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Reinforcing Autonomy: Legal Ethics and Constitutional Compliance in Indigent Criminal Defense

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NOTE

Reinforcing Autonomy: Legal Ethics and Constitutional Compliance in Indigent Criminal Defense

McCoy v. Louisiana, 138 S. Ct. 1500 (2018).

*George R. Brand**

I. INTRODUCTION

Regulating the judicial system is an inherently difficult task. With multiple stakeholder groups often at odds with each other and within themselves, it is almost impossible to create laws, rules, and norms that satisfy everyone. The unnervingly peculiar capital murder case of *McCoy v. Louisiana* typifies the many competing ideologies and motivations constantly in flux in the American judicial system.¹ While unique idiosyncrasies within this case frame a series of events unlikely to be repeated, the Supreme Court of the United States' split decision educes this ongoing debate amongst judges, litigants, and legislatures on the best practices and purposes undergirding the entire judicial system.² This improbable, upsetting, and downright odd outlier case yields implications for constitutional interpretation, legal ethics, indigent criminal defendants, and the philosophy of the judicial system at large.

The beginning of this Note first distinguish the conflicting motivations of the varying stakeholders in the questions posed by this case and trace applicable legal doctrines back to their foundational roots. Next, the middle will stratify the ongoing ethical debate pinpointed by this case and propose a potential middle ground solution that might provide limited satisfaction for both sides. Lastly, the end will remark on a glaring atrocity left by the practical application of this case and issue a call to action to prevent similar shortcomings in the future.

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1. *See McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

2. *See id.*

II. FACTS AND HOLDING

McCoy v. Louisiana is an appeal from defendant Robert McCoy, who was sentenced to death after being convicted of three counts of first-degree murder in Louisiana state court.³ McCoy sought a new trial on the grounds of Sixth Amendment violations stemming from structural error committed by his former attorney, Larry English.⁴

McCoy was accused of shooting and killing Christine Colston, Willie Young, and Gregory Colston on May 5, 2008 in Bossier City, Louisiana.⁵ These three victims were the mother, stepfather, and son (from a different father), respectively, of McCoy's ex-wife, Yolanda Colston.⁶ McCoy and Yolanda had recently separated less than a month before the murder after a domestic dispute in which she claimed he "pinned her down on the bed at knife-point and threatened to kill her and then kill himself."⁷ McCoy was issued an arrest warrant for aggravated battery after this incident, and he failed to show up to work and fled to California in an effort to evade arrest.⁸ McCoy returned from California the day before the murder took place.⁹ The murder took place at Yolanda's parents' house, where Gregory also lived while finishing up his senior year in high school.¹⁰

A tremendous amount of evidence linked McCoy to the murders of his three ex-family members.¹¹ A 911 call from the scene of the murder detailed Christine Colston screaming, "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," before a gunshot was fired and the call was disconnected.¹² "She" was presumably referencing McCoy's estranged wife, Yolanda, who had recently entered protective custody out-of-state, along with her infant child (from a different father) in the wake of McCoy's recent aggravated battery arrest.¹³ When police officers arrived at the murder scene, dashboard video footage recorded a car registered to McCoy fleeing the scene.¹⁴ The footage also recorded a black male matching McCoy's physical description jump out of the driver's side of the car, abandon the car, scale a fence, and run away across a busy highway.¹⁵

3. *State v. McCoy*, 218 So.3d 535, 541 (La. 2018).

4. *McCoy v. Louisiana*, 138 S. Ct. at 1507.

5. *Id.* at 1505–06.

6. *State v. McCoy*, 218 So.3d at 541.

7. *Id.* at 541 n.2.

8. *Id.* at 541.

9. *Id.*

10. *Id.*

11. *Id.* at 541–44.

12. *Id.* at 541–42.

13. *Id.* at 541.

14. *Id.* at 542.

