No. 16-8255

In the Supreme Court of the United States

ROBERT LEROY MCCOY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Is it unconstitutional for a lawyer to use a concession strategy over his client's objection when the defense is most effective means of sparing the client's life and when the defense demanded by the client would violate the lawyer's legal and ethical obligations?

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INTRODUCTION

This Court has recognized that in the context of a criminal trial, autonomy has limits. It has never commanded an attorney to actively assist a defendant in putting on false testimony as a means to prove his innocence, nor has it required a trial court to protect the defendant's pursuit of such a defense. When a lawyer and his client have irreconcilable differences on strategy and a defendant wishes to be the *sole* "master" of his defense, the client has a choice—he may choose to represent himself. Robert McCoy could have had the defense he wanted had he timely asserted his right to self-represent. Because he did not do so, he ceded the larger strategic plan for the trial and what arguments to advance within it to his attorney, Larry English.

By acquiescing to representation, a defendant necessarily gives up some autonomy. If "[t]he core of the *Faretta* right" is that "the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury," then forgoing self-representation necessarily provides control to a defendant's lawyer. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). "Once counsel is appointed… the attorney… *not the client*, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (footnote omitted and emphasis added). Although the client must expressly consent to certain decisions, this Court held in *Florida v. Nixon*, 543 U.S. 175 (2004), that conceding guilt in the hope of avoiding the death penalty is not one of them.

English did not violate the Sixth Amendment when he conceded that McCoy killed the victims and focused instead on whether McCoy possessed the specific intent necessary for first degree murder. This strategic decision was within the scope of authority ceded to him; meanwhile, the alibi defense McCoy demanded was not a lawful directive. On direct review, the Louisiana Supreme Court found "the alibi defense the defendant wanted Mr. English to put on, but which could not be substantiated, had no reasonable chance of success, but exposed those who attempted such a defense to the charge of perjury." JA83; La. R. Prof. Cond. 1.2(d) and 3.3(b). The right to counsel did not command English to pursue this defense. English was further justified by his belief that McCoy's judgment was impaired and the concession defense was in his best interest. His loyalty to McCoy, demonstrated by the numerous motions and appeals he filed and the sincere efforts to save his life at trial, are commendable, not unconstitutional.

Strickland recognizes that "advocacy is an art and not a science," and that "strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based." 466 U.S. at 681. In assessing counsel's performance, *Strickland* takes into account a myriad of factors, including counsel's experience, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. *Id*. McCoy wrongly seeks to pretermit that inquiry.

No one suggests that employing a concession strategy over the objections of a client is always reasonable or that it should be applied in anything other than rare circumstances. Whether this case is one of those rare cases, or whether English acted deficiently in concluding that it was, requires a careful assessment of the facts and record. That assessment must be made under *Strickland*.

STATEMENT

The Murders

Robert McCoy's then-wife, Yolanda Colston, went into protective custody April 16, 2008, following an incident of domestic abuse. According to Colston, McCoy hid inside her home, surprised her armed with a knife, pinned her down on the bed at knifepoint, and threatened to kill her and then kill himself. JA670-71. A warrant later issued for McCoy's arrest, but he evaded the police. R3372-73. Yolanda brought her infant daughter with her into protective custody in Dallas, but her son Gregory Lee Colston, who was set to graduate high school in May 2008, remained in Bossier City, Louisiana, so that he could finish the school year. JA32. Gregory stayed with his grandparents, Yolanda's parents, Christine Colston Young and Willie Ray Young. *Id.*

About a month later, on May 5, 2008, a 911 dispatcher received a frantic telephone call in which Christine Young is heard screaming "Robert, 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." A gunshot is audible before the line goes dead. R3293-95, JA33. Detectives, responding to this call,

arrived at the Youngs' home to find Christine and Willie dead from gunshot wounds to the head. Gregory had also been shot in the head, but was still alive. R3300-04, 3314-3321. He died a short time later at a hospital. R126, 936.

While in protective custody, Yolanda learned that her only son and her parents had all three been murdered—shot at close range in the head by her ex-husband. JA682.

The Evidence

Evidence implicating McCoy as the shooter was overwhelming. The 911 recording was only the beginning. After the 911 emergency dispatcher alerted police, Bossier City police officer Kary Szyska observed a white Kia, the same type of car owned by McCoy, fleeing the scene. R3281-82. Officer Szyska followed the Kia until it stopped and the driver jumped out of the vehicle, scaled a fence, and ran across interstate I-20. R3283-85. The fleeing driver matched McCoy's general description, and the vehicle was later identified as being registered to Robert and Yolanda McCoy. R3377. In the vehicle, police recovered a Walmart receipt dated May 5, 2008, for bullets for a .380 handgun and a cordless phone linked to the Colstons' house. R3286-88, 3377-78. A Walmart security video on May 5, 2008, showed McCoy, wearing a "do-rag," purchasing bullets. R3382-83.

Later, McCoy (wearing a do-rag) was apprehended in Idaho while destined for California riding in an 18-wheeler truck. In the truck, police found a loaded .380 caliber weapon behind the seat McCoy had occupied, which the driver denied owning. JA548-56, R3434. At

trial, a ballistics expert identified the gun as the murder weapon. The expert tied the cartridge casings found at the scene of the murder to the gun. R3398.

During the investigation, two of McCoy's personal friends—Sharon Moore and Gayle Houston—and his brother Spartacus McCoy gave statements to police placing McCoy in Bossier and implicating him in the crimes. Moore told police that McCoy stayed at her house the night before the murders, on the day of the murders asked her for money to buy bullets, and later phoned her and told her he shot someone in the head. JA544-46. Houston, who had known McCoy since childhood, told police he was with Spartacus when McCoy called and he rode in the car when Spartacus left, visibly upset, to pick up Robert McCoy in downtown Bossier City the night of the murders. R3410. While in the car, Houston heard Robert McCoy say he "f'ckd up" and had shot three people and that "he wasn't going back to jail." R3411-12. Spartacus, who died before trial, also had told police he picked up Robert, assisted in getting him out of Bossier City, and that Robert McCoy said he had shot three people. R936, R1451-52. Another of McCoy's brothers, Carlos McCoy, pleaded guilty to assisting McCoy in escaping Bossier City the night of the murders. R940.

McCoy's Alibi and Conspiracy Theory

Notwithstanding the statements of four individuals (including two of his brothers) placing him in Bossier, buying bullets, admitting to killing three people, and fleeing police, McCoy told his lawyers that he was in Houston on the night of the killings. JA227. McCoy could not provide any verifiable details regarding his Houston alibi witness, such as an address or a phone

number to reach her. JA227. This witness—the only person who could provide any actual corroboration he was in Houston—was never produced, even during the entire year post-trial while appeal counsel developed evidence in support of its motion for new trial. JA170. McCoy also made conflicting statements in pre-trial hearings, suggesting his lawyer corrupted his alibi witness, whom he identified as Sandra Black but as "Ms. [R]eena Miles" in his "Statement of Alibi." JA227, 450-51.

To explain the physical and eyewitness evidence against him, McCoy stated that he was the target in a vast police conspiracy to silence him after he supposedly revealed that certain Bossier Police were engaged in illegal drug trafficking. At trial, McCoy dismissed the testimony of the police as lies and the testimony of his friends as coerced. JA574-625. He stated that prior to the murders Bossier Parish police officers had come to his house, beat him, robbed him, stole his car, told him they were "going to do everything [the officer] could to get [him]," and then chased him out of Louisiana. JA583-89. He told the jury that the "Robert" referred to on the 911 tape was not him, but a corrupt, drug dealing, police officer, also named Robert, who killed the victims in a dispute over drug money. JA587-88. In another statement to the police, McCoy stated that Robert Thomas killed the victims in retaliation for Yolanda stealing drugs. R939. He further claimed that the Idaho police were complicit in the conspiracy, as were multiple medical personnel who lied about his multiple suicide attempts to cover up police beatings in Idaho and in Louisiana. JA604-620.

