LIST OF APPENDICES

APPENDIX A

FILED

DEC 30 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TARYN CHRISTIAN, Applicant, v. TODD THOMAS, Respondent.	No. 19-70036 District of Hawaii, Honolulu ORDER

Before: WALLACE, BEA, and BENNETT, Circuit Judges.

Petitioner's Motion to Extend Time to File Petition for Rehearing is **DENIED**. 28 U.S.C. § 2244(b)(3)(E) bars a denial of authorization to file a second or successive application from being the subject of a petition for rehearing.

No petitions for rehearing or petitions for rehearing en banc shall be filed or entertained.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TARYN CHRISTIAN, *Applicant*, v. TODD THOMAS, *Respondent.*	No. 19-70036 OPINION

Application to File Second or Successive
Petition Under 28 U.S.C. § 2254

Argued and Submitted October 19, 2020
Honolulu, Hawaii

Filed December 14, 2020

Before: J. Clifford Wallace, Carlos T. Bea, and
Mark J. Bennett, Circuit Judges.

Opinion by Judge Bea

SUMMARY*

Habeas Corpus

The panel denied Taryn Christian's application for federal habeas corpus relief from his 1997 conviction in Hawaii state court for second-degree murder in a case in which Christian seeks retroactive relief based on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which held that a defendant's Sixth Amendment rights are violated if, counter to the defendant's express objections, the defendant's counsel concedes guilt.

Christian filed in the district court a motion pursuant to Fed. R. Civ. P. 60(d) seeking relief from his first habeas judgment. The district court construed the motion as an application to file a second or successive (SOS) habeas petition and referred it to the Ninth Circuit.

The panel accepted the referral and confirmed that the Rule 60(d) filing, which asserted a federal basis for relief from Christian's state conviction, is properly construed as an application for authorization to file an SOS habeas petition.

The panel held that the application does not make the prima facie showing required in 28 U.S.C. § 2244(b)(2) for authorization to file an SOS petition. The panel assumed without deciding that *McCoy* created a new rule of constitutional law and that it was previously unavailable to Christian, but found that the application was otherwise

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

deficient. The panel held that the Supreme Court has not made *McCoy* retroactive on collateral review. The panel also held that because counsel does not violate a defendant's Sixth Amendment rights under *McCoy* simply by arguing self-defense in the alternative, Christian does not show that his proposed petition would rely on *McCoy*'s rule.

COUNSEL

Gary Modafferi (argued), Law Office of Gary A. Modafferi LLC, Las Vegas, Nevada, for Applicant.

Richard B. Rost (argued), Deputy Prosecuting Attorney; Donald S. Guzman, Prosecuting Attorney; Department of the Prosecuting Attorney, Wailuku, Maui, Hawaii; for Respondent.

OPINION

BEA, Circuit Judge:

Taryn Christian applies for federal habeas corpus relief from his 1997 conviction in Hawaii state court for second-degree murder. Having already been denied federal habeas relief once, he now seeks retroactive relief based on the Supreme Court's 2018 decision in *McCoy v. Louisiana*, 138 S. Ct. 1500. The Supreme Court held in *McCoy* that a defendant's Sixth Amendment right to determine the objective of his defense is violated if counsel, counter to the defendant's express instructions to maintain innocence, instead concedes guilt. Christian now argues his trial counsel effectively conceded his guilt by urging that the jury

consider self-defense as an alternative theory for acquittal against Christian's wishes.

In this proceeding, he initially filed a motion in the district court pursuant to Federal Rule of Civil Procedure 60 seeking relief from his first habeas judgment. The district court construed the filing as an application to file a second or successive petition for writ of habeas corpus ("SOS petition application") and referred it to the Ninth Circuit. We review whether Christian's filing is indeed an SOS petition application and, if so, whether, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), he is entitled to file a second or successive habeas petition at the district court based on *McCoy*.

I

A

In 1997, a jury in Hawaii state court found Christian guilty of second-degree murder of Vilmar Cabaccang.[1] The night of the murder, Cabaccang awoke to find an intruder inside his car parked outside his home. After confronting and chasing the fleeing intruder, Cabaccang caught and fought the knife-wielding stranger. Cabaccang's then-girlfriend aided in fending off the intruder, but Cabaccang had already been stabbed by that time. He would later die

[1] Christian was also convicted of attempted third-degree murder, attempted third-degree theft, and use of a deadly or dangerous weapon in the commission of a crime.

from the wound. The state identified Christian and prosecuted him for Cabaccang's murder.[2]

At trial, Christian maintained his innocence throughout, insisting that his counsel argue that a third man was the true perpetrator. Christian attached a letter from his trial counsel to the instant petition, which memorialized their pretrial strategy discussion. His trial counsel, Anthony Ranken, stated in the letter that he recommended Christian "not contest identification and instead [go] with a self defense theory." Dkt. 2 at 69. Rankin's letter states Christian rejected his recommendation, and that Christian "decided that [he] still do[es] wish to contest identification." *Id.* Ranken also specified in the letter: "I cannot admit identification without your consent" and that "[w]e will contest all aspects of the prosecution's case for which we have any contrary evidence at all." *Id.* at 69–70. The letter does not state that Christian told Ranken not to argue self-defense. Rather, Ranken wrote that he believed he "must not entirely foreclose the option of arguing a self-defense theory" and suggested he may so argue after reviewing the evidence presented at trial. *Id.* Christian did not sign the letter.

At trial, Ranken did contest identification per his and Christian's strategy discussion by presenting evidence and

[2] The state based its case against Christian on the following evidence: Christian's ex-girlfriend's statement that he had confessed the crime to her; a call between those two featuring incriminating statements from Christian; Christian's hat that was found at the scene of the crime, alongside gloves matching the type used by Christian's employer; Christian's history of theft of car radios and Christian's identification of Cabaccang's car in his notebook as a target; and two photo identifications of Christian by Cabaccang's ex-girlfriend and another witness at the scene.

examining witnesses. During Ranken's closing arguments, after summarizing the defense's primary theory of the case, Ranken first presented to the jury his own theory of self-defense. Ranken argued that if Christian was the one who stabbed Cabaccang, then the evidence suggests he did so in self-defense and that Christian lacked the mental state required for a second-degree murder conviction. Ranken prefaced his statements regarding self-defense by stating:

> I'm going to assume now for the sake of argument that [Christian] was the one who inflicted these wounds despite everything I said because I have to go on and help you analyze the other portions of the case, the other possible defenses just in case you do get beyond that question that you don't find a reasonable doubt as to who did it and want to move on to the next step.

Trial Tr., Dkt. 2 at 97. Later, when Ranken discussed how Cabaccang was stabbed, he stated: "The way [Cabaccang] got stabbed is obviously [Christian] from that position, if [Christian] was the one who did it . . . ." *Id.* at 111. Moments later, he repeated again: "If [Christian] was ever facing [Cabaccang] – if [Christian] was ever facing [Cabaccang] . . . ." *Id.* at 112. Ranken then moved on from self-defense to argue Christian lacked the requisite state-of-mind, prefacing this argument by stating: "Again if this was [Christian] who did it, what was his state of mind at the time?" *Id.* at 121.

Ultimately, Christian was convicted of the charges against him, including second-degree murder, for which he is serving a life sentence. Christian unsuccessfully appealed his conviction to the Hawaii Supreme Court.

B

In 2004, Christian filed his first petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, arguing, *inter alia*, ineffective assistance of counsel. Christian questioned multiple decisions made by Ranken during closing arguments, including Ranken's decision to argue self-defense in the alternative against his wishes. The magistrate judge recommended denying this basis for relief, finding Ranken's decision to argue self-defense in the alternative was an objectively reasonable strategy under the circumstances. The district court judge adopted the magistrate judge's findings and recommendation. The district court granted Christian's first habeas petition on other grounds; however we reversed on appeal and denied the petition in its entirety without remand. *Christian v. Frank*, 595 F.3d 1076, 1078 (9th Cir. 2010).

In the meantime, Christian has repeatedly sought post-habeas relief. In 2011, Christian attempted to reopen his federal habeas proceeding by filing a Federal Rule of Civil Procedure 60(b) motion in the district court, alleging newly discovered evidence of fraud on the courts. The district court construed the motion as an SOS petition application and referred it to the Ninth Circuit, which denied the application. Christian filed another Rule 60(b) motion in 2013, again alleging newly discovered evidence of fraud. The district court this time did not construe the motion as an SOS petition application. Instead, the district court held an evidentiary hearing, but ultimately entered an order denying the motion in 2015. In 2016, Christian filed a motion to reconsider the 2015 order, which was denied. Christian filed a second motion for reconsideration, which the district court denied stating it would refuse to consider any more motions. Christian then filed a third motion to reconsider, a petition

for writ of mandamus in the Ninth Circuit, a third Rule 60 motion, a second petition for writ of mandamus, and multiple requests for certificates of appealability at the Ninth Circuit; all were denied.

On October 19, 2018, Christian filed the instant action, styled "Petitioner's Independent Action for Equitable Relief from Judgment Under Federal Rule 60(d)(1) Pursuant to Intervening Supreme Court Precedent in *McCoy v. Louisianna*, [sic] (2018)." The district court determined Christian's fourth Rule 60 filing was instead a disguised SOS petition application. The court found that the petition presented "a federal basis for relief from his underlying conviction," and was thus "a successive habeas petition," and referred it to the Ninth Circuit.[3]

II

We have jurisdiction over applications for authorization to file second or successive habeas corpus petitions pursuant to 28 U.S.C. § 2244. Our role in determining whether to authorize a second or successive habeas petition under AEDPA is limited. We assess only whether a petitioner has made a prima facie showing of a qualifying claim. 28 U.S.C. § 2244(b)(2), (b)(3)(C); *Henry v. Spearman*, 899 F.3d 703,

[3] In January 2019, before this court, Christian filed a motion to hold in abeyance the proceedings before the panel pending appeal of a separate district court order denying Christian's motion for entry of findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(b). Dkt. 3. The Ninth Circuit has since denied Christian a certificate of appealability of that order (although Christian currently seeks certiorari review in the Supreme Court). *Christian v. Frank*, No. 19-15179 (9th Cir. Nov. 8, 2019). We **DENY** Christian's motion. Also pending are two motions for judicial notice, which we also **DENY** as moot. Dkts. 7, 24.

705 (9th Cir. 2018). Prima facie means "simply a sufficient showing of *possible* merit to warrant a fuller exploration by the district court." *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (citations omitted).

III

"AEDPA imposes significant limitations on the power of federal courts to award relief to prisoners who file second or successive habeas petitions." *Ezell v. United States*, 778 F.3d 762, 765 (9th Cir. 2015) (citations omitted). Prior to filing an SOS petition with the district court, the petitioner must first obtain authorization to do so from the court of appeals. 28 U.S.C. § 2244(b)(3). In this gatekeeper role, we must deny authorization to any second or successive petition for habeas corpus unless it meets AEDPA's strict requirements. 28 U.S.C. § 2244(b)(1)–(3).

A

The threshold issue is whether Christian's referred SOS petition application is properly before us. Christian filed this action with the district court as an independent action for equitable relief from its prior habeas judgment pursuant to Federal Rule of Civil Procedure 60(d). Rule 60 provides procedures for a traditional motion for relief from a judgment or order. Yet Rule 60(d) makes clear that it "does not limit a court's power to . . . entertain an independent action to relieve a party from a judgment, order, or proceeding" or "set aside a judgment for fraud on the court." The district court construed Christian's filing as an

unauthorized SOS petition application and referred it to us for review pursuant to Circuit Rule 22-3(a).[4]

A person may not disguise a second or successive habeas petition by styling it as a Rule 60 motion to avoid AEDPA's filing restrictions. "A habeas petitioner's filing that seeks vindication of [a federal basis for relief from a state court's judgment of conviction] is, if not in substance a habeas corpus application, at least similar enough that failing to subject it to the same requirements would be inconsistent with [AEDPA]." *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (quotation marks and citation omitted).

Determining whether a Rule 60 filing is instead an application for habeas relief depends on whether it "contains one or more 'claims.'" *Id.* at 530. "[A] 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." *Id.* "In most cases, determining whether a Rule 60(b) motion advances one or more 'claims' will be relatively simple. A motion that seeks to add a new ground for relief will of course qualify."[5] *Id.*

---

[4] Circuit Rule 22-3(a) states: "If an application for authorization to file a second or successive section 2254 petition or section 2255 motion is mistakenly submitted to the district court, the district court shall refer it to the court of appeals."

[5] We analyze whether a filing advances an unauthorized claim under AEDPA using this same standard regardless of whether the original filing is a Rule 60(b) motion or, as here, a Rule 60(d) independent action. *See Kostich v. McCollum*, No. 16-5007, 647 F. App'x 887, 890 (10th Cir. May 20, 2016) (unpublished) ("Motions brought under Rule 60(d) . . . are subject to the same analysis as other motions to determine if they bring unauthorized second or successive habeas claims."); *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1277 n.11 (11th Cir. 2004) (en banc) ("[A] petitioner [may not] circumvent the restrictions on second or

at 532 (citations omitted). "When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." *Id.* at 532 n.4. In contrast, for example, "a bona fide Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Hall v. Haws*, 861 F.3d 977, 985 (9th Cir. 2017) (quoting *Crosby*, 545 U.S. at 532).

Here, Christian does not urge a defect in the integrity of his earlier federal habeas proceeding. Rather, he presents a new claim for relief based on an intervening Supreme Court case, *McCoy*. Thus, his filing was properly construed by the district court as an SOS petition application. Christian claims the district court's denial of his Sixth Amendment claim in his original habeas petition was due to the court's "clear[] misunderst[anding]" of the "Constitutional significance" of the protected right discussed in *McCoy*. Pet'r's Br., Dkt. 2 at 29. He argues that "[i]n denying Petitioner's Sixth Amendment claim, the District Court applied a very narrow reading of *Strickland* to justify Ranken's complete reversal of Petitioner's defense in his closing summation." *Id.* at 32. In essence, Christian complains that the district court's interpretation of the substantive law governing his ineffective assistance of counsel claim was wrong in light of *McCoy*. In so doing, Christian asserts the district court's ruling on the merits of his original habeas petition was in error. Thus, under *Gonzalez v. Crosby*, Christian makes a claim covered under

---

successive petitions by the simple expedient of filing an independent action aimed at the judgment denying habeas relief.").

Section 2254. We therefore construe the Rule 60(d) action as a habeas petition subject to the restrictions of AEDPA.

So construed, Christian's petition before the panel is challenging the same judgment (his conviction for second-degree murder) as his original habeas petition, but on a new basis. A petition that challenges the same judgment as a prior habeas petition is considered second or successive. *See* 28 U.S.C. § 2244; *Gonzalez v. Sherman*, 873 F.3d 763, 767 (9th Cir. 2017). Christian concedes he had previously filed a habeas petition challenging the same conviction he challenges here and that it was denied. Pet'r's Br., Dkt. 2 at 19–20. Therefore, the habeas petition before the panel is second or successive under Section 2244.[6]

We accept the district court's referral of Christian's Rule 60(d) action and confirm that the filing is properly construed as an application for authorization to file a second or successive petition for writ of habeas corpus. We move now to the merits of the application.

B

We may authorize the filing of an SOS petition only if the petitioner makes a prima facie showing that satisfies the requirements of either 28 U.S.C. § 2244(b)(2)(A) or

[6] Christian argues that his filing falls under an exception to the second or successive rule outlined in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). *Stewart* held that a petitioner may bring a second habeas action without falling under the requirements of Section 2244 if the claim forwarded by the second petition was also originally brought in the first petition, but was dismissed at that time for being unripe. *Id.* at 643–44. This exception does not apply here. Christian does not forward a newly ripened claim denied at his original habeas proceeding, but seeks relief based on a new rule of constitutional law recognized by the Supreme Court in *McCoy*.

