No. 16-8255

IN THE

Supreme Court of the United States

ROBERT MCCOY,
Petitioner,
v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Louisiana has no credible argument that a court may permit defense counsel to tell the jury his client is guilty over the client's objection. The Sixth Amendment guarantees the accused both the right to an attorney and the right to decide whether to admit guilt. Louisiana posits that a defendant must forgo one of those rights as the price of exercising the other. But that claim flies in the face of the Framers'—and this Court's—understanding that the defense belongs to the accused personally and that the accused is entitled to decide what the objectives of that defense should be.

Louisiana therefore attempts to change the subject. It acknowledges (at 33) that "[i]n most cases, counsel may not concede guilt over the defendant's objection," and it recognizes (at 26-27, 40) that this case "might be very different" if McCoy had merely "requested that his innocence be maintained." Louisiana nonetheless contends that in *this* case, McCoy's counsel

was ethically obligated to concede guilt because—in counsel's view—it was the strategy most likely to spare McCoy's life and because—again, in counsel's view—McCoy sought to advance an alibi defense that was not credible.

Louisiana's argument misrepresents both McCoy's claim and the facts of this case. McCoy is indeed arguing only that "his innocence [should have been] maintained," Resp. Br. 26, 40, and that the court should not have allowed his counsel to tell the jury he was guilty. McCoy does not contend here that his counsel was obligated to present any particular testimony or evidence, let alone present a defense that would "violate the lawyer's legal and ethical obligations." *Cf.* Resp. Br. i.

A lawyer can never be obligated to tell the jury his client is guilty; to the contrary, doing so over the client's objection breaches both the Sixth Amendment and applicable ethics rules. Moreover, McCoy's counsel never expressed any concern that honoring McCoy's decision would have raised perjury concerns, as Louisiana contends. And even if he had, admitting a client's guilt is never a permissible response to doubts about the truth of the client's statements.

Louisiana also argues that counsel who believes that only an admission of guilt can save his client's life must make that admission even over his client's express objection. But the Sixth Amendment gives the accused the right to decide for himself whether he values his day in court and the possibility of acquittal—even if remote—more than the putative advantages a concession of guilt might provide at sentencing. Once the defendant has made that decision, counsel must honor it. The trial court violated McCoy's Sixth Amendment rights by allowing his counsel to admit his

guilt. Louisiana does not dispute that such an error is structural error requiring a new trial.

This case is not about the ineffective assistance of counsel or whether an admission of guilt might sometimes be a reasonable strategy. The client's autonomy, not the lawyer's competence, is at issue. But even if this were an ineffective-assistance case, McCoy would be entitled to a new trial. When McCoy's lawyer told the jury McCoy was guilty of murder, he vitiated the "meaningful adversarial testing" of the prosecution's charges to which McCoy was entitled. *United States* v. *Cronic*, 466 U.S. 648, 656 (1984). Whatever doctrinal framework applies, McCoy deserves a trial in which his lawyer acts as his advocate and not his prosecutor.

ARGUMENT

I. THE TRIAL COURT VIOLATED MCCOY'S CONSTITUTIONAL RIGHTS BY ALLOWING COUNSEL TO ADMIT GUILT OVER MCCOY'S OBJECTION

A. McCoy Did Not Forfeit His Right To Maintain His Innocence At Trial By Accepting The Assistance Of Counsel

Louisiana concedes (at 28) that, when a defendant chooses to represent himself, he has the right to decide whether to maintain his innocence and seek acquittal or to admit his guilt to the jury in pursuit of some other objective. But, Louisiana contends, a defendant who accepts the assistance of counsel forfeits that right. The decision whether to admit guilt becomes a matter of trial tactics for the attorney, and if counsel decides that admitting guilt serves counsel's conception of the client's best interest, he may do so even over the client's objection. Louisiana offers no genuine support for that startling proposition, which cannot be reconciled

with the understanding of the Sixth Amendment that has prevailed since the Founding.