To advance his conspiracy theory, McCoy filed myriad *pro se* motions and requests to issue subpoenas to his "alibi" witnesses. Initially, he requested subpoenas for 12 individuals, including two of his brothers, a reporter, an FBI agent, a justice of the peace, and a sitting judge (Judge Shonda Stone). R55. He later requested a subpoena of "medical officials," R45, and for U.S. Senator David Vitter. R45, 511-12. On the stand, McCoy insisted that "I know Mr. David Vitter personally and Mr. David Vitter knows everything that goes on with me. . . . He sent the Department of Corrections that same medical brochure letting them know how bad these people beat me. He wasn't happy with it." JA621. Not surprisingly, Senator Vitter stated in a letter sent to the District Attorney that he did not know McCoy and did not receive any of the information McCoy claimed to have sent him. R514-15. Likewise, Judge Shonda Stone told McCoy's mitigation expert that McCoy's assertion that she could validate his story had no basis in fact. JA726-27. He had merely made an appointment to meet with her when she was still in private practice to discuss possible representation in his divorce proceeding, an appointment he missed. *Id*. Caddo Parish Deputy Virgil Roberson, another alibi witness who was also McCoy's cousin, contradicted McCoy's claims as well. JA697. Shreveport Police Officer Marcus Hines, another alleged alibi witness, likewise contradicted McCoy's assertions. JA726.

McCoy Clashes with his Public Defenders

The public defenders representing McCoy, Pamela Smart and Randall Fish, refused to adopt McCoy's *pro se* subpoena requests and advised him, without success,

not to file the *pro se* motions. Fish explained to the court that because of the limitations on parish-funded subpoenas, they did not want to use their subpoenas on witnesses who would serve no purpose. JA314. The refusal to issue the subpoenas led to repeated clashes between McCoy and his public defenders. Finally, because "they did not accept his claim of innocence and were not investigating and preparing the defense he wanted," JA288, he fired them and invoked his *Faretta* right. JA312. At the *Faretta* hearing—in February 2010, about a year and a half after his arraignment—Mr. Fish stated that he had attempted to work on McCoy's case with several attorneys, investigators, and a mitigation specialist but McCoy refused to cooperate. JA313.

The trial court conducted a *Faretta* colloquy, during which McCoy falsely advised the court he was educated and held a college degree from Rice University as well as a theology degree.[1] JA315-326. The trial court found McCoy competent to represent himself, albeit temporarily, based upon McCoy's representation that his family hired an attorney who would be taking over in a month. JA320, 323. The court reaffirmed that McCoy requested a speedy trial and cautioned that his counsel should be ready for trial May 24, 2010. JA306, 325.

[1] *See* JA698-699. (Dr. Vigen testimony that McCoy's statements regarding his degrees were false).

English's Efforts, Clashes with McCoy, and Ethical Conundrum

McCoy decided to forego self-representation and hired Larry English in March 2010, three months before the scheduled trial. JA328. English advised the court he was not capital-certified; after a colloquy, McCoy waived his right to capital-certified counsel. JA330-31. English then requested a continuance, which the court initially denied but then granted in April after English sought appellate review. R147-48, R178. At that time, the trial court stated, "Mr. English, I want you to understand that if I grant this continuance, you will not be allowed to withdraw." English responded that he understood. JA335-36.

Efforts. English actively represented McCoy during the pre-trial period. He quickly filed motions to block the use of now-deceased Spartacus McCoy's statement and the use of Robert McCoy's prior bad acts. JA270, R359-361, 351. The former motion was granted; the latter denied despite an application for supervisory review filed by English. R358, R418, JA275. English took several steps to gain necessary funding, filing a "Motion for Funds" for mitigation experts in September 2010; and a motion to have McCoy declared indigent so he would be eligible for mitigation expert funds in December. R380. English used the funds to hire Dr. Mark Vigen, a clinical psychologist who specializes in capital cases, to evaluate McCoy's mental and emotional state. JA685-86, 688-89. Dr. Vigen and his staff spent well over 30 hours interviewing McCoy, his family, and the alibi witnesses and reviewing all documents in the case. JA690-91.

Closer to the trial, English filed a motion to limit use of autopsy and hospital photos of the deceased, which he contended would be highly prejudicial. JA472, 477. The State eventually agreed not to introduce the emergency room photos of Gregory. JA481. He attempted, without success, to meet with McCoy's parents to discuss a plea offer and the upcoming trial. JA455. And during voir dire, English successfully excused a juror for cause and exercised two *Batson* challenges, which he preserved for subsequent review on appeal. JA487-491. All the while, McCoy prepared for trial, including the likely penalty-phase proceedings.

Clashes with McCoy; Ethical Conundrum. By January 2011, it became apparent that McCoy and English did not agree on trial strategy. At a hearing on indigency, English told the judge he had questions about McCoy's competency and would not adopt his *pro se* subpoenas. JA347. English had come to believe that a mitigation strategy was in McCoy's best interest, even though McCoy did not wish to proceed with that approach. *Id*. English stated that he would not follow McCoy's advice unless ordered to by the court. *Id*. He explained:

> I believe that my client is suffering from some severe mental and emotional issues that has an impact upon this case. Mr. McCoy is [ ] recommending that I take a course of action that I do not believe is in his best interest. That I believe as a lawyer that I have an ethical duty given the ramifications of this case to not follow that advice that I am charged with at the end of the day. I have tried to explain to Mr. McCoy[,]

> whether he accepts it or not, I'm one of the few people that may be standing between him and a death sentence.

Id. The remainder of the hearing devolved into an argument between McCoy and English. JA347-352. The court repeatedly explained to McCoy that speaking out in court "may hamper Mr. English in being able to defend you in any way," to which McCoy replied that he understood and proceeded to speak on the record anyway. JA350-52. Nevertheless, at no point during this hearing did McCoy seek to remove English as his attorney. And despite their differences, English explained that he "reviewed every piece of… [the State's] evidence with Mr. McCoy." JA348, JA350.

Twenty days later, the two clashed again at a hearing on another continuance sought by English. McCoy, again against the advice of counsel and the court, aired his disagreements with a mitigation strategy and complained that English would not adopt his alibi subpoena requests. McCoy stated that "Mr. English has told me there is no way he can win this case" because of the overwhelming evidence of McCoy's guilt. JA390. The hearing turned into an argument between English and McCoy, during which English stated that McCoy "has severe mental issues," "continues to make statements that are irrational," and is "asking me to do and – to do things which I – I cannot do that goes [counter to] what his interests are in this trial." JA388. "Mr. McCoy has exhibited very bizarre behavior to me that warrants being put – warrants being further evaluated, Your Honor, and – and there are mitigating circumstances in this case." JA388. McCoy, however, did not attempt to have

English removed as his counsel. English ultimately pleaded to the court, "Mr. McCoy is asking me to subpoena witnesses to put forth a theory… that will help the District Attorney send him to the death chamber. I will not follow his advice. I will not subpoena FBI agents. I will not subpoena judges. I will not – I will not run all over the country looking for witnesses that don't exist." JA396.

Even so, McCoy stuck with English as his counsel. At the hearing, prosecutors advised McCoy that Louisiana Supreme Court Rules required an indigent capital defendant to have no fewer than two attorneys. JA361-62; *see also* La. Sup. Ct. R. XXXI(A)(1). English stated that he had consulted with other attorneys about the case, but was unable to obtain official co-counsel because of a lack of funding. JA365. "I have other lawyers who are advising me on this case, including the public offender's office… has been very helpful." JA379. The court discussed appointing a public defender to act as co-counsel but McCoy adamantly stated he did not want a public defender representing him. JA372. McCoy then explicitly waived the appointment of co-counsel and the court accepted his waiver. JA379-380.

When the court denied his motion for a continuance, English filed his third application for supervisory review in the case. The Louisiana Second Circuit Court of Appeal stayed the proceedings, R437, and issued a written opinion February 3, 2011, granting the continuance but directing the trial court to "ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified

attorneys and that McCoy has knowingly and intelligently waived same." R438-440.

Later that day, the court held a second hearing on the State's motion to appoint additional counsel. JA404. While English stated that he would welcome assistance, McCoy adamantly opposed the public defender's appointment to his case, stating "I would love, you know, to have my prior representation of Mr. English." JA408-09. After being extensively questioned by both the court and the State and informed as to the right he was waiving, McCoy said "I choose not to be strong armed to take a public defender's aspect of my secondary counsel when that's totally against my wishes." JA419. He stated, specifically, that "I am confident with Mr. English." JA411.

