Essay

The Ultimate Dilemma: Conceding a Client’s Guilt to Avoid a Death Sentence

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One of the dilemmas death penalty lawyers frequently face is how best to defend a client when there is overwhelming evidence of the client’s guilt. Because death penalty proceedings are litigated in two phases, attorneys must often decide whether to put their energy and limited resources into both phases of the trial or whether to put more emphasis on saving the client’s life by conceding guilt and presenting a vigorous punishment-phase defense. By conceding guilt the attorney may retain credibility with the jury which might make the jury more receptive to the arguments presented during the punishment phase. However, the client may wish to continue to maintain his innocence. This dilemma was faced by the attorney for Robert McCoy, a Louisiana death row inmate who objected to his attorney’s concession of guilt and whose case ended up before the U.S. Supreme Court. This paper discusses the Supreme Court’s holding in McCoy v. Louisiana. The article analyzes and critiques both the majority and dissenting opinions based on the author’s 25-year experience representing inmates sentenced to death. The article also reconciles the decision in McCoy with the Court’s previous decision in Florida v. Nixon in which the Court decided a similar issue and explains why the decisions are not inconsistent. The article also discusses the predicament of an attorney who must represent a defendant who objects to the attorney’s proposed strategy of conceding guilt. After McCoy, an attorney in a death penalty case who believes that conceding his client’s guilt is the best course of action can proceed with this strategy unless the client expressly objects to him doing so. The article concludes that the Supreme Court struck the right balance between the defendant’s right to maintain his innocence and the attorney’s right to make good strategic decisions.
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INTRODUCTION

Imagine the dilemma facing the attorneys representing Nikolas Cruz. Cruz is the nineteen year old who opened fire at Marjory Stoneman Douglas High School in Parkland, Florida, killing seventeen individuals.1 There is little doubt that he was the shooter.2 Because this was one of the worst mass shootings in United States history, the state of Florida will almost certainly seek the death penalty.3 His attorneys have to decide whether to contest his guilt or whether to attempt to save his life by focusing their efforts on the punishment phase of his trial given the overwhelming evidence of his guilt.4 As an attorney who has litigated death penalty cases for over twenty-five years, I can attest to the fact that attorneys in capital cases are often confronted with this dilemma.

There are three possible responses from a client to the attorney’s advice that he not contest his guilt. First, the client could object. Second, the client may neither agree to the strategy nor voice any objections. Third, the client could agree to concede his guilt. The U.S. Supreme Court has provided some answers to each possible response. This article will begin by discussing the situation involving a client who rejects his attorney’s recommendation and clearly expresses to his attorney his desire to maintain his innocence. This situation was recently addressed by the Supreme Court in McCoy v. Louisiana.5 In this section of the article I will analyze the McCoy decision and I will explain why, as a death penalty “insider,” I believe the majority was correct in its conclusion that an attorney must not concede guilt over the objections of his client. I will also critique the dissenting opinion, which I believe does not grasp the reality that criminal defense lawyers, and especially death penalty practitioners, face.

In the next section, I will discuss the situation involving clients who do not expressly agree or disagree with the attorney’s strategic decision to concede his guilt. This situation was addressed by the Supreme Court in Florida v. Nixon.6 I will reconcile this decision with McCoy and explain why

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2 Id.
3 Id.
4 Id.
6 543 U.S. 175 (2004).
they are not inconsistent. In the next section, I will address the situation involving a client who expressly consents to his attorney’s recommendation that conceding guilt is the best chance to save his life. This decision may have other legal ramifications, primarily a subsequent claim on ineffective assistance of counsel. I will explain how any decision to concede guilt makes an attorney vulnerable to a claim of ineffective assistance of counsel. I will conclude by discussing the predicament an attorney faces when the client disagrees with his assessment that the best strategy for preserving his life is to acknowledge guilt.

I. CLIENT OBJECTS

The defense counsel in a death penalty case has a legal and ethical obligation to thoroughly investigate the case before deciding on a strategy. After completing the investigation, a defense attorney may realize that there is overwhelming evidence of his client’s guilt and no plausible defense that he may present. He may decide that his best strategy is to attempt to save his client’s life by presenting mitigation evidence during the punishment phase of the proceedings. However, if he contests his client’s guilt before presenting the punishment defense, his credibility with the jury may be severely damaged and the jury may then tune him out during the subsequent punishment phase. Thus, in order to maintain credibility with the jury, he may decide that the best course of action is to acknowledge his client’s guilt during the guilt phase in the hope that the jury will reward his frankness by seriously considering the mitigation case that he presents during the punishment phase. The client, however, may continue to maintain his innocence. Can the lawyer proceed in the event that the client disagrees with his proposed strategy? That question was answered by the Supreme Court in McCoy v. Louisiana.

