THE RIGHT TO DECIDE AN ATTORNEY IS WRONG: THE EXTENT OF A DEFENDANT'S RIGHT TO CONTROL THE OBJECTIVE OF THE DEFENSE AND REJECT COUNSEL'S TRIAL STRATEGY

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INTRODUCTION

Madeleine L'Engle, the author of *A Wrinkle in Time*, once wrote that "to take away a man's freedom of choice, even his freedom to make the wrong choice, is to manipulate him as though he were a puppet and not a person."[1] Nevertheless, should freedom of choice be overridden if the choice could be detrimental to a person's life and liberty interests? The idea of autonomy has always been a deeply embedded piece of our societal consciousness, and its importance in different areas of the law has only grown over time.[2] Even so, courts have recognized the growing tension between allowing complete autonomy over a criminal trial and ensuring that defendants receive fair trials and just results.[3]

The Sixth Amendment recognizes the pre-existing inalienable right to effective assistance of counsel during all criminal prosecutions in which the court might impose a term of imprisonment.[4] However, the Supreme Court has also recognized that the right to counsel implicitly creates the right to reject counsel.[5] Yet, there are still limits imposed on the right to pro se

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[1] Madeleine L'Engle, THE YOUNG UNICORNS 202 (Macmillan ed., 2008).

[2] *See* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. REV. 1147, 1152 (2010) (stating that autonomy has had a particularly dominant role in First Amendment and substantive due process law over the past four decades).

[3] Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 696 (2006) (recognizing the tension between autonomy and reliability in a criminal trial).

[4] Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (stating that "[u]nder the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel").

[5] Faretta v. California, 422 U.S. 806, 832 (1975) (acknowledging that "[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation").

representation. Despite the Court's attempts to broadly answer questions in this area of law, there are gaps left between these distinguished rights, and defendants and attorneys alike are left questioning how much control or autonomy defendants with counsel can exercise over their own trial. This comment attempts to address the limits of a defendant's autonomy interest and the scope of a defendant's ability to reject certain trial strategies proposed by their attorney.

The recent Supreme Court decision in *McCoy v. Louisiana*, previous Supreme Court precedent in related areas of the law, and public policy point to the conclusion that a criminal defendant's Sixth Amendment autonomy interest extends beyond preventing the concession of guilt over a client's objection. Accordingly, a defendant maintains the right to completely control important aspects of their defense, such as the concession of any element of the crime, regardless of whether the accused crime is capital or non-capital.

I. THE FOUR CLEARLY ESTABLISHED DECISIONS IN WHICH A DEFENDANT HAS COMPLETE AUTHORITY OVER COUNSEL

Before venturing into murky constitutional terrain, it is necessary to explore the more clearly developed contours of a defendant's constitutional rights. Precedent dictates that a defendant has the "ultimate authority" over four determinations in their criminal trial: waiver of their right to a jury trial, acceptance of a guilty plea, the appeal of their case, and the choice to take the stand.[6] Because all of these decisions require the waiver of a constitutional right, it is imperative that the accused holds all of the decision-making power, and defense counsel is required to obtain consent.[7]

A. Accepting or Rejecting Plea Deals/Guilty Pleas

Due to the high stakes involved in entering a guilty plea, the law requires more than a mere lack of objection from a defendant.[8] Thus, a defendant wields complete authority, and counsel lacks the ability to consent to a guilty plea or accept a plea deal on behalf of the defendant.[9] Case law expanded a

[6] Jones v. Barnes, 463 U.S. 745, 751 (1983); Florida v. Nixon, 543 U.S. 175, 187 (2004).

[7] *Nixon*, 543 U.S. at 187; Alvord v. Wainwright, 469 U.S. 956, 959–60 (1984) (Marshall, J., dissenting).

[8] Boykin v. Alabama, 395 U.S. 238, 242 (1969) (stating that a plea of guilty is itself a conviction, and thus, the court cannot presume voluntary waiver of rights from a silent record).

[9] *See Jones*, 463 U.S. at 751.

defendant's right to choose to accept a plea deal, and attorneys are now required to communicate all plea offers to the defendant and cannot reject an offer without first receiving consent from their client.[10] Courts have also used the right to plead guilty as a stepping stone for finding other constitutional entitlements.[11]

Ultimately, the decision to plead guilty affects other important decisions because the defendant is waiving the right to a trial, the right to appeal on the merits, the privilege against self-incrimination, and ultimately releasing the prosecution of its burden of proof.[12] Due to the serious consequences involved, a court can still refuse to accept a defendant's decision to enter a guilty plea if the plea is not voluntarily and knowingly made.[13]

B. Waiver of Jury Trial

Although a defendant is guaranteed the right to have a jury trial in a criminal proceeding, the accused can waive this right and subject themself to a bench trial instead.[14] Of course, the decision to waive the jury trial must be made exclusively by the defendant and not the attorney.[15] However, the right to waive a jury trial is not absolute, and trial courts can impose additional requirements for accepting the waiver to ensure that justice is properly served.[16] Unlike the other decisions a defendant has control over, the waiver of a jury trial also implicates the independent right of members of the public

[10] Missouri v. Frye, 566 U.S. 134, 145 (2012) (holding that generally "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused" and failure to do so would constitute ineffective assistance of counsel).

[11] *Ex parte* Barbee, 616 S.W.3d 836, 842 (Tex. Crim. App. 2021) (recognizing that the defendant's right to assert innocence against the advice of counsel stemmed from the "defendant's right to decide whether to plead guilty and from his right to reject the assistance of counsel").

