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 AN ORDER DENYING A WIS. STAT. § 974.06 MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH R. WALL, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. More than one year after Defendant-Appellant Duanne D. Townsend's convictions in this case became final, the Supreme Court decided *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), holding that a lawyer may not concede his or her client's guilt over objection. Is Townsend's *McCoy* claim barred under the non-retroactivity doctrine?

The circuit court did not explicitly address the retroactivity issue but distinguished *McCoy* from Townsend's case on several grounds.

This Court should answer "yes."

2. On direct appeal, Townsend argued for a new trial based on ineffective assistance of trial counsel and in the interest of justice. Townsend now repackages those claims under the guise that his previous appellate counsel ineffectively litigated them. Is Townsend barred from relitigating those issues?

The circuit court answered "yes."

This Court should answer "yes."

3. Is Townsend's claim for postconviction discovery of a victim's medical records barred because he could have raised it in his previous appeal?

The circuit court rejected the discovery claim on the merits.

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this

appeal requires only the application of well-established precedent to the facts of the case.[1]

INTRODUCTION

Townsend was convicted of shooting three people, killing one of them. On the direct appeal from his convictions, he argued that he should get a new trial in the interest of justice and due to trial counsel's ineffective assistance. This Court affirmed his convictions.

Townsend then filed more postconviction motions that are the subject of this appeal. He first filed a 284-page motion for postconviction relief under Wis. Stat. § 974.06, which renewed the claims from his direct appeal and argued that appellate counsel ineffectively litigated them the first time around. Townsend also filed a motion seeking discovery of one of the victim's medical records to show that he shot her twice rather than four times. In his reply brief supporting his section 974.06 motion, Townsend argued that he was entitled to a new trial because his trial counsel admitted his guilt in violation of *McCoy*. The circuit court denied Townsend's motions.

Townsend's claims fail for three reasons.

First, Townsend's *McCoy* claim fails because *McCoy* does not apply retroactively. *McCoy* was decided more than a year after Townsend's convictions became final. He cannot rely on that decision to collaterally attack his convictions. Tellingly, Townsend does not even acknowledge the non-retroactivity doctrine.

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[1] Because Townsend's *McCoy* claim is barred under the non-retroactivity doctrine, this case does not give this Court an opportunity to explore the contours of *McCoy*. But another case pending in this district—*State v. Chambers*, appeal number 2019AP411-CR—raises a *McCoy* claim. The parties in *Chambers* have recommended publication.

Second, Townsend is barred from relitigating his interest-of-justice and ineffective-assistance-of-trial-counsel claims that he raised on direct appeal. Repackaging those claims under the guise of appellate counsel ineffectiveness does not help Townsend because "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Third, Townsend's claim for postconviction discovery is procedurally barred because he does not have a sufficient reason for failing to raise that claim on direct appeal. The only possible reason he offers is a conclusory assertion that appellate counsel was ineffective.

This Court should affirm.

STATEMENT OF THE CASE

Townsend shot three people: Brandon Thomas, Jamal, and Latisha. (R. 252:23.) Before the shooting, Townsend, his brother Antonio Stewart, and another man beat up Rocky[2] in in apartment hallway in April 2011. (R. 252:23.)

Rocky went to Latisha's apartment after the beating, and Brandon Thomas arrived soon after. (R. 252:23.) Latisha, Thomas, and Jamal left the apartment to confront the people who had beaten up Rocky. (R. 252:23.)

Townsend allowed the three to enter his apartment building. (R. 1:6.) Townsend's sister, Simone Stewart, told the people to come into her apartment unit from the hallway "because of the noise." (R. 1:6.) An argument ensued and

[2] The State uses the same pseudonyms for three victims that Townsend uses: Rocky, Jamal, and Latisha. (*See* Townsend's Br. 1 n.1.)

Townsend shot Latisha, Thomas, and Jamal. (R. 252:21.) Thomas died as a result. (R. 1:5.)

Police responded to the shooting and saw two men walking away from the apartment building. (R. 1:3.) One of those men, Townsend, "started to run back towards" the apartment building. (R. 1:3.) Police chased after Townsend and eventually found him hiding in a bathroom in a vacant apartment unit. (R. 1:3–4.) Police found a revolver with unfired cartridges and a nine-millimeter handgun with an extended magazine in the bathroom. (R. 1:3–4.) The nine-millimeter handgun was the murder weapon. (R. 252:28.) The revolver was a gun that Townsend had "scooped up from the apartment after the shootings." (R. 252:28.)

The State charged Townsend for the murder and two attempted murders. The State charged first-degree intentional homicide with use of a dangerous weapon and two counts of attempted first-degree intentional homicide with use of a dangerous weapon. The State also charged two counts of possession of a firearm by a felon. (R. 1:1–2.)

