STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1705-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CEDRIC TUNG,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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The State of Wisconsin has received Defendant-Appellant-Petitioner Cedric Tung's Petition for Review from the court of appeals' published opinion.

The State opposes Tung's petition because it does not meet the criteria for review in Wis. Stat. § (Rule) 809.62(1r). The petition itself is inadequate, containing almost no citations to legal authority and no legal theory under which this Court might overturn the court of appeals' decision.

To be clear, Tung does not reassert his legal claims for relief made in the court of appeals. But even if this Court were to assume generously that, if his petition were granted, Tung would make similar arguments to those made below, review would not be warranted because the court of appeals' decision is well-reasoned and correct.

SUPPLEMENTAL STATEMENT OF THE CASE

Tung's petition ignores the circuit court's factual findings and credibility determinations made in denying his postconviction motion. (Pet. 11.) The following facts are taken from those findings, other portions of the record, and the court of appeals' decision.

Accused of first-degree sexual assault of a child under the age of 13, Cedric Tung admitted to police in a recorded interview that he touched the child's vagina. (Pet-App. 11; R. 1:1.) He made the same admission to his attorney Reyna Morales before trial, but he "kept on saying" to counsel that the touching was "inadvertent." (Pet-App. 16; R. 112:32.) Contrary to his postconviction claims, which the circuit court rejected, Tung did not tell his attorney that he wanted her to argue that he never touched the child. (Pet-App. 16–17.)

Based on Tung's statements to police and to her, counsel told the jury in her opening statement that the evidence would show that Tung did touch the child, but he had done so on "pure accident." (Pet-App. 12–13.) The State

played for jurors the recording of Tung's interview in which he admitted to touching the child. (Pet-App. 13.)

Tung testified in his defense at trial. On cross-examination, Tung had an exchange with the prosecutor in which he suddenly insisted, to defense counsel's surprise, that he never touched the victim. (Pet-App. 14; R. 31:38.)

In closing argument, Attorney Morales argued that "[Tung] is having this trial because he never intended to touch [the victim] in a sexual way, and I think that's clear when you look at everything . . . ." (Pet-App. 15.) Counsel later asserted: "[D]id this guy have the intent to touch this child in any sexual way? No. Did he touch her accidentally because he's like in the middle of sleeping or whatever? Yeah." (Pet-App. 15.)

Counsel appeared to cast Tung's denial of touching the child as an assertion that he did not *intend* to touch her or to be aroused: "[H]e took the stand . . . he wanted to let you guys know, man, I never did this. . . . I think they were cuddling, but [Tung] never, ever, ever intended to touch her or to get aroused by touching her." (Pet-App. 15.) The jury found Tung guilty of the charges.

Tung filed a postconviction motion alleging that counsel was ineffective for pursuing a defense that was contrary to his express wishes and trial testimony; he later withdrew the motion to reframe his claim under *McCoy*. (Pet-App. 15–16; R. 73:1–2; 88:1–2.) The court held an evidentiary hearing on the motion. (Pet-App. 15–16.) Tung testified that he told defense counsel before trial that he did not want her to admit to the jury that he touched the child's vagina. (Pet-App. 16.) Attorney Morales testified that Tung admitted to her that he inadvertently touched the child's genital area. (Pet-App. 16.) Counsel said she did not recall Tung telling her not to admit at trial that he touched the girl. (Pet-App. 17.)

The court denied Tung's motion, finding defense counsel was "more credible" than Tung and that Tung never expressed any objection to her about counsel's defense. (Pet-App. 17.) Moreover, the court observed that counsel "did not concede guilt in any way." (Pet-App. 17.)

Tung appealed, renewing his *McCoy* claim and arguing that counsel's performance in closing argument represented a breakdown of the adversarial process under *United States v. Cronic*, 466 U.S. 648 (1984).[1] The court of appeals affirmed. The court rejected the *McCoy* claim for two reasons: "first, that trial counsel did not concede Tung's ultimate guilt," and so there was no *McCoy* violation; "and second, that Tung failed to show" that he gave trial counsel "express instructions to pursue an innocence defense" that counsel then disregarded. (Pet-App. 19–20.)

The court also rejected Tung's *Cronic* claim and Tung's assertion that counsel told jurors in her closing argument that Tung "lied" about not touching the child. (Pet-App. 21–22.)

Tung petitions for review.