15. *Id.*

The cordless telephone used to make the 911 call was found inside the car.¹⁶ Police suspected McCoy took the phone out of the house with him after Christine used it to call 911.¹⁷ Also found inside the car were a Walmart bag with a box of .380-caliber ammunition (the same caliber used in the murders) and a Walmart cash receipt dating the purchase of the ammunition as earlier that same day.¹⁸ Walmart video surveillance footage recorded a person matching McCoy's physical description making the ammunition purchase at the same time shown on the ammunition receipt.¹⁹ Finally, a friend of McCoy testified that McCoy had asked her to buy bullets for him, or to at least loan him money for the bullets.²⁰ After refusing both requests, she agreed to accompany McCoy to Walmart, and he went into the store and bought the bullets himself.²¹

Five days after the murders took place, police apprehended McCoy at a truck stop in Lewiston, Idaho.²² He had hitchhiked with truck drivers across the United States.²³ McCoy was carrying a pay stub, birth certificate, social security card, insurance cards, credit cards, and identification cards.²⁴ Most importantly, McCoy also had a loaded handgun on the floor behind the passenger seat of the truck he was riding in.²⁵ A firearms examiner concluded at trial that all four bullets used during the triple homicide were fired from the gun McCoy had when he was apprehended in Idaho.²⁶ While in custody and awaiting extradition to Louisiana, McCoy unsuccessfully tried to hang himself with a bed sheet.²⁷ McCoy was finally returned to Louisiana two days after the bed sheet incident and nine days after the murders took place.²⁸

Despite the overwhelming amount of evidence to the contrary, McCoy has constantly asserted his innocence over the eleven years since the incident took place.²⁹ After a psychiatrist and a clinical psychologist concluded McCoy was competent to understand the proceedings against him and to assist in his defense,³⁰ he originally proceeded with the assistance of an appointed public

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 542, n.3.

21. *Id.*

22. *Id.* at 543.

23. *Id.*

24. *Id.* at 544.

25. *Id.* at 543–44.

26. *Id.* at 544 n.8.

27. *Id.* at 544.

28. *Id.*

29. *See generally* McCoy v. Louisiana, 138 S. Ct. 1500 (2018).

30. The sanity commission determined McCoy had a full-scale IQ of 89. State v. McCoy, 218 So.3d at 544 n.9. His verbal IQ was 95, and his performance IQ was 83. *Id.* These metrics did not meet the codified Louisiana definition for mental retardation or intellectual disability. *Id.*

defender.³¹ McCoy later fired the public defender and represented himself pro se until his parents hired attorney Larry English to represent him on March 1, 2010.³² Although English had previous criminal defense experience, he had never represented a client facing the death penalty and was not certified to try death penalty cases.³³ The court made sure McCoy understood his attorney was not certified to try death penalty cases and obtained McCoy's consent before letting English commence representation.³⁴ English successfully petitioned the court to delay the trial for a year in order to give him more time to find assistance (from the same public defender's office that McCoy had previously fired) to present McCoy's defense.³⁵

Throughout the case, McCoy's defense was that the court, prosecutors, police officers, and English were all part of an elaborate scheme to frame him for the triple homicide and cover up an intricate drug-running ring in which they were all co-conspirators.³⁶ He had no evidence for any of these theories, and a clinical psychologist testified that McCoy "is one of those people that can lie to themselves so extensively and for such a long period of time that they ultimately end up believing what the lie is."³⁷

In preparation for trial, English advised McCoy to plead guilty in hopes of obtaining a lesser conviction and avoiding a death sentence.³⁸ However, it was not until two weeks before trial that English definitively told McCoy that he intended to confess McCoy's guilt to the jury even though McCoy wanted to plead innocent to the charged crimes.³⁹ Two days before the trial was scheduled to commence, English told the court he had just learned that McCoy wanted to fire him as his counsel.⁴⁰ McCoy claimed his parents had retained two new attorneys to take over his representation, although the new attorneys were not at the hearing and McCoy did not even know their names.⁴¹ With the trial only two days away – having now been over three years since the murders took place – the trial judge refused to let English withdraw and ordered him to continue representing McCoy at trial.⁴²

English followed through with the planned guilty plea even though it was against McCoy's wishes.⁴³ He admitted McCoy's guilt in his opening statement, saying, "I'm telling you Mr. McCoy committed these crimes, [but he

31. *Id.* at 544.

32. *Id.* at 545.

33. *Id.*

34. *Id.*

35. *Id.* at 545–46.

36. *Id.* at 549 n.15.

37. *Id.* at 550 n.16.

38. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1506 n.2 (2018).

39. *Id.*

40. *State v. McCoy*, 218 So.3d at 548.

41. *Id.*

42. *Id.* at 549.

