
*Sixth Amendment — Assistance of Counsel —
Capital Punishment — McCoy v. Louisiana*

Where a criminal defendant's authority over his trial ends and defense counsel's begins is a murky area of constitutional law. One question in particular has risen to state supreme courts and the U.S. Supreme Court multiple times in recent decades: whether a defense attorney can admit her client's guilt without the client's consent. This question often arises in capital cases, where the bifurcation of trials incentivizes concession strategies. In *Florida v. Nixon*,¹ the Supreme Court held that a defense attorney may admit a client's guilt when the client is unresponsive; express consent is not required.² The *Nixon* Court did not answer the logical corollary: Can defense counsel concede guilt when her client explicitly objects? Last Term, in *McCoy v. Louisiana*,³ the Supreme Court held that a defendant's Sixth Amendment rights are violated when counsel admits guilt over the defendant's express objections.⁴ In principle, *McCoy* champions defendant autonomy and was rightly decided. In practice, however, *McCoy* is less protective of defendants' rights than it appears on its face. *McCoy* excludes from federal habeas relief a range of defendants with valid *McCoy* claims and bears dangerous implications for defendants who lack the mental competence to stand trial. *McCoy* should have addressed head-on the thorny practical dilemmas it creates by providing direction to federal and state courts tasked with implementing the decision.

In 2008, Robert McCoy was charged with murdering three members of his estranged wife's family in Bossier City, Louisiana.⁵ An investigation yielded overwhelming evidence that McCoy committed the crime, and the prosecution sought the death penalty.⁶ From the start, McCoy maintained his innocence. He argued that while he was in Texas, corrupt police officers killed the victims over a soured drug deal and launched a conspiracy to frame McCoy for the crime.⁷ McCoy's appointed public defenders were unwilling to pursue his defense narrative, so he sought alternate representation.⁸ His parents pulled together \$5000 to retain Larry English, a local attorney who was not capital certified.⁹

¹ 543 U.S. 175 (2004).

² *Id.* at 178.

³ 138 S. Ct. 1500 (2018).

⁴ *Id.* at 1505.

⁵ *Id.* at 1505–06.

⁶ *Id.* at 1506; *id.* at 1513 (Alito, J., dissenting). The evidence included: an abandoned car registered to McCoy containing a receipt for bullets and a landline phone matching the phone cradle in the victims' home; a 911 call recorded the night of the killing with a victim shouting, "She ain't here, Robert"; and the gun used to shoot the victims, later found in McCoy's possession. *Id.*

⁷ Brief for Respondent at 5–6, *McCoy*, 138 S. Ct. 1500 (No. 16-8255).

⁸ *Id.* at 7–8.

⁹ Joint Appendix Volume I of II (JA1-JA431) at 60 n.20, *McCoy*, 138 S. Ct. 1500 (No. 16-8255).

Like the public defenders, English was unwilling to pursue McCoy's alibi, which he considered "delusion[al]."¹⁰ A court-appointed sanity commission found McCoy competent to stand trial, but English remained convinced of his incompetence and moved for a continuance to allow for a more thorough mental evaluation.¹¹ Addressing the judge, McCoy protested, "There is . . . nothing wrong with me . . . Mr. English wants the Court to believe something is wrong with me . . . I'm fully competent."¹² The motion for a continuance was denied.¹³

English and McCoy also disagreed over whether to concede guilt. When English informed McCoy two weeks before trial of his plan to admit guilt, McCoy rejected the strategy and attempted to fire English, but the court prohibited the last-minute change.¹⁴ Still, English refused to follow McCoy's direction, believing, "I have no ethical duty as a lawyer to hold Mr. McCoy's hand while he walks into the death chamber. . . . I have an ethical duty . . . [to] do the . . . best I can to save his life."¹⁵

