

Ethical Issues Confronting Criminal Defense Attorneys

The Twist and Turns of *McCoy v. Louisiana*,
138 S.Ct. 1500 (2018)

Defending a Federal Criminal Case

Kansas City, Missouri

October 5, 2018

To Try to Save Client's Life, a Lawyer Ignored His Wishes. Can He Do That?

Supreme Court to hear case of lawyer who defied client in murder trial

Can a lawyer admit the guilt of a client who claims to be innocent?

Robert Leroy McCoy



<https://www.nytimes.com/2017/10/09/us/politics/death-penalty-supreme-court-attorney.html>

Robert Leroy McCoy

- Born on October 2, 1973. Second oldest of five children born to Robert McCoy, Sr. and Mary McCoy. Raised by both parents in Shreveport, Louisiana.
- High school football, weight-lifting, and ROTC. Graduated with a 3.8 GPA.
- Married Yolanda Colston in 2005, during which his fifth child was born. He has two daughters and three sons.
- Experience working in restaurants, as a deckhand, and running a lawn service. Employee for Greystone Drilling and Union Pacific Railroad from 2006 to 2008.
- No juvenile criminal record. Adult criminal record includes convictions for simple criminal damage to property (1997); simple criminal damage to property (1999); no license plate light (2000); attempted second degree kidnapping (2001); and aggravated battery (2008).

Robert Leroy McCoy

- In May 2005, Robert McCoy was charged with murdering his estranged wife's mother, stepfather, and son.
- McCoy was appointed a Louisiana public defender.
- McCoy pleaded not guilty to first-degree murder, insisting that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong.
- At defense counsel's request, a court-appointed sanity commission examined McCoy and found him competent to stand trial.

Robert Leroy McCoy

- In January 2010, McCoy fired his public defender and then sought and gained leave to represent himself.
- In March 2010, Larry English, engaged by McCoy's parents, enrolled as McCoy's counsel.
- English eventually concluded that the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.
- McCoy was "furious" when told, two weeks before trial was scheduled to begin, that English would concede McCoy's commission of the triple murders.

Robert Leroy McCoy

- McCoy told English not to make any concession and ordered English to pursue acquittal.
- At a July 2011 hearing, McCoy sought to terminate English's representation and English asked to be relieved.
- With trial set to start two days later, the court refused to relieve English and directed that he remain as counsel of record.
- “[Y]ou are the attorney,” the court told English when he expressed disagreement with McCoy's wish to put on a defense case, and “you have to make the trial decision of what you're going to proceed with.”

Larry English



Larry English

- Raised along with six siblings on a sharecropper's farm in rural Louisiana.
- Tulane Law School - Class of 1993.
- Youngest to serve as president of Shreveport's N.A.A.C.P. chapter.
- Upon moving from Louisiana to Harlem, NY, he continued to represent Mr. McCoy.
- He is the founding partner and Chairman of AirRail, a company which advises and assists diverse communities in establishing partnerships to develop and manage infrastructure.

Larry English

- During opening statement at trial, English told the jury there was “**no way reasonably possible**” that they could hear the prosecution’s evidence and reach “**any other conclusion than Robert McCoy was the cause of these individuals’ death.**”
- McCoy protested; out of earshot of the jury, McCoy told the court that English was “selling [him] out” by maintaining that McCoy “murdered [his] family.”
- The trial court reiterated that English was “representing” McCoy and told McCoy that the court would not permit “any other outbursts.”

Larry English

- McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom.
- In closing argument, English reiterated that McCoy was the killer. On that issue, English told the jury that he “took [the] burden off of [the prosecutor].”
- The jury then returned a unanimous verdict of guilty of first-degree murder on all three counts.
- At the penalty phase, English again conceded “Robert McCoy committed these crimes,” but urged mercy in view of McCoy’s “serious mental and emotional issues.”
- The jury returned three death verdicts.

Appeal

- Represented by new counsel, McCoy unsuccessfully sought a new trial.
- The Louisiana Supreme Court affirmed the trial court's ruling that English had authority to concede guilt, despite McCoy's opposition.
- The concession was permissible, the court concluded, because counsel reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence. **Ethics rule?**

RBG

- When counsel confers with a capital defendant and the defendant remains silent, neither approving nor protesting counsel's proposed guilt-phase concession strategy, no blanket rule demands the defendant's explicit consent to implementation of that strategy.
Florida v. Nixon, 543 U.S. 175 (2004).
- In contrast here, McCoy vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. Yet English stated McCoy "committed the three murders... He's guilty."

RBG

- Court holds that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.
- Guaranteeing a defendant the right "to have the Assistance of Counsel for his defence," the Sixth Amendment so demands.
- Defendant's prerogative, not counsel's, to decide on the objective of his defense: 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.

RBG

- Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective.
- He may wish to avoid “the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.”
- It is for the defendant to make the value judgment whether “to take a minuscule chance of not being convicted and spending a life in ... prison.”
- For some defendants, “the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence.”

Alito

- English did not admit that McCoy was guilty of first-degree murder.
- Instead, faced with overwhelming evidence that McCoy shot and killed the three victims, English admitted that McCoy committed one element of that offense, i.e., that he killed the victims.
- But English strenuously argued that McCoy was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense.

Alito

- English found himself in a predicament as the trial date approached.
- The evidence against his client was truly “overwhelming.”
- Evidence showed McCoy, before the incident, had abused and threatened to kill his wife, and she was therefore under police protection. On the night of the killings, McCoy’s mother-in-law made a 911 call and was heard screaming McCoy’s first name.
- She yelled: “ ‘She ain’t here, Robert ... I don’t know where she is. The detectives have her. Talk to the detectives. She ain’t in there, Robert.’ ” Moments later, a gunshot was heard, and the 911 call was disconnected.

