

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT LEROY McCOY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 16-8255  
 )  
LOUISIANA, )  
 )  
 ) Respondent. )  
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Pages: 1 through 62

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Petitioner, )  
v. ) No. 16-8255  
LOUISIANA, )  
Respondent. )  
- - - - -

Washington, D.C.

Wednesday, January 17, 2018

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:03 a.m.

APPEARANCES:  
SETH P. WAXMAN, Washington, D.C.; on behalf  
of the Petitioner  
ELIZABETH MURRILL, Solicitor General of Louisiana,  
Baton Rouge, Louisiana; on behalf  
of the Respondent

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 16-8255, McCoy versus  
5 Louisiana.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. WAXMAN: Mr. Chief Justice, and  
10 may it please the Court:

11 When a defendant maintains his  
12 innocence and insists on testing the  
13 prosecution on its burden of proof, the  
14 Constitution prohibits a trial court from  
15 permitting the defendant's own lawyer, over the  
16 defendant's objection, to tell the jury that he  
17 is guilty.

18 The Sixth Amendment guarantees a  
19 personal defense that belongs to the accused,  
20 and whether to admit or contest guilt is the  
21 paradigmatic example of that personal defense,  
22 not only because it singularly affects the life  
23 and liberty of the accused, but also because  
24 making that decision requires weighing  
25 subjective aspirations and value judgments that

1 are unique to every individual. How --

2 CHIEF JUSTICE ROBERTS: Suppose the --  
3 the charge is murder and -- and the lawyer  
4 says: Based on what I've looked -- I think  
5 your best case is self-defense, you know. And  
6 -- and the other guy's -- the defendant says:  
7 No, I didn't shoot the person. And the lawyer  
8 says: Well, I think the evidence is going to  
9 show that you did, self-defense.

10 If the lawyer goes ahead and presents  
11 that defense, is -- does that fall under your  
12 theory?

13 MR. WAXMAN: Well, Mr. Chief Justice,  
14 I think your question raises a question both of  
15 what defense counsel may constitutionally do  
16 and also what defense counsel may not  
17 constitutionally do.

18 I'll also note first that your  
19 hypothetical, in dramatic contrast to this  
20 case, involves at a minimum the shared  
21 objective of obtaining a -- an acquittal on the  
22 charged crimes.

23 But, in addition, our position is that  
24 the one thing that counsel in that case and in  
25 no case may do is -- this isn't about what

1 counsel can argue. It's not about what  
2 evidence can be introduced. It's that counsel  
3 may not stand up and affirmatively vouch, admit  
4 that his client is guilty.

5 CHIEF JUSTICE ROBERTS: That was --

6 MR. WAXMAN: Now, your example --

7 CHIEF JUSTICE ROBERTS: -- a big --

8 MR. WAXMAN: Yes.

9 CHIEF JUSTICE ROBERTS: -- that was a  
10 big wind-up with the --

11 MR. WAXMAN: Yes.

12 CHIEF JUSTICE ROBERTS: But my  
13 particular question is obviously, when you say  
14 simply that my client shot the guy, that  
15 doesn't mean he's guilty. If he did it in  
16 self-defense, he's not guilty. And then the  
17 defense is it was self-defense. So --

18 MR. WAXMAN: That's right. So  
19 recognizing that that is not this case, our  
20 position is -- and I think the framers utterly  
21 would agree -- that if a defendant stands up  
22 and says, look, I did not shoot that guy, as  
23 Mr. McCoy said, I did not kill my own family  
24 members and I do not want my lawyer standing up  
25 and telling the jury that I did --

1 CHIEF JUSTICE ROBERTS: Okay. So --

2 MR. WAXMAN: -- that is for the  
3 defendant --

4 CHIEF JUSTICE ROBERTS: -- your  
5 position is not -- your position is not limited  
6 to the situation where the lawyer admits the  
7 client's guilt; it goes beyond that?

8 MR. WAXMAN: We -- that's a  
9 hypothetical, and our position is that the  
10 framers -- that the -- that the meaning of the  
11 Sixth Amendment, the meaning of the right to  
12 defend, that the framers enshrined, and it is  
13 recognized in all common law jurisdictions, is  
14 that if the defendant contests and decides to  
15 put the prosecution to its proof beyond a  
16 reasonable doubt as to an element of the  
17 offense, particularly at the actus reus, the  
18 Constitution precludes the defense -- his own  
19 lawyer from telling the jury --

20 CHIEF JUSTICE ROBERTS: Any element --

21 MR. WAXMAN: -- that he did it.

22 CHIEF JUSTICE ROBERTS: -- any element  
23 of the offense?

24 MR. WAXMAN: So --

25 CHIEF JUSTICE ROBERTS: Offenses have

1 a lot of -- is venue an element of an offense  
2 sometimes? Or --

3 MR. WAXMAN: Well, the -- the most  
4 extreme hypothetical I can think of is, was  
5 there a mailing in interstate commerce.

6 CHIEF JUSTICE ROBERTS: All right.  
7 Well, that's a good one.

8 (Laughter.)

9 MR. WAXMAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Is that, I  
11 mean --

12 MR. WAXMAN: I think --

13 CHIEF JUSTICE ROBERTS: -- does that  
14 -- the Hobbs Act or something? Did you cross  
15 -- cross state lines?

16 MR. WAXMAN: So --

17 CHIEF JUSTICE ROBERTS: That's an  
18 element of the offense.

19 MR. WAXMAN: Yeah.

20 CHIEF JUSTICE ROBERTS: So if a lawyer  
21 says it's obvious that you did cross state  
22 lines, you've got 48 witnesses, I'm not going  
23 to argue that you didn't cross state lines; and  
24 the person says that's an element of the  
25 offense, you have to say I didn't or withdraw.



1           MR. WAXMAN: No, no, no. You don't --  
2 the -- the client doesn't get to decide what  
3 you will affirmatively say. The client can  
4 say, even if it's just an element of the  
5 offense --

6           CHIEF JUSTICE ROBERTS: Okay. So the  
7 lawyer gets up, look, they've got to prove  
8 these things. Crossing state lines, that's  
9 clearly proved, but we want to talk about these  
10 other things. So that violates this  
11 fundamental right?

12           MR. WAXMAN: Just so that we're -- you  
13 and I are very clear about this, we don't think  
14 that this case presents the question because  
15 this is a case in which -- in which there was  
16 not an agreement on whether to pursue  
17 acquittal. This wasn't a disagreement about  
18 strategy, about how to be acquitted of murder.

19           And that's a huge difference, and our  
20 position in this case only depends on that.  
21 But the logic --

22           CHIEF JUSTICE ROBERTS: No, I know.  
23 You -- you know how hypotheticals work.

24           MR. WAXMAN: I do.

25           CHIEF JUSTICE ROBERTS: This is a

1 different case. And I just want to make sure  
2 that I understand that your position is that  
3 the lawyer cannot vouch for any element of the  
4 defense, not just that, you know, it was  
5 self-defense, not that you didn't shoot him,  
6 all that, but any element of an offense, if the  
7 lawyer tells the jury that that's satisfied  
8 contrary to the client's wishes, that  
9 violates --

10 MR. WAXMAN: Our position is that the  
11 defense that the framers enshrined in the Sixth  
12 Amendment and that is recognized in the entire  
13 rest of the common law world is that, whether  
14 it's admitting guilt or not, if the defendant  
15 says I did not do X, I did not kill my parents,  
16 my family members, defense counsel may not  
17 affirmatively tell the jury that he did and ask  
18 that he be required to spend the rest of his  
19 life in prison.

20 JUSTICE BREYER: Well, then that's the  
21 problem.

22 CHIEF JUSTICE ROBERTS: So I did not  
23 -- I did not cross the Pennsylvania state line  
24 in the course of committing this crime.

25 MR. WAXMAN: That's right. The

1 defense lawyer doesn't have to say to the  
2 jury -- he doesn't have to say one word about  
3 crossing state lines.

4 What he can't say is I am telling you  
5 that Mr. McCoy killed these three family  
6 members.

7 JUSTICE ALITO: Your answer is that --  
8 this is fairly simple. The -- the defense  
9 attorney cannot concede any element of the  
10 defense -- of -- of the offense.