Having waived his Fifth Amendment rights on numerous occasions, refused an insanity plea, refused a plea bargain, refused the advice of all his attorneys, waived additional capital-certified counsel, and actively filed over 100 pages of *pro se* documents and motions contrary to counsel's advice, McCoy—with English as his counsel—approached his capital murder trial now scheduled for July 28, 2011. JA379-380, 427, 436, 451, R18-502, 1328-29. Two weeks before trial, on July 12, 2011, the court held yet another hearing related to McCoy's *pro se* subpoenas. JA432. At that hearing, English told the judge that McCoy had no alibi and again affirmed that he did not adopt the subpoenas. JA433-434. He stated his "opinion that Mr. McCoy lacks the mental capacity to even help me defend himself in this case. I believe that Mr. McCoy is insane . . . ." JA436.

Explaining, English noted that he has "a client that believes that I'm in a conspiracy with you, the district attorney, the FBI, the Bossier Parish Sheriff's Department, the Caddo Parish Sheriff's Department, and the United States. . . to convict him." *Id*. English insisted that he would "not adopt those [m]otions," which would "further move him more quickly to the death penalty." *Id*. English emphasized his "ethical duty . . . to try to defend him and do the most best I can to save his life"; "I have no ethical duty as a lawyer to hold Mr. McCoy's hand while he walks into the death chamber." JA441. Although McCoy disagreed with English's views, at no point during this hearing did McCoy move to remove English as his counsel.

McCoy did not attempt to fire English until the weekend before trial. The matter came to the court's attention for the first time July 26, 2011, two days before trial. JA449. Immediately before attempting to fire English, McCoy acknowledged that he had previously stated on the record several times that he wanted English to represent him, despite their differences and the fact that English was not capital certified. R1619. McCoy then told the court he had obtained substitute counsel–but that counsel had not filed a motion to appear and did not appear in court in person. JA456. Indeed, McCoy could not even provide the court with the names of his alleged substitute counsel. JA457. English did not object to being removed as counsel. JA458. Earlier that month, English had explained very simply: "I'm the best Mr. McCoy has." R1629. Because of the close proximity to trial, and McCoy's history of seeking to change counsel and upset trial dates, the court interpreted this last-minute request as an attempt to obstruct its orderly procedure

and administration of justice and denied McCoy's request to substitute counsel as untimely. JA460-61. The court denied McCoy's subsequent request to represent himself for the same reasons. JA465.

The Trial

English began the trial with several disadvantages. McCoy's prior refusal to plead not guilty by reason of insanity limited English's ability to submit evidence regarding a mental defect. JA210-226, R1328-29. McCoy's frequent waivers of his Fifth Amendment rights exposed him to significant attacks on his credibility and would allow the prosecution to highlight his propensity for domestic violence. McCoy insisted on taking the stand and testifying that he is the victim of a vast, multi-state conspiracy. Finally, and most significantly, the prosecution was able to present a compelling picture of McCoy as a cold-blooded killer who executed his wife's parents and his own stepson for hiding his wife. JA497-503, 639-646.

Through opening arguments, English tried to suggest a less brutal context for the evidence he knew was coming and which portrayed a more sympathetic view of McCoy than that presented by the prosecution. JA504-512. English's goal was to establish credibility with the jury and encourage sympathy for McCoy as a damaged individual for whom the death penalty was not warranted. And so he began by acknowledging that "Robert McCoy was the cause of these individuals' deaths," but explained "that's not the only issue to be decided." JA504. That is because "[t]his is a first degree murder trial," which means "the District Attorney has to prove specific intent." JA508. But, he argued, "the evidence will show that because of Mr. McCoy's

emotional and mental condition" he lacked specific intent. English noted that McCoy tried to commit suicide several times because he is "so racked with guilt about this case." He then turned McCoy's expected testimony to his advantage, as evidence of his "serious emotional issues that inhibit[] his ability to function in society and to make rational decisions." JA509.

In short, English argued, the State could *not* prove McCoy had the specific intent to kill because he "is crazy" and "lives in a fantasy world." JA509, 510. This theme continued throughout English's opening statement. He implored the jury to remember McCoy's rights and not to allow statements by the prosecution to inflame them and affect the verdict. JA510-11. "[T]he issue is whether or not in this phase of the trial that Robert McCoy is guilty of first degree murder. And I say to you that he is not. I say to you that Mr. McCoy is a damaged human being that cannot function among us and his mental and emotional state is a mitigating factor in this case." JA511.[2]

Following opening statements, the State presented its case. As McCoy acknowledged in his brief, English cross-examined all of the State's witnesses. JA513-527, JA536-542, JA552-58. Among other things, English used his cross-examination questioning to ask about McCoy's numerous suicide attempts in attempt to show

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[2] As McCoy notes (at 11 of his brief), in the middle of the opening statement English once accidentally identified himself as a "district attorney." JA509. That is no more meaningful than the fact that during his closing statement he accidentally stated that "Mr. McCoy (sic) can play the 911 tape," when he meant Mr. Schuyler Marvin, the district attorney.

that McCoy felt remorse. JA510-522. He also established that McCoy had no history of violence or threatening the victims. JA523. English then conducted a direct examination of McCoy, during which McCoy attempted to explain away the evidence against him by positing his elaborate conspiracy theory. JA568-625. McCoy told the jury that after he exposed the police officers for drug-dealing, "Detective Humphrey told me he was going to kill me" and then Officer "McGhee and them took [my car] from me." JA583, 589. After his car was stolen, McCoy claimed he left Louisiana and was in Houston the night of the murders with Sandra Black, contrary to his "Statement of Alibi" in which he identified the person he stayed with as "[R]eena Miles". JA597-98, JA227, R70.

To explain how the murder weapon came to be in the truck when McCoy was apprehended in Idaho, McCoy testified that he personally saw an officer from the Idaho Police Department, a Mr. Craig Roberts (who had testified earlier), "put [the gun] in the doggone truck." JA605-06. McCoy also vehemently denied that he had attempted to commit suicide in prison, instead stating that the records of his suicide were fabricated to cover up the fact that prison officials in Bossier "beat me consistently," "something ruptured in my stomach from the constant beatings," and "shot me with a Taser with the prongs on it and jerked them out. This is where he ripped my main artery in my arm." JA612, 617.

English, in his closing, returned to the themes he had developed in his opening statement. He acknowledged that "our heart cries out to" the three victims and that we "weep" for Gregory Colston, Willie

Young, and Christine Colston. But, he explained, "the law requires you to put aside emotions, passions and prejudice and apply the evidence." JA648. And that evidence shows that, although "Robert McCoy was the cause of these people's deaths," "this case was about whether or not Robert McCoy has the specific intent to commit first degree murder." McCoy did not, English argued, because he "is so defective emotionally. He is so defective mentally." *Id*. Again turning McCoy's unbelievable testimony to his advantage, English stated that "if you find that Robert McCoy on that stand was paranoid, delusional, wrapped up in his own world, then I think you have to find that first degree murder is not appropriate; that second degree murder is appropriate and that Robert McCoy spend the rest of his natural life in jail." JA650. English then pointed to McCoy's suicide attempts as further proof:

> People who try to kill themselves five times, people who chew their arms off, people who stuff toilet tissue down their . . . throats, people who hang themselves, people who believe that the police who protect us, the FBI, the Bossier Parish Police Department, are all in a collusion to kill them, to get them, they're not with us.

English closed by reminding the jury to "divorce [it]self from the emotions and the passions and remember the individual that you saw on this stand. . . And that you reach a conclusion he did not have the specific intent to kill these people; that he is guilty of second degree murder . . . ." JA651.

The jury retired, but did not quickly return a verdict of first degree murder. It submitted several questions to the court, asking to review the videos and to listen

again to the 911 tape, to see a map with the layout of the house, and to be reminded of the definitions of "murder one, murder two"—a sign that English's strategy had gained some traction. JA654-59. R3553. After additional deliberations, the jury returned a verdict of three counts of first degree murder. R3573.

The Penalty Phase

The jury returned for the penalty phase several days later. The prosecution began with Yolanda Colston describing McCoy's assault on her prior to the murders, while their two-year-old daughter clung to her leg. JA670. Ms. Colston testified about her loss. JA682-683. English objected to the details of the aggravated assault being discussed, but his objection was overruled. JA671-67. Gregory's basketball coach and best friend both testified, stating that Gregory was a good student, a mentor to others, and a good friend, who was planning to go to college and play basketball. R3613-3622.