43. *Id.*

suffers from] serious emotional issues [that impair his ability] to function in society and to make rational decisions.”⁴⁴ English asked the jury to consider the case as a second-degree murder trial in hopes of saving McCoy from the death penalty charge that might accompany a first-degree murder conviction.⁴⁵ Against English’s advice and wishes, McCoy insisted on testifying in his own defense and presented his elaborate alibi defense at trial.⁴⁶ The jury returned a unanimous verdict finding McCoy guilty as charged on all three counts of first-degree murder, and, at the penalty phase, sentenced him to death after hearing victim impact statements from McCoy’s ex-wife, Yolanda, other friends and relatives of the deceased, and a mitigation plea from the clinical psychologist who previously conducted McCoy’s sanity commission.⁴⁷

Four months after being sentenced to death, attorneys from the Louisiana Capital Assistance Center filed a motion for a new trial on behalf of McCoy.⁴⁸ McCoy’s appellate attorneys also filed several motions for a new trial and appealed the death sentence conviction based on sixteen alleged assignments of error.⁴⁹ The main thrust of the appellate argument was that McCoy was irreparably wronged when English admitted his client’s guilt (in an effort to reduce his client’s conviction from first to second-degree murder) because English knew his client wanted to plead innocent to the charged crimes.⁵⁰ The Supreme Court of Louisiana ruled against McCoy and issued an opinion on October 19, 2016 that affirmed the lower court’s decision and McCoy’s death sentence order.⁵¹

The United States Supreme Court granted certiorari and heard the case in January 2018.⁵² On May 14, 2018, the Court reversed the decision of the Supreme Court of Louisiana and ordered a new trial for McCoy based on English’s structural error in admitting McCoy’s guilt when his client wanted to plead innocent.⁵³ Rather than focusing on English’s professional conduct and punishing the attorney for his actions, the Court tried to determine whether McCoy had suffered irreparable harm worthy of a new trial.⁵⁴ Justice Ginsburg wrote the majority opinion and was joined by five other justices.⁵⁵ Justice Alito

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 550.

48. *Id.*

49. *Id.* at 550–51.

50. *Id.*

51. *See generally* State v. McCoy, 218 So.3d 535 (La. 2018).

52. McCoy v. Louisiana, 138 S. Ct. 1500 (2018).

53. *Id.* at 1512.

54. *Id.* at 1511–12.

55. *Id.* at 1504–05.

filed a dissenting opinion that was joined by Justice Thomas and Justice Gorsuch.⁵⁶ In her majority opinion, Justice Ginsburg wrote that the Sixth Amendment gives defendants “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.”⁵⁷

III. LEGAL BACKGROUND

A dense background of cases and rules are germane to the ethical issues posed in *McCoy*. The starting point is the Sixth Amendment, which requires that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁵⁸

The United States Supreme Court has heard several cases over the years in which it has attempted to define and qualify exactly what protections the Sixth Amendment provides to criminal defendants. Perhaps the earliest of these cases was *Brookhart v. Janis*, in which an able-minded criminal attorney waived his client’s rights to cross-examine witnesses even though the client did not consent to the waiver beforehand and did not intend to plead guilty.⁵⁹ While the attorney in *Brookhart* did not actually enter a guilty plea, the Court determined the attorney’s conduct and actions effectively amounted to a guilty plea because of the irreversible harm caused by defending oneself without the ability to cross-examine witnesses at trial.⁶⁰ The Court in *Brookhart* held the attorney did not have “power to enter a plea which is inconsistent with his client’s expressed desire and thereby waive his client’s constitutional right to plead not guilty.”⁶¹

The conclusion reached in *Brookhart* rests on the well-known rule of law explicitly codified in 1983 by the Model Rules of Professional Conduct:

A lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.⁶²

56. *Id.* (Alito, J., dissenting).

57. *McCoy v. Louisiana*, 138 S. Ct. at 1505.

58. U.S. CONST. amend. VI.

59. *Brookhart v. Janis*, 384 U.S. 1, 3 (1966).

60. *Id.* at 7–8.

61. *Id.* at 7.