11 MR. WAXMAN: If there is a  
12 contemporaneous objection, the trial court may  
13 not permit the defense lawyer to admit any  
14 element of the offense. That's --

15 JUSTICE BREYER: Right there is the  
16 problem. I mean, that's the problem in my  
17 mind.

18 Faretta itself poses a problem because  
19 a large percentage of the people that insist on  
20 representing themselves, particularly in death  
21 cases, are going to walk right into the death  
22 -- the death chamber. A lot of the people  
23 there are just not really capable of managing  
24 their own defense.

25 So now we have a lawyer. And,

1 suddenly, we come in with a constitutional rule  
2 that's going to tell the lawyer how to argue  
3 his case. How do I know what you say is true?  
4 The people who know this are the trial bar, if  
5 anybody. But how do you know whether there are  
6 cases where, in fact, to make a sensible  
7 defense for this person who might have one, the  
8 lawyer has to say to the jury, because of what  
9 other witnesses have said and so forth, that  
10 letter did cross state lines?

11 And if we agree with you in this,  
12 which is a very different case, the argument  
13 against agreeing with you in this is it will be  
14 like a balloon expanding into we don't know  
15 where what, because they're filled with  
16 elements, the federal code. And before you  
17 know it, lawyers will have a hard time  
18 defending this person. And you're walking  
19 right into jail when you start telling your  
20 lawyer how to run his case.

21 Now, that's the concern that I think  
22 is there in the chief's question. And I -- I  
23 would like to know your response to what I  
24 consider a very practical concern.

25 MR. WAXMAN: My response, as Your

1 Honor's question noted, is there is -- there is  
2 no need for this Court to decide the elements  
3 question or any other hypothetical in which  
4 there is a shared objective of acquittal in  
5 order to decide this case.

6 JUSTICE BREYER: Well, that would be  
7 surprising.

8 MR. WAXMAN: My position with -- my --  
9 excuse me?

10 JUSTICE BREYER: That's surprising.  
11 Because if we announce that we're not deciding  
12 it, there are like 200,000 criminal cases in  
13 the lower courts and there will be a kind of  
14 chaos, I mean, I fear, that as to what -- there  
15 are lots of people, you know, there are many,  
16 many defendants who go through dozens of  
17 lawyers while they're objecting to this one or  
18 that one or the other one.

19 MR. WAXMAN: Justice Breyer --

20 JUSTICE BREYER: And you see what I'm  
21 worried about?

22 MR. WAXMAN: I --

23 JUSTICE BREYER: I think we should  
24 decide it.

25 MR. WAXMAN: Okay. I --

1 JUSTICE BREYER: But -- yeah.

2 MR. WAXMAN: -- I invite you to decide  
3 it. It will be dicta, but I invite you to  
4 state what the logic is.

5 And our position is simply this: We  
6 are talking about the defense that was  
7 enshrined in the Sixth Amendment, and there is  
8 no contest from the state about the  
9 contemporary understanding of this at the time.

10 JUSTICE GORSUCH: But, Mr. Waxman, if  
11 we have to draw a line, it seems to me we have  
12 at least two axes we have to worry about. One  
13 is, where do we stop on the concession? You  
14 say it goes down to elements.

15 I -- I -- I press you why wouldn't it  
16 go further than that, if the client instructs  
17 the lawyer not to accede to admission of a  
18 piece of evidence as particularly damning but  
19 the lawyer sees no good faith basis for  
20 objecting. So why -- why doesn't it go down to  
21 that level? That's one axis.

22 The other axis would be you say the  
23 lawyer can't admit the element. But what if  
24 the lawyer casts doubt on the element?

25 I mean, what if the lawyer here hadn't

1 admitted guilt but had presented a mens rea  
2 defense that really cast aspersions on the  
3 actus reas defense, right, it really cast --  
4 any reasonable person would know what the  
5 lawyer is up to. He didn't use the magic words  
6 "I admit," but he did, in fact, essentially do  
7 that. So we have ambiguity on both these axes.  
8 Where would we draw the lines?

9 MR. WAXMAN: So I think this Court has  
10 been -- as to your first axis, the Court has  
11 been very, very clear that decisions, once a --  
12 once a defendant chooses to be represented by  
13 counsel, decisions about what evidence to  
14 admit, what objections to raise, what witnesses  
15 to call, with the exception of the defendant,  
16 and what witnesses not to call and what  
17 arguments to be made are for the lawyer,  
18 reviewable if at all under the ineffective  
19 assistance of counsel defense.

20 So evidence, arguments, witnesses,  
21 this case is only about -- and you say there's  
22 a small difference, but this is all the  
23 difference in the world.

24 JUSTICE GORSUCH: But sometimes --  
25 sometimes -- sometimes, though, a piece of

1 evidence is far more important than an element.  
2 Take -- take the Chief Justice's example of a  
3 Hobbs Act. I mean, the interstate commerce  
4 element is usually not that big a deal in those  
5 cases. But admission of a piece, a letter or,  
6 you know, an admission by the defendant is a  
7 huge deal.

8 MR. WAXMAN: I mean, in the real  
9 world, what defendants object to -- and I've  
10 been representing death row inmates for -- this  
11 is my 40th year --

12 JUSTICE GORSUCH: I know.

13 MR. WAXMAN: -- defendants are not  
14 drawing a line and saying you can't admit that  
15 something moved in interstate commerce across  
16 state lines. What they are concerned about and  
17 what they have an autonomy, dignitary right to  
18 have protected is I didn't do this, I didn't  
19 commit the actus reas.

20 JUSTICE GINSBURG: Mr. Waxman, may I  
21 ask if we -- if we concede the general  
22 proposition that you're right, the client has a  
23 right to say I didn't do it, but that's a  
24 defense. And what the client wants to put on  
25 to make out that defense, the lawyer says I



1 can't present that because you say there are  
2 witnesses, I've talked to the witnesses, they  
3 say the opposite. I can't put on the defense.

4 So if -- if -- take this very case.  
5 So the lawyer can't say: My client shot these  
6 three people. But then what? What -- what --  
7 how -- how does the lawyer back up that  
8 defense, I didn't do it, when, in the lawyer's  
9 view, there is no basis for taking that  
10 position?

11 MR. WAXMAN: Justice Ginsburg, the  
12 defendants, and even clients in civil cases,  
13 all the time do things that make counsel's job  
14 either difficult or impossible.

15 The defendant can say: Look, I don't  
16 care, I am going to testify, and I am going to  
17 give my side of the story, or I don't care,  
18 I've instructed all of my family members not to  
19 talk to you, not to provide you any  
20 information.

21 The lawyer's professional  
22 responsibility, nonetheless, is just exactly  
23 how Justice White explained it at pages 257 and  
24 258 of his opinion in United States versus  
25 Wade.

1           What happens in these cases is that  
2           the lawyer doesn't have -- the -- the principle  
3           at stake here is not in any way a restriction  
4           on how the lawyer presents evidence, what  
5           defenses he actually does present, how he goes  
6           about cross-examining witnesses.

7           JUSTICE GINSBURG: Can we be -- can we  
8           --

9           MR. WAXMAN: His obligation --

10          JUSTICE GINSBURG: Can we be concrete  
11          about this case? So the lawyer doesn't say to  
12          the jury he did it. The lawyer says nothing.

13          And then the client wants to present  
14          this alibi that is inherently incredible. What  
15          does the lawyer do? How does the lawyer assist  
16          the client in making out the defense that the  
17          client has chosen?

18          MR. WAXMAN: The -- the lawyer will  
19          cross-examine the government's witnesses, as  
20          Justice White explained, attempting to find  
21          holes in their testimony even if the lawyer  
22          believes that they are testifying truthfully.

23          That is the hallmark of the adversary  
24          system. And although it is not this case,  
25          because Mr. English testified repeatedly under

1 oath that -- that his client's belief that he  
2 was not there and he did not do this was  
3 sincere -- sincerely reflected his  
4 understanding, even if he thought that Mr.  
5 McCoy -- Mr. McCoy said, look, I was there, but  
6 I'm going to get up and say that I wasn't. The  
7 ethics rule are very clear about what lawyers  
8 can and can't do.

