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## When Mental Health Meets “The One-Armed Man” Defense: How Courts Should Deal with McCoy Defendants

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# COMMENT

*Farid Seyyedi\**

When Mental Health Meets “The One-Armed Man”  
Defense: How Courts Should Deal with *McCoy* Defendants

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## I. INTRODUCTION

The Supreme Court's ruling in *McCoy v. Louisiana*<sup>1</sup> is in many ways problematic. This case dealt with a borderline-competent client waffling on his version of events and presented the Court an opportunity to address complex issues that frequently arise in similar capital cases.<sup>2</sup> These tremendously important issues include: client perjury, the duty of candor, the rules of professional ethics, the right to withdraw, client autonomy, borderline competency, and mental health.<sup>3</sup> Despite these important issues, the Court held a strategic concession of guilt by defense counsel was a structural error worthy of retrial without the showing of any prejudice.<sup>4</sup> The Court favored client autonomy and set precedent that gives defendants a constitutional right to insist their attorneys not concede guilt to any element of a crime, whether facing overwhelming adverse evidence or for the purpose of presentence mitigation.<sup>5</sup>

This Comment argues the Supreme Court and every applicable lower court erred in finding Robert McCoy competent,<sup>6</sup> thereby enabling his execution.<sup>7</sup> Due to McCoy's behavior and mental state,<sup>8</sup> he was not eligible for the death penalty,<sup>9</sup> and the Court should have remanded on the issue of competency. Additionally, the Court should have considered the issues mentioned above<sup>10</sup> and given more deference to defense counsel's strategic concession of guilt in light of the State's overwhelming evidence.<sup>11</sup> Even if the Court held the concession of guilt was improper, they should have then applied the *Strickland* test<sup>12</sup> and decided if the defendant suffered prejudice

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1. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

2. See discussion *infra* Sections II–VI.

3. See discussion *infra* Sections II–VI. See generally *McCoy*, 138 S. Ct. 1500.

4. *McCoy*, 138 S. Ct. at 1511–12.

5. *Id.*

6. *Id.* at 1506; *State v. McCoy*, 218 So. 3d 535 (La. 2016), *rev'd*, 138 S. Ct. 1500 (2018).

7. *Cf. Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (“Today, no State in the Union permits the execution of the insane.”); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“[D]eath is not a suitable punishment for a mentally retarded criminal.”).

8. See *McCoy*, 138 S. Ct. at 1513 (Alito, J., dissenting) (providing details regarding McCoy's actions and proposed “incredible and uncorroborated defense”).

9. See cases cited *supra* note 7.

10. See *supra* note 3 and accompanying text.

11. *McCoy*, 138 S. Ct. at 1510.

12. See *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (laying out the Strickland two-pronged test to assess “[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence”).

stemming from the concession.<sup>13</sup> Lastly, this Comment will discuss some of the issues faced by defense counsel when dealing with a perjurious or borderline-competent client, including the lack of guidance from the American Bar Association (ABA) Model Rules of Professional Conduct.<sup>14</sup>

## II. HISTORY

The Sixth Amendment guarantees: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>15</sup> The right to assistance of counsel is a relatively new concept because the norm throughout the seventeenth and part of the eighteenth centuries was self-representation.<sup>16</sup> The right to counsel stemmed from the framers’ intent to allow defendants to ultimately “act in their own self-interest, free of government intervention.”<sup>17</sup> During the mid-eighteenth century, however, defense counsel began to appear more frequently in court, although they were prohibited from speaking to the jury.<sup>18</sup> Given most crimes were private in nature, defense counsel was only allowed to cross-examine witnesses and act “as a vessel through which defendants could exercise their personal rights.”<sup>19</sup> Defendants themselves were in charge of essentially all other parts of a criminal trial, including “speaking on issues of fact.”<sup>20</sup>

Defendant self-representation is no longer the norm due to the Supreme Court’s shift in ideology, which began with landmark cases like *Gideon v.*

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13. See *McCoy*, 138 S. Ct. at 1511 (“To gain redress for attorney error, a defendant ordinarily must show prejudice.” (citing *Strickland*, 466 U.S. at 692)); see *infra* notes 39–41 and accompanying text.

14. See generally MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2020).

15. U.S. CONST. amend. VI.

16. See *McCoy*, 138 S. Ct. at 1507 (citation omitted) (“Even now, when most defendants choose to be represented by counsel, an accused may insist upon representing herself—however counterproductive that course may be.”); see also *Faretta v. California*, 422 U.S. 806, 819–20 (1975) (demonstrating the Sixth Amendment’s assurances, which do not merely provide the accused with a right to a defense but actually grant them the power to make their own personal defense); see also Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147, 1166 (2010) (“Although representation by counsel had become more common by the time of the Revolution, self-representation remained the norm.”).

17. See Maeve Sullivan, Comment, *McCoy v. Louisiana and the Perils of Client Control of the Defense*, 96 DENV. L. REV. 733, 735 (2019) (discussing the very limited role of an attorney in the seventeenth and early eighteenth centuries).

18. *Id.* at 735.

19. See *id.* at 735–36 (discussing the limited role of an attorney in the mid-eighteenth century).

20. See *id.* (describing certain duties of defense counsel and the defendant).

*Wainwright*.<sup>21</sup> *Gideon* overturned the Court's prior holding in *Betts v. Brady*,<sup>22</sup> which only gave the right to counsel to defendants charged with federal capital crimes such as rape or murder.<sup>23</sup> *Gideon* was a landmark case in every aspect because it interpreted the Sixth Amendment right to counsel as "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."<sup>24</sup> The *Gideon* Court held:

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for [them]. . . . Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.<sup>25</sup>

The Court reasoned an indigent defendant is significantly disadvantaged without the helping hand of counsel, and this right should not be limited to capital offenses, but extended to any criminal prosecution where there is a chance of significant jail time.<sup>26</sup> The *Gideon* Court also emphasized the importance of having competent defense counsel because of the difficulties

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21. See *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (recognizing a constitutional right to counsel is not limited to federal capital offenses but is also available to state court defendants).

22. *Betts v. Brady*, 316 U.S. 455 (1942).

23. *Gideon*, 372 U.S. at 339. *Contra Betts*, 316 U.S. at 473 (holding the Fourteenth Amendment did not strictly require appointing trial counsel to a defendant for every criminal offense).

24. *Gideon*, 372 U.S. at 340–41 (quoting *Betts*, 316 U.S. at 465) (holding the right to counsel as a fundamental right which must be given to a defendant who cannot afford to hire counsel for themselves); see U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

25. *Gideon*, 372 U.S. at 344.

26. See *id.* (making the Sixth Amendment right to counsel obligatory on the States); see also *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (recognizing the need for counsels' help in maneuvering through the criminal justice system); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained." (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938))).

of maneuvering through the justice system as a layperson.<sup>27</sup> As Justice Sutherland explained in *Powell v. Alabama*:<sup>28</sup> “Even the intelligent and educated layman has small and sometimes no skill in the science of law.”<sup>29</sup> The *Gideon* and *Powell* Courts recognized that without an attorney’s help at every step of the judicial process there is simply no just or fair way to convict a criminal defendant.<sup>30</sup> This is largely because, even if the accused were innocent, she would not have the means to prove her innocence without an attorney’s help.<sup>31</sup>

The Supreme Court subtly changed its ideology when the right to self-representation was revitalized in *Faretta v. California*.<sup>32</sup> *Faretta* concentrated more on the text of the Constitution, which merely recognizes counsel as an assistant and reasoned that an attorney should not be forced on an unwilling defendant.<sup>33</sup> The *Faretta* Court, in holding the Sixth Amendment implies a right to self-representation rather than a practice of forcing counsel on unwilling defendants in a criminal proceeding, favored autonomy and relied on the roots of English legal history.<sup>34</sup>

In the 1980s, following *Faretta*, the Court further accentuated its shift toward defendants’ rights in *Jones v. Barnes*.<sup>35</sup> In *Jones*, the Supreme Court held: counsel has the authority to make strategic decisions when defending a client, but the client controls the objectives of the defense.<sup>36</sup> Additionally,

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27. See *Gideon*, 372 U.S. at 337–39, 344–45 (quoting *Powell*, 287 U.S. at 68–69) (overturning the Court’s previous holding in *Betts* because of the Court’s realization that the refusal to appoint counsel is offensive to the idea of fairness).

28. *Powell v. Alabama*, 287 U.S. 45 (1932).

29. *Id.* at 69.

30. See U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .”); see also *Gideon*, 372 U.S. at 344–45 (deeming the Sixth Amendment right to counsel “fundamental”); *Powell*, 287 U.S. at 68–69 (recognizing the danger a lay defendant may encounter without help from counsel in navigating the criminal justice system).

31. See *Powell*, 287 U.S. at 69 (“Without [the help of counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

32. See *Faretta v. California*, 422 U.S. 806, 817 (1975) (using a strict interpretation of the Constitution to hold the Sixth Amendment guarantees “the assistance of counsel” and does not require an attorney to be forced on an unwilling defendant).

33. See *id.* at 817, 820 (“We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.”).

34. *Id.* at 819–21.

35. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (affirming the defendant has the authority to make many decisions regarding certain aspects of his case, including whether to represent himself).

36. See *id.* at 751 (“[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case . . .”); see also Brief for the Ethics Bureau at Yale as Amicus Curiae

the Court emphasized: counsel does not have a duty to press every nonfrivolous argument the client requests “if counsel, as a matter of professional judgement, decides not to present those points.”<sup>37</sup> The Supreme Court “rationalized that these defined roles would afford counsel sufficient flexibility in forming the defense, as experienced advocates are often better equipped to determine which issues will offer the defendant the greatest chance of success.”<sup>38</sup>

In 1984, the Supreme Court offered further protections for criminal defendants in *Strickland v. Washington*.<sup>39</sup> *Strickland* provided a mode of recourse for defendants whose attorneys “fell below an objective standard of reasonableness.”<sup>40</sup> *Strickland*’s two-pronged standard provides: if a defendant can show (1) his attorney fell below an objective standard of reasonableness, and (2) as a result he was prejudiced, the defendant is entitled to a new trial—or alternatively a new sentencing proceeding—on grounds of ineffective assistance of counsel.<sup>41</sup> The recourse provided under *Strickland* is frequently raised on appeal in both state and federal courts but hardly ever granted.<sup>42</sup> To date, the Supreme Court has failed to

Supporting Petitioner at 4–5, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (No. 16-8255) (“Nowhere do the rules of ethics suggest that the prospect of false testimony entitles the lawyer to affirmatively disparage his client’s case in court against his express wishes.”); MODEL RULES OF PROF’L CONDUCT R. 1.2 (AM. BAR ASS’N 2020) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . . In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

37. *See Jones*, 463 U.S. at 751 (explaining, while a defendant has the ultimate authority regarding certain aspects of his case, he does not have a constitutional right to force appointed counsel to pursue nonfrivolous claims).