(b)(2)(B). 28 U.S.C. § 2244(b)(3)(C). As is relevant here, Christian must make a prima facie showing that his proposed petition "[1] relies on [2] a new rule of constitutional law, [3] made retroactive to cases on collateral review by the Supreme Court, [4] that was previously unavailable." *Spearman*, 899 F.3d at 705 (quoting 28 U.S.C. § 2244(b)(2)(A)).

Christian argues that the rule announced by the Supreme Court in *McCoy v. Louisiana* is one such new rule and his rights under *McCoy* were violated at trial such that he should be afforded retroactive habeas relief. We review Christian's application to determine whether he has met these four AEDPA requirements. For purposes of this analysis, we assume without deciding that *McCoy* did indeed create a new rule of constitutional law and that it was previously unavailable to Christian.[7] However, we find Christian's application otherwise deficient.

1

In 2018, the Supreme Court decided *McCoy v. Louisiana*, holding that a defendant's Sixth Amendment rights are violated if, counter to express objections, the defendant's counsel concedes guilt. 138 S. Ct. at 1512.

McCoy was charged with triple homicide in the first degree. *Id.* at 1506–07. The state sought the death penalty based on "strong," even "overwhelming," evidence against

[7] We will observe, however, that we have previously held that a counsel's concession of guilt could be grounds for a claim of ineffective assistance of counsel, and that this argument, at least, was available to Christian during his first habeas proceedings. *See United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991).

McCoy. *Id.* at 1506, 1512. Despite the evidence arrayed against him, McCoy insisted on his innocence. *Id.* at 1506.

McCoy's counsel, skeptical of his client's alibi and believing the evidence in favor of conviction to be insurmountable, determined that the best strategy for McCoy was to concede guilt at the trial stage in hopes of building credibility with the jury to avoid the death penalty at the sentencing stage. *Id.* at 1510. Yet McCoy was "intransigent and unambiguous" in expressly objecting to his counsel's proposed strategy. *Id.* at 1507. McCoy "vociferously insisted" he was innocent and "adamantly objected to any admission of guilt." *Id.* at 1505.

McCoy's counsel ignored his client's instructions. At trial, he was unambiguous in conceding guilt before the jury, stating "my client committed three murders" and that he "took [the] burden off of [the prosecutor]." *Id.* at 1507 (alterations in original). McCoy's counsel did not couch, equivocate, or preface these statements with assurances that he was arguing only in the alternative. In so doing, his express objective was not to obtain acquittal, but to lessen the severity of the penalty. *Id.* at 1510 (observing that McCoy's counsel's "express motivation for conceding guilt was . . . to try to build credibility with the jury, and thus obtain a sentence lesser than death.").

On direct review from the Louisiana Supreme Court, the U.S. Supreme Court reversed McCoy's conviction on the ground that his counsel violated his Sixth Amendment rights, namely the "[a]utonomy to decide that the objective

of the defense is to assert innocence."[8] *Id.* at 1508. The Court held that counsel could not "override" and "interfere" with a defendant's decision to maintain innocence, provided that the client gave "express statements of [his] will" to do so prior to trial. *Id.* at 1509. Counsel is nonetheless permitted to "focus his own collaboration on urging" alternative theories, such as arguing that the defendant's "mental state weighed against conviction." *Id.*

The Court elaborated on the proper division of labor between counsel and client: "With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt."[9] *Id.* at 1505. With that said, the defendant's right to maintain innocence "should not displace counsel's . . . trial management role[]." *Id.* at 1509. Counsel is permitted to determine "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," *id.* at 1508 (citations omitted), along with "choosing the basic line of defense, moving to suppress evidence, delivering an opening statement and deciding what to say in the opening, objecting to the admission of evidence, cross-examining witnesses, offering evidence and calling defense witnesses, and deciding what to say in summation," *id.* at 1516 (Alito, J.,

[8] The Supreme Court relied on the Assistance of Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

[9] The client is also entitled to decide "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy*, 138 S. Ct. at 1508.

dissenting) (citing *New York v. Hill*, 528 U.S. 110, 114–15 (2000)).

The Supreme Court clarified that deprivation of this constitutional right is a "structural error," and not one falling within the purview of the Court's "ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510–11 (majority opinion). The Supreme Court did not express whether this rule would be retroactively applicable on collateral review.

2

Applications for leave to file SOS petitions pursuant to Section 2244(b)(2)(A) may not be authorized unless the intervening new constitutional rule has been "made retroactive to cases on collateral review by the Supreme Court." "[T]he Supreme Court is the only entity that can make a new rule retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). "The Supreme Court can make a rule retroactive explicitly or through a combination of holdings that 'logically dictate' the new rule's retroactivity." *Young v. Pfeiffer*, 933 F.3d 1123, 1125 (9th Cir. 2019) (citations omitted).

The Supreme Court will not hold a new constitutional rule of criminal procedure to be retroactively applicable on collateral review unless it falls within two narrow exceptions. *Teague v. Lane*, 489 U.S. 288, 310 (1989). The first is for substantive rules that proscribe the criminalization of particular individual conduct. *Id.* at 307. The second

> is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. To fall within this exception, a new rule must meet two requirements: Infringement of the rule

> must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.

Tyler, 533 U.S. at 665 (quotation marks and citations omitted). Absent an explicit statement on retroactivity, "[t]he Court . . . can be said to have 'made' a rule retroactive within the meaning of § 2244(b)(2)(A) only where the Court's holdings logically permit no other conclusion than that the rule is retroactive." *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring) ("*[I].e.*, the holdings must *dictate* the conclusion and not merely provide principles from which one *may* conclude that the rule applies retroactively.").

The Supreme Court has not explicitly made *McCoy* retroactive. *McCoy* was heard on direct appeal rather than collateral review, and the U.S. Supreme Court did not discuss retroactivity. *McCoy*, 138 S. Ct. at 1507. Nor has the Supreme Court in any subsequent decision held *McCoy* to be explicitly retroactive.

Neither is *McCoy*'s retroactivity logically dictated by a combination of holdings from multiple Supreme Court cases. Christian does not cite to any Supreme Court holdings that might lend themselves to that conclusion. He argues only that we should conclude that *McCoy*'s right to maintain innocence is a watershed rule of criminal procedure because its withholding, like the right to counsel, "vitiates the fairness of the conviction." Reply Br. 14–15 (citing *Mackey v. United States*, 401 U.S. 667, 693–94 (1971)). That may or may not be the case—that is for the Supreme Court to decide. We may consider only whether the Supreme Court

has yet done so, either explicitly or through two or more holdings that in combination perform a logical proof.

To prove retroactivity absent an explicit holding, "[t]he relationship between the conclusion that a new rule is retroactive and the holdings that make this rule retroactive . . . must be *strictly logical*." *Tyler*, 533 U.S. at 669 (O'Connor, J., concurring) (emphasis added). For example, in *McCoy*, the Supreme Court held that the denial of a defendant's Sixth Amendment right to maintain innocence is a "structural" error and held that overriding the client's decision as to the objective of the defense was a "[v]iolation of a defendant's Sixth Amendment-secured autonomy." *McCoy*, 138 S. Ct. at 1511. Such a rule could be *logically* retroactive if, for instance, the Supreme Court had previously held that "all newly discovered Sixth Amendment rights are retroactive," or if it had held that "all new rights whose deprivation result in structural errors are watershed rules of criminal procedure." The Supreme Court would not then have had to state explicitly that *McCoy* was retroactive: that conclusion would be logically inescapable based upon the interaction of either of those two premises with *McCoy*'s holding.

But Christian does not establish a strictly logical relationship between *McCoy* and another Supreme Court holding. He points to no case that necessarily dictates that all structural errors are coincident with *Teague*'s permitted category of retroactive rights. In fact, the Supreme Court has said otherwise: "[A] holding that a particular error is structural does not logically dictate the conclusion that the second *Teague* exception has been met." *Tyler*, 533 U.S. at 666–67. Neither does Christian cite to any Supreme Court case deeming all Sixth Amendment rights to be watershed rules of criminal procedure implicating the fundamental

fairness and accuracy of the criminal proceeding. As such, Christian fails to show that *McCoy* has logically been made retroactive. We therefore conclude that the Supreme Court has not made *McCoy v. Louisiana* retroactive to cases on collateral review.

3

Even if we were to hold that *McCoy* is retroactive, Christian's petition does not sufficiently rely on *McCoy* so as to present a prima facie case for relief.

"[Section] 2244(b) calls for a permissive and flexible, case-by-case approach to deciding whether a second or successive habeas corpus petition 'relies on' a qualifying new rule of constitutional law. We ask whether the rule substantiates the movant's claim, even if the rule does not conclusively decide the claim, or if the rule would need a non-frivolous extension for the petitioner to get relief." *Spearman*, 899 F.3d at 706 (9th Cir. 2018) (cleaned up).

For Christian's application to be substantiated by *McCoy*, he must show at the very least that his counsel conceded to his guilt at trial. Christian argues that Ranken, defying his instructions, changed strategy mid-trial to forward a theory of self-defense before the jury during closing arguments. According to Christian, Ranken's statements relating to the alternative self-defense argument ran so counter to the third-man argument pursued during trial as to have effectively conceded Christian's guilt. He asserts that this de-facto concession of guilt deprived him of his right under *McCoy* to maintain innocence. We do not agree.

Unlike McCoy's counsel, Ranken never conceded Christian's guilt. Ranken never relieved the prosecution of its burden. Indeed, throughout the trial, Ranken argued that

Christian was innocent and contested the state's identification of Christian as the one who stabbed Cabaccang.

Moreover, Ranken repeatedly and explicitly prefaced his self-defense argument as relevant only if the jury concluded that Christian had stabbed Cabaccang. Ranken's intention to argue in the alternative was clear as day: "I'm going to assume now for the sake of argument;" "just in case you do get beyond that question that you don't find a reasonable doubt as to who did it;" "if [Christian] was the one who did it." Trial Tr., Dkt. 2 at 97, 111. No reasonable member of the jury could view a self-defense argument couched in these terms as tantamount to a concession of guilt.

Additionally, *McCoy* makes clear that counsel does not interfere with the objective of the defense by arguing alternative theories if he does so in the pursuit of acquittal. *McCoy*, 138 S. Ct. at 1508–09 ("[Counsel] could not interfere with [a defendant's] telling the jury 'I was not the murderer,' although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that [a defendant's] mental state weighed against conviction."). While *McCoy* safeguards the client's authority to determine the "objective of the defense," the Supreme Court made sure to state that its holding did not displace counsel's trial management role, including in deciding "what arguments to pursue." *Id.* at 1508 (citations omitted).

Urging a jury to consider self-defense as an alternative argument does not amount to a concession of guilt. Ranken did not relieve the state of its burden to prove Christian's guilt beyond a reasonable doubt. Moreover, Ranken's objective in arguing self-defense was identical to Christian's: acquittal. His objective was not, as it was in

McCoy, to forsake acquittal in hopes of obtaining a lighter sentence. We hold that counsel does not violate a defendant's Sixth Amendment rights under *McCoy* simply by arguing self-defense in the alternative.

IV

Christian's Rule 60(d) filing before the district court asserted a federal basis for relief from his state conviction, and thus made a claim covered by 28 U.S.C. § 2244(b). The filing was properly referred to us and we construe it as an application for authorization to file a second or successive petition for writ of habeas corpus. Christian's application does not make the required prima facie showing pursuant to 28 U.S.C. § 2244(b)(2). He does not show that *McCoy* was made retroactive on collateral review by the Supreme Court nor that his proposed petition would rely on *McCoy*'s rule.

DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

TARYN CHRISTIAN, Petitioner, vs. CLAYTON FRANK, Director, State of Hawaii Department of Public Safety, and STATE OF HAWAII DEPARTMENT OF PUBLIC SAFETY, Respondents.	§ § § § § § § § § § § § § §	CIV. NO. 04-00743

ORDER: (1) REFERRING SUCCESSIVE PETITION FOR HABEAS RELIEF TO NINTH CIRCUIT COURT OF APPEALS; AND (2) DENYING PETITIONER'S MOTION FOR EXPEDITED HEARING

Before the Court are Petitioner's: (1) Independent Action for Equitable Relief from Judgment Under Federal Rule 60(d)(1) Pursuant to Intervening Supreme Court Precedent in McCoy v. Louisiana (Dkt. # 453), and (2) Motion for Expedited Hearing to Admit Testimonial Evidence in Support of Independent Action for Equitable Relief (Dkt. # 459). For the following reasons, the Court: (1) in the interests of justice, **REFERS** the independent action for equitable relief to the Ninth Circuit Court of Appeals pursuant to Ninth Circuit Rule 22-3(a) because it is a successive petition for habeas relief; and (2) **DENIES** Petitioner's motion for an expedited hearing.

FACTUAL BACKGROUND

Petitioner is a Hawaii state prisoner serving a life sentence with a forty-year minimum period of incarceration for murder in the second degree. (Dkt. # 267 at 12.) The conviction arose out of his alleged involvement in the July 14, 1995 murder of Vilmar Cabaccang ("Cabaccang"). The facts that follow are taken from the voluminous record in this case.

On the night of the murder, Cabaccang and his girlfriend, Serena Seidel ("Seidel"), awoke from sleep and saw through the window that someone was inside of Cabaccang's car. Cabaccang and Seidel ran outside to confront the intruder, but the intruder fled on foot. Cabaccang and Seidel began chasing the intruder, but Seidel briefly stopped to summon a friend's help from a nearby residence. When no one answered the door, Seidel continued her pursuit.

When Seidel caught up to Cabaccang and the intruder, she found the two men engaged in a struggle. Cabaccang warned Seidel that the intruder had a knife. Seidel was undeterred from attempting to assist Cabaccang, and eventually their combined effort caused the intruder to drop the knife and flee the scene. At that point, Seidel observed blood in the area of the struggle and saw that Cabaccang had been stabbed. A short time later, Phillip Schmidt ("Schmidt") a local resident who had heard the noise from the struggle, rushed to the scene.

When Schmidt saw Cabaccang's injuries, he called 911. Cabaccang eventually died from the knife wounds.

Although police also investigated James Burkhart ("Burkhart") and Christian Dias ("Dias") as potential suspects, they ultimately prosecuted Petitioner Taryn Christian ("Petitioner" or "Christian") for the crime. The prosecution's theory was based on six major categories of evidence: (1) a statement from Christian's ex-girlfriend, Lisa Kimmey ("Kimmey"), that he had confessed to her; (2) a recording of a call between Christian and Kimmey, which the prosecution argued contained a confession; (3) Christian's baseball cap, which was found at the scene of the crime; (4) discarded gloves at the crime scene that matched the type that Christian's employer, Pukalani Country Club and Restaurant, had in its kitchen; (5) the fact that Christian had previously stolen car radios from parked cars and had identified Cabaccang's car as a target in a notebook; and (6) photo identifications from Seidel and Schmidt identifying Christian in a photo lineup.

Petitioner was ultimately convicted by a jury in 1997 of second-degree murder, attempted third-degree murder, attempted third-degree theft and use of a deadly or dangerous weapon in the commission of a crime.

PROCEDURAL BACKGROUND

On December 22, 2004, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1997 conviction and sentence

("Prior Petition"). (Dkt. # 1.) On September 30, 2008, this Court issued an order granting the Prior Petition as to one ground and denying it as to all other grounds. (Dkt. # 153.) The Court ordered that Petitioner be released within seven days of the entry of judgment unless the State elected to retry Petitioner. However, of relevance to the instant motions, the Court found the following claim to be without merit: Petitioner's ineffective assistance of counsel claim for counsel's change in defense theory during closing argument. (See Dkt. # 153 at 28–29.) Both Petitioner and Respondents filed notices of appeal. (Dkts. ## 157, 165.)

