No. 16-8255

IN THE

Supreme Court of the United States

ROBERT MCCOY,
Petitioner,
v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

CORRECTED BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether it is unconstitutional for defense counsel to admit an accused's guilt to the jury over the accused's express objection.

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INTRODUCTION

The constitutional right at the heart of this case is one so central to our justice system that it rarely requires explication: a criminal defendant's right to decide whether to admit guilt or instead to pursue acquittal and require the prosecution to prove his commission of the offense beyond a reasonable doubt. That choice is the defendant's core entitlement, without which none of the procedural protections the Constitution guarantees the defendant in a criminal prosecution has genuine meaning. A trial in which the defendant is deprived of this core right is no trial at all.

Robert McCoy made it clear beyond any doubt, both to his lawyer, Larry English, and to the trial court, that he chose to defend against the charges and *not* to admit guilt. Yet, over McCoy's express objection, the court permitted English to tell the jury that

McCoy had in fact committed the acts for which he was on trial. With the court's approval, English assured the jury that his "client committed three murders" and told them that he "took that burden [of proof beyond a reasonable doubt] off of" the prosecutor. JA509, JA647. He told the jury, "I've just told you he's guilty." JA510. McCoy was convicted on that basis notwithstanding his unflagging protestations of innocence—which never received any genuine hearing—and sentenced to death.

The Louisiana Supreme Court concluded that English made a reasonable strategic decision to admit McCoy's guilt and thereby supposedly improve McCoy's chance of receiving a life sentence rather than death. But that is the wrong inquiry. It is irrelevant whether an admission of guilt might have been reasonable trial strategy. Once McCoy communicated his contrary decision, that choice was not English's to make.

Under the Sixth Amendment, "the right to defend is personal." *Faretta* v. *California*, 422 U.S. 806, 834 (1975). It is the accused's life and liberty, not the lawyer's, at stake. And it is the accused's defense. The lawyer merely assists the accused in making it. This Court has repeatedly recognized "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017). It is the defendant's right to make certain basic decisions that shape his defense, including whether to defend himself or to obtain counsel, whether to go to trial or enter a plea, and whether to testify or stand on his right to remain silent. The defendant is likewise entitled to decide whether he will admit guilt in the hope of securing a lesser sentence or seek acquittal—as is his right—and require the prosecution to prove his guilt. The defendant does not waive that core

entitlement by accepting the "Assistance of Counsel for his defence." U.S. Const. amend. VI.

Here, where McCoy expressly and insistently informed his counsel and the court that he was innocent and did not want to admit guilt, counsel was not entitled to overrule that decision and tell the jury McCoy was guilty. The court's error in allowing counsel to do so requires a new trial.

OPINIONS BELOW

The Louisiana Supreme Court's opinion (JA31-209) is reported at 218 So. 3d 535. The Order denying rehearing is available at 2016 La. LEXIS 2485.

JURISDICTION

The Louisiana Supreme Court entered judgment on October 19, 2016, and denied rehearing on December 6, 2016. The petition for certiorari was filed on March 6, 2017. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. Pretrial Proceedings

On May 5, 2008, Christine and Willie Young and Gregory Colston were shot and killed in their home in Bossier City, Louisiana. The victims were the mother, stepfather, and son of Robert McCoy's estranged wife, Yolanda. Police arrested McCoy several days later in Idaho. McCoy was extradited to Louisiana, where he was appointed counsel from the public defender's office. R1324.[1] A Bossier Parish grand jury indicted McCoy on three counts of first-degree murder, R3, to which he pleaded not guilty, R1329. The prosecution gave notice of intent to seek the death penalty. R8.

At defense counsel's request, the court appointed a sanity commission to evaluate McCoy's "present mental condition" and his "mental capacity at the time of the alleged offense." R9, R11. A psychiatrist and a psychologist appointed by the court examined McCoy and concluded that he was competent to stand trial and that, at the time of the alleged offense, he was able to distinguish right from wrong. JA210-211, JA225-226, JA293-295. At a November 2008 hearing, the court reviewed and accepted both reports and determined McCoy was competent. JA293-295. During the course of their appointment, McCoy's public defenders filed no other motions on his behalf except for a two-page boilerplate discovery motion.

From the time he was arrested until the present, McCoy has consistently maintained his innocence of the offense. He maintains that he was out of state at the time of the killings and that he believes corrupt police

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[1] Citations of "R__" refer to documents in the Corrected Record on Appeal that do not appear in the Joint Appendix.

officers killed the victims when a drug deal went wrong. In support of that defense—and in the absence of any filings by his public defenders—McCoy filed *pro se* a notice of intent to raise an alibi defense and several subpoena requests for witnesses who he believed had knowledge of the police's involvement in the crime or could confirm his alibi. *See* JA227-231; R32, R45, R49, R1401-1402.

In December 2009 and January 2010, McCoy reported to the court that his relationship with his counsel had broken down, in part because the public defenders refused to support his subpoenas for witnesses at trial, and that he wished to represent himself until new counsel retained by his family could make an appearance. JA302; R49-51. McCoy repeated that request at a February 2010 hearing, stating that he expected retained counsel to appear in time for the May 2010 trial, but that he wished to represent himself in the meantime and would continue to do so if retained counsel could not appear. JA310-327. McCoy stated that he wished to represent himself so that he could oppose the prosecution's motion to quash his subpoenas—a motion the public defenders indicated that they would not oppose. *Id.* After a *Faretta* colloquy, the court granted the request, finding McCoy had knowingly and voluntarily waived his right to counsel and was competent to represent himself at trial with a public defender as standby counsel. *Id.*

In March 2010, Larry English, who had been engaged by McCoy's parents, enrolled as McCoy's counsel. JA328-331; R138. English adopted all of McCoy's *pro se* motions, except for his motion for speedy trial, JA328, and requested a continuance of the trial date, which the court denied, R1430. English sought interlocutory review of the denial, but failed to

file the proper paperwork. The intermediate appellate court rejected the filing. R154.

English subsequently asked again for a continuance because he was "having trouble … putting together a legal team to represent Mr. McCoy," and was "still not up to speed or nearly ready to undertake the representation." JA332-333. The judge warned that if he granted the continuance, English "w[ould] not be allowed to withdraw," JA335, and English agreed, *id.* The court granted the continuance and rescheduled trial for February 2011. JA336.

As English later testified, McCoy "adamantly maintained his innocence" throughout English's representation of him. JA284. English was "certain that [McCoy] truly believed that he was out of state at the time of the crime and that law enforcement and others were conspiring against him." JA285-286. English also confirmed that McCoy was adamant about going to trial and resisted any delay. JA288. Several months after English enrolled, and in the absence of any filings by English, McCoy made *pro se* filings to develop his alibi defense, including three additional requests for witness subpoenas. R190-191, 218-220, 324-325. English did not support those subpoenas. At a January 4, 2011 hearing, English told the judge that he believed McCoy was "suffering from some severe mental and emotional issues that ha[ve] an impact upon this case," and that he would not adopt McCoy's *pro se* filings. JA347; *see also id.* ("if [McCoy] wants to argue them, he can argue them"). English did not ask to revisit McCoy's competence to stand trial.

At a hearing on January 24, 2011, McCoy again complained that English "w[ouldn't] subpoena people … that w[ould] validate [his] innocence," including

witnesses who allegedly had knowledge of the police collusion and his relationship with his estranged wife, as well as an alibi witness who would testify that McCoy was in Houston on the night of the killings. JA393, 395, 398-399. English confirmed that he would not subpoena the witnesses McCoy wanted. JA388-389. He again told the court that he believed McCoy had "severe mental issues" and was "irrational" and was asking English to do things that were "counter [to] what [McCoy's] interests are in this trial." *Id.* English told the court he believed he had "an ethical duty to this man not to follow his bizarre behavior." JA397.

With trial approaching, English requested a further continuance, which the court denied. On English's application for supervisory writ—filed the day before jury selection was to commence—the intermediate appellate court "reluctantly" ordered a continuance, out of concern that even at that late date, nearly a year after English's engagement, "evidently no work had been done in this capital case to develop [mitigating] evidence." R439-440.