38. Sullivan, *supra* note 17, at 737–38; *see Jones*, 463 U.S. at 751–52 (recognizing experienced attorneys have long emphasized the importance of narrowing the scope of arguments and focusing on a few key issues that are likely to succeed).

39. *Strickland v. Washington*, 466 U.S. 668 (1984).

40. *Id.* at 688.

41. *See id.* at 687–88 (explaining the necessary components to support a defendant’s claim that the court should reverse his conviction or death penalty on the basis that his counsel’s assistance was defective).

42. *See* Meredith J. Duncan, “Lucky” Adnan Syed: Comprehensive Changes to Improve Criminal Defense Lawyering and Better Protect Defendants’ Sixth Amendment Rights, 82 BROOK. L. REV. 1651, 1652–53 (2017) (“[T]he failure rate of ineffective assistance claims does not accurately reflect the frequency with which defendants receive unacceptable legal representation at trial.”); Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W.L. REV. 237, 259 (1995) (demonstrating ineffective assistance of counsel claims are granted at a rate of less than 1% in federal courts and less than 10% in state courts); Nancy J. King, Essay, *Enforcing Effective Assistance After Martinez*, 122 YALE



recognize the inadequacy of existing ineffective assistance of counsel jurisprudence.<sup>43</sup>

The Supreme Court had yet another opportunity in *McCoy* to address how to balance a client's interest with the attorney's interest in using his professional judgment.<sup>44</sup> *McCoy* represented the difficult position often met by capital defense counsel dealing with a borderline-competent client facing the most extreme criminal charges.<sup>45</sup> This case was an excellent opportunity for the Court to clear many ambiguities in capital cases, especially cases involving a fundamental disagreement regarding trial strategy and the concession of guilt.<sup>46</sup>

### III. FACTS OF *MCCOY V. LOUISIANA*

On May 5, 2008, Christine Young and her husband, Willie Young, were shot dead in their home in Bossier City, Louisiana.<sup>47</sup> Christine's grandson, Gregory Colston—only a high school senior—was also shot and killed in the same incident.<sup>48</sup> After quick investigative work and cooperation between the state and federal police, Robert McCoy ("McCoy") was arrested and charged with three counts of first-degree murder.<sup>49</sup> On July 1, 2008, the State of Louisiana "gave its notice of intent to seek the death penalty against [McCoy]."<sup>50</sup>

The physical and circumstantial evidence obtained by the State of Louisiana was overwhelming.<sup>51</sup> First, the State had police dashboard footage of McCoy fleeing the scene of the crime in his car, a white Kia registered to him and the daughter of the victims, Yolonda Colston.<sup>52</sup>

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L.J. 2428, 2431 (2013) (emphasis added) (describing "the notoriously low rate of relief in federal habeas [claims,] . . . [stating] less than 1% of noncapital habeas petitions were granted for *any* claim").

43. Duncan, *supra* note 42, at 1653.

44. See generally *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (avoiding modification of the existing approach to defendant autonomy).

45. See discussion *infra* Section V.B.

46. See discussion *infra* Part VI.

47. *State v. McCoy*, 218 So. 3d 535, 541 (La. 2016), *rev'd*, 138 S. Ct. 1500 (2018).

48. *Id.*

49. See *id.* at 541–44 (describing the manhunt for McCoy involving local police, the U.S. Marshals, and the FBI resulting in his arrest and subsequent indictment for capital murder).

50. *Id.* at 544.

51. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1513 (2018) (Alito, J., dissenting) ("The evidence against [McCoy] was truly 'overwhelming,' as the Louisiana Supreme Court aptly noted." (citing *McCoy*, 218 So. 3d at 565)).

52. See *McCoy*, 218 So. 3d at 542 ("Detective Humphrey cautioned the first responders to be on the lookout for a white four-door Kia, which he believed was driven by Robert McCoy.").

Second, Yolonda had separated from McCoy earlier that spring and was in protective custody after an incident of domestic abuse.<sup>53</sup> Next, the police received a distressed 911 call from one of the victims, in which she screamed: “She ain’t here, Robert [McCoy] . . . I don’t know where she is. The detectives have her. Talk to the detectives. She ain’t in there, Robert [McCoy].”<sup>54</sup> A gunshot then rang out and the call disconnected.<sup>55</sup> The phone used to place the 911 call was later found inside the white Kia McCoy abandoned during the police chase.<sup>56</sup> Also inside the Kia was ammunition for the gun used to kill the victims and a receipt documenting an ammunition purchase earlier that day.<sup>57</sup> The State obtained security camera footage from Walmart, showing McCoy purchasing the ammunition.<sup>58</sup> Further, the State had cell phone records placing McCoy in Bossier City on the day of the murders, negating his assertion of being out of state when the murders occurred.<sup>59</sup> The next piece of damning evidence obtained by the State was the murder weapon, which officers found on McCoy at the time of his arrest; the State ran a ballistics test on the weapon, confirming it was the same gun that killed the three victims.<sup>60</sup> The gun, bullets, and ammunition found in the white Kia were identical to the bullet casings found at the scene of the crime.<sup>61</sup>

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53. *See id.* at 541 (footnote omitted) (“Yolanda Colston[] had separated from [McCoy] earlier in the [s]pring of 2008 and following an incident of domestic abuse battery in April 2008. . . . Yolanda and her infant daughter had gone into protective custody out-of-state, and a warrant was issued, on April 16, 2008, for [McCoy’s] arrest for aggravated battery . . .”).

54. *Id.* at 541–42.

55. *Id.* at 542.

56. *Id.*

57. *See id.* at 542, 544 n.8 (“Also found in the center console of the abandoned Kia was a Walmart bag with a box of .380 caliber ammunition. Inside the Walmart bag was a cash receipt from earlier that same day . . . for the purchase of the ammunition.”).

58. *See id.* (footnote omitted) (“The police obtained video surveillance footage from Walmart, generated at the time of the purchase on the receipt, which showed an individual matching the defendant’s physical description purchasing ammunition while wearing a black ‘do-rag’ on [his] head.”).

59. *See id.* at 541, 549 n.15 (“[McCoy’s] cell phone records indicated that he returned to Bossier City on or about May 4, 2008, as calls were initiated from [McCoy’s] cell phone in Bossier and Caddo Parishes on the day of, and the day after, the murders.”).

60. *See id.* at 543–44, 544 n.8 (“[T]he bullet that killed Willie Young, which was removed from his brain during autopsy, was fired from [the gun], and all four cartridge casings found at the scene at 19 Grace Lane were conclusively determined to have been fired from [the gun].”).

61. *Id.* at 544 n.8.

Despite this evidence, McCoy insisted he was innocent and was not in Louisiana at the time of the murders.<sup>62</sup> Instead, McCoy swore corrupt police shot the victims when a drug deal went sour, and the government was trying to frame him for the murders.<sup>63</sup> McCoy was certain the police were involved in a massive drug ring conspiracy, which included the federal government, his defense attorney, and even the presiding judge.<sup>64</sup>

As the Supreme Court noted:

Despite all this evidence, [McCoy], who had been found competent to stand trial and had refused to plead guilty by reason of insanity, insisted that he did not kill the victims. [McCoy] claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho. [McCoy] believed that even his attorney and the trial judge had joined the plot.<sup>65</sup>

When it came time for trial, McCoy insisted his defense counsel (hereinafter “English”) not concede guilt as to any element of the charged offense, believing he was innocent of any wrongdoing.<sup>66</sup> Although English reasonably believed the best way to avoid the death penalty was to concede guilt to the murders and argue McCoy lacked the mental state requisite for first-degree murder, McCoy disagreed and insisted English put on the farfetched conspiracy defense and pursue acquittal.<sup>67</sup> English—aware that pursuing such a defense would be madness for his client—conceded guilt over McCoy’s objection, believing this was truly the best strategy to maintain

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62. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1506 (2018) (describing McCoy’s insistence he was not in the State of Louisiana at the time of the murders).

63. *See id.* at 1506 (“[McCoy] insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong.”).

64. *See id.* at 1513 (Alito, J., dissenting) (describing McCoy’s belief his attorney and federal officials were involved in the plot).

65. *Id.*

66. *See id.* at 1506 (alteration in original) (citation omitted) (“McCoy told English ‘not to make that concession,’ and English knew of McCoy’s ‘complet[e] oppos[ition] to [English] telling the jury that [McCoy] was guilty of killing the three victims’; instead of any concession, McCoy pressed English to pursue acquittal.”).

67. *See id.* at 1506 & n.1 (describing English’s plan to concede guilt and argue for a lesser offense); Jeffery C. Mays, *To Try to Save Client’s Life, a Lawyer Ignored His Wishes. Can He Do That?*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/nyregion/mccoy-louisiana-lawyer-larry-english.html> [<https://perma.cc/PTG9-PKQ8>] (“Mr. English said it was Mr. McCoy’s delusions of a grand conspiracy that made his client unable to participate in his defense and that led him to believe he had no choice but to try to save his client’s life.”).

credibility with the jury and spare his client's life.<sup>68</sup> Mr. English explained his position in a post-trial affidavit stating:

I [knew] that [McCoy] was completely opposed to me telling the jury that he was guilty of killing the three victims and telling the jury that he was crazy but I believed that this was the only way to save his life. . . . I felt that as long as I was his attorney of record it was my ethical duty to do what I thought was best to save his life even though what he wanted me to do was to get him acquitted in the guilt phase. . . . I firmly believe that Robert McCoy is insane and was not competent to be tried . . . .<sup>69</sup>

McCoy's actions demonstrated the extremely difficult hand dealt to English in this case.<sup>70</sup> English could either concede guilt—giving McCoy a fighting chance at life in prison instead of a capital verdict—or do what the Supreme Court now says is required and walk his client into the government's "death chamber."<sup>71</sup>

The Supreme Court noted: "English harbored no doubt that McCoy believed what he was saying, . . . English simply disbelieved McCoy's account in view of the prosecution's evidence."<sup>72</sup> In light of this fact, the Court incorrectly held English could not have violated the rules of ethics or committed perjury because he did not actually *know* his client was lying.<sup>73</sup>

68. See *State v. McCoy*, 218 So. 3d at 565–66 (portraying a post-trial affidavit from Mr. English that states his concern with maintaining credibility with the jury; see also *Steward v. Grace*, No. 04-3587, 2007 WL 2571448, at \*2 (E.D. Pa. Aug. 30, 2007) ("This is an established technique whereby a criminal defendant, in order to enhance his credibility with the jury, concedes guilt in the liability phase in order to more effectively persuade the jury to show leniency at sentencing."). But see *People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010) ("Although defense counsel is free to develop defense theories based on reasonable assessments of the evidence, as guided by her professional judgment, she cannot usurp those fundamental choices given directly to criminal defendants by the United States and Colorado Constitutions.").