1. The Constitution guarantees a criminal defendant both the right to the assistance of counsel and the right to insist that the prosecution prove his guilt beyond a reasonable doubt at a trial that conforms to the Constitution's requirements. The former right is designed to effectuate the latter; the Sixth Amendment does not require the defendant to choose between them.

The purpose of the right to counsel is not to displace other trial rights, but "to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). Counsel's "presence is essential" precisely because the right to counsel is "the means through which the other rights of the person on trial are secured." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984). "Without counsel the right to a fair trial itself would be of little consequence," as "it is through counsel that the accused secures his other rights." *Kimmelman* v. *Morrison*, 477 U.S. 365, 377 (1986). Accordingly, "absent a voluntary plea of guilty, we … insist that [defense counsel] defend his client whether he is innocent or guilty." *United States* v. *Wade*, 388 U.S. 218, 257 (1967) (White, J., dissenting in part and concurring in part); *see also Lafler* v. *Cooper*, 566 U.S. 156, 169 (2012). Defense counsel must "put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." *Wade*, 388 U.S. at 258 (White, J., dissenting in part and concurring in part).

Consistent with "'that respect for the individual which is the lifeblood of the law,'" a defendant may

choose to represent himself rather than accept representation by counsel. *Faretta* v. *California*, 422 U.S. 806, 834 (1975). But this respect for the defendant's autonomy in controlling his defense does not disappear if a defendant invokes his right to counsel. Pet. Br. 24-30. Because it is still "[t]he defendant, and not his lawyer" who bears the consequences of a conviction, *Faretta*, 422 U.S. at 834, the defendant who exercises his right to counsel retains the basic right to control the objectives of his defense. "[T]he [Sixth] Amendment speaks of the 'assistance' of counsel" because it contemplates that "the accused, and not a lawyer, is master of his own defense." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382 n.10 (1979); *see Faretta*, 422 U.S. at 819-820; Criminal Bar Ass'n of England & Wales Br. 3-5; Cato Br. 5-14.

Even when represented by counsel, the accused thus retains "the ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The decision whether to admit guilt is equally fundamental to the personal defense guaranteed by the Sixth Amendment, and, like those other decisions, must belong to the defendant, not counsel. Pet. Br. 22-27. When the defendant has expressly made and communicated that decision, counsel cannot override it—even if counsel believes the decision is unwise.

2. Louisiana acknowledges that certain decisions remain the defendant's to make even where the defendant has counsel, but asserts without explanation that the decision whether to admit guilt is not among them. Instead, Louisiana equates that choice with the ordinary "'tactical decision[s]'" made during trial that

are committed to counsel's discretion and do not require the client's approval. Resp. Br. 28-29. But Louisiana's examples (at 29) of such decisions—deciding to "forgo cross-examination" or "not to put certain witnesses on the stand"—are categorically different from a decision to tell the jury one's client is guilty. *See* Pet. Br. 25-27. A lawyer may decide what trial tactics would best serve the client's goal of acquittal—for example, by choosing which witnesses to call or which lines of questioning to pursue. But the lawyer may not decide, contrary to his client's express instructions, that acquittal is not the right goal and instead admit guilt.

It does not matter if the lawyer's intentions are benign or his judgment sound. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment). A defendant may decide, in the exercise of his autonomy, that his day in court and the chance of acquittal—even if remote—are worth more to him than the speculative advantages a concession of guilt might provide at sentencing. *See Lee* v. *United States*, 137 S. Ct. 1958, 1968-1969 (2017). That judgment is not legal or tactical, but value-laden and personal. And it is the defendant's to make.

Louisiana's contrary vision (at 27)—that the lawyer knows better than the client whether it is in the client's "best interest" to deny guilt and pursue acquittal or to admit guilt in the hope of a more lenient sentence—flouts this Court's decisions and the original understanding of the Sixth Amendment. "[T]he accused, and

not a lawyer, is master of his own defense," *Gannett*, 443 U.S. at 382 n.10, and must at a minimum be entitled to determine whether to seek acquittal in the first place. As McCoy has explained (at 27-30)—and Louisiana does not contest—the notion that a lawyer could veto a client's attempt to assert his innocence was a signal feature of the Star Chamber, repugnant to the Framers, which the common law, colonial practice, and the Sixth Amendment all repudiated.

