No. 16-8255

In The
Supreme Court of the United States

ROBERT MCCOY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

BRIEF OF *AMICI CURIAE* TEN LAW SCHOOL PROFESSORS AND THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of the ten undersigned law professors and the Ethics Bureau at Yale. The individuals are teachers at law schools throughout the United States whose research and writing concentrates in the field of lawyer professional responsibility.

Amici have no direct interest in the outcome of this litigation. Because this case reflects a wholesale violation of a lawyer's ethical obligation to obey his client's lawful objectives during the course of a legal representation, *Amici* believe these volunteered views might assist the Court in resolving the important issues presented.

Lonnie T. Brown, Jr. is the Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism at the University of Georgia School of Law. Brown currently serves on the Drafting Committee for the Multistate Professional Responsibility Exam and on the State Bar of Georgia Formal Advisory Opinion Board. He was previously

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The individual *Amici's* institutional affiliations are provided only for purposes of identification. The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or the Yale Law School.

a member of the Executive Committee for the Professional Responsibility Section of the Association of American Law Schools and the American Bar Association's Center for Professional Responsibility.

Kathleen Clark is a Law Professor at Washington University, where she teaches and writes about legal and government ethics. She serves on the D.C. Bar's Rules of Professional Conduct Review Committee and is on the board of the Association of Professional Responsibility Lawyers. Clark has taught at the University of Michigan, Cornell University, Utrecht University, and the University of Economics and Law in Vietnam.

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SUMMARY OF ARGUMENT

The client is the master of the objectives of his own defense. Contrary to the Louisiana Supreme Court's decision here, the client, not his lawyer, is entitled to decide whether to admit guilt or maintain his innocence. The Constitution, the professional rules adopted by Louisiana, forty-eight other states, and the District of Columbia,[2] and enduring

[2] The rules adopted by these states are based on the American Bar Association's Model Rules of Professional Conduct. *State Adoption of the ABA Model Rules of Professional Conduct*, Am. Bar Ass'n, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html. In all respects relevant to this case, the Louisiana Supreme Court has adopted the language of the Model Rules for the Louisiana Rules of Professional Conduct. The Louisiana Supreme Court did not adopt the Preamble, Scope, or Terminology sections of the Model Rules. Nor has it adopted the comments to the Model Rules. Nevertheless, the Louisiana Task Force that recommended that Louisiana adopt the rules without comments observed that the comments should still be considered "precatory to any interpretation or application of the Louisiana version of the Model Rules, except to the extent that they are inconsistent with the verbiage in the rules adopted by the House of Delegates." *Report and Recommendation of the*

principles of agency law all support this view of the client's relationship with counsel.[3] As this Court recognized in *Faretta v. California*, the Sixth Amendment ensures that unwanted lawyers are not "thrust . . . upon the accused." 422 U.S. 806, 820 (1975). Likewise, the Sixth Amendment ensures that unwanted concessions of guilt are not thrust upon

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Task Force To Evaluate the American Bar Association's Model Rules of Professional Conduct (Nov. 23, 1985), *quoted in* N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 La. L. Rev. 1, 11 (2000). As such, it is *Amici*'s view that the comments to the Model Rules are still a helpful source for interpreting the Louisiana Rules of Professional Conduct.

[3] We recognize, of course, that Louisiana's Supreme Court is the final arbiter of the meaning of the state's ethics rules. We write, however, to explain how pervasive authority in American jurisdictions rejects the Louisiana view and in the hope and expectation that this contrary national view will aid the Court in its application of the constitutional issues before it. We note that the Court has previously looked to national ethical standards in construing constitutional requirements. *See, e.g.*, *Nix v. Whiteside*, 475 U.S. 157 (1986) (citing to common understandings of professional ethics in construing lawyers' Sixth Amendment duties when a client plans to present perjured testimony at trial).

clients who are intent on defending the charges against them. While this Court held in *Florida v. Nixon*, 543 U.S. 175 (2004), that a lawyer may concede his client's guilt where a client is unresponsive to the lawyer's requests for guidance—that is, the lawyer may pursue a strategic decision where the client provides no direction—that decision in no way undermined the overarching principle that the client decides the fundamental objectives of his own defense. And it provides no support for the notion that lawyers are allowed to ignore their client's repeated instructions *not* to concede guilt.