In McCoy, the defendant was charged with capital murder for shooting his estranged wife’s mother, stepfather, and son. The evidence against him was overwhelming. Prior to the killings, the defendant had abused and threatened to kill his wife. On the night of the killings, one of the victims, his mother-in-law, called 9-1-1 and was heard screaming the defendant’s first name. Shortly thereafter a gunshot was heard and the 9-1-1 call was

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7 See Wiggins v. Smith, 539 U.S. 510, 532 (2003) (imposing a legal duty on trial counsel to thoroughly investigate); In re Conduct of Bettis, 149 P.3d 1194, 1198–99, 239–41 (2006) (finding that an attorney did not provide competent representation by not properly informing himself of the case to adequately determine whether jury trial should be waived).
8 138 S. Ct. 1500.
9 Id. at 1505–66066.
10 Id. at 1513.
11 Id.
disconnected. Soon after the police arrived they saw a man fitting the defendant’s description fleeing the crime scene in the defendant’s car. He was arrested in Idaho in possession of the gun that was used to shoot the victims. After he was charged with murder, the defendant pleaded not guilty. He maintained his innocence throughout the proceedings. The defendant was appointed counsel but, after that relationship irretrievably broke down, his family retained new counsel—Larry English. English concluded that the evidence against the defendant was overwhelming, and absent a concession of guilt, it would be difficult to avoid a death sentence at the penalty phase. The defendant, however, was furious when English told him that he planned to concede the defendant’s guilt. English was specifically told by the defendant “not to make that concession.”

After learning of English’s strategy, the defendant sought to terminate English’s representation. English also attempted to withdraw but the trial judge refused to grant their requests, and English represented the defendant at trial. At the beginning of opening statements, English informed the jury that there was no way that they could reach “any other conclusion than Robert McCoy was the cause of these individuals’ death.” The defendant, in an outburst during English’s opening statement, told the court that English was “selling [him] out.” Despite the defendant’s outburst, English told the jury that the evidence was “unambiguous,” and that “my client committed three murders.” During trial, the defendant “testified in his own defense, maintaining his innocence.” During closing arguments, English repeated to the jury that the defendant was the killer. At the penalty phase, English also conceded the defendant’s guilt. Despite the concessions of guilt, the defendant was sentenced to death.

Moving for a new trial, the defendant claimed that his constitutional rights had been violated by trial counsel informing the jury of the
defendant’s guilt in front of the jury on three separate occasions.\textsuperscript{30} The U.S. Supreme Court agreed with the defendant that his rights had been violated.\textsuperscript{31} The Court acknowledged that counsel may reasonably assess the evidence and determine that a concession of guilt is the best strategy for avoiding the death penalty.\textsuperscript{32} However, the Court held that counsel may not pursue that strategy over the objections of a mentally competent client, even if it appears that an acknowledgement of guilt would be the best course of action: “When a client expressly asserts that the objective of \textit{his defence} is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.”\textsuperscript{33} In reaching this conclusion, the Court divided the decisions that have to be made at trial into two categories. First, there are trial management decisions, such as “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.”\textsuperscript{34} According to the Court, these decisions are the province of the lawyer.\textsuperscript{35} The second category involved decisions that are about the objectives of the representation, and these decisions are reserved solely for the client: “whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.”\textsuperscript{36} The Court held that the decision to forgo a defense to the crime and acknowledge guilt fell into the latter category and therefore could only be made by the client “even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.”\textsuperscript{37} The Court further held that, unlike other Sixth Amendment violations, McCoy did not have to prove that he was prejudiced by counsel’s actions.\textsuperscript{38} The Court held that when the trial court allowed counsel to disregard defendant’s wish to maintain his innocence, it committed a “structural” error which requires that the defendant be provided a new trial without any need to first show prejudice.\textsuperscript{39}

I believe the Court reached the correct result for three reasons. First, the client’s wish to maintain his innocence has to be respected because it is the client, not his lawyer or the State, who will bear the personal consequences of a conviction. Even if his decision to maintain his innocence in the face of overwhelming evidence of guilt is irrational, as the dissent suggests,\textsuperscript{40} his