9 JUSTICE ALITO: Now, Mr. Waxman --

10 JUSTICE SOTOMAYOR: Mr. Waxman --

11 MR. WAXMAN: None of that is at issue  
12 in this case.

13 JUSTICE ALITO: Mr. Waxman, let me --

14 JUSTICE SOTOMAYOR: Mr. Waxman, this  
15 sounds like a -- my ethics class in law school,  
16 and this very hypothetical of what do you do  
17 with a lying client?

18 And it was my understanding that every  
19 ethics rule requires the lawyer to put the  
20 client on the stand but not assist the client  
21 in telling the lie by -- you can put him on the  
22 stand and say tell your story. And if the  
23 judge or someone objects that your -- that this  
24 person's rambling on, you say to the judge: I  
25 cannot ask questions. My client has directed

1 me to put him or her on the stand.

2 People can walk themselves into jail.  
3 They can walk themselves, regrettably, into the  
4 gas chamber. But they have a right to tell  
5 their story.

6 MR. WAXMAN: They have -- they have  
7 the same -- I mean, Your Honor's understanding,  
8 this is not a question of ethics rules --

9 JUSTICE SOTOMAYOR: Absolutely not.

10 MR. WAXMAN: -- about perjured  
11 testimony or anything.

12 JUSTICE SOTOMAYOR: But the question  
13 --

14 MR. WAXMAN: Your Honor's  
15 understanding is correct as to --

16 JUSTICE SOTOMAYOR: So let me find --

17 MR. WAXMAN: -- the vast majority of  
18 jurisdictions.

19 JUSTICE ALITO: Well, could I ask you  
20 about --

21 JUSTICE SOTOMAYOR: May I ask -- may I  
22 just --

23 JUSTICE ALITO: Mr. Waxman, could I  
24 ask you about, because I want to understand  
25 where the -- the line is here.

1           So let's imagine a case where the  
2 evidence of the actus reas is overwhelming,  
3 there's not a chance in the world that the  
4 defense is going to be able to convince a jury  
5 that the defendant did not commit the actus  
6 reas, but there's a plausible defense, maybe a  
7 pretty good defense, on mens rea.

8           So -- but the client insists: I  
9 didn't do it, I did not commit the actus reas.  
10 Now, two ways of approaching this on the part  
11 of the defendant, defense attorney, and I want  
12 you to explain whether one is required or  
13 whether -- whether both are permissible or only  
14 one is permissible.

15           One is for the attorney to concede in  
16 the opening, yes, he committed the actus reas,  
17 but there's a good mens rea defense, and  
18 develop that.

19           I take it you would say that's not  
20 permissible?

21           MR. WAXMAN: Correct.

22           JUSTICE ALITO: But could the attorney  
23 open by saying: Now, they have to prove he  
24 committed certain acts but also that he had a  
25 certain mental state, and our defense here is

1 going to be that he didn't have the requisite  
2 mental state, and everything that's done during  
3 the trial is directed toward that. There's no  
4 attempt to put the government to its proof, to  
5 try to poke holes in the witnesses who are  
6 going to be called to establish the actus reas.

7 Is the latter permitted?

8 MR. WAXMAN: So the latter --

9 JUSTICE ALITO: So long as he doesn't  
10 say the magic words he actually committed the  
11 -- the -- the physical acts charged, it's okay?

12 MR. WAXMAN: Right. The core -- it  
13 may or may not be okay. Let me be very clear  
14 about this.

15 The core Sixth Amendment right that is  
16 at issue here is where a defendant says this is  
17 a personal defense, I can make my own value  
18 judgments about whether I do or do not want to  
19 -- to take a minuscule chance of not being  
20 convicted and spending a life in -- in prison.

21 The -- the -- the Sixth Amendment  
22 prohibits the lawyer from affirmatively telling  
23 the jury: I'm telling you he is guilty and he  
24 should spend the rest of his life --

25 JUSTICE ALITO: I -- I understand

1 that.

2 MR. WAXMAN: That's -- that's the  
3 right at issue here, and your --

4 JUSTICE ALITO: I -- I -- I -- I  
5 understand your --

6 MR. WAXMAN: And that would --

7 JUSTICE ALITO: I understand --

8 MR. WAXMAN: Yeah.

9 JUSTICE ALITO: -- your position, but  
10 what is the answer -- I want to understand  
11 where the line is.

12 MR. WAXMAN: So the line --

13 JUSTICE ALITO: What is the answer to  
14 my question?

15 MR. WAXMAN: Yes, the answer to your  
16 question is, if I understood your hypothetical  
17 correctly, there would not be a violation of  
18 this fundamental Sixth Amendment right and the  
19 defense counsel's strategy in focusing the jury  
20 on mens rea and saying nothing or  
21 cross-examining or not would be evaluated under  
22 the ineffective assistance of counsel  
23 standards.

24 JUSTICE SOTOMAYOR: Excuse me,  
25 Mr. Waxman -- Mr. Waxman --

1 CHIEF JUSTICE ROBERTS: That's true if

2 --

3 JUSTICE SOTOMAYOR: Mr. Waxman, can --

4 CHIEF JUSTICE ROBERTS: That's true --

5 that's true even if -- Justice Sotomayor will  
6 have the next question, and I'll have this one.

7 MR. WAXMAN: All right.

8 CHIEF JUSTICE ROBERTS: That's true  
9 even if the -- the accused says I want you to  
10 say that I didn't do it? The lawyer does not  
11 have to do that, right? That's your position?

12 MR. WAXMAN: Our position is that the  
13 lawyer --

14 CHIEF JUSTICE ROBERTS: Yes or no,  
15 please. Your -- the lawyer does not go in and  
16 say the client did it, but the client says I  
17 want you to say I didn't do it -- that's a very  
18 clever defense you have on mens rea, but I want  
19 you to say I didn't do it. And the lawyer says  
20 I'm not going to do that.

21 MR. WAXMAN: I believe that the lawyer  
22 does not have to do that.

23 CHIEF JUSTICE ROBERTS: Okay.

24 MR. WAXMAN: But the --

25 CHIEF JUSTICE ROBERTS: Now Justice --



1           MR. WAXMAN: This is only a  
2 prohibition.

3           CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor.

5           JUSTICE SOTOMAYOR: Taking Justice  
6 Alito's hypothetical, I walk in and say it is  
7 the government's burden to prove this case  
8 beyond a reasonable doubt. It means that they  
9 have to prove each and every element of the  
10 offense. The actus reus, the mens rea,  
11 whatever other important element there is.

12           If the government were to prove every  
13 other element in this case beyond a reasonable  
14 doubt, the one they can't prove is that the  
15 person who shot this person did it with -- with  
16 the right mens rea. That would be okay?  
17 Hasn't conceded the person committed the  
18 elements and is saying I'm putting your focus  
19 just on mens rea.

20           MR. WAXMAN: Right.

21           JUSTICE SOTOMAYOR: Right?

22           MR. WAXMAN: Well, I'm -- my defense  
23 -- I -- you know, the government alleges all  
24 these things. Ladies and gentlemen of the  
25 jury, it is going to be required to prove each

1 and every element to your satisfaction beyond a  
2 reasonable doubt. I am going to introduce  
3 evidence in this case that is going to convince  
4 you that even if you find that the defendant  
5 committed these murders, he did not act with  
6 the requisite mens rea.

7 JUSTICE BREYER: That -- that's easy  
8 for you to say in a case that you're imagining.  
9 What I'm wondering, if there are other cases  
10 where it might be far more difficult to come up  
11 with that answer, and, therefore, I'm asking  
12 you this question: Suppose the opinion were to  
13 say in this case the lawyer explicitly said to  
14 the jury he is guilty of the crime charged.  
15 That the Sixth Amendment forbids.

16 But the rest of these complicated  
17 matters, whether it's elements, whether it's  
18 this, whether it's that, we leave -- at least  
19 for now, we leave to the law schools, the bars,  
20 the ethics classes and the others because we  
21 don't want to freeze the answer into the Sixth  
22 Amendment.