[12] *See* Class v. United States, 138 S. Ct. 798, 805 (2018) (quoting United States v. Broce, 488 U.S. 563, 573–74 (1989)); United States v. Vasquez-Hernandez, 314 F. Supp. 3d 744, 755 (W.D. Tex. 2018), *aff'd*, 924 F.3d 164 (5th Cir. 2019).

[13] *See* McCarthy v. United States, 394 U.S. 459, 462 n.4 (1969); FED. R. CRIM. P. 11(b)(2).

[14] Hallinger v. Davis, 146 U.S. 314, 320 (1892).

[15] CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-5.1, 4-5.2 (AM. BAR. ASS'N 2017).

[16] Singer v. United States, 380 U.S. 24, 36 (1965) (holding that there is no "constitutional impediment" in requiring the consent of the prosecuting attorney and the trial judge before accepting the waiver).

to view a public trial.[17] Thus, a balancing of societal interests justifies imposing more limits than the other determinations within a defendant's power.

C. Forgoing or Pursuing an Appeal

A defendant also has complete autonomy over the decision to forgo or pursue the appeal of their case.[18] Even if a client previously decided to waive their right to appeal, counsel should follow a client's request to file an appeal if "there are non-frivolous grounds to argue that the waiver is not binding or that the appeal should otherwise be heard."[19] If the client decides to file a non-frivolous appeal contrary to the advice of counsel, counsel must still present the appeal.[20] Likewise, an attorney cannot unilaterally decide to pursue an appeal and must obtain their client's consent before moving forward.[21]

Defense counsel's "failure to file a notice of appeal without defendant's consent is not per se deficient."[22] Even so, an attorney still has a constitutionally imposed duty to consult with the defendant about an appeal if there is reason to think that either a rational defendant would want to appeal or the defendant "reasonably demonstrated to counsel that he was interested in appealing."[23]

D. Taking the Stand or Invoking the Privilege Against Self-Incrimination

The Fifth Amendment's privilege against self-incrimination provides the accused with the guaranteed right "to remain silent unless he chooses to speak

[17] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 382–83 (1979) (holding that although there is a strong societal interest in public trials, it does not outweigh a defendant's constitutional rights).

[18] *SEE* MODEL CODE OF PRO. RESP. EC 7–8 (AM. BAR. ASS'N 2020).

[19] CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-9.2(d) (AM. BAR. ASS'N 2017).

[20] *Id.* at § 4-9.2(f).

[21] *Id.* at § 4-9.1(b) (stating that "[t]he ultimate decision whether to appeal should be the client's").

[22] Fitzpatrick v. Davis, CV H-18-1832, 2018 WL 5995069, at *3 (S.D. Tex. Nov. 15, 2018) (citing Roe v. Flores-Ortega, 528 U.S. 470, 470–71 (2000)).

[23] *Roe*, 528 U.S. at 480.

in the unfettered exercise of his own will."[24] Accordingly, the decision to take the stand and risk revealing incriminating information must be made entirely by the defendant and not counsel.[25] Despite the potential danger taking the stand may pose to the defense, courts have been reluctant to allow any limitation on a defendant's informed decision to take the stand or invoke their constitutional privilege to remain silent.[26]

With these four clearly established areas of autonomy in mind, courts have begun to tackle the scope of the newly recognized autonomy over a fifth determination: the "objective of the defense."[27] Although the Supreme Court recognized that the "objective of the defense" fell squarely within the control of the defendant, a lack of clarity regarding whether defensive theories and concession of elements are included within the "objective" has blurred the boundaries of this emerging autonomy right.[28]

II. THE RIGHT TO PRO SE REPRESENTATION

The Supreme Court first acknowledged that a right to assistance of counsel was a fundamental right under the Sixth and Fourteenth Amendments in *Gideon v. Wainwright*.[29] One of the considerations for affording such weight and importance to assistance of counsel was the fact that a defendant "lacks both the skill and knowledge to adequately prepare his defense, even though he [has] a perfect one."[30] Thus, without "the guiding hand of counsel," a defendant who is not guilty "faces the danger of conviction because he does not know how to establish his innocence."[31] Yet, the fact that a defendant's choice of self-representation may negatively impact their case has not been established as a sufficient reason to prevent the defendant from enforcing their constitutional right.

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[24] Harris v. New York, 401 U.S. 222, 229–30 (1971) (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

[25] *See id.* at 230.

[26] *See* Bell v. State, 5 So. 389, 389 (1889); Nassif v. District of Columbia, 201 A.2d 519, 520 (D.C. 1964); Brooks v. Tennessee, 406 U.S. 605, 609–11 (1972) (holding that the state interest in preventing testimonial influence was not sufficient to override a defendant's right to remain silent at trial); Brown v. Walker, 161 U.S. 591, 597–98 (1896) (stating that the accused may be compelled to answer questions on cross-examination upon choosing to take the stand).

[27] *See* McCoy v. Louisiana, 138 S. Ct. 1500, 1505, 1508 (2018).

[28] *Id.*

[29] 372 U.S. 335, 342 (1963).

[30] *Id.* at 345 (quoting Powell v. Alabama, 287 U.S. 45, 68–69).

[31] *Id.*

A. The Rights of a Pro Se Defendant

Despite the acknowledged importance of counsel in a criminal proceeding, the Supreme Court held that the right to counsel impliedly created the correlative right to not have counsel, and to "thrust counsel upon the accused, against his considered wish" would violate the purpose of the Sixth Amendment.[32] Therefore, a defendant in a criminal trial possesses a constitutional right of self-representation and may provide their own defense when voluntarily and intelligently electing to do so.[33] Courts have placed a significant emphasis on the fact that the Sixth Amendment refers only to the "assistance" of counsel, which contemplates that the accused is the "master of his own defense" and should only be aided in conducting the defense.[34] Therefore, the ability to elect pro se representation is necessary "to affirm the dignity and autonomy of the accused," which the Sixth Amendment seeks to protect.[35]

Although the right to pro se representation is as important as the right to effective assistance of counsel, courts have still recognized limitations.[36] For example, a defendant does not have an absolute right to pro se representation while appealing their case.[37]

B. The Rights of a Pro Se Defendant With Standby Counsel

Standby counsel is an attorney who is assigned to assist a pro se defendant.[38] The role of standby counsel is to "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."[39]

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[32] Faretta v. California, 422 U.S. 806, 820 (1975).