69. *McCoy*, 218 So. 3d at 565 (third omission in original).

70. See *McCoy*, 138 S. Ct. at 1512 (Alito, J., dissenting) ("The real case is far more complex. Indeed, the real situation English faced at the beginning of petitioner's trial was the result of a freakish confluence of factors that is unlikely to recur.").

71. See *id.* at 1514 (Alito, J., dissenting) (emphasis in original) ("As English observed, taking that path would have only 'help[ed] the District Attorney send [petitioner] to the death chamber.'").

72. *Id.* at 1510; see also *Mays*, *supra* note 67 ("About a month before the trial, Mr. English told Mr. McCoy that the case was unwinnable because of the evidence the prosecution had against him, including that when Mr. McCoy was discovered, the gun used in the killings was under a seat of the vehicle he was traveling in.").

73. See *McCoy*, 138 S. Ct. at 1510 ("English simply disbelieved McCoy's account in view of the prosecution's evidence. . . . Louisiana's ethical rules might have stopped English from presenting McCoy's alibi evidence if English knew perjury was involved. But Louisiana has identified

This distinction is farfetched and undermines the difficult position defense counsel faces when dealing with this type of defendant.<sup>74</sup> Additionally, the Court's opinion strangely acknowledged McCoy was ruled competent to stand trial and be executed, barely glazing over the facts that (1) McCoy truly believed he was out of the state at the time he killed three innocent people and (2) was convinced the government (including the trial judge) was trying to frame him in a massive conspiracy.<sup>75</sup> On appeal, McCoy argued English violated his constitutional right to counsel when English conceded guilt over McCoy's consistent objections.<sup>76</sup> The Supreme Court agreed, going as far as ruling such a concession a structural error—meaning there is no need to show prejudice and the error automatically entitled McCoy to a new trial.<sup>77</sup>

#### IV. CLIENT PERJURY AND THE RIGHT TO WITHDRAW

The first argument of this Comment will focus on when an attorney can withdraw from a case, particularly when the attorney believes her client will commit perjury.<sup>78</sup> Perjury occurs when “[a] witness testifying under oath or affirmation . . . gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”<sup>79</sup> The Supreme Court has not clarified what amounts to *knowledge* of a client's intent to commit perjury, which would potentially justify counsel's withdrawal. Unfortunately, caselaw and the rules of professional conduct also do not clarify or define

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no ethical rule requiring English to admit McCoy's guilt over McCoy's objection.”) *But see* MODEL RULES OF PROF'L CONDUCT R. 3.1 (AM. BAR ASS'N 2020) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . .”); *Id.* at R. 3.3 (“A lawyer shall not knowingly: . . . make a false statement of fact or law to a tribunal . . . [or] offer evidence that the lawyer knows to be false.”); *Id.* at R. 8.5(a) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.”).

74. *See McCoy*, 138 S. Ct. at 1513 (Alito, J., dissenting) (“[P]etitioner and English were stuck with each other, and petitioner availed himself of his right to take the stand to tell his wild story. Under those circumstances, what was English supposed to do?”).

75. *See id.* (“[P]etitioner, who had been found competent to stand trial and had refused to plead guilty by reason of insanity, insisted that he did not kill the victims. He claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials . . .”).

76. *State v. McCoy*, 218 So. 3d 535, 550 (La. 2016).

77. *McCoy*, 138 S. Ct. at 1511–12.

78. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (stating when an attorney must and may withdraw from representing a client—a lawyer must attempt to withdraw if the client insists on a course of conduct that would violate the Rules, which includes committing perjury).

79. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

what amounts to *actual knowledge*, although the rules do provide that knowledge may be inferred from the circumstances.<sup>80</sup> To add to the confusion, different courts use different standards for concluding what amounts to the attorney *knowing* his client's testimony will be perjurious.<sup>81</sup> Courts have used multiple standards, including: (1) "good cause to believe the defendant's proposed testimony would be deliberately untruthful,"<sup>82</sup> (2) "knowledge 'beyond a reasonable doubt,'"<sup>83</sup> (3) "a firm factual basis,"<sup>84</sup> (4) "a 'good-faith determination,'"<sup>85</sup> and (5) "actual knowledge."<sup>86</sup>

Keeping all of these standards in mind, it seems obvious that—regardless of what standard is used—when the evidence is overwhelming and the client's only defense is blaming the government for three homicides in a drug deal gone south, an attorney can certainly use his professional judgment in deciding whether or not this story is true, and whether or not there is evidence to corroborate such an accusation.<sup>87</sup> It would be

80. See MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (defining "knowingly" and stating "[a] person's knowledge may be inferred from circumstances"); see also *State v. Chambers*, 994 A.2d 1248, 1259 (Conn. 2010) ("[O]ur Rules of Professional Conduct require 'actual knowledge' and not a mere 'reasonable belief' by the attorney that his client intends to commit perjury."); *Att'y U v. The Miss. Bar*, 678 So. 2d 963, 970 (Miss. 1996) (citation omitted) ("The Terminology section of the Rules does not define 'knowledge' but it does define similar terms. 'Knowingly,' 'Known[.],' or 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. Nowhere, however, is 'actual knowledge' defined.").

81. See *Commonwealth v. Mitchell*, 781 N.E.2d 1237, 1246–47 (Mass. 2003) (discussing some of the many different standards used by courts across the nation).

82. See *State v. Hischke*, 639 N.W.2d 6, 11 (Iowa 2002) ("Hischke satisfied the requisite standard that a lawyer must be 'convinced with good cause to believe the defendant's proposed testimony would be deliberately untruthful.'").

83. See *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989) ("[A]n attorney should have knowledge 'beyond a reasonable doubt' before he can determine under Rule 3.3 that his client has committed or is going to commit perjury. This standard of knowledge is necessary to allow the attorney to represent the client zealously while remaining true to the judicial system.").

84. See *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977) ("If an attorney faced with this situation were in fact to discuss with the Trial Judge his belief that his client intended to perjure himself, without possessing a firm factual basis for that belief, he would be violating the duty imposed upon him as defense counsel.").

85. See *People v. Bartee*, 566 N.E.2d 855, 857 (Ill. App. Ct. 1991) (applying a "good-faith determination" standard as adopted by the Illinois Supreme Court (citing *People v. Flores*, 538 N.E.2d 481 (Ill. 1989))).

86. See *United States v. Del Carpio-Cotrino*, 733 F. Supp. 95, 99 (S.D. Fla. 1990) ("However, we do agree that a lawyer's duty to disclose future crimes or fraud by the client depends on the lawyer's state of knowledge. In short, actual knowledge is required.").

87. See, e.g., *Commonwealth v. Mitchell*, 781 N.E.2d 1237, 1247–48 (Mass. 2003) (giving deference to trial counsel with thirty-five years of experience to use professional judgment in spotting client perjury).

unrealistic to reach any other conclusion but falsity given the evidence the State had against McCoy and McCoy's accusations. The lower courts erred in not allowing English to withdraw, or alternatively not allowing McCoy to proceed by himself if he wanted to put on a defense that his attorney firmly believed was fraudulent.<sup>88</sup>

A. *How the McCoy Holding Affects the Legal Profession*

With the ruling in *McCoy*, defense attorneys—especially those who handle capital crimes—will be discouraged from taking these already immensely complex life or death cases.<sup>89</sup> Taking capital cases is a demanding and emotional task for any lawyer, but when the lines get blurred with opinions like *McCoy*, attorneys will not want to put their reputations—including their professional disciplinary reputations—at risk to take these cases.<sup>90</sup> All attorneys who are able and willing should take capital cases and fight to save the client's life.<sup>91</sup> But attorneys will not do this when the rules for capital punishment proceedings are so unclear, and caselaw from the Supreme Court only adds to the perplexity.<sup>92</sup> Moreover, higher courts pick apart professional trial strategy at every turn, causing capital defense attorneys—who are already few in number—to stop taking these cases altogether.<sup>93</sup>

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88. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1513 (2018) (Alito, J., dissenting) (“English told petitioner ‘some eight months’ before trial that the only viable strategy was to admit the killings and to concentrate on attempting to avoid a sentence of death. . . . [P]etitioner could have discharged English and sought new counsel willing to pursue his conspiracy defense . . .”).

89. See, e.g., Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527, 533 (2016) (“The unusual nature and vulnerability of the clientele—individuals, many with mental impairments, whose lives are on the line—leads to particular challenges of decision-making and counseling.”).

90. See, e.g., *id.* at 533–34 (footnote omitted) (“Death penalty defense is complex and demanding, and the quality of the defense matters to the outcome.”).

91. See, e.g., CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION Standard 4-1.2(e) (AM. BAR ASS'N 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/) [<https://perma.cc/R2XH-CW4Z>] (stating, generally, defense counsel should actively contribute to the administration of justice and to improving the law and criminal justice system as a whole).

92. See Mays, *supra* note 67 (“We are looking for guidance. This area of the law is ripe with ambiguity and mistakes . . .”).

93. See *Representation*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/death-penalty-representation> [<https://perma.cc/5LQA-DYGE>] (indicating “most states have raised the standards for representation,” but many counties lack resources for providing adequate representation in a capital case).