On February 19, 2010, the Ninth Circuit reversed the Order as to the Court's order granting Petitioner habeas relief. Christian v. Frank, 595 F.3d 1076, 1078 (9th Cir. 2010). However, the Ninth Circuit did not order remand and declined to issue a certificate of appealability. Christian v. Frank, 365 F. App'x 877, 879 (9th Cir. 2010). The Ninth Circuit left undisturbed the Court's findings on Petitioner's claim for ineffective assistance of counsel based on a changed defense theory in closing argument.

On March 11, 2010, Petitioner filed a petition for panel rehearing and a petition for rehearing en banc. The Ninth Circuit denied both petitions on May 19, 2010 (Dkt. # 221), issuing its Mandate on May 27, 2010 (Dkt. # 222). Petitioner filed a petition for writ of certiorari with the Supreme Court on

August 17, 2010, which was denied on November 1, 2010. Christian v. Frank, 131 S. Ct. 511 (2010).

On January 7, 2011, Petitioner moved to reopen his habeas proceeding pursuant to Federal Rule of Civil Procedure 60(b), alleging newly discovered evidence of fraud on the Hawaii state court, this Court, and the Ninth Circuit Court of Appeals. (Dkt. # 229.) In an order dated February 23, 2011, this Court held that it had been stripped of jurisdiction to consider Petitioner's Rule 60(b) motion when Respondents and Petitioner filed notices of appeal with respect to the Prior Petition. (Dkt. # 255 at 3.) Instead, the Court construed Petitioner's motion as a second or successive petition for writ of habeas corpus. (Id.) Noting that a petitioner may not file a second or successive petition for writ of habeas corpus unless he first obtains authorization from the court of appeals, see 28 U.S.C. § 2244(b)(3), the Court transferred Petitioner's motion to the Ninth Circuit. (Id. at 4.)

On November 15, 2011, the Ninth Circuit, treating Petitioner's motion as an application for authorization to file a second or successive petition for writ of habeas corpus, denied the application. See Christian v. Frank, No. 11-70561 (9th Cir. Nov. 15, 2011) (Dkt. # 16). On January 23, 2012, Petitioner filed a writ of mandamus, arguing that the Ninth Circuit failed to follow established procedures of appellate review in characterizing Petitioner's Rule 60(b)(3) motion as

"something it is not" (Dkt. # 261-1); the Ninth Circuit denied the writ on February 16, 2012 (Dkt. # 260).[1] On May 14, 2012, Petitioner filed a petition for a writ of certiorari (Dkt. # 261), which the Supreme Court denied on October 9, 2012 (Dkt. # 263).

On April 17, 2013, Petitioner filed a Motion to Reopen Habeas Corpus Proceedings Pursuant to Federal Rule of Civil Procedure 60(b) Motion, alleging newly discovered evidence of fraud on the Court. (Dkt. # 267.) In his Motion, Petitioner argued that evidence came to light that Respondents perpetrated a fraud on the court, which corrupted the integrity of Petitioner's original habeas corpus proceeding. (Id. at 11.) The Court determined that Petitioner's motion was not a second or successive petition for writ of habeas corpus, but instead alleged fraud upon the court, a matter this Court had jurisdiction to review under Rule 60 of the Federal Rules of Civil Procedure. (Dkt. # 286 at 5–11.)

Because the record before the Court was insufficient to establish the precise value of the evidence allegedly withheld, the Court ordered that an evidentiary hearing be held on Petitioner's motion. (Dkt. # 348.) Respondents sought a writ of mandamus in the Ninth Circuit to block the Court from proceeding with the hearing. The Ninth Circuit denied the writ. The Court held the evidentiary hearing on July 16, 2014. (Dkt. # 348.) However, because the Court

[1] The Ninth Circuit denied Petitioner's subsequent writ of mandamus on December 23, 2013. (Dkt. # 293.)

was unable to hear all of the relevant evidence and because Petitioner had obtained counsel only shortly before the hearing, the hearing was continued until March 16, 2015, at which time additional evidence was presented to the Court. (Dkts. ## 362, 377.) On December 1, 2015, final oral argument was held on the motion. (Dkt. # 404.) On December 28, 2015, the Court entered an order denying Petitioner's motion to reopen habeas corpus proceedings. (Dkt. # 406.)

On January 6, 2016, Petitioner filed a motion to reconsider the Court's order denying his motion to reopen. (Dkt. # 407.) On February 10, 2016, the Court denied this motion on the grounds that Petitioner had not cleared the high hurdle necessary to warrant the extraordinary remedy of reconsideration. (Dkt. # 410.) On April 12, 2016, the Court denied Petitioner's second motion for reconsideration and stated that "[n]o further motions to reconsider will be entertained." (Dkt. # 420 at 16.) On June 2, 2016, the Court denied Petitioner's third motion to reconsider. (Dkt. # 425.) On June 29, 2016, the Court denied Petitioner a Certificate of Appealability. (Dkt. # 427.) On September 12, 2016, a petition for writ of mandamus filed by Petitioner was received by the Ninth Circuit. (Dkt. # 431.) On November 21, 2016, the Ninth Circuit denied the petition for writ of mandamus. (Dkt. # 433.)

On December 27, 2016, Petitioner filed a motion for relief pursuant to Rule 60(d)(3) and to disqualify the undersigned pursuant to 28 U.S.C. §§ 455(a),

455(b)(1). (Dkt. # 434.) On February 13, 2016, Petitioner filed a motion asking that his case be reassigned to a different district court judge. (Dkt. # 439.) On February 15, 2017, the Court denied both of Petitioner's motions, finding that the motion for Rule 60(d)(3) relief was in effect a fourth attempt at reconsideration of the Court's order denying Petitioner's Rule 60(b) motion alleging fraud on the habeas court. (Dkt. # 440). The Court also denied Petitioner a certificate of appealability. (Dkt. # 445.) On March 13, 2017, Petitioner appealed the Court's order to the Ninth Circuit. (Dkt. # 441.) On June 12, 2017, the Ninth Circuit declined to issue a certificate of appealability. (Dkt. # 450.) On August 2, 2017, the Ninth Circuit denied Petitioner's "Motion for Clarification and Reconsideration," stating that "[n]o further filings will be entertained in this closed case." (Dkt. # 452.)

On April 19, 2017, while his March 13, 2017 appeal was still pending, Petitioner filed a Petition for Writ of Mandamus for Disqualification Pursuant to 28 U.S.C. §§ 455(a) and 455(b)(1), which essentially repeated the relief he sought in the district court. (Dkt. # 448.) On July 26, 2017, the Ninth Circuit denied the petition for a writ of mandamus. (Dkt. # 451.)

On October 19, 2018, in Petitioner's most recent round of filings, Petitioner moved the Court for equitable relief from judgment under Rule 60(d)(1) of the Federal Rules of Evidence. (Dkt. # 453.) Petitioner contends that the

Supreme Court's recent decision in McCoy v. Louisiana, 138 S.Ct. 1500 (2018), is intervening precedent that justifies vacating the Court's prior habeas judgment and reopening the proceedings in this case "to rectify error that has resulted in a grave miscarriage of justice." (Dkt. # 453 at 2.) On November 8, 2018, Respondents filed a response in opposition. (Dkt. # 455.) Petitioner filed a reply on November 15, 2018. (Dkt. # 456.)

On December 4, 2018, Petitioner filed a motion for expedited hearing to admit testimonial evidence in support of his motion for equitable relief pursuant to Rule 60(d)(1). (Dkt. # 459.) On December 20, 2018, Respondents filed a response in opposition. (Dkt. # 461.) On December 28, 2018, Petitioner filed a reply. (Dkt. # 463.)

APPLICABLE LAW

I. Federal Rule of Civil Procedure 60(d)(1)

Rule 60(d)(1) permits the Court to "entertain an independent action to relieve a party from judgment, order, or proceeding. . . ." Fed. R. Civ. P. 60(d)(1). Because a Rule 60 independent action is an equitable one, the proponent must show a meritorious claim or defense. Furthermore, relief under Rule 60(d) is reserved for the rare and exceptional cases where a failure to act would result in a miscarriage of justice. United States v. Beggerly, 524 U.S. 38, 42–46 (1998).

Rule 60 may not be used to challenge once again the movant's underlying conviction after his habeas petition attacking the same conviction has been denied. Like a Rule 60(b) motion, one brought under Rule 60(d) may not be used as a substitute for appeal. Fox v. Brewer, 620 F.2d 177, 180 (8th Cir. 1980); see Payton v. Davis, 906 F.3d 812, 818 (9th Cir. 2018). An independent action brought under Rule 60(d) is generally treated the same as a motion under Rule 60(b). Nevada VTN v. Gen. Ins. Co. of Am., 834 F.2d 770, 775 (9th Cir. 1987).

II. Successive Habeas Petition

Because Rule 60(b) and 60(d) are similar, a court performs the same analysis with respect to a Rule 60(b) motion. See Blackwell v. United States, No. 4:99-CV-1687, 2009 WL 3334895, at *7 (E.D. Mo. Oct. 14, 2009). For habeas petitioners, a Rule 60(b) motion may not be used to "make an end-run around the requirements of AEDPA or to otherwise circumvent that statute's restrictions on second or successive habeas corpus petitions" set forth in 28 U.S.C. § 2244(b). Jones v. Ryan, 733 F.3d 825, 833 (9th Cir. 2013) (quoting Calderon v. Thompson, 523 U.S. 538 (1998)) (internal quotation marks omitted). This statute has three relevant provisions: (1) § 2244(b)(1) requires dismissal of any claim that has already been adjudicated in a previous habeas petition; (2) § 2244(b)(2) requires dismissal of any claim not previously adjudicated unless the claim relies on either a new and retroactive rule of constitutional law or on new facts demonstrating actual

innocence of the underlying offense; and (3) § 2244(b)(3) requires prior authorization from the Court of Appeals before a district court may entertain a second or successive petition under § 2244(b)(2). Absent such authorization, a district court lacks jurisdiction to consider the merits of a second or successive petition. United States v. Washington, 653 F.3d 1057, 1065 (9th Cir. 2011); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

There is no "bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second or successive [§ 2254] motion." Jones, 733 F.3d at 834 (quoting Washington, 653 F.3d at 1060). In Gonzalez v. Crosby, the Supreme Court held that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim on the merits." 545 U.S. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." Id. at 532 n.4. A legitimate Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Id. at 532; accord United States v. Buenrostro, 638 F.3d 720, 722 (9th Cir. 2011) (observing that a defect in the integrity of a habeas proceeding requires a showing that something happened during that proceeding "that rendered its outcome suspect"). For example, a Rule 60(b) motion does not

constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar"—or contends that the habeas proceeding was flawed due to fraud on the court.[2] Id. at 532 nn. 4–5; see, e.g., Butz v. Mendoza-Powers, 474 F.3d 1193 (9th Cir. 2007) (holding that "where the district court dismisses a petition for failure to pay the filing fee or to comply with the court's orders, the district court does not thereby reach the "merits" of the claims presented in the petition and a Rule 60(b) motion challenging the dismissal is not treated as a second or successive petition"). The Court reasoned that if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction," there is no basis for treating it like a habeas application. Gonzalez, 545 U.S. at 533.

On the other hand, if a Rule 60(b) motion "presents a 'claim,' i.e., 'an asserted federal basis for relief from a . . . judgment of conviction,' then it is, in substance, a new request for relief on the merits and should be treated as a disguised" habeas application. Washington, 653 F.3d at 1063 (quoting Gonzalez,

[2] The Court notes that Petitioner has already unsuccessfully challenged his habeas proceeding on grounds that it was flawed due to fraud on the Court pursuant to Rule 60(b). (See Dkt. # 406.)

545 U.S. at 530). Interpreting Gonzalez, the court in Washington identified numerous examples of such "claims," including:

> a motion asserting that owing to excusable neglect, the movant's habeas petition had omitted a claim of constitutional error; a motion to present newly discovered evidence in support of a claim previously denied; *a contention that a subsequent change in substantive law is a reason justifying relief from the previous denial of a claim*; a motion that seeks to add a new ground for relief; a motion that attacks the federal court's previous resolution of a claim on the merits; a motion that otherwise challenges the federal court's determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief; and finally, an attack based on the movant's own conduct, or his habeas counsel's omissions.

Id. (internal quotations and citations omitted) (emphasis added). If a Rule 60(b) motion includes such claims, it is not a challenge "to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." Gonzalez, 545 U.S. at 532 n.5.

ANALYSIS

Petitioner seeks equitable relief from the judgment on his Prior Petition for habeas relief pursuant to Rule 60(d)(1). (Dkt. # 453.) Specifically, Petitioner contends that the Supreme Court's May 2018 decision in McCoy v. Louisiana, 138 S.Ct. 1500 (2018), warrants the Court's relief from his prior judgment. (Id.) According to Petitioner, in light of McCoy, the relief he requests is necessary to avoid a "grave miscarriage of justice" in his case. (Id. at 11.)

In his Prior Petition for habeas relief, Petitioner claimed that his trial counsel's change in defense theory resulted in ineffective assistance of counsel. (See Dkt. # 153 at 28.) Petitioner argued that his trial counsel's presentation of alternate theories of defense during closing argument that Petitioner did not commit the crime, but that if he did do it, it was in self-defense, had no chance of convincing the jury to find him not guilty. (See id.) Relying on Strickland v. Washington, 466 U.S. 668, 687 (1994), this Court adopted the Magistrate Judge's recommendation that trial counsel's performance did not fall below an objective standard of reasonableness as it was within the wide range of competence and trial strategy. (Id. at 28–29.) Thus, the Court determined that Petitioner's ineffective assistance of counsel claim on that basis was without merit. (Id.)

In the instant motion, Petitioner now argues that this Court's findings regarding counsel's trial strategy conflicts with the Supreme Court's rule in McCoy. (Dkt. # 453 at 20.) According to Petitioner, McCoy establishes that the Court erred in deciding the merits of his prior habeas petition, raising exceptional circumstances justifying the independent action for relief he now presents to the Court. (Id.)

In McCoy v. Louisiana, the Supreme Court considered the case of a defendant who had been convicted on three counts of first-degree murder and sentenced to death. 138 S.Ct. at 1500. The defense attorney there concluded that

the evidence against the defendant was overwhelming and that the best or only way to avoid a death sentence at the penalty phase of the trial was to concede at the guilt phase of the trial that the defendant was the killer and then urge mercy in view of his "serious mental and emotional issues." Id. at 1506–07. The defendant both before and during the trial "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505. The state court nonetheless denied his requests to terminate his counsel's representation and for a new trial, concluding that the defendant's counsel had the authority to concede guilt despite the defendant's opposition to the concession. Id. at 1506–07. The Supreme Court reversed and held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Id. at 1505.

The Court reasoned that while "[t]rial management is the lawyer's province," including decisions as to "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," id. at 1508 (quoting Gonzalez, 553 U.S. at 248), a criminal defendant is entitled to "[a]utonomy to decide that the objective of the defense is to assert innocence" and to "insist on maintaining her innocence at the guilt phase of a capital trial." McCoy, 138 S.Ct. at 1508. As the Court stated, "[t]hese are not

strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." Id.

As in McCoy, Petitioner argues that the record in his case demonstrates that his Sixth Amendment right to autonomy was violated by his trial counsel when he abruptly switched defense theories during closing argument despite Petitioner's insistence on maintaining his innocence. He relies on evidence that he refused to provide written consent to his trial counsel's request that he authorize him to argue a "self-defense" theory of the case. (Dkt. # 456 at 10.) Petitioner also contends that the record is clear that he disagreed with trial counsel throughout trial, and that he attempted to have his counsel removed from the case during trial to no avail. (Id. at 11.) Additionally, Petitioner asserts that his trial counsel's post-trial pleadings confirm Petitioner's specific intent to maintain his innocence at trial. (Id. at 11–12.) For these reasons, Petitioner contends that McCoy demonstrates that his Sixth Amendment right to autonomy was violated when his counsel argued a self-defense theory of the case over Petitioner's objections. He requests that the Court grant him relief pursuant to an independent action filed under Rule 60(d)(1).