English presented one mitigation witness—Dr. Vigen. He testified to the clinical diagnoses behind English's layman description of McCoy as "crazy." JA705. Vigen detailed his findings that McCoy has several personality disorders which affect the way he views reality and his personal relationships, rendering him "very ineffective in working with other people." JA706-07. Dr. Vigen further told the jury that McCoy's personality disorders played a role in the murders and "certainly influenced his behavior in that house." JA736. He also discussed McCoy's suicide attempts and explained to the jury that this could have been an expression of his grief over committing the murders. JA708-09, 728-731. Dr. Vigen explained that McCoy

needed to re-formulate the facts to fit his viewpoint and did not have the psychological wherewithal to comprehend any view of reality other than his own. JA696-704, 730.

In his penalty-phase closing, English, consistent with his overall strategy from the beginning, begged for mercy. He urged the jury to remember that he had been honest from the beginning. JA751. He expressed sympathy for Yolanda McCoy and her family and compassion for a lost teenager's life. JA751. But, he argued, the State failed to meet its burden of proof on aggravating factors. JA752-54. He argued that McCoy suffered from an extreme emotional personality disorder, and said "I told you that Robert McCoy was crazy because I tried to communicate to you in words we could all understand. But Robert McCoy has some serious mental and emotional issues that impacted on him when he was in that house." JA754-55. In his final statements, he asked the jury "to do a very difficult thing, to try to step outside the emotions, to try to step outside the need to call for vengeance in all of us and to see Robert McCoy's humanity and to send Robert McCoy to jail for the rest of his natural life." JA757.

The jury retired and again asked questions, one of which was "may we have doctor's diagnosis?" R3732. After the jury submitted additional questions, English moved for the court to ask the jury whether further deliberations would "do any good in this case. They have been out for four hours now." R3737. When the State objected, the court acknowledged, "one of the questions that they did ask is what is the time limit before we are considered a deadlocked jury." *Id.* The court also advised that the second question was "Can

we hear the definition of an expert witness and how much weight is given?" R3739. After the court re-read its earlier charges, the jury continued to deliberate and eventually returned a unanimous verdict recommending the death penalty for all three murders. R3756.

Post-Trial Proceedings

In a motion for new trial filed by new counsel, English testified and submitted an affidavit regarding the breakdown of his relationship with his client. JA284-290. He stated that he believed the evidence against McCoy was overwhelming and he had an ethical obligation to try and save McCoy's life. JA286. He further stated that McCoy came to view him as part of the conspiracy to convict him. *Id*.

McCoy's new counsel sought to investigate McCoy's alibi claim and ultimately moved for a new trial. R830-38, 842. Requesting additional time to investigate McCoy's claims, counsel stated that "Given his current review of the materials, interviews with Mr. McCoy and discussion with Mr. McCoy's former counsel and mental health professionals undersigned counsel can only say that McCoy is either innocent of the charges of which he has been convicted or as crazy as Mr. English has said." R834. Counsel also moved to appoint a second sanity commission, arguing that "this court unquestionably has reasonable ground to doubt the defendant's mental capacity to proceed." R840. Counsel further stated that English provided significant evidence to the court of the defendant's "mental illness, and that according to medical and jail accounts, he engaged in serious suicide attempts at least four times during the pendency of the case." R883. The court

denied the motions for a new trial and a new sanity hearing. R1-C, 3798-3800, 3897-3901.

The Louisiana Supreme Court Opinion

On direct appeal to the Louisiana Supreme Court, McCoy raised 16 assignments of error, several of which asserted interrelated arguments regarding the concession defense English used over McCoy's objection. The Louisiana Supreme Court began by noting "that the evidence of the defendant's guilt was overwhelming. Nonetheless, the defendant persists in pursuing his alibi theory, and appellate counsel has expended considerable resources to investigate that defense, which appears wholly baseless." JA170.

The Louisiana Supreme Court, after reviewing the entirety of the record, found the trial court did not abuse its discretion in refusing to allow English to withdraw, nor did it err by refusing McCoy's cursory and untimely request to self-represent. While recognizing that the Sixth Amendment grants defendants both the right to counsel of their choice and the right to self-representation, the Louisiana Supreme Court also recognized that neither right is absolute. JA53, 68. "This court has consistently held that this right cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice." JA58, 69. "Defendant must exercise his right to counsel of his choice [and to self-representation] at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings." JA56, 69. The Louisiana Supreme Court acknowledged McCoy's claim that he did not know of English's specific method of carrying out his strategy until July 12, 2011, but found McCoy knew

English's trial strategy, to avoid the death penalty by conceding guilt and seeking a life sentence, some eight months prior. JA67.

The court next held that McCoy's ineffective-assistance-of-counsel claim, based on English's concession defense, should be assessed under *Strickland v. Washington*, 466 U.S. 668 (1984), rather than *United States v. Cronic*, 466 U.S. 648 (1984). JA96. McCoy had argued that the concession of guilt "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" and therefore falls into one of *Cronic*'s enumerated categories where prejudice must be presumed. JA90. But the Louisiana Supreme Court pointed out that to fall within this category, "the attorney's failure must be complete." *Id*. Yet "English remained active at trial, probing weaknesses in the prosecution's case. . . . [D]uring jury selection, Mr. English ardently fought to retain some racial diversity in the defendant's trial by pressing a *Batson* claim and arguing for challenges when warranted. During trial, Mr. English cross-examined most of the State's guilt phase witnesses, frequently asking questions written by the defendant." JA91.

The Louisiana Supreme Court further noted that "the Sixth Amendment does not require that counsel do what is impossible or unethical." JA80 (citing *Cronic*, 466 U.S. at 656 n.19). Because McCoy's alibi defense "could not be substantiated, had no reasonable chance of success, [and] exposed those who attempted such a defense to the charge of perjury," pursuing it would have violated Louisiana Rule of Professional Conduct 1.2(d) and 3.3(b). JA81-83. The court declined to find that English "completely abdicate[d] the defendant's

defense, rather Mr. English advanced what he saw was the only viable course of action." JA90.

The Louisiana Supreme Court found its conclusion supported by *Florida v. Nixon*, 543 U.S. 175 (2004), which held that the proper rubric to evaluate a concession strategy is the two-pronged *Strickland* test. JA93-94. The Louisiana court noted *Nixon*'s recognition that "a concession strategy does not amount to the functional equivalent of entering a guilty plea on the defendant's behalf," and that it "may constitute a reasonable strategic choice in a case where the circumstances of the crime are horrendous and the evidence of the defendant's guilt overwhelming." JA94 (citing *Nixon*, 543 at 191). Here, the court found:

> Given the circumstances of this crime and the overwhelming evidence incriminating the defendant, admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute reasonable trial strategy. The jury was left with several choices after Mr. English conceded that the defendant shot the three victims, including returning a responsive verdict of second degree murder or manslaughter, as well as not returning the death penalty.

JA95.

SUMMARY OF ARGUMENT

Robert McCoy is bound by his counsel's decision to concede he committed the charged murders. Autonomy in the context of a criminal trial has limits. And when a defendant acquiesces to being represented by counsel, he necessarily gives up some autonomy. More specifically, a defendant gives up some of his autonomy to control strategic and tactical decisions, including the larger strategic plan for trial and arguments to advance. A defendant who wishes to be the sole "master" of his case so that he can exercise absolute control has the choice to represent himself but he must do so in a timely manner. Though McCoy disagreed with English's defense strategy as early as January 2011, he did not ask the court for permission to replace McCoy until two days before trial. The trial court acted within its discretion to deny his request.

The specific strategy of conceding elements of the crime and focusing on the weakest elements is a recognized defense strategy and is not among the trial decisions for which a client's express consent is required. In *Florida v. Nixon*, this Court rejected the claims that this strategy was the functional equivalent of a guilty plea and that express consent was required for counsel to use it. 543 U.S. 175, 187-88. In the context of a death case, the Court recognized that this defense may be the best and perhaps only viable strategy to save the defendant's life when the state has overwhelming evidence the defendant committed the charged murders. *Id.* at 190-91. Where only a concession strategy has a realistic chance of sparing the defendant's life, pursuing that course, even over the defendant's objection, is the only course "consistent

with the lawyer's conscience, the law, and his duties to the court." *Jones v. Barnes,* 463 U.S. 745, 759 (1983) (Brennan, J., dissenting). The Sixth Amendment does not bar counsel from pursuing it.