Townsend had a jury trial. The jury heard evidence that Jamal or Brandon Thomas might have had a gun during the shooting. For example, the jury heard that (1) Thomas made a phone call before the shooting and asked someone to bring over a gun; (2) Latisha told a detective that she saw a gun inside Thomas's jacket as Thomas tried to flee from the shooting; (3) just before the shooting, Jamal said to Townsend that "we have guns too" and lifted his shirt as if to show a gun; (4) right after the shooting, Townsend's sister saw a revolver that she did not recognize lying on the floor; (5) Townsend picked up that revolver and ran out the door. (R. 271:129–32; 272:114, 116–17; 273:9–12, 14, 95, 97–100.)

During closing argument, the State said there were two possibilities for how the revolver got into the apartment where the shooting happened: either Jamal or Brandon

Thomas brought it there. (R. 275:23–24.) The prosecutor said that "there is decent evidence to show that [Thomas] probably did have a firearm." (R. 275:24.) But the prosecutor argued that Townsend did not act in self-defense. (R. 275:23–26.) The prosecutor argued that, at most, Townsend unreasonably acted in self-defense and thus was guilty of second-degree intentional homicide and attempted second-degree intentional homicide. (R. 275:43–44.)

Townsend's lawyer argued that Townsend did not intend to kill anyone, Townsend was threatened right before the shooting, Brandon Thomas had a gun, there were threats about guns in the apartment, the shooting happened "very shortly" after Jamal lifted his shirt, and "[t]here [wa]s no evidence to say that [Townsend] could not have seen a gun." (R. 275:29–30, 32, 37–38.)

The jury found Townsend guilty of the five counts charged. (R. 277:5–7.)

Townsend filed a motion for postconviction relief pursuant to Wis. Stat. § (Rule) 809.30, arguing that he was entitled to a new trial in the interest of justice or due to trial counsel's ineffective assistance. (R. 185.) After receiving more briefs, the circuit court denied the motion without a hearing. (R. 189; 192; 194.) Townsend filed a motion for reconsideration, which was denied. (R. 195; 197.)

Townsend had a direct appeal, case number 2014AP2395-CR. In July 2015, this Court affirmed his convictions and the order denying postconviction relief. (R. 207.)

In March 2018, Townsend filed a 284-page motion for postconviction relief under Wis. Stat. § 974.06. (R. 227.) As relevant here, Townsend "argue[d] that Attorney Daniel Mitchell provided ineffective assistance of trial counsel" in several ways. (R. 227:1.) Townsend "also contend[ed] that during his direct appeal Attorney Basil Loeb provided

ineffective assistance of postconviction counsel by . . . inadequately investigating and presenting the first 4 'ineffective assistance of trial counsel' claims . . . and a 'new trial in interest of justice' claim." (R. 227:2.)[3]

Also in March 2018, Townsend filed a motion seeking access to Latisha's medical records. (R. 229.) Townsend argued that the records would show that he shot Latisha twice, not four times as she testified at his trial. (R. 229:2, 4.)

In May 2018, Townsend filed a letter with the circuit court arguing that his trial counsel improperly conceded his guilt in violation of *McCoy*. (R. 233.)

The State filed a response brief in opposition to the motions. (R. 242.)

Townsend then filed a reply brief supporting his section 974.06 motion and further advancing his *McCoy* claim. (R. 249.)

The circuit court denied Townsend's motions in a 40-page written decision. (R. 252.) Townsend appeals that order. (R. 255.)

STANDARD OF REVIEW

This Court decides de novo "[w]hether to retroactively apply the holding of a case," *State ex rel. Krieger v. Borgen*, 2004 WI App 163, ¶ 7, 276 Wis. 2d 96, 687 N.W.2d 79, whether an appeal is procedurally barred, *State ex rel. Washington v. State*, 2012 WI App 74, ¶ 27, 343 Wis. 2d 434, 819 N.W.2d 305, and "[w]hether a Wis. Stat. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier," *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668. This Court "will uphold a court's denial of

[3] Townsend also argued that trial counsel and appellate counsel were ineffective with respect to certain DNA evidence. (R. 227:2.) Townsend does not raise that claim in this appeal.

postconviction discovery absent an erroneous exercise of discretion." *State v. Ziebart*, 2003 WI App 258, ¶ 32, 268 Wis. 2d 468, 673 N.W.2d 369.

ARGUMENT

All three of Townsend's grounds for relief are procedurally barred. His *McCoy* claim is barred under the non-retroactivity doctrine, his ineffective-assistance-of-counsel claims are barred because he is relitigating them after they failed on direct appeal, and his discovery claim is barred because he could have raised it on direct appeal. This Court thus need not reach the merits of Townsend's claims. The State will, upon this Court's request, supply it with a supplemental brief addressing the merits of Townsend's barred claims. *See State v. Tillman*, 2005 WI App 71, ¶ 13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574 (approving this briefing strategy).