\textsuperscript{30} Id.
\textsuperscript{31} Id. at 1512.
\textsuperscript{32} Id. at 1508.
\textsuperscript{33} Id. at 1509.
\textsuperscript{34} Id. at 1508.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 1505.
\textsuperscript{38} Id. at 1511.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 1514–15 (Alito, J., dissenting).
decision must be honored out of “that respect for the individual which is the lifeblood of the law.”\footnote{Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).} Second, in a death penalty case, the defendant is frequently the only living person with knowledge of the facts of the case. He’s often the only person alive who knows with certainty whether he’s guilty or not. The lawyer does not have this direct knowledge. There have been capital cases in the past in which the evidence of guilt appeared overwhelming and the defendant’s protestations of his innocence were ignored and it was later determined that the defendant was wrongly convicted or at least that there was sufficient doubt as to the defendant’s guilt.\footnote{According to the Death Penalty Information Center, since 1973, at least 167 people who were sentenced to death have been exonerated. \textit{DEATH PENALTY INFORMATION CENTER, POLICY ISSUES: INNOCENCE}, \url{https://deathpenaltyinfo.org/policy-issues/innocence} (last visited Jan. 22, 2020). Another peer reviewed study estimated that at least 4.1% of those sentenced to death in the United States are innocent. Gross et al., \textit{Rate of False Conviction of Criminal Defendants Who are Sentenced to Death}, 111 PNAS 7230, 7230 (2014). Furthermore, the National Registry of Exoneration has identified 507 cases in which guilty pleas were made by individuals who were innocent and later exonerated. \textit{NATIONAL REGISTRY OF EXONERATIONS}, \url{http://www.law.umich.edu/special/exonerations/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P\url{http://www.law.umich.edu/special/exonerations/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P} (last visited Jan. 22, 2020).} Given the growing number of exonerations in capital cases, a client’s innocence claim needs to be taken seriously. Third, it is possible that the attorney’s recommendation to concede guilt is based on a less-than-thorough investigation, which occurs all too often in capital cases.\footnote{See \textit{DEATH PENALTY INFORMATION CENTER, POLICY ISSUES: REPRESENTATION}, \url{https://deathpenaltyinfo.org/death-penalty-representation} (last visited Jan. 22, 2020) (explaining that ineffective assistance of counsel is prevalent in capital cases due in part to insufficient investigations).}

The dissent, however, believed that the case was wrongly decided for several reasons. First and foremost, the dissenters believed that the majority created a constitutional right that did not previously exist.\footnote{See \textit{Florida v. Nixon}, 543 U.S. 175, 187 (2004) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) (explaining that the Supreme Court has affirmed that the defendant “has ‘the ultimate authority’ to determine ‘whether to plead guilty . . . .’”).} I don’t believe this to be the case. In \textit{McCoy}, the lawyer made the decision to essentially enter a guilty plea on behalf of his client. However, it has long been established and recognized by the Supreme Court that the decision whether to plead guilty is for the client to make, not his attorney.\footnote{\textit{McCoy}, 138 S. Ct. at 1514.} Second, the dissenters wrote a lot about their belief that this type of case is unlikely to recur.\footnote{\textit{McCoy}, 138 S. Ct. at 1514.} Based on my experience of having litigated death penalty cases for
over 25 years, the dissenters’ conclusion is only partially correct. Attorneys in
deadly penalty cases are frequently confronted with cases in which the
evidence against their client appears to be overwhelming and, as the majority
acknowledges, it would not be unreasonable for an attorney to conclude that
a concession of guilt is the best strategy to avoid the death penalty. Thus,
attnies in deadly penalty cases are often in the same position as Larry
English. What was unusual in McCoy was his attorney’s decision to inform
the jury that the defendant committed the charged offense in the face of
strenuous opposition from his client. Furthermore, if the dissenters are
correct that the situation in McCoy is unlikely to recur, it begs the question
why, then, did they write such a lengthy dissent?
The dissenters also seem to believe that whenever there is a
agreement between counsel and client as to whether the client should
concede guilt, the client could easily discharge counsel and obtain new
counsel who would be willing to pursue his innocence defense. However,
for most defendants facing a death sentence, it’s not that simple. These
defendants are almost exclusively indigent and must rely on court-appointed
counsel or public defenders for their defense since indigent defendants do
not have the right to counsel of choice. Furthermore, because the pool of
qualified lawyers who handle death penalty cases is small, the judge may be
reluctant to release the lawyer out of concern that it would be difficult to find
another lawyer to represent the defendant. In most jurisdictions, lawyers
who handle death penalty cases have to go through training and must be
certified. The pool of qualified death penalty lawyers in a place like
Bossier City, Louisiana, where McCoy was being tried, for instance, is
probably very small and that might have been a major reason why the judge
did not want to replace McCoy’s trial counsel. It is simply not as easy as the
dissent suggests for an indigent defendant to replace his court-appointed
counsel or public defender whenever he disagrees with trial counsel’s
proposed strategy, as illustrated in McCoy.
Finally, the dissenters believed that the majority created confusion as to
whether trial counsel can make a unilateral decision to concede an element of
the crime charged. For instance, in McCoy, defense counsel conceded