[33] *Id.* at 807.

[34] Gannett Co. v. DePasquale, 443 U.S. 368, 382 n.10 (1979).

[35] McKaskle v. Wiggins, 465 U.S. 168, 176–177 (1984).

[36] *See* HASHIMOTO, *supra* note 2, at 1156 (stating that limits imposed on pro se representation include imposing standby counsel without the defendant's consent, requiring defendants to follow the same evidentiary and courtroom rules as counsel, and requiring the defendant to invoke their right to self-representation before the trial begins).

[37] Martinez v. Ct. App. of Calif., 528 U.S. 152, 163 (2000) (acknowledging that States can conclude that "the government's interests in ensuring the integrity and efficiency of the appellate process outweigh an invasion of the appellant's interest in self-representation," but States may choose to recognize a constitutional right to appellate self-representation).

[38] Anne Bowen Poulin, *Ethical Guidance for Standby Counsel in Criminal Cases: A Far Cry from Counsel?*, 50 AM. CRIM. L. REV. 211, 211 (2013).

[39] *Id.* at 215 (quoting Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

As previously stated, the Counsel Clause "implies a right in the defendant to conduct his own defense, with *assistance*," at trial.[40] Therefore, standby counsel is not only permitted for a pro se defendant, but their unsolicited participation may sometimes be appropriate.[41] Furthermore, a trial court may appoint standby counsel even if the defendant objects in order to preserve the defendant's right to assistance of counsel.[42] Even so, the actions of an attorney appointed as standby counsel cannot interfere with the rights afforded to a pro se defendant.[43] Although the right to self-representation is not violated simply by the appointment of standby counsel, courts have limited their role in the defense in order to prevent a violation.[44]

When independent counsel assists with the trial, a pro se defendant must still be allowed to control the organization and content of their defense, make motions, argue points of law, participate in voir dire, question witnesses, and address the jury and the court.[45] In addition, even when a judge requires standby counsel for a pro se defendant, courts have still given deference to the defendant for matters generally determined by counsel.[46] The right to self-representation also includes a right to direct trial strategy, and any action by standby counsel that conflicts with the defendant's decision would violate the defendant's constitutional rights.[47]

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[40] *McKaskle*, 465 U.S. at 174.

[41] *Id.* at 188 (determining that excluding counsel altogether is not required to maintain the defendant's pro se representation rights as long as the defendant is allowed to make their own appearances and unsolicited involvement is reasonably limited).

[42] *Martinez*, 528 U.S. at 162 (holding that "[a] trial judge may also terminate self-representation or appoint 'standby counsel' even over the defendant's objection-if necessary"); *cf. Faretta*, 422 U.S. at 835 (1975) (holding that since the defendant "was literate, competent, and understanding, and that he was voluntarily exercising his informed free will," it was a constitutional deprivation of the defendant's self-representation rights to force standby counsel on the defendant over his expressed objections).

[43] United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002).

[44] *See* Poulin, *supra* note 38, at 216.

[45] *McKaskle*, 465 U.S. at 174.

[46] *Id.* at 179 (holding that proceedings outside the presence of a jury require disagreements between standby counsel and the pro se defendant to be resolved in the defendant's favor whenever the matter is one that would normally be reserved for the discretion of counsel).

[47] *Davis*, 285 F.3d at 385 (concluding that a defendant's ability to control the case presented to the jury is a core element of the right to pro se representation, and the trial court's decision to appoint independent counsel to present mitigating evidence at the penalty phase of the trial was a denial of the defendant's rights).

C. Decisions Left to Counsel When a Defendant Chooses to Have Representation

The decision to acquire counsel does not divest the defendant of authority or control over their defense, but courts have noted some situations in which an attorney has authority instead of the defendant.[48] Absent ineffective assistance of counsel, lawyers are able to decide to forgo cross-examination and choose witnesses.[49] In addition, most tactical decisions, such as whether to file a motion to suppress and what evidence to introduce, can be made without the client's express consent due to an attorney's superior experience with the trial process.[50] Many issues concerning trial management will also fall into the realm of a lawyer's control in order to prevent unnecessary delays during the proceedings.[51] As such, counsel may make decisions regarding which legal arguments to make and what evidentiary objections to raise.[52] However, the Supreme Court has noted that even procedural and tactical decisions which are generally left for an attorney can be taken over by the defendant in some instances.[53]

III. SILENCE VERSUS AN EXPRESSED OBJECTION

Although the current question that needs to be confronted by the Supreme Court only encompasses situations where a defendant objects to their counsel's proposed strategy, the Court's response to a lack of objection in a similar dispute is relevant.[54] In *Florida v. Nixon*, the Court took the

[48] McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018) (holding that a defendant is not required to surrender control entirely to counsel to have the assistance of counsel).

[49] *See* Taylor v. Illinois, 484 U.S. 400, 418 (1988) (holding that clients are bound to the decisions of their attorneys to not cross-examine certain witnesses or not put certain witnesses on the stand).

[50] Sexton v. French, 163 F.3d 874, 885 (4th Cir. 1998).

[51] *See Taylor*, 484 U.S. at 417–18 (noting "the lawyer has . . . full authority to manage the conduct of the trial").