I. The non-retroactivity doctrine bars Townsend's *McCoy* claim.

A. A new rule of criminal procedure generally does not apply to convictions that are final.

Whether a new criminal rule applies retroactively often depends on whether it is substantive or procedural. "[A] new rule of substantive criminal law is presumptively applied retroactively to all cases, whether on direct appeal or on collateral review." *State v. Lagundoye*, 2004 WI 4, ¶ 12, 268 Wis. 2d 77, 674 N.W.2d 526. By contrast, "a new rule of criminal procedure generally cannot be applied retroactively to cases that were final before the rule's issuance under the federal nonretroactivity doctrine announced by the Supreme Court plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989), and later adopted by the majority of the Court in *Graham v. Collins*, 506 U.S. 461, 467 (1993)." *Lagundoye*, 268 Wis. 2d 77, ¶ 13. Wisconsin has adopted the United States

Supreme Court's case law on non-retroactivity and has applied it to claims brought under Wis. Stat. § 974.06. *Id.* ¶ 14.

As an initial matter, Townsend cannot rely on *McCoy* because he "does not even acknowledge that retroactivity is an issue, much less does he make any argument why *McCoy* ought to be given retroactive application." *Ex parte King*, No. WR-49,391-03, 2019 WL 1769023, at *1 (Tex. Crim. App. Apr. 22, 2019) (unpublished).[4] In any event, *McCoy* does not apply retroactively here.

A court uses a "three-step process" to determine whether a rule of criminal procedure applies retroactively. *Beard v. Banks*, 542 U.S. 406, 411 (2004). Specifically, a court must decide (1) "when the defendant's conviction became final"; (2) whether the rule of criminal procedure is new; (3) and, if the rule is new, whether it meets either of the two exceptions to non-retroactivity. *Id.*

So, in deciding whether the non-retroactivity doctrine bars Townsend's *McCoy* claim, this Court must address four sub-issues. This Court must first decide whether *McCoy* adopted a procedural or substantive rule. After determining that the *McCoy* rule is procedural, this Court must then apply the three-step process identified in *Banks*.

The State will now explain why *McCoy* does not apply retroactively to Townsend's case.

B. *McCoy* adopted a rule of criminal procedure.

As noted above, a new rule of *substantive* criminal law generally applies retroactively to cases on collateral review under Wis. Stat. § 974.06, but a new rule of criminal

[4] Wisconsin's rules of appellate procedure allow citations to unpublished decisions from other jurisdictions. *State v. Stenzel*, 2004 WI App 181, ¶ 18 n.6, 276 Wis. 2d 224, 688 N.W.2d 20.

procedure generally does not so apply. *Lagundoye*, 268 Wis. 2d 77, ¶¶ 12–14.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016) (citation omitted). Substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 1265 (citation omitted).

"Procedural rules, by contrast, 'regulate only the manner of determining the defendant's culpability.'" *Welch*, 136 S. Ct. at 1265 (emphasis omitted) (citation omitted). "Such rules alter 'the range of permissible methods for determining whether a defendant's conduct is punishable.'" *Id.* (citation omitted). Procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* (citation omitted).

Under those principles, *McCoy* adopted a rule of criminal procedure. The *McCoy* Court held that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy*, 138 S. Ct. at 1510. The Court further held that a lawyer's impermissible concession of guilt "is not subject to harmless-error review." *Id.* at 1511. The *McCoy* decision is not substantive because it did not narrow the scope of a criminal statute or place constitutional limits on the State's power to punish certain conduct or persons. *See, e.g.*, *Elmore v. Shoop*, No. 1:07-CV-776, 2019 WL 3423200, at *10 (S.D. Ohio July 30, 2019) (unpublished) (noting that "*McCoy* did not establish a new substantive rule of constitutional law in the *Teague* sense"); *Ex parte King*, 2019 WL 1769023, at *1 (same).

C. *McCoy* was decided after Townsend's convictions became final.

Again, "a new rule of criminal procedure generally cannot be applied retroactively to cases that were *final* before the rule's issuance." *Lagundoye*, 268 Wis. 2d 77, ¶ 13 (emphasis added). "A case is final if the prosecution is no longer pending, a judgment or conviction has been entered, the right to a state court appeal from a final judgment has been exhausted, and time for certiorari review in the United States Supreme Court has expired." *Id.* ¶ 20. A criminal defendant may file a certiorari petition in the United States Supreme Court within 90 days after a state supreme court denies discretionary review. U.S. Sup.Ct. R. 13.1; *see also Lagundoye*, 268 Wis. 2d 77, ¶ 20 n.13.