Louisiana suggests (at 2, 45) that the trial court correctly allowed English to override McCoy's decision because McCoy's "judgment was impaired" by "mental and emotional deficits." But McCoy was found competent to stand trial and competent to represent himself. Pet. Br. 4-5. English himself elicited testimony that McCoy suffered from no mental impairment that would render him unable to stand trial. JA688-689. Louisiana even argued below, when it was convenient to do so in opposing McCoy's motion for a new trial, that there was no doubt as to McCoy's competence, R3796-3797, and the trial court again held he was competent, R3799-3800. And notwithstanding English's many dramatic assertions that his client was "crazy," *e.g.*, JA504, JA509, English never asked the court to revisit McCoy's competence. If English believed McCoy was not capable of making rational decisions, the proper course would have been to seek a new competency hearing—not to tell the jury McCoy was guilty. McCoy was deemed competent, and a defendant competent to stand trial and represent himself is competent to decide whether to admit guilt.[1]

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[1] The Restatement guideline on clients with diminished capacity is thus inapposite because McCoy was capable of making "adequately considered decisions" about his own objectives. *Re-*

3. Louisiana's reliance (at 30-32) on *Florida* v. *Nixon*, 543 U.S. 175 (2004), fails. Pet. Br. 30-32. *Nixon* addressed whether counsel's concession of guilt requires a new trial where counsel has proposed that strategy to his client and the client has refused to respond, thereby implicitly acquiescing. *See* 543 U.S. at 181, 192. Those are not the facts here, and that is not the question presented.

The problem here is not that English failed to obtain McCoy's express approval of his decision to admit guilt; the problem is that McCoy expressly and repeatedly rejected any admission of guilt, but the trial court nonetheless allowed English to tell the jury McCoy was guilty. And whereas in *Nixon* the client complained about the admission only after trial, here McCoy rejected English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. Pet. Br. 8-12, 16.

Louisiana suggests (at 29-30) that because McCoy "disagreed with English's defense strategy as early as January 2011," his objections came too late. But it was not until July 12, 2011—sixteen days before trial, in a meeting that Louisiana omits completely from its statement of facts (at 13-15)—that English told McCoy for the first time that he intended to admit McCoy's guilt to the jury. JA286. McCoy immediately attempted to discharge English and have him replaced, and

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statement (Third) of the Law Governing Lawyers (*"Restatement"*) §24(1); *cf.* Resp. Br. 44 n.4. His "insistence on a view of [his] welfare that [English] consider[ed] unwise" did not establish otherwise. *Restatement* §24 cmt. c. Moreover, the Restatement makes clear that even if a client has diminished capacity, the lawyer should still "function as advocate and agent of the client, not judge or guardian." *Id.*

raised the issue with the court at the next scheduled hearing, two days before trial. Pet. Br. 9-10. The court erred in rejecting those diligent efforts.[2]

Enforcing McCoy's Sixth Amendment rights here does not require recognizing any "new category of trial-related decisions … for which the client's consent is not needed, but which may not be made over his express objection." Resp. Br. 32-33. As McCoy has explained (at 30-31), this Court has recognized that there are certain basic trial rights that cannot be denied by counsel or the court once the defendant expressly invokes them, but can be implicitly waived by the defendant's silent acquiescence in counsel's or the court's actions. Those rights include the right to represent oneself, to testify, and to appeal. Pet. Br. 31 (citing cases). Like those other basic trial rights, the right to decide whether to admit guilt may be expressly invoked or

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[2] Louisiana's implication that McCoy knew of English's intent to admit guilt months before trial is not the only liberty Louisiana takes with the record. Among other examples, Louisiana asserts (at 26, 36-38, 40) that English considered McCoy's testimony to be perjury even though English never expressed that concern, *infra* at 13; it asserts (at 11) that a January 2011 hearing "devolved into an argument between McCoy and English" when no such thing occurred, *see* JA346-359; and it asserts (at 5, 37-38) that McCoy's brother Carlos pleaded guilty to helping McCoy escape Bossier City the night of the killings, when in fact he pleaded *not* guilty, R940.