Louisiana Rule of Professional Conduct 1.2(a), like ABA Model Rule 1.2(a), mandates that a lawyer abide by a client's instructions regarding "the objectives of representation." La. Rules of Prof'l Conduct r. 1.2(a); Model Rules of Prof'l Conduct r. 1.2(a) (Am. Bar Ass'n 1983). From the beginning, Robert McCoy elected to exercise his authority on that topic. He repeatedly told counsel that his key objective was to go to trial to maintain his innocence and challenge the prosecution's case. As a result, his lawyer, Larry English, was bound by the rules of ethics—as well as the Sixth Amendment and basic agency principles—to conform his representation accordingly. Yet, in his opening statement to the jury and again in closing, Mr. English affirmatively told the jury that Mr. McCoy was guilty.

Mr. English defended his actions as a strategic decision, designed to establish that his client, Mr. McCoy, was suffering from a mental

defect and unable to form the necessary criminal intent for first-degree murder. But a strategic decision that does not conform to the client's objectives is ethically impermissible. The Rules of Professional Conduct counsel that lawyers may make strategic decisions regarding the "*means* by which" the lawyer aims to achieve the client's objectives, not contravene the objectives themselves. La. Rules of Prof'l Conduct r. 1.2(a) (emphasis added); *see also* Model Rules of Prof'l Conduct r. 1.2(a). By explicitly declaring to the jury Mr. McCoy's guilt despite Mr. McCoy's clearest of directives not to do so, Mr. English violated his professional obligations and denied his client the fundamental right to challenge the prosecutor's allegations of guilt before a jury of his peers.

The common law has long recognized that lawyers are their clients' agents. *See C.I.R. v. Banks*, 543 U.S. 426, 436 (2005) (describing the attorney-client relationship as "a quintessential principal-agent relationship"). Principles of agency law have often been used to illuminate a lawyer's duties in the course of representation. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Holland v. Florida*, 560 U.S. 631, 659-60 (2010) (Alito, J., concurring). As agents, lawyers' strategic judgments can never provide a sufficient reason to deviate from the explicit limitations concerning fundamental objectives placed on their authority by their client-principals. Restatement (Third) of Agency, § 8.09 (Am. Law Inst. 2006) ("[T]he underlying premise of a relationship of agency is action by the agent that is

consistent with the principal's manifestation of assent, not whether an agent's action is in fact beneficial to the principal."). This basic tenet of agency law is also reflected in the Restatement of the Law Governing Lawyers, which notes that the client defines the objectives of his representation, and in so doing, "limit[s] the lawyer's authority" to act on his behalf. Restatement (Third) of the Law Governing Lawyers § 21 cmt. b. (Am. Law Inst. 2000). Thus, once Mr. McCoy made his decision to take the path of contesting his guilt, a fundamental decision reserved to him, Mr. English never possessed the authority to disregard his client's choice.

No competing ethical obligations complicated Mr. English's ethical duties in this case. The Louisiana Supreme Court relied on Rule 3.3, the duty of candor, to conclude that Mr. English could not conform his representation to Mr. McCoy's wishes. JA84 n.30; *id*. at 208. This reliance was misplaced. Based on the trial court's reasoning, the Louisiana Supreme Court determined that Mr. English could not present the alibi defense Mr. McCoy requested without the risk of suborning perjury. JA83. Contrary to the Louisiana Supreme Court's conclusion, however, there was never any issue of perjury in this case. But even if there were, basic norms of professional conduct and Model Rule 3.3 provide specific procedures for lawyers who believe their clients may testify falsely. *See* Model Rules of Prof'l Conduct, r. 3.3, cmt. 10. Nowhere does

the Model Rule permit a lawyer to concede his client's guilt against his client's wishes.