23 Now, what would you think of that?

24 MR. WAXMAN: I think that the only  
25 holding that this Court can apply in this case

1 is that under the -- that where -- was Your  
2 Honor's hypothetical -- was Your Honor's  
3 statement of the case, which is where the  
4 defendant says and says to the judge promptly  
5 and repeatedly: I did not kill the members of  
6 my family, my lawyer wants to stand up and tell  
7 the jury that I did and that I am guilty, and  
8 the judge -- if the judge says you're the  
9 lawyer, you decide, that is a violation of the  
10 Sixth Amendment and the due process clause.

11 JUSTICE ALITO: But you were drawing  
12 --

13 JUSTICE KAGAN: Mr. Waxman, can I take  
14 you back to the Chief Justice's question?  
15 Because here we do have a case where the  
16 defendant is saying you can't admit the actus  
17 reus, which is killing. I didn't kill my  
18 family. You can't say I killed my family.

19 But there are different levels of  
20 generality, right? One is you can't say that I  
21 didn't kill my family. One is you -- you --  
22 you can't say that I committed the actus reus  
23 no matter what the actus reus is. And another  
24 is you can't say that I committed any element  
25 of the offense, actus reus or otherwise.

1           And if I understood your argument,  
2           you're saying that the logic of your position  
3           takes you from this case, which is an actus  
4           reus of killing, to any actus reus and then  
5           further from there to any element.

6           And I guess I wonder, why is it that  
7           the logic of your position insists that we go  
8           up that chain?

9           MR. WAXMAN: I don't think the logic  
10          of my position insists that you go all the way  
11          up the chain, but I'll explain to you why I  
12          think the better view would stop at  
13          affirmatively admitting -- nothing about what  
14          the trial -- how the trial is conducted, but  
15          affirmatively admitting any element.

16          And it -- it simply goes back to my  
17          reading and my understanding -- maybe I'm wrong  
18          -- of the rule that existed, the law that  
19          existed at the time the Sixth Amendment was  
20          considered and adopted and what the framers  
21          must have understood.

22          And we -- we go over this at some  
23          length in our brief. There's no controversion  
24          about this. I think that at the time in the  
25          18th century in England and common law

1 jurisdictions and at the time of the framing of  
2 the Sixth Amendment, the frame -- people would  
3 have been astonished, as the -- as the amicus  
4 brief of the bar of England and Wales  
5 expresses, that the notion that the defendant  
6 could say this is my defense and my decision to  
7 contest this invokes my own subjective  
8 judgments about what is important to me and  
9 what is not important to me, that it would be  
10 -- they would be astonished to hear that in  
11 that circumstance defense counsel could stand  
12 up and say at that time --

13 JUSTICE GORSUCH: Mr. Waxman, I -- I  
14 think you're right about that, but my question  
15 would be -- I'm sorry.

16 JUSTICE ALITO: No, go ahead.

17 MR. WAXMAN: No, no, no. I'll --

18 JUSTICE GORSUCH: On that, it seems to  
19 me that that's Faretta, right? That you have a  
20 right to control your self-representation if  
21 you're unhappy with your lawyer.

22 The -- your client had an  
23 opportunity to -- this is on his second lawyer.  
24 And he -- he had notice before trial that there  
25 was a breakdown with his lawyer. And the trial

1 court ruled he -- he came too late to replace  
2 him with a third lawyer yet or to go to  
3 self-representation. Why isn't this just an  
4 untimely Faretta problem, accepting everything  
5 you've said about the original understanding?

6 At some point, one can waive these  
7 rights too. These are personal rights that can  
8 be waived.

9 MR. WAXMAN: There -- there's no  
10 question about it, but the -- the right to the  
11 assistance of counsel and the right to your  
12 defense are not mutually exclusive rights.  
13 Justice Alito, and then if I may, I'd like to  
14 save some time for rebuttal.

15 JUSTICE ALITO: Well, in -- when the  
16 Sixth Amendment was adopted, there was not a  
17 right to appointed counsel. So I imagine that  
18 somebody in Mr. English's position would simply  
19 say: I'm not going to be part of this farce  
20 that you want to put on. I'm just withdrawing.

21 And Mr. McCoy would be -- would either  
22 have to come up with another attorney very  
23 quickly or go ahead without an attorney. So I  
24 don't know --

25 MR. WAXMAN: I agree.

1 JUSTICE ALITO: -- how much you can  
2 read into the -- into the original  
3 understanding because the situation here is  
4 dictated -- is dominated by the fact that now  
5 there is the right to have an appointed  
6 attorney.

7 MR. WAXMAN: Justice Alito, Daniel  
8 Webster himself could not constitutionally have  
9 done what Mr. English did in this case. And I  
10 don't think there would be any doubt in the  
11 framers' mind about that.

12 If I may, may I reserve the balance of  
13 my time?

14 CHIEF JUSTICE ROBERTS: Certainly.

15 MR. WAXMAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Ms. Murrill.

17 ORAL ARGUMENT OF ELIZABETH MURRILL  
18 ON BEHALF OF THE RESPONDENT

19 MS. MURRILL: Thank you, Mr. Chief  
20 Justice, and may it please the Court:

21 The state proposes a -- a rule that,  
22 in a narrow class of death penalty classes,  
23 counsel sometimes might be required to override  
24 his client on a trial strategy when the  
25 strategy that the -- that the client wants

1 counsel to pursue is a futile charade and  
2 requires him to defeat both their objectives of  
3 defeating the death penalty.

4 We submit that that should be treated  
5 as a Strickland ineffective assistance of  
6 counsel.

7 JUSTICE SOTOMAYOR: I'm sorry, you  
8 started by saying you want a narrow rule. Why  
9 is it narrow? It seems to me that it's a rule  
10 that you're saying is absolute. Why does it  
11 have to be just in death penalty cases?

12 MS. MURRILL: Your Honor --

13 JUSTICE SOTOMAYOR: How do you limit  
14 your -- why would we limit your rule?

15 MS. MURRILL: Because I think we've  
16 conceded, and we would -- we would agree that  
17 in most cases that the rules of professional  
18 conduct would dictate that a lawyer follow the  
19 directives of his client.

20 JUSTICE SOTOMAYOR: Is it the rules of  
21 professional conduct or is it the Sixth  
22 Amendment? The Sixth Amendment requires you to  
23 be represented by counsel, effective counsel,  
24 but counsel.

25 Or do you concede that generally or



1 all the time -- let's not say this is a death  
2 case, let's just say this was a robbery case,  
3 all right? A robbery case.

4 The defendant says: I wasn't the  
5 robber. Can the lawyer come in and do what Mr.  
6 English did: Yes, he was the robber, but no,  
7 he didn't intend to force -- to use force.

8 MS. MURRILL: I think that the rules  
9 of professional conduct inform the Sixth  
10 Amendment and that they would probably give  
11 some level of greater force to the client's  
12 wishes in certain situations, but, again, I  
13 think that goes back to Strickland.

14 It's in -- if you evaluate it as a  
15 Strickland claim, then we're looking at it  
16 under the first prong of Strickland as a  
17 question of deficiency.

18 JUSTICE SOTOMAYOR: So you don't think  
19 it is a Sixth Amendment violation?

20 MS. MURRILL: I do not. I think it's  
21 an ineffective assistance claim and you have  
22 not proven that until you've --

23 JUSTICE SOTOMAYOR: So -- so you're  
24 not taking the position when you're saying  
25 generally that -- that a client has any right

1 to say I didn't do this in court? I didn't do  
2 -- I didn't shoot, I didn't rob, I didn't make  
3 that call that that witness says I made, that  
4 the witness -- that a client, once he takes a  
5 lawyer, takes -- doesn't have a right to say I  
6 didn't do it --

7 MS. MURRILL: I -- I think we --

8 JUSTICE SOTOMAYOR: -- at all?

9 MS. MURRILL: -- we wouldn't  
10 characterize it as an independent autonomy  
11 right. We -- we -- we believe that it is a  
12 shared relationship inside the attorney-client  
13 relationship when counsel -- when he has  
14 counsel.

