AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Juries and Lawyers

**McCoy v. Louisiana, \_\_\_ U.S. \_\_\_** (2018)

*Robert McCoy was accused of murdering his estranged spouse’s son, mother and step-father. His attorney, Larry English, maintained that McCoy should concede that he did the actual killings as the best strategy for avoiding capital punishment. McCoy disagreed, insisting that the lawyer claim that he was in Idaho when the murders were committed. Two days before the trial, the trial judge refused McCoy’s request to terminate English’s representation. At trial, English asserted that the evidence was “unambiguous” that McCoy “committed three murders” but that he lacked the requisite intent for capital murder. The jury found McCoy guilty and at the sentencing phase sentenced him to death. The Supreme Court of Louisiana on appeal concluded that the trial court did not violate McCoy’s Sixth and Fourteenth Amendment rights by allowing trial counsel to concede guilty against the wishes of his client. McCoy appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-3 vote ruled that McCoy was unconstitutionally convicted. Justice Ruth Bader Ginsburg’s majority opinion held that persons have a Sixth Amendment right to decide whether to concede guilt. Ginsburg maintains that the Constitution allocates some decisions to counsel and some decisions to the defendant. What is the basis of that division? Does the dissent dispute that division? Is that division sound? Suppose a defendant tells their lawyer not to make certain hearsay objections. Does the lawyer have a constitutional obligation not to object? What should a lawyer do when a client urges a strategy the lawyer believes will fail?*

JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Id451c034574411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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The Sixth Amendment guarantees to each criminal defendant “the Assistance of Counsel for his defence.” At common law, self-representation was the norm. As the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized.  Even now, when most defendants choose to be represented by counsel, an accused may insist upon representing herself—however counterproductive that course may be. . . .

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in “grant[ing] to the accused personally the right to make his defense,” “speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.”  Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.”  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.

Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.

Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. When a client expressly asserts that the objective of “*his* defence” is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.

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The Louisiana Supreme Court concluded that English's refusal to maintain McCoy's innocence was necessitated by [Louisiana Rule of Professional Conduct 1.2(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006378&cite=LASTBAR16RPCR1.2&originatingDoc=Id451c034574411e8a2e69b122173a65f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (2017), which provides that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Presenting McCoy's alibi defense, the court said, would put English in an “ethical conundrum,” implicating English in perjury. . . . There was no such avowed perjury here. English harbored no doubt that McCoy believed what he was saying. English simply disbelieved McCoy's account in view of the prosecution's evidence. English's express motivation for conceding guilt was not to avoid suborning perjury, but to try to build credibility with the jury, and thus obtain a sentence lesser than death. . . .

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Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington* (1984). To gain redress for attorney error, a defendant ordinarily must show prejudice. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.

Violation 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. Structural error “affect[s] the framework within which the trial proceeds,” as distinguished from a lapse or flaw that is “simply an error in the trial process itself.”  An error may be ranked structural, we have explained, “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.”  An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt.

Under 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. Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And 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. McCoy must therefore be accorded a new trial without any need first to show prejudice.

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

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[T]he fundamental right supposedly violated in this case comes down to the difference between the two statements set out below.

*Constitutional*: “First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I submit to you that my client did not have the intent required for conviction for that offense.”

*Unconstitutional*: “First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I admit that my client shot and killed the victims, but I submit to you that he did not have the intent required for conviction for that offense.”

The practical difference between these two statements is negligible. If English had conspicuously refrained from endorsing petitioner's story and had based his defense solely on petitioner's dubious mental condition, the jury would surely have gotten the message that English was essentially conceding that petitioner killed the victims. But according to petitioner's current attorney, the difference is fundamental. The first formulation, he admits, is perfectly fine. The latter, on the other hand, is a violation so egregious that the defendant's conviction must be reversed even if there is no chance that the misstep caused any harm. It is no wonder that the Court declines to embrace this argument and instead turns to an issue that the case at hand does not actually present.

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While the question that the Court decides is unlikely to make another appearance for quite some time, a related—and difficult—question may arise more frequently: When guilt is the sole issue for the jury, is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged? If today's decision were understood to address that question, it would have important implications.

Under current precedent, there are some decisions on which a criminal defendant has the final say. For example, a defendant cannot be forced to enter a plea against his wishes. Similarly, no matter what counsel thinks best, a defendant has the right to insist on a jury trial and to take the stand and testify in his own defense. And if, as in this case, a defendant and retained counsel do not see eye to eye, the client can always attempt to find another attorney who will accede to his wishes. A defendant can also choose to dispense with counsel entirely and represent himself.

While these fundamental decisions must be made by a criminal defendant, most of the decisions that arise in criminal cases are the prerogative of counsel. . . . Among the decisions that counsel is free to make unilaterally are the following: choosing the basic line of defense, moving to suppress evidence, delivering an opening statement and deciding what to say in the opening, objecting to the admission of evidence, cross-examining witnesses, offering evidence and calling defense witnesses, and deciding what to say in summation. . . .

Some criminal offenses contain elements that the prosecution can easily prove beyond any shadow of a doubt. A prior felony conviction is a good example. Suppose that the prosecution is willing to stipulate that the defendant has a prior felony conviction but is prepared, if necessary, to offer certified judgments of conviction for multiple prior violent felonies. If the defendant insists on contesting the convictions on frivolous grounds, must counsel go along? Does the same rule apply to all elements? If there are elements that may not be admitted over the defendant's objection, must counsel go further and actually contest those elements? Or is it permissible if counsel refrains from expressly conceding those elements but essentially admits them by walking the fine line recommended at argument by petitioner's current attorney?

What about conceding that a defendant is guilty, not of the offense charged, but of a lesser included offense? That is what English did in this case. He admitted that petitioner was guilty of the noncapital offense of second-degree murder in an effort to prevent a death sentence. Is admitting guilt of a lesser included offense over the defendant's objection always unconstitutional? Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter? What about simple assault?

These are not easy questions, and the fact that they have not come up in this Court for more than two centuries suggests that they will arise infrequently in the future. I would leave those questions for another day and limit our decision to the particular (and highly unusual) situation in the actual case before us. And given the situation in which English found himself when trial commenced, I would hold that he did not violate any fundamental right by expressly acknowledging that petitioner killed the victims instead of engaging in the barren exercise that petitioner's current counsel now recommends.

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