Here, the Wisconsin Supreme Court denied Townsend's petition for review in his direct appeal (case number 2014AP2395-CR) on January 25, 2017. (Townsend's App. 141.) His deadline for filing a certiorari petition in the United States Supreme Court expired 90 days later, in late April 2017. His convictions became final then. *McCoy* was decided more than a year later, in May 2018.

In short, *McCoy* was decided after Townsend's convictions at issue became final.

D. *McCoy* announced a new rule.

As mentioned above, "a *new rule* of criminal procedure generally cannot be applied retroactively to cases that were final before the rule's issuance." *Lagundoye*, 268 Wis. 2d 77, ¶ 13 (emphasis added). "A rule is new if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Krieger*, 276 Wis. 2d 96, ¶ 9 (citing *Lagundoye*, 268 Wis. 2d 77, ¶ 26).

The Supreme Court in *McCoy* "granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *McCoy*, 138 S. Ct. at 1507. The Supreme Court "agree[d] with the majority of state courts of last resort that counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *Id.* at 1510.

No Wisconsin court had adopted that rule before *McCoy*. To the contrary, Wisconsin courts have held in multiple cases that defense lawyers reasonably conceded their clients' guilt. *State v. Gordon*, 2003 WI 69, ¶¶ 22–30, 262 Wis. 2d 380, 663 N.W.2d 765; *State v. Silva*, 2003 WI App 191, ¶¶ 14–20, 266 Wis. 2d 906, 670 N.W.2d 385. *McCoy* implicitly abrogated those cases to the extent that they might have allowed a lawyer to concede guilt over his or her client's objection. *See McCoy*, 138 S. Ct. at 1510. Further, the courts in *Gordon* and *Silva* analyzed the concession of guilt within the context of an ineffective-assistance-of-counsel claim. *Gordon*, 262 Wis. 2d 380, ¶¶ 22–30; *Silva*, 266 Wis. 2d 906, ¶¶ 14–20. The *McCoy* Court, however, held that a concession of guilt over a client's objection results in automatic reversal and thus is *not* analyzed under "ineffective-assistance-of-counsel jurisprudence." *McCoy*, 138 S. Ct. at 1510–11.

In short, *McCoy* announced a new rule in Wisconsin because its holding was not dictated by precedent that controlled in Wisconsin when Townsend's convictions became final. So, for *McCoy* to apply here, it must meet an exception to the non-retroactivity doctrine. It does not.

E. The two very narrow exceptions to the non-retroactivity doctrine do not apply here.

"Under *Teague*, a new rule of criminal procedure is not applied retroactively to cases on collateral review unless it falls under either of two well-delineated exceptions." *Lagundoye*, 268 Wis. 2d 77, ¶ 13. Neither exception applies here.

1. The first exception does not apply here because *McCoy* did not announce a substantive rule.

"This first exception applies to conduct that 'is classically substantive.'" *Lagundoye*, 268 Wis. 2d 77, ¶ 32. This exception thus does *not* apply to a court decision that "did not decriminalize any conduct or place any conduct beyond the power of the legislature to proscribe." *Id.*; *see also State v. Lo*, 2003 WI 107, ¶ 70, 264 Wis. 2d 1, 665 N.W.2d 756 ("The first test does not apply because Lo's conduct was not decriminalized [by a recent supreme court decision].").

So, this first exception is simply another way of saying that the non-retroactivity doctrine does not apply to substantive rules. "Rules that fall within . . . *Teague*'s first exception 'are more accurately characterized as substantive rules not subject to [*Teague*'s] bar.'" *Banks*, 542 U.S. at 411 n.3 (second alteration in original) (citation omitted); *accord Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016).

McCoy does not fall within the first exception to the non-retroactivity doctrine. *McCoy* did not decriminalize Townsend's conduct, namely homicide and attempted homicide. As explained above, *McCoy* adopted a procedural rule rather than a substantive rule.

2. The second exception does not apply here because *McCoy* did not announce a "watershed" rule of criminal procedure.

The second *Teague* "exception is 'reserved for watershed rules of criminal procedure.'" *Lagundoye*, 268 Wis. 2d 77, ¶ 33 (quoting *Teague*, 489 U.S. at 311). "This exception is 'extremely narrow.'" *Whorton v. Bockting*, 549 U.S. 406, 417 (2007) (citation omitted). Since *Teague* was decided in 1989, the Supreme Court "rejected every claim that a new rule satisfied the requirements for watershed status." *Id.* at 418.

"In order to qualify as watershed, a new rule must meet two requirements." *Bockting*, 549 U.S. at 418. "First, the rule must be necessary to prevent 'an "impermissibly large risk"' of an inaccurate conviction." *Id.* (citation omitted). "Second, the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" *Id.* (citation omitted).