Trial was rescheduled for July 28, 2011. JA424. By that time, English had come to believe the evidence against McCoy was "overwhelming" and sought to negotiate a plea agreement for a life sentence. JA286. About one month before trial, English "confronted Mr. McCoy," telling him English "believed that [McCoy's] case could not be won and that [McCoy] needed to take a plea." *Id.*; JA436. McCoy "rejected that outright." JA436.

On July 12, 2011, the court held a hearing on the prosecution's motion to quash McCoy's *pro se* subpoenas. At the hearing, English told the judge—contrary to McCoy's expressed wishes—that the defense "had no

alibi evidence in this case" and that he "d[id] not adopt any of the subpoenas that Mr. McCoy has filed" and "w[ould] not call those witnesses if they are subpoenaed." JA434-436, JA441. English told the court he "believe[d] that Mr. McCoy is insane even though the doctors have found him to be legally sane." JA436. English said McCoy was "not … capable of helping [English] defend his life"—though, once again, English did not seek to revisit the competency determination—and said he believed he "ha[d] an ethical duty to Mr. McCoy that goes beyond whether or not to follow Mr. McCoy's advice." *Id.*; JA441. For his part, McCoy attempted to defend his subpoenas and complained to the judge that English was trying to "undermin[e]" him because English "d[id] not want [him] to present a defense … when [he] ha[d] a defense to be presented":

> In order to have a probable defense for myself, Your Honor, I have to have my … witnesses that I need to validate my defense. … I'm going to maintain my innocence, Your Honor. … I've got a right to face my accusers … . And that is—that's what I'm going to do.

JA438-439.

Immediately after the hearing—with just sixteen days left before trial—English met with McCoy and told him, for the first time, that English intended to admit to the jury that McCoy had killed the three victims. JA286. As English later testified, McCoy was "furious" and "completely opposed to … telling the jury that he was guilty of killing the three victims and telling the jury he was crazy." JA286-287. McCoy "told [English] not to make that concession, but [English] told him that [he] was going to do so" anyway because English "believed that this was the only way to save

[McCoy's] life" and "felt [he] had an ethical duty to save [McCoy's] life, regardless of what [McCoy] wanted to do." *Id.* English dismissed McCoy's profession of innocence as "delusion[al]," believing that McCoy was "insane and … not competent to be tried" and could not "deal rationally with the evidence of his guilt." JA288-289. English "ended the meeting as it was becoming too intense." JA286.

That meeting essentially ended the professional relationship between English and McCoy, as McCoy came to see English "not as his lawyer but as his enemy—part of the system that was conspiring to convict him of a crime he believed that he had not committed." JA286. Right after the meeting, McCoy tried to terminate English. He called his parents several times over the next two weeks to enlist their help arranging substitute counsel, and McCoy's father assured him that substitute counsel had been arranged and would be at court. R963-964, 966-973, 977, 983-986, 988, 1053-1054, 1062, 1069-1071, 1075, 1080-1081, 1083-1084, 1089, 1090-1093, 1096-1097, 1104, 1109-1110. McCoy's parents, who had originally hired English, told English that he was terminated, and they wrote a letter to the court, which they gave to the District Attorney's office, requesting English's removal. JA291-292. When English visited McCoy shortly before the next scheduled hearing, McCoy told English that he had been terminated and that substitute counsel had been arranged and would appear at the hearing. JA286-287.

A hearing on the matter was held two days before trial. McCoy told the court he wanted to terminate English, explaining that English had "not investigated anything," JA450, and had sought to turn McCoy's alibi witness against him:

> [T]his is my life, Your Honor. … I need somebody that's going to work for me, not somebody that's going to … work for the prosecutor …. This is a very vital time in my life, Your Honor, and I need help. I don't need somebody that's working against me, Your Honor. And he's worked against me every step of the way.

JA456. McCoy told the court that his parents had retained two substitute lawyers to take over for English. JA457. Despite having been discharged, English did not move to withdraw, but did ask to be "relieved" if McCoy "secured substitute counsel." JA458.

The court denied as untimely McCoy's request to terminate English and noted that the substitute lawyers had not appeared in the courtroom. JA460-461. At that point, McCoy asserted his right to represent himself. JA465. The court cut him off and denied that request as untimely because McCoy "ha[d] not made that known to the Court unequivocally before this date." *Id.* The court instructed McCoy that "from th[at] day forward" he "would not be allowed" to address the court "except through Mr. English." JA464.

English then told the court that McCoy "insist[ed] that [English] put forward a defense in this case at the guilt phase," but that English had "made a determination … that the evidence in this case is … overwhelming against Mr. McCoy." JA468-469. The court told English:

> [Y]ou are the attorney, sir. … And you have to make the trial decision of what you're going to proceed with.

JA469.

B. Trial

Voir dire began on July 28, 2011. The State exercised peremptory challenges against four of the five qualified African American jurors, and English raised challenges under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), which the court rejected. *E.g.*, R3114-3127; R3196-3202.

In English's opening statement—during which he referred to himself as the "district attorney," JA509—he told the jury that "[t]here is no way reasonably possible that you can listen to the evidence in this case" and not conclude that McCoy was "the cause of these individuals' death." JA504. He told the jury that McCoy was "so wracked with guilt about this case that he has attempted to kill himself six times," and he said the "evidence is overwhelming that Mr. McCoy caused the death of these people"—indeed, he told the jury, "I've just told you he's guilty." JA509-510; *see, e.g.*, *id.* ("my client committed three murders … the evidence … will say that he did it").

Part way through English's opening, McCoy objected and asked to be excused from the courtroom. JA504-507. Outside the presence of the jury, he told the judge that English was "simply selling [him] out," JA 505:

> I tried to get Mr. English removed, Your Honor, and you still kept Mr. English on my case, Your Honor, when I told you Mr. English was not putting up any type of defense for me. He's sitting there vindicating, Your Honor, that I murdered my family. I did not murder my family, Your Honor. I had alibis of me being out of state. Your Honor, this is unconstitutional for you to keep my attorney on my case when this attorney is completely selling me out.

JA506. The judge repeated his order to McCoy that "Mr. English [wa]s representing [him]," warned McCoy not to make any statements in front of the jury, and allowed English to finish his opening. JA505-508.

The sole defense theory English presented in his opening was that McCoy lacked the mental capacity to form specific intent, as was required for first-degree murder. JA504-505, JA508-512. He told the jury that even though McCoy had been judged competent to stand trial, McCoy was "crazy" and that the case was therefore "a second degree murder trial … not a first degree murder trial." JA504-505, JA509.

In fact, as the prosecutor later told the jury, this diminished-capacity defense was legally baseless. In Louisiana, second-degree murder and first-degree murder are both specific-intent crimes, so English's argument could not support a conviction of second-degree rather than first-degree murder. JA652-654. Moreover, as the Louisiana Supreme Court later noted, English's argument was also foreclosed because Louisiana does not recognize a diminished-capacity defense independent of an insanity plea. Under "well-settled" Louisiana law, evidence of a mental defect that does not establish legal insanity cannot negate the requisite intent to commit a crime or reduce the degree of the offense. JA92 n.35. And McCoy had never entered any notice of intent to plead not guilty by reason of insanity.

Trial proceeded. Through eleven witnesses, the prosecution presented evidence that: on the 911 call made from the victims' home, the caller could be heard addressing another person in the house as "Robert," R3294; the three victims in the house were killed by gunshot wounds to the head, R3349-3350, R3353-3365; the white Kia that police pursued fleeing the area of the

crime was registered to McCoy and his estranged wife, R3377; a dashboard camera showed an unidentified black male running from the Kia, R3284-3285; a search of the Kia revealed personal items belonging to McCoy, a cordless phone that had been removed from the victims' house, and a Walmart bag and receipt for the purchase that day of .380 caliber ammunition, R3288; Walmart video footage showed an individual buying ammunition, whom a detective identified as McCoy, R3383; a detective tracked McCoy using cellphone records and by speaking to truck drivers, leading to McCoy's arrest while hitchhiking in a truck in Idaho, R3371-3383; and a .380 caliber pistol was found behind McCoy's seat in the truck, which matched the bullets retrieved from the victims R3393, R3434-3440.