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[1] The circuit court did not address a *Cronic* claim, and the State argued on appeal that the claim was forfeited because it was not raised in the circuit court. The court of appeals concluded that Tung preserved the claim by referencing *Cronic* in his postconviction motion. (Pet-App. 21 n.8.)

ARGUMENT

This Court should deny review because Tung's petition is inadequate, and the court of appeals' decision is well-reasoned and correct.

A. Tung's petition does not merit consideration because he does not develop any legal theory under which he would be entitled to relief, and he has forfeited his claims made in the court of appeals by not reasserting them here.

Tung frames the issue presented in this case as "whether the constitution allows a defense attorney to formulate and to argue a theory of defense that is contrary to her client's trial testimony." (Pet. 12.)[2] Tung then proceeds to argue that court of appeals "avoided" this issue and misread counsel's closing argument in determining that counsel did not effectively assert that Tung "lied" on the stand. (Pet. 12.) The State addresses the latter of these arguments in section B. below.

As to the issue Tung frames up in his petition, Tung does not offer a legal theory that answers his own question. His petition contains almost no citations to legal authority. (Pet. 1–17.)[3] He fails to show if or how the court of appeals misapplied case law or constitutional principles in rejecting his arguments in the court of appeals. Most importantly, he makes no positive case for relief based on any legal theory showing why he is entitled to a new trial on his conviction for first-degree sexual assault of a child.

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[2] When citing Tung's petition, the State uses the page numbers generated by electronic filing, not Tung's page numbers.

[3] The lone cite is to Wisconsin Supreme Court Rule 20.3.3. (Pet. 13.)

Instead, he merely asserts that the issue presented should be decided by this Court, rather than the court of appeals. But by not presenting a legal theory under which the court of appeals decision might be reversed and a new trial ordered, he fails to show that the law provides him any avenue for relief.

Indeed, if this Court grants relief, it will do so not knowing what legal arguments Tung will make in his briefs to this Court. The Court might assume that Tung would reassert the arguments made in the court of appeals under *McCoy/Chambers* and *Cronic*. But by not reasserting those claims in his petition, or even citing and discussing those cases, Tung has forfeited those claims. If Tung intends to make some new argument that draws from *McCoy* and *Cronic*, or federal and state constitutional principles in general, he could have and should have at least previewed this argument in his petition. But he did not.

The petition should be denied because Tung fails to make a developed legal argument in support of relief.

B. The court of appeals' decision is well-reasoned and properly applied the facts to Tung's *McCoy* and *Cronic* claims made below.

Even if Tung's petition were not deficient and had reasserted his claims raised in the court of appeals, review would not be warranted because the court of appeals reached the correct result in denying Tung's *McCoy* and *Cronic* claims on these facts.

1. The court of appeals correctly concluded that there was no *McCoy* violation.

In *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018), the Supreme Court recognized that a defendant has the right "to

decide that the objective of the defense is to assert innocence." Awaiting trial on multiple homicide counts, McCoy told counsel that he wanted to pursue an innocence defense. *McCoy*, 138 S. Ct. at 1505–06. Believing that his client's best chance to avoid the death penalty was to concede guilt, counsel argued to the jury that McCoy was guilty, despite McCoy's express wish that counsel assert his innocence. *Id.*

The Supreme Court concluded that counsel's concession of guilt over his client's express wishes violated the Sixth Amendment. *McCoy*, 138 S. Ct. at 1508. "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts," the Court held, "his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (quoting U.S. Const. Amend. VI). "Counsel, in any case, must still develop a trial strategy and discuss it" with the defendant. *Id.* But when the defendant makes "express statements of [his or her] will to maintain innocence . . . counsel may not steer the ship the other way." *Id.*

This Court recognized the *McCoy* right in *State v. Chambers*, 2021 WI 13, 395 Wis. 2d 770, 955 N.W.2d 144. Chambers was charged with first-degree reckless homicide, and this Court assumed that Chambers had expressly directed counsel to pursue an innocence defense at trial. *Id.* ¶¶ 1, 22 n.9. This Court concluded that defense counsel did not concede Chambers's guilt in closing argument by asking the jury to "consider" second-degree reckless homicide where counsel had argued Chambers's absolute innocence before and after making this statement. *Id.* ¶¶ 23–25.

This Court summarized the requirements of *McCoy* as follows: "[T]o succeed on a *McCoy* claim, the defendant must show that he or she 'expressly assert[ed] that the objective of "his defence" is to maintain innocence of the charged criminal acts' and the lawyer did not 'abide by that objective and [overrode] it by conceding guilt.'" *Chambers*, 395 Wis. 2d 770,

¶ 20 (alteration in original) (citations omitted). Published last month, *Tung* joins *Chambers* as the only published Wisconsin cases to apply *McCoy*.