At trial, English conceded that McCoy murdered the decedents. His opening statement declared, "[T]here is no way reasonably possible that you can listen to the evidence in this case' and not conclude that McCoy was 'the cause of these individuals' death.' . . . 'I've just told you he's guilty.'"¹⁶ McCoy protested that English was "selling [him] out," yet the judge allowed the concession and prohibited additional "outbursts" from McCoy.¹⁷ After cross-examining his own client to highlight the lunacy of McCoy's alibi, English argued that McCoy committed the killings but, due to his diminished capacity, lacked the intent necessary for first-degree murder.¹⁸ During the penalty phase of trial, English's only witness — the same psychologist who found McCoy competent to stand trial — asserted that McCoy lacked any "mental illness that would interrupt his ability to know right from wrong regarding the . . . murders."¹⁹ The jury found McCoy guilty on three counts of first-degree murder and sentenced him to death.²⁰

On appeal, McCoy argued that English's strategy was not only unsuccessful but also unconstitutional, violating his Sixth Amendment rights.²¹

¹⁰ State v. McCoy, 218 So. 3d 535, 565 (La. 2016).

¹¹ *Id.* at 611, 614.

¹² *Id.* at 616 (first omission in original).

¹³ *Id.*

¹⁴ *McCoy*, 138 S. Ct. at 1506 & n.2.

¹⁵ Joint Appendix Volume II of II (JA432-JA760) at 441, *McCoy*, 138 S. Ct. 1500 (No. 16-8255).

¹⁶ Corrected Brief for Petitioner at 11, *McCoy*, 138 S. Ct. 1500 (No. 16-8255).

¹⁷ *McCoy*, 138 S. Ct. at 1506-07 (alteration in original).

¹⁸ Corrected Brief for Petitioner, *supra* note 16, at 12, 14-15. However, Louisiana law "does not recognize a diminished-capacity defense independent of an insanity plea." *Id.* at 12.

¹⁹ Joint Appendix Volume II of II (JA432-JA760), *supra* note 15, at 689.

²⁰ Corrected Brief for Petitioner, *supra* note 16, at 16-17.

²¹ State v. McCoy, 218 So. 3d 535, 568 (La. 2016).

The Louisiana Supreme Court affirmed the conviction.²² Applying an ineffective assistance of counsel analysis under the *Strickland v. Washington*²³ harmless error standard, the court concluded that the concession strategy was a reasonable tactical approach and did not prejudice McCoy's case.²⁴ Furthermore, the court argued that presenting McCoy's alibi defense would have made English complicit in perjury.²⁵

The U.S. Supreme Court reversed. Writing for the Court, Justice Ginsburg²⁶ held that a court violates a defendant's Sixth Amendment rights when it allows defense counsel to admit guilt over the defendant's express objections — even if counsel believes her strategy is necessary to avoid the death penalty.²⁷ While criminal defendants have the constitutional right to represent themselves, they do not cede all control over their cases when they opt for the assistance of counsel.²⁸ Control is divided based on the nature of the decision: strategic trial management decisions are allocated to counsel, while defendants retain power over fundamental choices, such as whether to plead guilty or to appeal.²⁹ Conceding guilt at trial falls in the latter category as a fundamental decision about what the defense's objectives are, not a “strategic choice[] about how best to *achieve* [those] objectives.”³⁰ Indeed, conceding guilt may be the best way to avoid the death penalty, but a defendant can legitimately prioritize other objectives — such as avoiding a lifetime in prison or the opprobrium of admitting to killing family members.³¹

Justice Ginsburg then explained why the decision she authored in *Nixon* did not foreclose McCoy's holding. *Nixon* considered an “unresponsive” client who “never verbally approved or protested” counsel's concession strategy³² — a far cry from McCoy, who asserted an “intransigent and unambiguous objection.”³³ Furthermore, the Court clarified that its holding was not precluded by rules of professional conduct that prohibit lawyers from assisting clients in criminal or fraudulent behavior.³⁴ Contrary

²² *Id.* at 541.

²³ 466 U.S. 668 (1984).

²⁴ *McCoy*, 218 So. 3d at 564–72.

²⁵ *Id.* at 565.

²⁶ Justice Ginsburg was joined by Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan.