Although English had already admitted that McCoy killed the victims, he did ask questions written out by McCoy of some of the prosecution's witnesses—but only because, as he repeatedly told the jury, McCoy asked him to. *See* JA515 ("I have just a few questions for you Mr. McCoy wants me to ask you."); JA517 ("I have a couple of questions—actually, Mr. McCoy wanted me to ask you a couple of questions"); JA524 ("Mr. McCoy has asked me to ask you some questions."); R701. Those questions highlighted the following facts: the 911 dispatcher could not be certain that the "Robert" referenced on the 911 call was Robert McCoy, JA514; the officer who pursued the white Kia could not identify the fleeing driver in the video footage as McCoy, JA513; although a detective identified the individual in the Walmart video footage as McCoy, the testifying Walmart employee could not identify that individual, R3340; and the seized gun was not tested for fingerprints or DNA, JA525, JA556. English used his own cross-examination of two other witnesses to elicit

testimony detrimental to McCoy—namely, hearsay testimony that McCoy had attempted suicide following his arrest, JA520-521, JA522-523, JA555, which directly contradicted McCoy's denial that he had ever attempted suicide, *e.g.*, JA608-609, JA612-620.

McCoy took the stand in his own defense. JA568-638. McCoy maintained his innocence, *e.g.*, JA601, JA607, testifying that he was in Houston at the time of the killings and that he had an alibi witness, whom English had neither interviewed nor subpoenaed, JA597-598. He explained that police had taken his car prior to the shootings, JA589-591, and that a friend had use of his cell phone at the relevant time, JA579-582. He testified that he believed corrupt police officers were selling drugs and had killed the three victims during a "drug deal gone bad" and were trying to cover it up. JA584-588. And he testified that the gun found when he was arrested in Idaho had not been retrieved from his person and had not been tested for DNA or fingerprints because the police had already decided whom they were going to "try to put it on." JA611.

English used his examination of McCoy to impeach his own client, including by asking several questions about McCoy's supposed suicide attempts after the shootings. JA612-619. English also made statements during his questioning that directly undercut McCoy's defense. For instance, even though no prosecution witness had identified McCoy as the individual in the video footage of the driver fleeing the white Kia, English asserted that McCoy was indeed the individual in the footage and asked McCoy to acknowledge that he "physically resembled" the person in the video. *See* JA513, JA588-589, JA592. And English referred to inculpatory evidence the prosecution had not introduced, including call records for a phone that was allegedly in

McCoy's possession the night of the killings, JA579-580, JA598. English called no other witnesses.

In his closing argument, English again admitted that McCoy had killed the victims and told the jury that he had removed the prosecution's burden of proof:

> I … told you that after you saw the evidence in this case no reasonable person could come to any other conclusion than Robert McCoy was the cause of these people's deaths. So, I took that burden off of Mr. Marvin [the district attorney]. I took that burden off of you. And the evidence said what Mr. Marvin said it was going to be and it said what I told you it was going to be.

JA647. Directly contradicting his client's testimony, English stated that "McCoy … believes that he was in Houston, Texas, when the evidence is overwhelming that he was in Bossier City." JA649. Again, the sole defense English presented was the legally unavailable defense that McCoy suffered from diminished mental capacity and should therefore be convicted only of second-degree murder. JA647-651.

On rebuttal, the prosecution explained that under Louisiana law, second-degree murder (as well as the lesser included offense of manslaughter) also requires specific intent. As a result, a lack of specific intent would not provide a basis to convict McCoy of second-degree murder or manslaughter rather than first-degree murder. JA652-654.

The jury was instructed that it could find McCoy guilty of first-degree murder if it was satisfied that McCoy committed the shootings with the specific intent to kill or cause great bodily harm to more than one

person. The jury was further instructed that, if it was not convinced that McCoy was guilty of first-degree murder, it could consider verdicts of second-degree murder or manslaughter or a verdict of not guilty. R635-641. English did not request, and the jury was not given, any instruction that would have allowed it to apply his defense theory. Thus, the jury was not instructed on any offense that did not require specific intent, and the court gave no instruction on the diminished-capacity defense. R632-641.

After submitting several questions to the court during deliberations and reviewing certain items of evidence, the jury returned a unanimous verdict of guilty of first-degree murder on all three counts. R623, R625, R627. After hearing the verdict, McCoy told the court he had been "railroad[ed]" and "totally … set up" because English "didn't subpoena any of [his] witnesses" and "ha[d] not d[one] anything … to vindicate [his] innocence." JA661-665.

During the penalty phase, the prosecution called five witnesses. Although English's strategy had purportedly focused on mitigating McCoy's sentence, English in fact called no mitigation witnesses. The sole witness he did call, Dr. Mark Vigen, the court-appointed psychologist who had earlier found McCoy competent to stand trial and had opined that McCoy had the ability to distinguish right from wrong, undercut English's own theory of mitigation. English's penalty-phase argument focused on the mitigating circumstance that "at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" was "impaired." JA755. Nonetheless, he prompted Dr. Vigen to tell the jury that McCoy was mentally competent to stand trial and that there was "no evidence to

suggest that [McCoy] had a mental illness that would interrupt his ability to know right from wrong regarding the … murders he's been convicted of." JA689, JA704. Rather than presenting any evidence that might have been mitigating, under English's questioning, Dr. Vigen offered a dehumanizing portrait of McCoy that could only have encouraged the jury to sentence him to death. Dr. Vigen told the jury that McCoy "has a narcissistic personality disorder," JA706, and that he lied about his background, JA699, JA702-703, and "transforms, rewrites, refabricates his view of himself … to maintain his self image," JA692. After "strip[ping] away all those lies," Dr. Vigen opined, "there's nobody there." R3704. McCoy was only a "shell where there's no inner—inner core personality. There's no real self inside." JA730.

During its deliberations, the jury sent several questions to the court, including an inquiry as to the "time limit until [it is] considered a deadlocked jury." R3737. Eventually, the jury returned three death verdicts.

C. Decision Under Review

Represented by new appointed counsel, McCoy moved for a new trial. R842. Presenting both a declaration and live testimony from English, McCoy argued that the trial court had violated his constitutional rights by permitting English to proclaim McCoy's guilt to the jury over his express objection, and that English's actions constituted ineffective assistance of counsel under *United States* v. *Cronic*, 466 U.S. 648 (1984). The motion was denied. McCoy renewed those arguments on direct appeal, and the Louisiana Supreme Court affirmed.

The court rejected McCoy's argument that he had the right to instruct English to defend against the charges rather than admit his guilt. JA78-87. The court reasoned that, under *Nix* v. *Whiteside*, 475 U.S. 157 (1986), counsel must comply only with "the client's *lawful* instructions." JA81. It opined that the "alibi defense [McCoy] 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. And the court observed that English had an ethical obligation not to assist McCoy in "'conduct that the lawyer knows is criminal or fraudulent.'" JA80 (quoting Louisiana R. of Prof. Conduct 1.2(d)). Attaching no constitutional significance to McCoy's objection, the court further reasoned that "[c]onceding guilt, in the hope of saving a defendant's life at the penalty phase, is a reasonable course of action" and that the "court does not sit to second guess strategic and tactical choices made by trial counsel." JA84, JA86.

The court also held that English's admission over McCoy's objection did not constitute ineffective assistance of counsel under *Cronic*. JA87-96. Relying on this Court's decision in *Florida* v. *Nixon*, 543 U.S. 175 (2004), the court held that English "did not completely abdicate the defendant's defense," but "advanced what he saw was the only viable course of action." JA90. The court further noted that English cross-examined some witnesses and raised a *Batson* claim. JA91. The court deemed English's strategy "reasonable," JA95, despite acknowledging that English's diminished-capacity theory was in fact foreclosed by Louisiana law, JA92 n.35.

SUMMARY OF ARGUMENT

I. When the accused in a criminal proceeding chooses to defend against the charges rather than admit guilt, the Constitution does not allow his lawyer to override that choice and tell the jury, over the client's express objection, that the client is guilty. The irreducible guarantee of the Sixth Amendment, reflected in its text and in its common-law origins, is the defendant's right to make the basic decisions regarding the objectives of his defense—including the decision whether to admit guilt or to defend against the charges and insist that the prosecution prove its case beyond a reasonable doubt. As this Court has long recognized, it is the accused's liberty—and, in capital cases, his life—at stake in a criminal prosecution. It is "[t]he defendant, and not his lawyer or the State, who will bear the personal consequences of a conviction," *Faretta* v. *California*, 422 U.S. 806, 834 (1975), and it is therefore the accused who must have the ultimate authority to decide whether to admit guilt.