In addition, the Louisiana Supreme Court pointed to a lawyer's ethical duty under Louisiana Rule 1.2(d) not to assist his client in "criminal or fraudulent" conduct, asserting that Rule 1.2(d) prevented Mr. English from maintaining his client's "unflinchingly maintained claim of innocence." JA80. The Louisiana Supreme Court's interpretation of the prohibition against assisting in "criminal or fraudulent" conduct is plainly inconsistent with constitutional obligations lawyers owe to their clients. A criminal defense lawyer is duty-bound, where his client directs him to do so, to put the government to its proof and urge acquittal due to weaknesses in the prosecution's case. *See* La. Rules of Prof'l Conduct r. 3.1; Model Rules of Prof'l Conduct r. 3.1. The Louisiana Supreme Court's misunderstanding of the lawyer's obligations under the Louisiana Rules would bar many lawyers from fulfilling their constitutional and ethical obligations to hold the prosecution to its burden of proving the case beyond a reasonable doubt. *See United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984) ("[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."); La. Rules of Prof'l Conduct r. 3.1 (explaining that a defense lawyer must defend his client's case so as to "require that every element of the case be established"); *see also* Model Rules of Prof'l Conduct r. 3.1. Adopting the Louisiana

Supreme Court's view of a lawyer's ethical duties would substantially undermine the lawyer's basic role of arguing why the jury should find reasonable doubt and why the prosecution failed to achieve that constitutionally required standard of proof.

While not every violation of the Rules of Professional Conduct has a constitutional dimension, the ethical failures in this case do. Mr. English usurped Mr. McCoy's constitutionally guaranteed right to define the objectives of the representation. This Court should not "accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime," *Jones v. Barnes*, 463 U.S. 745, 764 (1983) (Brennan, J., dissenting), and allow Mr. McCoy to suffer the consequences of Mr. English's misconduct.

ARGUMENT

I. A CRIMINAL DEFENDANT HAS THE RIGHT TO SERVE AS THE MASTER OF THE OBJECTIVES OF HIS OWN DEFENSE.

The client's right to be the master of his own defense is central to the protections provided by the Sixth Amendment of the United States Constitution. *See 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 right to put on a defense is granted directly to the accused, not

his lawyer. *Faretta v. California*, 422 U.S. 806, 819 (1975). The Sixth Amendment also grants a client the personal right to choose and refuse counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144-48 (2006); *Faretta*, 422 U.S. at 819. These rights of self-representation and counsel-selection reflect an underlying commitment to placing the defendant front and center, in control of his defense. Counsel unavoidably must make many forensic decisions during the course of a trial without first consulting the client, *see* Restatement (Third) of the Law Governing Lawyers § 21(3) (acknowledging that a lawyer "may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client"), but the lawyer remains at all times bound to respect the client's fundamental wishes regarding the objectives of the representation. *See Faretta*, 422 U.S. at 820 ("[The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."). The Rules of Professional Conduct and basic principles of agency law both support this view of the client's relationship with counsel.

A. Fundamental Principles of Legal Ethics Required that Mr. English Follow Mr. McCoy's Instructions.

The Rules of Professional Conduct reflect the profession's common understanding of lawyers' ethical obligations in the course of representation. Louisiana Rule of Professional Conduct 1.2(a) establishes the proper allocation of decision-making authority between clients and their lawyers. The rule requires that a lawyer "abide by a client's decisions concerning the objectives of representation, and . . . consult with the client as to the means by which [those objectives] are to be pursued." La. Rules of Prof'l Conduct r. 1.2(a); *see also* Model Rules of Prof'l Conduct r. 1.2(a). Mr. McCoy repeatedly proclaimed to Mr. English and the court that he was not guilty and did not want his counsel to concede his guilt. That fundamental decision was Mr. McCoy's to make.

