he shot Brandon because Brandon rushed at him. (R.227:241; App.161).

Mitchell told Duanne not to testify. He said it was unnecessary because the court had agreed to give the self-defense instruction, and he did not want the jury to hear Duanne's criminal record. Mitchell said he wanted to argue that Duanne was high on Ecstasy when he started shooting to show that

Duanne did not act with intent. Duanne told Mitchell that he had not taken Ecstasy before the shooting, and he did not want an Ecstasy defense. (R.227:241; App.162).

Duanne initially told the court that he would waive his right to testify, but then he asked for more time to consult Mitchell, who again advised him not to testify. Duanne followed his advice and waived his right to testify. (R.274:42-43, 53-59).

When advising Duanne, Mitchell never mentioned that: (1) he planned to call Simone "a liar" during his closing argument; (2) without Duanne's testimony there would be no credible testimony that Duanne shot Jamal, Latisha and Brandon in self-defense; (3) he was not going to ask the jury to find self-defense; or (4) he was going to argue the Ecstasy defense despite Duanne's express objection. (R.227:242; App.162). Mitchell rested the defense without calling a single witness.

H. Closing statements.

During closing arguments, the State focused on proving 1st degree intentional and attempted homicide and on refuting the self-defense argument that Mitchell promised to make. It told the jury: "There is no testimony, no evidence whatsoever" that Brandon, Latisha, and Jamal went to Simone's apartment "***for anything other than to talk*** to the defendant and the people that beat up [Rocky]." (R.275:13). "This isn't [a] case of people coming to a house with guns and [the defendant is] forced to defend himself. No." (R.275:14). Duanne "starts firing, ***first, at [Latisha] in the back***. She goes down, then [Jamal]." (R.275:16). (Emphasis supplied). Brandon "gets shot as he's making a run for his life." (R.275:17)(Emphasis supplied).

"[T]his is not the good, the bad, and the ugly. This is not one person drawing first, ladies and gentlemen." (R.275:22). "The defendant obviously didn't see [a gun] if no one else did. So there

is no reason to shoot." (R.275:23). "This is not a case of self-defense. This is a case of Mr. Townsend being angry and pulling the gun and shooting three people." (R.275:23). The State told the jury 10 different times that this is not a "quick draw" or self-defense case. (R.275:13, 14, 22, 23, 24, 25, 26, 27).

To prove intent and refute self-defense, the State also told the jury over and over that Duanne shot Latisha in the back. The State said: "[Duanne] starts firing, first at [Latisha] ***in the back***. She goes down, then [Jamal.]" (R.275:16). (Emphasis supplied). It asked the jury: "Who does [Duanne] shoot first, ladies and gentlemen? Follow the casings, follow the bullets. He is shooting ***[Latisha] in the back***." (R.275:23; *see also* R.275:25). (Emphasis supplied). The State said: "If we are so concerned about [Jamal], why are we shooting ***[Latisha] first in the back***?" (R.275:25). (Emphasis supplied). It also said: "[Duanne] shoots an unarmed female ***in the back***." (R.275:26). (Emphasis supplied).

Next, Mitchell gave his closing statement. He did not ask the jury to find self-defense. He never uttered the words "self-defense." Instead, he told the jury 7 times that Duanne was high on Ecstasy during the shooting. (R.275:30, 33-37). He asserted that Latisha and April established this fact. (R.275:30, 34). He called Simone, ***the only witness who saw Jamal lift his shirt***, a "liar" and asked the jury: "How do you know Simone is lying? When her lips are moving." (R.275:33-34). He said "we don't know what [Duanne] saw." (R.275:30, 37). He described the shooting as a "preventable tragedy." ***"[I]f Duanne hadn't taken three pills of Ecstasy and been drinking***, maybe he would [sic] have made this terrible tragic decision" (R.275:36). (Emphasis supplied).

In rebuttal, the State stressed that Duanne acted with intent to kill, not in self-defense. (R.275:40-44). It argued that there was no evidence that Duanne was high during the shooting. Latisha told police that she saw him take pills, but she changed

her testimony at trial. (R.275:39). The State said that April ***denied*** seeing Duanne take Ecstasy and that the Mitchell conjured an Ecstasy defense to get a finding of recklessness. (R.275:42).

> So when self-defense falls, we try to put this as reckless because he's high and he's drunk. There is no testimony as to that, ladies and gentlemen. (R.275:42).

III. Deliberations and verdict.

During deliberations, the court asked Duanne what he thought about Mitchell's decision to concede guilt to recklessness.

> The Court: . . . In closing arguments Mr. Mitchell suggested to the jury that it would be acceptable to you if they find you guilty of the reckless homicide based on all the circumstances. That's his choice to make as a professional. But I think it makes sense at this point to ask if you agree with that strategy.
>
> The Defendant: ***No***.
>
> The Court: And what strategy do you want to pursue?
>
> The Defendant: Weigh in, ***to put their own decision***.
>
> The Court: Okay. But you don't want them to take any particular verdict among the ones that are being offered to them.
>
> The Defendant: No, sir. I'm not sure to be honest. (R.276:60-61). (Emphasis supplied).

Mitchell immediately volunteered: "Obviously I [did] so not only because of the way the evidence came out but because of the potential exposures that are out there. One is life. One is six years, and one is 12 and a half." (R.276:61).

The jury convicted Duanne of 1st degree intentional homicide of Brandon, attempted 1st degree intentional homicide of Latisha and Jamal, and two counts of felon in possession of a firearm. (R.277:5-6).