Florida v. *Nixon*, 543 U.S. 175 (2004), on which the Louisiana Supreme Court relied, is not to the contrary. There, this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." *Id.* at 178. The Court held that when counsel consults with the defendant "and the defendant is unresponsive," no "blanket rule demanding the defendant's explicit consent" bars counsel from conceding guilt in the hope of securing a more lenient sentence. *Id.* at 192. *Nixon* simply does not speak to the very different question presented here, where McCoy *did* object to any admission of guilt and counsel and the court knew it, yet proceeded with a

trial in which McCoy's own representative affirmatively asserted his guilt to the jury.

Nor did counsel have any ethical obligation to admit his client's guilt, as the Louisiana Supreme Court suggested. To the contrary, ethics rules—as well as the Constitution—bar counsel from doing so over the client's objection. Counsel could and should have put the prosecution to its proof.

The only possible remedy for the constitutional violation in this case is a new trial. By allowing counsel to proclaim McCoy's guilt to the jury over his objection, the trial court stripped McCoy of the right to decide whether to admit guilt or defend against the charges and completely changed the adversarial framework of the proceeding. Rather than requiring the prosecution to prove McCoy's guilt beyond a reasonable doubt, counsel vouched for his own client's culpability and expressly relieved the prosecution of its burden. That was structural error, for multiple reasons. Like a failure to let a defendant represent himself, the trial court's error deprived McCoy of the basic control over his own defense that the Sixth Amendment guarantees, and it is thus irrelevant whether that error "harmed" McCoy's defense. Like a failure to let a defendant choose his own counsel, the error infected the framework of the proceedings so broadly that its consequences are necessarily indeterminate. And like a failure to instruct the jury on the correct burden of proof, an admission of guilt and failure to hold the prosecution to its burden over the client's objection deny a defendant the elemental right to be heard on his claim of innocence. *See Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

II. What happened here violated McCoy's constitutional right to make the most fundamental choices regarding whether, and how, to defend his life and liberty. It is thus not properly analyzed as a question of ineffective assistance of counsel. Even if it were, however, this case would fall into the category of cases in which there was such a breakdown of the adversarial process that prejudice must be presumed. *See United States* v. *Cronic*, 466 U.S. 648 (1984). By admitting guilt over his client's express objection, counsel "fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. And counsel also eviscerated many of McCoy's other constitutional rights that inhere in a criminal trial. When counsel affirmed McCoy's guilt, it rendered his right against self-incrimination meaningless. And when McCoy testified to try to counteract counsel's proclamation of his guilt, counsel cross-examined his own client. Rather than defend his client, counsel effectively acted as a prosecutor. McCoy is entitled to a new trial.

ARGUMENT

I. THE TRIAL COURT'S DECISION TO PERMIT ENGLISH TO ADMIT GUILT OVER MCCOY'S EXPRESS OBJECTION VIOLATED MCCOY'S CONSTITUTIONAL RIGHTS AND REQUIRES A NEW TRIAL

A. Counsel May Not Override A Client's Decision Whether Or Not To Admit Guilt

The Constitution does not permit what happened here: a trial in which, over the defendant's vehement objection and assertion of innocence, the court permitted defense counsel to tell the jury that his client was guilty. The accused alone has the right to choose whether to admit guilt or to defend against the charges.

Where, as here, the defendant has clearly and expressly chosen not to admit guilt, but to hold the prosecution to its burden to prove its case beyond a reasonable doubt, defense counsel may not override that decision.

1. The Sixth Amendment guarantees the accused in a criminal proceeding the right to have "the *Assistance* of Counsel for *his* defence." U.S. Const. amend. VI (emphasis added). It "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." *Faretta* v. *California*, 422 U.S. 806, 819 (1975) (emphasis added). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 819-820 (footnote omitted). This Court has long recognized that because the accused's liberty—and in capital cases, the accused's life—is at stake in a criminal prosecution, the accused must have the ultimate authority to control the objectives of his defense.

It is for that reason that the defendant has the right to conduct his own defense at trial, provided he is competent to do so and makes the choice knowingly and intelligently. *Faretta*, 422 U.S. at 819-821; *see also Indiana* v. *Edwards*, 554 U.S. 164, 170, 174 (2008); *McKaskle* v. *Wiggins*, 465 U.S. 168, 170 (1984). That right is not merely ancillary to the goal of assuring a fair or accurate trial; it reflects the accused's indefeasible prerogative to make the fundamental choices that will shape his own fate. Accordingly, a criminal defendant may defend himself even if doing so would make conviction more likely, because "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his

advantage," and "his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834 (quotation marks omitted).

For similar reasons, the Sixth Amendment right to counsel embraces the right to one's counsel of choice for defendants who retain counsel. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). That right, too, is an aspect of the defendant's entitlement to make basic decisions regarding the defense of his life or liberty, and is not merely subordinate to the broader right to a fair trial. "The Sixth Amendment right to counsel of choice … commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel *he believes to be best*." *Id.* at 146 (emphasis added).

Likewise, the Sixth Amendment encompasses the defendant's right to "take the witness stand and to testify in his or her defense." *Rock* v. *Arkansas*, 483 U.S. 44, 49 (1987). "[T]he structure of the [Sixth] Amendment" "necessarily implie[s]" that right because the "accused's right to present his own version of events in his own words" is "fundamental to a personal defense." *Id.* at 52 (quotation marks omitted). The choice whether to testify or to insist on the right against self-incrimination is a choice for the defendant, to be made "in the unfettered exercise of his own will." *Brooks* v. *Tennessee*, 406 U.S. 605, 610 (1972) (quotation marks omitted); *see Rock*, 483 U.S. at 53 n.10.

The right of a competent defendant to decide whether to admit guilt at trial in the hope of securing a lesser sentence or to pursue acquittal and hold the prosecution to its burden of proof is likewise essential to the personal defense guaranteed by the Sixth

Amendment. It is the defendant who faces the consequences of an admission, and he must thus be entitled to choose whether to invite those consequences. "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363 (1970). An admission of guilt creates a certainty of conviction and loss of liberty, even if it might potentially result in a lesser sentence. That gamble is the defendant's to make. "[T]he dignity and autonomy of the accused" turn on his right to make these deeply personal decisions. *McKaskle*, 465 U.S. at 177.

2. A defendant is not required to abandon his entitlement to make these basic choices regarding the protection of his life and liberty as a condition of exercising his right to the assistance of counsel. Counsel is a "defense tool[] guaranteed by the [Sixth] Amendment," to be "an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Faretta*, 422 U.S. at 820.

A defendant is likely to benefit from having counsel because "even the intelligent and educated layman" may "lack[] both the skill and knowledge adequately to prepare his defense." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). "[A]ccess to counsel's skill and knowledge" may thus be "necessary to accord [a] defendant[] the 'ample opportunity to meet the case of the prosecution' to which [he is] entitled." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984) (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275 (1942)). When a defendant chooses to accept "the guiding hand of counsel," *Powell*, 287 U.S. at 69, however, he does not

relinquish the right to determine whether he will admit guilt at trial or instead defend against the charge. The Counsel Clause provides the defendant "with *assistance* at what, after all, is his, not counsel's trial." *McKaskle*, 465 U.S. at 174 (emphasis in original). "[A]nd an assistant, however expert, is still an assistant." *Faretta*, 422 U.S. at 820. The accused thus retains "the ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *see Gonzalez* v. *United States*, 553 U.S. 242, 250-251 (2008). Otherwise, "the right to make a defense [would be] stripped of the personal character upon which the [Sixth] Amendment insists." *Faretta*, 422 U.S. at 820.

