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SIXTH AMENDMENT — RIGHT TO AUTONOMY — SECOND  
CIRCUIT HOLDS THAT COUNSEL ADMITTING TO ELEMENT  
OF CRIME OVER DEFENDANT’S PROTESTS DOES NOT VIOLATE  
DEFENDANT’S AUTONOMY. — *United States v. Rosemond*, 958 F.3d  
111 (2d Cir. 2020).

“The Sixth Amendment . . . grants to the accused personally the right to make his defense.”<sup>1</sup> But to what extent does a defendant give up the constituent right to make choices about his defense if he chooses to be represented by counsel?<sup>2</sup> The question is an important one because it bears on individual autonomy as well as the accuracy and perceived legitimacy of the criminal justice system.<sup>3</sup> The Supreme Court considered the issue in *McCoy v. Louisiana*<sup>4</sup> in 2018, holding that a defense counsel may not override a defendant’s choice as to the objectives of his defense and recognizing a right to autonomy under the Sixth Amendment.<sup>5</sup> Recently, in *United States v. Rosemond*,<sup>6</sup> the Second Circuit held that defense counsel’s admission — against the defendant’s wishes — that the defendant had hired someone to shoot the victim in a murder-for-hire case did not concern the defendant’s objectives and so did not violate the defendant’s right to autonomy.<sup>7</sup> Although not inconsistent with *McCoy*, the court’s holding failed to grapple with the meaning of the right to autonomy and to consider where the boundaries of this right should lie.

James Rosemond owned a hip-hop management company, which had an intense and violent feud with a music group managed by a rival company.<sup>8</sup> In March 2007, Lowell Fletcher and other members of the

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<sup>1</sup> *Faretta v. California*, 422 U.S. 806, 819 (1975).

<sup>2</sup> *Compare, e.g.,* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 3.07, at 57 (5th ed. 2016) (arguing that the defendant should control most decisions because it is “not the lawyer’s day in court, but the defendant’s”), *with* Christopher Johnson, *The Law’s Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 132–41 (2004) (arguing that lawyers are generally better able to present the best defense, so the “least damage is done by a rule committing [almost] all decisions to the lawyer,” *id.* at 140–41). For discussion of the impact of private versus public counsel on this question, see Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147, 1181–84 (2010); and Steven Zeidman, “McCoy v. Louisiana”: *Whose Case Is It Anyway?*, N.Y. L.J. (Jan. 19, 2018, 2:30 PM), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/19/mccoy-v-louisiana-whose-case-is-it-anyway> [<https://perma.cc/6CTG-K5XN>].

<sup>3</sup> Defendants have greater autonomy if they can make more decisions about their case. Yet counsel may be better aware of which defenses are likely to succeed. *See* Johnson, *supra* note 2, at 132–33. Greater accuracy implies greater legitimacy, *see id.*, but “client control of the case is a significant element in a litigant’s perception that justice has been done, regardless of the outcome,” FREEDMAN & SMITH, *supra* note 2, § 3.07, at 58.

<sup>4</sup> 138 S. Ct. 1500 (2018).

<sup>5</sup> *See id.* at 1507–09.

<sup>6</sup> 958 F.3d 111 (2d Cir. 2020).

<sup>7</sup> *See id.* at 115, 122–23.

<sup>8</sup> *Id.* at 115.

rival group confronted Rosemond's fourteen-year-old son, "slapped him, and threatened him with what appeared to be a gun."<sup>9</sup> One of Rosemond's friends, Brian McCleod, heard Fletcher bragging about the assault while in prison in 2009 and, after his release, told Rosemond about it.<sup>10</sup> Upon hearing this, Rosemond told McCleod "I have \$30,000 for anybody who brings [Fletcher] to me cause I'mma hit him so hard and so fast he's not gonna see it coming."<sup>11</sup> Rosemond considered "doing this" himself, but McCleod advised him against getting personally involved in any violence.<sup>12</sup> Instead, at Rosemond's instruction, McCleod asked another of Rosemond's associates, Derrick Grant, to shoot Fletcher.<sup>13</sup> Grant agreed.<sup>14</sup>

McCleod arranged to meet Fletcher once he was out of prison.<sup>15</sup> On the agreed day, McCleod met Grant and two other associates, whom Rosemond had sent as back-up shooters in case anything went wrong.<sup>16</sup> When Fletcher got off the train, Grant shot and killed him.<sup>17</sup> As payment for the shooting, Rosemond gave McCleod a kilo of cocaine, instructing him to split it evenly between himself, Grant, and his contact in the prison who had given him details of Fletcher's release.<sup>18</sup>