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47 Id. at 1515. See id. at 1515 (suggesting that if counsel and defendant do not agree on a strategy,
the client could then search for a new attorney or represent himself, except for limited situations where
the disagreement comes at the eve of trial).
48 See Wheat v. United States, 486 U.S. 153, 160 (1988) (“[N]o such flat rule can be deduced
from the Sixth Amendment presumption in favor of counsel of choice.”); Andrea Neal, Death Row
Inmates Point to Poor Quality of Lawyers Who Defend Them, L.A. TIMES (Oct. 29, 1986, 12:00 AM),
capital defendants] rely on a free attorney provided by the state.”).
50 Id.
that defendant shot the victim but claimed that defendant did not have the requisite mental state for first-degree murder. This concern seems to be unfounded. It is nonsensical for an attorney to concede an element of a crime that the client maintains he did not commit. By maintaining his innocence, McCoy made it clear that he did not wish to admit to shooting the victim and therefore his attorneys should not have conceded this element of the crime over McCoy’s objection.

II. CLIENT NEITHER CONSENTS NOR OBJECTS

The dissenters were correct about one of their assertions about the impact of the *McCoy* decision:

> [T]he right that the Court now discovers will not come into play unless the defendant expressly protests counsel’s strategy of admitting guilt. Where the defendant is advised of the strategy and says nothing or is equivocal, the right is deemed to have been waived.

This was the holding of a unanimous Supreme Court in *Florida v. Nixon*. Nixon was a hitchhiker to whom the victim made the fateful decision of giving a ride. After robbing her, Nixon subsequently tied the victim to a tree and set her on fire while she was still alive because he was concerned that she might later identify him. Nixon was charged with murder, and the state sought the death penalty. The evidence against Nixon was overwhelming. He confessed to both his brother and the police that he had killed the victim. A witness saw Nixon and the victim together shortly before the crime. Nixon was seen driving her car after the murder. His palm print was in the victim’s car. He pawned her jewelry, and the pawnshop owner later identified Nixon as the individual who had sold the jewelry. Defense counsel deposed all of the state’s witnesses and, after doing so, concluded that Nixon’s guilt was not “subject to any reasonable dispute.” Defense counsel concluded that, in order to maintain credibility with the jury, the best course of action would be to acknowledge Nixon’s

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52 Id.
53 Id. at 1515.
55 Id. at 179.
56 Id. at 179–80.
57 Id. at 180–81.
58 Id. at 179–80.
59 Id. at 180.
60 Id.
61 Id.
62 Id.
63 Id. at 180–81.
guilt to the jury and instead focus on the punishment phase and Nixon’s mental health and history of instability.\(^{64}\) Trial counsel was concerned that contesting Nixon’s guilt might compromise the ability to present an effective penalty phase defense.\(^{65}\) This proposed strategy was explained to Nixon on three separate occasions prior to trial, but he was non-responsive.\(^{66}\) Nixon never verbally approved or rejected the proposed strategy.\(^{67}\)

Trial counsel proceeded with the proposed strategy.\(^{68}\) But after Nixon was sentenced to death, he claimed that by acknowledging Nixon’s guilt without his express consent, his trial counsel had rendered ineffective assistance of counsel.\(^{69}\) The Florida Supreme Court held that trial counsel was ineffective, since Nixon never affirmatively and explicitly agreed to counsel’s strategy.\(^{70}\) The U.S. Supreme Court unanimously reversed, holding that trial counsel’s decision to concede guilt without the express approval of the client did not automatically constitute deficient performance.\(^{71}\) Rather, the Court held the decision had to be judged under the Strickland standard for determining ineffective assistance of counsel: reasonableness under the circumstances.\(^{72}\) The Court held that, given the weight of the evidence against Nixon and the fact that after an investigation the attorneys determined this evidence to be credible, and in the absence of an objection from Nixon, trial counsel’s decision to concede his guilt did not fall below an objective standard of reasonableness.\(^{73}\)