15 JUSTICE SOTOMAYOR: One of my former  
16 colleagues said this isn't -- one must  
17 analogize these things to agency, that the  
18 defendant -- the lawyer is the agent of the  
19 defendant. And once they disagree, the agency  
20 ends.

21 MS. MURRILL: Yes, Your Honor.

22 JUSTICE SOTOMAYOR: So if the agency  
23 has ended because the client has said: Don't  
24 do this, how could it not be a violation of the  
25 Sixth Amendment to do it?

1 MS. MURRILL: Because agency  
2 principles only take us so far. And because  
3 even the ABA standards on -- on criminal  
4 defense standards don't suggest that they do,  
5 that -- that agency principles, especially in a  
6 death penalty case, can only take you so far.

7 And that if we -- if we -- if we look  
8 at this purely as a question of agency, then we  
9 are viewing the lawyer's relationship simply as  
10 the alter ego of the client, but I think --

11 JUSTICE BREYER: Your point -- I see  
12 your point. Normally these are questions of  
13 the bar rules of -- rules of ethics for lawyers  
14 and so forth. And normally they do what the  
15 client says. That's the normal situation.

16 Right here it was pretty clear that on  
17 the most major matter in respect to the trial,  
18 he did the opposite and said his client was  
19 guilty. So why didn't this work out just the  
20 way you said? Why didn't the defendant say it  
21 violates the ethics rules, it was therefore  
22 ineffective; therefore, give me a new trial?

23 MS. MURRILL: Your Honor, I think this  
24 was a very, very difficult client and that that  
25 -- that is part of the equation in this case.

1 JUSTICE BREYER: And the ethics rule  
2 say it's all different when -- when you have a  
3 difficult client? I think many are difficult.

4 MS. MURRILL: The ethics rules don't  
5 tell us what to do.

6 JUSTICE BREYER: No, but you just said  
7 the ethics rule say follow the wishes of your  
8 client. I mean, that's what's worrying me  
9 obviously, in fact, about the case is the  
10 extent to which it is fed into the Sixth  
11 Amendment, because there is so many different  
12 situations.

13 But if anything is fed into the Sixth  
14 Amendment, I would think the example of the  
15 lawyer going in against his wishes and saying  
16 he is guilty of the crime charged, which is  
17 basically what happened, that that might or  
18 must.

19 MS. MURRILL: Well, Your Honor, I  
20 mean, I think the state has been -- has been  
21 very clear that we think that the defense that  
22 Mr. McCoy wanted was inextricably intertwined  
23 with the alibi that Mr. McCoy wanted.

24 That it was not purely a questionable  
25 --

1 JUSTICE BREYER: But they're not  
2 saying about what you have to put on or not put  
3 on. They're just saying the Sixth Amendment  
4 says you can't go to the jury and say -- as  
5 this lawyer did -- my client is guilty of the  
6 crime charged.

7 Now -- now that's the extreme case  
8 that's put to us. Now why doesn't that violate  
9 the Sixth Amendment?

10 MS. MURRILL: Because at the end of  
11 the day it leaves him with a less -- less of a  
12 defense, a less -- the defense is not as  
13 strong. It is a weaker defense.

14 He has not waived his right to  
15 counsel. He hasn't waived the remedy of  
16 ineffective assistance of counsel.

17 And so he's -- he's -- he is tying his  
18 counsel's hands.

19 JUSTICE KAGAN: Well, for sure we've  
20 given lawyers a lot of leeway to make quite a  
21 number of decisions when they're representing  
22 the defendant, troubled and untroubled, and the  
23 idea is that lawyers know better sometimes than  
24 their clients and that we should want to lodge  
25 a great many strategic decisions in their

1 hands, rather than in the client's.

2 But you're not talking about here or  
3 we're not talking about here, about how to  
4 pursue a set of objectives. Is it better to  
5 pursue it this way or is it better to pursue it  
6 that way?

7 We're talking about a client saying:  
8 You have to follow -- I have -- I have an  
9 overriding objective in this case, and that's  
10 to avoid the opprobrium that comes with  
11 admitting that I killed family members. And  
12 that's my overriding objective.

13 And you're saying that the lawyer can  
14 say it doesn't matter that that's your  
15 overriding objective. And I guess what I want  
16 to know is why?

17 MS. MURRILL: Well, because -- first,  
18 Your Honor, I don't think that that's entirely  
19 how Mr. McCoy characterized his objective. I  
20 -- I would describe it more as though he said I  
21 know a better way to cross this divide and  
22 we're going to cross it by letting me drive the  
23 -- this car over the cliff because the car will  
24 fly.

25 JUSTICE GINSBURG: But he didn't say

1 that. He said, and I think this much is clear  
2 from the record, he said in no uncertain terms  
3 I do not want to concede that I killed these  
4 three people.

5 MS. MURRILL: Yes, Justice Ginsburg.

6 JUSTICE GINSBURG: He wasn't talking  
7 about strategy at that time. He just said I do  
8 not want to concede that I killed these people.

9 I think we -- we've heard that -- that  
10 -- from Mr. Waxman, a lawyer can't make that  
11 concession, but the lawyer doesn't have to do  
12 anything else. They can just stand there and  
13 let the client get on the stand and tell  
14 whatever story the client wants to tell.

15 MS. MURRILL: No, Your Honor. I mean,  
16 I don't think that we -- I think that the  
17 problem that that presents is that the lawyer  
18 is now less effective than he could be,  
19 especially in a case like this when -- and we  
20 will -- I will give Mr. English the benefit of  
21 the doubt that he did not believe that his  
22 client was going to lie and yet he believed the  
23 alibi was entirely falsified.

24 So he -- he's giving him the benefit  
25 of the doubt. He believed his client was

1 delusional. And -- and so that does bring into  
2 play other rules of ethics. It doesn't really  
3 give him the answer of what to do and how to do  
4 it, but his ultimate objective, his ultimate  
5 objective is to try and do the right thing for  
6 his client, to defeat the death penalty, and to  
7 save his life.

8 JUSTICE ALITO: But --

9 JUSTICE KAGAN: But the client is  
10 saying this his ultimate objective is not to  
11 defeat the death penalty. In other words, you  
12 just have conflicting objectives.

13 I mean, I totally understand that this  
14 lawyer was in a terrible position because this  
15 lawyer wants to defeat the death penalty. And  
16 he has a client who says: That's not my goal  
17 here.

18 But the question is when that happens,  
19 does the lawyer have to step back and say: You  
20 know what? That's not his goal. His goal is  
21 to avoid admitting that he killed his family  
22 members.

23 MS. MURRILL: Well, and so if that's  
24 all he had said and that was the totality of  
25 the circumstances was I don't want to admit



1 that, and it was -- it was a rational, fine  
2 discussion, I don't want to admit that, I don't  
3 want anybody to hear that, that's fine.

4 JUSTICE ALITO: When we got to this --

5 MS. MURRILL: That's not what  
6 happened.

7 JUSTICE ALITO: We got to this -- the  
8 situation here occurred -- and it's an extreme  
9 situation, and a difficult one -- but it -- it  
10 only occurred because of a number of prior  
11 steps, many of which I think are debatable.

12 One, the decision that McCoy is  
13 competent to handle -- to stand trial.

14 The second, the -- the judge's ruling,  
15 I understand the reason, that English couldn't  
16 withdraw. The decision that there couldn't be  
17 a continuance, so that McCoy could find another  
18 attorney, if he could find one who would put on  
19 his far-fetched alibi defense. And McCoy's  
20 refusal to waive his right to counsel and  
21 represent himself.

22 Now, if any of those had gone  
23 differently, the situation wouldn't have been  
24 presented. So what about the issue of -- what  
25 about the issue of competence and allowing

1 English to withdraw?

2 If a -- if somebody like McCoy really  
3 sincerely believes that he did not commit these  
4 physical acts, but it was all done by -- as  
5 part of an elaborate conspiracy, is he -- is he  
6 capable of assisting in his own defense?