[52] Gonzalez v. United States, 553 U.S. 242, 248–49 (2008) (quoting New York v. Hill, 528 U.S. 110, 114–115 (2000)); *McCoy*, 138 S. Ct. at 1508.

[53] *See* Snyder v. Com. of Mass., 291 U.S. 97, 106 (1934), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964) (stating that when the defendant is present for voir dire or the summoning up of counsel, it is within that defendant's control to "give advice or suggestion, or even to supersede his lawyers altogether and conduct the trial himself").

[54] *See* Broadnax v. State, No. W2018-01503-CCA-R3-PC, 2019 WL 1450399, at *6 (Tenn. Crim. App. Mar. 29, 2019) (holding that *McCoy* did not apply where "nothing in the record showed" that the defendant "made an objection to" counsel's defense strategy).

opportunity to directly address the constitutionality of an attorney making trial strategy decisions without the defendant's *express consent*.[55] Due to the overwhelming evidence against the defendant, counsel proposed the strategy of conceding Nixon's guilt to focus on presenting mitigating evidence at sentencing and avoiding the death penalty.[56] Although Nixon's attorney repeatedly discussed the proposed strategy with the defendant, Nixon remained silent during the discussions and did not indicate any intention of rejecting the concession.[57]

Under this set of circumstances, the Court was reluctant to recognize a blanket rule of ineffective assistance of counsel due to counsel's failure to obtain express consent from an unresponsive defendant before conceding guilt during a capital trial.[58] Notably, the decision expressly limited the scope of the holding to situations in which a defendant *does not object* to the trial strategy.[59] Yet, the opinion still recognized that defense counsel "undoubtedly has a duty to discuss potential strategies with the defendant."[60] Furthermore, the fact that failure to acquire consent would not automatically bar an attorney from pursuing the strategy of conceding guilt does not indicate that an attorney's unilateral decision would not violate a defendant's constitutional rights.[61] If the defendant is able to show that counsel's strategy, in light of the evidence corroborating the defendant's guilt, is objectively unreasonable and results in prejudice under the standard established under *Strickland v. Washington*, then the admission would be deemed unconstitutional.[62]

[55] 543 U.S. 175, 192 (2004) (holding that defense counsel's failure to obtain defendant's express consent to a strategy of conceding guilt at the guilt phase of a capital trial did not automatically render counsel's performance per se deficient).

[56] *Id.* at 181.

[57] *Id.* at 189.

[58] *Id.* at 192 (holding that when the defendant is informed of the strategy which counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is "not impeded by any blanket rule demanding the defendant's explicit consent").

[59] *See id.* at 178–79.

[60] *Id.* at 178.

[61] *See id.* at 179 (limiting the holding only to forbidding a *presumption* of prejudice).

[62] 466 U.S. 668, 690–92 (1984) (establishing that an ineffective assistance of counsel claim requires that "the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial"); *Nixon*, 543 U.S. at 190.

IV. THE CURRENT SPLIT IN AUTHORITY OVER THE MCCOY DECISION

In 2018, the Supreme Court re-examined the scope of an attorney's authority and attempted to provide clarity to the lower courts when handing down *McCoy v. Louisiana*.[63] Since then, mass confusion has resulted among both federal and state courts.[64] The issue is so prevalent that during the first two years after *McCoy* was published, a lower court cited the opinion nearly every other day.[65]

Some of the circuit courts, as well as lower courts, have limited the holding and determined that the right to autonomy interest established in *McCoy* is violated only when an attorney unilaterally concedes guilt.[66] In contrast, other courts have held that a lawyer may not unilaterally concede any element of an offense.[67] Others have determined that the right to autonomy encompasses only certain elements of an offense, such as the *actus reus*, but not elements that are considered less central to a conviction.[68] Additionally, courts have become divided on which types of cases actually implicate *McCoy*.[69] While some courts have limited the decision to capital cases implicating the death penalty, other courts have held otherwise.[70]

In *McCoy*, the defendant argued that his attorney caused a constitutional violation while conceding that his client had committed the three murders he had been charged with.[71] Unlike the facts present in *Florida v. Nixon*, McCoy made his complete opposition to the concession known to counsel and expressed his desire to pursue acquittal instead.[72] The Supreme Court recognized that the Sixth Amendment afforded a defendant the right to choose the objective of his defense.[73] This holding established that counsel could not admit their client's guilt to the charged offense over the defendant's objection, regardless of a reasonable belief and "experience-based view" that

[63] 138 S. Ct. 1500, 1512 (2018) (holding that the defendant was entitled to a new trial when his attorney conceded his guilt and overrode his desired defense objective).

[64] *See* Petition for Writ of Certiorari, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020), 2020 WL 5991229, at *2–3.

[65] *Id.* at *4.

[66] *See id.* at *14.

[67] *Id.* at *16.

[68] *Id.* at *15–16.

[69] *Id.* at *21–22.

[70] *Id.*

[71] McCoy v. Louisiana, 138 S. Ct. 1500, 1507 (2018).

[72] *Id.* at 1505.

[73] *Id.* at 1508.

the admission would be the best option for avoiding the death sentence.[74] The opinion noted that the Sixth Amendment guarantees a defendant the right "to have the *Assistance* of Counsel for *his* defense."[75] Thus, the defendant must be in control of the defense objective, not counsel. The Court also expressed that "with individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's," to decide whether the objective of his defense is "to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt."[76]

Although it is clear that the Court intended to implement a bright-line rule that the defendant has complete autonomy over the "objective of the defense," lower courts have struggled to determine what decisions fall under the umbrella of this phrase. In consequence, circuit, district, and county courts have reached different conclusions regarding the application and scope of the *McCoy* decision.