A rule does not meet the first requirement for watershed status just because it "is aimed at improving the accuracy of trial" or "is directed toward the enhancement of reliability and accuracy in some sense." *Bockting*, 549 U.S. at 418 (citations omitted). "Instead, the question is whether the new rule remedied 'an "impermissibly large risk"' of an inaccurate conviction." *Id.* (citation omitted).

The second requirement for watershed status "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right." *Bockting*, 549 U.S. at 420–21 (emphasis omitted). "Similarly, '[t]hat a new procedural rule is "fundamental" in some abstract sense is not enough.'" *Id.* at 421 (alteration in original) (citation omitted). "Instead, in order to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.*

McCoy does not meet the two requirements to qualify as a watershed rule of criminal procedure.

a. *McCoy* fails the first requirement for watershed status.

Again, to meet the first requirement for watershed status, a new rule of criminal procedure must have "remedied 'an "impermissibly large risk"' of an inaccurate conviction." *Bockting*, 549 U.S. at 418 (citation omitted). Because *McCoy* did not do so, it fails the first requirement for watershed status. It would be strange to view *McCoy* otherwise. A lawyer would unlikely concede his or her own client's guilt if there was a large chance that the defendant was innocent. *See, e.g.*, *Gordon*, 262 Wis. 2d 380, ¶¶ 28–29 (collecting cases where lawyers conceded their clients' guilt when the State presented overwhelming evidence of guilt); *see also Silva*, 266 Wis. 2d 906, ¶ 20 (concluding that a lawyer reasonably conceded his client's guilt given the strength of the State's case). So, prohibiting a lawyer from admitting her client's guilt over the client's objection will not remedy an impermissibly large risk of an inaccurate conviction.

The *McCoy* decision itself supports this conclusion. The *McCoy* Court held that "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *McCoy*, 138 S. Ct. at 1511. The Court listed three rationales for why certain errors are deemed structural. The first rationale is "'if the right at issue is *not designed to protect the defendant from erroneous conviction* but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.'" *McCoy*, 138 S. Ct. at 1511 (emphasis added) (citation omitted). The Court next said that "[a]n error might also count as structural [2] when its effects are too hard

to measure . . . or [3] where the error will inevitably signal fundamental unfairness." *Id.* The Court concluded that "[u]nder at least the *first two rationales*, counsel's admission of a client's guilt over the client's express objection is error structural in kind." *Id.* (emphasis added).

McCoy thus fails the first requirement for watershed status. The *McCoy* Court's structural-error holding was intended to protect a defendant's autonomy; it was "not designed to protect the defendant from erroneous conviction." *McCoy*, 138 S. Ct. at 1511. So, the *McCoy* Court indicated that its holding was *not* meant to prevent inaccurate convictions at all, let alone an impermissibly large risk of them.

Because *McCoy* fails the first requirement for watershed status, it does not apply retroactively to Townsend's case.

b. *McCoy* fails the second requirement for watershed status.

McCoy also fails the second requirement for watershed status. Again, "to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Bockting*, 549 U.S. at 421.

The Supreme Court has found only one case to meet the non-retroactivity exception for watershed rules: the landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which recognized a right to appointed counsel for indigent criminal defendants. *Bockting*, 549 U.S. at 419. "*Gideon* effected a profound and 'sweeping' change." *Id.* at 421 (citation omitted). The Supreme Court has "'not hesitated to hold that less sweeping and fundamental rules' do not qualify" as watershed rules. *Id.* (citation omitted). The *Bockting* Court, for example, held that *Crawford v. Washington*, 541 U.S. 36 (2004)—which changed the legal landscape for the Sixth Amendment right

to confront one's accusers—"is not in the same category with *Gideon*" and thus "does not fall within the *Teague* exception for watershed rules." *Bockting*, 549 U.S. at 421.

McCoy is not in the same category as *Gideon*. The *McCoy* Court did not even say that its structural-error holding was designed to promote fairness. Again, the Court listed three rationales for labelling certain errors structural, it noted fairness as the third rationale, and it said that "at least the first two rationales" applied to a lawyer's concession of guilt over her client's objection. *McCoy*, 138 S. Ct. at 1511. When given the chance, the *McCoy* Court did not say that its holding was based on fairness. The *McCoy* decision is not a bedrock procedural rule that is essential to the fairness of a trial.