Upon careful review, the Court finds that Petitioner's argument reveals that he is not attacking "some defect in the integrity of federal habeas proceedings," as he has already done in previous filings, but rather, is presenting a

federal basis for relief from his underlying conviction, predicated on his Prior Petition for habeas relief. Thus, the Court finds that Petitioner's Rule 60(d)(1) motion amounts to a successive habeas petition for which this Court lacks proper jurisdiction to review under 28 U.S.C. § 2244 absent permission from the Ninth Circuit Court of Appeals.

Ninth Circuit Rule 22-3(a) provides, "If a second or successive petition or motion, or an application for authorization to file such a petition or motion, is mistakenly submitted to the district court, the district court shall refer it to the court of appeals." Because Petitioner's motion is a "second or successive" § 2254 motion that requires certification before it may proceed in this Court, the Court refers the matter to the Ninth Circuit pursuant to Rule 22-3(a) for certification purposes. This referral leaves nothing pending before this court. Additionally, because the Court is without jurisdiction to consider Petitioner's successive habeas petition, the Court will **DENY** Petitioner's motion for expedited hearing related to the petition.

CONCLUSION

Based on the foregoing, the Court **REFERS** Petitioner's "second or successive" § 2254 motion to the Ninth Circuit pursuant to Rule 22-3(a) for certification purposes. The Clerk of Court is directed to send this order, along with Petitioner's motion, to the Ninth Circuit. The Clerk of Court is also directed to

terminate Petitioner's motion pending the Ninth Circuit's certification decision. The Court **DENIES** Petitioner's Motion for Expedited Hearing to Admit Testimonial Evidence in Support of Independent Action for Equitable Relief (Dkt. # 459).

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 4, 2019.

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

David Alan Ezra
Senior United States Distict Judge

GARY A. MODAFFERI, ESQ.
Hawaii Bar No. 3379
Nevada Bar No. 12450
Law Office of Gary A. Modafferi LLC
815 S, Casino Center Boulevard
Las Vegas, Nevada. 89101
Telephone: (702) 474-4222
modafferilaw@gmail.com

Attorney for Petitioner
TARYN CHRISTIAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN

CIV. NO. 04-00743 DAE-KSC

Petitioner

vs.

CLAYTON FRANK,

Respondent.

PETITIONER'S INDEPENDENT ACTION FOR EQUITABLE RELIEF FROM JUDGMENT UNDER FEDERAL RULE 60(d)(1) PURSUANT TO INTERVENING SUPREME COURT PRECEDENT IN MCCOY V. LOUISIANNA, (2018)

Petitioner, Taryn Christian, by and through his undersigned counsel, respectfully moves by Independent Action under Fed. R. Civ. P. 60(d)(1) for equitable relief from judgment of his federal habeas corpus application closed by the judgment of this Court entered on September 30, 2008 (Doc. 153). Petitioner's grounds for equitable relief are cognizable under Fed. R. Civ. P. 60(d)(1) /Independent action as interpreted in Beggerly, Gonzalez, Article III, and/or 28 U.S.C. §2243.

This Independent Action is brought on the grounds that the Supreme Court's

intervening decision in McCoy v. Louisiana, 584 U.S. ___, (2018), which governs the facts and circumstances of Petitioner's Sixth Amendment claim, warrants the District Court's notice in the interests of fundamental justice, to vacate its habeas judgment and reopen the proceedings to rectify error that has resulted in a 'grave miscarriage of justice.' Extraordinary circumstances are demonstrated where the Justices of the Supreme Court have opined that the Sixth Amendment violation described herein, as one that is "rare" and therefore corrected on appeal. The federal courts have repeatedly concluded that when a party to federal litigation receives an inconsistent application of the law which deprives him of a right accorded to other similarly situated parties, "extraordinary circumstances" exist which warrant post-judgment relief.

The motion for equitable relief from judgment is outlined more fully in the accompanying Memorandum of Points and Authorities and supporting documents. Using its power to ensure justice, this Court should grant equitable relief where the common law tradition, developed over centuries across the English-speaking world, mandates that if the client gives clear instruction that his defense is to be "not guilty", defense counsel is required to honor that instruction and is forbidden to argue his client is guilty.

Dated this 19th day of October, 2018.

/s/ Gary A. Modafferi

GARY A. MODAFFERI, ESQ.
Hawaii Bar No. 3379
Attorney for Petitioner.

GARY A. MODAFFERI, ESQ.
Hawaii Bar No. 3379
Nevada Bar No. 12450
Law Office of Gary A. Modafferi LLC
815 S, Casino Center Boulevard
Las Vegas, Nevada. 89101
Telephone: (702) 474-4222
modafferilaw@gmail.com

Attorney for Petitioner
TARYN CHRISTIAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN

CIV. NO. 04-00743 DAE-KSC

Petitioner,

v.

CLAYTON FRANK,

Respondent.

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL RULE 60(d)(1) INDEPENDENT ACTION FOR EQUITABLE RELIEF FROM JUDGMENT PURSUANT TO INTERVENING SUPREME COURT DECISION IN MCCOY V. LOISIANNA, 584 U.S.___(2018).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

The Supreme Court in its recent landmark decision in McCoy v. Louisiana, 584 U.S. __ (2018), addressed the constitutional question whether it is unconstitutional for defense counsel to admit an accused's guilt to the jury over his client's express objection. The Court's decision, authored by the Honorable Justice, Ruth Bader Ginsburg, affirmed that the Sixth Amendment guarantees a defendant the right of autonomy to choose the objective of his defense and to insist that his counsel refrain from admitting guilt.

McCoy sought to exercise his autonomy on one of the most fundamental decisions a defendant can possibly make—whether to admit or deny his own guilt before a jury. On trial for his life, McCoy made an informed, intelligent, and timely decision to maintain his innocence and put the state to its burden. That decision was not respected by his attorney. Over McCoy's express objection, the trial court permitted his attorney, Larry English, to tell the jury that McCoy was guilty of murder. A unanimous jury returned a verdict for first degree murder and sentenced McCoy to death. The Supreme Court reversed the Louisiana Supreme Court's decision that McCoy's attorney had authority to concede guilt despite McCoy's opposition—finding that it was incompatible with the Sixth Amendment and because the error was 'structural' and not subject to harmless-error review, a new trial was the required corrective.

The Sixth Amendment is addressed to the accused; it grants to him personally the right to make a defense—not to his lawyer and not to the state. Faretta v. California, 422 U.S. 806, 819 (1975), and therefore it is the accused who must have the ultimate authority to admit guilt. The Supreme Court observed that autonomy to decide whether to

concede guilt is a fundamental component of the client's right to set the objectives of his representation; it is not a mere question of tactics best left to the lawyer's expertise. Justice Ginsburg wrote that where a client's autonomy, not counsel's competence, is in issue, ineffective assistance jurisprudence is an inapt frame-work for understanding defendant autonomy—therefore its ineffective-assistance-of counsel jurisprudence under Strickland v. Washington, 466 U. S. 668 (1984), did not apply.

Petitioner, Taryn Christian, like Robert McCoy, made it clear beyond any doubt, both to his lawyer, Anthony Ranken, and the trial court, that he chose to defend against the charges and assert his innocence. This was especially clear where he plead not guilty and the defense had proffered three witnesses to testify that a third party had confessed to the murder for which Petitioner was charged. Yet, over Petitioner's express objection, and over Petitioner's request to testify before closing argument, his attorney reversed the defense's position from its opening statement, and in closing-summation, told the jury that Petitioner had committed the murder—but had acted in "self-defense". A unanimous jury returned a verdict of second-degree murder and Petitioner was sentenced to life.

Upon habeas review, the District Court, adopting the Magistrate Judge's findings and recommendation, attached no constitutional significance to Petitioner's protected Sixth Amendment right of autonomy to assert his innocence at trial, or the "structural" error that resulted from its violation. Applying a narrow reading of Strickland, the habeas court concluded Mr. Ranken's decision in his closing summation was reasonable defense strategy. The District Court's reasoning reflects the conclusion that defense counsel, not Petitioner, controlled the decision whether to admit guilt. Such reasoning posited a

conflict between the Sixth Amendment right to defend against the charges and that of having the assistance of counsel. The Supreme Court's explicit holding in McCoy made clear that no claim of coherent defense strategy could justify counsel's admission—indeed, prosecution—of his client's guilt in the face of his express objection. The District Court's habeas judgment is contrary to the fundamental principles affirmed by McCoy's holding, where the Supreme Court held that the Constitution does not permit what happened here.

Taryn Christian's Sixth Amendment right of autonomy was indeed violated by the actions of his trial attorney, and that his constitutional claim was wrongly decided and erroneously foreclosed from appellate review—resulting in a 'grave miscarriage of justice' warranting the District Court's immediate notice and correction of its habeas judgment, that can no longer in good conscience be enforced.

JURISDICTION

In United States v. Beggerly, 524 U.S. 38 (1998), the Supreme Court held that "an independent action brought in the same court as the original lawsuit [does not] requir[e] an independent basis for jurisdiction." Id. at 46. In every federal case—habeas or non-habeas—Article III provides a District Court "inherent power ... over its own judgments." Bronson v. Schulten, 104 U.S. (14 Otto) 410, 417 (1881). Article III provides a district Court plenary equitable power to revisit and/or revise its own judgments in the interest of fundamental justice. That inherent power dates to the adoption of Article III itself, which extends federal jurisdiction to all matters of equity. See U.S. Const. Art. III §2. See also United States v. Ohio Power Co., 353 U.S. 98, 99

(1957) (per curium (acknowledging a federal court's "power over [its] own judgment."). In habeas proceedings, 28 U.S.C. § 2243 compliments a District Court's inherent Article III equitable powers over its judgment, endowing a District Court with "all the freedom of equity procedure" necessary to revise a judgment in the interest of fundamental justice.

STATEMENT

A. Trial Proceedings

On August 17, 1995, Petitioner, Taryn Christian, was arrested without warrant or grand jury indictment and charged with the murder of Vilmar Cabaccang that occurred on July 14, 1995. From the time he was arrested Petitioner consistently maintained his innocence of the offense, requesting DNA testing of crime scene evidence and forensic examination of certain audio and video recordings. All requests were denied. Prior to trial, appointed counsel, Anthony Ranken, proffered to the court that the defense would call three witnesses to testify that the initial suspect in the case, James Hina Burkhart, had confessed and bragged to committing the fatal stabbing of Cabaccang.

On February 24, 1997, prior to the commencement of trial, Anthony Ranken produced to Petitioner a letter requiring Petitioner to give his signed authority to argue self-defense and attempted theft to the charge of murder in the second degree. Petitioner refused consent, insisting counsel argue his innocence which was supported by evidence that Burkhart had confessed to his friends that he committed the murder. See (Appendix B – Ranken's Letter Requesting Petitioner's Signed Consent). Because of Ranken's pre-trial admonitions, his refusal to withdraw, and his adamant insistence that Petitioner not testify despite being a percipient witness—Petitioner produced a notarized hand-written

'Affidavit' describing the events witnessed on the morning of July 14, 1995, and served his Affidavit on both Ranken and the prosecutor at the onset of trial.

In his opening statement to the jury, Ranken indicated that Petitioner was innocent and did not commit the murder, stating "that there was another man there" whom the prosecutor had not mentioned—a man known to the decedent and his girlfriend. See (Appendix C-1 – Ranken's Opening Statement). In the midst of trial, the trial court held an *in chambers* hearing and ruled to exclude the testimony of the witnesses that were proffered to testify that James Burkhart had confessed to the stabbing of Cabaccang, and that Serena Seidel, [Cabaccang's girlfriend] had furnished him with the keys to Cabaccang's vehicle. During the hearing while Burkhart asserted his Fifth Amendment privilege, the State argued to the court that the confession witnesses were "not reliable or trustworthy" because "no witnesses had identified Burkhart from any photographic arrays" and "two witnesses" placed him *within* their residence at the time of the crime. Petitioner's request to testify as his own witness before the commencement of closing arguments was denied by the trial court. Ranken, in siding with the prosecution that Petitioner not be allowed to take the stand, argued to the trial court:

> "I've informed him that we're beyond that stage of the trial and advised him not engage in any further outburst in front of the jury because I believe it will only hurt his case..."

Then, in closing summation, over Petitioner's expressed objection, Ranken proceeded to argue to the jury that Petitioner, while under great duress had committed the murder in "self-defense", reversing the defense's position which was paramount to him changing Petitioner's plea: See (Appendix C-2 – Ranken's Closing Argument at pp. 40;

55; 56) (emphasis supplied). Ranken argued in part:

> "... *I'm going to explore with you what really happened that night... But I have to admit to you I don't really know what happened*... I've got to move on, and you know it's-this is the hardest thing for a lawyer to do because now you're going to say well, Mr. Ranken, you are contradicting yourself. You just told us that Taryn didn't do it, and now you're talking about well he did it, its self-defense, whatever. There's no way around it, ladies and gentlemen, I'm-I don't know what happened... So, yes, I'm going to assume now for the sake of argument that Taryn was the one that inflicted these wounds despite everything I said... Lets try to reconstruct how this fight happened....Mr. Cabaccang tackles Taryn. His shirt -Taryn's shirt conies up enough to expose his belly or Vilmar pushes the shirt up to get his knife hand under against Taryn's flesh. Taryn's lying face down on the pavement...with this larger, heavier, stronger man on top of him...pinning him down and cutting him with a knife...There was after that–after Taryn felt the pain of his own blood being drawn, after he felt the knife against his belly that he grabbed that knife only to again - *I submit to you it was then that Taryn, the terrified teenager, took his own knife out of its sheath to defend himself...*"

None of this information was supported by any eyewitness or by Petitioner. Petition had no cuts or wound(s) as Ranken described. Earlier, counsel represented that he did not know what happened. Yet, he argued specific details not supported by any evidence, providing a theory that was substantially similar to that of the prosecution, and in effect, testified for the prosecution. (Refer at pp. 70-72; 74; 80-86) (emphasis added).

> "... *So then how did Vilmar get stabbed? The way Vilmar got stabbed is obviously Taryn from that position,* if Taryn was the one who did it, managed to get up his knife without seeing what he was doing, just thrust blindly behind him and up where Vilmar was sitting on him...And it looks like he was acting in self-defense, never really realizing the harm that he was inflict-ing because he could not see the harm he was inflicting. He did not know where that knife was landing... Blindly, without being able to see, just stabbing behind his own back...He was tackled, and that's how he ended up face down. And there was a struggle, Vilmar was getting the best of Taryn. *Taryn had the knife, and Taryn defended himself."*
> "...What was Taryn's intent that night? ...Taryn never intended to kill anyone. Taryn never knowingly killed anyone...Taryn didn't want this fight to happen. He didn't intend this fight to happen... *he didn't intend for Vilmar to end up dead."*

As supported by the record, Ranken in his summation, profoundly separated himself from his client when he stated to the jury, "I don't really know what happened." This was undoubtedly against the best interests of his client, as counsel, prosecutor and the court, were fully aware that Petitioner had requested the trial court grant him his constitutional right to testify before closing argument. Ranken argued: (emphasis added).