In fact, attorney Larry English never practiced law again after taking the *McCoy* case because he “went into a deep depression,” and knew that “[he] could never put [himself] through that again, emotionally.”<sup>94</sup>

Larry English had dedicated his life and criminal law practice to help fight injustice in the United States.<sup>95</sup> Mr. English, who grew up poor in rural Louisiana with six siblings, beat the odds and graduated from Tulane Law School.<sup>96</sup> When given the chance to represent McCoy, English saw the opportunity “as part of a larger struggle against injustice” in the United States.<sup>97</sup> English was dedicated to making a real change in our system, which “is so racked by racism and classism that there is no way the death penalty can be implemented in a way that’s constitutional.”<sup>98</sup> During the *McCoy* case, English frequently spoke to his friend Bridgett Brown, a lawyer friend of nearly two decades.<sup>99</sup> Ms. Brown had tried three capital cases in the past and described the situation as English having the “job nobody wanted.”<sup>100</sup> Unfortunately, English has now retired from practicing law, and another warrior in our justice system is lost due to a broken system that will not face difficult issues head on.<sup>101</sup>

It is certainly not desirable to run attorneys out of the business—especially those dedicated to changing the system. When a citizen’s life is at stake and terrible crimes have been committed, the most competent attorneys are necessary to ensure the end result is just, and due process is afforded at every step. With the help of the Supreme Court and the ABA, this can be done by making the rules clear and through guiding attorneys instead of second-guessing their professional decisions.

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94. See Mays, *supra* note 67 (detailing English’s reaction to the *McCoy* case).

95. See *id.* (“All these lives are coming in, and you are doing everything you can to save them. It was my way of fighting the system.”).

96. See *id.* (“Mr. English, who is 62, grew up poor with six siblings on a sharecropper’s farm in rural Louisiana. [English] said he had ‘a better chance of being the starting point guard for the New York Knickerbockers than graduating from Tulane Law School.’”).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See *id.* (explaining lawyers are in need of guidance and clarification in this area of the law).



B. *Potential Solutions to the McCoy Problem*

The first proposed solution to the *McCoy* dilemma is a specialized code for death penalty litigation.<sup>102</sup> This code would set specific rules for litigators encountering tough issues that frequently arise in death penalty cases.<sup>103</sup> This specialized code could include a separate code of professional responsibility and ethics that would guide attorneys who are forced to work with a client who is committing perjury or insisting on a bizarre defense objective. This seems like a dramatic course of action—especially because it could potentially flood the courts with other specialized attorneys arguing for a specialized code within their area of law—but it seems reasonable and necessary for death penalty litigation.<sup>104</sup> The death penalty case is a truly particular area of the law, as it uniquely involves life or death.<sup>105</sup> Thus, the need for a specialized set of rules is crucial. As one commentator explained:

[T]here are areas of professional conduct where lawyers—particularly those working in specialized legal practices—do not have adequate guidance about how to resolve ethics problems. These lawyers face disciplinary and other legal risks because of the vagueness, uncertainty, or incompleteness of the ethics rules. . . . Ideally, the problem would be addressed by additional, clearer rules that are tailored to the relevant areas . . . .<sup>106</sup>

Of course, a better solution would be for the Court to address the perjurious client issue, which arises with defendants like Robert McCoy. This would not be an easy task, but it is one important enough to be necessary.

The Supreme Court could have initiated this resolution by clearly defining what amounts to knowledge of perjury. It is unclear what constitutes

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102. See Green, *supra* note 89, at 532–34 (explaining why capital defense differs significantly from other types of criminal cases and involve frequent ethical issues that need to be addressed swiftly and accurately).

103. See *id.* (“If there are areas of practice where generalized ethics rules provide insufficient guidance, one might assume that death penalty defense is one of them.”)

104. See *id.* at 534 (explaining death penalty defense cases often involve particularly distinct and important ethical problems that require wise solutions). But see *id.* at 534–35 (addressing some of the potential pitfalls, including objections from other attorneys and judges who deal with specialized issues, in adopting a specialized code).

105. See *id.* at 534 (“[D]eath penalty defense would seem to be an area of practice where it is especially important for lawyers to resolve ethics problems appropriately, and where lawyers would need more guidance than usual in determining how to reach adequate resolutions.”).

106. *Id.* at 556.

knowledge of a client's intent to commit perjury, and cases are conflicting on the issue.<sup>107</sup> The Supreme Court has held defense counsel must know their client is going to commit perjury before they may withdraw; but how does one ever truly know—without a shadow of doubt—what his client is saying is not true? Is absolutely no evidence to corroborate the client's version of the facts enough?<sup>108</sup> Is it enough if the client merely changes her story before trial?<sup>109</sup> Is it enough if the attorney is almost certain the client is fabricating her story because she has nothing to live for?

One such case on the issue includes *Nix v. Whiteside*,<sup>110</sup> in which the Supreme Court held: "An attorney's duty of confidentiality . . . does not extend to a client's announced plans to engage in . . . criminal conduct."<sup>111</sup> The Court in *Nix* held "an ethical lawyer, as an officer of the court," should be "dedicated to a search for truth," and the right to counsel does not include the right to have a lawyer who will cooperate with planned perjury.<sup>112</sup> In fact, the Court stated if a lawyer does cooperate in such conduct, he would risk suspension and disbarment from the practice of law.<sup>113</sup> However, the Court does not provide guidance on what constitutes knowledge of a client's intent to commit perjury.<sup>114</sup> The client in *Nix* actually manifested his intent to commit perjury by telling his attorney directly that he intended to testify falsely and claim he saw a gun because he

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107. See *Nix v. Whiteside*, 475 U.S. 157, 160–61 (1986) (indicating when a defendant changes his story right before trial, defense counsel has enough evidence to know her client is going to perjure himself). But see *United States v. Midgett*, 342 F.3d 321, 322–23 (4th Cir. 2003) (declaring the defendant's "mystery man did it" story, although lacking any corroboration, was not enough to know the defendant was lying).

108. See generally *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (demonstrating an instance in which the defendant's version of the facts was wholly uncorroborated); *Midgett*, 342 F.3d 321 (providing another instance in which the defendant's version of the facts is uncorroborated and incredible).

109. See *Nix*, 475 U.S. at 160–61 (demonstrating an instance in which the defendant's story was consistent up until the eve of trial).

110. *Id.*

111. *Id.* at 174 (citing *Clark v. United States*, 289 U.S. 1, 15 (1933)).

112. See *id.* at 174 ("[T]he responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury.").

113. See *id.* at 173 ("A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.").

114. See generally *id.* (failing to specify when an attorney knows a client intends to perjure himself).

believed if he did not he was “dead.”<sup>115</sup> However, these types of express concessions are rare.

For example, in *United States v. Midgett*,<sup>116</sup> the defendant was charged with damaging a vehicle with fire and injuring another, bank robbery, and threatening a bank teller with gasoline.<sup>117</sup> Midgett and his lawyer were at odds from the outset of the case.<sup>118</sup> Among other things, Midgett was not satisfied with his lawyer’s unwillingness to pursue a “third person” defense.<sup>119</sup> According to Midgett, there was a third person involved who committed the assaults while Midgett himself was “in a drug-induced sleep in the back of the vehicle.”<sup>120</sup> Unfortunately for Midgett, there was absolutely no corroborating evidence to support his “third person” theory.<sup>121</sup> As Midgett’s attorney stated on the record: “[T]he issue relates to whether or not a third person was at the scene at the time of the destruction incident when [the victim] was burned, a third person actually did the act. . . . There’s nothing whatsoever that I can find to corroborate any such representation.”<sup>122</sup>

The court in *Midgett* distinguished these facts from *Nix* and held the attorney did not actually know that his client was going to commit perjury.<sup>123</sup> The court stated Midgett had been consistent with his story and his lawyer’s responsibility to him did not depend on the quantity of proof in favor of or contrary to Midgett’s version of the

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115.

Whiteside consistently stated to [counsel] that he had not actually seen a gun, but that he was convinced that [the victim] had a gun in his hand. About a week before trial . . . Whiteside for the first time told [counsel] and his associate Donna Paulsen that he had seen something “metallic” in [the victims] hand. When asked about this, Whiteside responded: “[I]n Howard Cook’s case there was a gun. If I don’t say I saw a gun, I’m dead.”

*See id.* at 160–61 (fifth alteration in original).

116. *United States v. Midgett*, 342 F.3d 321 (4th Cir. 2003).

117. *Id.* at 322.

118. *Id.*

119. *See id.* (“According to Midgett, it was [his co-accused’s] friend, and not Midgett, who had committed the assault . . . while Midgett lay in a drug-induced sleep in the back of the vehicle. . . . [Midgett’s] lawyer did not want Midgett to take the stand because he did not believe Midgett’s version of events.”).

120. *Id.*

121. *Id.* at 323.

122. *Id.*

123. *See id.* at 325–26 (distinguishing the facts of the case from those in *Nix*).

facts.<sup>124</sup> The court recognized this “mystery man did it” story lacked corroboration but found persuasive the fact Midgett never changed his story and never admitted he intended to commit perjury.<sup>125</sup> The court stated—quite comically—that “[d]efense counsel’s mere belief, albeit a strong one supported by other evidence, was not a sufficient basis to refuse Midgett’s need for assistance in presenting his own testimony.”<sup>126</sup>

Courts ought to give defense counsel a lot of deference in these situations because, other than the client themselves, counsel is in the best position to know whether her client is lying or telling the truth. Defense counsel works directly with the client and has access to all the facts, including those that are confidential. Thus, when defense counsel wants to withdraw from a case because she is quite certain her client is committing perjury, she ought to not be challenged by the court or have her “belief, albeit a strong one” questioned by judges who have not been working directly with the client and likely have no experience working with criminal clients.<sup>127</sup> When courts publish opinions like the one in *Midgett*, they create a situation where defense counsel, who are already in a difficult situation, must potentially put their reputations and license at risk for a client who insists on a potentially frivolous defense with no corroborating evidence.<sup>128</sup> Furthermore, defenses like this are comical for a jury because jurors are not incompetent and know when a defendant is reaching in an effort to escape prison.

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124. *See id.* at 326 (“Defense counsel’s responsibility to his client was not dependent on whether he personally believed Midgett, nor did it depend on the amount of proof supporting or contradicting Midgett’s anticipated testimony regarding how the incident happened.”).