IV. Section 809.30 postconviction proceedings.

Attorney Loeb, filed a postconviction motion asserting claims for ineffective assistance of trial counsel and a new trial in the interest of justice. (R.185. Regarding the "ineffective assistance of trial counsel" claims, Loeb asserted that Mitchell:

- Failed to fully present Duanne's self-defense theory to the jury.
- Failed to impeach Latisha with her statement to police that she saw Brandon with a gun and failed to impeach Latisha and Jamal with video footage from Trial Ex. 1 showing that Brandon went to Simone's apartment with a gun.
- Failed to subpoena (a) Antonio who would have testified that Jamal was holding a gun at the time of the shooting, and (b) Rocky who would have testified that Brandon went to Simone's apartment with the intent to shoot people.
- Misled Duanne into waiving his right to testify. (*Id*.)

The circuit court[2] denied Loeb's postconviction motion without a hearing. It adopted the arguments in the State's response brief and held that Loeb made cursory allegations, violated a court order by failing to submit supporting affidavits on time, and failed to show—or even allege—the prejudice requirement for an ineffective assistance of trial counsel claim. (R.194; App.159; R.189). It stated: "The court finds the motion

[2] Judge Sankovitz presided over the trial. Judge Wagner presided over postconviction proceedings.

completely conclusory and without requisite support to obtain a *Machner* hearing." (R.194:2; App.160). The court did not address Loeb's "new trial in the interests of justice" claim.

Loeb moved for reconsideration and this time submitted an affidavit from Antonio stating that he saw Jamal holding a gun when Duanne shot him. (R.195, R.196). The court denied reconsideration because: (a) it was impossible for a jury to believe Antonio over Latisha, Jamal, and Simone, and (b) Antonio did not attest that Jamal held the gun in a threatening manner. Also, Loeb failed to prove prejudice. (R.197; App.157). Again, the circuit court said nothing about the "new trial in the interests of justice" claim.

Loeb appealed and raised two issues: (1) Duanne was entitled to a *Machner* hearing on his "ineffective assistance of trial counsel claims"; and (2) Duanne was entitled to a new trial in the interests of justice because the real controversy was not tried. The court of appeals affirmed. (R. 207; App.145). Duanne filed a petition for review, which the supreme court denied over two dissents. (R.224; App.141).

V. Section 974.06 proceedings.

Duanne filed a §974.06 motion[3] and a motion for postconviction discovery and presented the following arguments:

First, Duanne was entitled to a new trial due to structural error. Contrary to Duanne's instructions and *McCoy v. Louisiana*, __U.S.__, 138 S.Ct. 1500 (2018), Mitchell abandoned Duanne's self-defense claim, presented an unapproved, false Ecstasy defense, and conceded guilt to reckless conduct. (R.227, R. 249).

[3] Duanne amended his §974.06 motion to add this claim. (R.233). For simplicity's sake, this brief refers to the original and the amended motions as the §974.06 motion.

Second, Loeb provided ineffective assistance of postconviction counsel in the way he presented Duanne's claims to the circuit court. He performed deficiently in his research, briefing, and marshalling of evidence to support Duanne's §809.30 postconviction motion and in violating a court order to file Rocky's affidavit by a deadline.

Duanne's §974.06 motion attached the missing affidavit by Rocky, who attested that he was at Gregory's apartment when Brandon called for a gun. Brandon said: "Bring the heat over" and "those niggas jus upped on me" and "I'm going to go over there and fuck someone up" and I'm "going to kill someone, kids and all." And Latisha replied "Come on let's go over there." (R.227:244; App.164). Duanne's §974.06 motion also attached his own affidavit describing his conversations with Mitchell about whether to testify and Mitchell's plan for closing argument. (R.227:241; App. 161). Duanne argued that Loeb's ineffectiveness cost him a *Machner* hearing on his claims for ineffective assistance of trial counsel and ultimately a new trial. (R.227).

Duanne also filed a motion for postconviction discovery of Latisha's medical records. (R.229). The records would have shown that the State relied on false testimony during its closing argument. Duanne did not shoot Latisha once in the side and 3 times in the back, as Latisha testified. He shot her twice in the chest, which supported his theory that Jamal and Latisha were facing him with a gun when he started shooting. Duanne argued that Loeb should have moved for postconviction discovery to prove that Mitchell was ineffective in failing to conduct pre-trial discovery of the medical records. (R.229).

In a 40-page decision, the circuit court denied Duanne's §974.06 motion and motion for postconviction discovery without a hearing. (R.252; App.101). Its reasons are set forth in the corresponding Argument sections below. Briefly, it held that

McCoy only applies to death penalty cases on direct appeal. It did not address Duanne's claims that Loeb provided ineffective assistance of postconviction counsel at all. Instead, it held that Duanne's ineffective assistance of trial counsel claims were procedurally barred. And it denied Duanne's motion for postconviction discovery because evidence that Latisha testified falsely that she was shot in the back rather than the chest would not impeach her credibility or support Duanne's self-defense claim. (R.252:38; App.138).

ARGUMENT

I. Duanne is entitled to a new trial because Mitchell violated his 6th Amendment right to determine his own defense.

A. Duanne's structural error claim.

In *McCoy*, the government charged the defendant with murdering three family members. He insisted that he did not commit the crimes and told his lawyer not to concede that he was guilty. Because evidence of guilt was overwhelming, and the jury could return the death penalty, his lawyer told the jury that the defendant was guilty in the hopes of gaining mercy at the sentencing stage. The strategy failed. The jury convicted the defendant of 1st degree homicide and returned three death verdicts. On appeal, the defendant argued that his lawyer could not concede guilt over his express wishes. *McCoy*, 138 S.Ct. at 1507.

McCoy held that a lawyer may decide "trial management" issues like which arguments to raise and which objections to make. However, the defendant is master of his own defense. He decides whether or not to plead guilty. *Id*. at 1508 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1973)). "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." *Id*. at 1509. (Emphasis in original)(citing U.S. Const. Amdt. 6 and ABA model Rule of Professional Conduct 1.2(a)). When a defendant claims that his lawyer violated his 6th Amendment right to determine his own defense, the error is structural. It is not analyzed under ineffective assistance of counsel or harmless error jurisprudence. *Id*. at 1510-1511. An admission of guilt "blocks the defendant's right to make the fundamental choices about his own defense." *Id*. The defendant is entitled to a new trial without any need to show prejudice. *Id*.