> "... Now, my client's asked me, won't the jury hold it against me if I don't testify? My client's asked me, won't they think I'm hiding something? But when I'm handling a case this serious, I ask myself if I do put my client on the stand, are you going to believe him anyway? *If someone's facing a charge this serious, are you going to believe whatever he says, or are you going to figure that he'll say whatever he needs to say to try get acquitted. I figure there's not much point in putting him on the stand."*

After telling the jury that he didn't really know what happened that night, Ranken's comments as to the irrelevance of his client's testimony were profoundly prejudicial and cannot be considered harmless error. His concession to the jury that while Petitioner was pinned down under the weight of Cabaccang, he was just, *"blindly, without being able to see, just stabbing behind his own back"* does not demonstrate mere negligence in the presentation of his client's case or a "strategy" to gain a favorable result that misfired. Instead, Ranken's statements lessened the government's burden of persuading the jury that Petitioner was the person who stabbed Cabaccang. In yet another instance of counsel's concession to the jury that his client was the perpetrator he states: "He's never been in trouble...He's facing shame of being caught for stealing..."

Again, when counsel made this claim to the jury, implying and confirming for them that his client was a thief and had unlawfully entered Cabaccang's vehicle, he ceased to function as defense counsel. Counsel's conduct cannot be considered a tactical

admission in order to persuade the jury to focus on a defense, such as the one of self-defense. When counsel abandoned his duty of loyalty to his client and effectively joined the state in their effort to attain a conviction, he suffered an obvious conflict of interest. Thus, when Ranken failed to subject the prosecution's case to meaningful adversarial testing, there was a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

After Petitioner was convicted of second-degree murder, Ranken filed a motion for new trial and a supplemental memorandum representing a reversal of his position during summation. Ranken, in his pleadings, attempts to shift blame to the trial court in an effort to mask counsel's deplorable conduct during the trial. (Dkt. 1-2: Exhibit #47-F). Ranken wrote at #1 and #2 as follows:

1. When Defendant Requested a New Attorney in the Middle of The Trial, the Court Failed to Conduct the Required "Penetrating and Comprehensive Examination" of the Defendant to Determine the Basis of His Request.

2. When Defendant Informed the Court Before Closing Arguments That He Wished to Testify Before the Jury, the Court Should Have Reopened the Evidentiary Portion of The Trial to Allow Defendant to Testify.

Attached to his Supplement for New Trial, in an 'Affidavit of Anthony Ranken' counsel wrote at #3: (Dkt. # 1-2: Exhibit # 52-A).

3. If allowed to testify, Defendant would have denied being the person who stabbed Vilmar Cabaccang and would have told the jury about the presence of a third man at the scene of the stabbing.

In his Affidavit, counsel concedes that his representation of Petitioner at trial and his closing argument was inconsistent with what Petitioner would have testified to under oath. The trial court denied Ranken's Motion for New Trial and the Hawai'i

Supreme Court upheld Petitioner's conviction.

B. Habeas Judgment.

On December 22, 2004, Petitioner filed a timely petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 29, 2008, the Magistrate Judge, the Honorable Leslie E. Kobayashi, issued her Findings and Recommendations to grant the Petition in part and deny it in part. In deciding Petitioner's Six Amendment claim on the issue of trial counsel's concession of guilt over Petitioner's objection, the Magistrate concluded that where the trial court had excluded the witnesses from testifying that Burkhart had confessed to the killing, trial counsel's "strategic decision" to argue self-defense was "objectively reasonable". (Dkt # 146: pp. 60-61). See (Appendix D – The Magistrate Judge's Findings and Recommendations to Grant in Part and Deny in Part Petition for Writ of Habeas Corpus). The court wrote:

> At the outset of trial, the defense's strategy was to establish that Petitioner did not kill Cabaccang. By the time of closing arguments, however, trial counsel apparently altered the defense's strategy and presented self-defense and extreme emotional disturbance as alternative arguments. This Court finds that, under the circumstances of the trial, this decision was within "the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690. As discussed, supra, Burkhart invoked the Fifth Amendment when called as a defense witness and the trial court excluded the witnesses who would have testified that Burkhart confessed to killing Cabaccang. These events certainly hurt the defense's ability to establish that another person, namely Burkhart, killed Cabaccang. Trial counsel's strategic decision to also argue self-defense and extreme emotional disturbance was objectively reasonable under the circumstances.

On September 30, 2008, the District Court entered its judgment and adopted the Magistrate's findings and recommendations regarding trial counsel's concession of guilt. (Dkt. #153 at p. 28). See (Appendix E - Habeas Order). The District Court wrote:

> ...This Court also finds on a de novo review that a change of the theory of defense did not fall below an objective standard of reasonableness. As the main theory of defense that Burkhart committed the killing was not supported by strong evidence, it was within the wide range of competence and trial strategy to argue that in the event the jury believed the prosecution, it should consider that the stabbing was in self-defense...

Petitioner was denied a COA on his Sixth Amendment claim by the Ninth Circuit Court of Appeals, foreclosing appellate review and the opportunity to seek certiorari review in the United States Supreme Court.

On May 14, 2018, the U.S. Supreme Court entered its landmark decision in McCoy v. Louisiana, 584 U.S. __ (2018), establishing governing precedent of the specific facts and circumstances found in Petitioner's trial that was incorrectly decided by the District Court during Petitioner's §2254 proceeding. See (Appendix A – The Supreme Court's Decision in McCoy v. Louisiana).

Petitioner's instant Independent Action in Equity pursuant to Fed. R. Civ. P. 60(d)(1), demonstrating a 'grave miscarriage of justice' and exceptional circumstances is properly before the District Court.

* * *

ARGUMENT

I. IN LIGHT OF SUPREME COURT PRECEDENT IN MCCOY V. LOUISIANA, WHICH GOVERNS PETITIONER'S SIXTH AMENDMENT CLAIM—PETITIONER'S RULE 60(d)(1) INDEPENDENT ACTION TO ADDRESS A 'GRAVE MISCARRIAGE OF JUSTICE' IS PROPERLY BEFORE THE DISTRICT COURT.

The Supreme Court's May 2018 decision in McCoy v. Louisiana, 584 U.S. __ (2018), has been hailed as a decisive statement of the priority of the value of a criminal defendant's autonomy over the fairness and reliability interests that also inform both the Sixth Amendment and the ethical obligations of defense counsel.

In its decision, the Supreme Court affirmed when a defendant expressly asserts that the objective of "his defence" is to maintain innocence of the charged criminal acts, "his lawyer must abide by that objective and may not override it by conceding guilt." U.S. Const., Amdt. 6 (emphasis added); see ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation"). "Presented with express statements of the client's will to maintain innocence ... counsel may not steer the ship the other way". See Gonzalez, 553 U. S., at 254 (Scalia, J., concurring in judgment) ("[A]ction taken by counsel over his client's objection... ha[s] the effect of revoking [counsel's] agency with respect to the action in question.").

Robert McCoy was charged with the murder of three of his family members in Bossier City, Louisiana. The state brought capital charges against him, but McCoy maintained his innocence—claiming he was not even in the state at the time of the murders—and demanded a jury trial. But in light of the evidence against him, McCoy's

lawyer thought the best trial strategy would be to admit guilt to the jury and hope for leniency in sentencing. McCoy adamantly opposed this plan, but his lawyer pursued it anyway and told the jury that McCoy was guilty. The jury returned three murder convictions and sentenced McCoy to death.

The Supreme Court reversed the decision of the Louisiana Supreme Court—finding that it was incompatible with the Sixth Amendment and because the error was 'structural' in kind, a new trial was required. The majority opinion by the Honorable Justice Ginsburg accords with the principle of defendant autonomy, and the long-standing maxim that the Sixth Amendment guarantees the right to a *personal* defense.

While a defendant is, of course, guaranteed the "Assistance of Counsel," the defendant himself remains master of the defense and is entitled to make fundamental decisions in his own case. The precept of the right of a defendant to serve as the master of his own defense finds resonance in the Sixth Amendment, which grants the right to put on a defense directly and personally to the accused—not to his lawyer and not to the state. Faretta, 422 U.S. at 819. A defendant who accepts the assistance of counsel does not forfeit the right to be the master of his defense. See Faretta, 422 U.S. at 819-21; see also United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) ("[W]hile defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense. The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." Faretta, 422 U.S. at 820.

The heart of the Supreme Court's analysis emphasized that defendant autonomy—not ineffective assistance of counsel—was the proper lens through which to view the

case. The McCoy Court addressed that the issue is not whether such a strategy is reasonable; it is whether a competent defendant, fully informed of his situation, may decide for himself whether to maintain his innocence and demand the state prove his guilt beyond a reasonable doubt. The Court observed that autonomy to decide whether to concede guilt is a fundamental component of the client's right to set the objectives of a representation; it is not a mere question of tactics best left to the lawyer's expertise. "These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." Weaver v. Massachusetts, 582 U.S. __, (2017) (slip op., at 6) (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U. S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("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.").

The Court discussed that because a client's autonomy, not counsel's competence, is in issue, the Court does not apply the ineffective-assistance-of-counsel jurisprudence discussed in Strickland v. Washington, 466 U.S 668 (1984), or United States v. Cronic, 466 U.S. 648 (1984), to the claim." The Court explained that to gain redress for attorney error, a defendant ordinarily must show prejudice. See Strickland, 466 U. S., at 692. "Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative."

Id. This principle of autonomy has received the most judicial attention in the context of self-representation, but also finds expression in the defendant's right to choice of counsel, see United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), and in a defendant's "ultimate authority to make certain fundamental decisions regarding the case," Jones v. Barnes, 463 U.S. 745, 751 (1983), even when represented by counsel.

There is nothing in the common law history of counsel-client relations before the adoption of the Bill of Rights to suggest that such assistance empowered the advocate to ignore or override the client's manifest instruction as to his plea and defense.

A. An Independent Action Pursuant to Rule 60(d)(1) Codifies Legal Grounds and Procedures to Relieve a Party of the Final Judgment to Address a "Grave Miscarriage of Justice."

Rule 60 of the Federal Rules of Civil Procedure, entitled "Relief from a Judgment or Order," provides that judgments, while ordinarily accorded a degree of finality, are subject to being set aside when appropriate, whether for ministerial reasons at one end of the spectrum or for fraud at the other. Fed. R. Civ. P. 60. Pursuant to Fed. R. Civ. P. 60(d)(1); "[T]he reference to 'independent action' in the saving clause is to what had been historically known simply as an independent action in equity to obtain relief from a judgment." Barrett, 840 F.2d at 1262–63 (quoting 11 C. Wright & A. Miller, Federal Practice & Procedure § 2868, at 237–38 (1973)). The rule therefore "does not limit a court's power to . . . entertain" such an action regardless of the passage of time. Fed R. Civ. P. 60(d), (d)(1). Thus, an independent action may be dismissed if filed within one year, when other Rule 60(b) remedies are available. See Moore's, supra note 7, at §60.82 [3]. An independent action is appropriate only where there is no adequate remedy at law.

See, Bankers Mortg. Co. v. United States, 423 F. 2d 73, 79 (5th Cir. 1970).

The Supreme Court addressed the topic of Rule 60 independent actions in United States v. Beggerly, 524 U.S. 38, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998), accord Pickford v. Talbott, 225 U.S. 651, 657, 32 S.Ct. 687, 56 L.Ed. 1240 (1912) (available when enforcement of the judgment is "manifestly unconscionable"). In that case, the Beggerly family entered into a settlement with the United States Government quieting title to disputed land in favor of the latter in return for a sizeable payment. 524 U.S. at 39. The family filed an independent action in federal court several years later to set aside the settlement, citing new evidence. See id. at 39, 40–41. In denying relief, the Supreme Court explained the family's allegation that the government withheld information during the original action would have, at most, "form[ed] the basis for a Rule 60(b)(3) motion," id. at 46, and "it should [have been] obvious that [the family's] allegations d[id] not nearly approach th[e] demanding" "grave miscarriage of justice" standard. Id. at 47.

The Beggerly Court was very specific as to the issues it addressed and those it did not address. In a concurring opinion, Justice Stevens and Justice Souter explained:

> ...We are not confronted with the question whether a doctrine such as fraudulent concealment or equitable estoppel might apply if the Government were guilty of outrageous misconduct that prevented the plaintiff, though fully aware of the Government's claim of title, from knowing of her own claim. Those doctrines are distinct from equitable tolling, see 4 C. Wright & A. Miller, Federal Practice and Procedure §1056 (Supp.1998); cf. United States v. Locke, 471 U. S. 84, 94, n. 10 (1985) (referring separately to estoppel and equitable tolling), and conceivably might apply in such an unlikely hypothetical situation. The Court need not (and, therefore, properly does not) address that quite different type of case.

The Supreme Court summed up the standard by stating that "an independent action should be available only to prevent a *grave miscarriage of justice.*" Id, at 47.

(emphasis added). The Court held that only a plausible claim alleging an injustice "sufficiently gross" to merit departing from the strict doctrine of res judicata will compel relief in such cases. Beggerly, 524 U.S. at 46. In other words, the injustice must be so severe that enforcement of the original judgment would be "manifestly unconscionable." Mitchell, 651 F.3d at 599 (citing Pickford v. Talbott, 225 U.S. 651, 657 (1912)). See, Barrett, 840 F.2d. at 1263 ("Relief pursuant to the independent action is available only in cases 'of unusual and exceptional circumstances.'" (quoting Rader v. Cliburn, 476 F.2d 182, 184 (6th Cir. 1973)). In Solomon v. DeKalb County, Georgia, the Eleventh Circuit again addressed Rule 60 independent actions. 154 Fed. Appx. 92 (11th Cir. 2005). The court observed that the Rule 60 independent action gives the court "the power to set aside a judgment whose integrity is lacking..." The court further stated: Relief under this clause... is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. The party seeking relief has the burden of showing that absent such relief, an 'extreme' and 'unexpected hardship will result." *Id.* (quoting Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984).

Second, a petitioner may seek equitable relief under Rule 60(d)(1) where manifest error is shown to have caused "*some defect in the integrity of the federal habeas proceedings.*" Gonzalez, 545 U.S. ___, 125 S.Ct. at 2648 (emphasis supplied). This mirrors the Sixth Circuit's holding in In Re Abdur'Raman, 392 F.3d 174 (6th Cir. 2004) (en banc), which specifically held that a motion for equitable relief is permissible if the motion contains arguments which show "reason to doubt the integrity of a habeas judgment." Id. at 180. Such a motion is proper if it "attacks the manner in which the

earlier habeas judgment was procured." Id. At 177. While a petitioner invoking Rule 60(d)(1) may seek relief from judgment in accordance with Gonzalez, a petitioner may also seek relief proceeding directly under Article III of the Constitution, which confers upon a District Court inherent equitable powers over its own judgment.

(i) The 'Miscarriage of Justice' Standard Defined.

In 1927, Justice Dundedin of the Privy Council (whom the British, in accordance with their parochial tradition, called "*Viscount* Dunedin") wrote in *Robins*:

> "... *miscarriage of justice* ... means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all."

In Fanjoy v, R., (1985): Justice McIntyre of Canada's Supreme Court wrote:

> "A person charged with the commission of a **crime** is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a *miscarriage of justice*. It is not every error which will result in a *miscarriage of justice*, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact."

In Lin v Tang, 147 D.L.R. (4th) 577 (1997): Justice Huddard of the British Columbia Court of Appeal opined:

> "Miscarriage of justice is a difficult concept. It is not simply unfairness as viewed by the party who perceives himself the victim of an unfair process.... In my view, miscarriage of justice means that which is not justice according to law. A miscarriage of justice will almost always be procedural. The blemish must be such as to make the judicial procedure at issue not a judicial procedure at all."

In R. v. Duke, 6 W.W.R. 386, 22 C.C.C. (3d) (1985), Justice McClung: Alberta Court of Appeal wrote, in reference to an appeal and the *Canadian Criminal Code*:

> "... the determination of whether a *miscarriage of justice* has occurred rests on broader considerations than those attaching to the demonstration of

a *substantial wrong*. Proof of actual prejudice resulting from an error of law is not requisite to a finding that a *miscarriage of justice* has occurred. It may be enough that an appearance of unfairness exists."