Indeed, courts around the country have held that *McCoy* does not apply retroactively. *See, e.g.*, *Elmore*, 2019 WL 3423200, at *10 (holding that "*McCoy* did not establish a new substantive rule of constitutional law in the *Teague* sense, nor is its holding a 'watershed' rule of criminal procedure"); *Ex parte King*, 2019 WL 1769023, at *1 (holding that *McCoy* "is neither 'substantive' nor 'a "watershed" rule of criminal procedure' in contemplation of *Teague*"); *Johnson v. Ryan*, No. CV-18-00889-PHX-DWL, 2019 WL 1227179, at *2 (D. Ariz. Mar. 15, 2019) (holding that "*McCoy* didn't announce a watershed rule of criminal procedure, so it doesn't apply retroactively"); *see also Commonwealth v. Manus*, No. 2847 EDA 2018, 2019 WL 2598179, at *3 (Pa. Super. Ct. June 25, 2019) (noting that the "appellant has failed to establish that the *McCoy* decision applies retroactively to cases on collateral review" (formatting omitted)); *Commonwealth v. Steward*, No. 3196 EDA 2018, 2019 WL 1388184, at *2 (Pa. Super. Ct. Mar. 27, 2019) (noting that the "[a]ppellant has not established that the [*McCoy*] Court held the decision applies retroactively to cases on collateral review").

In sum, Townsend's *McCoy* claim fails because that decision does not apply retroactively here.

II. Townsend is barred from relitigating the claims from his direct appeal.

"Successive, and often reformulated, claims clog the court system and waste judicial resources." *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). This Court has addressed that problem by holding that "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (citing *State v. Kern*, 442 N.W.2d 381, 382 (Neb. 1989)). The *Witkowski* court noted that "[o]ther courts have reached the same result where defendants attempted to apply new 'theories' to matters previously litigated." *Id.* (citing *Price v. State*, 779 S.W.2d 6, 7 (Mo. Ct. App. 1989); *Commonwealth v. Curtin*, 529 A.2d 1130, 1132 (Pa. Super. Ct. 1987)). It concluded that the defendant's motion under Wis. Stat. § 974.06 was barred under those principles because "he has simply rephrased—or re-theorized—the matters raised in his first appeal." *Id.*

The *Witkowski* bar against relitigating or rephrasing claims for postconviction relief is well-established in Wisconsin. This Court has "repeatedly" applied the holding of *Witkowski*. *Washington*, 343 Wis. 2d 434, ¶ 30; *see also, e.g.*, *State v. Crockett*, 2001 WI App 235, ¶¶ 12, 15, 248 Wis. 2d 120, 635 N.W.2d 673 (finding relitigated claims barred under *Witkowski* despite defendant's rephrasing of one claim).

Townsend's claims of ineffective assistance of counsel are barred under *Witkowski*. In his direct appeal, Townsend argued that his trial counsel was ineffective in several ways and that he was entitled to a new trial in the interest of justice. (R. 207:6–12.) In this collateral attack under Wis.

Stat. § 974.06, Townsend tries to relitigate those claims by repackaging them as claims of ineffective assistance of postconviction counsel. (Townsend's Br. 24–38.) Townsend cannot do so.

"An appellant cannot obtain post-conviction review of claims previously litigated on appeal by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims." *Commonwealth v. Whitney*, 708 A.2d 471, 476 (Pa. 1998). In other words, "[t]hat post-conviction counsel raises the claims in a different posture than that raised on direct appeal is not grounds for reasserting the claims under the guise of ineffective assistance of appellate counsel." *Davis v. State*, 123 P.3d 243, 248 (Okla. Crim. App. 2005) (alteration in original) (quoting *Turrentine v. State*, 965 P.2d 985, 989 (Okla. Crim. App. 1998)). "Just because post-conviction counsel has the benefit of reviewing appellate counsel's brief on direct appeal, and with the benefit of hindsight, envisions a new method of presenting the arguments is not a legal basis for disregard of the procedural bar [against relitigating claims]." *Turrentine*, 965 P.2d at 989.

Other courts have similarly held that claims from direct appeal cannot be repackaged as claims of ineffective assistance of counsel. *See, e.g.*, *State v. Lee*, 181 So. 3d 631, 638 (La. 2015) ("A petitioner's attempt to re-litigate a claim that has been previously disposed of, by couching it as a post-conviction ineffective assistance of counsel claim, is generally unavailing."); *Sireci v. State*, 469 So. 2d 119, 120 (Fla. 1985) ("Claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel."). In a Second Circuit case, for example, a defendant was barred from rephrasing a claim from his direct appeal as a claim of appellate counsel ineffectiveness. *Underwood v. United States*, 15 F.3d 16, 18 (2d Cir. 1993). Relying on the

distinction between raising a new claim and relitigating a prior claim, the court noted that the defendant's "claim of ineffective assistance is based upon his counsel's failure to cite a single case rather than failure to raise an issue entirely." *Id.*