Alito

- Officers were dispatched to the scene and found three dead or dying victims.
- The officers saw a man who fit McCoy's description fleeing in McCoy's car. They chased the suspect, but he abandoned the car along with critical evidence linking him to the crime: the cordless phone McCoy's mother-in-law had used to call 911 and a receipt for the type of ammunition used to kill the victims.
- McCoy was eventually arrested while hitchhiking in Idaho, and a loaded gun found in his possession was identified as the one used to shoot the victims.
- A witness testified that McCoy had asked to borrow money to purchase bullets shortly before the shootings, and surveillance footage showed McCoy purchasing the ammunition on the day of the killings. And two of McCoy's friends testified that he confessed to killing at least one person.

Alito

- Despite all this evidence, McCoy, who had been found competent to stand trial and had refused to plead guilty by reason of insanity, insisted that he did not kill the victims.
- McCoy claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho.
- McCoy believed that even his attorney and the trial judge had joined the plot.

Alito

- Unwilling to go along with this incredible and uncorroborated defense, English told McCoy “some eight months” before trial that the only viable strategy was to admit the killings and to concentrate on attempting to avoid a sentence of death.
- At that point—aware of English’s strong views—McCoy could have discharged English and sought new counsel willing to pursue his conspiracy defense; under the Sixth Amendment, that was his right. See *United States v. Gonzalez–Lopez*, 548 U.S. 140, 144 (2006).
- But petitioner stated “several different times” that he was “confident with Mr. English.”

Alito

- The weekend before trial, however, McCoy changed his mind. He asked the trial court to replace English, and English asked for permission to withdraw.
- McCoy stated that he had secured substitute counsel, but he was unable to provide the name of this new counsel, and no new attorney ever appeared.
- The court refused these requests and also denied McCoy's last-minute request to represent himself. (McCoy does not challenge these decisions here.)
- So McCoy and English were stuck with each other, and McCoy availed himself of his right to take the stand to tell his wild story. Under those circumstances, what was English supposed to do?

Alito

- The result of mounting McCoy's conspiracy defense almost certainly would have been disastrous.
- That approach stood no chance of winning an acquittal and would have severely damaged English's credibility in the eyes of the jury, thus undermining his ability to argue effectively against the imposition of a death sentence at the penalty phase of the trial.
- So, again, what was English supposed to do?

Alito

- When pressed at oral argument, current counsel eventually provided an answer: English was not required to take any affirmative steps to support McCoy's bizarre defense, but instead of conceding that McCoy shot the victims, English should have ignored that element entirely.
- So the fundamental right supposedly violated in this case comes down to the difference between the next two statements:

Alito

- Constitutional: “First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I submit to you that my client did not have the intent required for conviction for that offense.”
- Unconstitutional: “First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I admit that my client shot and killed the victims, but I submit to you that he did not have the intent required for conviction for that offense.”

Alito

- “The constitutional right that the Court has now discovered —a criminal defendant’s right to insist that his attorney contest his guilt with respect to all charged offenses...”

Decisions for Defendant

- A defendant cannot be forced to enter a plea against his wishes. *Brookhart v. Janis*, 384 U.S. 1, 5–7 (1966).
- No matter what counsel thinks best, a defendant has the right to insist on a jury trial and to take the stand and testify in his own defense. *Harris v. New York*, 401 U.S. 222, 225 (1971).
- If a defendant and retained counsel do not see eye to eye, the client can always attempt to find another attorney who will accede to his wishes. *Gonzalez–Lopez*, 548 U.S., at 144.
- A defendant can also choose to dispense with counsel entirely and represent himself. *Faretta v. California*, 422 U.S. 806, 819 (1975).

Decisions for Defense Counsel

- Choosing the basic line of defense
- Moving to suppress evidence
- Delivering an opening statement and deciding what to say in the opening
- Objecting to the admission of evidence
- Cross-examining witnesses
- Offering evidence and calling defense witnesses
- Deciding what to say in summation
- See, e.g., *New York v. Hill*, 528 U.S. 110, 114–115 (2000)

Conceding Elements?

- Some criminal offenses contain elements that the prosecution can easily prove beyond any shadow of a doubt. A prior felony conviction is a good example. See 18 U.S.C. § 922(g) (possession of a firearm by a convicted felon).
- Suppose that the prosecution is willing to stipulate that the defendant has a prior felony conviction but is prepared, if necessary, to offer certified judgments of conviction for multiple prior violent felonies. If the defendant insists on contesting the convictions on frivolous grounds, must counsel go along?

Conceding Elements?

- Does the same rule apply to all elements?
- If there are elements that may not be admitted over the defendant's objection, must counsel go further and actually contest those elements?
- Or is it permissible if counsel refrains from expressly conceding those elements but essentially admits them by walking the fine line recommended at argument by McCoy's current attorney?

Conceding Elements?

- What about conceding that a defendant is guilty, not of the offense charged, but of a lesser included offense? That is what English did in this case. He admitted that petitioner was guilty of the noncapital offense of second-degree murder in an effort to prevent a death sentence.
- Is admitting guilt of a lesser included offense over the defendant's objection always unconstitutional?

Conceding Elements?

- Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter?
- What about simple assault?

Did Larry English Get it Right?

- Minority would hold that Larry English did not violate any fundamental right by expressly acknowledging that McCoy killed the victims instead of engaging in the barren exercise that McCoy's current counsel now recommends.
- What say you?