²⁷ *McCoy*, 138 S. Ct. at 1512. The Sixth Amendment entitles each defendant to “the Assistance of Counsel for *his* defence,” U.S. CONST. amend. VI (emphasis added), and counsel, “however expert, is still an assistant,” *McCoy*, 138 S. Ct. at 1508 (quoting *Faretta v. California*, 422 U.S. 806, 820 (1975)).

²⁸ *McCoy*, 138 S. Ct. at 1507–08 (citing *Faretta*, 422 U.S. at 819–20, 834).

²⁹ *Id.* at 1508 (first citing *Gonzalez v. United States*, 553 U.S. 242, 248 (2008); then citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

³⁰ *Id.* Counsel must still fulfill her trial management role. *Id.* at 1509.

³¹ *Id.* at 1508.

³² *Id.* at 1509 (quoting *Florida v. Nixon*, 543 U.S. 175, 181 (2004)).

³³ *Id.* at 1507.

³⁴ *Id.* at 1510.

to the view of the Louisiana Supreme Court, English was not at risk of aiding perjury because he “harbored no doubt that McCoy believed what he was saying.”³⁵

The Court then asserted that English’s concession strategy amounted to a structural error, thus demanding a new trial.³⁶ Structural errors — unlike simple trial errors — “affect[] the framework within which the trial proceeds” and are not subject to harmless error review under *Strickland*.³⁷ Justice Ginsburg explained that McCoy’s claim was not about ineffective assistance of counsel because English’s competence was not the issue; his concession strategy may have been sound, but it “usurp[ed] control of an issue within McCoy’s sole prerogative,” and was therefore a structural error.³⁸ The majority closed by acknowledging the difficult position that English faced, while reiterating that lawyers in similar positions must yield to their clients’ objections.³⁹

Justice Alito dissented.⁴⁰ He maintained that English’s concession did not violate McCoy’s fundamental rights and faulted the majority for establishing a rule that misapprehended the facts of this case.⁴¹ McCoy’s lawyer merely conceded guilt of the actus reus — killing the victims — but did not concede guilt of the charged crime of first-degree murder, which requires specific intent.⁴² Yet the Court adopted a rule that prohibits lawyers from conceding guilt of the charged offense, something English never did.⁴³ After drawing this distinction, Justice Alito presented a version of the facts absent from the majority opinion. He described the extensive evidence pointing to McCoy as the killer, the “incredible and uncorroborated” story that McCoy offered as a defense, and McCoy’s failure to seek alternate counsel until just days before trial.⁴⁴ Repeating the refrain, “[W]hat was English supposed to do?,” Justice Alito framed English as a lawyer with no good option but to concede guilt of the actus reus.⁴⁵ Putting on McCoy’s preferred defense would have been not only unethical under Louisiana’s rules of ethics, but also pragmatically disastrous, increasing the likelihood of a death sentence.⁴⁶ McCoy’s appellate counsel proposed that a lawyer is not required to support her client’s “bizarre defense,” but must avoid an affirmative concession of guilt.⁴⁷ The dissent found this

³⁵ *Id.*

³⁶ *Id.* at 1511.

³⁷ *Id.* (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

³⁸ *Id.*

³⁹ *Id.* at 1512.

⁴⁰ Justice Alito was joined by Justices Thomas and Gorsuch.

⁴¹ *McCoy*, 138 S. Ct. at 1512, 1517 (Alito, J., dissenting).

⁴² *Id.* at 1512.

⁴³ *Id.* at 1512 & n.1.

⁴⁴ *Id.* at 1513.