62. MODEL RULES OF PROF’L CONDUCT 1.2 (AM. BAR ASS’N 1983). While this rule traditionally holds that lawyers are allowed to make tactical decisions as long as clients make the fundamental ones, *McCoy* presents a perfect example of the Court making amendments to this overly-simplistic rule that Justice Scalia called “vague and

However, *Brookhart* and its progeny assert that defense attorneys cannot undertake actions that effectively, although not explicitly, surmount to entering a plea decision adverse to their client's wishes.⁶³

In the same vein as *Brookhart*, the 1975 watershed case *Faretta v. California* strengthened a criminal defendant's rights to control his own case.⁶⁴ The Court in *Faretta* affirmed that able-minded criminal defendants held rights to proceed pro se, and Justice Stewart's lengthy majority opinion included several paragraphs outlining the intentions and practical applications of the Sixth Amendment.⁶⁵ He commented on the balance of power between criminal defendants and counselors in writing, "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails . . . [The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."⁶⁶ The Court in *Faretta* announced that able-minded criminal defendants effectively captain the ship in defending themselves in a lawsuit even though their attorney, if present, can serve as a valued and trusted first mate.⁶⁷

Justice Stewart went on to write "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."⁶⁸ *Faretta* determined that the Sixth Amendment's promise of "Assistance of Counsel for his defence" meant that able-minded criminal defendants were free to decline counsel altogether and that, if present, criminal defense attorneys owed duties to abide by their client's wishes and nothing else.⁶⁹

Justice Blackmun wrote a dissenting opinion in *Faretta*, which Justices Burger and Rehnquist also joined.⁷⁰ The dissent disagreed that able-minded criminal defendants should be able to represent themselves unassisted by counsel in all cases under any circumstances.⁷¹ While the dissent acknowledged that the Sixth Amendment should not allow counsel to co-opt defendants from

derive[ing] from nothing more substantial than this court's say-so." See Steven Zeidman, *McCoy v. Louisiana: Whose Case is it Anyway?*, N.Y. L. J. (Jan. 19, 2018), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/19/mccoy-v-louisiana-whose-case-is-it-anyway/?slreturn=20190308034418> [perma.cc/SN7D-UQ4A] (citing *Gonzalez v. United States*, 553 U.S. 242, 256 (2008) (Scalia, J., concurring)).

63. See *Jones v. Barnes*, 463 U.S. 745, 754 (1983); *Florida v. Nixon*, 543 U.S. 175, 187–89 (2004); *Gonzalez v. United States*, 553 U.S. 242, 250–51 (2008).

64. *Faretta v. California*, 422 U.S. 806 (1975).

65. *Id.* at 819–36.

66. *Id.* at 819–20.

67. *Id.* at 806.

68. *Id.* at 820.

69. U.S. CONST. amend. VI; *Faretta*, 422 U.S. at 820.

70. *Faretta*, 422 U.S. at 846–52 (Blackmun, J., dissenting).

71. *Id.* at 848 (Blackmun, J., dissenting).

mounting their own defense, Justice Blackmun feared that giving able-minded criminal defendants so much agency might lead them to ignore good intentions from appointed counsel and end up worse off than they would have been if counsel had more control.⁷²

Two previous cases heard in state courts were factually similar to *McCoy*, and both cases reached similar outcomes.⁷³ In *State v. Carter*, the defendant was originally charged with both first-degree murder and felony murder.⁷⁴ Although Carter wanted to plead innocent to all charges, his attorney admitted his client was guilty on the felony murder charge and only defended his client's innocence on the first-degree murder charge.⁷⁵ The Kansas Supreme Court ultimately granted Carter a new trial because the lawyer's conduct "not only denied Carter the right to conduct his defense, but, as in *Brookhart*, it was the equivalent to entering a plea of guilty."⁷⁶

In *Cooke v. State*, a defense attorney attempted to defend his client's charges by arguing his client was "guilty but mentally ill" even though the client wanted to plead not guilty to all charges.⁷⁷ The Delaware Supreme Court held that the defense attorney's conduct unfairly infringed his client's right to plead not guilty, negated his right to testify in his own defense, and deprived him of his right to an impartial jury trial.⁷⁸ As in *Carter*, the court in *Cooke* granted the defendant a new trial in light of the violations of the defendant's Sixth Amendment rights.⁷⁹

However, the mere fact that defense attorneys act without their client's consent does not, in and of itself, warrant a new trial. Three different federal circuit courts in cases factually similar to *McCoy* found Sixth Amendment violations but did not grant new trials or rule in favor of defendants because of a lack of prejudicial effect.⁸⁰ A key distinction between these cases and *McCoy* is that the former were reviewed through a challenge of ineffective assistance of counsel – which triggered the prejudicial error requirement – while *McCoy* was reviewed under a lens focused on defendant autonomy that did not require a finding of prejudicial error in order to grant a new trial.⁸¹

72. *Id.* at 849 (Blackmun, J., dissenting) ("I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical – albeit voluntary – caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification.").

