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The Real McCoy: Defining the Defendant's Right to Autonomy in the Wake of McCoy v. Louisiana

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The Real *McCoy*: Defining the Defendant’s Right to Autonomy in the Wake of *McCoy v. Louisiana*

Colin Miller*

Defense counsel, and not the defendant, has the power to make most decisions in a criminal case. Until recently, there were only four decisions reserved for the defendant: whether to (1) plead guilty, (2) waive the right to a jury trial, (3) testify, and (4) forgo an appeal. In McCoy v. Louisiana, the United States Supreme Court recently added a fifth decision reserved for the client: the right to autonomy, i.e., the right to decide on the objective of her defense. Under this right, a defendant can prevent her attorney from admitting her legal guilt at trial by preemptively objecting to this course of conduct. But what if the defendant didn’t (and couldn’t) object because defense counsel never ran the decision to admit guilt by her client? And what if, without the defendant’s consent, defense counsel admitted that her client committed an element of the crime but not all of the elements (e.g., actus reus but not mens rea)? Would McCoy be inapposite because the client did not object and/or her attorney did not admit full legal guilt? Courts have split on both issues, leading to the question of what constitutes the real McCoy. This Article argues that the right to autonomy is broad and precludes a defense attorney from admitting any opprobrious element of the crime(s) charged without first disclosing that decision to his client.

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I. INTRODUCTION

In *McCoy v. Louisiana*, the United States Supreme Court observed that while a criminal defense attorney mainly calls the shots, at least four decisions are reserved for the defendant: whether to (1) plead guilty, (2) waive the right to a jury trial, (3) testify, and (4) forgo an appeal.¹ The *McCoy* Court then added a fifth decision reserved for the client: the right to autonomy, i.e., the right “to decide on the objective of his defense.”² Pursuant to this right, a defendant decides whether “to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.”³ Therefore, as in the *McCoy* case, defense counsel could not argue to the jury, over the defendant’s objection, that his client was guilty of three murders in the hope that the jurors would spare his life.⁴

But what if the defendant didn’t (and couldn’t) object because defense counsel never ran the decision to admit guilt by his client? And what if, without the defendant’s consent, defense counsel admitted that his client committed an element of the crime but not all of the elements (e.g., actus reus but not mens rea)? Would *McCoy* be inapposite because the client did not object and/or his attorney did not admit full legal guilt? Courts have split on both issues, leading to the question of what constitutes the real *McCoy*.

This Article argues that the right to autonomy is broad and precludes a defense attorney from admitting any opprobrious element of the crime(s) charged without first disclosing that decision to his client. In Section II, the Article explores the rules and precedent surrounding the requirement that a defendant must knowingly, voluntarily, and intelligently make the decision to plead guilty, waive the right to a jury trial, testify, and forgo an appeal. In Section III, the Article then contends that a similar requirement must apply to the right to autonomy, meaning that a defendant’s right to autonomy is violated when his attorney does not fully inform him of the decision to admit guilt. The Article argues that the right to autonomy recognized in *McCoy* includes not only the right to avoid the legal consequences of admitting legal guilt but also the “opprobrium that comes with admitting” criminal behavior.⁵

II. DECISIONS LEFT TO THE DEFENDANT

In recognizing that a defendant retains the right “to decide on the

1. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

2. *Id.* at 1505.

3. *Id.*

4. *Id.* at 1506–07.

5. *Id.* at 1508.

objective of his defense,” the *McCoy* Court noted that at least four other decisions are reserved for the defendant: whether to (1) plead guilty, (2) waive the right to a jury trial, (3) testify, and (4) forgo an appeal. This section explores the rules and precedent surrounding each of these decisions to provide context for a subsequent discussion of the scope of the right to autonomy.

