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April 15, 2020

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

Re: *State of Wisconsin v. Duanne D. Townsend*, Appeal No. 2019AP787

Dear Ms. Reiff:

Pursuant to the court of appeals' order of March 17, 2020, counsel for Duanne Townsend submits this letter brief addressing the following questions: (1) The application of *McCoy v. Louisiana*, __U.S.__, 138 S.Ct. 1500 (2018), 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; and (3) How does a concession of guilt over a client's objection constitute a structural error, and does it relate to retroactivity?

I. *Teague's* non-retroactivity doctrine does not apply to this case.

The State argues that *McCoy* adopted a "new rule" of criminal procedure. Therefore, it cannot apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). (Response Br. 8). Duanne agrees that *McCoy* applied a rule of criminal procedure, rather than a rule of substantive law. However, he contends that *McCoy* applied a "settled rule" of procedure, not a "new" one. It therefore applies retroactively to cases on collateral review, including this case.

A. *Teague*'s non-retroactivity doctrine does not apply to "settled rules" of criminal procedure.

Teague establishes a dichotomy. When a new case interprets a "settled rule," the new case applies retroactively. *Id* at 299-301. When a case establishes a "new rule" it is generally not retroactive, unless it is "substantive" or announces a "watershed rule of criminal procedure." *Id*. at 311.

The United States Supreme Court recently reinforced this point in *Chaidez v. United States*, 568 U.S. 342, 347 (2013):

> *Teague* makes the retroactivity of our criminal procedure decisions turn on whether they are novel. When we announce a "new rule," a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. Only when

we apply a settled rule may a person avail herself of the decision on collateral review.

A case announces a new rule "when it breaks new ground or imposes a new obligation" on the government. *Teague*, 489 U.S. at 301. It announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (Emphasis in original). "[A] holding is not so dictated . . . 'unless it would have been apparent to all reasonable jurists.'" *Chaidez*, 568 U.S. at 347 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-528 (1997)).

That standard is not as tough as it sounds. A holding may be "dictated by precedent" even when jurists disagree about it. *Chaidez* explained: "Dissents have been known to exaggerate the novelty of majority opinions; and 'the mere existence of a dissent' like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new." *Id.* at 353 n.11.

According to *Chaidez*, "*Teague* also made clear that a case does *not* 'announce a new rule, [when] it [is] merely an application of the principle that governed' a prior decision to a different set of facts." *Chaidez*, 568 U.S. at 347-348 (emphasis in original)(quoting *Yates v. Aiken*, 484 U.S. 211, 217 (1988)). "'[W]here the beginning point' of our analysis is a rule of 'general application, a rule designed for the specific purpose of evaluating myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.'" *Chaidez.*, 568 U.S. at 348 (quoting *Wright v. West*, 505 U.S. 277, 309 (1992)(Kennedy, J., concurring)). The Court highlighted *Strickland v. Washington*, 466 U.S. 668 (1984) as an example of a test that is applied to a variety of different claims for ineffective assistance of counsel without producing "new rules." *Id.*

The question presented in *Chaidez* was whether *Padilla v. Kentucky*, 559 U.S. 356 (2010) applied retroactively. *Padilla* held, in part, that a lawyer who fails to advise his client about the deportation consequences of his guilty plea provides ineffective assistance of counsel. *Chaidez* explained that if *Padilla* had merely applied *Strickland* to the facts at issue in that case, it would not have announced a new rule. But *Padilla* did more than that, *Id.* at 349. It first asked whether the *Strickland* test even applied to advice about deportation consequences of a guilty plea. According to *Chaidez*, "that preliminary question about *Strickland*'s ambit . . . required a new rule." *Id.* Thus, *Padilla* did not apply retroactively.

In sum, when all a court does is "apply a general standard to the kind of factual circumstances it was meant to address," it "will rarely state a new rule for *Teague* purposes." *Id.* at 348.

B. *McCoy* applied a "settled rule."

McCoy held: "When a client expressly asserts that the objective of '*his* defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy*, 138 S.Ct. at 1509 (emphasis in

original)(citing U.S. Const. Amdt. 6; ABA Model Rule of Professional Conduct 1.2(a)(2016)); *see also* SCR 20:1.2(a)("a lawyer shall abide by a client's decisions regarding the objectives of representation.")