Although the decision in Nixon was unanimous, some legal scholars have taken the position that a decision to acknowledge guilt is the functional equivalent of a guilty plea because doing so does not allow true adversarial testing of the case, and that a concession of guilt should not be made without the express permission of the client.\(^{74}\) I tend to agree with this argument. The Court in Nixon believed that the concession of guilt was not the functional equivalent of a guilty plea because “Nixon retained the rights accorded a defendant in a criminal trial,” whereas a defendant who pleads guilty waives

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\(^{64}\) Id. at 181.
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id.
\(^{68}\) Id.
\(^{69}\) Id. at 185.
\(^{70}\) Id. at 186.
\(^{71}\) Id. at 192–93.
\(^{72}\) Id. at 189–192.
\(^{73}\) Id.
\(^{74}\) See Sharon G. Seudder, \textit{With Friends Like You, Who Needs a Jury? A Response to the Legitimization of Conceding a Client’s Guilt}, 29 \textit{CAMPBELL L. REV.} 137, 146 (2006) (“[T]he Supreme Court’s conclusion that a nonconsensual concession of guilt is not functionally equivalent to a guilty plea does not withstand close scrutiny, because conceding guilt to a jury effectively renders the trial a technicality and prevents true adversarial testing.”).
all of his rights. A concession of guilt, however, does waive some of the defendant’s rights—for instance, the right to confront his accusers—and significantly diminishes others, such as the right to a jury trial. Because of the grave consequences of a concession of guilt, especially in death penalty cases, this should never be done without the client’s express consent.

A. Reconciling McCoy and Nixon

The holdings in McCoy and Nixon make it clear that, after trial counsel has reviewed the evidence and determined that the best strategy for preserving his client’s life is to focus on the punishment phase, he has two primary responsibilities before acknowledging his client’s guilt to the jury. First, he has to discuss the matter with his client before any concession is made. Second, he cannot concede his client’s guilt in the event that his client expressly objects to the strategy. Doing so violates the defendant’s Sixth Amendment right to the assistance of counsel, and no proof of prejudice is required. However, in the event that the client neither objects nor consents to the lawyer’s strategy, the lawyer may acknowledge defendant’s responsibility for the crime. The attorney’s decision to concede guilt will be assessed under the Strickland v. Washington two-part test for determining ineffective assistance of counsel. In order to prevail, a defendant would have to prove that the decision to concede guilt was not professionally reasonable. For instance, if the decision was made before an attorney conducted a thorough investigation, the defendant might prevail if he can also demonstrate that he was harmed by counsel’s decision.

The Court decided in McCoy that his right to the assistance of counsel had been violated by the concession of guilt, whereas in Nixon, the Court decided that the concession of guilt was not ineffective assistance of counsel. Why did the Court decide the same issue on separate constitutional grounds? In all likelihood, the cases were decided on different

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76 The attorney can continue to represent the client in the event that the client does not expressly consent to the concession of guilt that the attorney believes is the best strategy. For instance, the rule of professional conduct that forbids frivolous claims or arguments contains an explicit exception for criminal defense lawyers to make the prosecution prove all the elements of the crime charged. Model Rules of Prof'l Conduct r. 3.1 (Am. Bar Ass’n 2018).
78 Id.
80 Id. at 688.
81 Id. at 691. See id. at 690–91 (discussing investigations and how defendants may be able to demonstrate harm).
82 See McCoy v. Louisiana, 138 S. Ct. 1500, 1510–11 (2018) (holding counsel cannot admit a client’s guilt if the client objects to the admittance).
grounds because McCoy didn’t involve a question of the trial attorney’s competence. Rather, the issue in McCoy arose because of the trial judge’s refusal to grant either the attorney’s, or the client’s, request for the attorney to withdraw and new counsel to be appointed.84 By refusing these requests it was the trial judge, not the attorney, who denied McCoy’s right to counsel, whereas in Nixon, the decision to concede guilt was made solely by counsel, and therefore it had to be assessed under Strickland for reasonableness.

Very few defendants are likely to prevail on appeal after an acknowledgement of guilt by trial counsel under either McCoy or Nixon. McCoy requires defendants to make their objections expressly known to their attorneys.85 The facts of McCoy were very unusual in that he was extremely vocal in informing everyone—his attorney, the trial judge, and the jury—that he was not consenting to his attorney’s strategy.86 Most defendants will not be so clear. Any objections are likely to have been made in private consultations between the attorneys and the defendants. The courts are likely to impose the same requirement on objecting defendants as they do on criminal suspects who invoke their Miranda rights.87 A suspect in custody must clearly and unequivocally make it known to an interrogating officer his desire to have counsel present, or to remain silent.88 The courts are similarly likely to hold that a defendant must clearly and unequivocally make known to defense counsel any objections he may have to his attorney’s strategy of conceding guilt. Many criminal suspects fail to have their statements suppressed because they did not make their wishes sufficiently clear to the police,89 and many defendants are likewise unlikely to prevail under McCoy because they will not be able to establish that they made their objections sufficiently clear to trial counsel.