73. *See, e.g.*, *State v. Carter*, 14 P.3d 1138, 1145 (Kan. 2000); *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009).

74. *Carter*, 14 P.3d at 1141.

75. *Id.* at 1143.

76. *Id.* at 1148.

77. *Cooke*, 977 A.2d at 809.

78. *Id.* at 842–46.

79. *Id.* at 857.

80. *Carter*, 14 P.3d at 1148; *Cooke*, 977 A.2d at 857.

81. *See* Jay Schweikert, *Victory for Defendant Autonomy and the Criminal Jury Trial in McCoy v. Louisiana*, CATO INST. (May 14, 2018),

Federal circuit courts have also heard similar cases where attorneys acted contrary to their clients' wishes. In *United States v. Holman*, a defendant was convicted by a jury of three separate crimes: possession of cocaine with intent to distribute, possession of a firearm and ammunition by a felon, and carrying a firearm during and in relation to a drug trafficking crime.⁸² Without consulting his client or explaining the trial strategy beforehand, the defense attorney conceded that his client possessed cocaine, but denied his client's guilt as to the other crimes charged.⁸³ Although the court held that the attorney's conduct violated his client's Sixth Amendment rights, the court found these violations were unprejudicial.⁸⁴ The court affirmed the ruling that there was not "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."⁸⁵

In *Haynes v. Cain*, a defense attorney pleaded guilty, without his client's consent, to a second-degree murder charge in order to prevent his client from receiving the death penalty, which was possible if he was convicted on first-degree murder.⁸⁶ The defendant was later denied a new hearing when he argued his Sixth Amendment rights were violated by his attorney's conduct because he could not show these violations resulted in prejudicial effect.⁸⁷

A finding of prejudicial effect is the key distinction between harmless and structural error findings. Errors that do not affect substantial rights and lack "substantial and injurious effect or influence in determining the jury's verdict" are likely to be deemed harmless error and will not, in and of themselves, cause judges to order cases be retried.⁸⁸ Structural error, however, are those that affect "the entire conduct of the trial from beginning to end."⁸⁹ These types of errors affect "the framework within which the trial proceeds," and often are grounds for judges to order cases be retried to remove the presumption of unfairness injected by the error at issue.⁹⁰

IV. INSTANT DECISION

While many of the aforementioned cases are factually similar to *McCoy*, a key distinction is that McCoy was informed of his attorney's planned strategy

<https://www.cato.org/blog/victory-defendant-autonomy-criminal-jury-trial-mccoy-v-louisiana> [perma.cc/UP9E-SSQB].

82. *United States v. Holman*, 314 F.3d 837, 839 (7th Cir. 2002).

83. *Id.* at 840.

84. *Id.* at 844.

85. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

86. *Haynes v. Cain*, 298 F.3d 375, 378 (5th Cir. 2002).

87. *Id.* at 382–83.

88. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946); *see also* FED. R. CRIM. P. 52(a); 28 U.S.C. § 2111 (2018).

89. *See Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991).

90. *Id.* at 310.

before the trial and vehemently objected.⁹¹ Conversely, in many of these other cases, attorneys acted at trial without their client's consent, but the clients were never consulted or informed of the planned strategies ahead of time. This express denial of consent makes McCoy's case less like *Holman*, or *Haynes* and more like *Carter* or *Cooke*. In distinguishing *McCoy* from some of these similar cases without express denials of consent, the Court held "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."⁹² Justice Ginsburg's majority opinion did not address some of the prejudicial issues raised in similar Sixth Amendment cases because McCoy's case was not reviewed for ineffective assistance of counsel.⁹³

Justice Alito's dissent made three main arguments.⁹⁴ First, he contended that English's trial strategy did not actually surmount to a guilty plea.⁹⁵ Although English admitted McCoy shot the victims, he only admitted to the requisite actus reus, and he went on to deny that McCoy had the requisite mens rea to be found culpable for murder.⁹⁶

Second, the dissent argued McCoy's case did not meet the Court's stated criteria for certiorari and should never have been heard.⁹⁷ Emphasizing the incredibly rare and unusual nature of McCoy's case, the dissent argued the many idiosyncrasies made the case unlikely to hold much relevance to future litigants, judges, or juries, and thereby should not have been granted certiorari.⁹⁸

Third, the dissent addressed issues related to a lack of prejudicial error review.⁹⁹ Justice Alito suggested the majority opinion compounded its error in hearing the case in the first place when it affirmed the lower court's finding of structural error, as he believed this topic was outside the realm of the certiorari grant.¹⁰⁰

91. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1506 n.2 (2018).