"It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas" without first obtaining the client's express consent. *Faretta*, 422 U.S. at 820. As a matter of "practical necessity," counsel must have "control of trial management matters" to ensure that the adversary process functions effectively. *Gonzalez*, 553 U.S. at 249 (citing *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988)). Those matters—decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," *id.* at 248—"reflect[] considerations more significant to the realm of the attorney than to the accused," *id.* at 253. They draw upon "the expertise and experience that members of the bar should bring to the trial process," and "can be difficult to explain to a layperson." *Id.* at 249. Requiring the defendant to give formal and express consent to all of

these choices "would burden the trial process, with little added protection for the defendant." *Id.* at 253.[2]

The decision to admit guilt and forgo the chance of acquittal falls nowhere near that category of decisions. The decision whether to admit guilt turns not only on a strategic assessment of the likelihood of a particular outcome in light of the evidence, but also on the value the defendant personally places on maintaining a hope of freedom—unlikely though it may be—relative to accepting a certainty of imprisonment. *Cf. Lee* v. *United States*, 137 S. Ct. 1958, 1968-1969 (2017) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certain[]" conviction). It is the defendant who will lose his liberty or face the executioner. And it is the defendant who will face the opprobrium of admitting guilt to a capital

[2] Even as to decisions counsel may make without the client's express prior approval, this Court has only once approved an action of counsel that overrode the defendant's express instruction. 3 LaFave et al., *Criminal Procedure* §11.6(a), at 905 n.32 (4th ed. 2015); *cf. Gonzalez*, 553 U.S. at 253 ("We do not have before us, and we do not address, an instance where … the party by express and timely objection seeks to override his or her counsel."). In *Jones* v. *Barnes*, 463 U.S. 745 (1983), appellate counsel briefed only some of the arguments the defendant had requested. The Court held that the defendant had no right to insist that counsel raise every argument because counsel's constitutional duty to "'support his client's appeal to the best of his ability'" permitted counsel to focus on the strongest arguments. *Id.* at 754 (quoting *Anders* v. *California*, 386 U.S. 738, 744 (1967)). But even there, counsel did not act contrary to the defendant's ultimate objective, and the Court did not suggest that counsel could have conceded the conviction was valid or refused to appeal despite the defendant's instruction. To the contrary, a defendant may "instruct[] his counsel to file an appeal," *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000), and even if counsel believes the appeal frivolous, counsel must follow the appropriate procedures to ensure he does not "brief the case against his client," *Anders*, 386 U.S. at 745.

offense, reserved for the "narrow category of the most serious crimes." *Kennedy* v. *Louisiana*, 544 U.S. 407, 420 (2008). Nothing could be more fundamental, and more important to the capital defendant's life and liberty, than the decision whether to admit guilt and potentially accept life imprisonment. Like the choice whether to represent oneself or the choice whether to testify, the choice whether to admit guilt necessarily belongs to the defendant personally, not to counsel. And once the defendant has made that choice, counsel may not override it.

3. The Framers of the Sixth Amendment would unquestionably have understood the Counsel Clause to forbid counsel from incriminating a defendant against his will. At common law, "it was not representation by counsel but self-representation that was the practice in prosecutions for serious crimes." *Faretta*, 422 U.S. at 823; *see also Powell*, 287 U.S. at 60-61. The defendant was required to plead and prove all affirmative defenses and mitigation defenses; "indeed, 'all … circumstances of justification, excuse or alleviation' rested on the defendant." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (quoting 4 Blackstone, *Commentaries on the Law of England* *201). The defendant personally had the right—and obligation—to decide whether to admit his guilt to the jury or to defend against the prosecution's case. In cases where the defendant was entitled to counsel, counsel's role was limited to debating points of law. 4 Blackstone, *Commentaries* *348-350.

When the colonies authorized the right to counsel, they intended to provide defendants with learned assistance in arguing legal points that could establish their innocence. Rhode Island, for example, guaranteed the "lawful privilege of any person that is indicted, to procure an attorn[ey] to plead any po[i]nt of law that may

make for the clearing of his innocency[,]" in express recognition that the defendant "may not be[] accomplished with so[] much wisdom[] and knowl[e]dge of the law as to plead his own[] innocency." 2 *Records of the Colony of Rhode Island* 239 (1857) (Act of Mar. 11, 1669). Other colonial statutes authorizing counsel similarly did not allow counsel to argue, let alone to admit, the fact of the defendant's guilt. McManus, *Law and Liberty in Early New England* 94 (2009).

As the practice of using counsel became more regular, counsel remained only an "assistant." *Faretta*, 422 U.S. at 820 & n.16. Even when assisted by counsel, defendants retained the right to make their own defense and the right to choose personally how to address the jury. *Id.* at 825. That allocation of responsibility reflected colonial "appreciation of the virtues of self-reliance and traditional distrust of lawyers." *Id.* at 826. "No State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable." *Id.* at 832. It can hardly be contended that the Framers would nonetheless have found it tolerable for counsel to force an unwanted admission of guilt upon the accused.

To the contrary, using involuntary confessions against the accused "was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions" that formed the backdrop against which the Bill of Rights was written. *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936). It was "specially repugnant" to justice that the Star Chamber procured such confessions through counsel ostensibly provided for the accused's defense. *Faretta*, 422 U.S. at 822-823 (quoting 1 Stephen, *A History of the Criminal Law of England* 341-342 (1883)). The Star Chamber not only "forc[ed] counsel upon an unwilling defendant," *id.* at

821, but also made the defendant's counsel an instrument for the defendant's involuntary confession of guilt by providing that if counsel, "for whatever reason," did not endorse the defendant's denial of guilt, then "the defendant was considered to have confessed," *id.* at 821-822; *see id.* at 821-823 & n.18. The constitutional right against self-incrimination, adopted in response to that practice, would be hollow if the accused had no right to prevent his incrimination by his own counsel.

When the Bill of Rights was ratified and in the years afterward, it was understood that defense counsel could not admit the defendant's guilt over the defendant's objection. Thomas Erskine expressed the rule of the defense bar in 1792 during his celebrated defense of Thomas Paine:

> If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge … and … puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.

1 Speeches of Lord Erskine 474-475 (High ed. 1876); *cf. Grosjean* v. *American Press Co.*, 297 U.S. 233, 247-248 (1936) (relying on Erskine). The same rule prevailed throughout the next century, with leading treatises expressing the widespread understanding that the defendant "has a right to have the evidence against him fully tested before it is relied upon for a conviction," that the assistance of counsel is intended "[t]o secure the benefit of this right," and that the denial of that right by the defendant's own counsel "would rend the

bonds of society." Warvelle, *Essays in Legal Ethics* 137 (1902).

The Sixth Amendment thus provides a defendant with both the right to control the objectives of his defense and the right to the assistance of counsel. It has never been understood to require a defendant to choose between the two. *Cf. Simmons* v. *United States*, 390 U.S. 377, 394 ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."). Put to that choice, a defendant would only "believe that the law contrives against him" and would feel the necessity to forgo counsel and represent himself—thus losing the benefits that skilled counsel brings and to which he is entitled. *Faretta*, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."). And the burdens of a rule requiring such a choice would fall most heavily on a defendant who lacks the means to seek out and hire an attorney who will abide by his wishes. The Sixth Amendment does not demand that choice, and it forbids a court from requiring a defendant to make it.

4. *Florida* v. *Nixon* does not alter this analysis. *Nixon* recognized that in a capital case a defendant might choose to admit guilt in order to bolster his chances of receiving a lesser sentence than death, and held that when counsel believes admitting guilt in the hope of a lesser sentence is an appropriate strategy, there is no "blanket rule demanding the defendant's explicit consent." *See* 543 U.S. 175, 181, 192 (2004). Accordingly, when—as in *Nixon*—a lawyer presents such a strategy to his client and the client neither agrees nor disagrees, but remains silent, his silence may be treated as implicit acquiescence; the defendant's express

consent is not required. *Id.* at 187-189; *cf. Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *Brookhart* v. *Janis*, 384 U.S. 1, 6-7 (1966). In that event, the defendant is "deemed bound by the acts of his lawyer-agent." *New York* v. *Hill*, 528 U.S. 110, 115 (2000) (quotation marks omitted); *see Gonzalez*, 553 U.S. at 257 (Scalia, J., concurring in the judgment) (under common-law rule, defendant "who defends by counsel, and silently acquiesces in what they agree to, is bound as any other principal by the act of his agent") (quotation marks omitted).