Regardless, the strength of the prosecution's evidence is irrelevant to the question presented. *Cf.* Resp. Br. 3-5. It does not matter whether English's strategy was "reasonable" in light of the State's evidence, because the constitutional violation here was the usurpation of McCoy's right to decide whether to admit guilt. In any event, the record cannot show how strong the prosecution's case would have been if English had thoroughly investigated and actually challenged the prosecution's evidence.

implicitly waived. *See id.* McCoy invoked that right here, and the trial court should have ensured its protection.

4. Contrary to Louisiana's unsupported suggestion (at 28-29, 50), the adversary process can—and does—function effectively when defendants retain the right to decide whether to admit guilt. Many jurisdictions have considered this issue and barred defense counsel from admitting the defendant's guilt in a capital case over the defendant's objection, *e.g.*, *Cooke* v. *State*, 977 A.2d 803, 847 (Del. 2009); *see also* 3 LaFave et al., *Criminal Procedure* §11.6(a), at 904-905 & n.30 (4th ed. 2015); Cato Br. 20, yet Louisiana has identified none of the problems it imagines here in those jurisdictions.

Louisiana's speculation (at 50) that defense counsel might "conspire" with a defendant to "manufacture structural error in bad faith" through an admission of guilt relies on the baseless premise that defense counsel would risk punitive sanctions for such misconduct. In any event, no such conspiracy can arise where, as here, the defendant informs the court before trial of his objection.

Louisiana's other hypothetical (at 50) actually highlights the importance of the defendant's right to decide whether to admit guilt. Louisiana suggests that the constitutional rule McCoy relies on would have the "absurd consequence[]" of barring defense counsel from asserting a consent defense for a rape defendant who denies contact with the victim. That question is not presented here, since Louisiana's hypothetical lawyer is at least pursuing the client's objective of acquittal. But the notion that a lawyer should refrain from telling the jury that his client committed an act that the client denies is hardly absurd. It instead reflects the lawyer's

role to "hold the prosecution to its heavy burden of proof" when the defendant has decided to contest guilt, *Cronic*, 466 U.S. at 656 n.19, and "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust" that underlie the defendant's right to counsel, *Luis* v. *United States*, 136 S. Ct. 1083, 1089 (2016) (plurality). Louisiana suggests that defense counsel should betray a client who asserts his innocence if the prosecution has evidence, such as DNA in a rape case, that appears sufficiently strong. But as this Court has recognized, no evidence is uniquely infallible, *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 318 (2009)—including DNA evidence in rape cases, *see, e.g.*, *Williams* v. *Illinois*, 567 U.S. 50, 118-119 (2012) (Kagan, J., dissenting). Louisiana would deny the defendant—particularly the indigent defendant who lacks the means to hire counsel of choice—the opportunity to challenge such evidence and to demand that the prosecution prove his guilt of all the elements of the crime, unless the defendant relinquishes the right to counsel. Yet it is precisely so that defendants can challenge evidence and "'meet the case of the prosecution'" that the Sixth Amendment secures to all defendants the assistance of counsel. *Strickland*, 466 U.S. at 685.

B. English's Ethical Duties Did Not Permit, Much Less Require, Him To Admit McCoy's Guilt

Perhaps recognizing the weakness of its principal argument, Louisiana obfuscates both the facts of the case and the question presented. Louisiana admits (at 33) that "[i]n most cases, counsel may not concede guilt over the defendant's objection," and recognizes (at 40) that had McCoy "only requested that his innocence be

maintained, the case before this Court might be very different." What makes this case special, Louisiana claims (at 40), is that English was ethically obligated to tell the jury McCoy was guilty because McCoy "demanded a specific alibi defense that English believed to be unethical and illegal." That is not McCoy's argument here. Nor is it a concern English himself ever suggested. Instead, English claimed he had an ethical duty to try to save his client's life that required him to override McCoy's choice to deny guilt. But neither Louisiana's purported ethical obligation nor English's expressed reason could justify the trial court's decision to permit English to admit McCoy's guilt over his objection.