McCoy simply applied a constitutional (and ethics) rule that has existed for decades. The Sixth Amendment protects a criminal defendant's dignity and autonomy to make fundamental decisions about defense. *Id.* at 1506-1509 (reviewing history of the right to defend).

Relying on cases decided over a half century ago, *McCoy* stressed: "'[t]he right to defend is personal,' and a defendant's choice in exercising that right 'must be honored out of "that respect for the individual which is the lifeblood of the law."'" *McCoy*, 138 S.Ct. at 1507 (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975) and *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970). "The Sixth Amendment 'contemplate[es] a norm in which the accused, and not a lawyer, is master of his own defense.'" *McCoy*, 138 S.Ct. at 1508 (quoting *Gannett Co. v. Depasquale*, 443 U.S. 368, 382 n. 10 (1979)). *See also McKaskle v. Wiggins*, 465 U.S. 168-176-177 (1984)("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused.")

Subsequent cases clarified that trial lawyers may decide "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admissions of evidence." *Gonzalez v. United States*, 553 U.S. 242, 248 (2008). "Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy*, 138 S.Ct. at 1508 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

Clearly, *McCoy* (2018) was not the first United States Supreme Court case to recognize that a defendant has the right to make certain fundamental decisions about his trial. Courts cite *Faretta* (1975) for the "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his liberty.") *See e.g. Weaver v. Massachusetts*, __U.S.__,137 S. Ct. 1899, 1908 (2017)(citing *Faretta*, 422 U.S. at 834). *McCoy* was not even the first case to hold that counsel lacks authority to concede guilt. *Brookhart v. Janis*, 384 U.S. 1, 67 (1966), for example, held that counsel "does not have the power to enter a plea which is inconsistent with his client's expressed desire."

McCoy simply applied a defendant's settled right to be "master of his defense," to the situation where a defendant insists on maintaining his innocence at trial against counsel's advice. This is evident from the majority opinion's march through decades of cases recognizing and applying this right. Nevertheless, the dissent by Justice Alito (joined by Justices Thomas and Gorsuch) repeatedly referred to the majority holding as a "newly discovered right." *McCoy*, 138 S.C.t at 1512, 1514, 1518. This is just what *Chaidez* warned about: "Dissents have been known to exaggerate the novelty of majority opinions," and the mere existence of dissents or conflicting authority "does not establish that a rule is new." *Chaidez,* 568 U.S. 353 n.11.

The State has argued that *McCoy* represents a "new rule" because it is contrary to two Wisconsin cases holding that defense lawyers performed reasonably in conceding 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. (Response Br. 11). The State is wrong. Neither *Gordon* nor *Silva* involved a defendant *who objected* to having his lawyer concede guilt. The defendant's insistence that his lawyer not concede guilt was essential to *McCoy*'s holding. Thus, even after *McCoy*, *Gordon* and *Silva* would be analyzed and decided the same way.

Finally, the State cites four unpublished, non-Wisconsin cases holding that *McCoy* does not apply retroactively. (Response Br. 16). Not one of those cases addresses the argument that Duanne makes: *McCoy* applied a settled rule of criminal procedure, and under *Teague* "settled rules" apply retroactively.

II. Counsel's concession of guilt over his client's objection is a structural error, and prejudice is presumed even on collateral review.

When a client claims that his counsel provided ineffective assistance, he ordinarily must prove both deficient performance and prejudice, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *McCoy*, 138 S.Ct. at 1511. However, when a "structural error" occurs, prejudice is presumed. *Id.*

A "structural error" affects the framework within which the trial proceeds. It is different from an error in the trial process itself. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). An error is deemed "structural" when: (1) the right at issue protects the defendant from something other than an erroneous conviction (like his right to choose the proper way to protect his liberty); (2) its effects are too hard to measure; or (3) it always results in fundamental unfairness. *Weaver*, 137 S.Ct. at 1908. When an error is structural, the defendant must "be accorded a new trial without any need to first show prejudice." *McCoy*, 138 S.Ct. at 1511.

McCoy explained that a lawyer's concession of guilt over his client's objection meets the first two classifications above. First, it implicates a client's autonomy, rather than a lawyer's competence. "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have when an error called 'structural'; when present, such an error is not subject to harmless-error review." *McCoy*, 138 S.Ct. at 1511. Second, it is impossible to measure the effects of this kind of violation, however, "a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *Id.* When an error is structural, the defendant must "be accorded a new trial without any need to first show prejudice." *Id.*

Weaver v. Massachusetts observed that courts are divided about whether a defendant must prove prejudice when he raises a structural error on collateral review rather than on direct appeal, and it refrained from deciding that question. *Id.* at 1907, 1912. *Weaver* narrowly held that a violation of the right to a public trial is a structural

error (subject to some exceptions). When this type of violation is raised on collateral review, the defendant must prove prejudice. *Id.* at 1907.