In most cases in which the attorney has determined that the best strategy for saving the client’s life is to concede guilt, the holding in Nixon is more likely to be applicable than the holding in McCoy, since most defendants will either not expressly object or will fail to make their objections clear to trial counsel. The holding in Nixon will also make it extremely unlikely that defendants will prevail since these cases will be decided under the Strickland

84 See McCoy, 138 S. Ct. at 1506 (noting the trial court directed attorney to remain as counsel).
85 Id. at 1509.
86 Id. at 1506–07.
87 See Davis v. United States, 512 U.S. 452, 459 (1994) (holding an invocation of Miranda rights required a statement “that can reasonably be construed to be an expression of a desire for the assistance of an attorney,” and that this statement could not be ambiguous) (quoting McNeil v. Wisconsin, 501 U.S. 178 (1991)).
88 Id. at 459.
89 See, e.g., State v. Demesme, 228 So. 3d 1206, 1207 (La. 2017) (holding the statement “if y’all, this is how I feel, if y’all think I did it, I know that I didn’t do it so why don’t you just give me a lawyer dog cause this is not what’s up,” was not an unambiguous request for counsel); State v. Piatnitsky, 325 P.3d 167, 169 (Wash. 2014) (holding the defendant’s statement “I don’t want to talk right now,” but would “write it down,” was not an unequivocal invocation of the right to remain silent).
standard, and very few defendants prevail under Strickland. 90 As a result of Strickland, the courts are highly deferential to counsel’s strategic decisions. 91 Most defendants will not be able to overcome the high burden the courts have placed on those who challenge their attorney’s strategic decisions by proving that a strategic decision to concede guilt was not reasonable. In most cases, the attorney’s decision will seem reasonable in light of the strong evidence implicating the defendant in the crime. Even if he were to overcome this difficult hurdle, the strong evidence that implicates him will make it extremely difficult to prove that he suffered harm as a result of his attorney’s unreasonable decision.

A case decided shortly after McCoy provides a perfect illustration of how most of these cases will likely be decided in the future. In Julian v. Huss, the defendant was denied a habeas petition on his conviction for first-degree premeditated murder. 92 He had confessed to the murder on two separate occasions, one of which was tape-recorded. The defendant had no defense on the merits. The only possible defense was insanity. 93 After the court denied funds for a second psychiatric expert—the first had determined that the defendant was not insane—trial counsel conducted a “walk-through” trial “during which Julian would not contest most of the facts in dispute.” 94 The “walk-through” trial was done to preserve the defendant’s right to appeal the denial of his motion for expert assistance since Michigan law did not permit him to appeal the issue if he pled guilty. The defendant agreed on the record to the “walk-through” trial. After he was convicted and his appeals were denied, he filed a habeas petition claiming that his right to counsel had been violated by the “walk through.” He argued that he did not have to prove prejudice. However, the court analogized the claim to Nixon rather than McCoy since, unlike McCoy, the defendant had “lodged no such adamant objection” and never insisted that his counsel refrain from admitting guilt. 95 The defendant’s petition was denied after the reviewing court applied Strickland and determined that counsel had not been ineffective. 96 This case comports with my experience. Defendants typically go along with their lawyer’s suggestions but then complain when the lawyer’s strategy is unsuccessful.

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93 Id. at *6.

94 Id.

95 Id. at *8–9 (internal quotation marks and citation omitted) (alteration in original).

96 Id. at *9–10.
III. CLIENT AGREES

The easiest case would appear to be one in which a client has agreed with trial counsel’s decision to acknowledge guilt. However, this situation is also not without potential problems. The case of Nikolas Cruz, who was accused of murdering the students at Marjorie Stoneman-Douglas, is a good example of some of the complications that can arise even when the defendant agrees with the lawyer’s decision to acknowledge his guilt. There appears to be no doubt that Nikolas Cruz was responsible for the deaths of the 17 victims.\(^{97}\) There are scores of eyewitnesses (many of whom knew Cruz) who saw him open fire at the school.\(^{98}\) The crime was captured on surveillance cameras.\(^{99}\) Cruz was captured within hours of the shooting after blending in with fleeing students and escaping to a Walmart and a McDonald’s.\(^{100}\) Most importantly, Cruz confessed to the killings.\(^{101}\) As a result of this overwhelming evidence, Cruz’s attorney, the elected public defender, announced within twenty-four hours of being assigned to represent Cruz that they were not going to contest Cruz’s guilt and that they would instead focus on the penalty phase in order to attempt to save Cruz’s life. “He committed this crime. Everybody saw it. Everybody knows it. He’s admitted it. The crime is horrific and beyond words. This is going to come down to one issue—does he live, or does he die?”\(^{102}\) Cruz’s public defender has also stated the following publicly:

“We have been upfront, from the first 24 hours. He is guilty. He did it. It’s the most awful crime in Broward County. He should go to prison for the rest of his life. There are people in the community who believe he should be locked up and the key should be thrown away. I happen to be one of those people.\(^{103}\)

The attorneys’ decision to signal their defense strategy within twenty-four hours of the commission of the crime was highly unusual in such a high-profile case. Since he confessed to the crime, it would seem that Cruz consented to the defense strategy. However, I predict that their controversial strategy will lead to an ineffective assistance of counsel claim in the event that Cruz is convicted.

\(^{97}\) David Ovalle, Florida Mass Shooter Will Plead Guilty if Prosecutors Drop the Death Penalty, MIAMI HERALD (Feb. 16, 2018, 3:31 PM).

\(^{98}\) Id.

\(^{99}\) Id.

\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) Id.

In *Wiggins v. Smith*, the Supreme Court reiterated a general duty of defense counsel in capital cases to conduct a thorough investigation before making strategic decisions. The Court added that “strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.” In imposing this general duty to investigate, the Court relied heavily on the American Bar Association guidelines for death penalty cases. In Cruz’s case, because his attorneys made their strategic decision to not contest his guilt within twenty-four hours of his arrest, this decision obviously was not made after a thorough investigation of the facts and any plausible defense that he might have. It would therefore have to be assessed for reasonableness.

One of the first and most important tasks of defense counsel in capital cases is to arrange for a mental health examination of the client. The purpose of this examination is threefold: to determine defendant’s competency to stand trial; to determine defendant’s mental state at the time of the crime; and also, to determine whether defendant suffers from a mental health disorder which, although it may not provide a defense to the crime, could be presented to the jury during the penalty phase as a mitigating circumstance. The failure of defense counsel in the Cruz case to have their client examined by a mental health expert will almost certainly be the basis of an ineffective assistance of counsel claim should he be convicted. They made a strategic decision to concede his guilt even though there is evidence in his confession which suggests the possibility of an insanity defense. A mental health examination could also have assisted them in determining the validity of his confession to the police. However, the defense could have a plausible explanation for making a strategic decision so soon after their client’s arrest. They could explain to the reviewing court that, in deciding on such a quick legal strategy and announcing it to the public, they were attempting to ameliorate the hatred for their client in the community. Any

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105 *Id.* at 533 (internal quotation marks and citation omitted).
106 *See Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1015 (2003) (“Counsel at every stage have an obligation to conduct thorough and independent investigations relating to both guilt and penalty.”).
107 *Id.* at 956–57.
108 *Id.*
109 For instance, he told the police that a demon voice inside his head gave him instructions prior to the shooting to “Burn. Kill. Destroy.” Patricia Mazzei, ‘*Kill Me,* Parkland Shooting Suspect Said After Rampage,* N.Y. Times (Aug. 6, 2018), https://nyti.ms/2KumaWs.
110 *See Garner v. Mitchell, 557 F.3d 257, 263 (6th Cir. 2009)* (“[W]e may consider later-developed evidence of a defendant’s actual mental ability to understand the warnings at the times of the interrogation.”). Before his confession he asked the police for a psychologist, “to find out what’s wrong with me.” He was also interrogated after asking to speak with an attorney. Mazzei, *supra* note 109, https://nyti.ms/2KumaWs.
hope that they would have to convince one or two jurors to vote against the
death penalty for their client rests with a quick acceptance of responsibility.
The reviewing court would have to assess this explanation for reasonableness: was this a reasonable course of action and, if it is, why is
this type of strategy almost never employed by defense counsel in other
high-profile cases?