A. The Decision About How to Plead

1. *Brookhart v. Janis* and the Defendant’s Decision About How to Plead

The Supreme Court’s 1966 opinion in *Brookhart v. Janis*⁶ rested authority in the defendant to decide whether to waive his right to plead not guilty. In *Brookhart*, James Brookhart initially pleaded not guilty at his arraignment on charges of forgery and uttering false instruments.⁷ Brookhart was subsequently appointed counsel, who “told the judge that his client had signed waivers of trial by jury and wanted to be tried by the court.”⁸ The judge then confirmed with Brookhart that he had signed “two written waivers of trial by jury” and engaged in a colloquy with defense counsel.⁹

During that colloquy, defense counsel said that the matter was before the court on a prima facie case, i.e., that “he would not contest the state’s case or cross-examine its witnesses but would require only that the state prove each of the essential elements of the crime.”¹⁰ The judge responded by saying, “Ordinarily in a prima facie case . . . the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it.” Brookhart then interjected, “I would like to point out in no way am I pleading guilty to this charge.”¹¹

After he was subsequently convicted, Brookhart appealed, claiming that he was denied his constitutional right to confront witnesses against him.¹² In response, the Supreme Court of Ohio appointed Master Commissioners, who concluded that “petitioner although he did not plead guilty agreed that all the state had to prove was a prima facie case, that he would not contest it and that there would be no cross-examination of witnesses.”¹³ The Supreme Court of Ohio later adopted this conclusion.¹⁴

6. *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966).

7. *Id.* at 5.

8. *Id.*

9. *Id.*

10. *Id.* at 3 (quoting *Brookhart v. Haskins*, 205 N.E.2d 911, 914 (Ohio 1965)).

11. *Id.* at 6 (quoting from the trial court record).

12. *Id.* at 2.

13. *Id.* at 2–3 (quoting *Brookhart*, 205 N.E.2d at 912–13).

14. *Id.* at 3 (citing *Brookhart*, 205 N.E.2d at 914).

The United States Supreme Court disagreed.¹⁵ It first found that it was Brookhart's attorney who "agree[d] to this truncated kind of trial—if trial it could be called."¹⁶ Further, it decided "that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him."¹⁷

This left the Court with the question of "whether counsel has 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 and have a trial in which he can confront and cross-examine the witnesses against him."¹⁸ The Court answered this question in the negative, concluding "that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances."¹⁹ Finally, the Court held that nothing in its prior opinion in *Henry v. State of Mississippi* could "possibly support a contention that counsel for defendant can override his client's desire expressed in open court to plead not guilty and enter in the name of his client another plea—whatever the label."²⁰

2. *Taylor v. Illinois* and the Respective Roles of the Defendant and Defense Counsel

While *Brookhart* did not deal with a literal guilty plea, the Supreme Court in *Taylor v. Illinois* later made clear that *Brookhart*'s holding did cover such pleas and clarified the respective roles of the defendant and defense counsel. In *Taylor v. Illinois*, Ray Taylor was charged with attempted murder in connection with a street fight on the South Side of Chicago.²¹ On day two of trial, Taylor's attorney filed an oral motion to amend his Answer to Discovery to include two witnesses, including Alfred Wormley, saying "that he had just been informed about them and that they had probably seen the 'entire incident.'"²² Although this was a discovery violation, the judge allowed "an offer of proof in the form of Wormley's testimony outside the presence of the jury."²³ Wormley then testified that he "had not been a witness to the incident itself" but instead saw the victims before the street fight carrying "two guns in a blanket,"

15. *Id.* at 7–8 (explaining that the constitutional rights of a defendant cannot be waived by their counsel under the circumstances present in *Brookhart*, despite *Henry v. Mississippi* allowing it under certain circumstances).

16. *Id.* at 6.

17. *Id.* at 7.

18. *Id.*

19. *Id.*

20. *Id.* at 7–8 (citing *Henry v. Mississippi*, 379 U.S. 443, 451 (1965)).

21. *Taylor v. Illinois*, 484 U.S. 400, 402 (1988).

22. *Id.* at 403 (quoting from the trial court record).