Wisconsin has not yet addressed *McCoy*. It has cited *Weaver* with approval, but not on collateral review. *State v. C.L.*, 2019 WI 14, 385 Wis. 2d 418, 922 N.W.2d 807 (where TPR respondent was called adversely in State's case, but prevented from presenting his case-in-chief, structural error requiring new trial occurred).

The Iowa Supreme Court recently analyzed *McCoy* and *Weaver* at length and applied *McCoy* on collateral review. *Krogmann v. State*, 914 N.W.2d 293 (Ia. 2018). In *Krogmann*, the State charged the defendant with murder and prior to trial froze his assets, which limited his phone calls from jail and prevented him from hiring a lawyer and a jury consultant. He was convicted, lost on direct appeal, and an in a collateral attack argued his counsel was ineffective for failing to object to the asset freeze. Citing *Faretta*, *McKaskle* and *McCoy*, the Iowa Supreme Court held that the defendant was denied his Sixth Amendment autonomy rights and that this was a structural error. *Id.* at 313-325. It noted that *Weaver's* holding was limited to cases involving the violation of a right to a public trial. *Id.* at 323. Citing *McCoy*, it presumed prejudice and ordered a new trial. *Id.* at 324-325, 326.

Following *McCoy*, *Weaver*, and *Krogmann*, the court of appeals should likewise hold that trial counsel's concession of guilt over his client's objection is a structural error, and when it is raised on collateral review, the defendant need not prove prejudice.

III. Duanne is entitled to a new trial under *McCoy*.

To repeat: "When a client expressly asserts that the objective of '*his* defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy*, 138 S.Ct. at 1509. (Emphasis in original).

If a jury found that Duanne Townsend shot Brandon, Latisha, and Jamal in self-defense, he would be acquitted of one count of 1st degree intentional homicide and two counts of attempted 1st degree intentional homicide. Duanne told his trial lawyer, Dan Mitchell, that he wanted to present a self-defense claim to the jury. (R.227:241; App.161). The court held that based on the testimony of Duanne's sister, Simone, there was enough evidence to put that claim to the jury. (R.274:46-51). Duanne also told Mitchell, that he did not want a "voluntary intoxication" or "ecstasy" defense, a defense which meant conceding guilt to reckless conduct. (R.227:241; App.162).

Despite Duanne's instructions, Mitchell gave a closing argument that (1) failed to argue self-defense to the jury, (2) negated any self-defense claim by calling Simone a liar, (3) failed to ask the jury to find self-defense, and (4) instead argued 7 different times that Duanne acted recklessly because he was high on Ecstasy (R.275:33-34 re Simone; R.275:30, 33-37 re Ecstasy defense). During rebuttal, the State flagged Mitchell's change in strategy

for the jury: "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).

While the jury was deliberating, the court asked Duanne if he agreed with Mitchell's decision to tell the jury that "it would be acceptable to you if they find you guilty of the reckless homicide based on all the circumstances." (R.276:60-61). Duanne said "no." On the record, Mitchell told the court that he conceded Duanne's guilt to reckless conduct "not only because of the way evidence came out but because of the potential exposures that are out there." (R.276:61).

The record is undisputed. Mitchell violated Duanne's right to determine his own defense. Whether the court of appeals analyzes this as a "client autonomy" claim or an "ineffective assistance of counsel" claim the result is the same. The court must presume prejudice and order a new trial. If it does, it need not address the other issues on appeal.

Sincerely,

Colleen D. Ball
Assistant State Public Defender

cc:

AAG Scott E. Rosenow

Mr. Duanne D. Townsend

CERTIFICATION AS TO LENGTH

Pursuant to the court of appeals' order of March 17, 2020, I hereby certify that the length of this letter brief is no more than 2500 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this letter brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic letter brief is identical in content and format to the printed form of the letter brief filed on or after this date.

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

Dated this 15th day of April, 2020.

Signed:

Colleen D. Ball
Assistant State Public Defender