Once Mr. McCoy established that his objective was maintaining his innocence, the ABA Model Rules make clear that Mr. English could not deviate from that objective for strategic reasons. *See* Model Rules of Prof'l Conduct r. 1.2 cmts. 1-2 (clarifying that Rule 1.2 "confers upon the client the ultimate authority to determine the purposes to be served by legal representation" and that clients only "normally defer to the special knowledge and skill of their lawyer with respect *to the means* to be used to accomplish their objectives") (emphasis added). Confirming that basic principle, Louisiana Rule

1.4(b), the rule describing the lawyer's duty to communicate, requires a lawyer to affirmatively explain the legal circumstances, seek his client's input, and empower his client to determine the goals of the representation, placing the burden on the lawyer to initiate the communication. La. Rules of Prof'l Conduct r. 1.4(b) ("The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."); *see also* Model Rules of Prof'l Conduct r. 1.4(b). The lawyer's obligations to consult with the client helps ensure that the lawyer does not take any action that conflicts with the client's objectives by ensuring that the client is made aware when any such conflicts arise.

The drafting history of ABA Model Rule 1.2(a) further confirms that the lawyer's strategic decisions must conform to the client's objectives. In 1983, the Kutak Commission, which took the laboring oar in developing the draft of the ABA Model Rules, explicitly declined to adopt a proposed revision to Model Rule 1.2 which would have given lawyers more strategic authority. This proposed revision would have established lawyers' affirmative right to "determine the means by which [objectives] are to be pursued." Importantly, the ABA chose not to grant lawyers this right and instead to mandate that lawyers consult with clients concerning appropriate means. The development of Model Rule 1.2 thus further confirms that Mr. English was not permitted

to deviate from his client's clear instructions not to confess his guilt.

Mr. McCoy's objective—to defend against the government's charges—was fundamental to the representation, as it was rooted in Mr. McCoy's constitutional right to personally participate in the criminal process and contest his guilt before his peers. *See Faretta*, 422 U.S. at 819 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). Public trials are more than exercises in strategic lawyering. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) ("Our cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant."). Lawyers' particular expertise thus does not grant them license to make whatever decisions they believe are necessary to minimize harm to their clients. To decide otherwise would allow a lawyer's utilitarian calculations to nullify fundamental objectives, the establishment of which is the sole domain of the client.

B. Principles of Agency Law Required That Mr. English Follow Mr. McCoy's Instructions.

The requirement that a lawyer must comply with the client's fundamental case objectives originates in the common law of agency. Indeed, the attorney-client relationship is "a quintessential

principal-agent relationship." *C.I.R. v. Banks*, 543 U.S. 426, 436 (2005). In recent cases, this Court has drawn on the law of agency to resolve questions about the scope of lawyers' duties in relation to their client-principals. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring). Lawyers, as agents of their clients, have a duty "to take action only within the scope of the agent's actual authority." Restatement (Third) of Agency § 8.09. Actual authority exists only when "the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency § 2.01. The agent has a duty to comply with the principal's lawful instructions. Restatement (Third) of Agency § 8.09(2).

The Restatement of the Law Governing Lawyers reflects these agency principles in defining the allocation of decision-making authority between a lawyer and client. The objectives of the representation must be "defined by the client" and pursued through consultation with the client. Restatement (Third) of the Law Governing Lawyers § 21. Thus, the client "may limit the lawyer's authority by contract or instructions." *Id.* cmt. b. Here, Mr. McCoy made his opposition to conceding guilt unmistakably clear. As a matter of basic agency law, Mr. English had no authority to violate his client's wishes and concede guilt on Mr. McCoy's behalf.

The Restatement makes clear that "a lawyer may not continue a representation while refusing to follow a client's continuing instruction." *Id.* cmt. d. Instead, the lawyer may only advise the client on the advantages and disadvantages of his decision and seek to dissuade the client from adhering to it. If the client, nonetheless, maintains his position, the choices before the lawyer are to follow the client's instruction or voluntarily withdraw from the representation. *Id.*

These agency principles demonstrate why Mr. English was not permitted to concede his client's guilt. An agent's duty to act within the confines of the principal's wishes always takes precedence over an agent's independent conclusions as to whether his actions are "beneficial to the principal." Restatement (Third) of Agency § 8.09 cmt. b. (explaining the rule that an agent is liable for a loss caused to the principal by the agent's acting beyond his authority, even if the loss would have been greater had the agent acted within his authority). Otherwise, the Restatement notes, "an agent might be tempted to act or to continue to act without actual authority in the hope that matters will turn out sufficiently well that the principal will not suffer loss." *Id.* Such actions would disregard the "underlying premise of a relationship of agency," which is that the crux of agent action must be whether it "is consistent with the principal's manifestation of assent, not whether an agent's action is in fact beneficial to the principal." *Id.* But Mr. English failed to appreciate his role as his client's agent. Here, Mr. McCoy's

objective of contesting the charges against him was unquestionably lawful, and Mr. English had no right to deviate from that objective—even if he believed a strategic deviation would help his client.