Now consider Duanne's case. Before trial he and Mitchell agreed upon a defense strategy—Mitchell would ask the jury to find self-defense. (R.227:241; App.161). Thus, during opening statements, Mitchell argued self-defense. At the close of evidence, Mitchell requested a self-defense instruction. The circuit court gave it based on Simone's testimony that she saw Jamal lift his shirt as if to show he had a gun in his waistband. (R.274:50-51). Just before closing arguments. Mitchell told Duanne that he wanted to argue that Duanne was high on Ecstasy and therefore acted recklessly, not intentionally, when he shot the three victims. Duanne told Mitchell that this was not true—he had not taken Ecstasy before the shooting. Furthermore, he did not want Mitchell to present an Ecstasy defense. (R.227:242; App.162). Mitchell defied Duanne's instruction.

During closing arguments, Mitchell did not ask the jury to find self-defense. He told the jury that Simone was a liar. (R.275:33-34). He told the jury 7 times that Duanne was high on Ecstasy and acted recklessly when he shot the three victims. (R.275:30-37). This strategy negated Duanne's self-defense claim, and the argument was false. As the State itself argued during rebuttal, there was no evidence that he was high on Ecstasy at

the time of the shooting. (R.275:39). The jury convicted Duanne on all counts. After submitting the case to the jury the court asked Duanne whether he agreed with Mitchell's strategy to concede guilt to reckless homicide and he answered "no." (R.276:60). Mitchell explained on the record that he made that concession due to the evidence and Duanne's sentence exposure. (R.276-61).

In sum, Mitchell violated Duanne's 6th Amendment right to determine his own defense in two ways. First, he did not ask the jury to find that Duanne acted in self-defense. That finding would have acquitted Duanne of the homicide and attempted homicide charges. Second, despite Duanne's instruction, Mitchell asked the jury to find that he was high on Ecstasy and guilty of reckless conduct when he shot Brandon, Latisha, and Jamal. Duanne is entitled to a new trial under *McCoy*.

B. The circuit court's decision.

The circuit court gave three reasons for denying this claim. First, *McCoy*'s facts were extreme. In that case counsel conceded guilt when his client was facing the death penalty. (R.252:35; App.135). Second, Mitchell did not abandon self-defense. The trial court gave the instruction. Allegedly, "trial counsel argued in closing that Townsend was exercising self-defense." And on direct appeal the court of appeals allegedly "found that [Mitchell] argued self-defense in his closing. *Townsend*, ¶¶5, 23". (R.252:36-37; App.136-137). Third, *McCoy* applies to structural error claims made on direct appeal. When a defendant presents structural error claim on collateral review, the court analyzes it as a claim for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and the defendant must prove prejudice, (R.252:37; App.137)(citing *Weaver v. Massachusetts*, __U.S.__, 137 S.Ct. 1899 (2017).

C. The circuit court misapplied the law to undisputed facts.

Whether a circuit court correctly applied case law to undisputed facts poses a question of law, which the court of appeals reviews *de novo*. *State v. Starks*, 2013 WI 69, ¶28, 349 Wis. 2d 274, 833 N.W.2d 146.

The circuit court first erred in holding that *McCoy* is limited to the death penalty context. A recent Ninth Circuit Court of Appeals decision confirms this point. *United States v. Read*, 918 F.3d 712 (9th Cir. 2019). In *Read*, the government charged the defendant with two counts of assault with a deadly weapon. At trial he proceeded *pro se* with standby counsel, who, over the defendant's objection, presented an insanity defense. The defendant was convicted and sentenced to concurrent 82-month terms. On appeal, the Ninth Circuit reversed because standby counsel violated the defendant's 6th Amendment autonomy rights under *McCoy*. Clearly, *McCoy* applies outside the death penalty context.

Furthermore, the circuit court misunderstood *Weaver*. It did not establish a general rule that on collateral review a defendant must present a structural error claim as an ineffective assistance of counsel claim.[4] *Weaver* specifically limited its holding to the "context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Weaver*, 137 S.Ct. at 1907. *Weaver* does not apply to Duanne's case because it does not concern closure of the courtroom during jury selection.

[4] Note that Duanne preserved a claim for ineffective assistance of trial counsel based on Mitchell's presentation of his defense theory. *See* Argument II.

The circuit court also misunderstood the undisputed facts. During closing arguments, the State argued against a self-defense finding. But Mitchell—Duanne's lawyer—never uttered the words "self-defense." He did not ask the jury to find that Duanne acted in self-defense. (R.275:27-38). The circuit court also misinterpreted the court of appeals' holdings in Paragraphs 5 and 23 of its decision. The court of appeals noted that Mitchell "argued that Townsend acted in self-defense." (R.207:3, 11; App.147, 155). Mitchell made that argument in his ***opening*** statement, not during his closing statement. The court of appeals said nothing about Mitchell's closing statement in those paragraphs. (*Id*.).

Finally, the circuit court erred in holding that under an "ineffective assistance of counsel" analysis, Duanne must prove that Mitchell's violation of his 6th Amendment autonomy rights caused prejudice. When defense counsel concedes his client's guilt, he vitiates "meaningful adversarial testing" of the prosecution's charges and fails to "hold the prosecution to its heavy burden of proof beyond a reasonable doubt." *United States v. Cronic*, 466 U.S. 648, 656 & n.19 (1984). The concession results in a breakdown of the adversarial process and renders the jury's finding of guilt "presumptively unreliable." *See also Garza v. Idaho*, __U.S.__, 139 S.Ct. 738, 744 (2019)(prejudice is presumed where counsel fails to subject prosecution's case to meaningful adversarial testing).

