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**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2021AP001705-CR**

State of Wisconsin,

Plaintiff-Respondent,

v.

Cedric Tung,

Defendant-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable Mark A. Sanders, and the
Honorable Sandy A. Williams, presiding**

Defendant-Appellant's Reply Brief

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Certification as to Length and E-Filing

Argument

I. The state's bald assertion that Tung's issue is "lightly briefed" does not make it so.

According to the state, "Tung's argument is lightly briefed, particularly for a claim that he acknowledges is not controlled by existing precedent." (Resp. brief p. 15)

Nevertheless, the state was able to correctly summarize Tung's position on appeal. *McCoy* and *Chambers* are not entirely on point because defense counsel did not flat-out admit that Tung was guilty; however, counsel's behavior was so far contrary to her obligation to be a zealous advocate for Tung that she made a *de facto* admission of guilt. Thus, the principle of *McCoy* and *Chambers* ought to apply, and the court should find that this was structural error.

Thereafter, the state goes on to argue for approximately seven pages that *McCoy* and *Chambers* do not apply, and--according to the state-- Tung forfeited any argument concerning counsel's obligation to act as a zealous advocate for the defense.

Consequently, it does not appear that the state had any difficulty understanding Tung's argument, nor the legal authority on which it was based, nor did the state have any trouble controverting the issue.

An argument is undeveloped when, in the party's brief, it amounts to nothing more than a "passing reference." *State v. Jackson*, 229 Wis. 2d 328, 336, 600 N.W.2d 39, 43, 1999 Wisc. App. LEXIS 752, *9 That is, "A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories." *Jackson*, 229 Wis. 2d at 337, 600 N.W.2d at 43, 1999 Wisc. App. LEXIS 752, *9

As mentioned above, this is not what Tung did. To be sure, he was required to argue for an extension of law, but the brief fully explains the legal basis for the extension of law. Tung's argument is not "lightly briefed."

II. Tung argued in his postconviction motion that his attorney's behavior was a violation of her obligation to be a zealous advocate; and, therefore, contrary to the state's assertion, Tung has not forfeited that argument on appeal.

Concerning Tung's argument on appeal that his attorney abandoned her role as zealous advocate, the state contends that, "[F]irst, Tung never raised a *Cronic* claim in the postconviction court that counsel's decision was a total breakdown of the adversarial process; *he only sought relief under McCoy and Chambers.*" (Resp. brief p. 19)

This is simply untrue.

In his original postconviction motion, which alleged

ineffective assistance of counsel, Tung argued that:

Certain errors by counsel are presumptively prejudicial. This usually occurs in the context where, as here, counsel's error affects the defendant's fundamental rights, and the degree of prejudice is difficult or impossible to quantify. When defense counsel's conduct contravenes his or her duty of loyalty to the client, a criminal proceeding loses its character as a character as a confrontation between adversaries and the constitutional right to effective assistance of counsel is violated. See, *United States v. Cronin*, 466 U.S. 648, 655-57 (1984); see also, *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997); *Spisak v. Mitchell*, 465 F.3d 684, 704-5 (6th Cir. 2006) *vacated and remanded sub nom. Hudson v. Spisak*, 552 U.S. 945 (2007), *reinstated on remand sub nom. Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008)

(R:73-8),

Tung later filed a supplemental postconviction motion so as to include the argument that counsel's conduct, as alleged in the original motion, should be analyzed as structural error under *McCoy* rather than under the ineffective assistance of counsel rubric. (R:88) The supplemental motion withdrew the claim of ineffective assistance of counsel insofar as it required Tung to demonstrate prejudice. (R:88-2). Nevertheless, Tung never withdrew the factual allegation that counsel's conduct was so far contrary to his wishes that she was not acting as adversarial counsel; and, for this reason, it was structural error because it amounted to a *de facto* admission of guilt.

Additionally, the evidence presented at the motion hearing directly addressed the question of whether defense counsel

failed to zealously advocate Tung's position. Attorney Morales claimed that the reason she did not advocate Tung's position in her closing argument was because she did not believe his trial testimony was truthful.

In its brief, the state claims that the Rules of Professional Conduct for Attorneys (SCR 20), "[S]upport Morales' postconviction testimony that it would have been 'unprofessional' and 'unethical' for her to argue that he did not touch the child's vaginal area at all" under the rule requiring candor toward the tribunal. For the reasons stated at length in his brief-in-chief, Tung disputes the state's assertion that defense counsel is prohibited from arguing her client's trial testimony when she has subjective reservations about the truthfulness of the testimony; however, that is not the point here. The point is whether Tung has forfeited his argument on appeal that Morales abandoned her role as zealous advocate.

Plainly, the question of whether Morales abandoned her role as zealous advocate for Tung was raised in the postconviction motion, and it was the subject of testimony at that postconviction motion hearing. The parties have fully briefed the question on appeal.

It is difficult to understand, then, the state's assertion that Tung has somehow forfeited that argument on appeal.

Dated at Milwaukee, Wisconsin, this 5th day of April,
2022.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 1173 words.

Dated at Milwaukee, Wisconsin, this 5th day of April, 2022.

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