Rosemond was charged with murder-for-hire<sup>19</sup> and tried in the Southern District of New York.<sup>20</sup> He instructed his retained attorney,<sup>21</sup> David Touger, not to tell the jury that he had paid for his associates to shoot Fletcher, only that he had paid them to bring Fletcher to him, since he did not want to confess to committing what he considered an "immoral and shameful act."<sup>22</sup> Despite these instructions, Touger told the jury that Rosemond paid his associates to shoot Fletcher.<sup>23</sup> He

<sup>9</sup> *Id.* at 116.

<sup>10</sup> *Id.* at 116–17.

<sup>11</sup> *Id.* at 117 (quoting Appendix Volume IV of VI at 1034, *Rosemond*, 958 F.3d 111 (2020) (No. 18-3561)).

<sup>12</sup> *Id.* (quoting Appendix Volume IV of VI, *supra* note 11, at 1057).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 117–18.

<sup>16</sup> *Id.* at 118.

<sup>17</sup> *Id.* Grant shot Fletcher with a gun Rosemond had provided him. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> He was also charged with "conspiracy to commit murder-for-hire, possession of a firearm during a murder-for-hire conspiracy, and murder through use of a firearm, in violation of 18 U.S.C. §§ 1958, 924(c)(1)(A)(iii), and 924(j)." *Id.* at 115.

<sup>20</sup> See *United States v. Rosemond*, 322 F. Supp. 3d 482 (S.D.N.Y. 2018). This was in fact his third trial: the first resulted in a mistrial after the jury failed to reach a unanimous decision, and the second was overturned on the basis that Rosemond was wrongfully denied the chance to argue that he did not intend to kill Fletcher. *Rosemond*, 958 F.3d at 118–19.

<sup>21</sup> *Rosemond*, 322 F. Supp. 3d at 484.

<sup>22</sup> *Rosemond*, 958 F.3d at 123–24 (quoting Appendix Volume VI of VI, *supra* note 11, at 1705).

<sup>23</sup> *Id.* at 119.

argued that Rosemond was not guilty of murder-for-hire, though, because the government had not proven that Rosemond intended Fletcher to be killed.<sup>24</sup> Rosemond filed a Rule 33 motion for a new trial,<sup>25</sup> arguing that Touger's actions violated his Sixth Amendment right to autonomy.<sup>26</sup>

The U.S. District Court for the Southern District of New York denied the motion. Judge Kaplan reasoned that Rosemond's constitutional rights were not so violated as to cause "manifest injustice," as required by Rule 33.<sup>27</sup> Following *McCoy*, he distinguished between the defendant's objectives and the strategy employed to achieve those objectives.<sup>28</sup> In *McCoy*, the defendant was sentenced to death after his lawyer — over McCoy's repeated protests — conceded that McCoy had killed three people but argued that he lacked the intent required for first degree murder, believing this to be McCoy's best chance of avoiding the death penalty.<sup>29</sup> The Supreme Court reversed and ordered a new trial<sup>30</sup> on the basis that a "lawyer must abide by [the defendant's] objective and may not override it by conceding guilt."<sup>31</sup> In *Rosemond*, on the other hand, Judge Kaplan explained that Touger and Rosemond were working toward the same objective — acquittal — and Touger overrode Rosemond's preference only as to how to achieve that objective.<sup>32</sup> Judge Kaplan worried about the "chaotic and untold consequences" if a defendant could question his counsel's strategy, which "could lead to endless post-conviction litigation" and "substantially impair the finality of jury verdicts."<sup>33</sup> He refused to grant a new trial.<sup>34</sup> Rosemond appealed on three grounds: that Touger had infringed upon his right to autonomy, that he had provided ineffective assistance of counsel, and that the district court had erred in admitting uncharged prior bad act evidence.<sup>35</sup>

The Second Circuit affirmed. Writing for the panel, Judge Chin<sup>36</sup> rejected all three of Rosemond's arguments. First, he considered Rosemond's right to autonomy. The intent in *McCoy*, he stated, was to

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 123; FED. R. CRIM. P. 33.

<sup>26</sup> *Rosemond*, 322 F. Supp. 3d at 485.

<sup>27</sup> *Id.* at 485–86.