In sum, the circuit court misunderstood *McCoy* and *Weaver*. It misread the record and the court of appeals' decision. And it did not consider *Cronic*. The court of appeals should reverse the circuit court's decision and remand this case for a new trial.

II. Duanne is entitled to a new trial or an evidentiary hearing on the claims that Loeb presented ineffectively.

A. The law applicable to claims for ineffective assistance of postconviction counsel.

In Wisconsin, §809.30 postconviction proceedings are part of a defendant's direct appeal where he is entitled to the effective assistance of counsel. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985). Appellate counsel "must master the trial record, thoroughly research the law and exercise judgment in identifying arguments that may be advanced on appeal." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 438 (1988). Counsel may not assert arguments "supported by only general statements." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). He may not assert claims "unsupported by references to legal authority." *Id.* He may not submit a brief so lacking in organization and substance that for [the court of appeals] to decide his issues, [it] would first have to develop them" *Id.* If an appellate lawyer commits these transgressions, the court need not address his arguments. *Id*. His client loses.

To win a claim for ineffective assistance of postconviction counsel, the defendant must demonstrate: (1) deficient performance and (2) prejudice. *State v. Balliette*, 2011 WI 79, ¶28, 336 Wis. 2d 358, 805 N.W.2d 334. To prove deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *State v. Romero-Georgana*, 2014 WI 83, ¶40, 360 Wis. 2d 522, 849 N.W.2d 688. To prove prejudice the defendant must show there was a reasonable probability that but for counsel's unprofessional errors, the result to the proceeding would have been different. *Id.,* ¶41. This "'does not require certainty or even a preponderance of the evidence that the outcome would have been different with effective

assistance of counsel'; it requires only a 'reasonable probability.'" *State v. Dillard*, 2014 WI 23, ¶103, 358 Wis. 2d 543, 859 N.W.2d 44.

To obtain an evidentiary hearing on a claim for ineffective assistance of postconviction counsel, a defendant must allege "sufficient material facts—*e.g.,* who, what, where, when, why, and how—that, if true, would entitle [him] to the relief he seeks." *Romero-Georgana*, ¶37 (citations omitted).

B. Duanne's §974.06 motion made the allegations required for an evidentiary hearing.

1. Duanne's 974.06 motion alleged that Loeb performed deficiently.

As required, Duanne's §974.06 motion alleged: "Attorney Basil Loeb (***who***) performed deficiently (***what***) during postconviction proceedings (***where*** and ***when***) in at least two ways." (R.227:15). (Emphasis in original). First, Loeb's briefs were deficient. "Regarding each of the first 4 'ineffective assistance of trial counsel' claims and the 'new trial in the interests of justice' claim, Loeb's postconviction briefs presented cursory allegations, failed to marshal evidence and legal research, violated a court order, and failed to explain how Mitchell's deficient performance affected the outcome of the trial (***why* and *how***)." (R.227:16). (Emphasis in original). His motion then argued these deficiencies in detail and alleged, with supporting analysis, that Loeb's "deficient performance prejudice[d] Duanne." (R.227:16-20).

Loeb's postconviction motion presented an incoherent statement of facts. It cited the general standards for "ineffective assistance of counsel" and "new trial in the interest of justice" claims but did not apply them to the facts of Duanne's case. It did not cite any law to support Duanne's particular claims. It failed

to cite any facts to establish that Mitchell performed deficiently. It failed to allege prejudice at all. (R.185). That was a fatal omission for "ineffective assistance of trial counsel" claims. *Strickland*, 466 U.S. at 697 (court need not address deficient performance if defendant fails to show prejudice). When the State's response noted these deficiencies, Loeb responded with a 24-paragraph reply brief, which included 19 paragraphs literally copied and pasted from his initial motion. (R.192).

Duanne's §974.06 motion further alleged that Loeb violated a court order to file Rocky's affidavit by a deadline and arguably violated SCR 20:3.2 (re a lawyer's obligation to expedite litigation) and 20:3.4(d) (re a lawyer's obligation to comply with court orders unless he asserts a valid reason for refusing). Rocky's affidavit was critical to Duanne's claims for ineffective assistance of trial counsel and for a new trial in the interest of justice. (R.227:18-19).

Rocky was Latisha's close friend. He attested that he was at Gregory's apartment when Brandon called for a gun. Rocky heard Brandon and Latisha say that they wanted the gun to kill Duanne and his family for revenge. According to Rocky, Brandon said: "Those niggas just upped on me. I'm going to go over there and fuck someone up." Brandon said that he was going to "kill someone, kids and all." Latisha agreed. She agreed: "C'mon, let's go over there." (R.227:244; App.164).

Duanne's §974.06 motion argued that Rocky's affidavit would have been powerful support for his ineffective assistance of trial counsel claims and new trial in the interest of justice claim. It showed that Mitchell bungled Duanne's self-defense claim and neglected important evidence for impeaching Latisha and Jamal. Rocky's affidavit showed the real controversy was not tried. (R.227:18-19).

2. Duanne's §974.06 motion described how Loeb should have presented Duanne's claims for ineffective assistance of trial counsel and for a new trial in the interest of justice.

a. How Loeb should have argued Mitchell's deficient presentation of Duanne's defense theory.

As noted in Argument I above, and incorporated here by reference, Mitchell performed deficiently by conceding guilt over Duanne's objection and failing to argue, or ask the jury to find, self-defense. But his presentation of Duanne's defense theory was deficient in other respects as well.