125. *See id.* at 325–26 (“Midgett consistently maintained that his third-person defense was true and that he believed his co-defendant could corroborate his story.”).

126. *Id.* at 326.

127. *See id.* at 326 (stating although counsel’s belief of perjury was very strong, it was not enough to *know* his client intended to commit perjury). *But see* *People v. Salquerro*, 433 N.Y.S.2d 711, 713 (N.Y. Sup. Ct. 1980) (explaining a potential downside to allowing counsel to withdraw is that the client could now find another attorney who lacks ethical standards who may help the client defraud the court).

128. *See* Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 528 (2000) (“For the capital defense lawyer, issues of ethics are neither theoretical nor abstract. How he or she addresses these issues will drive virtually every aspect of how the client’s case will be investigated and litigated.”); *see also* Michael S. McGinniss, *The Character of Codes: Preserving Spaces for Personal Integrity in Lawyer Regulation*, 29 GEO. J. LEGAL ETHICS 559, 566 (2016) (“The most fundamental reason to exercise restraint when imposing specific mandates in lawyer regulation is to create space for individual lawyers to integrate their personal, moral, and religious convictions with their professional lives.”).

C. *How McCoy Affects Trial Strategy and Using the Narrative Approach to Avoid Attorney Discipline*

The Supreme Court's ruling in *McCoy* also makes problems worse in terms of credibility with the court and jury.<sup>129</sup> If English did put on the implausible conspiracy defense, he would have lost all credibility and the trial would have been a circus full of meritless accusations.<sup>130</sup> Furthermore, by putting on a fruitless defense, English would be subject to discipline for perjuring the court and bringing claims with no corroborating evidence.<sup>131</sup>

A potential way around discipline would be through a specialized death penalty code, addressed above, which would provide attorneys with breathing room when dealing with these types of clients.<sup>132</sup> Another solution proposed for situations when an attorney has a perjurious client is to use the narrative approach; however, that approach has been criticized and raises further issues that the Court should have addressed in *McCoy*.<sup>133</sup>

1. The Narrative Approach and Pitfalls Associated with this Approach

Although it is well established attorneys may not assist their clients in committing perjury, nothing stops them from allowing their clients to get on the stand and tell their story without guidance.<sup>134</sup> This is the “narrative approach,” which allows the defendant to tell her side of the story without

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129. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1515 (2018) (Alito, J., dissenting) (“Endorsing petitioner’s bizarre defense would have been extraordinarily unwise . . .”); see also *State v. McCoy*, 218 So. 3d 535, 565 (La. 2016) (“I needed to maintain my credibility with the jury in the penalty phase and could not do that if I argued in the guilt phase that he was not in Louisiana at the time of the killings, as he insisted.”)

130. As we have seen before in the famous Unabomber case, allowing unrealistic accusations to freely come into court can create a chaotic environment:

[Judge Burrell] understandably developed a strong desire to avoid the chaos, legal and otherwise, that would have ensued had Kaczynski been allowed to present his twisted theories to a jury as his defense to a capital murder charge. Not only would such a trial have had a circus atmosphere but, in light of Kaczynski’s aversion to mitigating evidence, it would in all likelihood have resulted in his execution.

*United States v. Kaczynski*, 239 F.3d 1108, 1126 (9th Cir. 2001).

131. See sources cited *supra* note 73.

132. See *supra* Section IV.B. and accompanying footnotes.

133. See *infra* Section IV.C.1 and accompanying footnotes.

134. See *People v. Johnson*, 72 Cal. Rptr. 2d 805, 813 (Cal. Ct. App. 1998) (“Under the narrative approach, the attorney calls the defendant to the witness stand but does not engage in the usual question and answer exchange. Instead, the attorney permits the defendant to testify in a free narrative manner.”).

it being in question and answer form like a typical direct examination.<sup>135</sup> However, this approach is problematic because it is well known that it is only used when an attorney believes his client is committing perjury.<sup>136</sup> Thus, the attorney is essentially selling out his client and also tainting his own defense.<sup>137</sup> Likewise, if even one juror knows this method is only used when the attorney believes his client is committing perjury,<sup>138</sup> the whole jury pool could potentially be tainted, and the case will almost certainly be lost. Moreover, the attorney is portraying his client as a liar and as someone who disregards the oath and the law to the judge and prosecutor who know very well why the approach is being used.<sup>139</sup>

This unfavorable solution is even more problematic because the defendant is subject to cross-examination and is effectively ruining her credibility on the stand without her attorney's guidance. Furthermore, when telling a story without the guidance of an experienced trial attorney, the version of events may be told out of order or in a manner that does not quite make sense. This could be especially true for a client in a court room setting with the judge and jury watching and nerves racing.

## 2. Attempting to Withdraw as Counsel and Prejudicial Effects

Aside from using the flawed narrative approach, a client is further prejudiced because the rules of professional conduct require an attorney

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135. *See id.* (describing the "narrative approach").

136. *See* *People v. Andrades*, 828 N.E.2d 599, 604 (N.Y. 2005) ("[I]f counsel were permitted to present defendant's testimony in narrative form without objection, the very fact of defendant testifying in such a manner would signify to the court that counsel believes that his client is perjuring himself."); *see also* *State v. McDowell*, 681 N.W.2d 500, 504 (Wis. 2004) ("[D]efense counsel may not substitute narrative questioning for the traditional question and answer format unless counsel knows that the client intends to testify falsely. Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission of intent to testify untruthfully."); *United States v. Rantz*, 826 F.2d 808, 813 (10th Cir. 1988) (justifying defense counsel's failure to put his client on the stand because of the state's overwhelming evidence, which led counsel to believe that his client's testimony would be false); *People v. DePallo*, 754 N.E.2d 751, 753-54 (N.Y. 2001) ("A lawyer with a perjurious client must contend with competing considerations—duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other.")

137. *See Johnson*, 72 Cal. Rptr. 2d at 814 ("The narrative approach has also been criticized as communicating to the jury that the defendant is committing perjury.")

138. *Id.*

139. *See id.* ("This procedure could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable." (quoting *State v. Robinson*, 224 S.E.2d 174, 180 (N.C. 1976))).

attempt to withdraw when his client commits perjury on the stand.<sup>140</sup> The dramatic effect this has on a client's case is emphasized in *Lowery v. Cardwell*.<sup>141</sup>

In *Lowery*, the Ninth Circuit correctly highlighted the effect a motion to withdraw has on a client when it is done in the midst of trial, especially when it is during a bench trial as it was in this case.<sup>142</sup> In *Lowery*, defense counsel moved to withdraw from the case when his client testified as to something the attorney believed was false.<sup>143</sup> Although the attorney was within the bounds of the rules in doing so,<sup>144</sup> the court stressed the troubling effects this has on a client's case. Among other things, the motion to withdraw clearly communicates to the judge—and potentially the jury if the motion is granted—that something has gone terribly wrong between the client and attorney.<sup>145</sup> This sends a troubling message to the court and greatly reduces the chance of a favorable verdict for the defendant. In effect, a motion to withdraw in these circumstances deprives the defendant of a fair trial because the court now knows the defendant is not credible.<sup>146</sup> The *Lowery* court ultimately held that the attorney's conduct was proper.<sup>147</sup> The court, however, plainly stated “this is an unhappy result” because it is inescapable though extremely unfavorable.<sup>148</sup>

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140. See MODEL RULES OF PROF'L CONDUCT R. 1.16 (AM. BAR ASS'N 2020) (stating a lawyer must attempt to withdraw if the client insists on an unlawful course of conduct, which clearly includes committing perjury).

141. See *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978) (“[I]f . . . counsel informs the fact finder of his belief he has, by that action, disabled the fact finder from judging the merits of the defendant's defense. . . . [and] openly placed himself in opposition to his client upon her defense. The consequences . . . deprive the defendant of a fair trial.”).

142. See *id.* (stating a motion to withdraw mid-trial based on a belief of perjury may negate the possibility of a fair trial).

143. *Id.* at 729.

144. See *id.* at 730 (footnote omitted) (“The result on these unusual facts is not inconsistent with the principles of professional responsibility under ethical standards as they are generally recognized today and does not expose counsel to a charge of subornation of perjury.”).

145. See *supra* note 141.

146. See *Lowery*, 575 F.2d at 730 (explaining after counsel moved to withdraw and stated he could not divulge his reasoning for the motion, “the only conclusion that could rationally be drawn by the judge was that in the belief of her counsel appellant had falsely denied shooting the deceased”).

147. *Id.* at 730–31.

148. The court in *Lowery* reluctantly states:

Trial counsel is to be commended for his attention to professional responsibility. . . . We are acutely aware of the anomaly presented when mistrial must result from counsel's bona fide efforts to avoid professional irresponsibility. We find no escape, however, from the conclusion that fundamental requisites of fair trial have been irretrievably lost.

#### D. *Raising the Competency Standard as an Alternative Solution*

Another alternative solution to this problem would be to refine and raise the competency standard for capital punishment defendants in every state which implements the death penalty. Given the fact life or death is at stake, as well as the importance of capital defendants receiving a fair trial, it would not be unreasonable to raise the competency bar for capital punishment defendants. Many capital punishment defendants are mentally unstable and have gone through trauma which has put them on a destructive path.<sup>149</sup> Given that many of these individuals are mentally unstable, on top of the implications of a jury verdict in a capital case—not only on the defendant but also on the jury's own conscience—it is not unreasonable to categorically and uniformly raise the standard for these limited cases, which are of the utmost importance in our justice system.

The Supreme Court should categorically adopt, for death penalty jurisdictions, the competency standard recommended by the ABA.<sup>150</sup> This

*Id.* at 731 (footnote omitted).

149. See Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 791 (2009) (“Indeed, many prisoners on death row, and many who have been executed, have suffered from demonstrable mental illness.”); see also Donald P. Judges, *The Role of Mental Health Professionals in Capital Punishment: An Exercise in Moral Disengagement*, 41 HOUS. L. REV. 515, 532 (2004) (“Psychiatrists, psychologists, and other mental health professionals participate in the capital punishment process in several capacities . . . . [M]ental health professionals’ role in the capital punishment process continues to expand, and this expansion has pushed the edges of the ethical envelope.”).