<sup>28</sup> *Id.* at 486. The "objectives" language in *McCoy* mirrors the American Bar Association's Model Rules of Professional Conduct, which state that "a lawyer shall abide by a client's decisions concerning the objectives of representation." MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

<sup>29</sup> *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505, 1506 n.1 (2018).

<sup>30</sup> *Id.* at 1512.

<sup>31</sup> *Id.* at 1509.

<sup>32</sup> *Rosemond*, 322 F. Supp. 3d at 486.

<sup>33</sup> *Id.* at 487.

<sup>34</sup> *Id.*

<sup>35</sup> *Rosemond*, 958 F.3d at 119.

<sup>36</sup> Judge Chin was joined by Judges Sack and Bianco.

“safeguard the ‘objective of [one’s] defense.’”<sup>37</sup> While the defendant controls the objective of his defense, the lawyer controls trial strategy, and “[c]onceding an element of a crime while contesting the other elements falls within the ambit of trial strategy.”<sup>38</sup> Judge Chin explained that *McCoy* supported this conclusion, as the Court distinguished between “strategic disputes about whether to concede an element of a charged offense” and “disagreements about the fundamental objective of the defendant’s representation.”<sup>39</sup> Judge Chin found further support for this reading in other circuit court decisions.<sup>40</sup>

Judge Chin also rejected Rosemond’s argument that Touger had infringed on his right to autonomy by admitting to a crime other than the one charged.<sup>41</sup> Instead, he found that *McCoy* applied only to charged crimes, which cohered with “the other defense-related decisions . . . within the defendant’s province,” such as whether to have a jury trial and whether to testify.<sup>42</sup> Lastly, he expressed skepticism about the legitimacy of Rosemond’s claim that he wanted to tell the jury he paid Grant to bring Fletcher to him, not to kill him.<sup>43</sup> Judge Chin was unconvinced that someone who was prepared to admit to kidnapping, and who had a history of violent acts, was not prepared to admit to paying an associate to shoot someone.<sup>44</sup>

After considering the right to autonomy, Judge Chin separately assessed whether Touger’s strategic concession had violated Rosemond’s right to effective assistance of counsel. Applying the highly deferential two-prong test from *Strickland v. Washington*,<sup>45</sup> Judge Chin concluded that Rosemond had not shown that (1) his counsel’s conduct was objectively unreasonable, and (2) he suffered prejudice, particularly given the overwhelming evidence indicating that Rosemond had paid for Fletcher to be killed (and not merely kidnapped).<sup>46</sup> Finally, Judge Chin found that the district court had not abused its discretion in admitting evidence of prior bad acts, as there were legitimate reasons for admitting this evidence that were related to the murder-for-hire conspiracy.<sup>47</sup>

Although *Rosemond* did not conflict with *McCoy*, the court should have construed *McCoy* more broadly to protect a defendant’s autonomy

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<sup>37</sup> *Rosemond*, 958 F.3d at 122 (alteration in original) (quoting *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505, 1508 (2018)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *McCoy*, 138 S. Ct. at 1510).

<sup>40</sup> *Id.* at 123.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 124.

<sup>44</sup> *Id.*

<sup>45</sup> 466 U.S. 668 (1984); *see Rosemond*, 958 F.3d at 121.

<sup>46</sup> *Rosemond*, 958 F.3d at 124–25. Not only had McCleod testified that Rosemond had paid Grant to shoot Fletcher, but Rosemond also had expressed no surprise upon learning of Fletcher’s death. *Id.* at 117–18.

<sup>47</sup> *Id.* at 125–26.

to make important decisions, over and above the decision whether to maintain innocence. While *McCoy*'s holding could be read narrowly, its reasoning permits a more comprehensive understanding of the autonomy right, as applied by another circuit in the context of insanity. The court in *Rosemond* relied on the fact that, unlike in *McCoy*, counsel admitted to an *uncharged* crime, but it failed to consider how admitting to an uncharged crime can still be stigmatizing and might violate a defendant's ability to maintain his innocence, in a practical sense of the word. The court's disposal of this issue as a mere question of "strategy" is similarly unsatisfying. Instead of dismissing it out of hand, the Second Circuit should have meaningfully engaged with the issue in order to decide the boundaries of the right to autonomy more thoughtfully.