⁴⁵ *Id.* at 1513–14.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1514.

proposal unsatisfying. Justice Alito expressed skepticism that an otherwise constitutional defense becomes unconstitutional when it includes an explicit admission of a client's guilt, if the absence of such a statement would nonetheless imply the same level of guilt.⁴⁸

Justice Alito then argued that the right created in *McCoy* was not only ill-suited to the facts of the case, but also unlikely to arise in another case “for many years to come.”⁴⁹ He asserted that future cases claiming *McCoy* rights will have to satisfy the rare confluence of five factors: (1) the case is capital, making it reasonable for the attorney to concede guilt to maintain credibility with the jury at the penalty phase of trial; (2) the defendant is irrational, insisting on maintaining his innocence even when an innocence defense would be counterproductive; (3) the defendant and retained counsel reach an irreconcilable impasse, yet the defendant declines to fire the attorney far enough ahead of trial; (4) the trial court fails to appoint substitute counsel; and (5) the defendant explicitly protests the concession strategy, placing his case in the realm of *McCoy* rather than *Nixon*.⁵⁰ The dissent believed that, because this issue arises so rarely, the Court should not have granted certiorari — particularly given that alternative defenses would have done little to avoid the death penalty.⁵¹

Justice Alito feared that, if read expansively, *McCoy* bears “important implications” for a more common scenario: Can a defendant veto the concession of just an element of the offense when guilt is the only issue for the jury?⁵² Rather than opening the floodgates of defendants' veto power in various circumstances, the dissent favored narrowing *McCoy* to its unusual facts.⁵³ Finally, the dissent took issue with the majority deciding the structural-error question — an issue not addressed by the Louisiana Supreme Court or the state's brief — and resolving *McCoy* based on a newfound right not implicated by the case's facts.⁵⁴

The Court rightly affirmed the principle of criminal defendant autonomy. However, the deceptively straightforward opinion neglects *McCoy*'s real-world implications and fails to provide direction to lower courts, undercutting the practical value of the *McCoy* principle. First, the Court should have directed federal courts to provide habeas review for defendants whose *McCoy* rights were violated under circumstances less explicit than the facts of *McCoy* itself, to avoid excluding those de-

⁴⁸ *Id.*

⁴⁹ *Id.* The majority countered that this conflict has arisen in state supreme courts three other times over twenty years. *Id.* at 1510 (majority opinion) (citing *People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010); *Cooke v. State*, 977 A.2d 803 (Del. 2009); *State v. Carter*, 14 P.3d 1138 (Kan. 2000)).

⁵⁰ *Id.* at 1514–15 (Alito, J., dissenting).

⁵¹ *Id.* at 1515–16.

⁵² *Id.* at 1516.

⁵³ *Id.* at 1517.

⁵⁴ *Id.* at 1517–18.

defendants from federal habeas relief. Second, the Court should have directed state courts to apply mental competency standards more rigorously, to avoid incompetent defendants objecting to guilt concessions at trial. Providing such direction to lower courts would have rendered *McCoy* a more robust shield in practice for vulnerable defendants.

Despite the reasonableness of guilt-concession strategies in capital cases,⁵⁵ the Court correctly concluded that a defendant's fundamental right to decide the objective of his defense outweighs the strategic benefit of admitting guilt. Legally, the *McCoy* decision aligns with the intuition behind the Sixth Amendment, the American Bar Association (ABA) Model Rules of Professional Conduct,⁵⁶ and the rulings of most state courts that have considered this issue.⁵⁷ Ethically, *McCoy*'s holding affirms a client-centered lawyering model that assumes "most [clients] are in a better position to make case decisions because so many decisions ultimately turn on the values and priorities that the client alone best appreciates."⁵⁸ As the *McCoy* Court acknowledged, clients' priorities may validly differ from those of their attorneys.⁵⁹ Moreover, attorneys — particularly when appointed to defend indigent clients with minimal compensation — may "too often allow self-interest to color their judgment about the best course of defense."⁶⁰ This dynamic contributes to indigent defendants often feeling "their lawyer [is] not on their side."⁶¹ *McCoy* protects defendants facing mistrust and divergent interests between themselves and their attorneys by restoring their "power to decide the ends of the representation."⁶²

⁵⁵ Capital trials are bifurcated into a guilt phase and penalty phase, with the same jury deciding both issues. See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1578, 1588 (1998). Capital defendants are statistically more likely to receive the death penalty when they present innocence defenses at the guilt phase because the jury perceives them as less remorseful or trustworthy. See, e.g., *id.* at 1589–96. Because "death is different," many capital attorneys feel morally obligated to concede guilt to help save the client's life, even over a client's objections. Cf. Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1377, 1390 (1988).