1. Louisiana's claim (at 35-40) that English was ethically obligated to refrain from asserting "a defense based on false testimony" is a red herring. McCoy does not argue before this Court that English was required to introduce any specific testimony, evidence, or defense theory that English believed was false. To hold the prosecution to its proof and avoid the constitutional violation at issue here, English was not required to present any specific defense. He was required simply to refrain from asserting his client's guilt to the jury.

The ethics rules recognize the difference. They never prohibit defense counsel from contesting guilt, even when defense counsel knows the defendant is guilty. *See* Pet. Br. 33-34; Professors Br. 25-26; *see also Wade*, 388 U.S. at 257 (White, J., dissenting in part and concurring in part). To the contrary, Model Rule 3.1 and the identical Louisiana Rule 3.1 recognize that defense counsel may "so defend the proceeding as to require that every element of the case be established," even when there is no "basis in law and fact for doing so that is not frivolous." *See also* Model Rule 3.1 cmt. 3

(lawyer's ethical obligation not to make a frivolous defense is subordinate to defendant's constitutional rights).

Like the Louisiana Supreme Court, Louisiana relies on various rules embodying the principle that defense counsel shall not assist a client in fraudulent conduct or false testimony. Resp. Br. 36 (citing Rules 1.2(d), 3.3(b), 3.4). But English never claimed that his admission of McCoy's guilt was driven by an ethical duty to remedy or avoid perjurious testimony. To the contrary, English was "certain" that McCoy sincerely believed in his innocence, JA285-286, and thus did not consider McCoy's testimony to be perjury. *See also* JA564. In any event, defense counsel does not facilitate perjury or other criminal conduct by simply refraining from admitting the defendant's guilt. *See* Pet. Br. 33-34; Professors Br. 25-26.

McCoy's testimony did not "box" English into admitting guilt. Resp. Br. 40. Precisely the opposite is true. English admitted McCoy's guilt in his opening statement, *before* McCoy elected to testify. *See* JA47-48; JA504, JA508-511, JA568-638. Had English not done so, McCoy would not have been forced to take the stand to assert his innocence. Instead, English's admission effectively compelled McCoy to abandon his right against self-incrimination. *See* Pet. Br. 46.

Nor, as Louisiana concedes (at 37), did English have actual knowledge that McCoy's testimony was false. Both the Model Rules and the Louisiana Rules are clear that when "the testimony of a defendant in a criminal matter" is at issue, actual knowledge of perjury is required to raise any ethical concern; a "reasonabl[e] belie[f]" that the defendant's testimony may be false is not enough. Rule 3.3(a)(3); *see* Rule 1.0(f)

("'knows' denotes actual knowledge"); *see also* Model Rule 3.3 cmt. 9 ("Because of the special protections historically provided criminal defendants, … this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false."); Pet. Br. 36 n.6; ABA Br. 16-17; Professors Br. 22-24.[3]

Even if English had actually known that McCoy's testimony was false, the ethics rules would not have permitted—much less required—English's admission of guilt to the jury. If counsel can neither dissuade a defendant from testifying falsely nor withdraw from the representation, he can bring the matter to the trial court's attention. *See* Model Rule 3.3 cmt. 7 (court may require "counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false"); *see also Nix* v. *Whiteside*, 475 U.S. 157, 174 (1986). But "the advocate must make such disclosure to the tribunal," not to the jury, and it "is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing." Model Rule 3.3 cmt. 10. Indeed, *Nix* makes clear that counsel may not disclose even a "client's admission of guilt." 475 U.S. at 174; *cf.* Resp. Br. 38. And if counsel may not disclose a client's admission of guilt, he certainly may