A. Circuit Courts

A few of the circuit courts have determined that the defense attorney should have discretion to determine the means of achieving the overall objective of the defense chosen by the defendant.[77] Recently, the Second Circuit Court of Appeals narrowly interpreted the *McCoy* decision in *United States v. Rosemond* and rejected the defendant's argument that he was unconstitutionally deprived of his autonomy interests.[78] In *Rosemond*, the defendant attempted to dispute murder-for-hire and conspiracy to commit murder-for-hire charges.[79] When the lawyer conceded, over the defendant's objection, that the accused had paid other individuals to shoot the victim, but not that the accused intended him to die, the court found that the *McCoy*

[74] *Id.* at 1505.

[75] *Id.* (emphasis in original).

[76] *Id.*

[77] *See* United States v. Wilson, 960 F.3d 136, 143–44 (3d Cir. 2020) (holding that *McCoy* created ambiguity about what concessions qualify as "conceding guilt" and that means of achieving the objective determined by the defendant are left to the lawyer); United States v. Holloway, 939 F.3d 1088, 1101 (10th Cir. 2019) (*applying the holding in McCoy and deciding that* the right to autonomy was not violated when an attorney and the defendant had "strategic disputes" about how to achieve the same objective).

[78] United States v. Rosemond, 958 F.3d 111, 124 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1057 (2021).

[79] *Id.* at 115.

holding was limited to a defendant's right to maintain his innocence of the charged crime and therefore inapplicable.[80] The court stated that because the attorney had only conceded one element of the crime as a trial strategy and had not conceded the defendant's guilt to the charged crime, the ultimate goal of acquittal was still preserved.[81]

Although *McCoy* recognized that a defendant has a "protected autonomy right" to make "fundamental choices about his own defense," the court noted that defendants who choose to retain counsel must "relinquish some autonomy to their attorneys."[82] The Second Circuit concluded that although Rosemond's attorney conceded that the defendant had hired another individual to shoot the victim, the attorney had only conceded one element of the crime and not that the defendant had intended for the victim to die.[83] Thus, the court concluded that the attorney was in line with Rosemond's "objective" to maintain his overall innocence in regards to the accused acts.[84]

Some courts have addressed certain parts of the *McCoy* decision while not taking a clear position on whether the holding applies beyond counsel conceding that their client is guilty. For example, the Fourth Circuit addressed the issue of the *McCoy* decision's retroactibility.[85] Although the intention of the court was not to interpret the application and scope of the decision, the opinion recognizes a broader interpretation by stating that conceding guilt is "*among* the types of decisions reserved for clients under the Sixth Amendment."[86]

Other courts have chosen to apply the *McCoy* holding to broader situations. When addressing whether depriving a defendant of their autonomy interest constituted a structural error, the Fourth Circuit held that failing to inform the defendant of each element of the crime charged "violated [his] right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest."[87] Admittedly, this holding only

[80] *See id.* at 119.

[81] *Id.* at 123.

[82] *Id.* at 119–120 (quoting McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018)).

[83] *Id.* at 123–24.

[84] *Id.* at 122–23 (noting that the *McCoy* decision referred to guilt of a *charged crime*).

[85] Smith v. Stein, 982 F.3d 229, 232–33 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2532 (2021).

[86] *Id.* at 234 (emphasis added).

[87] United States v. Gary, 954 F.3d 194, 205 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 974, (2021) and *rev'd sub nom*. *See also* Greer v. United States, 141 S. Ct. 2090 (2021) (holding that the defendant's guilty plea could be not knowingly and intelligently made since the essential elements

expressly establishes that failure to inform a defendant of the elements of the charged crime deprives the defendant of their autonomy over their defense and the "right to determine the best way to protect his liberty."[88] Yet, it would make little sense to conclude that the failure to inform a defendant of the elements of a crime would result in a constitutional violation while also holding that the concession of the elements of a crime over the defendant's objection is constitutional.

The Ninth Circuit Court of Appeals also upheld a broader interpretation of *McCoy* and concluded that a defendant's autonomy rights go beyond deciding concessions of guilt and apply to concessions that a defendant is not guilty by reason of insanity as well.[89] The court came to this conclusion mainly because an insanity plea results in serious personal consequences beyond trial tactics, which are comparable to the concession of guilt.[90] Notably, there is a considerable amount of overlap between the dire social consequences of the insanity plea discussed by the court and the consequences of conceding certain elements of a crime.[91]

B. Other Lower Courts

As previously stated, hundreds of federal and state decisions have attempted to determine the bounds of the *McCoy* decision.[92] Some lower courts have held that attorneys must not concede any acts alleged as the *actus reus* of a charged crime over their client's objection.[93] In *State v. Horn*, the court stated that *McCoy* was "broadly written" and expressly declined to

of the offense to which he pled guilty were not completely understood, but reversed on other grounds); Reply Brief in Support of Petition for Writ of Certiorari, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020), 2021 WL 103650, at *3.

[88] *Gary*, 954 F.3d at 199, 205–206 (noting that the defendant was never informed that the state would also have to prove that Gary "knew he had the relevant status when he possessed [the firearm]").

[89] United States v. Read, 918 F.3d 712, 720 (9th Cir. 2019).

[90] *Id.* at 720–721 (acknowledging that a defendant could prefer to maintain a remote chance of acquittal over the definite commitment to an institution and the stigma surrounding a plea of insanity).

[91] *Compare id.* (discussing the "grave personal consequences" accompanying an insanity defense) *with* McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018) (discussing the "opprobrium" that comes with admitting to the factual slaying of one's family).

[92] *See, e.g.*, *Ex parte* Barbee, 616 S.W.3d 836 (Tex. Crim. App. 2021), *cert. denied*, 142 S. Ct. 258 (2021).