In most cases, conceding guilt is an unwise strategy, the defendant will agree to pursue that strategy, or—if counsel and the defendant irreconcilably disagree about the strategy—new counsel will be obtained. Where, however, counsel could not withdraw, the defendant's objective is to personally advance a patently false conspiracy theory, and the best hope of avoiding the death penalty is to concede guilt, counsel's professional and ethical obligations permit him to do so. English knew McCoy intended to present false testimony based on his review of the evidence, his review of interviews with the alibi witnesses, and the sheer absurdity of McCoy's story. After English rejected McCoy's conspiracy theory as utterly incredible and contrary to several of his alibi witnesses' statements, he properly, indeed commendably, refused to "advocate or passively tolerate [his] client's giving false testimony." *Nix v. Whiteside*, 475 U.S. 157, 171 (1986). Counsel's duty of loyalty and zeal is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth," including not "taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 166.

McCoy did not want English to simply hold the State to its burden, but wanted him to advance a *specific* alibi defense. *See* JA398-99; *see also* JA661-662. Had McCoy not demanded a specific defense that English believed to be unethical and illegal, but only requested that his innocence be maintained, the case

before this Court might be very different. Here, the concession defense was the best available lawful defense given the evidence. Respecting defendant autonomy does not and never has required an attorney to abandon his professional judgment and conscience, especially in a case such as this when the attorney believes he is acting in his client's best interest and believes his client's judgment is impaired.

English's decision to concede guilt should be assessed under the *Strickland v. Washington* test for ineffective assistance of counsel. McCoy reserved his *Strickland* claims for collateral review, and no state court has yet ruled on it. Here, he argues that the limited exception to *Strickland* recognized in *United States v. Cronic*, under which prejudice is presumed, applies. He is wrong. In *Florida v. Nixon*, this Court held that counsel's concession of guilt in a capital case is not subject to the *Cronic* presumption. That remains the law, McCoy's express objection to the strategy does not change the result, and none of the other facts of this case requires a different conclusion.

ARGUMENT

I. McCOY IS BOUND BY HIS COUNSEL'S DECISION TO CONCEDE HE COMMITTED THE *ACTUS REUS* OF THE CHARGED CRIMES.

This Court has recognized that in the context of a criminal trial, autonomy has limits. It has never commanded an attorney to actively assist a defendant in putting on false testimony as a means to prove his innocence, nor has it required a trial court to protect the defendant's pursuit of such a defense.

A. A defendant gives up his autonomy to control strategic and tactical trial decisions by retaining, or acceding to the appointment of, counsel.

A defendant who wishes to exercise absolute control over the presentation of his defense has the choice to represent himself. *Faretta v. California*, 422 U.S. 806, 820 (1975). "The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). Thus, if a defendant does not want to "allocate to the counsel the power to make binding decisions of trial strategy," he may decline "to accept counsel as his representative." *Faretta*, 422 U.S. at 820. Once he retains or accepts counsel, he cedes significant control over his defense.

Although counsel must "consult with the client regarding 'important decisions,'" he need not "obtain the defendant's consent to 'every tactical decision.'"

Nixon, 543 U.S. at 187 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). That rule "is a practical necessity" because "[t]he adversary process could not function effectively if every tactical decision required client approval." *Gonzalez v. United States*, 553 U.S. 242, 249 (2008) (internal quotation marks omitted). Accordingly, although the principles of agency generally guide the attorney-client relationship, *see Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991), "with the exception of [certain] fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case." *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983).

Applying that principle, this Court has held that "the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor*, 484 U.S. at 418. More generally, trial counsel determines both the "larger strategic plan for the trial" and what "arguments to advance" within it. *Gonzalez*, 553 U.S. at 249. *See also Brookhart v. Janis*, 384 U.S. 1, 8 (1966) (Harlan, J., dissenting) ("a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval").

When McCoy retained English as counsel he acquiesced in English's control over the defense strategy and tactics. Even though McCoy disagreed with English's defense strategy as early as January 2011, he did not ask the trial court for permission to replace McCoy or to represent himself until mere days before the trial was set to begin. As the Louisiana

Supreme Court held, JA74, the trial court acted well within its discretion in denying that request as untimely. *See Martinez v. Court of Appeal*, 528 U.S. 152, 161-162 (2000) (noting that "most courts" require defendants to assert their *Faretta* right "in a timely manner") (footnote omitted). McCoy did not seek this Court's review of that ruling.

B. The strategy of conceding elements of the crime and focusing on the weakest elements is not among the trial decisions for which a client's express consent is required.

This Court has held that a few important rights—"to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"—may be waived only with the client's consent. *Jones*, 463 U.S. at 751. But "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Jones*, 463 U.S. at 753 n.6. In *Florida v. Nixon*, 543 U.S. 175 (2004), the Court declined to add contesting guilt at the guilt phase of a capital trial to that list.

Nixon concluded that strategically conceding guilt in a capital case is not "the equivalent of a guilty plea" and may be defense counsel's wisest course. *Id*. at 189-191. As the Court explained, a "guilty plea is 'more than a confession which admits that the accused did various acts,' it is a 'stipulation that no proof by the prosecution need be advanced.'" *Id*. at 188 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). A "plea is not simply a strategic choice; it is itself a

conviction." *Id*. at 187 (citation and internal quotation marks omitted).

By contrast, a capital defendant whose counsel concedes guilt "retain[s] the rights accorded a defendant in a criminal trial." *Id*. at 188. The defendant still has the right to a trial by jury, the protection against self-incrimination, and the right of confrontation. *Id*. at 188-189. In addition, the defense could attempt to "exclude prejudicial evidence," and preserve the ability to appeal "errors in trial or jury instructions." *Id*. And critically, because the State must present its evidence establishing the elements of the crime during the guilt phase, "[t]hat aggressive evidence would [ ] be separated from the penalty phase, enabling the defense to concentrate that portion of the trial on mitigating factors." *Id*.

For those reasons, a concession strategy is not inconsistent with the plea of not guilty. "Winning over an audience by empathy is a technique that dates back to Aristotle." *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (internal citation and quotation marks omitted). Where the prosecution has not agreed to recommend a life sentence in return, "pleading guilty . . . holds little if any benefit for the defendant." *Nixon*, 543 U.S. at 191 n.6 (citing *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* §10.9.2 cmt., reprinted in 31 HOFSTRA L. REV. 913, 1045 (2003)). As the United States explained in its *amicus* brief, "If the trial is infected by error and the defendant obtains a mistrial or a reversal, the prosecution may be more willing at that point to bargain for a guilty plea rather than retry the case." U.S. Br. at 22, *Florida v. Nixon*, 543 U.S. 175.

If the concession in *Nixon* was not considered the functional equivalent of a guilty plea, the concession in this case cannot either. Unlike here, Nixon's counsel's concession in the closing argument was total; he agreed that Florida had proven all of the elements of the charged crime: "I think that what you will decide is that the State of Florida . . . has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson." *Nixon v. State*, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, *Nixon*, 543 U.S. at 193 (citation omitted).

Having concluded that conceding guilt is not the equivalent of pleading guilty, this Court held that counsel was not "required to gain express consent before conceding Nixon's guilt." *Id*. at 189. The decision whether to concede guilt at trial for tactical reasons is therefore not one of the "basic trial choices [ ] so important that an attorney must seek the client's consent" before making it. *Gonzalez*, 553 U.S. at 250.

C. English's decision to concede that McCoy killed the victims, over his objection, did not violate McCoy's Sixth Amendment rights.

McCoy nonetheless insists that the decision whether to concede he killed the victims must be distinguished from other "strategic plan[s] for the trial" and "arguments to advance" that counsel may make in his own discretion. He asks this Court to create a new category of trial-related decisions, to which conceding guilt would be the first addition—decisions for which the client's consent is not needed, but which may not be

made over his express objection. *See* Pet'r Br. 21-38. This Court should decline the invitation.

McCoy's argument echoes Justice Brennan's dissent in *Jones v. Barnes*, where he stated that the "right to counsel as *Faretta* . . . conceive[s] it is not an all-or-nothing right, under which a defendant must choose between forgoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure." 463 U.S. at 759; *see* Pet'r Br. 24. Justice Brennan added a critical caveat, however, which McCoy brushes aside. Counsel should let the defendant decide which arguments to press, he said, "insofar as that is possible consistent with the lawyer's conscience, the law, and his duties to the court." *Id*.