A lawyer performs deficiently (and causes prejudice) when he makes a promise to the jury during opening statements and then breaks it without explanation. *State v. Coleman*, 2015 WI App 38, ¶30, 362 Wis. 2d 447, 865 N.W.2d 190. ("If counsel says something will happen that does not, without explanation, counsel necessarily damages both his own, and potentially his client's credibility.") A lawyer also performs deficiently (and causes prejudice) by conceding guilt to a charge no evidence supports. *People v. Barnes*, 965 N.Y.S.2d 488 (N.Y. App. Div. 2013); *State v. Gordon*, 2003 WI 69, ¶¶25-28, 262 Wis. 2d 380, 663 N.W.2d 765 (when defendant has conceded the underlying facts, counsel may concede guilt on a charge to gain credibility and acquittal on other charges). At the time of Duanne's trial, a lawyer could not argue a voluntary intoxication defense unless he first offered expert testimony, and the court found, that the defendant was so impaired as to negate a specific intent to kill. *State v. Strege*, 116 Wis. 2d 477, 486, 343 N.W.100 (1984).

Mitchell committed these "defense strategy" errors. His opening prepared the jury for a self-defense theory. He obtained a supporting instruction based on Simone's testimony that she saw

Jamal lift his shirt as if to flash a gun. But then, during closing arguments, he never asked the jury to find self-defense. He called Simone a liar. He told the jury that Duanne was high on Ecstasy. This was an attempted voluntary intoxication defense, but Mitchell had not called an expert and the circuit court had not made the required findings. In fact, Duanne told Mitchell that he had ***not*** taken Ecstasy and did not want that defense. Mitchell admitted on the record that he defied Duanne. His strategy was both deficient and presumptively prejudicial under *Cronic*.

b. How Loeb should have argued Mitchell's deficient performance in failing to call Rocky and Antonio at trial.

A trial lawyer performs deficiently when he fails to investigate and call material witnesses to corroborate his client's defense, even if they are biased or have credibility problems. *State v. Jenkins*, 2014 WI 59, ¶41, 355 Wis. 2d 180, 848 N.W.2d 786 (citing *Tolivar v. Pollard*, 688 F.3d 853, 862 (7th Cir. 2012); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006); *State v. White*, 2004 WI App 78, ¶¶20-21, 271 Wis. 2d 742, 680 N.W.2d 362)). *Jenkins* found both deficient performance and prejudice where trial counsel failed to call such an eyewitness to a shooting when he knew she could contradict or impeach the State's witness. *Jenkins*, ¶¶42, 63-66.

Mitchell failed to call Rocky and Antonio at trial. Both gave statements to police. (R.227:259-267). Rocky would have testified that at Gregory's apartment, he heard Brandon call for a gun to take to Simone's apartment and kill Duanne and his family in revenge. Rocky heard Latisha agree to this plan. (R.227:244, App.164). Antonio would have testified that at Simone's apartment Latisha, Brandon and Jamal were arguing with Duanne, and he heard Jamal say that they had guns too. In fact,

he saw Jamal holding a gun when Duanne shot him. [5] (R.227:246; App.166). Mitchell's failure to call them to corroborate Duanne's self-defense theory was deficient performance under *Jenkins*.

c. How Loeb should have argued Mitchell's deficient performance in advising Duanne not to testify.

A trial lawyer performs deficiently (and causes prejudice) when he advises a client not to testify in order to avoid revealing his criminal history and when that leaves no evidence to support the client's theory of defense. *See e.g. Visger v. State*, 953 So.2d 741, 744 (Fla. Dist. Ct. App. 2007); *see also State v. Flynn*, 190 Wis. 2d 31, 50-51, 527 N.W.2d 343 (acknowledging that trial counsel can be ineffective in advising client not to testify). That is what happened here. Mitchell advised Duanne that he did not need to testify and should not testify because the jury would learn about his criminal history. (R.227:241; App.161). Mitchell did not tell Duanne that he planned to call Simone a liar or that without her testimony, there was no evidence that Duanne perceived a threat and shot Jamal in self-defense. Without Duanne's testimony, the jury had no evidence to find self-defense. Mitchell's advice was deficient under *Visger* and *Flynn*.

d. How Loeb should have argued Mitchell's deficient performance in impeaching Latisha and Jamal.

A trial lawyer performs deficiently (and causes prejudice) when he fails to pursue areas of impeachment for key prosecution witnesses. *State v. Delgado*, 194 Wis. 2d 737, 754-755, 535

[5] The affidavit Loeb submitted had Antonio attesting that Jermichael Finley, a former Packers player, was holding the gun. Duanne submitted a corrected affidavit at the §974.06 stage. (R.196).

N.W.2d 450 (1995); *Coleman*, ¶¶33-39 (failure to explore inconsistencies in victim's testimony). Latisha and Jamal, the State's star witnesses, testified that they only went to Simone's apartment with Brandon to talk. They did not have a gun. And Duanne shot Latisha in the back.

Mitchell should have impeached both Latisha and Jamal as follows:

- Mitchell should have played a security video showing a gun in Brandon's pocket just before he went into Simone's apartment and cross-examined Latisha and Jamal about it. (R.279: Ex.1).

- Mitchell should have cross-examined Latisha and Jamal with: (a) Rocky's police statement that Brandon, Latisha, and Jamal took a gun to Simone's apartment to kill Duanne and his family, and (b) Antonio's police statement that Jamal was making threats and holding a gun when Duanne started shooting.

- Mitchell should have cross-examined Latisha with Lieutenant Butler's police report. Butler conveyed Latisha to the hospital and reported that she was treated by Dr. Brasel for two, through-and-through gunshot wounds to the chest.

- Mitchell should have impeached Latisha with Officer Humitz's testimony. He observed Latisha at the scene and saw only chest wounds.

- Mitchell should have requested discovery of Latisha's medical records and called Dr. Brasel to testify in order to impeach Latisha's claim that she was shot 4 times—3 in the back.