*McCoy*'s reach is somewhat ambiguous, leaving open the question of how far a right to autonomy might extend. On one read, the *McCoy* Court phrased its holding narrowly, extending the right to decide the objectives of one's defense only to the decision "to maintain innocence of the charged criminal acts."<sup>48</sup> Yet *McCoy*'s sweeping reasoning hints at a more far-reaching right. In uncovering the right to autonomy, the Court looked to the Sixth Amendment's history and purpose, concluding that the Sixth Amendment "grant[s] to the accused *personally* the right to make his defense,"<sup>49</sup> which courts must "honor[] out of 'that respect for the individual which is the lifeblood of the law.'"<sup>50</sup> A defendant who chooses to be represented by counsel gives some decisionmaking power to his counsel, but is still fundamentally the "master of his own defense."<sup>51</sup> The Court need not have appealed to a right to autonomy. It could have based its holding on two rights already reserved for the defendant: since the admission directly contradicted McCoy's testimony, in which he repeatedly asserted his innocence, McCoy's counsel functionally eliminated his rights to plead guilty and to testify on his own behalf.<sup>52</sup> Indeed, *People v. Bergerud*,<sup>53</sup> one of the cases *McCoy* cited, relied on these very rights.<sup>54</sup> Therefore, although the Court perhaps

<sup>48</sup> *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018); see *The Supreme Court, 2017 Term — Leading Cases*, 132 HARV. L. REV. 277, 383 (2018) ("[T]he *McCoy* holding is framed in ambiguous terms that risk cabinining the decision to its facts . . .").

<sup>49</sup> *McCoy*, 138 S. Ct. at 1508 (emphasis added) (quoting *Faretta v. California*, 422 U.S. 806, 819 (1975)); see *id.* at 1507–08.

<sup>50</sup> *Id.* at 1507 (quoting *Faretta*, 422 U.S. at 834).

<sup>51</sup> *Id.* at 1508 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979)); see also *id.* ("[T]he Sixth Amendment . . . 'speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.'" (quoting *Faretta*, 422 U.S. at 820)).

<sup>52</sup> It is for the defendant to decide "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

<sup>53</sup> 223 P.3d 686 (Colo. 2010).

<sup>54</sup> *Id.* at 699 n.10 ("[T]he fundamental choices committed to the defendant's decision . . . provide for adequate protection of a defendant's constitutional rights at trial. We therefore decline to append a new choice to the list of those already entrusted to the defendant alone."). For the proposition

phrased its holding in narrow terms, the reasoning underlying that holding alluded to a far wider-ranging understanding of the right to autonomy.

This broad understanding of *McCoy* has been applied in the context of insanity. In *United States v. Read*,<sup>55</sup> the Ninth Circuit held that, in light of *McCoy*, “counsel cannot impose an insanity defense on a non-consenting defendant.”<sup>56</sup> Read was charged with assault.<sup>57</sup> He wanted to claim he was possessed by demons but instead, over his repeated objections, his counsel put on an insanity defense.<sup>58</sup> Unlike in *McCoy*, Read’s disagreement with his counsel was not over whether to maintain his innocence, but over how to describe what compelled him to commit the assault — mental illness or demonic possession. The court held that even where a lawyer’s actions do not “directly violate the *McCoy* right to maintain innocence,” the defendant still has the right to maintain his sanity because, just as pleading guilty carries a stigma, so does pleading insanity.<sup>59</sup> In addition to concerns about being confined in a mental institution, the defendant may wish to “avoid contradicting his own deeply personal belief that he is sane” and the “social stigma associated with . . . insanity.”<sup>60</sup> In this way, pleading insanity was inconsistent with Read’s objectives.<sup>61</sup>

The Second Circuit in *Rosemond* should have also looked beyond the narrow right to maintain innocence and evaluated whether Rosemond’s desire not to admit to hiring a shooter also amounted to an “objective” he should have been entitled to decide.<sup>62</sup> The Second Circuit recognized that the difference between *Rosemond* and *McCoy* was not whether defense counsel admitted to a crime<sup>63</sup> — Touger’s admission that Rosemond hired a shooter amounted to aiding and abetting assault in the first

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that *McCoy* recognized a new right, see, for example, Erwin Chemerinsky, *Chemerinsky: The 3 Sleeper Cases of the Last Supreme Court Term*, ABA J. (Aug. 6, 2018, 6:00 AM) [https://www.abajournal.com/news/article/the\\_sleeper\\_cases\\_of\\_october\\_term\\_2017](https://www.abajournal.com/news/article/the_sleeper_cases_of_october_term_2017) [<https://perma.cc/C3NZ-6GWU>].