The same is true of other rights that belong to the defendant personally under the Sixth Amendment. In *Faretta*, for example, the Court made clear that although the defendant has the right to insist on self-representation, counsel can be assigned for him if he acquiesces. The constitutional violation occurs "when [the defendant] insists that he wants to conduct his own defense" and is prevented from doing so. *Faretta*, 422 U.S. at 806, 821. Likewise, although the defendant has the right to testify, and counsel must fully inform him of that right, the defendant can implicitly acquiesce in waiving the right; he need not explicitly consent to waive the right to testify. 3 LaFave et al., *Criminal Procedure* §11.6(c), at 930 n.115 (4th ed. 2015); *e.g.*, *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (Breyer, J.). Similarly, although the defendant, not his counsel, has "ultimate authority" to decide whether to take an appeal, *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000), the defendant's explicit consent is not required to waive that right. If a defendant who is fully informed of his right to appeal does not request an appeal, he may waive his right to insist on it, *see Peguero* v. *United States*, 526 U.S. 23, 28 (1999), and no blanket rule requires his counsel to file a notice of appeal, *see Roe*, 528 U.S. at 477.

But nothing in *Nixon* or the cases discussed above remotely suggests that when a defendant clearly rejects his counsel's proposed strategy and insists that counsel defend against the charges rather than admitting guilt, counsel may overrule that decision. Even if a client might acquiesce in an admission of guilt by his lawyer acting as his agent, a client's express *refusal* to agree to an admission of guilt "ha[s] the effect of revoking [counsel's] agency with respect to the action in question." *Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring in the judgment); *see Brookhart*, 384 U.S. at 6-7. A defendant has the right to insist that his counsel not admit his guilt. Defense counsel may not override the defendant's decision and thereby try "his case against his client." *Anders* v. *California*, 386 U.S. 738, 745 (1967). If he does so, he is no longer acting as the client's agent, and the defense is "stripped of the personal character upon which the [Sixth] Amendment insists." *Faretta*, 422 U.S. at 820.

B. The Louisiana Supreme Court Erred In Concluding That English's Admission Of McCoy's Guilt Was Required By—Or Consistent With—His Ethical Obligations

In upholding the trial court's conclusion that English, not McCoy, controlled the decision whether to admit guilt, the Louisiana Supreme Court posited a conflict between McCoy's Sixth Amendment right to defend against the charges at trial and his counsel's duties under applicable ethics rules. The court reasoned that McCoy's constitutional right had to give way to his lawyer's "ethical obligation to advance a lawful defense." JA84. The court was wrong. English had no ethical duty or authority to override McCoy's decision to put the prosecution to its burden of proof rather than

admit guilt. To the contrary, applicable ethics rules and standards of professional conduct *require* defense counsel to follow the client's direction as to whether to admit guilt or not, consistent with the Constitution's recognition that the decision to admit guilt is the defendant's—not the lawyer's—to make. And to the extent English believed he could not ethically advance particular arguments or call particular witnesses while contesting McCoy's guilt, there were steps he could have taken consistent with his ethical obligations. Admitting McCoy's guilt was not among them.

1. According to the Louisiana Supreme Court, English faced an ethical dilemma in view of Louisiana Rule of Professional Conduct 1.2(d), which provides that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." JA80.[3] Because, in the court's view, "the State's evidence against [McCoy] was overwhelming," and 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," the court believed that English could reasonably choose to admit McCoy's guilt. JA81, JA83.

But there was no ethical conflict here. The decision whether to defend against the charges or admit guilt in a criminal case does not implicate Rule 1.2(d). Denying guilt, in itself, can never be fraudulent, perjurious, or otherwise criminal. Rather, "the right to plead not guilty" and put the prosecution to its proof is among the "vouchsafed basic minimal rights" secured by the Due Process Clause. *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963). "The right of an accused in a criminal

[3] ABA Model Rule of Professional Conduct 1.2(d) is identical.

trial to due process is, in essence, the right of a fair opportunity to defend against the State's accusations." *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). And "[n]either the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt." *Carter* v. *Illinois*, 329 U.S. 173, 174 (1946).

Where a criminal defendant exercises his constitutional right to defend against the charges, the decision to deny guilt is not imputed to counsel and thus in no way implicates his ethical obligations to the court. *See* 3 LaFave, *Criminal Procedure* §11.6(c), at 935 ("A lawyer is not placed in a professionally embarrassing position when he is reluctantly required … to go to trial in a weak case, since that decision is clearly attributed to his client."). To the contrary, a lawyer is ethically obligated to honor his client's direction not to admit guilt and put the government to its proof. The ABA Model Rules of Professional Conduct and the nearly identical Louisiana Rules provide that "a lawyer shall abide by a client's decisions concerning the objectives of the representation and … shall consult with the client as to the means by which they are to be pursued." Rule 1.2(a). The most basic of those decisions is the decision whether to admit guilt or defend against the charges, and under the rules of ethics as well as the Constitution, it is the client's decision to make.[4]

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[4] Of course, counsel can and should consult with the client to advise him about the weight of the evidence, the likelihood of conviction, and the consequences of conviction. It is for that reason that this Court recognized in *Godinez* v. *Moran*, 509 U.S. 389 (1993), that a defendant who goes to trial must have the level of competence needed to make decisions after consultation with counsel about whether to put on a defense and, if so, what defense

If defense counsel has a fundamental disagreement with his client, the ABA Model Rules and Louisiana Rules provide a mechanism for handling that disagreement. Counsel may seek leave of the court to "withdraw from representing a client." Rule 1.16(b)(3). If the court denies leave to withdraw, however, "the attorney must implement his client's directions on a matter within the client's personal control, assuming that implementation does not require him to violate standards of professional responsibility." 3 LaFave, Criminal *Procedure* §11.6(a), at 897 n.7.[5] In sum, although a lawyer may determine *how* to pursue the client's objectives in a manner that does not violate standards of professional responsibility, those same standards give the lawyer no discretion as to *whether* to pursue the client's objectives. Here, simply refraining from announcing his client's guilt in no way violated English's ethical obligations.

2. The Louisiana Supreme Court also invoked this Court's decision in *Nix* v. *Whiteside*, 475 U.S. 157 (1986), to condone English's decision to admit McCoy's guilt. In *Nix*, faced with the threat of known perjury,

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to assert—decisions that the Court recognized are for the defendant to make. *Id.* at 398; *see also id.* at 405 (Kennedy, J., concurring in part and concurring in the judgment) (defendant at common law must have the level of competence needed "to instruct counsel, or to withdraw [counsel's] authority if he acts improperly" (quotation marks omitted)). But Rule 1.2(a) requires the criminal defense lawyer to abide by the client's decision once he has made it, barring the lawyer from admitting the defendant's guilt if he expressly insists on seeking acquittal.

[5] *See also Restatement (Third) of the Law Governing Lawyers* § 23 cmt. c ("[A] lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action[.]").

the defendant's lawyer had admonished him not to testify falsely and had threatened to withdraw if he did perjure himself. After the defendant testified according to counsel's direction, he was convicted and sought a new trial on the theory that he had been faced with "an impermissible choice between the right to counsel and the right to testify." *Id.* at 172. The Court rejected that argument, commenting that "at most [the defendant] was denied the right to have the assistance of counsel in the presentation of false testimony"—something he had no right to do in the first place. *See id.* at 174. Based on *Nix*, the Louisiana Supreme Court reasoned that English's decision to admit McCoy's guilt was permissible because doing otherwise would have meant facilitating perjury. JA81.