- Mitchell should have exploited contradictions between Latisha's and Jamal's testimony during closing arguments. Latisha said that Brandon called for a gun just before they went to Simone's apartment. Jamal denied this fact. Latisha said that Jamal made what sounded like a threat just before Duanne shot him. Jamal denied this fact. Latisha said that Duanne shot Jamal inside the apartment and out in the hall while Brandon stood by with his hands up. Jamal said Duanne shot him only in the apartment and Brandon ran from the apartment.

Under *Delgado* and *Coleman*, Mitchell performed deficiently in failing to impeach Latisha and Jamal as described above.

e. How Loeb should have argued that Mitchell's deficient performance prejudiced Duanne and that Duanne was entitled a new trial in the interests of justice.

When a court finds multiple instances of deficient performance, it determines prejudice by considering whether their cumulative effect undermines confidence in the reliability of the trial. *Coleman*, ¶41 (prejudice found due to combined effect of counsel disclosing defendant's prior conviction, making unkept promises in opening arguments, and failing to impeach credibility).

When deciding whether to order a new trial in the interest of justice, a court considers whether the real controversy was fully tried or justice was miscarried for any reason. *See e.g. State v. Armstrong*, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98; *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996). In *Armstrong*, the defendant was convicted of murder and sexual assault. The court ordered a new trial because the real controversy was not tried.

The jury did not hear DNA evidence excluding the defendant as the source of hair and semen on the victim's bathrobe. Similarly, in *Hicks*, the State used hair evidence as affirmative proof that the defendant was the perpetrator of a sexual assault. The jury did not hear evidence excluding the defendant as the source of the hair. The court ordered a new trial because the real controversy had not been tried.

In this case, the same set of facts proves both that Mitchell's performance prejudiced Duanne's defense and that the real controversy was not tried.

Loeb should have highlighted the evidence and arguments that the jury actually heard:

- Duanne and his brother beat up Rocky at Latisha's apartment.
- Brandon, Latisha, and Jamal were simply heading to Latisha's apartment when they happened to pass Simone's apartment.
- They saw Duanne with a gun. He invited them over to talk, so they went—unarmed.
- Brandon, Latisha, and Jamal did not have a gun inside Simone's apartment.
- Depending on whom the jury believed, Jamal may have threatened to get a gun.
- Simone, who heard Jamal make threats about guns and saw him lift his shirt as if to show that he had one, was a liar.
- Latisha was facing Jamal with her back to Duanne when he shot her once in the side and 3 times in her back.

- Brandon watched the shooting with his hands up in surrender posture.

- Duanne acted intentionally, not in self-defense, because he shot Latisha in the back.

- Or Duanne was high on Ecstasy and thus shot recklessly.

Loeb also should have highlighted the evidence and arguments that the jury ***did not*** hear and the arguments the jury ***should have*** heard.

- After Duanne and Antonio beat up Rocky, Latisha, Jamal and Brandon were angry and wanted revenge.

- Latisha's good friend, Rocky, heard Brandon call for a gun to go kill Duanne and his family—kids and all. Latisha agreed and said "let's go."

- Brandon, Latisha, and Jamal went to Simone's apartment intending to shoot Duanne and his family.

- A video showed Brandon with a gun in his pocket as he headed to Simone's apartment.

- Inside the apartment, Jamal threatened Duanne, and he was holding a gun when Duanne shot him.

- Simone testified truthfully and in fact faced serious charges if she testified falsely.

- Latisha was shot twice in the chest because she was next to Jamal facing Duanne when Duanne started shooting.

- Brandon rushed at Duanne so Duanne shot him too.

- Duanne acted in self-defense when he shot Jamal, Latisha, and Brandon.

- The jury should not have heard an Ecstasy defense or a concession of guilt during Mitchell's closing argument.

The juxtaposition of what the jury heard with what it did not hear (and should have heard) undermines confidence in the reliability of Duanne's convictions for 1st degree intentional homicide and attempted homicide (*i.e.* prejudice) and reveals that the real controversy was not tried. The jury heard evidence and argument that Duanne shot Latisha, Brandon, and Jamal with intent to kill. It saw Duanne's lawyer break a promise to prove self-defense and try a last second, unsubstantiated Ecstasy defense. It heard Duanne's lawyer concede guilt to reckless conduct and call Simone a liar. Citing these facts, Loeb should have argued that Duanne was entitled to a new trial or an evidentiary hearing per *Coleman*, *Armstrong* and *Hicks*.

3. Duanne's §974.06 motion alleged that he was prejudiced by Loeb's deficient performance.

Duanne's §974.06 motion described how Loeb should have presented his claims for ineffective assistance of trial counsel and a new trial in the interest of justice. (R.227:9-14). He argued that if Loeb had researched, briefed and supported his postconviction claims effectively, Duanne would have received an evidentiary hearing in order to prove his claims (R.227:19). He pointed out that during his direct appeal, the State, the circuit court and the court of appeals all ***agreed*** that Loeb's postconviction motion made conclusory, undeveloped assertions, violated a court order, failed to cite case law, and failed to allege or argue prejudice, and thus Duanne was not entitled to an evidentiary hearing on his claims for ineffective assistance of trial counsel and a new trial in the interest of justice. (R.189, 194, 207; App.145-160). At a minimum, Loeb's ineffective assistance cost Duanne an evidentiary hearing on the claims that Loeb asserted.

The State's response to Duanne's §974.06 motion did not address Loeb's ineffective assistance at all, so the point is conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp*, 90 Wis. 2d 109, 279 N.W.2d 493 (1979). Given that Loeb was ineffective, the circuit court should have, at a minimum, ordered an evidentiary hearing on Duanne's claims for ineffective assistance of trial counsel and a new trial in the interest of justice.[6]

However, if the court of appeals analyzes Duanne's *McCoy* claim as an ineffective assistance of trial counsel claim, then Duanne is entitled to a new trial because (a) Mitchell admitted on the record that he defied Duanne's instruction, and (b) prejudice is presumed under *Cronic*. *See* Argument I above.