7 MS. MURRILL: Your Honor, that's a  
8 very difficult question. I -- I agree it's a  
9 very tough question, and I think it is a -- it  
10 is a question in tension in this case, but it's  
11 not the question that was presented.

12 JUSTICE GINSBURG: Wasn't -- wasn't  
13 there --

14 MS. MURRILL: And -- and so the  
15 question is really about counsel --

16 JUSTICE GINSBURG: Wasn't there a  
17 motion -- there was a determination that he was  
18 competent to stand trial?

19 MS. MURRILL: There -- there was a  
20 determination that he was competent. There was  
21 a subsequent review of that determination on  
22 the motion for new trial by the trial judge,  
23 and there was a third review of that decision  
24 by the Louisiana Supreme Court.

25 JUSTICE ALITO: All right. If I

1 could --

2 JUSTICE BREYER: The -- the lawyer put  
3 on a defense?

4 JUSTICE ALITO: -- just move on to the  
5 -- the other part of it. So, if English says  
6 to the judge, look, Your Honor, I can't be part  
7 of -- and I don't want to be part of this  
8 farce, it -- and this farce that has the  
9 predictable result of sending this -- my client  
10 to a death sentence, I want to withdraw, why  
11 shouldn't the judge let him withdraw?

12 MS. MURRILL: Perhaps he should at a  
13 certain point in time, but I think that's a  
14 limited right in and of itself and -- and that  
15 the judge has to make that decision based on an  
16 abuse of -- and that's an abuse of discretion  
17 standard. And -- and that was raised in this  
18 case too.

19 So, I mean, maybe that would have been  
20 an answer. I think it has to happen at the  
21 right time and under the right circumstances.

22 JUSTICE BREYER: Would the lawyer --  
23 did -- did his lawyer put on a defense? He  
24 conceded that -- he didn't fight the  
25 competence. But did he put on a defense that

1 the defendant was not competent at the time of  
2 the murder, that his -- that his mental state  
3 was such that he couldn't be convicted?

4 MS. MURRILL: The entire tenor of his  
5 defense was to attack mens rea and then  
6 subsequently to beg for mercy in the -- the  
7 penalty phase if there was --

8 JUSTICE BREYER: To attack mens rea on  
9 the ground that it was not -- he was not  
10 mentally competent at that time?

11 MS. MURRILL: Yes, Your Honor, that he  
12 didn't have the capacity to develop the  
13 specific intent --

14 JUSTICE GORSUCH: Counsel, you've been  
15 asking us to review this under Strickland, but  
16 why -- why isn't this a structural error? The  
17 Sixth Amendment guarantees the assistance of  
18 counsel, as Mr. Waxman points out, and that is  
19 a fiduciary relationship. And when someone  
20 doesn't just admit an element but admits guilt  
21 of second-degree murder, which is effectively  
22 what happened here, why isn't that structural  
23 error? A total denial of assistance of  
24 counsel, absence of an assistance of counsel,  
25 that we should take cognizance of and draw the

1 line there?

2 MS. MURRILL: Your Honor, first of  
3 all, because I don't think it fits within the  
4 class of cases that have been evaluated as  
5 Cronic, complete failure of adversarial  
6 testing --

7 JUSTICE GORSUCH: Well, why -- why  
8 isn't this just like Faretta, where we said,  
9 you know, that you have a right to have  
10 assistance of counsel and not to have an agent  
11 of the state assist the state in prosecuting  
12 you?

13 MS. MURRILL: Well, initially, because  
14 I would suggest to you it was not a -- he was  
15 not an agent of the state. He was Mr. McCoy's  
16 counsel of choice.

17 JUSTICE GORSUCH: You'd agree, though,  
18 that he -- he effectively conceded guilt to  
19 second-degree murder?

20 MS. MURRILL: As a strategy and a  
21 means of defeating the death penalty and  
22 testing the state's case on specific intent.

23 JUSTICE SOTOMAYOR: I'm sorry, I  
24 thought it's been not disputed that he thought,  
25 quite wrongly, that there was no mens rea for

1 second-degree murder but that it's been  
2 conceded that what -- there -- that there was a  
3 mens rea both for first and second degree and  
4 he was only arguing for second degree?

5 MS. MURRILL: Your Honor, on the facts  
6 of this case, he was arguing for second degree.  
7 Louisiana law does permit -- does -- does cover  
8 -- felony murder is not a specific intent to  
9 kill, but that was really never at issue in  
10 this case. It was charged as a second degree.

11 JUSTICE SOTOMAYOR: I'm sorry, but  
12 there is a mens rea for second degree murder.

13 MS. MURRILL: There is, yes.

14 JUSTICE SOTOMAYOR: And so --

15 MS. MURRILL: Yeah, I mean, I --

16 JUSTICE SOTOMAYOR: -- you concede  
17 that there wasn't second degree?

18 MS. MURRILL: I think that that was a  
19 strategy decision that falls under the first  
20 prong of Strickland. And -- and if that was,  
21 in fact, the wrong decision, then it was still  
22 -- would fail potentially the first prong of  
23 Strickland, and then we would go to the second,  
24 but I think that does go back to Strickland and  
25 most -- all of the questions about how he did,

1 what he did, and the choices that he made,  
2 ultimately, I think, fall under the first  
3 point.

4 JUSTICE BREYER: And that's -- I now  
5 understand why we are where we are. The -- in  
6 this case he did not, the lawyer, concede that  
7 his client was guilty of the crime charged.  
8 Rather, he said he conceded that he had shot  
9 the people, killed the people, but he's not  
10 guilty because of his state of mind.

11 So it's a question of the defense.  
12 That's why he started with elements and so  
13 forth. You have to go down some road like  
14 that.

15 MS. MURRILL: Yes.

16 JUSTICE BREYER: All right. And so  
17 your view is that even here, where he's saying  
18 I did this thing, but I didn't have the mental  
19 element -- I did this thing -- the client says  
20 don't say I did this thing, and that's the  
21 problem and -- okay, I've got the problem.  
22 Sorry. I should have it before now, but --  
23 but --

24 MS. MURRILL: I -- Justice Breyer, I  
25 think -- I think that you captured where the

1 state is when you said let's -- don't freeze  
2 that answer into the Sixth Amendment. That's  
3 --

4 JUSTICE BREYER: Well, what's your --  
5 what's -- that's fine to say in abstract terms,  
6 but -- but -- but our problem, I think, at  
7 least mine, is I have to write something here  
8 that is going to be taken as a rather  
9 authoritative account.

10 Now, what is your view as to what  
11 those words should be? That he can do  
12 anything, the lawyer, no matter how  
13 incriminating it is to the client as long as he  
14 says I want to follow a different defense, a  
15 different defense than my client wants? That's  
16 your view of it?

17 And leave the rest to the -- to  
18 Strickland, the bar association, et cetera. Is  
19 that your view?

20 MS. MURRILL: Well, then I -- I --

21 JUSTICE BREYER: What is your view, if  
22 you can say it in a sentence or two?

23 MS. MURRILL: That in a very narrow  
24 class of death penalty cases, counsel may be  
25 required to override the decision of his



1 client, if that's -- if -- if the client's  
2 strategy is -- is futile and --

3 JUSTICE GORSUCH: Well, if we're  
4 there, though, in Strickland, even in  
5 Strickland, on deficient performance, why isn't  
6 there at least deficient performance here by  
7 the lawyer admitting the element as opposed to  
8 remaining mute about it? That would have been  
9 an option that I think the lawyer could have  
10 pursued.

11 So we'd still have prejudice prong, I  
12 understand your arguments there, but why not on  
13 deficient performance? I would have thought  
14 under the ethical rules, which I know are not  
15 controlling here, that you -- you would have  
16 had an argument for an ethical violation in  
17 conceding your client's guilt.

18 MS. MURRILL: And -- and I would  
19 expect them to make that argument. They've  
20 reserved their Strickland claims. They  
21 reserved them before the Louisiana Supreme  
22 Court. They can bring those claims in  
23 subsequent post-conviction review proceedings.  
24 And they have expressly reserved them in their  
25 proceedings here.