[93] People v. Flores, 246 Cal. Rptr. 3d 77, 82 (Ct. App. 2019).

restrict the application of the opinion to cases in which a defendant seeks to maintain "absolute innocence to any crime."[94]

Courts have also discussed whether the holding in McCoy intended to limit the application to capital cases.[95] Although the dissenting opinion in McCoy remarked that the decision would be "effectively confined to capital cases" since "it is hard to see how the right could come into play" in a non-capital case,[96] multiple non-capital cases implicating a defendant's newly determined autonomy rights have recently reached the courts.[97] The Supreme Court's statement in the majority opinion that a "defendant has the right to insist that counsel refrain from admitting guilt, *even when* counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty" also supports a broad application of the holding.[98] In *People v. Flores*, the California appellate court interpreted the use of the words "even when" to indicate that the need to respect a defendant's autonomy is even stronger in non-capital cases.[99] However, autonomy interests would still prevail despite how serious the consequences of a conviction are. Furthermore, the Court's statement that the risk of losing "individual liberty," and not just life, created the need for control over the objective of the offense indicates that the *McCoy* holding's application extends beyond capital cases.[100]

V. IMPORTANT TRIAL STRATEGY DECISIONS ARE ENCOMPASSED IN THE DEFENDANT'S RIGHT TO CONTROL THEIR DEFENSE

In light of the *McCoy* decision and other relevant case law, the Supreme Court would likely hold that a defendant has the right to make determinations about important trial strategies other than the complete concession of guilt

[94] 2016-0559, p. 9–10 (La. 9/7/18), 251 So. 3d 1069, 1075 (holding that an attorney who is given instruction to admit guilt to a different crime is not permitted to admit guilt to the crime charged or any lesser included crimes).

[95] *Flores*, 246 Cal. Rptr. 3d at 86.

[96] *McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting) (emphasis added).

[97] See, e.g. Kellogg-Roe v. Gerry, 19 F.4th 21 (1st Cir. 2021); Thompson v. Cain, 433 P.3d 772 (2018); *Flores*, 246 Cal. Retro. 3d.

[98] *See McCoy*, 138 S. Ct. at 1505 (emphasis added).

[99] 246 Cal. Rptr. 3d at 87.

[100] *See McCoy*, 138 S. Ct. at 1505; Appellant's Opening Brief and Special Appendix at 37, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020) (No. 18-3561-cr), 2019 WL 4857429, at *37.

and has the authority to prevent the concession of any element of the charged crime.

The holding in *McCoy* did not indicate that the decision intended to limit a defendant's control over their trial to *only* the objective of the defense.[101] By stating that a defendant has a "right to make the *fundamental* choices about his own defense," the Court indicated an intention to expand the extent of a defendant's control to encompass decisions beyond just the objective of the defense.[102]

In addition, the Supreme Court has continuously recognized that an attorney has a duty to consult with their client regarding "important decisions," which would include "questions of overarching defense strategy."[103] Although the Court did not expressly recognize that these "important decisions" required consent from the defendant, it would be inconsistent with autonomy to ignore the defendant's express objections.

However, even with a more narrow reading of the "objective of his defense" standard, the Court would still likely hold that a defendant has autonomy over certain trial strategies, including the concession of elements. Therefore, decisions and strategies, such as the strategy in the *Rosemond* case, should fall under the established "objective of his defense" standard.[104] As noted by the Court, the ability to decide that the "objective of the defense is to assert innocence" falls under the "reserved-for-the-client category" of trial decisions.[105] The goal of asserting actual innocence is not limited to just seeking acquittal, and conceding that a defendant performed an element of the crime for which they are accused would be inconsistent with this objective.[106] In *McCoy*, the Court concluded that McCoy's objective was to

[101] *McCoy*, 138 S. Ct. at 1504 (stating that an error is structural if it protects "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty," and therefore, "counsel's admission of a client's guilt over the client's express objection is error structural in kind").

[102] *Id.* at 1511 (emphasis added).

[103] Florida v. Nixon, 543 U.S. 175, 187 (2004).

[104] *See* Appellant's Opening Brief and Special Appendix at 37, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020) (No. 18-3561-cr), 2019 WL 485742, at *37.

[105] *McCoy*, 138 S. Ct. at 1503.

[106] *See* United States v. Scott, 437 U.S. 82, 97 (1978) (defining "acquittal" as a ruling that "actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense"); Lambert v. Blackwell, 134 F.3d 506, 509 (3d Cir. 1997) (holding that "a finding of actual innocence, as that term has come to be used in federal habeas corpus jurisprudence, is not the equivalent of a finding of not guilty by a jury or by a court at a bench trial").

sustain that "I did not kill the members of my family," and his attorney went against his objective by conceding his guilt in regards to the murders and all elements of the charged crime.[107] However, this does not indicate that the concession of some of the elements fall under counsel's control or that a client could not have a more specific objective requiring counsel to avoid any concession involving the charge.

The application of *McCoy* to certain types of cases has also been a point of contention for courts.[108] The *McCoy* Court stated the importance of protecting autonomy rights for all charges, *especially* when charged with a capital crime, due to the heightened interests of the defendant.[109] Since it makes little sense to afford a criminal defendant with more at stake less rights, the *McCoy* reasoning should be expanded beyond capital trials.

Despite the vague boundaries articulated by the Court, it is apparent that the right established in *McCoy*, like other autonomy interests, was intended to be a bright-line rule. Therefore, asking courts to determine which elements are significant enough to implicate a defendant's autonomy rights would be inconsistent with the holding. Thus, the concession of any element, against the will of the defendant, would violate autonomy. Although some courts have been reluctant to read the *McCoy* opinion to encompass the concession of any element of a crime,[110] it would undoubtedly contradict the purpose of the Sixth Amendment to read the opinion so narrowly and allow counsel to ignore a defendant's desire to maintain complete innocence and have control over their defense.