[3] Louisiana says (at 37) some States use different standards for determining when an attorney "knows" his client intends to testify falsely, but Louisiana Rules 1.0(f) and 3.3(a)(3) are identical to the Model Rules, and, as the very opinion Louisiana cites explains, federal law requires "actual knowledge" that the defendant intends to commit perjury. *State* v. *Chambers*, 994 A.2d 1248, 1260 (Conn. 2010).

not do what English did—admit McCoy's guilt to the jury even though McCoy had consistently maintained his innocence. Instead, English should have refrained from telling the jury McCoy was guilty, and the trial court should have ensured that he did so.

2. Louisiana's attempt to justify English's admission as a reasonable effort to avoid the death penalty also fails. McCoy's avowed objective was to maintain his innocence and seek acquittal. No rule of ethics allowed English to reject that objective and admit guilt in pursuit of his own view of McCoy's best interests. As Louisiana concedes, the ethics rules require a lawyer to "abide by a client's decisions concerning the objectives of representation." Resp. Br. 34 (quoting Rule 1.2(a)). Louisiana notes that the client may not choose an objective outside "the limits imposed by law and the lawyer's professional obligations," Resp. Br. 34 (quoting Model Rule 1.2 cmt. 1), but seeking acquittal can never be an unlawful or unethical objective. *See* Pet. Br. 33-35; Professors Br. 25-26.

The lawyer's obligation to act with "'commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf'" also does not permit the lawyer to substitute his judgment for the client's assessment of his own best interests. *Cf.* Resp. Br. 40 (quoting Model Rule 1.3 cmt. 1). Rather, counsel must "take whatever lawful and ethical measures are required to vindicate [the] *client*'s cause or endeavor." Model Rule 1.3 cmt. 1 (emphasis added). The ABA's Criminal Justice Standards for the Defense Function similarly explain that defense counsel should ask what "the client's" objectives are at the outset of the repre-

sentation, and determine "how to fulfill them," Standard 4-3.3(a); *see* Standard 4-3.1(b); ABA Br. 13-14.[4]

Louisiana again invokes *Nixon*, asserting (at 41) that it "blessed" English's strategy. No one disputes that conceding guilt can be a reasonable trial strategy in a death-penalty case. But it is the client—not the lawyer—who is entitled to make that choice. *Nixon* did not suggest that any ethics rule compelled counsel to pursue that strategy, let alone over the defendant's objection.

3. Finally, Louisiana mischaracterizes what English actually did. Louisiana suggests (at 44) that English did not concede McCoy's *guilt*, but instead reasonably believed it would serve his client's best interests to admit "some of the elements of the crime charged." But the premise of the question presented here is that English did "concede [McCoy's] guilt," Pet. i, and Louisiana waived its present argument by failing to object to that premise in its brief in opposition.

In any event, Louisiana's assertion is wrong. As Louisiana concedes, English did not merely admit an element of the offense, but told the jury outright that "'[McCoy] [wa]s guilty of second degree murder.'" Resp. Br. 18 (quoting JA651). He charged the jury: "[Y]ou have to find that … second degree murder is appropriate and that Robert McCoy [should] spend the rest of his natural life in jail." JA650. When done over

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[4] Ironically, the Louisiana Supreme Court itself has held that at the penalty phase, counsel is bound by a defendant's decision not to present any defense, *see, e.g.*, *State* v. *Bordelon*, 33 So. 3d 842, 863-865 (La. 2009); *State* v. *Felde*, 422 So. 2d 370, 394-395 (La. 1982), in sharp contrast to Louisiana's position here that, at the guilt phase, counsel may override a defendant's decision to assert his innocence and defend the charges against him.

the client's objection, admitting guilt of second-degree murder is no more constitutionally permissible than admitting guilt of first-degree murder. Moreover, English offered no cognizable defense to first-degree murder, instead relying on a diminished-capacity defense that Louisiana does not dispute was legally unavailable. *See* Pet. Br. 12, 47. In every meaningful sense, the trial court thus allowed English to concede McCoy's guilt of first-degree murder as well, in violation of McCoy's constitutional rights.