⁵⁶ ABA Model Rule 1.2 dictates that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation," and most state codes of legal ethics have adopted this rule. Petition for a Writ of Certiorari at 23 n.17, *McCoy*, 138 S. Ct. 1500 (No. 16-8255) (quoting MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2018)).

⁵⁷ See, e.g., *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009); *State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000); *People v. Schultz*, 271 N.W.2d 305, 307 (Mich. Ct. App. 1978); *State v. Wiplinger*, 343 N.W.2d 858, 860 (Minn. 1984).

⁵⁸ Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 9 (1998) (footnote omitted).

⁵⁹ See *McCoy*, 138 S. Ct. at 1508.

⁶⁰ Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted In-dignity*, 93 KY. L.J. 39, 125 (2004–2005).

⁶¹ Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1037 n.89 (1981) (citation omitted); see also *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting).

⁶² Johnson, *supra* note 60, at 55.

While *McCoy* was rightly decided in principle, the Court provided virtually no direction to lower courts tasked with implementing *McCoy*, undermining practical protections for defendants. First, defendants with legitimate *McCoy* claims may be shut out of federal habeas relief because the *McCoy* holding is framed in ambiguous terms that risk cabin-ing the decision to its facts — as the dissent sought.⁶³ While *McCoy* may carry normative force, increasing defense lawyers’ respect for defendant autonomy *ex ante*, its binding legal force is questionable in cases where *McCoy* violations are less clear-cut than the violation *McCoy* himself experienced. The Court should have clearly established that the scope of its holding covers such cases — particularly those where objections to guilt concessions are not registered on the trial record.

After *McCoy*, it is unclear what circumstances amount to *McCoy* violations. The Court held that “a defendant has the right to insist that counsel refrain from admitting guilt,”⁶⁴ without addressing key threshold questions: What constitutes a concession of guilt? How much objection is necessary to trigger *McCoy*, given the gaping gray area between *Nixon*’s unresponsive defendant and *McCoy*’s strenuous objector? Must the defendant’s objection be on the trial record? The Court declined to address whether *McCoy*’s rule applies in scenarios less explicit than the facts of *McCoy* itself.

This ambiguity limits the range of future cases in which *McCoy* may serve as “clearly established . . . law” under the Antiterrorism and Effective Death Penalty Act of 1996⁶⁵ (AEDPA) — foreclosing federal review of myriad *McCoy* claims. Under the Court’s narrow interpretations of AEDPA, state court violations are immune from federal review unless the rule violated clearly and objectively applies to a given case.⁶⁶ The more a principle is subject to “subjective inquir[ies]” about its application to new facts, the less it enables federal review.⁶⁷ *McCoy* is

⁶³ *McCoy*, 138 S. Ct. at 1517 (Alito, J., dissenting) (“I would . . . limit our decision to the particular (and highly unusual) situation in the actual case before us.”).

⁶⁴ *Id.* at 1505 (majority opinion).

⁶⁵ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). Under § 2254 of AEDPA, federal habeas review for state prisoners may be granted only if the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” or was based on an “unreasonable determination of the facts” in the record. 28 U.S.C. § 2254(d) (2012).

⁶⁶ The Supreme Court has gradually “restrict[ed] what federal courts [can] regard as ‘clearly established Federal law.’” Stephen R. Reinhardt, Essay, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1233–34 (2015).