That caveat controls this case. Where only a concession strategy has a realistic chance of sparing the defendant's life, pursuing that course, even over the defendant's objection, is the only course "consistent with the lawyer's conscience, the law, and his duties to the court." The Sixth Amendment does not bar counsel from pursuing it.

1. In most cases, counsel may not concede guilt over the defendant's objection.

The Sixth Amendment's requirement that counsel provide effective assistance, as well as rules of professional conduct, will preclude a concession strategy over the defendant's objection in the vast majority of cases. No one contends that conceding guilt is a wise or proper course "in a run-of-the-mine trial." *Nixon*, 542 U.S. at 190. No one disputes, therefore, that in an ordinary case counsel would be acting

ineffectively by conceding guilt over the defendant's objection.

Ethical rules further narrow the circumstances where counsel may concede guilt over his client's objection. Both Model Rule 1.2(a) and Louisiana Rule of Professional Conduct 1.2(a) state in part that "a lawyer shall abide by a client's decisions concerning the objectives of representation." Comment 1 to the Model Rule clarified, however, that the rule "confers upon the client the ultimate authority to determine the purposes to be served by legal representation, *within the limits imposed by law and the lawyer's professional obligations*." (Emphasis added.)[3] The situations when a lawyer cannot abide by a client's objective because of "the limits imposed by law and the lawyer's professional obligations" will necessarily be rare.

And when defense counsel and his client have a fundamental and irreconcilable disagreement about critical strategic issues and decisions, the usual remedy is for counsel to withdraw or the client to fire her. *See* RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS § 32. That leaves the unusual situation presented by this case: where "the limits imposed by law and the lawyer's professional obligations" demand that counsel concede guilt, the defendant objects to that strategy, and counsel is not permitted to withdraw.

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[3] Although Louisiana has not adopted the comments to the ABA's model rules, where the rule is the same, it may rely on them as persuasive authority. *See, e.g., In re Greenburg*, 9 So.3d 802, 806 (La. 2009).

2. In the rare case—such as this one—where only a concession strategy might spare the defendant's life, the Sixth Amendment does not categorically bar its use over the defendant's objection.

Where "the defendant's guilt is clear," counsel "may reasonably decide to focus on . . . persuad[ing] the trier that his client's life should be spared." *Nixon*, 542 U.S. at 191. In this narrow band of cases, counsel's duty to represent his client to the utmost of his ability and to zealously seek the best outcome may clash with counsel's duty to seek the client's stated objectives. McCoy maintains that the Sixth Amendment dictates the answer to that dilemma and that a defendant's "autonomy" overrides counsel's considered strategic judgment. It does not.

Lawyers' professional and ethical obligations inform the operation of the Sixth Amendment. Although the "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel," counsel's professional and ethical duties invariably shape what conduct is "acceptable under the Sixth Amendment." *Nix v. Whiteside*, 475 U.S. 157, 165, 166 (1986). Just as the "presumption in favor of counsel of choice" gives way to courts' "independent interest in ensuring that criminal trials are conducted within the ethical standard of the profession," *Wheat v. United States*, 486 U.S. 153, 160 (1988), so too must clients' interest in deciding important strategic matters.

Applicable ethical standards barred English from pursuing McCoy's "objective" of asserting a defense

based on false testimony and commanded that he zealously attempt to keep McCoy off death row. The Sixth Amendment permitted English to take the course consistent with both obligations—namely, conceding that McCoy killed the three victims.

a. After English rejected McCoy's conspiracy theory as utterly incredible, he properly, indeed commendably, refused to "advocate or passively tolerate [his] client's giving false testimony." *Nix*, 475 U.S. at 171. Counsel's duty of loyalty and zeal is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth," including not "taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 166. Louisiana law embodies that foundational principle in Louisiana Rules of Professional Conduct 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."), 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage . . . in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."), and 3.4 ("A lawyer shall not . . . counsel or assist a witness to testify falsely").

McCoy contends that these rules did not apply here because English did not "know" with absolute certainty that McCoy's conspiracy theory was false. Pet'r Br. 36 n.6; *see also* ABA Br. 16-17. The Louisiana Supreme Court, the ultimate arbiter of the State's rules of professional conduct, *see Succession of Wallace*, 574 So.2d 348, 350 (La. 1991), disagreed with that interpretation of the Rule 1.2(d), ruling that it barred

English from presenting McCoy's testimony. *See* JA80. That conclusion was eminently reasonable.

Courts and commentators have applied "a myriad of standards for determining when an attorney 'knows' his or her client intends to testify falsely. These standards include: 'good cause to believe,' 'knowledge beyond a reasonable doubt,' 'a firm factual basis,' and 'a good faith determination' that a client intends to testify falsely[,] as well as 'compelling support' for concluding that the client will commit perjury, and 'actual knowledge' for such a conclusion." *State v. Chambers*, 994 A.2d 1248, 1260 n.13 (Conn. 2010) (citations omitted). Under all of those standards other than "actual knowledge," English "kn[e]w" that McCoy's bizarre tale was false.

English "kn[e]w" McCoy intended to present false testimony based on his review of the evidence, his review of Dr. Vigen's interviews with the alibi witnesses, and the sheer absurdity of McCoy's story. A look at a few of McCoy's supposed alibi witnesses underscores his story's obvious falsity. One alibi witness whom McCoy attempted to subpoena was Senator David Vitter, who confirmed to Dr. Vigen that he had never heard of McCoy. R514-15. Another alibi witness was Judge Shonda Stone, who confirmed she had no idea where McCoy was the day of the crime. JA726-28. Caddo Parish Deputy Virgil Roberson, another alibi witness who was also McCoy's cousin, contradicted McCoy's claims as well. JA697. Shreveport Police Officer Marcus Hines, another alleged alibi witness, likewise contradicted McCoy's assertions. JA726. Still another alibi witness was McCoy's brother

Carlos, who pleaded guilty to being an accessory to the murders. R940.

The proposition "that 'a lawyer must believe his client, not judge him,'" therefore no longer applied, for a lawyer may not "honorably be a party to or in any way give aid to presenting known perjury." *Nix*, 475 U.S. at 171.

b. English did precisely what *Nix* said counsel should do when faced with a client who intends to present false testimony. Counsel should first try to dissuade the client from pursuing that course. *Nix*, 475 U.S. at 169. If that fails, counsel may inform the court. *Id*. at 170. And if the court is unable to resolve the situation, counsel may ask to withdraw from representation. *Id*. English followed all three courses, culminating in his telling the court he would willingly honor McCoy's desire to fire him based on their "irrevocable disagreement [on] how to proceed in this case." JA458. With the trial just days away, however, the court refused to allow English to withdraw.

The issue, then, was how English could effectively represent McCoy at trial consistent with his duties to McCoy, his "conscience, the law, and his duties to the court." *Jones*, 463 U.S. at 759 (Brennan, J., dissenting). McCoy concedes that English did not have "to present perjured testimony." Pet'r Br. 36. And English could not ask the jury, in his opening and closing statements, to believe McCoy's conspiracy theory because that would "give aid to presenting known perjury." *Nix*, 475 U.S. at 171. It would also have destroyed any credibility he had with the jury. Further limiting English's options, this Court has cautioned that "[i]f there is no bona fide defense to the charge, counsel

cannot create one and may disserve the interests of the client by attempting a useless charade." *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984).

English therefore had two basic choices. One choice, which McCoy now claims was constitutionally compelled (Br. 23, 32), was to tell the jury—in the face of overwhelming evidence and a defendant who presented an obviously false story on the stand—that the prosecution failed to meet its burden of proving that McCoy killed Gregory Lee Colston, Christine Colston Young, and Willie Ray Young. *See* Pet'r Br. 34; ABA Br. 17-18. Neither Louisiana ethical rules nor the Sixth Amendment required that strategy.

Given the unusual circumstances of this case, English could not "implement his client's directions," Pet'r Br. 35 (internal quotation marks omitted), no matter what he said in his opening and closing statements. McCoy's "directions" were to advocate the conspiracy theory, a course that (for reasons already stated) English could not pursue. McCoy's claimed right to a "personal defense" (Pet'r Br. 23) was therefore already giving way, by necessity. The "limits imposed by" several rules of professional conduct prohibited English from seeking McCoy's ultimate "objectives of representation." JA84 n.30 (holding that McCoy's "alibi defense was not ethically possible for Mr. English").