1           So I would suggest that it would not  
2           be appropriate to pretermite that inquiry, that  
3           a state court should make that decision, and  
4           that those are factual findings that need to be  
5           made.

6           JUSTICE GINSBURG: But not if this is  
7           a case that comes under Cronic. If it's -- if  
8           it's a Cronic case, as Mr. Waxman urged that it  
9           is, then there's no Strickland analysis,  
10          there's no prejudice inquiry; it's just  
11          automatic new trial because the Sixth Amendment  
12          right is violated, not --

13          MS. MURRILL: And -- and so, Justice  
14          Ginsburg, I would suggest that the Sixth  
15          Amendment is not violated until -- if it is a  
16          Strickland question, which we submit that it  
17          is, the Sixth Amendment isn't violated until he  
18          has --

19          JUSTICE GINSBURG: But why isn't it --

20          MS. MURRILL: -- we have demonstrated  
21          both prongs.

22          JUSTICE GINSBURG: -- it a Cronic  
23          question? This is a -- a -- a lawyer who has  
24          said I concede my client did it, against the  
25          client's will, has made that concession.

1                   Why isn't that a Cronic error?

2                   MS. MURRILL:   Because I think it's not  
3                   a complete failure of adversarial testing and  
4                   that it -- it fundamentally tested the state's  
5                   case.  It did not relieve the state of its  
6                   burden of proof.  The state put on overwhelming  
7                   evidence of this man's guilt.

8                   JUSTICE KENNEDY:  Can I --

9                   JUSTICE GINSBURG:  What about the --

10                  JUSTICE KENNEDY:  Can I put in my  
11                  notes in this case -- can I take away from your  
12                  argument that the state of Louisiana says that  
13                  if a defendant wants to plead not guilty, the  
14                  defense attorney can plead guilty if the  
15                  defense attorney thinks that's the best way to  
16                  avoid the death penalty?

17                  MS. MURRILL:  No, Your Honor,  
18                  because --

19                  JUSTICE KENNEDY:  So you do not agree  
20                  with that proposition?

21                  MS. MURRILL:  I do not agree with that  
22                  proposition --

23                  JUSTICE KENNEDY:  How is that  
24                  proposition any different from what really  
25                  happened in this case?

1 MS. MURRILL: Because the state was  
2 still put to its burden of proof. Because I  
3 think -- I think that in Florida v. Nixon, this  
4 Court did evaluate the nature of the defense  
5 itself and that it is not the equivalent of a  
6 guilty plea. So he didn't change the guilty  
7 plea. He tested the state's case. And he --  
8 he -- I mean --

9 JUSTICE GINSBURG: I thought -- I  
10 thought he said I'm relieving the prosecutor of  
11 that burden. That burden --

12 MS. MURRILL: He made that statement.  
13 He did make that statement in his closing  
14 arguments, but he couldn't actually do it. He  
15 had no power to relieve the state of its  
16 burden.

17 CHIEF JUSTICE ROBERTS: Maybe this is  
18 the same question Justice Kennedy was getting  
19 at, but what if there was a discussion before  
20 and the client told the lawyer: So I  
21 understand you think you are doing your job  
22 keeping me from the death sentence, but I don't  
23 want -- it's worse for me to spend the rest of  
24 my life in jail, that's my perspective, so I  
25 don't want you to pursue your objective of

1 saving the death penalty.

2 He said I've got this -- and so if  
3 that's not the case, I don't want to make it an  
4 easier case on second degree. Our only chance  
5 is to defeat first degree murder and here's how  
6 I'm going to do it; so you cannot stand up and  
7 say that he's guilty because that's just  
8 getting me life in prison and that's worse.

9 And the lawyer -- does the lawyer then  
10 still have the right to pursue his strategy?  
11 Still has the right to say: Yes, I'm going to  
12 tell you he's guilty but he doesn't have the  
13 mens rea?

14 MS. MURRILL: I think in that -- I  
15 think in that situation, you probably are going  
16 to fail the deficiency prong of Strickland and  
17 probably the prejudice prong.

18 And -- and you are, in your  
19 hypothetical, talking about a rational  
20 conversation with someone who is cooperative.  
21 I mean, that's not correct on this case.

22 Mr. McCoy simply said I won't talk to  
23 you any more, I want my alibi, I want to  
24 subpoena David Vitter, Senator David Vitter,  
25 and -- and put on all this crazy stuff. And --

1 and I can -- I can prove --

2 JUSTICE SOTOMAYOR: So the further --

3 MS. MURRILL: -- that I wasn't -- that  
4 I was in Houston.

5 JUSTICE SOTOMAYOR: So the further  
6 footnote is it's -- only happens if your client  
7 is not rational, that that's where you have the  
8 freedom to ignore your client?

9 MS. MURRILL: No, Your Honor. I think  
10 that -- I think that our rule, by placing it  
11 under Strickland, falls within the -- the  
12 principles that have been applied by state  
13 courts over and over again that you look at the  
14 totality of the circumstances, that the rules  
15 of ethics and norms of practice do inform  
16 counsel's judgment, and that in most cases you  
17 would validate the decision of the client.

18 JUSTICE KAGAN: But, Ms. Murrill, I --  
19 I think all of these questions go to the same  
20 point, which is Strickland seems a very awkward  
21 fit here because there's nothing wrong with  
22 what this lawyer did, if the goal is avoiding  
23 the death penalty.

24 This lawyer probably did the best  
25 thing, the thing that a good lawyer would do if

1 the goal were avoiding the death penalty. The  
2 problem that this case presents is something  
3 different.

4 It's the lawyer's substitution of his  
5 goal of avoiding the death penalty for the  
6 client's goal, as the Chief Justice said, I  
7 don't care about that. I don't want to avoid  
8 the death penalty. I -- I -- that's not my  
9 paramount goal.

10 My paramount goal is to insist until  
11 my last breath that I didn't kill my family  
12 members.

13 MS. MURRILL: Well, Justice Kagan, I  
14 think the record reflects that's not -- that  
15 what Mr. McCoy wanted was to defeat the death  
16 penalty by the means that he wanted it, which  
17 was his alibi. So, I --

18 JUSTICE GORSUCH: Well, let's take  
19 Justice Kagan's hypothetical then on its own  
20 terms. What would be the outcome in that case?

21 MS. MURRILL: I think that probably to  
22 some degree goes back to Justice Roberts'  
23 hypothetical about a rational conversation with  
24 a defendant who was willing to have a  
25 conversation and not simply close the door to

1 the discussion, which -- which is much more  
2 like the defendant in -- in Nixon.

3 JUSTICE GORSUCH: Let's posit all of  
4 that, that we have a competent, rational,  
5 thoughtful individual who makes a calculated  
6 decision autonomously, that that's the route he  
7 or she wishes to go.

8 Is it -- can we even call it  
9 assistance of counsel? Is that what it is when  
10 a lawyer overrides that person's wishes?

11 MS. MURRILL: I -- I do believe it  
12 still falls within assistance of counsel. And  
13 I -- I think that that is answered by the  
14 deficiency prong and the norms of practice --

15 JUSTICE BREYER: Did the --

16 MS. MURRILL: -- and the totality of  
17 the circumstances. And he would probably win  
18 that.

19 JUSTICE BREYER: Did -- -- did -- I'm  
20 thinking back, I think the Chief asked you, or  
21 maybe it was Justice Kennedy, he quoted the  
22 language where he said "I have relieved you of  
23 your burden," so he says, "I have relieved you  
24 of your burden," he says to the jury, and he  
25 also says, "and he's guilty." That was



1 earlier.

2 Now, in the context, was that -- you  
3 are familiar with the record. All right. Was  
4 that, in fact, an admission that he committed a  
5 crime; namely, first degree murder or second  
6 degree murder or both, or are you saying, no,  
7 it was not an admission because -- if -- if it  
8 was not an admission, then why didn't he tell  
9 the jury: But, you see, he had a mental state  
10 that makes it impossible for you to convict.  
11 Or did he?

12 MS. MURRILL: He did. He did tell --

13 JUSTICE BREYER: He said you cannot  
14 convict because he has a mental state that  
15 prevents you from convicting him for either  
16 first or a second degree murder.