Nix is wholly inapplicable here. McCoy is not challenging English's refusal to present perjured testimony, nor would defending his client have required English to do so.[6] Rather, the question here is whether the trial court properly allowed English to tell the jury that his client was guilty, over McCoy's express objection. English did not merely counsel McCoy to testify truthfully; he affirmatively acted as a prosecutor and witness against his own client, assuring the jury of his

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[6] In *Nix*, the defendant affirmatively told his lawyer that he intended to commit perjury. 475 U.S. at 161. There was no such known perjury here. Rather, McCoy steadfastly maintained his alibi defense, and English was "certain that [McCoy] truly believed that he was out of state at the time of the crime." JA285-286. English simply disbelieved him in view of the strength of the prosecution's evidence. But "[t]he prohibition against offering false evidence only applies if the lawyer *knows* that the evidence is false. A lawyer's *reasonable belief* that evidence is false does not preclude its presentation to the trier of fact." ABA Model R. of Prof. Conduct 3.3 cmt. 8 (emphasis added); *accord* La. R. of Prof. Conduct 3.3.

guilt. No ethical rule required—or permitted—English to take that step. And his expressed motivation in doing so was not to avoid suborning perjury, but to try to build "credibility" with the jury and thus obtain a lesser sentence than death. JA287. Moreover, whereas the defendant in *Nix* was not deprived of his right to counsel or his right to testify, English's actions deprived McCoy of his constitutional right to decide whether to deny his guilt and put the government to its proof.

Indeed, *Nix* recognized that a lawyer may not admit his client's guilt even if the client has told the lawyer he committed the crime. *Nix* explained that although an "attorney's duty of confidentiality … does not extend to a client's announced plans to engage in future criminal conduct," including perjury, the duty "totally covers the client's admission of guilt." 475 U.S. at 174. Here, of course, McCoy has consistently maintained his innocence and English has acknowledged McCoy's sincere belief in his innocence. JA284-290. Nothing in *Nix*—or anywhere else—suggests that although a lawyer may not admit his client's guilt when the client has confessed it to him, he may nonetheless do so when the client has vehemently protested any such admission and has always insisted on his innocence.[7]

Nix is thus consistent with the constitutional principle that the decision whether to admit guilt or to pursue acquittal is one the defendant has the right to make himself and which counsel may not overrule. As the Court explained, although "counsel is precluded from

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[7] English believed he had a supervening ethical duty to spare McCoy's life. *See supra*, pp. 7-9. But no rule of ethics or professional conduct gave him the power to pursue that goal by admitting guilt on behalf of a client who had been adjudged competent and who sought, as his primary goal, to contest his guilt.

taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law," "counsel must take all reasonable lawful means to attain the objectives of the client." 475 U.S. at 166. Attempting to obtain an acquittal by not admitting guilt and holding the prosecution to its burden of proof is a lawful objective, and defense counsel may not constitutionally or ethically sabotage that objective by trumpeting his client's guilt over the client's objection.

C. English's Admission Of McCoy's Guilt Over McCoy's Objection Requires A New Trial

When a lawyer admits his client's guilt and relieves the prosecution of its burden of proof over the client's express objection, the defendant suffers a structural error that is "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to [its] effect on the outcome." *Neder* v. *United States*, 527 U.S. 1, 7 (1999) (quoting Fed. R. Crim. P. 52(a)). That is because the "constitutional deprivation" is not "simply an error in the trial process," but "affect[s] the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). Counsel's unauthorized admission deprives the defendant of his right to choose whether to admit guilt or defend against the charges, strips the trial of its adversary character, interposes adverse counsel between an unwilling defendant and his right to defend himself, and undermines the jury's findings by effectively relieving them of the obligation to find guilt beyond a reasonable doubt. The error is therefore structural and "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. Accordingly, McCoy is

entitled to a new trial without regard to whether the error was harmful.

Last Term, in *Weaver* v. *Massachusetts*, the Court identified "three broad rationales" supporting the conclusion that an error is structural and therefore not subject to harmless-error review. 137 S. Ct. 1899, 1908 (2017). The Court emphasized that "[t]hese categories are not rigid," and that "[i]n a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* Here, each of the Court's rationales obtains; standing alone or taken together, they demonstrate that counsel's unauthorized admission of guilt is a structural error.

First, an error is structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908. As discussed, the defendant's right to choose whether to admit guilt or put the prosecution to its burden is not designed solely to protect against erroneous conviction, but rather reflects "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* (citing *Faretta*, 422 U.S. at 834).

In explicating this rationale in *Weaver*, the Court cited cases involving the right to self-representation (*McKaskle* and *Faretta*) and the right to counsel of one's choosing (*Gonzalez-Lopez*). 137 S. Ct. at 1908. Those rights, like the right at issue here, are independent of the right to a fair trial and instead reflect "particular guarantee[s] of fairness" rooted in distinct constitutionally protected concerns. *Gonzalez-Lopez*, 548 U.S. at 146. Like the decision to represent himself, the defendant's right to insist on his decision to contest his

guilt is integral to "speak[ing] for [him]self" through the defense he chooses to present. *McKaskle*, 465 U.S. at 177. It "exists to affirm the dignity and autonomy of the accused." *Id.* at 177-178. And like the right to choose his counsel, the right to choose whether to contest guilt guarantees that the defendant can personally choose the defense that "*he believes* to be best." *Gonzalez-Lopez*, 548 U.S. at 140 (emphasis added). As this Court has recognized, the denial of such rights is simply "not amenable to 'harmless error' analysis." *McKaskle*, 465 U.S. at 177 n.8.[8]

Second, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Weaver*, 137 S. Ct. at 1908. Here, English's admission of guilt changed the entire character of the proceeding. Coming from the defendant's own counsel, such an admission carries particular weight: When a prosecutor "seeking a conviction" asserts that a defendant is guilty, "[j]urors understand this and may reasonably be expected to evaluate the government's evidence and arguments in light of its motivations." *Buck* v. *Davis*, 137 S. Ct. 759, 777 (2017). But when "a defendant's own lawyer" concedes the defendant's guilt, "it is in the nature of an admission against interest, more likely to be taken at face value." *Id.* That error necessarily infects the jury's deliberations and taints its findings. *See Kaley* v. *United States*, 134 S. Ct. 1090, 1102 (2014) (error is structural where it "pervades the entire trial"); *see id.* at 1107 (Roberts, C.J., dissenting) (similar). The error is structural because "the effect of the violation cannot be

[8] Even the dissenters in *Faretta* recognized that a defendant who lost a constitutional right because of "such overbearing conduct by counsel" "against the wishes of the defendant" would have the remedy of a new trial. 422 U.S. at 848 (Blackmun, J., dissenting) (citing federal habeas cases granting new trials).

ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986). And as with choice of counsel, an attorney not committed to admitting guilt "will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Gonzalez-Lopez*, 548 U.S. at 150. It is impossible to know "what different choices" counsel actually defending the charges would have made or "to quantify the impact of those different choices on the outcome of the proceedings." *Id.*

Third, and finally, "an error has been deemed structural if the error always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Failure to give a reasonable-doubt instruction, for instance, renders a trial fundamentally unfair. *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). What happened here is similar: It is hard to imagine a criminal proceeding more fundamentally unfair than one in which defense counsel admits his client's guilt, and relieves the prosecution of its burden of proof, over the express objection of a defendant who intends to maintain his innocence. The lawyer's decision to vouch for his client's guilt deprives the trial of its adversary character, predetermines the jury's verdict, and "undermine[s] the fairness of [the] criminal proceeding as a whole." *United States* v. *Davila*, 569 U.S. 597, 602 (2013).

Because the error here is structural, it is not subject to harmless-error review. *See Gonzalez-Lopez*, 548 U.S. at 152. But even if English's admission of McCoy's guilt were susceptible to harmless-error review, the State could not show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *see also Fulminante*, 499 U.S. at 306; Fed. R.

Crim. P. 52(a) (errors affecting "substantial rights" are not harmless).

To prove harmlessness, the State must prove that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error," "no matter how inescapable the findings to support that verdict might be." *Sullivan*, 508 U.S. at 279. The State could never meet that burden here. English's repeated and adamant professions of McCoy's guilt in both his opening and his closing were profoundly incriminating. This Court has recognized that a defendant's "confession is probably the most probative and damaging evidence that can be admitted against him" and has a "profound impact on the jury." *Fulminante*, 499 U.S. at 296 (quotation marks omitted). Therefore, the Court requires "extreme caution before determining that the admission of [a] confession at trial was harmless." *Id.* An admission by counsel likely carries even more weight with the jury. A jury might be skeptical of the prosecution's presentation of a confession in a case where the defendant has pled not guilty, in view of the "conditions of stress, confusion, and anxiety" that often surround a confession. *Reck* v. *Pate*, 367 U.S. 433, 447 (1961) (Douglas, J., concurring). A confession from the defendant's lawyer, however, is a truly extraordinary thing. The jury would have been inclined to take English's admission of his client's guilt at face value, understanding that it reflected the considered judgment of defense counsel who is presumably experienced in defending the innocence of his clients, and who is privy to unadmitted evidence. *See Buck*, 137 S. Ct. at 777.