McCoy's current argument, that English had the obligation to maintain his client's innocence and simply hold the State to its burden of proof, is something McCoy never requested. McCoy did not want English to simply hold the State to its burden, but wanted him to advance a *specific* alibi defense. JA83, 398-99; *see also*

JA661-662. And McCoy's testimony did, in fact, box English in. *See* JA48 (summarizing testimony), 568-638 (transcript). Had McCoy not demanded a specific alibi defense that English believed to be unethical and illegal and insisted upon personally testifying to the albi, but only requested that his innocence be maintained, the case before this Court might be very different.

On the other side of the equation, taking steps to prevent a client from receiving the death penalty fulfills defense counsel's most fundamental obligations. *See*, *Nixon*, 543 U.S. at 190-91 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 329 (1983)). Those obligations include "act[ing] with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Comments to Rule 1.3. Here, the concession defense was the best available lawful defense given the evidence. Respecting defendant autonomy does not and never has required an attorney to abandon his professional judgment and conscience.

The ABA, balancing these competing considerations, takes a different view of defense counsel's ethical obligations than the Louisiana Supreme Court. *See* ABA Br. 13-16. But, despite the tenor of the ABA's *amicus* brief, its Criminal Justice Standards do not dictate that counsel should resolve disagreements by abandoning professional judgment and pursuing a defendant's irrational and potentially illegal demands. In fact, the Standards only require consulting with the client and memorializing the disagreement. ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE

FUNCTIONS § 4-5.2(e) (4th ed. 2015). Nor do Model Rule 1.2 or its comments prescribe how disagreements in a particular case between lawyer and client are to be resolved.

Jurisdictions often differ over how ethical rules apply, even rules based on ABA Model Rules, and every case is fact sensitive. State high courts are the ultimate arbiter of the States' respective rules, not the ABA. And the Louisiana Supreme Court decision in this case definitively rejects the ABA *amicus* brief's view of how its ethical rules applied here. "[T]he fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." *Jones*, 463 U.S. at 753 n.6.

c. English therefore employed the strategy *Nixon* blessed: "conced[ing], at the guilt phase of the trial, the defendant's commission of murder" in the hope of "sparing the defendant's life." 543 U.S. at 178. The strategy is reasonable because when the "defendant's guilt is [ ] clear," "avoiding execution [may be] the best and only realistic result possible." *Id*. (internal quotation marks omitted). Maintaining the defendant's innocence may prove "a counterproductive course." *Id*. As a former defense counsel explained, juries do not like hearing "a 'he didn't do it' defense and a 'he is sorry he did it' mitigation." *Id*. at 191 (quoting Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 708 (1991)). This Court also pointed to studies showing that "juries approach the sentencing phase 'cynically' where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense." *Id*. at 192

(quoting Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1589-1591 (1998)).

Consistent with that tactic, English creatively attempted to turn McCoy's outlandish testimony to his advantage. The theme of his opening argument was that McCoy should not receive the death penalty because, as the jury will find out when he testifies, McCoy suffers from "emotional and mental conditions." JA508-509. More specifically, McCoy "believes that everyone in this courtroom, the judge, the district attorney, myself, the Bossier Parish Police Department, the Idaho Police Department, we are all in a conspiracy to kill him." JA509.

English therefore did not "undercut McCoy's defense" (Pet'r Br. 14) when he examined McCoy. Rather, English's questions elicited answers that highlighted McCoy's delusions, as well as his suicide attempts, which assisted the defense's efforts to avoid the death penalty. In closing, English pursued the theme, stating in layman's terms that "Robert McCoy is crazy. He's delusioned. He's paranoid. He's wracked by conspiracy." JA647. As a consequence, McCoy lacked "the specific intent to commit first degree murder. . . . He is so defective mentally. You – you saw him on the stand. Robert McCoy doesn't have the mental capacity to form specific intent." JA647-648. English therefore implored the jury to find McCoy "guilty of second degree murder and . . . spend the rest of his natural life in jail." JA651.

McCoy shuts his eyes to this defense on the ground that "Louisiana does not recognize a diminished-

capacity defense independent of an insanity plea." Pet'r Br. 12. That misses the point. First off, the defense carried over to the penalty phase, when McCoy asked the jury not to impose the death penalty because of his "serious mental emotional issues" and his suicide attempts. R3718. The jury's struggle to issue a verdict and then to impose the death penalty—deliberating for more than four hours and then asking the judge when the jury is considered deadlocked—suggests the argument had an impact.

Second, although McCoy, in his petition for certiorari, purported to demean this strategy as an effort to appeal to jury nullification, that is a common defense tactic. As explained in a recent *amicus* brief, "the discretion of independent juries was one of the very causes for revolution, and it informed not only the original guarantee of a right to trial by jury in the Constitution of 1787, but also the Sixth Amendment of the Bill of Rights, which expanded that guarantee." Cato Institute *Amicus* Br. at 11, *Lee v. United States*, 582 U.S. ___ (2017) (16-327). *See also Horning v. District of Columbia*, 254 U.S. 135 (1920) (Holmes, J.) ("The jury has the power to bring in a verdict in the teeth of both law and facts.").

Louisiana law does not foreclose the tactic, even if it is in tension with La. C.Cr.P. art. 797(4), requiring jurors to accept the law given to them by the court. *See State v. Strother*, 49 So.3d 372, 380 (La. 2010) ("Louisiana's system of responsive verdicts provides juries with the plenary power of nullification to return a lesser verdict even in the face of overwhelming evidence of guilt.") (citation omitted); *State v. Porter*, 639 So.2d 1137, 1140 n.5 (La. 1994) ("Jury nullification

is a recognized practice which allows the jury to disregard uncontradicted evidence and instructions by the judge.") (citation omitted). Indeed, the Louisiana Supreme Court found that English's closing "gave the jury three options for a verdict: first degree murder, second degree murder, or manslaughter." JA95.

English admitted that McCoy killed the victims, which were only some of the elements of the crimes charged, and then steadfastly and emphatically denied another: specific intent. This was a strategic decision, which he indisputably believed to be in the best interest of his client.[4] Had English not conceded that McCoy killed the three victims, and instead exclusively held the State to its burden of proving the *actus reus*, it would have crippled this strategy, prohibiting

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[4] A leading treatise, in discussing the challenge of advising a client who the lawyer believes has diminished capacity states,

> In the end, however, the lawyer will have to process all of the clues, and the lawyer alone will have to make the judgment call how best to act "in the best interests of the client." This point is made explicit in RESTATEMENT OF THE LAW GOVERNING LAWYERS §24(2), and its Comment *d*. Indeed, the Restatement text says that the lawyer "should be guided by *the lawyer's* (reasonable) view of how the client *would* define client interests if able, *even if the client states otherwise*." … As the Comment properly notes, the text of §24 requires that the lawyer "reasonably" come to the conclusion that an impaired client's stated views are not the views that the client would express but for the impairment. More important, the Comment states that a lawyer must investigate fully, perhaps relying on the opinions of other professionals, in order for such conclusion to qualify as "reasonable."

Gregory C. Hazard Jr., W. William Hodes, and Peter R. Jarvis, THE LAW OF LAWYERING , §19.03 (4th ed.) (emphasis in original.)

English from (1) arguing that the State had not proven intent to kill because of McCoy's obvious irrational behavior and (2) earning credibility with the jury. Instead, English pushed for a compromise verdict where the death penalty was not an option. Louisiana law did not foreclose such a defense and the jury's questions in the guilt and penalty stages show it almost worked.

All told, English's trial strategy was eminently reasonable, indeed commendable, and conformed to—in large part was compelled by—ethical guidelines, and was in all ways "consistent with the lawyer's conscience, the law, and his duties to the court." Allowing McCoy, who plainly suffered from mental and emotional deficits, to override that strategy "will not 'affirm the dignity' of a defendant." *Indiana v. Edwards*, 554 U.S. 164, 176 (2008). Rather, "insofar as [McCoy's] lack of capacity threatens an improper . . . sentence," it would "undercut[] the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id*. at 176-77.