C. *Florida v. Nixon* Did Not Alter the Basic Rule that Lawyers Must Follow Client Instructions Regarding Concessions of Guilt.

More recent Supreme Court precedent, including *Florida v. Nixon*, does not alter the fact that Mr. English, as Mr. McCoy's lawyer, was required to abide by Mr. McCoy's stated objectives for the representation. *Nixon* addressed the issue of whether the lawyer must "obtain consent" before conceding the client's guilt at trial. 543 U.S. 175, 187 (2004). There, "counsel inform[ed] the defendant of the strategy counsel believe[d] to be in the defendant's best interest and the defendant [was] unresponsive." 543 U.S. at 192 (2004). *Nixon* did not deal with the very different circumstance presented in this case; far from being "unresponsive," Mr. McCoy vigorously objected when Mr. English informed Mr. McCoy of his intention to concede guilt. From the perspectives of the law of agency and legal ethics, the difference between these two situations is crucial, for it is the difference between a reasonable strategic decision based on limited information and total inversion of the attorney-client relationship.

In this respect, the right to decide whether to admit guilt is like the right to self-representation. It

is widely held that the right to self-representation may be implicitly waived if the defendant does not insist upon it in clear and unequivocal terms. *See McGhee v. Dittmann*, 794 F.3d 761, 769-70 (7th Cir. 2015) ("[M]any courts . . . have interpreted *Faretta* as requiring that a defendant clearly and unequivocally articulate a desire to represent himself in order to invoke his *Faretta* rights." (internal citations omitted)). If a competent defendant "insists" upon exercising his right to self-representation, however, he must be permitted to do so. *Faretta v. California*, 422 U.S. 806, 807 (1975). So too with the right to decide whether to admit guilt. Once Mr. McCoy insisted upon asserting innocence and holding the government to its burden of proof, Mr. English was obligated to do so.[4]

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[4] *See Murphy v. Bradshaw*, 2008 WL 1753241, at *6 n.6 (S.D. Ohio Apr. 11, 2008) (distinguishing *Nixon* from the case at bar "because it is clear that [the defendant] actively opposed the strategy of conceding" guilt); *Steward v. Grace*, 2007 WL 2571448, at *8 (E.D. Pa. Aug. 30, 2007) (noting that *Nixon*'s holding only addressed circumstances where a client is unresponsive to his lawyer's inquiries about conceding guilt) ; *State v. Humphries*, 336 P.3d 1121, 1125 (Wash. 2014) ("Although courts can presume a defendant consents to a stipulation, this presumption disappears where the defendant expressly objects."); *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010) (distinguishing *Nixon* based on the defendant's explicit objection to the actions his lawyer took on his behalf); *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) ("However, where, as here, the defendant *adamantly* objects to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway,

II. NOWHERE DO THE RULES OF ETHICS JUSTIFY A DECISION TO CONCEDE GUILT.

In addition to the ethical obligations that a lawyer owes to his client, the lawyer also has duties to the public and to the tribunals in which he practices. Among other things, these duties prohibit the lawyer from offering evidence he knows to be false. *See Nix v. Whiteside*, 475 U.S. 157, 168 (1986); La. R. Prof'l Conduct r. 1.2(d), 3.3(a); *see also* Model Rules of Prof'l Conduct r. 1.2(d), 3.3(a). The Louisiana Supreme Court determined that these rules justified Mr. English's conduct in this case.