Indeed, English's admission went well beyond mere acknowledgment of guilt. *E.g.*, JA510 ("I've just told you he's guilty."). He told the jury that his admission relieved it (and the prosecution) of the bur-

den of finding McCoy guilty beyond a reasonable doubt, emphasizing that "no reasonable person could come to any other conclusion than Robert McCoy was the cause of these people's deaths." JA647; *see also id.* ("I took that burden off of [the prosecutor] Mr. Marvin. I took that burden off of you."). Just as "misdescription of the burden of proof" by the trial court "vitiates *all* the jury's findings," *Sullivan*, 508 U.S. at 281, defense counsel's relieving the prosecution of that burden cannot be harmless.

II. By Admitting McCoy's Guilt, Counsel Rendered Constitutionally Ineffective Assistance Requiring A New Trial

For the reasons discussed in Part I, the trial court's decision permitting English to admit guilt over McCoy's unambiguous objection violated McCoy's constitutional rights without regard to English's effectiveness as counsel and entitles McCoy to a new trial. Were the Court to reject that framework, however, and instead analyze counsel's admission of guilt as an issue of ineffective assistance of counsel, McCoy would still be entitled to a new trial. English's admission of McCoy's guilt to the jury over McCoy's objection—and his trial conduct in furtherance of that admission—constituted ineffective assistance under *United States* v. *Cronic*, 466 U.S. 648 (1984).[9]

"The right to the effective assistance of counsel is … the right of the accused to require the prosecution's case

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[9] As the Louisiana Supreme Court acknowledged, McCoy has not raised a claim of ineffective assistance under *Strickland* in this direct appeal; consistent with Louisiana state practice, he has reserved that claim for development in post-conviction proceedings. *See* JA88 n.32; Resp. La. S. Ct. Br. 36.

to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate,'" *id.* (quoting *Anders*, 386 U.S. at 743), and "if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt," *id.* at 656 n.19. *Cronic* "recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." *Nixon*, 543 U.S. at 190; *see also Roe*, 528 U.S. at 484. That exception applies in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic*, 466 U.S. at 658—*e.g.*, where "counsel has entirely failed to function as the client's advocate," *Nixon*, 543 U.S. at 189. In such cases, counsel's failure alone "demonstrate[s] a denial of the 'right to have the effective assistance of counsel,'" and the defendant "need not demonstrate prejudice in order to obtain relief." *Cuyler* v. *Sullivan*, 446 U.S. 335, 349 (1980).

English's admission of McCoy's guilt in the face of McCoy's express directive to the contrary was the paradigm of a breakdown in the adversarial process under *Cronic*. English entirely denied McCoy his constitutional right to defend against the charges and to hold the prosecution to its burden of proof. In doing so over McCoy's objection, English violated constitutional and professional norms governing the allocation of authority between lawyer and client. *Supra* Section I.A-B. Criminal defense counsel bears "the overarching duty to advocate the defendant's cause," *Strickland*, 466 U.S. at 688, and "must take all reasonable lawful means

to attain the objectives of the client," *Nix*, 475 U.S. at 166 (1986); *see also*, *e.g.*, ABA Model Rule 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of the representation"). But English's admission of guilt stripped McCoy of his prerogative to determine the ultimate objective of the defense. And by telling the jury he "took th[e] burden [of proof] off" both the prosecution and the jury, English literally "fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

English's admission also nullified other trial rights necessary to the "crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. When a defendant pleads not guilty, he invokes a battery of "constitutional rights that inhere in a criminal trial." *Nixon*, 543 U.S. at 187. English's conduct of the trial eviscerated each one of those rights. A defendant has the due process right to hold the prosecution to its burden of proof. *Rideau*, 373 U.S. at 726. But English embellished his admission of McCoy's guilt by gratuitously telling the jury that that his admission relieved the prosecution of proving—and the jury of finding—that McCoy had committed the crime. JA510 ("I've just told you he's guilty"), JA647 ("I took that burden off of [the district attorney]. I took that burden off of you."). A defendant has the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. But English failed entirely to pursue the case McCoy sought to put on, including by refusing McCoy's request to "subpoena people … that will validate my innocence," including an alibi witness. JA393, JA398. And a defendant has a "right to confront [his] accusers" through cross-examination. *Nixon*, 543 U.S. at 187. But in cross-examining prosecution witnesses, English diminished McCoy's efforts to contest the

prosecution's case by announcing repeatedly before the jury that he was asking questions only at McCoy's behest. *E.g.*, JA517 ("I have a couple of questions—actually, Mr. McCoy wanted me to ask you a couple of questions."), JA515, JA524.

A defendant also has the right to choose whether to remain silent or to testify in his defense—a decision to be made "in the unfettered exercise of his own will." *Brooks*, 406 U.S. at 610. That choice was rendered self-destructive for McCoy. Because of English's conduct, McCoy had no way to present his defense but to testify himself, and to do so under the pall of an admission of guilt by his attorney. And when McCoy did testify, English used his own examination to impeach his own client's testimony in ways the prosecution did not do and could not have done. He introduced inculpatory facts and adversely mischaracterized the evidence through his own questioning of his client. For example, English confronted McCoy with the assertion that the prosecution had evidence of phone records showing that a phone number linked to McCoy made calls in Louisiana during the time McCoy claimed to be in Houston. JA579, JA598. The prosecution, however, had introduced no such evidence. And English confronted McCoy with the claim that the person shown in footage fleeing the crime scene was McCoy, even though no prosecution witness had identified him. JA513, JA588-589, JA592.

English thus conducted himself more as a prosecutor than as McCoy's advocate. The result was not merely a "breakdown in the adversarial process," *Cronic*, 466 U.S. at 662, but the evisceration of each of those "particular guarantee[s] of fairness" the Constitution deems essential to a fair trial, *Gonzalez-Lopez*, 548 U.S. at 146.

No claim of coherent defense strategy could justify English's admission—indeed, prosecution—of McCoy's guilt in the face of McCoy's objections. English asserted that he believed McCoy was "crazy" and unable to assist in his defense, and that the only way to save his life would be to admit guilt, argue for a lesser charge, and build a case for mercy at the penalty phase. *Supra* pp. 7-9. Yet English never asked the trial court to reconsider its finding that McCoy was competent to stand trial. And because McCoy had not submitted a plea of not guilty by reason of insanity, and "well-settled" Louisiana law precluded a diminished-capacity defense to murder independent of an insanity plea, English's argument for a lesser charge based on McCoy's lack of the mental capacity to form the requisite intent for murder was foreclosed. *Supra* p. 12. English's admission of McCoy's guilt thus left the jury with no choice but to convict McCoy of first-degree murder.

English's professed strategy of appealing to the jury for leniency through a mitigation defense was finally exposed as a house of cards at the penalty phase, when he called no witnesses except for a court-appointed psychologist who opined that English's theory of mitigation was *unfounded*. Dr. Vigen had previously told the court that McCoy was able to distinguish right from wrong and gave no indication that he would testify otherwise at the penalty phase. Yet English rested McCoy's fate on his testimony. And at English's prompting, Dr. Vigen confirmed to the jury that McCoy was in fact fully competent and suffered no mental illness that would have prevented him from knowing right from wrong. *Supra* p. 16-17. Far from supporting a case for mercy, Dr. Vigen portrayed McCoy under English's questioning as a hollow shell—a narcissistic dissembler with no "real self inside." *Supra* pp. 17.

As a result of English's conduct, McCoy's trial thus lost "its character as a confrontation between adversaries." *Cronic*, 466 U.S. at 656-657. And the circumstances were "so likely to prejudice [McCoy] that the cost of litigating their effect … is unjustified." *Id.* at 658. Indeed, it is difficult to imagine a more prejudicial course for counsel to take. McCoy is entitled to a new trial.

CONCLUSION

The Louisiana Supreme Court's judgment should be reversed.

Respectfully submitted.

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