17 MS. MURRILL: He argued that --

18 JUSTICE BREYER: And I'll --

19 MS. MURRILL: -- consistently from  
20 start to finish.

21 JUSTICE BREYER: And he put -- and his  
22 closing statement said that too?

23 MS. MURRILL: Yes.

24 JUSTICE SOTOMAYOR: I'm sorry. I  
25 thought -- I'll go back to it, but I thought

1 the essence of his closing statement was he's  
2 not deserving of the death penalty because, as  
3 you heard him, he's a sick man.

4 MS. MURRILL: It -- it -- the -- the  
5 specific words that he used, the totality of  
6 his defense from start to finish was that he  
7 did not have the mens rea necessary to support  
8 the death penalty, the first degree charge.  
9 And that was the gist of it.

10 There's some creep in his arguments  
11 over time, I think the words are there on the  
12 page, but I would submit to you, again, that is  
13 argument and that that is a deficiency question  
14 under Strickland, that that is always --  
15 argument has always been a question of  
16 deficiency under -- under Strickland. That's  
17 not a new proposition.

18 So I think that if we're -- he still,  
19 and I would submit go -- that we should go back  
20 and look at what happened with the court and --  
21 and that ultimately to my very able friends to  
22 the left of me, this was not a court error.  
23 This was a counsel decision.

24 And the court and the prosecutor went  
25 over -- bent over backwards to try and protect

1 this record. There was very little more that  
2 they could do to protect the record once trial  
3 had started, once they were at the point where  
4 they were choosing a jury.

5 So -- so I think that it was a very,  
6 very complicated situation, and when we get to  
7 that point then it needs to be a Strickland  
8 question --

9 JUSTICE GINSBURG: I -- I still --

10 MS. MURRILL: -- because it's too  
11 hard.

12 JUSTICE GINSBURG: -- and when you say  
13 Strickland question, the -- the client says I  
14 didn't do it and I have a right to take that  
15 position. You agree that the client has a  
16 right to take that position?

17 MS. MURRILL: Certainly, Your Honor, I  
18 think the client can take that position.

19 JUSTICE GINSBURG: So the client can  
20 do that. And the client can say: When my  
21 lawyer tells you that I did it, he has violated  
22 my privilege against self-incrimination. He  
23 has incriminated me. He has said I've done  
24 something that I haven't conceded that I've  
25 done. What's happened to my Fifth Amendment

1 privilege?

2 MS. MURRILL: Justice Ginsburg, I  
3 think that the Fifth Amendment could be  
4 implicated in certain factual scenarios. I  
5 think in this particular case what we saw were  
6 a -- a repeated, consistent sequence of waivers  
7 of the Fifth Amendment, so that everything he  
8 said was already in the record; that he had  
9 repeatedly put this information with his alibi  
10 statements and his statements in the court  
11 where the court continued to Miranda and read  
12 him his rights over and over again.

13 And so all of this information was in  
14 the record. And now counsel has to cope with  
15 it. And that was part of the problem too.

16 So it -- it -- it is a -- a situation  
17 where you certainly had a very difficult  
18 client. You had a death penalty case. We are  
19 very near the -- two days before trial, and  
20 that's where we are suggesting you draw the  
21 line and treat it as an ineffective assistance  
22 of counsel claim, but not that it doesn't  
23 implicate other rights potentially, depending  
24 on when it happens.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Three minutes, Mr. Waxman.

3 REBUTTAL ARGUMENT OF SETH P. WAXMAN

4 ON BEHALF OF RESPONDENT

5 MR. WAXMAN: I know I'll never do  
6 this. I'll try to make five points:

7 First, Justice Gorsuch, this is  
8 structural error. The fact of the matter is  
9 that this was presented to the trial court, not  
10 once, but twice on the record that what the  
11 defendant was asking for is: I don't want my  
12 lawyer to admit that I am guilty and the trial  
13 court's ruling in this case made that  
14 structural error and not ineffective -- not  
15 properly viewed as ineffective assistance of  
16 counsel. Just as in Gonzalez-Lopez and in  
17 Faretta, it was structural error.

18 Second, the notion that what Mr. McCoy  
19 was asking for was not that his lawyer not  
20 stand up and admit that he was guilty, but that  
21 he -- he insists on putting on an alibi defense  
22 is simply refuted by the record.

23 At page 398 of the Joint Appendix,  
24 this is during an argument in -- six months  
25 before the trial, the argument was all about

1     whether his -- Mr. McCoy's subpoenas had to be  
2     enforced or not and whether Mr. English should  
3     be supporting him.

4             Mr. McCoy tells the court: I am not  
5     asking him to validate any theory. This was --  
6     there was a dispute about whether Mr. English  
7     was, in fact, investigating his alibi defense.  
8     If there ever were a subsequent hearing about  
9     that, that would be tested.

10            But this is flat out a case in which  
11     the judge was told as soon as this issue arose,  
12     twice on the record, I believe that I have an  
13     ethical duty to save my client's life and the  
14     client telling the judge: I do not want my  
15     lawyer admitting that I am guilty. That's  
16     structural error.

17            Number 2, Justice Breyer, this was  
18     absolutely an admission of the charge -- guilt  
19     on the charged crime. At opening and at  
20     closing, Mr. English got up and said: I am  
21     telling you he is guilty of second degree  
22     murder and he should spend the rest of his life  
23     in prison.

24            And under -- under Louisiana law, the  
25     jury -- the jury was required to be given the

1 choice, the following choices, which it was:  
2 murder 1, murder 2, manslaughter, and not  
3 guilty. And there is no dispute in the record  
4 that murder 1, murder 2, and manslaughter all  
5 have exactly the same mens rea defense as  
6 murder 1. That is not what distinguishes those  
7 crimes.

8 As to Cronic, as we've said, we don't  
9 think --

10 CHIEF JUSTICE ROBERTS: You can finish  
11 your third point.

12 MR. WAXMAN: As to Cronic, we don't  
13 think this is an ineffective assistance of  
14 counsel case but it surely is -- it surely is  
15 Cronic if it were because if the constitutional  
16 right to defend means anything, it means the  
17 right to decide to test the prosecution on its  
18 burden of proof beyond a reasonable doubt.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel. The case is submitted.

21 (Whereupon, at 12:04 p.m., the case  
22 was submitted.)

23

24

25

## Official - Subject to Final Review

<b>1</b>	22 27:13,15 <b>agency</b> <sup>[6]</sup> 33:17,19,22 34:1,5,8 <b>agent</b> <sup>[3]</sup> 33:18 44:10,15 <b>agree</b> <sup>[9]</sup> 5:21 11:11 29:25 31:16 41:8 44:17 50:19,21 58:15 <b>agreeing</b> <sup>[1]</sup> 11:13 <b>agreement</b> <sup>[1]</sup> 8:16 <sup>[3]</sup> 4:10 28:16 29:23 <b>alibi</b> <sup>[9]</sup> 17:14 35:23 38:23 40:19 52:23 54:17 59:9 60:21 61:7 <b>ALITO</b> <sup>[23]</sup> 10:7 18:9,13 19:19,23 20:22 21:9,25 22:4,7,9,13 26:11 28:16 29:13,15 30:1,7 39:8 40:4,7 41:25 42:4 <b>Alito's</b> <sup>[1]</sup> 24:6 <b>alleges</b> <sup>[1]</sup> 24:23 <b>allowing</b> <sup>[1]</sup> 40:25 <b>already</b> <sup>[1]</sup> 59:8 <b>alter</b> <sup>[1]</sup> 34:10 <b>although</b> <sup>[1]</sup> 17:24 <b>ambiguity</b> <sup>[1]</sup> 14:7 <b>Amendment</b> <sup>[30]</sup> 3:18 6:11 9:12 13:7 21:15,21 22:18 25:15,22 26: 10 27:19 28:2 29:16 31:22,22 32: 10,19 33:25 35:11,14 36:3,9 43: 17 47:2 49:11,15,17 58:25 59:3,7 <b>amicus</b> <sup>[1]</sup> 28:3 <b>analogize</b> <sup>[1]</sup> 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