



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Scott E. Rosenow
Assistant Attorney General
rosenowse@doj.state.wi.us
608/266-3539
FAX 608/266-9594

April 14, 2020

Sheila T. Reiff
Clerk, Wisconsin Court of Appeals
110 East Main Street, Suite 215
Post Office Box 1688
Madison, WI 53701-1688

RECEIVED

APR 16 2020

CLERK OF COURT OF APPEALS
OF WISCONSIN

Re: *State of Wisconsin v. Duanne D. Townsend*,
Case No. 2019AP787
Dist. I

Dear Ms. Reiff:

On March 17, 2020, the Court of Appeals ordered each party in the above-referenced case to file a letter brief by April 15, 2020, in lieu of previously scheduled oral argument. The State submits this letter brief pursuant to that order. The Court directed each party's letter brief to address three questions on the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny:

1. The application of *McCoy v. Louisiana*, whether it is procedural or substantive, and whether it applies retroactively.
2. If it is procedural, are there any exceptions that would allow it to be applied retroactively to this case.
3. How does a concession of guilt over a client's objection constitute a structural error, and does it relate to retroactivity.

The State stands on the arguments that it made in its main appellate brief on the first and second issues identified above. Regarding the first issue, the State explained that *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), adopted a procedural rule. (State's Resp. Br. 8–9.) More generally, the State explained why *McCoy* does not apply retroactively to Defendant-Appellant Duanne D. Townsend's case. (State's Resp. Br. 7–16.) As for the second issue identified above, the State explained why *McCoy*

Ms. Reiff
April 14, 2020
Page 2

does not meet any exception to the *Teague* rule against the retroactive application of new criminal procedural rules. (State's Resp. Br. 12–16.) The State has nothing to add to the arguments that it has already advanced on the first and second issues quoted above.

Regarding the third issue quoted above, a concession of guilt over a client's objection is structural error for at least two reasons. As the State noted in its appellate brief-in-chief, “[t]he *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.” (State's Resp. Br. 14.) The *McCoy* Court listed three reasons for why an error might be deemed structural: (1) when the right at issue serves an interest other than protecting a defendant from an erroneous conviction, such as serving the defendant’s right to make choices about how to protect his liberty; (2) when the error’s effects are too difficult to measure; and (3) when the error will inevitably signal fundamental unfairness. (State's Resp. Br. 14–15 (citing *McCoy*, 138 S. Ct. at 1511).) The *McCoy* Court held 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.” *McCoy*, 138 S. Ct. at 1511. Regarding the first rationale, the Court explained that “[s]uch an admission blocks the defendant’s right to make the fundamental choices about his own defense.” *Id.* And, on the second rationale, the Court stated that “the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer’s concession of his client’s guilt.” *Id.*

McCoy does not apply retroactively even though it recognized a structural error. The United States Supreme Court has *not* “held that all structural-error rules apply retroactively or that all structural-error rules fit within the second *Teague* exception” to non-retroactivity. *Tyler v. Cain*, 533 U.S. 656, 666 (2001). “The standard for determining whether an error is structural is not coextensive with the second *Teague* exception, and a holding that a particular error is structural does not logically dictate the conclusion that the second *Teague* exception has been met.” *Id.* at 666–67 (footnote omitted) (citation omitted). “On the contrary, the second *Teague* exception is reserved only for truly ‘watershed’ rules.” *Id.* at 666 n.7. And, as the State has explained, *McCoy* did not announce a watershed rule. (State's Resp. Br. 13–16.)

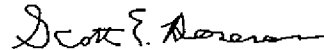
In sum, this Court should hold that *McCoy* does not apply retroactively. (State's Resp. Br. 7–16.)

Ms. Reiff
April 14, 2020
Page 3

The State notes that the parties in two other cases have briefed the merits of *McCoy* claims: *State v. Chambers*, appeal number 2019AP411-CR; and *State v. Howard*, appeal number 2019AP1384-CR. The parties in both of those cases have recommended publication. Those cases, like Townsend's, are in District I of the Court of Appeals. Even if *McCoy* applies retroactively (which it does not), a published decision in *Chambers* or *Howard* in the State's favor would likely foreclose Townsend's *McCoy* claim on the merits.

This Court should affirm the circuit court's decision denying Townsend's postconviction motion.

Sincerely,



Scott E. Rosenow
Assistant Attorney General

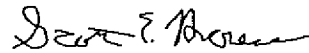
SER:cjs

c: Colleen Ball
Counsel for Defendant-Appellant

CERTIFICATION

I hereby certify that this letter brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a letter brief produced with a proportional serif font. The length of this letter brief is 740 words.

Dated this 14th day of April 2020.



SCOTT E. ROSENOW
Assistant Attorney General

**WISCONSIN COURT OF APPEALS
CERTIFICATE OF MAILING**

Re: *State of Wisconsin v. Duanne D. Townsend*
Case No. 2019AP903
District I

I hereby certify that on April 14, 2020, the **Letter Brief of Plaintiff-Respondent** was mailed by the United States Postal Service to the Clerk of the Wisconsin Court of Appeals on behalf of the plaintiff-respondent at:

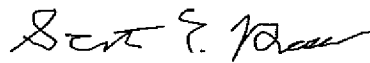
Sheila T. Reiff
Clerk, Wisconsin Court of Appeals
P.O. Box 1688
Madison Wisconsin 53701-1688

I hereby certify that a copy of the Brief will be mailed by United States Postal Service to the defendant-appellant:

Colleen Ball
Assistant State Public Defender
735 N. Water Street, Suite 912
Milwaukee, WI 53202

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
rosenowse@doj.state.wi.us