But Mr. English never suggested that he had an ethical concern with presenting perjured testimony. Rather, he testified that his concession of Mr. McCoy's guilt was designed to preserve his credibility with the jury and assist him in obtaining a sentence of less than death at the penalty phase—in other words, Mr. English improperly decided that his objective regarding sentencing trumped Mr. McCoy's objective of obtaining an acquittal. *See* JA284-90. Indeed, Mr. English testified that he was certain Mr. McCoy "truly believed" in his own innocence throughout the proceedings. JA285. Even if Mr. English *believed* Mr. McCoy's alibi defense

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the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury.").

was false, a proper interpretation of the ethical rules would not have permitted Mr. English to refuse to present that defense. And in no circumstances, even if Mr. English had actually known McCoy's defense was false—which he did not—could Mr. English ethically have conceded Mr. McCoy's guilt to the jury over his express objection.

In short, the Rules did not prohibit Mr. English from complying with Mr. McCoy's "unflinchingly maintained claim of innocence." JA80. It is a fundamental principle of legal ethics that a lawyer must vigorously defend even a client he believes to be guilty. The Rules of Professional Conduct therefore never prohibit the defense lawyer from seeking an acquittal in a criminal proceeding, regardless of the merits of the client's defense. *See* Model R. Prof'l Conduct r. 3.1. Nor was Mr. English permitted to override Mr. McCoy's claim of innocence by conceding guilt to the jury.

A. The Duty of Candor Does Not Allow the Lawyer To Concede Guilt Over the Client's Objection.

A lawyer's obligation to advocate for his client with zeal is qualified by another important ethical obligation, namely the duty of candor to the tribunal. La. Rules of Prof'l Conduct r. 3.3; *see also* Model Rules of Prof'l Conduct r. 3.3. The duty of candor to the tribunal prohibits the lawyer from "offer[ing] evidence that the lawyer knows to be false." La. Rules of Prof'l Conduct r. 3.3; *see also* Model Rules of Prof'l Conduct r. 3.3. But this strict prohibition only applies if the lawyer *knows* that the evidence is false, as the rule places it within the lawyer's discretion whether to offer evidence that the lawyer only "reasonably believes" to be false. La. Rules of Prof'l Conduct r. 3.3. Crucially, the rule does not allow the lawyer to refuse to offer the testimony of a defendant-client if he only "reasonably believes" that the client intends to testify falsely. *Id*. The Model Rules counsel that the lawyer should "resolve doubts about the veracity of testimony or other evidence in favor of the client." Model Rules of Prof'l Conduct r. 3.3, cmt. 8. Mr. English never suggested that he *knew* Mr. McCoy's alibi defense was false; to the contrary, Mr. English testified that Mr. McCoy consistently and vehemently maintained that he was innocent and out of the state when the killings took place, and that Mr. McCoy "truly believed" he was innocent. Under those circumstances, Mr. English had an ethical obligation to vigorously defend Mr.

McCoy whether or not Mr. English personally believed in Mr. McCoy's innocence.

Even if a lawyer is faced with a client who insists he present testimony the lawyer *knows* is false—which did not occur here—the lawyer can never concede the client's guilt over his objection. Rather, the rules set forth specific steps for the lawyer to take in that situation. First, the lawyer should "seek to persuade the client that the evidence should not be offered." *Id*. at r. 3.3, cmt. 6; *see Nix v. Whiteside*, 475 U.S. at 169 ("It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."); *In re Young*, 2003-0274, p. 8 n. 13 (La. 6/27/03), 849 So.2d 25, 30 n. 13 (La. 2003) ("In oral argument, respondent suggested his true reason for seeking to withdraw was that his client intended to perjure himself at trial. . . . [E]ven assuming respondent's allegations are true, he should have first sought to dissuade his client from giving perjured testimony."). If the client, nevertheless, insists on offering such false evidence, then the lawyer must refuse to comply with the demand. La. Rules of Prof'l Conduct r. 3.3(a)(3); Model Rules of Prof'l Conduct r. 3.3, cmt. 6 ("If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence."). Because such actions may adversely affect the lawyer's relationship with the client, the lawyer may be required "to seek permission of the tribunal to withdraw" if

compliance with the rule "results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client." Model Rules of Prof'l Conduct r. 3.3, cmt. 15; *see Nix v. Whiteside*, 475 U.S. at 170 ("[T]he Model Rules and the commentary . . . expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury."); *In re Young*, 2003-0274, p. 8 n. 13 (La. 6/27/03), 849 So.2d at 30 n. 13 ("If the client persisted in his criminal or fraudulent conduct [of offering perjured testimony], [the lawyer] could have moved to withdraw based on Rule 1.16(b)(1) (a lawyer may withdraw if the client "persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent.").