In just one conclusory paragraph, Townsend argues that his claims of ineffective assistance are not barred under *Witkowski*. He asserts that his "§974.06 motion did not reassert or repackage claims from his direct appeal. He argued that ***postconviction counsel*** was ineffective in how he presented [Townsend's] §809.30 postconviction claims." (Townsend's Br. 37.) That's repackaging. Townsend is retheorizing the claims from his direct appeal by arguing that his lawyer ineffectively raised those claims during the direct appeal. (*See* Townsend's Br. 24–38.) The heading of this section of Townsend's brief tellingly reads: "[Townsend] is entitled to a new trial or an evidentiary hearing on the claims that [appellate counsel] presented ineffectively." (Townsend's Br. 24 (formatting altered).) So, Townsend is once again seeking a new trial on the grounds of ineffective assistance of trial counsel and in the interest of justice. He is repackaging those claims under the guise of ineffective assistance of postconviction counsel. He may not do so.[5]

[5] If Townsend were to prevail in this appeal, he would need to have an evidentiary hearing under *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), before he could get a new trial on grounds of ineffective assistance of counsel. When a circuit court denies a postconviction motion without a hearing, the issue on appeal is whether the defendant is entitled to a hearing. *State v. Sholar*, 2018 WI 53, ¶ 51, 381 Wis. 2d 560, 912 N.W.2d 89. "A *Machner* hearing is required before a court may conclude a defendant received ineffective assistance." *Id.* ¶ 53. So, unless the State concedes error, a defendant may not receive relief on an ineffective assistance claim before receiving a *Machner* hearing. *State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶ 22, 314 Wis. 2d 112, 758 N.W.2d 806.

In short, Townsend "is merely 'attempt[ing] to rephrase or re-theorize his previously-litigated challenge,' as prohibited by *Witkowski*." *Washington*, 343 Wis. 2d 434, ¶ 30 n.17 (alteration in original) (quoting *Witkowski*, 163 Wis. 2d at 992).

III. Townsend's request for postconviction discovery of Latisha's medical records is procedurally barred and meritless.

Townsend's final ground for relief is a postconviction discovery claim: he seeks access to Latisha's medical records to show that he shot her twice in the chest, not three times in the back and one time in the side as she testified at trial. (Townsend's Br. 38–42.) This claim is procedurally barred and meritless.

A. Townsend's discovery request is procedurally barred.

A claim for postconviction discovery is procedurally barred unless a defendant shows a sufficient reason for why he did not raise the claim in an earlier postconviction motion or appeal. *See State v. Kletzien*, 2011 WI App 22, ¶¶ 11, 15–17, 331 Wis. 2d 640, 794 N.W.2d 920. In his motion for postconviction discovery, Townsend alleged that postconviction counsel was ineffective by not raising this discovery claim on direct appeal. (R. 229:5.)

"In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 36. A defendant who asserts ineffective assistance must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

"[A]ppellate counsel's performance is deficient under *Strickland* only if she fails to argue an issue that is both 'obvious' and 'clearly stronger' than the issues actually raised." *Makiel v. Butler*, 782 F.3d 882, 898 (7th Cir. 2015) (citations omitted). So, "a defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 4. And the defendant must show that the claim that postconviction counsel failed to raise is "obvious and very strong" and "the failure to raise [the issue] cannot be explained or justified." *State v. Balliette*, 2011 WI 79, ¶ 69, 336 Wis. 2d 358, 805 N.W.2d 334.

Significantly, "if the defendant fails to allege why and how his postconviction counsel was constitutionally ineffective—that is, if the defendant asserts a mere conclusory allegation that his counsel was ineffective—his 'reason' is not sufficient." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 36. To avoid being "conclusory," a defendant's motion "must say why the claim he wanted raised was clearly stronger than the claims actually raised." *Id.* ¶ 62.

Townsend's request for Latisha's medical records is procedurally barred under those principles. His motion for postconviction discovery offered only a conclusory allegation that postconviction counsel was ineffective by not raising this issue on direct appeal. (R. 229:5.) Townsend's motion did not apply, or even acknowledge, the "clearly stronger" standard. (R. 229:5.) Because Townsend's only purported "sufficient reason" was just a conclusory allegation, his discovery request

is procedurally barred under *Kletzien*, 331 Wis. 2d 640, ¶¶ 11, 15–17.[6]

B. Further, Townsend's discovery claim is meritless (and thus procedurally barred).

In any event, Townsend's postconviction counsel was effective by forgoing this discovery request because it is meritless or at least not clearly stronger than the claims that counsel raised. Because postconviction counsel was effective, Townsend lacks a sufficient reason for failing to raise this discovery claim on direct appeal. This claim is therefore procedurally barred under *Kletzien*.

"[A] defendant has a right to post-conviction discovery when the sought-after evidence is consequential to the case." *State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999). "[E]vidence is [consequential] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 320–21 (alterations in original) (footnote omitted) (citation omitted).