C. The circuit court's decision.

The circuit court issued a 40-page decision that completely overlooked Duanne's claim that Loeb provided ineffective assistance of postconviction counsel. It held that Duanne's claims were procedurally barred because he previously raised them in his §809.30 postconviction motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). It called Duanne's §974.06 motion an attempt to "repackage" his original "ineffective assistance of trial counsel" claims more forcefully, which is prohibited by cases like *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App 1991) and *Peterson v. State*, 54 Wis. 2d 370, 381 (1972). (R.252:13-15; App.113-115).

The circuit court addressed Duanne's claims for ineffective assistance *of* ***trial counsel*** individually and explained why each one failed.

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[6] This court of appeals can re-review Loeb's postconviction pleadings and see that they ineffectively presented Duanne's claims.

1. Mitchell's defense strategy was acceptable because the circuit court gave a self-defense instruction. "[T]he jury had evidence with which to find that [Duanne] acted in self-defense." (R.252:19; App.119). The jury could have inferred that Mitchell wanted them to find self-defense. (R.252:24-25; App.124-125).

2. Mitchell would have been ineffective if he had called Antonio to testify because he would have said that Duanne owned and fired the gun that killed Brandon and wounded Latisha and Jamal. (R.252:22; App.122). Mitchell did not perform deficiently in failing to call "Ricky Weeks"[7] (*i.e.* Rocky) because he would have testified that Antonio was a "violent hooligan." (R.252:24; App.124).

3. Mitchell made a reasonable strategic decision in advising Duanne not to testify because the State would have impeached Duanne. (R.252:24-27; App.124-127).

4. Mitchell did not fail to impeach Jamal and Latisha with the video showing Brandon with a gun in his pocket. The video isn't in the record and likely doesn't exist. (R.252:28; App.128). Also, the inconsistencies between Latisha's testimony and Jamal's testimony were "picky" and "immaterial." (R.252:28-29; App.128-129).

D. The court misunderstood the law, misstated the facts, and ignored Duanne's argument.

The court of appeals decides *de novo* whether a §974.06 motion alleges sufficient facts to require a hearing. *Romero-Georgana*, ¶30.

The circuit court's decision does not acknowledge or apply the "who, what, where, when, why, and how" requirement for

[7] The circuit court repeatedly refers to Ricky Weeks, a former Brewers player, but he was not involved in this case. (R.252:22; App.122).

obtaining an evidentiary hearing for an "ineffective assistance of postconviction counsel" claim. Duanne's §974.06 motion clearly satisfied this requirement. *See* Argument IIB1 above.

The circuit court misapplied *Escalona-Naranjo*, *Witkowoski* and *Peterson*. Those cases bar a defendant from using §974.06 to raise claims that he previously raised on direct appeal and from repackaging those claims. Duanne's §974.06 motion did not reassert or repackage claims from his direct appeal. He argued that ***postconviction counsel*** was ineffective in how he presented Duanne's §809.30 postconviction claims. The circuit court misunderstood Duanne's §974.06 claims.

Regarding the "ineffective assistance of trial counsel" claims that Loeb presented ineptly:

1. The circuit court erred in holding that the jury heard evidence to support self-defense. Duanne did not testify and his lawyer called Simone a liar. Also Duanne was entitled to an active advocate for his self-defense claim. *Cronic*, 466 U.S. at 656. Instead his lawyer conceded guilt. *See* Argument I and II.B.2.a. above.

2. The circuit court erred in inferring Mitchell's reasons for not calling Antonio and Rocky. Mitchell did not testify. The court does not know his strategy. Also, the court never even acknowledged the substance of Rocky's affidavit. He was Latisha's friend. He heard Brandon call for a gun to kill Duanne and his family, and Latisha agreed. These facts support self-defense and impeach Latisha and Jamal. *See* Argument II.B.2.b. above

3. The circuit court erred in holding that Mitchell reasonably advised Duanne not to testify. It ignored the fact that Mitchell defied Duanne's instruction on how to present his defense, asserted facts Duanne denied, called Simone a liar, and

presented a voluntary intoxication defense that the judge had not approved. *See* Argument II.B.2.c. above.

4. The circuit court erred regarding Mitchell's failure to impeach Latisha and Jamal. The video showing Brandon with a gun in his pocket was in the trial record all along. Loeb just forgot to include it in the appellate record for Duanne's appeal. (R.220, 224, 279:Ex. 1; App.141, 143). Also, Latisha and Jamal contradicted each other on critical facts like whether Brandon called for a gun and what Jamal said just before Duanne shot him. *See* Argument II.B.2.d. above.

Given these errors, the court of appeals should order a new trial on Duanne's claim that Mitchell was ineffective in defying Duanne's instructions regarding his defense theory. Mitchell admitted the point, and prejudice is presumed on this claim. Alternatively, it should order an evidentiary hearing on Duanne's claims for ineffective assistance of trial counsel and a new trial in the interest of justice.

III. Duanne is entitled to postconviction discovery concerning Latisha's injuries.

A. Duanne's motion for postconviction discovery.

Under the due process clause, a defendant must receive a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984). Once convicted, he has a right to postconviction discovery of evidence that was relevant to an issue of consequence in his case. *State v. O'Brien,* 223 Wis. 2d 303, ¶24, 588 N.W.2d 8 (1999). Evidence of consequence is evidence that creates a reasonable probability of a different outcome. *Id.* ¶28.

When a defendant seeks discovery of confidential medical records he must ask the court to conduct an in camera review of

the records, inform counsel of its conclusion, and release the records to the defendant so that he can pursue further appropriate relief. *See State v. Schiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; and *State v. Lynch*, 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89.