"While *Faretta* allows a defendant to have a fool for a client, 422 U.S. at 852, 95 S. Ct. 2525 (Blackmun, J., dissenting), there is nothing in its logic that commands that the defendant may also have a fool for an attorney." *Wright v. Estelle*, 572 F.2d 1071, 1073 (5th Cir. 1978) (en banc) (Thornberry, J., concurring).[5]

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[5] McCoy asserts that the deprivation of his "right to make basic decisions regarding the objectives of his defense," Pet'r Br. 19, is structural error. Pet'r Br. 38-43. Should the Court agree with McCoy that his constitutional rights were so violated, it should remand without addressing whether the error was structural or subject to harmless-error review. McCoy did not expressly present

II. *STRICKLAND* IS THE PROPER FRAMEWORK FOR ANALYZING MCCOY'S CLAIM OF ERROR.

English's decision to concede guilt should be assessed under the *Strickland v. Washington* test for ineffective assistance of counsel. McCoy reserved his *Strickland* claims for collateral review, and no state court has yet ruled on it. JA88 n.32. Here, he argues that the limited exception to *Strickland* recognized in *United States v. Cronic*, under which prejudice is presumed, applies. He is wrong. In *Florida v. Nixon*, this Court held that counsel's concession of guilt in a capital case is not subject to the *Cronic* presumption. That remains the law, McCoy's express objection to the strategy does not change the result, and none of the other facts of this case requires a different conclusion.

a. A concession strategy—even one employed over the client's objection—does not amount to a complete failure of adversarial testing of the kind identified in *Cronic*. This Court in *Nixon* rejected the argument that the *Cronic* presumed-prejudice standard should apply to a concession strategy, ruling that the defense "does not rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary." 543 U.S. at 190

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that question to the Court, and his petition for certiorari did not mention the remedy issue. Nor can the remedy issue be said to be "fairly included" in the question presented. It is not a "predicate to intelligent resolution of the question on which" certiorari was granted, *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980), and is not an alternative "argument in support of" the constitutional claim presented. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000). *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court").

(quoting *Cronic*, 466 U.S. at 666). To the contrary, for the reasons discussed in § I(B), *supra*, counsel "may reasonably decide to" use that strategy in capital cases. *Id*. at 191.

A client's objection has no bearing on whether it will be counterproductive to "put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation." Whether the defendant objects or not, "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Id*. (quoting *Cronic*, 466 U.S. at 656-657 n.19). In arguing otherwise, McCoy conflates his (meritless) autonomy argument with his ineffective-assistance-of-counsel argument.

b. Nor is there any other basis for concluding that *Cronic* applies here. This Court has stated that "for *Cronic*'s presumed prejudice standard to apply, counsel's 'failure must be complete.'" *Nixon*, 543 U.S. at 190 (quoting *Bell v. Cone*, 535 U.S. 685, 696-697 (2002)). "[D]efense counsel must *entirely* fail to subject the prosecution's case to meaningful adversarial testing for the *Cronic* exception to apply … a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute." *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002), 381 (emphasis in original) (citing, *inter alia*, *United States v. Swanson,* 943 F.2d 1070, 1074 (9th Cir. 1991)); *see also Darden v. United States*, 708 F.3d 1225, 1229-1231 (11th Cir. 2013); *United States v. Flores*, 739 F.3d 337, 340 (7th Cir. 2014), Easterbrook, J. ("The [*Nixon*] Court concluded that *Cronic* does not apply to situations in which defense counsel concedes a subset of the charges.") The record here, however, is replete

with evidence of English's efforts to defend McCoy and subject the State's case to adversarial testing, including:

- Presenting a defense with an overarching guilt-phase strategy designed to produce an acquittal as to the charged crime;
- Presenting a defense with an overarching mitigation-phase strategy designed to produce an acquittal of a death sentence;
- Withdrawing McCoy's *pro se* speedy trial motion to afford more time to prepare;
- Filing three writ applications at the court of appeal seeking supervisory review;
- Hiring mitigation experts, who spoke to alibi witnesses and conducted further mental evaluations;
- Filing motions in limine and successfully blocking the incriminating statement of McCoy's brother Spartacus;
- Objecting to photos of the deceased on grounds they would be unfairly prejudicial;
- Objecting to photos of Gregory Colston in the emergency room on grounds that they were cumulative and unduly prejudicial, and obtaining a concession from the defense not to use them;
- Bringing competency issues to the attention of the trial court;

- Actively engaging in jury selection, making two *Batson* challenges, and preserving them for appeal;
- Cross-examining witnesses and attempting to show lack of malice or intent;
- Presenting a mitigation expert witness who testified to a mental defect;
- Objecting to jury instructions related to aggravated burglary;
- Moving for a mistrial;
- Asking the trial court to give a deadlocked jury charge during the penalty stage.

English clearly did not abandon his client, and English's concession defense strategy did not result in a truncated proceeding. The State was "obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes." *Nixon*, 543 U.S. at 188. The government retained its burden of proof, the jury was instructed on each charged offense, and the jury was instructed that counsel's statements during argument are not evidence. R3535-3546. Indeed, English sought an acquittal from the jury as to the charged crime, first degree murder. This was not an abbreviated proceeding like the one in *Brookhart v. Janis*, 384 U.S. 1 (1966). As the Louisiana Supreme Court put it, "English's concession of guilt did not render the defendant's not guilty plea meaningless, as the State was still obliged

to present evidence establishing the essential elements of the crimes charged." JA97 (citation omitted).[6]

More broadly, neither *Nixon* nor any of this Court's other cases define what exactly a concession of guilt is—whether it is a concession of every element of the charged crime, a concession of a single element of any crime (charged or responsive to the crime charged), or something in between. McCoy does not explain the scope of the rule he proposes—*i.e.,* whether no concession of guilt of *any* element may be made over the objection of the client. Although lower courts are divided on this issue, some courts have held that such partial concessions are tactical decisions and are subject to *Strickland* analysis. *Haynes*, 298 F.3d at 381 n.7) (collecting cases); *Walker v. State*, 194 So.3d 253, 282 (Ala. Crim. App. 2015); Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 102-104 nn.325, 330, 331 (2004-2005) (collecting cases).

Here, a *per se* rule would have absurd consequences. For example, if a trial has not gone well a defendant and his lawyer could conspire to manufacture structural error in bad faith by conceding guilt over his client's objection. Or, what if a lawyer seeks to assert a defense of consent to a rape charge over his client's objection where his DNA is found within the victim? In such a situation, what is a lawyer to do if the client asserts that he never touched the victim? *See* Johnson,

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[6] English's claim that he took the burden off of the jury as to a finding of second degree murder did not actually have the effect of doing so because "arguments of counsel [are] not evidence." JA647; *e.g. State v. Draughn*, 950 So.2d 583, 615 (La. 2007); *Council of New Orleans v. Washington*, 9 So.3d 854, 857 n.4 (La. 2009).

The Law's Hard Choice, *supra*, at 39-41 (providing another example).

c. McCoy attacks specific actions taken by English (Pet'r Br. 44-47), but those attacks are properly assessed under *Strickland*. For example, McCoy criticizes a sentence apiece from English's opening and closing arguments; English's refusal to issue subpoenas to alleged alibi witnesses; his telling witnesses that "Mr. McCoy wanted me to ask you some questions"; and his direct examination of McCoy. Pet'r Br. 45-46. McCoy attacks English's judgment calls in connection with his legal and ethical duties. *Id*. at 32-35. Yet those are precisely the sort of discrete objections to counsel's performance for which *Strickland* was created.

Strickland recognizes that "advocacy is an art and not a science," and that "strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based." 466 U.S. at 681. In assessing counsel's performance, *Strickland* takes into account a myriad of factors, including counsel's experience, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. *Id*. McCoy wrongly seeks to pretermit that inquiry.

In short, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude

counsel must have in making tactical decisions." *Id.* at 689.

No one suggests that employing a concession strategy over the objections of a client is always reasonable or that it should be applied in anything other than rare circumstances. Determining whether this case is one of those rare cases, or whether English acted deficiently in concluding that it was, requires a careful assessment of the facts and record. Perhaps (though we doubt it) the Louisiana courts on remand will conclude that English performed deficiently in conceding guilt or in how he went about conceding guilt. But that assessment must be made under *Strickland*—as was true for Nixon's counsel.

CONCLUSION

The judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

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