92. *Id.* at 1505.

93. *Id.* at 1510–11.

94. *Id.* at 1512–18 (Alito, J., dissenting).

95. *Id.* at 1512 (Alito, J., dissenting).

96. *Id.* (Alito, J., dissenting).

97. *Id.* (Alito, J., dissenting).

98. *Id.* at 1512–15 (Alito, J., dissenting).

99. *Id.* at 1517–18 (Alito, J., dissenting).

100. *Id.* (Alito, J., dissenting). Certiorari was specifically granted to determine "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." *Id.* at 1507.

V. COMMENT

Perhaps the most glaring problem in this case is that the court allowed an incompetent attorney to defend a capital client.¹⁰¹ But, rather than remark on the many factual absurdities in the case, this comment will focus on the ethical and practical effects and shortcomings of the legal conclusions underlying the majority opinion. This section will first highlight the ethical and philosophical assertions raised by this case. Next, it will address the problems in practical application created by the Court's majority opinion and suggest more stringent prerequisites before new trials can be awarded in cases like *McCoy*.

A. *Welcoming State Aided Suicide*

Although Justice Ginsburg's majority opinion only makes one citation to Professor Erica Hashimoto's 2010 article, "Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case," Hashimoto might as well have written the entire opinion herself.¹⁰² In her critically acclaimed article, Hashimoto advocated for a reclassification of a "criminal defendant's autonomy interest" to control his own defense from a "constitutional value" to a "constitutional right."¹⁰³ Hashimoto cautioned against proceedings like *McCoy* where "counsel has the authority to pursue a guilt-based defense at trial and to concede the defendant's guilt of a lesser-included offense, even over the defendant's objection" because of the criminal defendant's lack of autonomy to manage his own case.¹⁰⁴

Hashimoto's opponents operate under the foundational belief that "the optimal strategy for a defendant in a criminal case is one that minimizes both the risk that an innocent defendant will be found guilty and the sentence of the defendant in the event of a conviction."¹⁰⁵ Alternatively, Hashimoto argued the true optimal strategy for a defendant in a criminal case depends on how individual defendants define their own "best possible result."¹⁰⁶ She surmised that, for some capital defendants, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death

101. *State v. McCoy*, 218 So. 3d 535, 545 (La. 2018). McCoy's attorney, Larry English, suffered depression and irreparable harm as a result of this case. For an interesting take on this case from English's perspective, see Jeffery C. Mays, *To Try to Save Client's Life, a Lawyer Ignored His Wishes. Can He Do That?*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/nyregion/mccoy-louisiana-lawyer-larry-english.html> [perma.cc/YK2M-ADPN].

102. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147 (2010).

103. *Id.* at 1152–60.

104. *Id.* at 1149–50.

105. *Id.* at 1174–75.

106. *Id.* at 1178–79.

sentence.”¹⁰⁷ Because individual defendants determine for themselves what their own “best possible result” is, Hashimoto argued criminal defendants have a “significant autonomy interest in controlling the key decisions in the case.”¹⁰⁸ This sentiment was specifically cited in Justice Ginsburg’s majority opinion as a reason for instituting an autonomy right for criminal defendants to control strategy decisions in their own defense.¹⁰⁹

An autonomy regime formulated by Hashimoto and enforced by Justice Ginsburg would ultimately provide grounds for “state aided suicide.”¹¹⁰ This phrase, originally coined by Pennsylvania Supreme Court Judge Thomas Pomeroy in 1978, refers to a scenario in which courts let capital defendants make strategic decisions, either adverse to their lawyer’s advice or when appearing pro se, that result in death penalty convictions.¹¹¹ The theory is that, had defendants been required to follow their lawyer’s strategy advice, they could have escaped capital punishment.¹¹²

A 2004 New Jersey Supreme Court case cites the fear of inducing “state aided suicide” as the motivation for rejecting Hashimoto and Justice Ginsburg’s plea for criminal defendant autonomy rights.¹¹³ In *State v. Reddish*, the court warned against strengthening autonomy rights for capital defendants in acknowledging:

An inadequate and incompetent presentation by a pro se defendant . . . unacceptably poses a risk to the State of executing a defendant whose individual character and record do not warrant the ultimate punishment . . . Honoring an incautious defendant’s choice to exercise his self-representation right does not mean a court must fulfill his death wish.¹¹⁴

While Hashimoto may qualify state aided suicide as a risk worth taking, the court in *Reddish* used this risk to advocate against an expansion of autonomy rights for criminal defendants.¹¹⁵

A similar argument was proposed by Professor John F. Decker in his 1996 article “The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*.”¹¹⁶ In his article, Decker examined the historical and legal regimes at play leading

107. *Id.* at 1178.