West's Encyclopedia of American Law, edition 2:

"A miscarriage of justice arises when the decision of a court is inconsistent with the substantive rights of a party."

Ballentine's Law Dictionary:

A decision inconsistent with substantial justice. Kotteakos v United States, 328 US 750, 90 L Ed 1557, 66 S Ct 1239. The result of a case in which essential rights of a party were disregarded or denied. People v Musumeci, 133Cal App2d 354, 284 P2d 168.

B. Petitioner's Independent Action Satisfies the Equitable Requirements For Relief.

To obtain relief from a judgment through an independent action, parties must establish equitable requirements. The independent action prerequisites are often stated as follows: (1) a judgment which ought not, in equity and good conscience, be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any remedy at law.

(i) Petitioner Satisfies McCoy's Core Requirement Where His Trial Counsel Conceded Guilt Over His Express Objection.

Petitioner, like McCoy, repeatedly and unequivocally instructed his attorney to pursue an innocence-based defense at trial, an instruction that counsel deliberately disregarded. By doing so, Ranken's pursuit of a defense strategy fundamentally incompatible with that selected by his client, resulted in a constructive denial of counsel

and a divided defense. But when the defense is divided, the defendant's own attorney, not the prosecutor, becomes his chief adversary. See United States v. Williamson, 53 F.3d 1500, 1511 (10th Cir. 1995) ("admission by counsel of his client's guilt to the jury" is a "paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice").

In accord with Supreme Court precedent in McCoy v. Louisiana, Petitioner has satisfied that he was denied his protected constitutional right of autonomy to serve as the master of his own defense—a Sixth Amendment 'structural' violation that was not recognized or correctly decided by the federal habeas court, resulting in a §2254 judgment, which ought not, in equity and good conscience, be enforced.

(ii) The District Court Egregiously Misunderstood the Constitutional Significance of Petitioner's Right of Autonomy to Assert An Innocence-Based Defense at Trial and the 'Structural' Error That Resulted From its Violation.

In denying habeas relief, the District Court clearly misunderstood the Constitutional significance of Petitioner's protected rights under the Sixth Amendment. Although a lawyer may make tactical decisions concerning the means used to pursue his client's objectives, the decision over whether to assert innocence at trial rests with the defendant. It has long been recognized that where a criminal defendant exercises his constitutional right to plead "not guilty," as Petitioner did, his lawyer has an obligation to "structure the trial of the case around his client's plea." Wiley v. Sowders, 647 F.2d 642, 560 (6th Cir. 1981). This Mr. Ranken clearly *failed* to do.

When a lawyer admits his client's guilt and relieves the prosecution of its burden

of proof over the client's express objection, the defendant suffers a structural error that is "so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to [its] effect on the outcome." Neder v. United States, 527 U.S. 1, 7 (1999) (quoting Fed. R. Crim. P. 52(a)). That is because the "constitutional deprivation" is not "simply an error in the trial process," but "affect[s] the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (quoting Rose v. Clark, 478 U.S. 570, 577-578 (1986)).

The District Court failed to recognize this long established and most fundamental tradition that under no circumstances, may counsel ignore the instructions and concede guilt. Where counsel refuses to withdraw and remaines on the case, he may never go against the client's instruction to present a defense of not guilty. This balance of power is reflected both in case law and professional conduct regulations.

(iii) Petitioner's Independent Action is Proper in the Absence of Any Other Remedy at Law to Afford the District Court to Correct Error.

In light of the Supreme Court's decision in McCoy v. Louisiana, which controls the specific circumstances of Petitioner's case, an 'independent action' in equity is proper in the absence of any other remedy at law to afford the District Court the opportunity to correct clear error in the face of a grave miscarriage of justice.

(iv) Extraordinary Circumstances Warranting Equitable Relief Exist Where Petitioner Received an Erroneous/ Inconsistent Application of the Law by the Federal Court.

The federal courts have repeatedly concluded that when a party to federal litigation receives an inconsistent application of the law which deprives him of a right

accorded to other similarly situated parties, "extraordinary circumstances" exist which warrant post-judgment relief. See e.g., Gondeck v. Pan American World Airways, 382 U.S. 25, 27 (1965)(granting post-judgment relief on rehearing to prevent inconsistent application of the law); Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975)(en banc) (granting 60(b) relief after finding extraordinary circumstances where, as a result of erroneous application of law by federal court, litigant received different treatment from similarly situated party); Cincinnati Insurance Co. v. Byers, 151 F.3d 574 (6th Cir.1998) (extraordinary circumstances existed where there was intervening change in the law); Overbee v. Van Waters, 765 F.2d 578 (6th Cir. 1985)(finding extraordinary circumstances and granting relief from judgment based on intervening decision of Ohio Supreme Court); Jackson v. Sok, 65 Fed.Appx. 46 (6th Cir. 2003) (per curiam), (upholding grant of 60(b) relief based on intervening state supreme court decisions).

Rare is the case where the district court's errors are so grave as to "seriously impair[] the fairness, integrity, or public reputation of judicial proceedings." C.B., 769 F.3d at 1019 (quoting Diaz-Fonseca, 451 F.3d at 36). In law, almost invariably applied to the act, fault, or omission of a court, as distinguished from that of an individual. See Holton v. Olcott, 58 N. H. 598; Fraud is always the result of contrivance and deception; injustice may be done by the negligence, mistake, or omission of the court itself. Silvey v. U. S., 7 Ct Cl. 324. In re Moulton, 50 N. H. 532. "Fraud" is deception practiced by the party; "injustice" is the fault or error of the court.

The Supreme Court's decision in McCoy confirms that manifest "injustice" has resulted here, from fault or error of the federal court and the Court of Appeals' failure to

recognize the ethical obligations of Counsel under the Sixth Amendment.

II. PURSUANT TO MCCOY'S PRECEDENT—THE DISTRICT COURT HAS A FUNDAMENTAL INTEREST AND A DUTY TO SEE THAT JUSTICE IS DONE IN PETITIONER'S CASE—WARRANTING THE REOPENING OF PETITIONER'S HABEAS ACTION TO RECTIFY A GRAVE MISCARRIAGE OF JUSTICE.

In denying Petitioner's Sixth Amendment claim, the District Court applied a very narrow reading of Strickland to justify Ranken's complete reversal of Petitioner's defense in his closing summation. The Court maintained that counsel's conduct was "reasonable" on the grounds the State had argued there was insufficient corroborating evidence to bringing in the Burkhart confession testimony before the jury. The District Court's framing elides the fundamental interest at issue. Nothing in Strickland—or anywhere else—suggests that a lawyer may admit his client's guilt against his consent.

It is well established law that defense counsel may not override the defendant's decision and thereby try "his case against his client." Anders v. California, 386 U.S. 738, 745 (1967). If he does so, he is no longer acting as the client's agent, and the defense is "stripped of the personal character upon which the [Sixth] Amendment insists." Faretta, 422 U.S. at 820. "[T]he dignity and autonomy of the accused" turn on his right to make these deeply personal decisions. McKaskle, 465 U.S. at 177.

The District Court demonstrably erred in concluding that Ranken's admission of guilt was "reasonable" defense strategy which predictably resulted in a divided defense before the jury. When the defense is divided, the defendant's own attorney, not the prosecutor, becomes his chief adversary. See United States v. Williamson, 53 F.3d 1500, 1511 (10th Cir. 1995) ("admission by counsel of his client's guilt to the jury" is a

"paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice"). Ranken's actions completely undermined Petitioner's stated objective for the representation and denied his right to present a defense.

The constitutional right against self-incrimination would be hollow if the accused had no right to prevent his incrimination by his own counsel. Here, Ranken conducted himself more as a prosecutor than as Petitioner's advocate. The result was not merely a "breakdown in the adversarial process," Cronic, 466 U.S. at 662, but the evisceration of each of those "particular guarantee[s] of fairness" the Constitution deems essential to a fair trial, Gonzalez-Lopez, 548 U.S. at 146. For a lawyer to override his client's wishes on such a matter is to "den[y] [him] the right to conduct his defense." State v Carter, 14 P.3d 1138, 1148 (Kan. 2000). Moreover, a lawyer who concedes his client's guilt against his will violates the spirit, if not the letter, of Rule 1.2(a), which provides that a "lawyer shall abide by his client's decision ... as to a plea to be entered." See Hawaii Rules of Prof'l Conduct, r. 1.2(a); see also Carter, 14 P.3d 1138 at 1148 (finding that defense counsel's decision to concede guilt at trial over his client's objection "was [] equivalent to entering a plea of guilty" without his client's consent).

Ranken had no ethical duty or authority to override Petitioner's decision to put the prosecution to its burden of proof rather than admit guilt. To the contrary, applicable ethics rules and standards of professional conduct require defense counsel to follow the client's direction as to whether to admit guilt or not, consistent with the Constitution's recognition that the decision to admit guilt is the defendant's—not the lawyer's—to make.

A. <u>In All Common Law Jurisdictions Counsel May Not Concede Guilt Against Instructions from the Client.</u>

Long settled precedent forbids counsel from conceding guilt and abandoning his client's defense—such is the law in the United States. The same law and practice is adhered to by all common law jurisdictions of the world which include: England and Wales; Australia and New-Zealand; Scotland and Ireland; Canada, the Caribbean; the West Indies; South Africa and Kenya. The common law tradition, developed over centuries across the English-speaking world, mandates that if the client gives clear instruction that his defense is to be "not guilty", defense counsel is required to honor that instruction and is *forbidden* to argue his client is guilty.

In England and Wales, statements of guilt must be made in person by the accused and, in the case of submissions, by counsel in accordance with the client's wishes. R. v. Ellis, (1973) 57 Cr. App. R. 571 (Eng.). Barristers must not put forward any case inconsistent with their client's instructions. In R. v. Clinton (1993) 1 W.L.R. 1181 (1993) 2 All E.R. 998 (Eng.), the Court of Appeal considered the question of departure from instructions: ("Conversely.... where a decision was taken "either in defiance of or without proper instructions," the situation is reversed. Then, the conviction is unsafe. Id. at 1187-88.")

In Australia, long settled precedent forbids counsel from conceding guilt and abandoning his [client's] defense. See Tuckiar v. The King, (1934) HCA 49, (1934) 52 CLR 335, (Austl.). The Australian rule is well stated in the textbook by Dal Pont, Lawyers' Professional Responsibility 604 (5th ed. 2012).

> Having accepted a brief, a defence lawyer is duty bound to defend the accused irrespective of any belief or opinion he or she may have formed as to the accused's guilt or innocence. Assessment of guilt or innocence is for the court, not counsel. In the well-known words of Bramwell, B: "A client is entitled to say to his counsel, 'I want your advocacy and not your judgment; I prefer that of the court.'"

In New Zealand, defense counsel is not entitled to disregard the instructions of the defendant with respect to the nature of the defense. R. v. McLoughlin [1985] 1 NZLR 106 (CA). In New Zealand, departure from a client's instructed plea is also a violation of the rules of professional conduct. The practice is the same in Scotland. It is for the accused to decide whether he wishes to plead guilty and defense counsel, referred to as an advocate, must follow the client's instructions regarding the defense. The courts there have confirmed that when an advocate advances a defense against the client's clear instructions, the conviction must be reversed. Anderson v. H. M. Advocate, (1996) J.C. 39 (Scot.). In Ireland, the duty of counsel to adhere to the defendant's choice of defense is found in the canons of ethics. The ethical duties of the barrister provide that it will be a breach to concede the guilt of a client who maintains their innocence. "Where the client maintains innocence, defence lawyers are obliged to attempt to expose weaknesses in the prosecution case." Section 10.14 of the Code of Conduct for the Bar of Ireland.

In Canada, the accused has the autonomy to determine the fundamental objectives of the defense, as well as the decision of how to plead, and counsel is obligated to follow the client's instructions. R. v. Szostak, (2012), 111 O.R. 3d 241 (Can. Ont. C.A.). In Canada, departure from a client's instructed plea is a violation of the rules of professional conduct. As the court held in R. v. G.D.B., (2000) 15 C.R. 520 (Can.) "there are decisions

such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions." Id. at 533.

In South Africa, counsel must follow the client's instructions and cannot make fatal concessions that harm his client's defense. In S v. Mofokeng 2004 (1) SACR 349 (W), Louw AJ said:

> Counsel also is not the judge. He does not have, nor should he have, the distance to adjudicate on the strength and weaknesses of his client's cause. He must, of course, advise his client on the probable findings of the court but he must fearlessly argue his client's case even if he, himself, does not believe that the case is right or just. Whilst he is an officer of the court, he is a representative of a litigant and he does not have the luxury to distance himself from his client's instructions and to condemn his client by making fatal concessions. In the final analysis, he is but a representative of his client, a mandatory. It is his duty to carry out his mandate and to take all reasonable steps to accomplish his aim. He must perform his obligations in accordance with the terms and limitations of his mandate. If he does not do so, he is no representative.
>
> * * *
>
> [W]ithin the four corners of the ethics which bind each defence advocate, counsel is not free to make submissions designed to destroy his client's case, or which may have that effect. He is, of course, in control of the presentation of the defence case... and he may otherwise bind his client through "vicarious admissions"... but where he, to the knowledge of the court, refutes his instructions, he fails to act as a representative.
>
> Id. at ¶ at 35g-i, 357f-g (emphasis supplied).

In his commentary on South African law, *Étienne du Toit, et al., Commentary on the Criminal Procedure Act* ¶¶ 11-42E (1987), Étienne du Toit writes that:

> "Grave incompetence, resulting in a fatal irregularity, is present where a legal representative ... does not establish the defence of his client..."

Thus, South African law goes further than the rule sought by Petitioner. In S. v.

Mafu and Others, 2008 (2) ALL SA 657 (W) (S.Afr.) at ¶15, for example, counsel's failure to put an affirmative alibi defense was held to breach "the very rudimentary duties of counsel when defending an accused." An authoritative treatise on Caribbean practice emphasizes "the necessity on the part of defence counsel to take written instructions and to act on those instructions. If counsel finds that he cannot do so, he must so indicate and seek leave to withdraw from the defence." Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* 230.

In Kenya, a Kenyan advocate must follow the client's legal instructions in accord with the Code of Ethics and Conduct for Advocates.

The Supreme Court's precedent in McCoy confirms that both the District Court's 2008 judgment and the Court of Appeals refusal to grant a COA on this constitutional ground were wrongly decided. In these circumstances, Petitioner has been erroneously left without a proper adjudication of the merits of his Sixth Amendment claim due to an extraordinary confluence of errors of law.

III. EXCEPTIONAL CIRCUMSTANCES ARE DEMONSTRATED WHERE JUSTICES OF THE SUPREME COURT OPINED THE DESCRIBED SIXTH AMENDMENT VIOLATION AS "RARE" AND "UNLIKELY TO RECUR".

The extraordinary and exceptional nature of this case is confirmed by the Supreme Court Justices in their dissenting opinion in McCoy. The Honorable, Justice Alito, joined by Justice Thomas and Justice Gorsuch, described the conflict between McCoy and his lawyer as "rare" and "unlikely to recur." Post, at 2, 5–7, and n. 2. The dissent concluded, that "a criminal defendant's right to insist that his attorney contest his guilt with respect

to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come." The Justices went on to reason, "... if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal." Id.

Here, Petitioner's Sixth Amendment violation, "rare" as it may be according to the Justices of the Supreme Court, has yet to be properly adjudicated and corrected under well-established principles of law and common law tradition developed over centuries across the English-speaking world—thus, demonstrating exceptional circumstances.