Rule 3.3 therefore provides clear and specific guidance for dealing with a client who intends to offer false testimony. Nowhere does the rule suggest that the prospect or delivery of false testimony justifies a decision to concede guilt over the client's objection, as the Louisiana Supreme Court suggested. At most, a lawyer in such a situation would have been allowed to make a limited refusal to comply with the client's unlawful demands, and potentially to seek to withdraw from the case. *See* Model R. Prof'l Conduct at r. 3.3, cmts. 5-6. What the Rules of Professional Conduct do not allow, however, is an unwanted and unauthorized concession of guilt to be thrust upon the accused.

B. Seeking an Acquittal Is Always a Lawful and Ethical Objective of Representation in a Criminal Proceeding.

Rule 1.2 of the Louisiana Rules of Professional Conduct prohibits the lawyer from assisting a client to engage "in conduct that the lawyer knows is criminal or fraudulent." La. Rules of Prof'l Conduct r. 1.2(d); *see also* Model Rules of Prof'l Conduct r. 1.2(d). The Louisiana Supreme Court suggested that Mr. English could not have "advanced [Mr. McCoy's] 'unflinchingly maintained claim of innocence'" without "run[ning] afoul of his ethical obligations" under this rule. *See* JA80 (citation omitted). That is wrong. The lawyer never runs afoul of his ethical obligations by advocating for his client's not-guilty plea, for the Rules of Professional Conduct charge the lawyer with defending even the guilty client.

By prohibiting the lawyer from engaging in criminal or fraudulent conduct, Rule 1.2(d) places a reasonable limitation on the scope of the lawyer's responsibilities to the client. In no way, however, does Rule 1.2(d) prohibit the lawyer from seeking an acquittal on his client's behalf. Indeed, no rule has such a prohibition. Far from considering it criminal or fraudulent to assist the client in seeking an acquittal, the Model Rules indicate that the lawyer generally carries a constitutional obligation to do so, if that is the client's wish. *See* Model Rules of Prof'l Conduct r. 3.1, cmt. 3 (stating that the prohibition on making frivolous arguments is "subordinate to

federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.").

The fact that Mr. English found the evidence against his client to be "overwhelming" did not justify his decision to concede Mr. McCoy's guilt. JA43. While a defense lawyer must, of course, be "interested in preventing the conviction of the innocent, . . . absent a voluntary plea of guilty," it is crucial that a defense lawyer also "defend his client whether he is innocent or guilty." *United States v. Wade*, 388 U.S. 218, 257 (1967) (White, J., concurring in part and dissenting in part). The Rules of Professional Conduct are clear that seeking an acquittal is always a lawful objective of representation in a criminal proceeding regardless of the merits of the defense. *See* La. Rules of Prof'l Conduct r. 3.1 (explaining that "[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may . . . so defend the proceeding as to require that every element of the case be established" without violating the prohibition on making frivolous arguments); *see also United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984) ("[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."); Model Rules of Prof'l Conduct r. 3.1.

CONCLUSION

Robert McCoy was entitled to a lawyer who would zealously defend his interests. His lawyer, Larry English, took on this obligation and all the ethical and constitutional duties that came with the representation. But from the moment the trial began, Mr. English violated his client's express directions, conceded Mr. McCoy's guilt before the jury, and failed to submit the prosecution's case to even the barest adversarial testing. In so doing, Mr. English acted in clear violation of his ethical obligations as a lawyer as well as Mr. McCoy's constitutional rights.

The Louisiana Supreme Court's judgment should be reversed.

Respectfully submitted,

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