The court of appeals correctly determined that Tung was not denied his *McCoy* right to determine that the objective of his defense was to assert innocence for at least two reasons. First, counsel never asserted in her closing argument that Tung was guilty. She asserted that he was innocent because he did not touch the child intentionally for a sexual purpose. (Pet-App. 15.) To the extent counsel asserted a different *theory* of innocence than Tung testified to, *McCoy* does not recognize a right for the defendant to choose a particular theory of innocence—only the right to choose to decide that the objective of his or her defense is to assert innocence and not concede guilt for purposes of securing a lesser penalty.

In the court of appeals, Tung cited no case from any jurisdiction that has extended *McCoy* to recognize a right of a defendant to choose a particular theory of innocence as well as the defense's objective of innocence.

Second, even if *McCoy* were extended to give defendants the right to choose a particular *theory* of innocence, the court's findings indicate that Tung never expressed a desire to counsel to assert a defense that no touching occurred. Following the postconviction hearing, the court found Attorney Morales to be a more credible witness than Tung and expressly found that Tung "never" raised "any objection expressed about [counsel's] defense." (Pet-App. 17.)

The circuit court having rejected Tung's testimony that he told counsel to assert that no touching occurred, Tung suggests in his petition that some unstated constitutional principles required defense counsel to repeat the defendant's theory of innocence stated in his trial testimony and abandon counsel's theory of innocence previewed in opening remarks.

(Pet. 12–16.) But *McCoy* required no such thing from counsel, and Tung cites no authority (even basic constitutional principles) that would have required counsel to adopt, on the spot, in full, the defendant's surprising new position. Further, as discussed below, *Cronic* did not require that Attorney Morales take this course of action. What counsel actually did in responding to Tung's unexpected testimony was reasonable and unlike Tung's caricature of her performance.

2. The court of appeals correctly concluded that there was no *Cronic* violation.

Ordinarily, claims that a defendant was denied the effective assistance of counsel require proof of prejudice as well as deficient performance. *See Strickland v. Washington*, 466 U.S. 668 (1984). But in those rare cases when the defendant has been effectively denied the right to counsel altogether, prejudice may be presumed. *Cronic*, 466 U.S. at 658. This approach is appropriate for "breakdown[s] in the adversarial process." *Id.* at 662.

Tung argued in the court of appeals that defense counsel abandoned her duty of zealous advocacy in closing argument, and her remarks—Tung insists counsel effectively said he "lied" on the stand in asserting that no touching occurred—represented a breakdown in the adversarial process. The court of appeals properly rejected this argument for two reasons.

First, there was no breakdown in the adversarial process because counsel continued to assert Tung's innocence. As Tung repeatedly insisted in his conversations with counsel, counsel argued that Tung was innocent because he did not touch the child intentionally for the purpose of sexual arousal or gratification. Intent and sexual arousal or gratification are, of course, elements of first-degree sexual assault of a child by sexual contact under Wis. Stat.

§ 948.01(5), as the court of appeals discussed in its decision. (Pet-App. 22.) Counsel asserted Tung's innocence by arguing that the State did not prove intent or sexual purpose.

Second, as the court of appeals reasonably determined, counsel did not effectively assert that Tung "lied" in his testimony by not fully adopting his surprise testimony in her closing argument remarks. Rather, counsel did the best she could for her client in a difficult situation. She credited her client with testifying in his own defense, and sought to cast his testimony as a general assertion of innocence: "[H]e took the stand . . . he wanted to let you guys know, man, I never did this. . . ." (Pet-App. 15.) She sought to deemphasize the difference between her opening statement about how he touched the child but it was a "pure accident" and Tung's testimony that he was innocent because there was no touching. And, by reasserting that the State had not shown that Tung touched her intentionally for a sexual purpose, she reasonably advanced a defense that was arguably consistent with Tung's prior admission played for the jury that he touched the child. Counsel did not "abandon" her client under *Cronic*.

Thus, even if Tung had reasserted his previously argued *McCoy* and *Cronic* claims, the court of appeals properly denied those claims, and review would not be warranted under Wis. Stat. § (Rule) 809.62(1r).

The petition should be denied.

Dated this 4th day of August 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,534 words.

Dated this 4th day of August 2023.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals and Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 4th day of August 2023.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General