<sup>55</sup> 918 F.3d 712 (9th Cir. 2019).

<sup>56</sup> *Id.* at 720.

<sup>57</sup> *Id.* at 717.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 721.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> The three circuit court decisions to which *Rosemond* cites in support of its narrow understanding of *McCoy* are inapposite. See *Rosemond*, 958 F.3d at 123. In *United States v. Holloway*, 939 F.3d 1088 (10th Cir. 2019), the defendant and his counsel did not disagree. See *id.* at 1101 n.8. In *Thompson v. United States*, 791 F. App’x 20 (11th Cir. 2019), *vacated and superseded on reh’g by* 826 F. App’x 721 (11th Cir. 2020), the court did not reach the issue of whether *McCoy* could be applied to something other than conceding guilt. See *id.* at 26–27. In *United States v. Audette*, 923 F.3d 1227 (9th Cir. 2019), the court made a passing statement that a disagreement over “the arguments that [counsel] may make” was not a disagreement over objectives, but did not elaborate on what those disagreements concerned, so it is unclear whether they were as central to the defendant’s defense as hiring a shooter was in *Rosemond*. *Id.* at 1236.

<sup>63</sup> There was some disagreement between the majority and dissent as to whether McCoy’s attorney admitted to first- and second-degree murder or just second-degree murder. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1516–17 & n.4 (2018) (Alito, J., dissenting).

degree<sup>64</sup> — it was whether the crime was charged. While there are clear ways in which charged crimes are different — they can result in a prison sentence, for one — the court failed to consider the important ways in which admitting to an uncharged crime can also violate autonomy.<sup>65</sup>

First, admitting to an uncharged crime can be equally stigmatizing. The *McCoy* Court recognized that McCoy’s “objective was to maintain ‘I did not kill the members of my family,’”<sup>66</sup> as “[h]e may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members.”<sup>67</sup> *Read* also emphasized that the defendant’s objective in not pleading insanity was partly to avoid stigma.<sup>68</sup> It is difficult to see why maintaining “I did not pay my friend to shoot someone” would not also be an objective aimed at avoiding stigma, especially since Rosemond considered it an “immoral and shameful act.”<sup>69</sup> The Second Circuit was wrong to dismiss this argument out of hand because of Rosemond’s violent past and willingness to admit to kidnapping — it is easily conceivable that different crimes may have different levels of stigma or immorality associated with them.<sup>70</sup>

Second, the distinction between charged and uncharged crimes reflects an overly formalistic conception of “innocence” at odds with how a defendant might conceive of his innocence. While admitting to an uncharged crime may not harm the defendant’s ability to maintain his innocence in the sense of being found not guilty at trial, there is a real way in which it harms the defendant’s ability to maintain what a nonlawyer might consider innocence — namely, that he actually did not commit certain acts.<sup>71</sup> Understanding “maintaining innocence” in practical

<sup>64</sup> N.Y. PENAL LAW § 120.10 (McKinney 2020). This crime is a serious felony that carries up to twenty-five years in prison for a first offense. *See id.* §§ 20.00, 70.02(1)(a), 70.02(3)(a).

<sup>65</sup> There are other ways in which the idea of autonomy seems to compel a broader understanding of a defendant’s decisionmaking power that are beyond the scope of this comment. *See generally*, e.g., David Binder, Paul Bergman & Susan Price, *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y.L. SCH. L. REV. 29 (1990); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing for applying an informed consent doctrine to the legal profession). Others make similarly compelling arguments from the premise of human dignity, rather than autonomy. *See* DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 70 (2007).

<sup>66</sup> *McCoy*, 138 S. Ct. at 1510 (quoting Transcript of Oral Argument at 26, *McCoy*, 138 S. Ct. 1500 (No. 16-8255), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-8255\\_m2hl.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-8255_m2hl.pdf) [<https://perma.cc/3RDF-DRYK>]).

<sup>67</sup> *Id.* at 1508.

<sup>68</sup> *See* *United States v. Read*, 918 F.3d 712, 721 (9th Cir. 2019).

<sup>69</sup> *Rosemond*, 958 F.3d at 123–24 (quoting Appendix Volume VI of VI, *supra* note 11, at 1705).

<sup>70</sup> It is unclear whether finding stigma is an objective or subjective inquiry — the *Read* court considered it clear that pleading insanity might be stigmatizing, so the court did not reach this question. *See Read*, 918 F.3d at 721. The court in *Rosemond* seemed to adopt a subjective standard, refusing to believe that Rosemond himself would find hiring a shooter to be stigmatizing, even though presumably a reasonable person might. *See Rosemond*, 958 F.3d at 123–24.