C. The Trial Court's Error Entitles McCoy To A New Trial

McCoy informed the court both before and during trial that he objected to the admission of guilt, but the court permitted English to admit his guilt anyway. JA455-456, JA468-469, JA505-508. The court thus deprived McCoy of his right to decide for himself whether to admit guilt or maintain his innocence, entitling McCoy to a new trial. Pet. Br. 38-43; *see Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017); *cf. Holloway* v. *Arkansas*, 435 U.S. 475, 488 (1978) ("reversal is automatic" when defense counsel alerts trial court to a conflict of interest and court nevertheless "improperly requires joint representation"); Cato Br. 11-14. The constitutional violation was "complete" upon the deprivation of that right, regardless of whether McCoy also suffered a violation of his separate right to the effective assistance of counsel, *see United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144-148 (2006), or whether English's admission affected the verdict, *see id.* at 148-151. Like the rights to counsel of choice, *id.* at 144-151, and to self-representation, *see McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984), the right exists to preserve the personal defense guaranteed by the Sixth Amendment.

Strickland's prejudice standard and the harmless-error inquiry are each inapt to protect that independent Sixth Amendment interest.

Louisiana does not dispute that the constitutional violation McCoy asserts amounts to structural error. Instead, it suggests in a footnote (at 45-46 n.5) that this Court should not address whether the error is structural or subject to harmless-error review because McCoy did not present or mention "the remedy issue" in his petition for certiorari. That is incorrect. McCoy claimed below that the trial court's error in permitting English's admission of guilt required reversal of his conviction and entitled him to a new trial. R842; *see also* JA50-51. The Louisiana Supreme Court rejected that claim. JA78-86, JA206. And McCoy's petition for certiorari sought "revers[al] [of] his convictions and sentences" in light of the "violation of his Sixth and Fourteenth Amendment rights." Pet. 4. McCoy's entitlement to a new trial was thus preserved below and is squarely before this Court.

In any event, Louisiana never suggested below that the error here could be excused as harmless under *Chapman* v. *California*, 386 U.S. 18 (1967), and makes no attempt to do so before this Court. *Cf.* Resp. Br. 45-46 n.5; Resp. La. S. Ct. Br. 11-20. To the contrary, Louisiana stresses (at 18-19, 20-21) that the jury struggled to reach a verdict as to both guilt and sentence. As McCoy has explained (at 41-43), no harmlessness showing could be made. Accordingly, the only alternative to ordering a new trial would be to force McCoy "to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1008 (2016) (per curiam). Louisiana offers no lawful justification for that result, and there is none.

II. ENGLISH'S ADMISSION OF GUILT OVER MCCOY'S OBJECTION CONSTITUTED INEFFECTIVE ASSISTANCE REQUIRING A NEW TRIAL

As the foregoing demonstrates, it is irrelevant whether English's admission was a reasonable strategy. The error McCoy challenges here is not the unreasonableness of counsel's strategy, but the trial court's decision permitting counsel to admit McCoy's guilt over his objection, in violation of McCoy's Sixth Amendment right to decide for himself whether to make such an admission or instead pursue acquittal. That is not a claim of ineffective assistance.

But even if the Court viewed this case through the lens of ineffective assistance, McCoy would still be entitled to a new trial because English "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Louisiana argues that *Cronic* does not apply because English did not completely "abandon" McCoy and because *Nixon* established a blanket rule that defense counsel's admission of guilt cannot be *Cronic* error. Neither contention is correct.