108. *Id.* at 1178–79.

109. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508–09 (2018).

110. *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978).

111. *Id.*

112. *Id.*

113. *State v. Reddish*, 859 A.2d 1173, 1201 (N.J. 2004).

114. *Id.*

115. *Id.*

116. John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483 (1996).

to *Faretta* in 1976 and argued that the Court's ruling in *Faretta* (that defense attorneys must abide by their clients' wishes above anything else) lacked constitutional basis.¹¹⁷ On the contrary, Decker highlighted the myriad procedural problems often caused by self-representation and concluded that "representing oneself is rarely, if ever, in the best interest of an accused."¹¹⁸ Decker concluded that *Faretta* was wrongly decided and should be overturned.¹¹⁹

Decker's argument that the procedural problems often presented by pro se representation in complex cases outweigh the ethical considerations of criminal defendant autonomy rights is supported elsewhere in theory and in practice. In *United States v. Taylor*, for example, the Court of Appeals for the Seventh Circuit affirmed a lower court's decision to appoint mandatory "standby counsel" to a defendant during a particular phase of trial even though the defendant would have preferred alternative counsel.¹²⁰ The court recognized the defendant's limited autonomy rights under *Faretta*, but qualified, "this right of self-representation [does not] comprehend any correlative right to preclude the trial court from appointing counsel and authorizing him to participate in the trial over the accused's objection in order to protect the public interest in the fairness and integrity of the proceedings."¹²¹ Essentially, the court determined a general procedural interest in fairness and integrity in judicial processes was more valuable than ensuring pro se defendants retain complete autonomy over every step of their legal defense.¹²²

In the end, the ethical issues posed by this question are the same that Justice Blackmun considered in his dissenting opinion in *Faretta*.¹²³ The debate forces a standoff between strengthening criminal defendants' autonomy rights to protect defendants from the potential dangers of impure intentions by appointed counsel and trumpeting judicial norms of fairness, integrity, and reliability over occasional oddball outlier cases and defendants. It is a question of utility versus individualism: Does the judicial system exist to provide the greatest amount of good for the greatest amount of people or does it seek to avoid individual injustices at any cost? While the constitutional and overarching legal answers (including Justice Ginsburg's majority opinion in *McCoy*) tend towards the latter, there are well-documented arguments and support for the former as well. In a progressing age of expanded access to knowledge and information, the future legal community will likely continue siding with the majority opinion's rationales in *McCoy*, but an ideal solution would be a more balanced regime that gives judges more leeway in answering these difficult ethical

117. *Id.* at 490–98.

118. *Id.* at 490.

119. *Id.*

120. *United States v. Taylor*, 569 F.2d 448, 450 (7th Cir. 1978). The "alternative counsel" the defendant sought in this case was a friend who was not a licensed attorney and had no formal legal training or experience. *Id.*

121. *Id.* at 452.

122. *See id.*

123. *Faretta v. California*, 422 U.S. 806, 846–52 (1975) (Blackmun, J., dissenting).

questions on a case-by-case basis.¹²⁴ If we trust judges enough to let them make ultimate life or death sentencing decisions, we should also trust them enough to recognize instances when abnormally behaving pro se defendants, like Robert McCoy, could better achieve their desired results if provided with stronger legal guidance.¹²⁵

B. Structural Error Review

Because the Court in *McCoy* determined the Sixth Amendment violations were structural error, the case was not subject to harmless-error review.¹²⁶ In attorney misconduct cases, like *Holman* and *Haynes*, the Sixth Amendment violations did not result in new trials for the defendants because the courts, using harmless-error review, determined the defendants were not prejudiced by their attorneys' misconduct.¹²⁷ The proceedings in those cases would have reached the same conclusions regardless of the attorneys' behavior. Although the same can certainly be said for McCoy, the Court granted him a new trial because the Sixth Amendment violations constituted structural error, which cast aside the need to conduct harmless-error review.¹²⁸