This "reasonable probability" determination looks at whether the desired evidence would lead to a different result at trial. *See, e.g.*, *O'Brien*, 223 Wis. 2d at 321 ("Evidence that is of consequence then is evidence that probably would have changed the outcome of the trial."); *Ziebart*, 268 Wis. 2d 468,

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[6] When reviewing the adequacy of a defendant's postconviction pleadings, a court considers only the allegations in the motion, not the defendant's appellate briefs. *See State v. (John) Allen*, 2004 WI 106, ¶ 27, 274 Wis. 2d 568, 682 N.W.2d 433. In any event, Townsend's appellate brief is even more conclusory in this respect than his discovery motion. His appellate brief faults postconviction counsel for not raising this discovery claim on direct appeal, but he does not even clearly allege that counsel was ineffective in this respect. (Townsend's Br. 40.)

¶ 32 ("[A] defendant seeking [postconviction] discovery must establish that the evidence probably would have changed the outcome of the trial.").

Under the *O'Brien* standard, Townsend's discovery claim is not "obvious" and "clearly stronger" than the claims that his postconviction counsel raised. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 4; *Balliette*, 336 Wis. 2d 358, ¶ 69. Townsend argues that Latisha's medical records "could have (1) impeached Latisha, (2) supported [Townsend's] self-defense claim, and (3) precluded the State from repeatedly citing Latisha's false testimony to prove intent to kill." (Townsend's Br. 39.) Those arguments do not show a reasonable probability of a different outcome at trial, as required under *O'Brien*.

First, impeaching Latisha with her medical records would not have changed the verdicts. Latisha was already impeached in multiple ways. She was impeached with her prior inconsistent statement to a detective, whom Latisha told that she saw Brandon Thomas with a gun shortly after Townsend began shooting. (R. 272:25; 273:95, 97–100.) And, as Townsend acknowledges, "Jamal contradicted Latisha on several critical facts." (Townsend's Br. 8.) So, inconsistencies already impeached Latisha's credibility.

And further impeaching Latisha's credibility could have backfired on Townsend because she *helped* his defense in a few ways. Latisha testified that, before the shooting, she heard Brandon Thomas on his phone asking for someone to bring a gun to him. (R. 271:129.) Latisha also testified that, right before Townsend began shooting, Latisha heard Jamal tell Townsend that Townsend was not the only person who had a gun. (R. 272:17.) Latisha admitted that Jamal's statement could have been perceived as a threat. (R. 272:60.) Further, a detective testified that Latisha had said that she saw Thomas with a gun right after Townsend began shooting. (R. 273:95, 97–100.) Because many of Latisha's statements

were helpful to Townsend's defense, it is unclear how further impeachment of her credibility would have changed the verdicts.

Second, it is unclear how Latisha's medical records would have helped Townsend prove self-defense. Townsend seems to think that he was more likely acting in self-defense if he shot Latisha in her chest rather than in the back. But it is unclear why. After all, Townsend does not seem to allege that he acted in self-defense *because Latisha was threatening him*. Townsend instead argues that he shot Jamal because Jamal was holding a gun while threatening Townsend, and that Townsend shot Brandon because Brandon "rushed at" Townsend. (Townsend's Br. 33.) Townsend argues that the jury should have heard that "Latisha was shot twice in the chest because she was next to Jamal facing [Townsend] when [Townsend] started shooting." (Townsend's Br. 33.) But Townsend fails to explain why his self-defense claim hinged on the direction that Latisha was facing when he shot her. Jamal and Brandon could have posed a threat to Townsend, as he argues, even if Latisha had her back turned to Townsend.

Third, Latisha's medical records would not have helped disprove Townsend's intent to kill. A gunshot to the chest at close range raises a presumption of intent to kill. *State v. Johnnies*, 76 Wis. 2d 578, 587, 251 N.W.2d 807 (1977); *see also, e.g.*, *Lofton v. State*, 83 Wis. 2d 472, 479, 266 N.W.2d 576 (1978) (finding a presumption of intent to kill because the victim's chest had a bullet hole). Even if the jury learned that Latisha had been shot in the chest rather than the back, the prosecutor could have argued that Townsend's act of shooting Latisha showed an intent to kill.

In sum, Townsend has not shown a reasonable probability that Latisha's medical records would have changed the verdicts at his trial, a showing required under *O'Brien*. At the very least, Townsend has not shown that this

discovery claim is "clearly stronger" than the claims that his postconviction counsel raised, so counsel was not ineffective by forgoing this claim. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 4. Townsend thus lacks a sufficient reason for failing to raise this discovery claim on direct appeal, so it is procedurally barred under *Kletzien*.

CONCLUSION

This Court should affirm the circuit court's order denying Townsend's motion for postconviction relief.

Dated this 3rd day of October 2019.

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 6667 words.

_____
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Assistant Attorney General

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).

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This electronic brief is identical in content and format to the printed form of the brief filed as of 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 3rd day of October 2019.

_____
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