VI. PUBLIC POLICY CONSIDERATIONS

Public policy concerns support establishing a broad interpretation of *McCoy* and respecting the defendant's overarching autonomy interest. In this area of law, the interest of the judicial system in promoting fair judicial proceedings and results conflicts with the accused's interest in maintaining autonomy and complete control over their defense.[111]

[107] *McCoy*, 138 S. Ct. at 1510.

[108] *See, e.g.*, State v. Horn, 2016-0559, (La. 9/7/18), 251 So. 3d 1069, 1075.

[109] *McCoy*, 138 S. Ct. at 1505.

[110] *In re* Somerville, 14 Wash. App. 2d 1068, 1068 (2020).

[111] WILLIAMS, *supra* at note 3, at 696.

A. Societal and Judicial Interests

Although a defendant should have the right to control key decisions about their defense, it would put a large strain on the judicial system and cause endless delays to leave every decision to the defendant. For that reason, specific procedural and technical decisions fall within the attorney's exclusive control.[112] However, the court's interest of preventing delay is not impaired by important decisions on theories and the concession of elements. Although failing to concede an element that can easily be proven may result in a slightly longer trial, the defense has no obligation to spare the prosecutor from meeting their burden of proof on all of the elements.

Another commonly used justification for limiting an individual's rights is the larger interests of society. For example, in the context of the Fourth Amendment, courts will afford citizens less privacy rights when society has an interest in accomplishing a legitimate objective that outweighs the intrusion.[113] Competing interests have already been balanced for related Sixth Amendment issues as well. When determining that the court could appoint standby counsel without the defendant's consent, the Court recognized that society had a strong interest in maintaining fairness in the justice system.[114] Yet, standby counsel's role is still limited enough to afford the defendant full control over important defense decisions.

Although a defendant conducting their own defense will generally receive a less favorable outcome, the right to self-representation is "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty."[115] This legal principle should also extend to protect a client's objections regarding important trial strategies. Society and courts undoubtedly have an interest in making sure that justice is properly served and the defendant is afforded a just proceeding and effective assistance of counsel.[116] However, this interest is not stronger when a defendant acquires an attorney instead of opting for

[112] *See* discussion *supra* Part II.C.

[113] United States v. Place, 462 U.S. 696, 703 (1983) (holding that courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion").

[114] Martinez v. Ct. of Appeal of Cal., Fourth App. Dist., 528 U.S. 152, 162 (2000).

[115] Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017).

[116] WILLIAMS**,** *supra* at note 3, at 705.

pro se representation. In fact, society would have less concerns about unfairness when a defendant has an attorney to fully advise them.[117]

Although a defendant's decision to go against their attorney's suggestion may ultimately be detrimental, the defendant will likely be more informed of the risks involved and alternative options than a defendant without an attorney. Because of this, it would make little sense to conclude that society has a stronger interest in ensuring effective trial decisions when a defendant has an attorney to advise them than when a defendant chooses pro se representation.

B. A Defendant's Interests

For decades courts have recognized that respect for the individual "is the lifeblood of the law."[118] The importance placed on respect for individual rights stems from the idea that, although an attorney is in a better position to decide trial strategies and defenses than a defendant lacking any experience practicing law, a defendant is the one who has the most at stake in a criminal proceeding.[119] Previously, the Supreme Court has recognized that, despite an attorney's superior knowledge and skill, it would be harmful to the defendant to strip them of one of their core guarantees as a citizen and allow an attorney to determine what rights to waive and whether to go to trial.[120] The Court has also stated that the same rationale applies when a client chooses to maintain their innocence.[121] Likewise, courts have been reluctant to infringe on the personal right of self-representation and allow society, hybrid counsel, or a judge to make strategic decisions for a defendant who has chosen to represent themselves.[122]

It would be harmful to defendants and lead to unfavorable consequences if choosing to utilize their constitutional right to assistance of counsel required giving up control over important aspects of their trial. Asking a

[117] *See* Emily Hughes, *Mitigating Death*, 18 CORNELL J. L & PUB. POL'Y 337, 339 (2009).

[118] Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350–351 (Brennan, J., concurring)); McCoy v. Louisiana, 138 S. Ct. 1500, 1507 (2018) (quoting Illinois v. Allen, 397 U.S. 337, 350–351 (Brennan, J., concurring)).

[119] HASHIMOTO, *supra* note 2, at 1178.

[120] *Id.*

[121] *McCoy*, 138 S. Ct. at 1508 (stating that "[j]ust as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial").

[122] *See, e.g.*, United States v. Davis, 285 F.3d 378, 384 (5th Cir. 2002).

defendant whose life and liberty are on the line to give up their ability to make decisions about their defense would only encourage a defendant to choose pro se representation to preserve their autonomy interest and maintain control over their case.

The argument that a defendant's interest in a fair trial would be negatively impacted by forcing counsel to comply with an inexperienced defendant's commands is ill-founded. As stated by the Supreme Court, a defendant need "not himself have the skill and experience of a lawyer in order [to] competently and intelligently" choose a pro se defense.[123] Therefore, a defendant with a lawyer should be able to competently and intelligently reject counsel's decisions. It is inconsistent to hold that the decision to forgo counsel entirely can be intelligently made, but the decision to reject counsel's opinion about the best defense is always unintelligently made and, therefore, not within the defendant's discretion.