CONCLUSION

Now, I will offer some final thoughts on *McCoy*. First, as I mentioned
previously, I believe the unusual and awkward situation that occurred in
*McCoy* will not be replicated in many future cases because in most capital
cases, lawyers will not acknowledge their client’s guilt against the express
wishes of their client. Most likely to arise are conflicts between the lawyer
and client as to whether the client made it clear to his lawyer that he objected
to the lawyer’s proposed strategy or cases in which the client acquiesces to
his lawyer’s strategy, but then complain after the strategy is unsuccessful.
Second, although the Court did not limit its holding in *McCoy* to death
penalty cases, as a practical matter, the holding is likely to be applicable only
in death penalty cases since it is only in death penalty cases that an
acknowledgement of guilt is likely to result in a lesser sentence. Third, some
have suggested that, as a result of *McCoy*, unscrupulous lawyers might
intentionally ignore their client’s wishes and acknowledge his guilt to the
jury so as to prolong the appeals process and put off an execution. Based
on my more than twenty-five years litigating capital cases, I believe that an
attorney is unlikely to take the risk of having his client sentenced to death
for a couple of reasons. First, it is very difficult to win an appeal of a death
sentence, especially as a result of the restrictions on appeals that Congress
imposed when it enacted the Antiterrorism and Effective Death Penalty
Act. Most attorneys who litigate capital cases are aware of the difficulty
of prevailing on appeal and thus have no incentive to commit trial error
deliberately. Second, the differences between *McCoy* and *Nixon* are very
subtle. If the client in any way acquiesced or failed to clearly and
unequivocally state his objections to his attorney’s decision to acknowledge
his guilt, the appellate court is likely to find the situation closer to *Nixon*,

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111 See MacAoidh, *The Fascinating, and Lousy, Supreme Court Decision in McCoy v. Louisiana*,
THE HAYRIDE (May 14, 2018), https://thehayride.com/2018/05/the-fascinating-and-lousy-supreme-
court-decision-in-mccoy-v-louisiana/ (discussing how often admitting to a crime leads to a more
lenient sentence).

112 See Lincoln Caplan, *The Destruction of Defendants’ Rights*, THE NEW YORKER (June 21,
how the Antiterrorism and Effective Death Penalty Act limited the abilities of federal courts to order
the release of someone wrongly imprisoned).
rather than *McCoy*, which substantially decreases the chances of a successful appeal.

Finally, the decision in *McCoy* does not create an ethical conundrum for the lawyer under the Model Rules of Professional Conduct. The lawyer has an ethical and legal obligation to conduct a thorough investigation of the facts before deciding on a legal strategy.\(^\text{113}\) If, however, after this investigation is completed, the lawyer concludes that the best strategy for avoiding a death sentence is to acknowledge the client’s guilt but the client does not want to do so, the lawyer then has to decide how best to proceed. The lawyer has two options. First, the lawyer can present the defense that the client wants to have presented even if the lawyer believes that the defense will not succeed and will ultimately damage the penalty phase defense. The lawyer, however, cannot present evidence that he knows to be false.\(^\text{114}\) If, during the investigation of the facts, the lawyer learns that the defendant’s claims are false, the lawyer cannot violate his ethical duty of candor to the tribunal and present the defense. For instance, if the client claimed to have been with someone else when the crime occurred, but investigation reveals that to be false, the lawyer cannot present the defense. The lawyer can still continue to represent the client and he would be allowed to hold the prosecution to its burden of proving guilt beyond a reasonable doubt.\(^\text{115}\)

The second option where there is a disagreement between the client and the lawyer over whether conceding guilt is the best strategy is for the attorney to seek to withdraw. The decision to seek to withdraw does present a moral dilemma for the lawyer. That is because withdrawal does not really help the client. An experienced capital litigator is well aware that defendants often receive substandard representation in capital cases. By withdrawing the lawyer knows that he is putting the client at risk of receiving less than adequate representation and thus putting the client’s life at risk. The other problem with seeking to withdraw is that the trial judge, as in *McCoy*, may not allow the attorney to withdraw, thereby damaging the lawyer’s relationship with his client.\(^\text{116}\) Furthermore, even if withdrawal is allowed, it only passes along the problem to another lawyer.

Despite these potential drawbacks, the Court reached the right conclusion in *McCoy*. The decision reaffirms the proper role of defense counsel in the attorney-client relationship and respects the fundamental autonomy of the client. Because it is the client who will suffer the consequences of an acknowledgement of guilt—a possible death sentence—


\(^{114}\) See MODEL RULES OF PROF’L CONDUCT r. 3.3 (AM. BAR ASS’N 1980) (stating that “a lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false”).

\(^{115}\) See MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 1980) (stating that “a lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established”).

\(^{116}\) See McCoy v. Louisiana, 138 S.Ct. 1500, 1506 (2018) (discussing how the attorney-client relationship had “broken down” after the court refused to allow the attorney to withdraw).
the Court was correct in concluding that it is a decision for the client to make.