This absurdity undergirds Justice Alito's dissenting opinion and frustrates those who advocate for a smoother and more streamlined judicial system.¹²⁹ Given the almost literal smoking gun evidence that linked McCoy to the triple homicide, the Court was forced to grant him a new trial because of its steadfast

124. One issue courts have faced in the aftermath of *McCoy* is whether their rulings hold true in circumstances where criminal defendants oppose their lawyer's plea decisions but fail to lodge their complaints in open court. See *Supreme Court Rejects Rogue Lawyer Appeal in Texas Death Case (1)*, BLOOMBERG L. (Feb. 28, 2019), <https://news.bloomberglaw.com/us-law-week/supreme-court-rejects-rogue-lawyer-appeal-in-texas-death-case-1> [perma.cc/S2B3-QLN8].

125. Some would consider such a regime as one "where lawyers decide what is best for clients and ignore their wishes – where, in effect, a defense lawyer acts as judge and jury." See Garrett Epps, *Can a Lawyer Declare His Client Guilty?*, THE ATLANTIC (May 16, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/should-lawyers-ever-force-their-clients-to-act-in-their-best-interest/560498/> [perma.cc/7UM9-F5U2]. To circumvent these fears, significant protections would have to be put in place to ensure that judges retain authority to monitor the scope, responsibilities, and activities at play within the attorney-client relationship. *Id.*

126. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018).

127. *Id.* at 1510–11; *United States v. Holman*, 314 F.3d 837, 844 (7th Cir. 2002); *Haynes v. Cain*, 298 F.3d 375, 380–81 (5th Cir. 2002).

128. *McCoy v. Louisiana*, 138 S. Ct. at 1510–11.

129. See *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/> [perma.cc/P5MS-U3ZV] ("We'll now have a new trial with the same impossible-to-contest facts, and the same guilty verdicts, and probably some new flimsy appeal. And untold amounts of money will be spent denying justice for the family of the victims.").

policies of structural error.¹³⁰ While some, like Hashimoto, praise Justice Ginsburg's majority opinion because "[i]t recognizes that what happened to McCoy was just so fundamentally unfair that he has to be given a new trial," the fact remains that McCoy will be found guilty whether represented pro se, by Clarence Darrow or even Bugs Bunny.¹³¹ Meanwhile, the State must spend resources retrying the case, the court must pay judges, juries, and staff to rehear the case, and, most importantly, plenty of other litigants face lengthier delays in their own proceedings because of the tremendous expenses, in both time and money, associated with granting a new trial in this case. Allowing new trials in instances of structural error further delays the entire judicial process and contributes to growing problems associated with judicial inefficiency and mandatory review policies.

If McCoy's Sixth Amendment violations were subject to harmless-error review, the Court likely would have determined English's conduct did not prejudice McCoy, and the case could have produced a more well-reasoned opinion without the frustration of forcing everyone to endure a new trial that will inevitably end with yet another guilty verdict. The unfortunate ending in this odd case should serve as a call to action for judges and policymakers to reconsider the classification of structural error in order to better serve judicial expediency in the future.

VI. CONCLUSION

Since *Faretta*, courts have largely upheld criminal defendants' autonomy rights when asked to ward off lawyers who overstep their duties. The Court's decision in *McCoy* follows this line of thinking, as it praises the American ideal that a criminal defendant has the authority to make fundamental legal decisions in mounting his own defense no matter how ill-advised or unwise his decisions may be. However, judges and scholars are not unanimous in praising the result of *McCoy*. A vibrant minority questions whether the judicial system and society at large would be better off if judges and attorneys had more leeway to advise and instruct criminal defendants when making legal decisions of paramount importance. The interplay between Justice Ginsburg's idyllic majority opinion and Justice Alito's biting dissent exude the competing viewpoints in this ongoing legal discussion, and it is yet to be seen if future courts will likely look back at *McCoy* as a harbinger of more autonomy-laden rhetoric or as a catalyst for reconsidering longstanding ethical and judicial norms.

130. See *McCoy v. Louisiana*, 138 S. Ct. at 1511.

131. Mark Joseph Stern, *Justice Ginsburg's Groundbreaking Opinion in McCoy Revives Criminal Defendants' Right to Autonomy*, SLATE (May 15, 2018), <https://slate.com/news-and-politics/2018/05/justice-ginsburgs-opinion-in-mccoy-v-louisiana-revives-criminal-defendants-right-to-autonomy.html> [perma.cc/FN6T-8JAR].