Furthermore, the Supreme Court has recognized that "a plea of guilty is more than an admission of conduct; it is a conviction."[124] Yet, a defendant has full discretion to make the plea as long as it is voluntarily and intelligently made.[125] It is difficult to argue that a defendant can have full discretion over whether or not to concede their full guilt and relinquish a handful of rights, but a potentially innocent defendant can be stripped of their ability to prevent certain concessions when they reject a guilty plea and choose to go to trial. In addition, the decision to plead guilty is reserved for the defendant because he is waiving his right to force the prosecution to meet its constitutionally mandated burden of proof at trial.[126] Thus, it would be inconsistent to allow a defense attorney to unilaterally relieve the prosecution of meeting its burden of proof on any element.

Although conceding an element of a crime may not ensure conviction and may still fall into the objective of acquittal, conceding an element will still affect the defendant's interest in preserving their reputation.[127] Conceding any aspect of a crime can have detrimental familial and societal

[123] *Faretta*, 422 U.S. at 835.

[124] Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[125] *See* McCarthy v. United States, 394 U.S. 459, 463 n.4 (1969).

[126] *See* Kercheval v. United States, 274 U.S. 220, 223 (1927) (noting that a guilty plea alone is sufficient to prove the offense and to support a judgment of conviction, as long as the plea is made intelligently and voluntarily).

[127] *See* State v. McCabe, 37 S.W. 123, 126 (Mo. 1896) (recognizing an interest in a party's reputation).

consequences, and it would be fundamentally unfair for defense counsel to have the discretion to unilaterally inflict such results.

Undeniably, the defendant has the largest interest in having complete control over their defense, and the interests of the court, attorney, or society do not provide a sufficient justification to override such a strong interest. Although there are times in which the interests of the courts in preventing delay and ensuring justice override an autonomy interest, those interests cannot override a defendant's interest in controlling important trial decisions and preventing the concession of elements of their charged crime.

C. A Lawyer's Interests

Although an attorney will not suffer the direct consequences of a negative verdict, they may be subject to collateral consequences. For example, attorneys may fear ineffective assistance of counsel claims arising from listening to the defendant. However, the traditional standard for ineffective assistance of counsel is inapplicable where the "client's autonomy, not counsel's competence, is in issue."[128] Additionally, in circumstances in which defense counsel simply fails to properly consult and inform their client of potential trial strategies and decisions, an issue separate from *McCoy* is implicated.[129]

Notably, defense counsel is bound by not only the confines of the Constitution but separate ethical rules as well.[130] The *McCoy* decision considered these additional boundaries and noted that although ethical rules might prevent an attorney from presenting alibi evidence involving known perjury, "Louisiana has identified no ethical rule requiring English to admit McCoy's guilt over McCoy's objection."[131] Furthermore, the American Bar Association's Model Rules of Professional Conduct state that "a lawyer shall abide by a client's decisions concerning the objectives of representation."[132] Therefore, an attorney would not be risking disbarment or sanctions by pursuing a complete acquittal and maintaining the innocence of the defendant.

[128] McCoy v. Louisiana, 138 S. Ct. 1500, 1510–11 (2018).

[129] Atwater v. State, 300 So. 3d 589, 591 (Fla. 2020), *cert. denied*, 141 S. Ct. 1700 (2021).

[130] *See McCoy*, 138 S. Ct. at 1510 (2018).

[131] *Id.*

[132] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

D. The Historical Importance of Autonomy

All other considerations aside, it cannot be denied that the historical importance of autonomy heavily weighs in favor of allowing complete control over all important trial decisions and strategies. In the context of the Sixth Amendment alone, the purpose of the trial rights granted was to guarantee the maintenance of autonomy until guilt was proven and autonomy was lost.[133]

In addition, the historical importance of autonomy goes far beyond criminal rights. For example, in contract law, courts respect the freedom to contract and the autonomy of parties and will still enforce contracts that are seen as unwise.[134] The right to freely enter into contracts is recognized by the Constitution, and courts have notoriously been reluctant to interfere with such a sacred and protected autonomy interest.[135] Since the right to have control over various aspects of a criminal defense is also a protected piece of the Constitution, courts should show the same level of reluctance toward limiting autonomy interests in the criminal law context.

VII. CONCLUSION

Time and time again, courts have recognized the importance of maintaining autonomy throughout criminal trials and the need for a defendant to serve as the "master of his defense."[136] Although some determinations and decisions may, and admittedly should, only require counsel's sound discretion, a defendant's choice to utilize their right to assistance of counsel should not result in a waiver of the defendant's ability to control important parts of their own defense. Although maintaining control over the defense does not always require an attorney to secure a defendant's consent, counsel should not ignore a clearly expressed objection.[137] The most important interest at stake is the defendant's interest in protecting their life and liberty. Although courts and society have an interest in ensuring that the defendant

[133] HASHIMOTO, *supra* note 2, at 1170; U.S. CONST. amend. VI.

[134] Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1185 (2010).

[135] 159 MP Corp. v. Redbridge Bedford, LLC, 71 N.Y.S. 3d 87, 95 (App. Div. 2018), *overturned due to legislative action*, *aff'd*, 128 N.E.3d 128 (2019); U.S. CONST. art. I § 10.

[136] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 382, n.10 (1979) (noting that the Sixth Amendment requires that "the accused, and not a lawyer, is master of his own defense"); United States v. Read, 918 F.3d 712, 720 (9th Cir. 2019).

[137] *See* McCoy v. Louisiana, 138 S. Ct. 1500, 1505 (2018).

will get a properly conducted defense, this interest can never outweigh the personal autonomy interest of the defendant and society's interest in respecting autonomy in all areas of the law. Whether the decision to object to an attorney's strategy is wise is a question outside the scope of this comment, but the right to decide an attorney is wrong is surely placed in the hands of the defendant.