CONCLUSION

In conclusion, neither Taryn Christian, the State of Hawaii, nor the federal courts have any legitimate interest in enforcing a federal judgment allowing a "structural" error of a Sixth Amendment violation to stand, when that federal judgment is patently in error, and no one can deny otherwise. The District Court has a fundamental interest and duty to see that justice is done in this case, warranting the re-opening of the habeas action for the Court to rectify its error in judgment which was foreclosed from appellate review.

Respectfully submitted,

/s/ Gary A. Modafferi

GARY A. MODAFFERI, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2018, the forgoing Independent Action and Appendices was filed with the Clerk of the Court for the U.S. District Court for the District of Hawaii, to be served by operation of the Court's electronic filing system upon the following:

John D. Kim
Prosecuting Attorney
County of Maui.

Counsel for Respondent
Theodore I. Sakai
Director State of Hawaii
Department of Public Safety

Patrick K. Wong 5878
Corporation Counsel
Moana M. Lutey 6385
Deputy Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793
Phone: (808) 270-7741
E-mail: moana.lutey@co.maui.hi.us

/s/ Erika W. Magana

Erika W. Magana
An Employee of the Law Office of
Gary A. Modaferri.

GARY A. MODAFFERI, ESQ.
Hawaii Bar No. 3379
Nevada Bar No. 12450
Law Office of Gary A. Modafferi LLC
815 S, Casino Center Boulevard
Las Vegas, Nevada. 89101
Telephone: (702) 474-4222
modafferilaw@gmail.com

Attorney for Petitioner
TARYN CHRISTIAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN

CIV. NO. 04-00743 DAE-KSC

Petitioner

vs.

CLAYTON FRANK,

Respondent.

PETITIONER'S INDEPENDENT ACTION UNDER FEDERAL RULE 60(d)(1) PURSUANT TO INTERVENING SUPREME COURT PRECEDENT IN MCCOY V. LOUISIANNA, (2018)

PETITIONER'S APPENDICES "A" – "E"

LIST OF APPENDICES

APPENDIX "A" - The Supreme Court's Decision in McCoy v. Louisiana, 584 U.S. ___ (2018).

APPENDIX "B" - Attorney, Anthony Ranken's Letter Requesting Petitioner's Signed Consent to Concede Guilt and Argue Self Defense:

APPENDIX "C-1" - Anthony Ranken's Opening Statement:

APPENDIX "C-2" - Anthony Ranken's Closing Argument:

APPENDIX "D" - Excerpt of (Doc. 146) at Pages 58-62: Magistrate Judge's [Hon. Leslie E. Kobayashi] Findings and Recommendations to Grant in Part, and Deny in Part, Petition for Writ of Habeas Corpus:

APPENDIX "E" - Excerpt of (Doc. 153) at Pages 28-29: The District Court's Habeas Order:

* * *

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McCOY *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 16–8255. Argued January 17, 2018—Decided May 14, 2018

Petitioner Robert McCoy was charged with murdering his estranged wife's mother, stepfather, and son. McCoy pleaded not guilty to first-degree murder, insisting that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. Although he vociferously insisted on his innocence and adamantly objected to any admission of guilt, the trial court permitted his counsel, Larry English, to tell the jury, during the trial's guilt phase, McCoy "committed [the] three murders." English's strategy was to concede that McCoy committed the murders, but argue that McCoy's mental state prevented him from forming the specific intent necessary for a first-degree murder conviction. Over McCoy's repeated objection, English told the jury McCoy was the killer and that English "took [the] burden off of [the prosecutor]" on that issue. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. The jury found him guilty of all three first-degree murder counts. At the penalty phase, English again conceded McCoy's guilt, but urged mercy in view of McCoy's mental and emotional issues. The jury returned three death verdicts. Represented by new counsel, McCoy unsuccessfully sought a new trial. The Louisiana Supreme Court affirmed the trial court's ruling that English had authority to concede guilt, despite McCoy's opposition.

Held: The Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Pp. 5–13.

(a) The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." The defendant does not

APPENDIX "A"

Syllabus

surrender control entirely to counsel, for the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta* v. *California*, 422 U. S. 806, 819–820. The lawyer's province is trial management, but some decisions are reserved for the client—including whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this reserved-for-the-client category. Refusing to plead guilty in the face of overwhelming evidence against her, rejecting the assistance of counsel, and insisting on maintaining her innocence at the guilt phase of a capital trial are not strategic choices; they are decisions about what the defendant's objectives in fact *are*. See *Weaver* v. *Massachusetts*, 582 U. S. ___, ___. Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did here. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium attending admission that he killed family members, or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22. Thus, when a client makes it plain that the objective of "his defence" is to maintain innocence of the charged criminal acts and pursue an acquittal, his lawyer must abide by that objective and may not override it by conceding guilt. Pp. 5–8.

(b) *Florida* v. *Nixon*, 543 U. S. 175, is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon "was generally unresponsive" during discussions of trial strategy and "never verbally approved or protested" counsel's proposed approach. *Id.*, at 181. He complained about counsel's admission of his guilt only after trial. *Id.*, at 185. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. Citing *Nix* v. *Whiteside*, 475 U. S. 157, the Louisiana Supreme Court concluded that English's refusal to maintain McCoy's innocence was necessitated by a Louisiana Rule of Professional Conduct that prohibits counsel from suborning perjury. But in *Nix*, the defendant told his lawyer that he intended to commit perjury. Here, there was no avowed perjury. English harbored no doubt that McCoy believed what he was saying; English simply disbelieved that 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 no ethical rule requiring English to admit McCoy's guilt over McCoy's objection. Pp. 8–11.

Syllabus

(c) The Court's ineffective-assistance-of-counsel jurisprudence, see *Strickland* v. *Washington*, 466 U. S. 668, does not apply here, where the client's autonomy, not counsel's competence, is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *id.*, at 692. But here, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy has been ranked "structural" error; when present, such an error is not subject to harmless-error review. See, *e.g.*, *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8; *United States* v. *Gonzalez-Lopez*, 548 U. S. 140; *Waller* v. *Georgia*, 467 U. S. 39. An error is structural if it is not designed to protect defendants from erroneous conviction, but instead protects some other interest, such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U. S., at __ (citing *Faretta*, 422 U. S., at 834). Counsel's admission of a client's guilt over the client's express objection is error structural in kind, for it blocks the defendant's right to make a fundamental choice about his own defense. See *Weaver*, 582 U. S., at ___. McCoy must therefore be accorded a new trial without any need first to show prejudice. Pp. 11–12.

2014–1449 (La. 10/19/16), 218 So. 3d 535, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS and GORSUCH, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–8255

ROBERT LEROY McCOY, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[May 14, 2018]

JUSTICE GINSBURG delivered the opinion of the Court.

In *Florida* v. *Nixon*, 543 U. S. 175 (2004), this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects," *id.*, at 178. In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. *Id.*, at 186. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, *id.*, at 181, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy, *id.*, at 192.

In the case now before us, in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. App. 286–287, 505–506. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant "committed three murders. . . . [H]e's guilty." *Id.*, at 509, 510. We hold that a defendant has the right to insist that counsel refrain from admitting

guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the *Assistance* of Counsel for *his* defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

I

On May 5, 2008, Christine and Willie Young and Gregory Colston were shot and killed in the Youngs' home in Bossier City, Louisiana. The three victims were the mother, stepfather, and son of Robert McCoy's estranged wife, Yolanda. Several days later, police arrested McCoy in Idaho. Extradited to Louisiana, McCoy was appointed counsel from the public defender's office. A Bossier Parish grand jury indicted McCoy on three counts of first-degree murder, and the prosecutor gave notice of intent to seek the death penalty. McCoy pleaded not guilty. Throughout the proceedings, he 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. App. 284–286. At defense counsel's request, a court-appointed sanity commission examined McCoy and found him competent to stand trial.

In December 2009 and January 2010, McCoy told the court his relationship with assigned counsel had broken down irretrievably. He sought and gained leave to represent himself until his parents engaged new counsel for him. In March 2010, Larry English, engaged by McCoy's parents, enrolled as McCoy's counsel. English eventually concluded that the evidence against McCoy was over-

whelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.[1] McCoy, English reported, was "furious" when told, two weeks before trial was scheduled to begin, that English would concede McCoy's commission of the triple murders. *Id.*, at 286.[2] 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. *Id.*, at 286–287.

At a July 26, 2011 hearing, McCoy sought to terminate English's representation, *id.*, at 449, and English asked to be relieved if McCoy secured other counsel, *id.*, at 458. With trial set to start two days later, the court refused to relieve English and directed that he remain as counsel of record. *Id.*, at 461. "[Y]ou are the attorney," the court told English when he expressed disagreement with McCoy's wish to put on a defense case, and "you have to make the trial decision of what you're going to proceed with." *Id.*, at 469.

---

[1] Part of English's strategy was to concede that McCoy committed the murders and to argue that he should be convicted only of second-degree murder, because his "mental incapacity prevented him from forming the requisite specific intent to commit first degree murder." 2014–1449 (La. 10/19/16), 218 So. 3d 535, 570. But the second-degree strategy would have encountered a shoal, for Louisiana does not permit introduction of evidence of a defendant's diminished capacity absent the entry of a plea of not guilty by reason of insanity. *Ibid.*, and n. 35.

[2] The dissent states that English told McCoy his proposed trial strategy eight months before trial. *Post*, at 3. English did encourage McCoy, "[a] couple of months before the trial," to plead guilty rather than proceed to trial. App. 66–67. But English declared under oath that "the first time [he] told [McCoy] that [he] intended to concede to the jury that [McCoy] was the killer" was July 12, 2011, two weeks before trial commenced. *Id.*, at 286. Encouraging a guilty plea pretrial, of course, is not equivalent to imparting to a defendant counsel's strategic determination to concede guilt should trial occur.

At the beginning of his opening statement at the guilt phase of the trial, English told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than Robert McCoy was the cause of these individuals' death." *Id.*, at 504. McCoy protested; out of earshot of the jury, McCoy told the court that English was "selling [him] out" by maintaining that McCoy "murdered [his] family." *Id.*, at 505–506. The trial court reiterated that English was "representing" McCoy and told McCoy that the court would not permit "any other outbursts." *Id.*, at 506. Continuing his opening statement, English told the jury the evidence is "unambiguous," "my client committed three murders." *Id.*, at 509. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. In his closing argument, English reiterated that McCoy was the killer. On that issue, English told the jury that he "took [the] burden off of [the prosecutor]." *Id.*, at 647. The jury then returned a unanimous verdict of guilty of first-degree murder on all three counts. At the penalty phase, English again conceded "Robert McCoy committed these crimes," *id.*, at 751, but urged mercy in view of McCoy's "serious mental and emotional issues," *id.*, at 755. The jury returned three death verdicts.

Represented by new counsel, McCoy unsuccessfully moved for a new trial, arguing that the trial court violated his constitutional rights by allowing English to concede McCoy "committed three murders," *id.*, at 509, over McCoy's objection. The Louisiana Supreme Court affirmed the trial court's ruling that defense counsel had authority so to concede guilt, despite the defendant's opposition to any admission of guilt. See 2014–1449 (La. 10/19/16), 218 So. 3d 535. The concession was permissible, the court concluded, because counsel reasonably believed that admitting guilt afforded McCoy the best chance to

avoid a death sentence.

We granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. 582 U. S. ___ (2017). Compare with the instant case, *e.g.*, *Cooke* v. *State*, 977 A. 2d 803, 842–846 (Del. 2009) (counsel's pursuit of a "guilty but mentally ill" verdict over defendant's "vociferous and repeated protestations" of innocence violated defendant's "constitutional right to make the fundamental decisions regarding his case"); *State* v. *Carter*, 270 Kan. 426, 440, 14 P. 3d 1138, 1148 (2000) (counsel's admission of client's involvement in murder when client adamantly maintained his innocence contravened Sixth Amendment right to counsel and due process right to a fair trial).

II

A

The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." At common law, self-representation was the norm. See *Faretta* v. *California*, 422 U. S. 806, 823 (1975) (citing 1 F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909)). As the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized. *Faretta*, 422 U. S., at 824–828. Even now, when most defendants choose to be represented by counsel, see, *e.g.*, Goldschmidt & Stemen, Patterns and Trends in Federal *Pro Se* Defense, 1996–2011: An Exploratory Study, 8 Fed. Cts. L. Rev. 81, 91 (2015) (0.2% of federal felony defendants proceeded *pro se*), an accused may insist upon representing herself—however counterproductive that course may be, see *Faretta*, 422 U. S., at 834. As this Court

explained, "[t]he right to defend is personal," and a defendant's choice in exercising that right "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Ibid.* (quoting *Illinois* v. *Allen*, 397 U. S. 337, 350–351 (1970) (Brennan, J., concurring)); see *McKaskle* v. *Wiggins*, 465 U. S. 168, 176–177 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused.").

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta*, 422 U. S., at 819–820; see *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 382, n. 10 (1979) (the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense"). Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez* v. *United States*, 553 U. S. 242, 248 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. See *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983).

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

about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*. See *Weaver* v. *Massachusetts*, 582 U. S. ___, ___ (2017) (slip op., at 6) (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("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.").

Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22 (it is for the defendant to make the value judgment whether "to take a minuscule chance of not being convicted and spending a life in . . . prison"); Hashimoto, Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case, 90 B. U. L. Rev. 1147, 1178 (2010) (for some defendants, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence"); cf. *Jae Lee* v. *United States*, 582 U. S. ___, ___ (2017) (slip op., at 12) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certai[n]" conviction (emphasis deleted)). When a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U. S. Const., Amdt. 6 (emphasis add-

ed); see ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation").

Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. See *Gonzalez*, 553 U. S., at 249 ("[n]umerous choices affecting conduct of the trial" do not require client consent, including "the objections to make, the witnesses to call, and the arguments to advance"); cf. *post*, at 8–9. Counsel, in any case, must still develop a trial strategy and discuss it with her client, see *Nixon*, 543 U. S., at 178, explaining why, in her view, conceding guilt would be the best option. In this case, the court had determined that McCoy was competent to stand trial, *i.e.*, that McCoy had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Godinez* v. *Moran*, 509 U. S. 389, 396 (1993) (quoting *Dusky* v. *United States*, 362 U. S. 402 (1960) (*per curiam*)).[3] If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection. English could not interfere with McCoy's telling the jury "I was not the murderer," although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction. See Tr. of Oral Arg. 21–23.

B

Florida v. *Nixon*, see *supra*, at 1–2, is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon

---

[3]Several times, English did express his view that McCoy was not, in fact, competent to stand trial. See App. 388, 436.

never asserted any such objective. Nixon "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach. 543 U. S., at 181. Nixon complained about the admission of his guilt only after trial. *Id.*, at 185. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. See App. 286–287, 456, 505–506. See also *Cooke*, 977 A. 2d, at 847 (distinguishing *Nixon* because, "[i]n stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty"). If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way. See *Gonzalez*, 553 U. S., at 254 (Scalia, J., concurring in judgment) ("[A]ction taken by counsel over his client's objection . . . ha[s] the effect of revoking [counsel's] agency with respect to the action in question.").

The Louisiana Supreme Court concluded that English's refusal to maintain McCoy's innocence was necessitated by Louisiana Rule of Professional Conduct 1.2(d) (2017), which provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." 218 So. 3d, at 564. Presenting McCoy's alibi defense, the court said, would put English in an "ethical conundrum," implicating English in perjury. *Id.*, at 565 (citing *Nix* v. *Whiteside*, 475 U. S. 157, 173–176 (1986)). But McCoy's case does not resemble *Nix*, where the defendant told his lawyer that he intended to commit perjury. There was no such avowed perjury here. Cf. ABA Model Rule of Professional Conduct

3.3, Comment 8 ("The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false."). English harbored no doubt that McCoy believed what he was saying, see App. 285–286; English simply disbelieved McCoy's account in view of the prosecution's evidence. English's express motivation for conceding guilt was not to avoid suborning perjury, but to try to build credibility with the jury, and thus obtain a sentence lesser than death. *Id.*, at 287. Louisiana's ethical rules might have stopped English from presenting McCoy's alibi evidence if English knew perjury was involved. But Louisiana has identified no ethical rule requiring English to admit McCoy's guilt over McCoy's objection. See 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §11.6(c), p. 935 (4th ed. 2015) ("A lawyer is not placed in a professionally embarrassing position when he is reluctantly required . . . to go to trial in a weak case, since that decision is clearly attributed to his client.").