⁶⁷ Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes “Clearly Established” Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 785 (2005); see also, e.g., *Lockyer v. Andrade*, 538 U.S. 63, 73–77 (2003) (denying federal review due to a lack of prior holdings on a scenario not clearly addressed by existing precedent).

riddled with subjective inquiries, as the dissent pointed out.⁶⁸ For all but the most explicit *McCoy* violations, defendants will often find themselves shut out of federal habeas review — the only route to relief in federal court. This cabins claims to state courts, which are often “unable or unwilling to afford the same dedication to federal constitutional rights.”⁶⁹

To expand the precedential force of *McCoy* — and potentially expand federal review of *McCoy* claims — the Court should have made clear that its holding applies beyond the narrow facts of *McCoy*. In particular, *McCoy*’s holding should cover cases where defendants explicitly object to guilt-concession strategies off the trial record. Particularly for indigent defendants depending on court-appointed counsel, asserting an objection during trial on the record may be unreasonably difficult. Facing an enormous power differential between himself and actors in the legal system,⁷⁰ a defendant may reasonably fear that interrupting the trial to contradict his lawyer could produce implicit or explicit reprisal by counsel, the judge, or the jury. He may not even know that such interruption is an option.⁷¹ A rule that requires defendants to explicitly object during trial on the record would disadvantage the most vulnerable defendants who feel unable to do so. Though it could create evidentiary issues for lower courts, the Court should have clarified that an explicit objection off the trial record is sufficient for raising a *McCoy* claim. This clarity would have facilitated access to federal courts for a broader range of *McCoy* claims. While judicial minimalism counsels against issuing a holding broader than necessary to decide *McCoy*,⁷² such minimalism would simply mean deferring back to state trial courts and defense counsel⁷³ — actors in the legal system whose undercutting of defendant agency gave rise to *McCoy* in the first place.

⁶⁸ See *McCoy*, 138 S. Ct. at 1516–17 (Alito, J., dissenting).

⁶⁹ Reinhardt, *supra* note 66, at 1231.

⁷⁰ Cf. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005) (explaining how the disempowering “mechanics of the legal process formally and informally silence defendants,” *id.* at 1458, and how “[t]he most immediate engine of a defendant’s silence is his lawyer,” *id.* at 1469). A defendant may even try to raise an objection in the courtroom and be explicitly silenced, like McCoy, who was told his “outburst” would not be tolerated. See *McCoy*, 138 S. Ct. at 1506–07; see also Scott Berson, *A Judge Had Police Duct Tape a Defendant’s Mouth Shut. But Is He Allowed to Do That?*, MIAMI HERALD (Aug. 1, 2018, 12:46 PM), <https://www.miamiherald.com/news/nation-world/national/article215897645.html> [https://perma.cc/DMY2-8LT2] (describing a defendant who was gagged after attempting to raise a concern about his lawyer).

⁷¹ Cf. Natapoff, *supra* note 70, at 1494 (describing defendants’ silence as “a way of admitting incomprehension and the inability to contest what is being said”).

⁷² See, e.g., Justin Fox & Georg Vanberg, *Narrow Versus Broad Judicial Decisions*, 26 J. THEORETICAL POL. 355, 356 (2014).

⁷³ Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 356 (2010) (describing minimalism as a “jurisprudence of deference”).

Second, the Court undermined *McCoy*'s protections for vulnerable defendants in its failure to address the decision's dangerous implications for mentally incompetent defendants who are nevertheless deemed competent to stand trial. Attorneys now must abide by defendants' instructions not to concede guilt — even with clients who are not capable of rational consultation about the trial strategy. Such mentally incompetent defendants should not be prevented from asserting their *McCoy* rights once a case has gone to trial. Instead, lower courts should avoid mentally incompetent defendants standing trial in the first instance by applying competency standards more rigorously. By highlighting this underlying issue, the Court could have increased pressure on states to bolster competency standards to ensure that defendants exercising *McCoy* rights have the mental competence to do so.

While the issue of competency is separate from the question presented in *McCoy*, it lurks in the background of the case. The record submitted to the Court made clear that McCoy's competence had been contested.⁷⁴ Noting this contestation without discussing it,⁷⁵ the majority did not address the implications of its holding for defendants who — like McCoy — are found competent yet may actually lack the capacity to rationally consult with their lawyers. McCoy's case presented an opening to address lenient applications of the competency standard established in *Dusky v. United States*,⁷⁶ which has been critiqued as overly vague and thus conducive to inconsistent local determinations.⁷⁷ States have developed their own criteria for evaluating competency,⁷⁸ and individual trial courts determine whether a given defendant is competent.⁷⁹ With inconsistent and lax competency standards across jurisdictions, defendants incapable of rational participation in proceedings are regularly found competent to stand trial.⁸⁰

⁷⁴ English testified, "McCoy . . . was not competent to be tried. . . . [H]e could not assist counsel . . . due to his mental illness." Joint Appendix Volume I of II (JA1-JA431), *supra* note 9, at 288.