150. Paul M. Igasaki, A.B.A. Section of Individual Rights and Responsibilities, Recommendation No. 122A, at 1–2 (2006). The ABA’s recommended competency standard is:

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.
2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to the conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.
3. Mental Disorder or Disability after Sentencing
  - (a) *Grounds for Precluding Execution.* A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to



rule is not a novel solution to the dilemma faced by defense attorneys dealing with a *McCoy* defendant. Justice Powell, in his *Ford v. Wainwright*<sup>151</sup> concurring opinion, suggested raising the competency standard for capital defendants;<sup>152</sup> his argument is now even more relevant and carries more force than it did when the case was decided in 1986. Justice Powell addressed the issue of competency for execution, stating the Eighth Amendment “forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.”<sup>153</sup> Justice Powell suggested the proper test of competency should be whether defendants can comprehend the nature, pendency, and purpose of their execution.<sup>154</sup> Further, he encouraged the states to adopt “a more expansive view of sanity,” which included the “requirement that the defendant be able to assist in his own defense[,]” stressing the Eighth Amendment competency requirement is only a minimum standard.<sup>155</sup>

Despite Justice Powell’s encouragement, states have failed to provide specific guidelines for evaluating a defendant’s competency for execution. This is problematic because a capital punishment trial is extremely intense for the defendant and the jury who must decide whether to sentence another citizen to death. Making the decision of whether to send a mentally unstable citizen to the death chamber is a decision which must not be taken lightly.<sup>156</sup> Raising the competency standard in capital punishment trials would give deference to the rising issues of mental health in the United States.

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challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner’s participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case.

*Id.* at 1.

151. *Ford v. Wainwright*, 477 U.S. 399 (1986).

152. *Id.* at 422 (Powell, J., concurring).

153. *Id.*

154. *See id.* (“[O]nly if the defendant is aware that his death is approaching can he prepare himself for his passing.”).

155. *Id.* at 422 n.3.

156. *Cf. Winick, supra* note 149, at 789 (“[T]he American Bar Association (“ABA”), the American Psychiatric Association (“APsya”), the American Psychological Association (“APA”), the National Alliance on Mental Illness (“NAMI”), and Mental Health America (“MHA”) (formerly known as the National Mental Health Association)—have adopted policy statements that recommend prohibiting the execution of those with severe mental illness.”).

Mental health has become a topic of conversation in recent years, but the courts have not given enough deference to the mental health of capital defendants. While it is true not all capital defendants are incapable of understanding the consequences of their actions, it is also true mental illnesses account for many heinous crimes.<sup>157</sup> Additionally, raising the competency standard would not allow defendants to get away with terrible crimes. Instead, this would merely require that when a defendant is mentally ill, he must be given a life sentence instead of the death penalty.<sup>158</sup> This is consistent with the Supreme Court's rulings disallowing execution of a mentally retarded defendant.<sup>159</sup>

The Supreme Court in *McCoy* completely failed to address some of these tough issues and instead punished the defense counsel by ruling his concession of guilt was structural error.<sup>160</sup> The *McCoy* opinion is ill-founded and makes defense counsel's already tough moral and ethical decisions in capital cases even more difficult.<sup>161</sup> When clients, especially in the context of capital punishment cases, insist on putting on a frivolous defense with no corroborating evidence, defense counsel ought to have the authority to make a judgment call on whether they want to continue with the representation of their client.<sup>162</sup>

157. See, e.g., *Serious Mental Illnesses and Homicide*, TREATMENT ADVOC. CTR. (June 2016), <https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3627> [<https://perma.cc/F7LW-UV4H>] (“[I]ndividuals with schizophrenia and bipolar disorder are responsible for approximately 10% of all homicides in the United States. For mass killings, the percentage is approximately 33% . . .”).

158. See, e.g., Jolie McCullough, *Texas House OKs Bill to Ban Death Penalty for Those with Severe Mental Illness*, TEX. TRIB. (May 8, 2019), <https://www.texastribune.org/2019/05/08/texas-death-penalty-rules-could-change-some-mentally-ill-defendants/> [<https://perma.cc/4TPD-FAFA>] (“For the second time in two weeks, the Texas House moved to change death penalty law. On Wednesday, the chamber tentatively passed a measure that would prohibit handing down a death sentence to someone with a severe mental illness, like schizophrenia or bipolar disorder.”).

159. See, e.g., Winick, *supra* note 149, at 785–86 (footnotes omitted) (“The Court, in effect, announced that the Constitution requires a per se finding of diminished responsibility. All people with mental retardation, the Court held, are constitutionally exempt from capital punishment based upon their diagnosis alone.”).

160. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018).

161. See Green, *supra* note 89, at 533 (“The unusual nature and vulnerability of the clientele—individuals, many with mental impairments, whose lives are on the line—leads to particular challenges of decision-making and counseling.”).

162. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (affirming an appellate lawyer was not required to accede to the defendant's request to raise particular non-frivolous arguments); see also *United States v. Masat*, 896 F.2d 88, 92–93 (5th Cir. 1990) (stating a lawyer did not provide ineffective assistance in arguing ridiculous theories upon the defendant's insistence); *Nelson v. State*, 21 P.3d 55, 60–61 (Okla. Crim. App. 2001) (suggesting—although the defendant's most plausible defense was

The Supreme Court in *McCoy* notes: in some instances a defendant may not want to avoid being put to death and instead may “above all else, [want to avoid] the opprobrium [attending admission that] he killed family members[, o]r he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.”<sup>163</sup> However, this is no excuse for letting a man purposefully walk himself into the government’s death chamber and, in effect, commit suicide because he does not want to live with the consequences of his actions. The Supreme Court is essentially implying counsel should put aside the fact his client is committing suicide because the client may prefer death to prison.<sup>164</sup> This reasoning is flawed and only worsens a major problem in our justice system. The United States has more people incarcerated than any other country in the world.<sup>165</sup> As of July 2020, there was an estimated 2,591 inmates on death row.<sup>166</sup> With the holding in *McCoy*, the Court only adds fuel to this fire.

Defense counsel should not be forced to put on a certain outlandish defense when there is overwhelming evidence to the contrary. More importantly, defense counsel should not be forced to ruin their reputation with the court, the jury, and the prosecution. It is likely attorneys will have to work together in the future and defense counsel should not be forced to raise meritless accusations against peers in the legal community. Although counsel certainly will have to raise some issues because their client insists, this does not amount to raising claims against the trial judge, federal, and state governments.

The client’s interests nonetheless do come first, and defense counsel shall

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insanity—trial counsel was not ineffective in acceding to the defendant’s decision not to raise the defense); *State v. Davis*, 506 A.2d 86, 89–90 (Conn. 1986) (indicating a trial lawyer is not constitutionally required to call a witness whom the defendant instructed him to call).

163. *McCoy*, 138 S. Ct. at 1508.

164. *See id.* at 1508–09 (stating an attorney is obligated to uphold the client’s express objective of maintaining innocence even in light of overwhelming evidence to the contrary).

165. Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html> [<https://perma.cc/B4BK-5W66>]; *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) [<https://perma.cc/4NPF-8EZQ>] (showing a total of 2.1 million prisoners incarcerated in the United States; China is the second on the list with 1.7 million incarcerated).

166. DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. SUMMER 2020, at 1 (2020), <https://www.naacpldf.org/wp-content/uploads/DRUSASummer2020.pdf> [<https://perma.cc/63RU-AVRB>].

not use these recommendations as an excuse to be lazy or not fully litigate tough cases. However, litigating zealously for a client does not mean an attorney has to ruin her reputation while doing so. In situations where there is overwhelming evidence against a client, the best way to craft a defense may be to concede guilt but focus on mitigation evidence or an insanity defense. This is exactly what English did in *McCoy*,<sup>167</sup> and it was consistent with many other cases in Louisiana which allowed the concession even if the client objected.<sup>168</sup> Additionally, this defense may have worked if it was not for McCoy's testimony to the jury in an unsuccessful attempt to put on his conspiracy defense.

V. THE LACK OF GUIDANCE FROM THE ABA MODEL RULES  
OF PROFESSIONAL CONDUCT AND MENTAL HEALTH ISSUES  
IN THE UNITED STATES

The ABA Model Rules of Professional Conduct do not reflect what the Supreme Court now says is required of defense counsel after *McCoy*.<sup>169</sup> The Rules do not reflect that a client is in charge of the tactical strategy of whether or not to concede guilt during trial as to one element of the charged offense.<sup>170</sup> Conceding guilt as to an element of the charge is largely a tactical decision done when defense counsel believes it will mitigate punishment at sentencing.<sup>171</sup> This strategy is commonly used when the State's evidence is truly overwhelming.<sup>172</sup> In these situations, the best thing to do as defense counsel is to focus on mitigation investigation and do anything possible to minimize liability at sentencing.<sup>173</sup>

167. See *supra* notes 67–68 and accompanying text.

168. See discussion *infra* Section VI.A–B.

169. See generally MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2020); see *McCoy*, 138 S. Ct. at 1512 (giving criminal defendants the right to insist their attorney not concede guilt as to any element of a crime).

170. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . . In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

171. See *Florida v. Nixon*, 543 U.S. 175, 191–92 (2004) (stating it is hopeless in many cases to put on a charade before the jury as many triers of fact would prefer candor).

172. See *infra* note 230 and accompanying text.

173. *Nixon*, 543 U.S. at 192 (“In a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed.”).

A. *The ABA Model Rules of Professional Conduct Are Silent on the Issue of Conceding Guilt*

The ABA Model Rules of Professional Conduct reflect that in a criminal case the client decides: (1) whether or not to proceed with a jury trial, (2) whether to plead guilty, and (3) whether or not to take the stand and testify.<sup>174</sup> This is the objective/means rule, which essentially states the client is in charge of the objective and the attorney the means.<sup>175</sup> Furthermore, the rules make clear that trial strategy is decided by the attorney and not the client.<sup>176</sup> This is reasonable because it is the attorney and not the client who is an experienced advocate. The rules further reflect an attorney may not help his client commit a crime, which clearly includes committing perjury.<sup>177</sup> Also, an attorney has a duty of candor toward the court and has a duty to not pursue and litigate meritless claims.<sup>178</sup> In fact, an attorney can be disbarred for helping a client commit perjury and not being candid with the tribunal.<sup>179</sup>

B. *Mental Health Issues Are Rampant in the Criminal Justice System*

The Death Penalty Information Center provides that mental health issues have a tremendous impact in death penalty cases.<sup>180</sup> Actually, “[o]ne in ten

174. See source cited *supra* note 170.

175. See W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on McCoy v. Louisiana*, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 92, 108 (2018) (alteration in original) (citations omitted) (“The client may be ‘the master of his or her own defense[,]’ but the lawyer is ‘captain of the ship.’”).

176. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (AM. BAR ASS'N 2020) (“Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.”).

177. *Id.* at R. 1.16(a)(1), 3.3; see also *People v. DePallo*, 754 N.E.2d 751, 753–54 (N.Y. 2001) (“A lawyer with a perjurious client must contend with competing considerations—duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other.”).

178. MODEL RULES OF PROF'L CONDUCT R. 3.1 & 3.3. But see *supra* note 162 and accompanying text.

179. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or . . . offer evidence that the lawyer knows to be false. . . . If . . . the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”).

180. *Mental Illness*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/mental-illness> [<https://perma.cc/XS8C-4F6Z>] (discussing the broad impact mental illnesses have on a defendant's criminal case); see also *Mental Health and the Death Penalty*, CAPITAL PUNISHMENT IN CONTEXT, <https://capitalpunishmentincontext.org/issues/mentalhealth> [<https://perma.cc/94N2-ZB8A>] (“The defendant's state of mind is often an issue in death penalty cases because the

prisoners executed in the United States are ‘volunteers’—defendants or prisoners who have waived key trial or appeal rights to” increase their chances of execution.<sup>181</sup> The Death Penalty Information Center also provides that mental illnesses affect defendants’ decisions whether or not to represent themselves, their ability to cooperate with attorneys, and even influences the jury’s perception of the individual because they must decide “whether they pose a future danger to society if” the jury gives a sentence of life instead of death.<sup>182</sup> Nonetheless, the bar for competency is low, and if a defendant is able to communicate with his attorney, he will likely be ruled competent to stand trial and be afforded the right to be the master of his defense.<sup>183</sup> This is extremely problematic because at some point the courts must allow defense counsel to do what is best for her client—who may be competent to stand trial but clearly incompetent to realize what is in his best interest legally and strategically in the context of a capital punishment trial.<sup>184</sup>

### C. *The Role of Mental Health Professionals in Capital Cases*

Mental health professionals, especially psychiatrists and psychologists, play an increasingly important role in capital punishment cases.<sup>185</sup> From pretrial competency evaluations to helping restore competence to prepare for execution, mental health professionals are heavily involved in the process of executing our death row inmates.<sup>186</sup> This, of course, is a problem because mental health professionals are in the business of

defendant’s mental health affects his or her culpability for the crime, ability to assist counsel, and ability to understand the connection between the crime and the punishment imposed.”).

181. *Mental Illness*, *supra* note 180; see also John Blume, *Give Me Death, A Lawyer Explains Why His Client Volunteered to Be Executed*, UTNE READER (Nov.–Dec. 2005), [www.utne.com/mind-and-body/give-me-death-prisoner-volunteers-for-execution](http://www.utne.com/mind-and-body/give-me-death-prisoner-volunteers-for-execution) [<https://perma.cc/JPN8-ZKXE>] (describing a client who had nothing to live for and essentially volunteered to be executed by waiving key rights).

182. *Mental Illness*, *supra* note 180.

183. See Sullivan, *supra* note 17, at 749 (recognizing how a client may be a competent decision maker on other issues but may utterly fail to appreciate the severity of the charges and the consequences of a proposed objective).

184. See *State v. McCoy*, 218 So. 3d 535, 565 (La. 2016) (discussing the defense attorney’s belief he could only save McCoy’s life by conceding guilt); see also *supra* note 183.

185. See Judges, *supra* note 149, at 552 (describing the growing role played by mental health professionals in the process surrounding capital punishment).

186. See *id.* at 532–33 (emphasis added) (footnotes omitted) (“Mental health professionals . . . perform assessment functions in both civil and criminal cases. In the general criminal arena, the services they provide include assessment, consultation, and testimony related to competency to waive . . . rights and to stand trial, criminal responsibility (such as the insanity defense and *mens rea*), sentencing, parole, and other dispositional matters.”).

providing treatment, not killing.<sup>187</sup> In fact, in some cases doctors have refused to give treatment to these types of defendants and received serious backlash and threats from the government for doing so, including being threatened with contempt of court.<sup>188</sup> This is quite shocking considering doctors are being threatened with contempt for exercising their own rules of professional conduct.<sup>189</sup> However, it seems clear these professionals are crucial to the administration of justice and perform vital roles in our criminal justice system.

The bigger issue is the amount of death row inmates with major mental health problems.<sup>190</sup> Although these inmates are severely ill, the bar for competency is low and if that bar is met, they are eligible for death for committing a capital offense.<sup>191</sup> While it is true someone must pay when these wicked crimes are committed, it is not in the best interest of anyone involved to put to death a person who is unable to understand the consequences of her actions.<sup>192</sup>

The Supreme Court in *Ford v. Wainwright*<sup>193</sup> prohibited the use of capital punishment on an insane defendant in 1986.<sup>194</sup> The Court again reiterated

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187. See Brian D. Shannon & Victor R. Scarano, *Incompetency to Be Executed: Continuing Ethical Challenges & Time for a Change in Texas*, 45 TEX. TECH L. REV. 419, 425 (2013) (discussing the Hippocratic Oath physicians traditionally take to “do no harm or injustice” to their patients); cf. Judges, *supra* note 149, at 548–49 (providing insight on the ethical dilemmas mental health professionals face during various mandatory evaluations of death row inmates).

188. See Judges, *supra* note 149, at 549–50 (describing an Arizona doctor who refused to give a severely ill defendant psychotics to restore him to competence and was threatened with contempt of court from the Arizona Attorney General’s Office).

189. *Id.* at 550 (“In other words, the state’s highest legal office actually considered employing the legal process to force a physician to violate his own professional ethical code—a code that the state would otherwise enforce—and to become an involuntary formal participant in executing a human being.”).

190. See *Position Statement 54: Death Penalty and People with Mental Illnesses*, MENTAL HEALTH AM., <https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses> [<https://perma.cc/W85Y-GJWZ>] (“Although precise statistics are not available, it is estimated that at least [twenty] percent of people on death row have a serious mental illness.”); see also FINS, *supra* note 166 (noting the number of prisoners on death row per state).

191. See *Pate v. Robinson*, 383 U.S. 375, 387 (1966) (holding criminal defendants must first be ruled competent to stand trial if there are doubts as to whether or not they understand the charges brought against them); see also *People v. Shrake*, 182 N.E.2d 754, 755 (Ill. 1962) (reiterating when there is “a bona fide doubt as to a defendant’s present sanity” before or during trial, a hearing must be held).

192. See *Atkins v. Virginia*, 536 U.S. 304, 318–20 (2002) (stressing how the imposition of the death penalty on a mentally retarded person serves no purpose of our criminal justice system).

193. *Ford v. Wainwright*, 477 U.S. 399 (1986).

194. *Id.* at 417–18.

this position in *Atkins v. Virginia*,<sup>195</sup> which explicitly provides the imposition of the death penalty on a defendant who is mentally retarded is unconstitutional as a violation of the Eighth Amendment.<sup>196</sup> These cases demonstrate the delicacy of dealing with defendants like McCoy who are completely insane and do not understand the nature of their reality. These defendants do deserve to be punished, but not by death. Defendants like McCoy typically have gone through extreme trauma and abuse and simply do not understand what they did was wrong. Research has shown repeatedly that many capital defendants have extremely brutal pasts which involve sexual assault, child abuse, drug abuse, verbal and physical abuse, and the like.<sup>197</sup> These individuals typically were once functioning beings who were steered in the wrong direction by a toxic parent, spouse, or significant other. Although this does not excuse their behavior, it should be heavily considered during competency rulings. *McCoy* now gives these troubled individuals a constitutional right to insist their attorneys not concede guilt as to any element of an offense, even in the face of overwhelming evidence which will certainly convince a reasonable jury they are guilty.<sup>198</sup>

#### VI. MCCOY SHOULD HAVE FALLEN UNDER THE SCOPE OF *STRICKLAND*

The Supreme Court, in *McCoy*, created a new constitutional right for capital defendants and disregarded serious mental health issues in the United States.<sup>199</sup> For English, conceding guilt was the only viable option in the

195. *Atkins v. Virginia*, 536 U.S. 304 (2002).

196. U.S. CONST. amend. VIII; *see also Atkins*, 536 U.S. at 318–19 (“Unless the imposition of the death penalty on a mentally retarded person ‘measurably contributes to one or both of these goals [of retribution and deterrence], it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”).

197. *See Childhood Trauma Prevalent Among Death Row Inmates*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/news/childhood-trauma-prevalent-among-death-row-inmates> [<https://perma.cc/HHM4-9GSA>] (“A majority of Texas death row prisoners who voluntarily responded to a recent survey . . . reported having experienced abuse or other trauma as children. The survey results are consistent with the findings of academic studies that have repeatedly documented high rates of childhood abuse among those sentenced to death.”).

198. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1512 (2018) (“Once [McCoy] communicated that to court and counsel, strenuously objecting to English’s proposed strategy, a concession of guilt should have been off the table. The trial court’s allowance of English’s admission of McCoy’s guilt despite McCoy’s insistent objections was incompatible with the Sixth Amendment.”).