<sup>71</sup> *See* Sarah Baumgartel, *Pop Off, G-Unit*, FED. DEFS. OF N.Y. BLOG (May 1, 2020), <https://blog.federaldefendersny.org/pop-off-g-unit> [<https://perma.cc/89WC-6JTF>] (“*McCoy* speaks

terms, as not admitting to acts to which one does not want to admit, would be more in line with the defendant being “master of his own defense.”<sup>72</sup>

Instead, the Second Circuit merely labelled Touger’s decision trial strategy, failing to adequately grapple with the boundaries of defendant autonomy. This reasoning is deeply unsatisfactory. Most trial decisions can be considered strategic on some level,<sup>73</sup> but this does not prevent courts from reserving these decisions for the defendant “because the consequences of them are the defendant’s alone, [so] they are too important to be made by anyone else.”<sup>74</sup> The strategies-objectives distinction therefore fails to explain who should make certain decisions.<sup>75</sup> Deciding where to draw this line is admittedly hard, yet this ought not prevent courts from addressing the issue head on: preserving individuals’ rights in the face of competing considerations of accuracy and efficiency is precisely courts’ role.<sup>76</sup>

The question of how to allocate the balance of power between a defendant and his counsel draws on several competing values. The defendant’s autonomy is sometimes at odds with the lawyer’s ability to present the most compelling defense, and both of these considerations bear on the perceived legitimacy of the criminal justice system. In restricting a defendant’s right to decide whether to admit to elements of the charged crime, *Rosemond* puts defendants in a position where they might be forced against their will to admit to stigmatizing acts and jeopardizes their ability to maintain their factual innocence.

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of a defendant’s right to maintain his ‘factual innocence’ and . . . defendants . . . seem likely to conceive of innocence in such practical terms.”). Along these lines, traditional models of legal ethics confined the lawyer’s decisions to “incidental matters . . . not affecting the merits of the cause, or working substantial prejudice to the rights of the client.” FREEDMAN & SMITH, *supra* note 2, § 3.09, at 63 (omission in original) (quoting AM. BAR ASS’N, CANONS OF PRO. ETHICS 581 (1908)).

<sup>72</sup> See *McCoy*, 138 S. Ct. at 1508 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979)).

<sup>73</sup> See, e.g., *Gonzalez v. United States*, 553 U.S. 242, 256 (2008) (Scalia, J., concurring in the judgment) (“Even pleading guilty . . . is highly tactical, since it usually requires balancing the prosecutor’s plea bargain against the prospect of better and worse outcomes at trial.”). In *McCoy*, Justice Ginsburg, writing for the Court, even described the decision to concede guilt — which *McCoy* firmly classes as an objective — as strategic. 138 S. Ct. at 1512 (“[McCoy] strenuously object[ed] to [his lawyer’s] proposed strategy [of conceding guilt].”); see also *Florida v. Nixon*, 543 U.S. 175, 178 (2004) (“This . . . case concerns defense counsel’s *strategic* decision to concede . . . the defendant’s commission of murder . . .” (emphasis added)); Alberto Bernabe, *A Tale of Two Cases: The Supreme Court’s Uneasy Position on the Proper Allocation of Authority to Decide Whether to Concede a Client’s Guilt in a Criminal Case*, 43 J. LEGAL PRO. 53, 59 (2018).

<sup>74</sup> *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009).

<sup>75</sup> See, e.g., *Wilkins v. State*, 190 P.3d 957, 968 (Kan. 2008) (“Mere invocation of the word ‘strategy’ does not insulate the performance of a criminal defendant’s lawyer from constitutional criticism.”); FREEDMAN & SMITH, *supra* note 2, § 3.07, at 55, § 3.09, at 64 (arguing that the distinction between objectives and strategy is unworkable and inconsistent with traditional codifications of lawyers’ professional ethics); Binder et al., *supra* note 65, at 40 (“[D]rawing a meaningful line based on ‘ends’ and ‘means’ is often impossible, because clients are often concerned about both the results and how they are obtained.” (footnote omitted)).

<sup>76</sup> Consider, for instance, the right to represent oneself, which courts uphold despite its inefficiency and the risk that it might lead to greater inaccuracy. See *Faretta v. California*, 422 U.S. 806, 834 (1975).