⁷⁵ *McCoy*, 138 S. Ct. at 1509 n.3.

⁷⁶ 362 U.S. 402 (1960). *Dusky* asks whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Id.* at 402.

⁷⁷ See John Matthew Fabian, *Rethinking "Rational" in the Dusky Standard: Assessing a High-Profile Delusional Killer's Functional Abilities in the Courtroom in the Context of a Capital Murder Trial*, 25 QUINNIPIAC L. REV. 363, 384 (2006) ("*Dusky* . . . can lead to various interpretations and applications by forensic mental health professionals . . ."); Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 215–17 (2004) (describing "shocking[ly]" inconsistent competency determinations by forensic psychiatrists, on whom judges rely).

⁷⁸ See Andrew D. Reisner & Jennifer L. Piel, *Mental Condition Requirement in Competency to Stand Trial Assessments*, 46 J. AM. ACAD. PSYCHIATRY & L. 86, 87 (2018).

⁷⁹ David Freedman, *When Is a Capitally Charged Defendant Incompetent to Stand Trial?*, 32 INT'L J.L. & PSYCHIATRY 127, 127 (2009).

⁸⁰ See Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 315 (2009) ("[E]vidence that the defendant . . . is currently psychotic, delusional, or hal-

McCoy allows those defendants to “walk[] into the death chamber”⁸¹ while laboring under severe mental illness, weakening the moral legitimacy of the decision. The Court should have addressed head-on that *McCoy* raises the stakes of competency determinations. It should have called for state courts to ensure that their competency standards adequately screen out those who lack the capacity to decide the objective of their defense, including whether to concede guilt. While this discussion would have been dicta, such dicta would have served as a valuable “prophylactic remed[y]” to mitigate the decision’s potential harms.⁸²

Of course, a more rigorous competency threshold would expose more defendants to involuntary hospitalization, forced treatment, and indefinite institutionalization.⁸³ This could be a worse option for some defendants than taking their chances at trial. Even still, adequately screening for competency to stand trial is “fundamental to an adversary system of justice”⁸⁴ and is more urgent after *McCoy*, given that a defendant’s insistence on an innocence defense could prove deadly.⁸⁵ By declining to address this issue, the Court missed an opportunity to acknowledge and reshape the real-world context operating in the background of this case.

McCoy champions defendants’ rights in principle, but does a disservice to defendants who will find *McCoy*’s protections elusive in practice. The opinion overlooked its implications for the universe of defendants whose experiences of *McCoy* will be defined by the unjust closing of federal court doors to habeas review and the erroneous opening of court doors to the mentally incompetent. Particularly for capital defendants facing countless rights abuses, *McCoy*’s espousal of defendant protections in name is not enough. The Court must demonstrate a corresponding commitment to give practical effect to those protections, remembering that “[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.”⁸⁶

lucinating is no bar to a judicial determination of competence.” (footnote omitted)). The vast majority of defendants referred for competency evaluations are deemed competent. See Fabian, *supra* note 77, at 364; Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 578 (1995).

⁸¹ Joint Appendix Volume I of II (JA1-JA431), *supra* note 9, at 190.

⁸² Foster Calhoun Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 U.S.F. L. REV. 883, 903 (2012) (describing “dicta’s potential as a source of . . . prophylactic remedies”).

⁸³ See Charles L. Scott, Commentary, *A Road Map for Research in Restoration of Competency to Stand Trial*, 31 J. AM. ACAD. PSYCHIATRY & L. 36, 36 (2003); Winick, *supra* note 80, at 578.

⁸⁴ *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

⁸⁵ See Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 708 (1991).

⁸⁶ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921).