1. *Cronic* is not limited to cases where defense counsel entirely "abandon[s]" the defendant or allows "a truncated proceeding." Resp. Br. 49. Under *Cronic*, once McCoy decided to plead not guilty, the Sixth Amendment required English to subject the prosecution's charges to "meaningful adversarial testing" and to "hold the prosecution to its heavy burden of proof beyond reasonable doubt." 466 U.S. at 656 & n.19. By admitting McCoy's guilt and providing no legally cognizable defense, English did the opposite. His failure resulted in a total breakdown of the adversary process

and rendered the adjudication of McCoy's guilt "presumptively unreliable." *Id.* at 659.[5]

Louisiana cites (at 48-49) various actions that it asserts English took on McCoy's behalf, but its list only confirms how thoroughly English failed to function as McCoy's advocate and undermined McCoy's trial rights.

For example, Louisiana claims (at 48) that English "[p]resent[ed] a defense with an overarching guilt-phase strategy designed to produce an acquittal as to the charged crime." That is wrong. As Louisiana acknowledges, English urged the jury to find McCoy "guilty of second degree murder" and presented no legally available defense to first-degree murder. Resp. Br. 18 (quoting JA651). Louisiana suggests (at 43) that jury nullification remained a possibility. But jury nullification is always a possibility; by itself, it cannot constitute the "meaningful adversarial testing" the Constitution demands. *Cronic*, 466 U.S. at 656.

Louisiana's assertion (at 48) that English brought "competency issues to the attention of the trial court" is supremely ironic given that English never asked the

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[5] Louisiana's contention (at 51) that *Strickland* applies to "McCoy's attacks [on] specific actions taken by English" misconstrues McCoy's argument. For purposes of this direct appeal, *see* Pet. Br. 43 n.9, English was ineffective because of one action: his admission of guilt. His other actions taken in furtherance of that admission illustrate the extent to which the admission caused the proceeding to lose "its character as a confrontation between adversaries." *Cronic*, 466 U.S. at 657. Louisiana's assertion (at 50 n.6) that English could not actually relieve the prosecution's burden of proof (despite telling the jury that he did) similarly misses the point. English's statement to the jury demonstrates how completely he abandoned meaningful testing of the prosecution's charges.

court to revisit its finding that McCoy was competent and, indeed, elicited testimony that he was competent. *See* Pet. Br. 5-10; JA 688-689. Louisiana's praise (at 49) of English's cross-examinations ignores that English's most effective cross-examination may have been that of his own client, as he eviscerated McCoy's right to remain silent or to take the stand in his own defense. Pet. Br. 46. And Louisiana's suggestion that English developed, investigated, and presented a mitigation strategy designed to secure a life sentence blinks reality: English presented no mitigation witnesses at all, except for the psychologist who had already gone on record to opine that English's mitigation theory was factually baseless. Pet. Br. 16-17, 47. In short, none of these actions Louisiana cites supplied the meaningful adversarial testing that English's admission of guilt abandoned.

2. *Nixon* did not hold that "counsel's concession of guilt in a capital case is not subject to the *Cronic* presumption." Resp. Br. 46. It held that the presumption does not apply when the defendant acquiesces in the decision to admit guilt. 543 U.S. at 192. Given McCoy's explicit objection to the admission of guilt, *Nixon* does not control, and English's failure to contest the prosecution's charges was *Cronic* error.

Contrary to Louisiana's contention (at 47), McCoy's objection makes all the difference. *See Gonzalez* v. *United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in the judgment); *Brookhart* v. *Janis*, 384 U.S. 1, 6-7 (1966). However competent defense counsel might—or might not—otherwise be in keeping the defendant from death row, he does not render the effective assistance the Sixth Amendment requires if he does not contest the prosecution's charges and refrain from admitting guilt when the defendant has instructed him to do so. Even Clarence Darrow could not repre-

sent McCoy effectively by conceding McCoy's guilt over his objection. When Darrow famously conceded Leopold and Loeb's guilt to keep them from death row, *see Nixon*, 543 U.S. at 192, he did so only at sentencing, after the defendants had already pleaded guilty. *See Attorney for the Damned: Clarence Darrow in the Courtroom* 18 (Weinberg ed. 2012). English's admission was not in that tradition. Rather, English subverted the Sixth Amendment's guarantee that where a defendant decides to contest his guilt, the defendant has the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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JANUARY 2018