199. *See Mental Illness*, *supra* note 180 (describing severely mentally ill capital defendants who are sometimes so unaware or ill that they waive key trial or appeal rights and effectively volunteer to be executed); *see also* J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 154 (2006) (footnote omitted) (“The most



face of the State's evidence.<sup>200</sup> Additionally, there were many cases in Louisiana at the time that allowed these concessions for capital crimes.<sup>201</sup> All cases were subject to the *Strickland* test and not viewed under a structural error standard.<sup>202</sup>

It is critical to understand conceding guilt to an element of an offense does not amount to pleading guilty.<sup>203</sup> Quite the opposite in fact—take, for example, a crime with the following elements: (1) the defendant committed the act, and (2) the defendant intended to commit the act. If defense counsel argues his client did commit the act (element 1) but did not intend to (element 2), counsel is not saying the client is guilty.<sup>204</sup> Counsel is admitting the act occurred but is arguing the client is not responsible for the outcome because the intent was not present. This is precisely what McCoy's defense attorney did when he admitted his client killed the victims but argued he did not have the mental capacity to be guilty of first-degree murder.<sup>205</sup>

A. *Louisiana Caselaw Views Improper Concessions of Guilt Under the Strickland Test*

In *State v. Haynes*,<sup>206</sup> the defendant was found guilty of first-degree murder after kidnapping, raping, stabbing, and eventually killing a female medical student on campus.<sup>207</sup> The evidence in the case was overwhelming.<sup>208</sup> The State had the defendant on videotape near the

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difficult ethical dilemma that faces capital attorneys may be what to do about the 'volunteer,' the client who wishes to waive his appeals and to expedite his own execution.'").

200. See *supra* text accompanying note 68.

201. See discussion *infra* Section VI.A–B.

202. See discussion *infra* Section VI.A.

203. See, e.g., *McCoy*, 138 S. Ct. at 1518 n.1 (“[Counsel’s] strategy was to concede that McCoy committed the murders and to argue that he should be convicted only of second-degree murder, because [McCoy’s] ‘mental incapacity prevented him from forming the requisite specific intent to commit first degree murder.’” (citing *State v. McCoy*, 218 So. 3d 535, 570 (La. 2016))).

204. See, e.g., *id.* at 1516–17 (Alito, J., dissenting) (“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.”).

205. *Id.* at 1506 n.1.

206. *State v. Haynes*, 662 So. 2d 849 (La. Ct. App. 1995).

207. *Id.* at 850.

208. See *id.* at 853 (“The State’s evidence was legally sufficient to prove that Haynes was engaged in one or more of the enumerated felonies in the first degree murder statute.”).

murder scene shortly before it occurred,<sup>209</sup> found the victim's wallet hidden in the defendant's mobile home,<sup>210</sup> and found the victim's blood in the defendant's automobile.<sup>211</sup> Along with other damning evidence in this case, it was clear the defendant was guilty.<sup>212</sup> In *Haynes*, defense counsel conceded guilt over his client's objection.<sup>213</sup> Haynes did not want to admit to any accusations made by the State and made this clear to the court.<sup>214</sup> However, his defense attorney, knowing this strategy would surely lead to the death penalty, conceded guilt to second-degree murder but argued his client did not possess the intent needed for first.<sup>215</sup>

The Fifth Circuit ultimately upheld the lower court's determination and properly considered the case under *Strickland*.<sup>216</sup> In doing so, the appellate court held the State's evidence was legally sufficient to support the verdict for first-degree murder.<sup>217</sup> The court considered the totality of the evidence and logically concluded: even if the concession was improper, it did not amount to any prejudice because it was not relied on by the State and the State had plenty of evidence to support the verdict.<sup>218</sup> In the end, the concession was successful because the jury did not agree on a capital

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209. *See id.* at 851 (“The medical school’s video surveillance system recorded Haynes on videotape on the ninth floor of the BRI building around the time in question. . . . Haynes’s grandfather, who was also his supervisor, identified him from the tape.”).

210. *Id.*

211. *See id.* at 851 (indicating scientific tests confirmed Haynes was the victim’s rapist).

212. *See id.* at 853 (“Based on the totality of the evidence, a reasonable juror could have concluded that Haynes had committed the aggravated kidnapping, rape, and armed robbery of [the victim].”).

213. *See id.* at 850 (“[H]aynes complains of his counsel’s above argument, which was effectively stated in his counsel’s opening remarks to the jury, conceding Haynes’s guilt of the underlying felonies relied on by the State for a conviction of first degree felony murder.”).

214. *See id.* at 852 (“Haynes specifically asserts that he did not want his lawyers to argue that he was guilty of any of the accusations made by the State.”).

215. *See id.* at 850 (“Haynes’s counsel argues here . . . that while the evidence may show that Haynes kidnapped, raped, robbed and cut and stabbed [the victim] with a knife, the evidence does not negate the reasonable inference of four arguable ways that [the victim] could have fallen to her death after the other felonies were committed.”).

216. *See id.* at 853 (“Where the assertion that counsel was ineffective rests on actions of counsel pertaining to the incident proceedings, the *Strickland* test is applicable.”).

217. *Id.*

218. *See id.* (“Here counsel’s strategy was to persuade the jury against a capital verdict in the bifurcated proceedings. The State did not rely on defense counsel’s concessions. The State’s evidence was legally sufficient to prove that Haynes was engaged in one or more of the enumerated felonies . . .”).

verdict and instead sentenced the defendant to life without parole.<sup>219</sup> *Haynes* gives Louisiana the general rule of using the *Strickland* ineffective assistance of counsel test when dealing with an attorney who admits guilt over client objection.<sup>220</sup>

B. *Other Capital Cases in Louisiana Allowed Defense Counsel to Concede Guilt Over Client Objection*

In four other capital cases, the Louisiana Supreme Court permitted defense counsel to concede their clients' guilt over an express objection and used the *Strickland* test if ineffective assistance of counsel was raised.<sup>221</sup> First, in *State v. Tucker*,<sup>222</sup> the defendant was forced to proceed with his attorney who, over his objection, admitted his guilt to first-degree murder while arguing for a lesser sentence.<sup>223</sup> Next, in *State v. Leger*,<sup>224</sup> the defendant was given the choice to accept his attorney's strategy—admit guilt over his objection—or represent himself.<sup>225</sup> Also, in *State v. Bridgewater*,<sup>226</sup> the defendant, who insisted his attorney fight for acquittal, was eventually told he must accept the strategy of conceding guilt to second-degree murder.<sup>227</sup> Lastly, in *State v. Tyler*,<sup>228</sup> the defendant was forced to proceed with his trial counsel admitting guilt over his objection.<sup>229</sup>

Whether right or wrong, English's strategy to concede guilt over McCoy's objection was not novel in the legal field, especially not in Louisiana, where this was typically the practice when there was overwhelming evidence of

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219. *See id.* ("Whatever the reasons for the jury's inability to agree on a capital verdict, Haynes's counsel succeeded in avoiding the death sentence.")

220. Brief for The Louisiana Association of Criminal Defense Lawyers and The Promise of Justice Initiative as Amici Curiae Supporting Petitioner at 15–16, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (No. 16-8255) [hereinafter Amicus Brief, *McCoy v. Louisiana*].

221. *Id.* at 16–17.

222. *State v. Tucker*, 181 So. 3d 590 (La. 2015).

223. *See id.* at 620–21 ("Defendant alleges he did not acquiesce in the decision of defense counsel to admit guilt of second degree murder and feticide in closing."); *see also* Amicus Brief, *McCoy v. Louisiana*, *supra* note 220, at 16 (providing details regarding the facts of *State v. Tucker*).

224. *State v. Leger*, 936 So. 2d 108 (La. 2006).

225. *Id.* at 148–50; *see also* Amicus Brief, *McCoy v. Louisiana*, *supra* note 220, at 16 (providing details regarding the facts of *State v. Leger*).

226. *State v. Bridgewater*, 823 So. 2d 877 (La. 2002).

227. *Id.* at 895–96; *see also* Amicus Brief, *McCoy v. Louisiana*, *supra* note 220, at 17 (providing details regarding the facts of *State v. Bridgewater*).

228. *State v. Tyler*, 181 So. 3d 678 (La. 2015).

229. *See* Amicus Brief, *McCoy v. Louisiana*, *supra* note 220, at 17 (providing details regarding the facts of *State v. Tyler*). *See generally Tyler*, 181 So. 3d 678; *Tyler v. Louisiana*, 137 S. Ct. 589 (2016) (cert. denied).

guilt. Although it seems counterintuitive, admitting guilt as to an element of a crime can sometimes be the best way to minimize liability in the face of overwhelming evidence.<sup>230</sup> It can also serve as an essential strategic choice in a bench trial if the judge is known to be more lenient when a defendant admits his fault. If the Supreme Court believed the concession of guilt by English was improper, they should have analyzed it under the scope of *Strickland* to determine whether the concession prejudiced McCoy to the extent where a new trial was necessary.<sup>231</sup>

## VII. CONCLUSION

The Supreme Court, in *McCoy v. Louisiana*, had an opportunity to consider heavily litigated and controversial issues, such as the right to withdraw when the client is going to commit perjury, the duty of candor toward the tribunal, the issue of competency, and client autonomy.<sup>232</sup> The Court failed to do so, despite the tremendous importance of these issues. Admittedly, some of these issues need to be considered by the ABA and by individual states, but the Court failed to remand the case and instead created poor law with the most extreme facts.<sup>233</sup>

The Supreme Court erred in holding a client may insist her attorney not concede guilt as to any element of a crime in the face of overwhelming evidence.<sup>234</sup> Although the client has the right to be the master of her own defense,<sup>235</sup> at some point this must give way to a seasoned attorney's professional judgment on what is best for the client's legal interests.<sup>236</sup> Especially in capital trials, defense attorneys should be given maximum deference in trial strategy decisions.<sup>237</sup> In any event, conceding guilt in the face of overwhelming evidence should not amount to structural error. Instead, the Supreme Court should have used a standard similar to the one

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230. See *United States v. Sampson*, 820 F. Supp. 2d 202, 227 (Mass. Dist. Ct. 2011) (citation omitted) (“[T]here was a risk that jurors presented with an initial denial of guilt would view skeptically any later attempt to claim acceptance of responsibility or remorse. Therefore, a plea of not guilty could have significantly undermined two of the most important mitigating factors available to Sampson.”); see also *In re Pers. Restraint of Elmore*, 172 P.3d 335, 346 (Wash. 2007) (en banc) (“[Counsel’s] advice to plead guilty [to a capital crime] was based upon reasonable trial strategy.”).

231. See *supra* note 41 and accompanying text.

232. See generally *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

233. *Id.*

234. See discussion *supra* Section VI.B.

235. See *supra* notes 174–75 and accompanying text.

236. See *supra* note 176 and accompanying text.

237. See *supra* notes 127–28 and accompanying text.

in *Strickland* and analyzed whether or not the client was prejudiced by his attorney's concession or trial strategy.<sup>238</sup>

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238. See discussion *supra* Part VI.