Citing these cases, Duanne's motion for postconviction discovery asked the circuit court to order the State to obtain Latisha's consent to release her medical records regarding her injuries. (R.229). His motion quoted her testimony that she was shot 3 times in the back and once in the side, not in the chest. His motion argued that if Mitchell had obtained her records before or during trial, he could have (1) impeached Latisha, (2) supported Duanne's self-defense claim, and (3) precluded the State from repeatedly citing Latisha's false testimony to prove intent to kill. To show that Latisha's testimony was central to the State's case, Duanne's motion quoted these excerpts from the State's closing argument:

> The defendant takes his .9 millimeter with an extended clip, a .31 round possible magazine, 30 in the clip, one in the pipe and he starts firing, first ***at [Latisha] in the back***. She goes down, then [Jamal]. (R.275:16). (Emphasis supplied).
>
> But let's just say for sake of argument that Brandon, his gun is out. Ladies and gentlemen, ***under the law of self-defense, this still doesn't apply. Because who does he shoot first***? Who does he shoot first, ladies and gentlemen? Follow the casings, follow the bullets. ***He is shooting [Latisha] in the back***. (R.275:23). (Emphasis supplied)
>
> But then, ladies and gentlemen, let me ask you a question. If we are so concerned about [Jamal having a gun], why are we shooting at [Latisha] first, ***in the back***? (R.275:25). (Emphasis supplied).

> The defendant because of the things that [Jamal] is saying because he is talking slick as a witness said, he decides to shoot. He's got his gun out the entire time. He raises it and he points. ***He shoots an unarmed female in the back.*** (R.275:25-26). (Emphasis supplied).

Duanne's motion made a fact-specific showing that warranted an inspection of Latisha's records and explained how they would have created a reasonable probability of a different outcome at the postconviction stage and at trial. Had Loeb spotted the contradiction between the police reports/testimony and Latisha's testimony and undertaken postconviction discovery, he could have: (1) shown that Mitchell was ineffective for not obtaining the records to impeach Latisha, blunt the State's "intent" argument, and support self-defense; and (2) made a convincing claim for a new trial in the interest of justice: the State hammered on false testimony during its closing argument. Loeb would have obtained an evidentiary hearing and ultimately a new trial.

B. The circuit court's decision.

The circuit court denied postconviction discovery for two reasons. First, it said that Latisha correctly perceived that she was shot 4 times:

> Lieutenant Butler states that [Latisha] was treated for "two through-and-through gunshot wounds to the upper chest exiting out the upper back." Of course, two-through and through gunshot wounds would create four separate areas of injury—exactly what [Latisha] perceived. (R.252:38; App.138).

Second, Latisha's medical records could not possibly contain information necessary to the determination of Duanne's guilt or innocence. At best they could contain "insignificant impeaching evidence." (R.252:39; App.139). The court reasoned: "How this apparent contradiction in [Latisha's] testimony could

somehow support [Duanne's] self-defense claim or further impeach [Latisha] is far beyond any rational analysis." (R.252:38). Duanne admitted that he shot Latisha twice. Therefore, Latisha's medical records "would not have changed any of the verdicts." (R.252:38-39; App.138-139).

C. The circuit court erroneously exercised its discretion.

The court of appeals reviews a decision denying postconviction discovery for an erroneous exercise of discretion. *O'Brien*, ¶28. A court exercises its discretion erroneously when it fails to examine the relevant facts, applies the wrong legal standard, or does not use a rational process to reach a reasonable conclusion. *May v. May*, 2012 WI 35, ¶39, 339 Wis. 2d 626, 813 N.W.2d 179.

The circuit court misstated the relevant facts. Latisha did not testify that she sustained four ***wounds***. She testified that Duanne shot her four times, three in the back. (R.272:30, 35-36).

> Q. And when those bullets came into your chest, they came in through your back?
>
> A. Yes.
>
> Q. So the three that go in–the three that we're talking about in your chest—and I'm sorry I was a little confused up to this point—the three that come into your back, through your back and are in your chest now?
>
> A. Right.
>
> Q. And are those the three they haven't removed?
>
> A. Right.
>
> Q. So you're basically shot from behind?
>
> A. Right. (R.272:35-36)

The circuit court also erred in holding that Duanne had to show that Latisha's medical records at trial would have "changed verdicts." That is the wrong standard. A defendant need only show that the requested evidence would create a reasonable probability of a different outcome. *O'Brien*, ¶28.

Finally, the circuit court neglected to address Duanne's arguments that Latisha's medical records would have created a reasonable probability of a different outcome at postconviction proceedings and at trial. Latisha's false testimony was the centerpiece of the State's closing argument and request for findings of guilt on the charges of 1st degree intentional homicide and attempted 1st degree intentional homicide. The circuit court did not address the State's closing argument at all.

The circuit court misunderstood the facts and the law and ignored Duanne's argument. The court of appeals should reverse this decision and remand the case for the requested discovery.

CONCLUSION

For the reasons stated above, defendant Duanne Townsend respectfully requests that the court of appeals reverse the circuit court's decision and:

(1) either:

(a) grant a new trial on Duanne's *McCoy* claim;

(b) grant a new trial on Duanne's claim that Mitchell provided ineffective assistance of counsel in conceding guilt and abandoning self-defense because Mitchell admitted he defied Duanne, and prejudice is presumed; or

(c) order an evidentiary hearing; and

(2) grant discovery of Latisha's medical records.

Dated this 1st day of August, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief (Introduction, Statement of Case and Facts, and Argument, and Conclusion) is 10,964 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of August, 2019.

Signed:

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COLLEEN D. BALL
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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 1st day of August, 2019.

Signed:

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APPENDIX

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