The dissent describes the conflict between English and McCoy as "rare" and "unlikely to recur." *Post,* at 2, 5–7, and n. 2. Yet the Louisiana Supreme Court parted ways with three other State Supreme Courts that have addressed this conflict in the past twenty years. *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 the Colorado Constitutions."); *Cooke*, 977 A. 2d 803 (Del. 2009); *Carter*, 270 Kan. 426, 14 P. 3d 1138 (2000). In each of the three cases, as here, the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel's preferred course: concession of the defendant's commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses. See *Bergerud*, 223

P. 3d, at 690–691; *Cooke*, 977 A. 2d, at 814; *Carter*, 270 Kan., at 429, 14 P. 3d, at 1141. These were not strategic disputes about whether to concede an element of a charged offense, cf. *post,* at 8; they were intractable disagreements about the fundamental objective of the defendant's representation. For McCoy, that objective was to maintain "I did not kill the members of my family." Tr. of Oral Arg. 26. In this stark scenario, we agree with the majority of state courts of last resort that counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission.

III

Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland* v. *Washington*, 466 U. S. 668 (1984), or *United States* v. *Cronic*, 466 U. S. 648 (1984), to McCoy's claim. See Brief for Petitioner 43–48; Brief for Respondent 46–52. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *Strickland*, 466 U. S., at 692. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.

Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, *e.g.*, *McKaskle*, 465 U. S., at 177, n. 8 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 150 (2006) (choice of counsel is structural); *Waller* v. *Georgia*, 467 U. S. 39, 49–50 (1984) (public trial is structural). Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a

lapse or flaw that is "simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U. S., at ___ (slip op., at 6) (citing *Faretta*, 422 U. S., at 834). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U. S., at ___–___ (slip op., at 6–7) (citing *Gonzalez-Lopez*, 548 U. S., at 149, n. 4, and *Sullivan* v. *Louisiana*, 508 U. S. 275, 279 (1993)).

Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. See *Cooke*, 977 A. 2d, at 849 ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole."). Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.[4]

---

[4]The dissent suggests that a remand would be in order, so that the Louisiana Supreme Court, in the first instance, could consider the structural-error question. See *post*, at 10–11. "[W]e did not grant certiorari to review" that question. *Post*, at 10. But McCoy raised his structural-error argument in his opening brief, see Brief for Petitioner 38–43, and Louisiana explicitly chose not to grapple with it, see Brief

* * *

Larry English was placed in a difficult position; he had an unruly client and faced a strong government case. He reasonably thought the objective of his representation should be avoidance of the death penalty. But McCoy insistently maintained: "I did not murder my family." App. 506. Once he 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. Because the error was structural, a new trial is the required corrective.

For the reasons stated, the judgment of the Louisiana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

---

for Respondent 45, n. 5. In any event, "we have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance." *Yates* v. *Evatt*, 500 U. S. 391, 407 (1991) (citing *Rose* v. *Clark*, 478 U. S. 570, 584 (1986)).

SUPREME COURT OF THE UNITED STATES

No. 16–8255

ROBERT LEROY McCOY, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[May 14, 2018]

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

The Constitution gives us the authority to decide real cases and controversies; we do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result. But that is exactly what the Court does in this case. The Court overturns petitioner's convictions for three counts of first-degree murder by attributing to his trial attorney, Larry English, something that English never did. The Court holds that English violated petitioner's constitutional rights by "admit[ting] h[is] client's guilt of a charged crime over the client's intransigent objection." *Ante*, at 11.[1] But English did not admit that petitioner was guilty

[1] When the Court expressly states its holding, it refers to a concession of guilt. See *ante*, at 1–2 ("We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty"); *ante*, at 11 ("counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission"). The opinion also contains many other references to the confession or admission of guilt. See, *e.g.*, *ante*, at 2 ("confessing guilt"; "admit guilt"); *ante*, at 4 ("admitting guilt"); *ante*, at 5 ("concede guilt"); *ante*, at 6 ("maintaining her innocence at the guilt phase"); *ante*, at 7 ("concession of guilt"); *ante*, at 8 ("conceding guilt"); *ante*, at 9 ("assertion of his guilt"); *ante*, at 10 ("conceding guilt"; "admit McCoy's guilt"); *ante*, at 13 ("concession of guilt"; "admission of McCoy's

of first-degree murder. Instead, faced with overwhelming evidence that petitioner shot and killed the three victims, English admitted that petitioner committed one element of that offense, *i.e.*, that he killed the victims. But English strenuously argued that petitioner was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense. App. 508–512. So the Court's newly discovered fundamental right simply does not apply to the real facts of this case.

I

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.

Retained by petitioner's family, English found himself in a predicament as the trial date approached. The evidence against his client was truly "overwhelming," as the Louisiana Supreme Court aptly noted. 2014–1449 (La. 10/19/16), 218 So. 3d 535, 565 (2016). Among other things, the evidence showed the following. Before the killings took place, petitioner had abused and threatened to kill his wife, and she was therefore under police protection. On the night of the killings, petitioner's mother-in-law made a 911 call and was heard screaming petitioner's first name. She yelled: "'She ain't here, Robert . . . I don't know where she is. The detectives have her. Talk to the detectives. She ain't in there, Robert.'" *Id.*, at 542. Moments later, a gunshot was heard, and the 911 call was

---

guilt").

At a few points, however, the Court refers to the admission of criminal "acts." *Ante*, at 1, 7, 10. A rule that a defense attorney may not admit the *actus reus* of an offense (or perhaps even any element of the *actus reus*) would be very different from the rule that the Court expressly adopts. I discuss some of the implications of such a broad rule in Part III of this opinion.

disconnected.

Officers were dispatched to the scene, and on arrival, they found three dead or dying victims—petitioner's mother-in-law, her husband, and the teenage son of petitioner's wife. The officers saw a man who fit petitioner's description fleeing in petitioner's car. They chased the suspect, but he abandoned the car along with critical evidence linking him to the crime: the cordless phone petitioner's mother-in-law had used to call 911 and a receipt for the type of ammunition used to kill the victims. Petitioner was eventually arrested while hitchhiking in Idaho, and a loaded gun found in his possession was identified as the one used to shoot the victims. In addition to all this, a witness testified that petitioner had asked to borrow money to purchase bullets shortly before the shootings, and surveillance footage showed petitioner purchasing the ammunition on the day of the killings. And two of petitioner's friends testified that he confessed to killing at least one person.

Despite all this evidence, petitioner, 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, reaching from Louisiana to Idaho. Petitioner believed that even his attorney and the trial judge had joined the plot. App. 509.

Unwilling to go along with this incredible and uncorroborated defense, 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. 218 So. 3d, at 558. At that point—aware of English's strong views—petitioner could have discharged English and sought new counsel willing to pursue his conspiracy defense; under the Sixth Amendment, that was his right. See *United States* v.

Gonzalez-Lopez, 548 U. S. 140, 144 (2006). But petitioner stated "several different times" that he was "confident with Mr. English." App. 411, 437.

The weekend before trial, however, petitioner changed his mind. He asked the trial court to replace English, and English asked for permission to withdraw. Petitioner stated that he had secured substitute counsel, but he was unable to provide the name of this new counsel, and no new attorney ever appeared. The court refused these requests and also denied petitioner's last-minute request to represent himself. (Petitioner does not challenge these decisions here.) So petitioner 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?

The Louisiana Supreme Court held that English could not have put on petitioner's desired defense without violating state ethics rules, see 218 So. 3d, at 564–565, but this Court effectively overrules the state court on this issue of state law, *ante*, at 9–10. However, even if it is assumed that the Court is correct on this ethics issue, the result of mounting petitioner's conspiracy defense almost certainly would have been disastrous. That approach stood no chance of winning an acquittal and would have severely damaged English's credibility in the eyes of the jury, thus undermining his ability to argue effectively against the imposition of a death sentence at the penalty phase of the trial. As English observed, taking that path would have only "help[ed] the District Attorney send [petitioner] to the death chamber." App. 396. (In *Florida* v. *Nixon*, 543 U. S. 175, 191–192 (2004), this Court made essentially the same point.) So, again, what was English supposed to do?

When pressed at oral argument before this Court, petitioner's current counsel eventually provided an answer: English was not required to take any affirmative steps to support petitioner's bizarre defense, but instead of conced-

ing that petitioner shot the victims, English should have ignored that element entirely. Tr. of Oral Arg. 21–23. So the fundamental right supposedly violated in this case comes down to the difference between the two statements set out below.

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

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

II

The constitutional right that the Court has now discovered—a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—

is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come. Why is this so?

First, it is hard to see how the right could come into play in any case other than a capital case in which the jury must decide both guilt and punishment. In all other cases, guilt is almost always the only issue for the jury, and therefore admitting guilt of all charged offenses will achieve nothing. It is hard to imagine a situation in which a competent attorney might take that approach. So the right that the Court has discovered is effectively confined to capital cases.

Second, few rational defendants facing a possible death sentence are likely to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the chances of avoiding execution. Indeed, under such circumstances, the odds are that a rational defendant will plead guilty in exchange for a life sentence. By the same token, an attorney is unlikely to insist on admitting guilt over the defendant's objection unless the attorney believes that contesting guilt would be futile. So the right is most likely to arise in cases involving irrational capital defendants.[2]

Third, where a capital defendant and his retained attorney cannot agree on a basic trial strategy, the attorney and client will generally part ways unless, as in this case, the court is not apprised until the eve of trial. The client will then either search for another attorney or decide to represent himself. So the field of cases in which this right

---

[2]The Court imagines cases in which a rational defendant prefers even a minuscule chance of acquittal over either the social opprobrium that would result from an admission of guilt or the sentence of imprisonment that would be imposed upon conviction. *Ante*, at 7. Such cases are likely to be rare, and in any event, as explained below, the defendant will almost always be able to get his way if he acts in time.

might arise is limited further still—to cases involving irrational capital defendants who disagree with their attorneys' proposed strategy yet continue to retain them.

Fourth, if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal.

Finally, even if all the above conditions are met, the right that the Court now discovers will not come into play unless the defendant expressly protests counsel's strategy of admitting guilt. Where the defendant is advised of the strategy and says nothing, or is equivocal, the right is deemed to have been waived. See *Nixon*, 543 U. S., at 192.

In short, the right that the Court now discovers is likely to appear only rarely,[3] and because the present case is so unique, it is hard to see how it meets our stated criteria for granting review. See this Court's Rules 10(b)–(c). Review would at least be understandable if the strategy that English pursued had worked an injustice, but the Court does not make that claim—and with good reason. Endorsing petitioner's bizarre defense would have been extraordinarily unwise, and dancing the fine line recommended by petitioner's current attorney would have done

---

[3]The Court responds that three State Supreme Courts have "addressed this conflict in the past twenty years." *Ante*, at 10. Even if true, that would hardly be much of a rebuttal. Moreover, two of the three decisions were not based on the right that the Court discovers and applies here, *i.e.*, "the right to insist that counsel refrain from admitting guilt." *Ante*, at 1–2. In *People* v. *Bergerud*, 223 P. 3d 686 (Colo. 2010), the court found that defense counsel *did not* admit guilt, and the court's decision (which did not award a new trial) was based on other grounds. *Id.*, at 692, 700, 707. In *State* v. *Carter*, 270 Kan. 426, 14 P. 3d 1138 (2000), defense counsel did not admit his client's guilt on all charges. Instead, he contested the charge of first-degree murder but effectively admitted the elements of a lesser homicide offense. *Id.*, at 431–433, 14 P. 3d, at 1143.

no good. It would have had no effect on the outcome of the trial, and it is hard to see how that approach would have respected petitioner's "autonomy," *ante*, at 6, 7, 8, 11, any more than the more straightforward approach that English took. If petitioner is retried, it will be interesting to see what petitioner's current counsel or any other attorney to whom the case is handed off will do. It is a safe bet that no attorney will put on petitioner's conspiracy defense.

III

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

Under current precedent, there are some decisions on which a criminal defendant has the final say. For example, a defendant cannot be forced to enter a plea against his wishes. See *Brookhart* v. *Janis*, 384 U. S. 1, 5–7 (1966). Similarly, no matter what counsel thinks best, a defendant has the right to insist on a jury trial and to take the stand and testify in his own defense. See *Harris* v. *New York*, 401 U. S. 222, 225 (1971). And if, as in this case, a defendant and retained counsel do not see eye to eye, the client can always attempt to find another attorney who will accede to his wishes. See *Gonzalez-Lopez*, 548 U. S., at 144. A defendant can also choose to dispense with counsel entirely and represent himself. See *Faretta* v. *California*, 422 U. S. 806, 819 (1975).

While these fundamental decisions must be made by a criminal defendant, most of the decisions that arise in criminal cases are the prerogative of counsel. (Our adversarial system would break down if defense counsel were

required to obtain the client's approval for every important move made during the course of the case.) Among the decisions that counsel is free to make unilaterally are the following: choosing the basic line of defense, moving to suppress evidence, delivering an opening statement and deciding what to say in the opening, objecting to the admission of evidence, cross-examining witnesses, offering evidence and calling defense witnesses, and deciding what to say in summation. See, *e.g.*, *New York* v. *Hill*, 528 U. S. 110, 114–115 (2000). On which side of the line does conceding some but not all elements of the charged offense fall?

Some criminal offenses contain elements that the prosecution can easily prove beyond any shadow of a doubt. A prior felony conviction is a good example. See 18 U. S. C. §922(g) (possession of a firearm by a convicted felon). Suppose that the prosecution is willing to stipulate that the defendant has a prior felony conviction but is prepared, if necessary, to offer certified judgments of conviction for multiple prior violent felonies. If the defendant insists on contesting the convictions on frivolous grounds, must counsel go along? Does the same rule apply to all elements? If there are elements that may not be admitted over the defendant's objection, must counsel go further and actually contest those elements? Or is it permissible if counsel refrains from expressly conceding those elements but essentially admits them by walking the fine line recommended at argument by petitioner's current attorney?

What about conceding that a defendant is guilty, not of the offense charged, but of a lesser included offense? That is what English did in this case. He admitted that petitioner was guilty of the noncapital offense of second-degree murder in an effort to prevent a death sentence.

App. 651.[4] Is admitting guilt of a lesser included offense over the defendant's objection always unconstitutional? Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter? What about simple assault?

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

IV

Having discovered a new right not at issue in the real case before us, the Court compounds its error by summarily concluding that a violation of this right "ranks as error of the kind our decisions have called 'structural.'" *Ante*, at 11.

The Court concedes that the Louisiana Supreme Court did not decide the structural-error question and that we "'did not grant certiorari to review' that question." *Ante*,

---

[4]The Court asserts that, under Louisiana law, English's "second-degree strategy would have encountered a shoal" and necessarily failed. *Ante*, at 3, n. 1. But the final arbiter of Louisiana law—the Louisiana Supreme Court—disagreed. It held that "[t]he jury was left with several choices" after English's second-degree concession, "including returning a responsive verdict of second degree murder" and "not returning the death penalty." 2014–1449 (La. 10/19/16), 218 So. 3d 535, 572 (2016).

basis of a newly discovered constitutional right that is not implicated by what really occurred at petitioner's trial. I would base our decision on what really took place, and under the highly unusual facts of this case, I would affirm the judgment below.

I therefore respectfully dissent.