23. *Id.* at 404.

saying “they were after Ray [petitioner] and the other people.”²⁴ Wormley also claimed that he later “‘happened to run into Ray and them’ and warned them ‘to watch out because they got weapons;’” however, he admitted on cross-examination that “he had first met defendant ‘about four months ago’ (i.e., over two years after the incident).”²⁵ After hearing Wormley’s testimony, “the trial judge concluded that the appropriate sanction for the discovery violation was to exclude his testimony.”²⁶

After he was convicted, Taylor appealed, claiming, *inter alia*, that it was “unfair to visit the sins of the lawyer upon his client.”²⁷ The Supreme Court rejected this argument, recognizing that it “strikes at the heart of the attorney-client relationship.”²⁸ According to the Court, “[a]lthough there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial.”²⁹ As one of two examples of a basic right that requires a client’s consent, the Court cited *Brookhart v. Janis* for the proposition that a “defendant’s constitutional right to plead not guilty and to have a trial where he could confront and cross-examine adversary witness could not be waived by his counsel without [the] defendant’s consent.”³⁰ But the Court cautioned that “[t]he adversary process could not function effectively if every tactical decision required client approval.”³¹ The Court found that tactical reasons related to disclosure of the identity of defense witnesses were no exception, concluding that “[w]henver a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client.”³²

3. *Boykin v. Alabama* and the Procedures for Accepting a Guilty Plea

While both *Brookhart* and *Taylor* recognized the right of a defendant to decide whether to plead guilty, the Supreme Court’s opinion in *Boykin v. Alabama* set forth the procedure for determining whether that right has been respected. In *Boykin v. Alabama*, Edward Boykin, Jr. pleaded guilty to five counts of robbery and was sentenced to die.³³ The Supreme Court of Alabama unanimously rejected Boykin’s claim that the death penalty

24. *Id.* (quoting from the trial court record).

25. *Id.* at 404–05 (quoting from the trial court record).

26. *Id.* at 405.

27. *Id.* at 416.

28. *Id.* at 417.

29. *Id.* at 417–18.

30. *Id.* at 418 n.24 (citing *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966)).

31. *Id.* at 418.

32. *Id.*

33. *Boykin v. Alabama*, 395 U.S. 238, 240 (1969).

was cruel and unusual punishment for common-law robbery.³⁴ Four of the seven justices, however, “discussed the constitutionality of the process by which the trial judge had accepted petitioner’s guilty plea.”³⁵

The United States Supreme Court subsequently took up this thread and found that it was constitutional error for the trial judge to accept Boykin’s guilty plea without an affirmative showing that it was knowing, intelligent, and voluntary.³⁶ The Court reached this conclusion because “a plea of guilty is more than an admission of conduct; it is a conviction.”³⁷ More than that, a guilty plea results in the waiver of several constitutional rights, including “the privilege against compulsory self-incrimination,” “the right to trial by jury,” and “the right to confront one’s accusers.”³⁸ According to the Court, “[w]e cannot presume a waiver of these three important federal rights from a silent record.”³⁹

As support for this conclusion, the Court cited to Federal Rule of Criminal Procedure 11, “which governs the duty of the trial judge before accepting a guilty plea.”⁴⁰ Subsequently, Rule 11 was amended in 1974 to codify *Boykin* and require judges to ensure defendants understand both the rights they are waiving by pleading guilty and the consequences of guilty pleas.⁴¹ *Boykin* and Rule 11 thus both stand for the proposition that “due process requires that the record contain affirmative evidence that the defendant knowingly, voluntarily, and intelligently pleaded guilty.”⁴²

4. Conclusion

For a guilty plea to be constitutional, “the defendant’s decision to plead guilty must be knowing, voluntary and intelligent.”⁴³ Moreover, it is a constitutional requirement that the judge inform the defendant on the record about the constitutional rights he is waiving before accepting his guilty plea.⁴⁴

34. *Id.*

35. *Id.*

36. *Id.* at 242.

37. *Id.*

38. *Id.* at 243.

39. *Id.*

40. *Id.* at 243 n.5.

41. See FED. R. CRIM. P. 11 advisory committee’s note to 1974 amendment (“The amendment . . . codifies . . . the requirements of *Boykin v. Alabama*, . . . which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.”).

42. Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 87 (2018).

43. *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996) (citing *Boykin*, 395 U.S. at 242–44).

44. See, e.g., *Boykin*, 395 U.S. at 242 (requiring affirmative showing of informed waiver); *Moore v. State*, 486 So.2d 517, 518 (Ala. Crim. App. 1986) (“Because the record in this cause is totally devoid of an explanation of appellant’s constitutional rights under *Boykin v. Alabama*, . . . the judgment in this cause as to the marijuana conviction is, hereby, reversed and remanded.”).

B. The Decision About Whether to Waive Trial by Jury

1. Waiving Trial by Jury by Pleading Guilty

There are two situations in which a defendant waives his right to trial by jury. The first is the one referenced in the prior section, where a defendant waives his jury right by pleading guilty and proceeding to sentencing. In this situation, the defendant's waiver of his jury right, like his decision to plead guilty, must be knowing, voluntary, and intelligent, and the judge must advise the defendant on the record.⁴⁵

2. Waiving Trial by Jury for a Bench Trial

The second situation involves a defendant waiving his right to trial by jury so that he can have a bench trial. *Patton v. United States* is the key United States Supreme Court opinion in this area. In *Patton*, multiple defendants were charged with conspiring to bribe a federal prohibition agent.⁴⁶ A jury of twelve was empaneled, but mid-trial, the judge dismissed a juror due to severe illness.⁴⁷ Thereafter, "it was stipulated in open court by the government and counsel for defendants, defendants personally assenting thereto, that the trial should proceed with the remaining eleven jurors."⁴⁸ The judge responded "that the defendants and the government both were entitled to a constitutional jury of twelve, and that the absence of one juror would result in a mistrial unless both sides should waive all objections and agree to a trial before the remaining eleven jurors."⁴⁹ This was followed by a colloquy in which the "counsel for defendants stated that he had personally conferred with all counsel and with each of the defendants individually, and it was the desire of all to finish the trial of the case with the eleven jurors if the defendants could waive the presence of the twelfth juror."⁵⁰

After they were convicted, the defendants appealed, claiming they had "had no power to waive their constitutional right to a trial by a jury of twelve persons."⁵¹ The United States Supreme Court disagreed, concluding that defendants in any criminal case can "waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court . . ."⁵² But, according to the Court, "before any

45. See *supra* notes 33–44 and accompanying text (illustrating how *Boykin v. Alabama* established the procedure for determining whether a defendant's right to knowingly, voluntarily, and intelligently plead guilty and waive the right to a jury trial was respected).

46. *Patton v. United States*, 281 U.S. 276, 286 (1930).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 286–87.

51. *Id.* at 287.

52. *Id.* at 312.

waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.”⁵³ Courts have interpreted *Patton* as holding that the Sixth Amendment requires the waiver of the right to trial by jury “be knowing, voluntary, and intelligent.”⁵⁴

Finally, the requirements *Patton* enunciated “with respect to waiver of jury trials were incorporated into Federal Rule of Criminal Procedure 23(a).”⁵⁵ Rule 23(a) states:

If the defendant is entitled to a jury trial, the trial must be by jury unless:

- (1) the defendant waives a jury trial in writing;
- (2) the government consents; and
- (3) the court approves.⁵⁶

Moreover, every federal circuit court, other than the Fifth and Eighth Circuits, has recommended that district courts should go beyond a defendant’s written waiver through “[s]ome form of waiver colloquy.”⁵⁷ Most of these courts, however, have held that neither a colloquy nor a waiver is constitutionally required; instead, both merely help document that the waiver was voluntary, knowing, and intelligent, which is a constitutional requirement.⁵⁸ In turn, such waiver is voluntary, knowing, and intelligent if the defendant “understood that the choice confronting him was, on the one hand, to be judged by a group of people from the community, and on the other hand, to have his guilt or innocence determined by a judge.”⁵⁹

Every federal circuit court of appeals that has addressed the issue has found that defense counsel renders deficient performance by failing to advise a defendant of his right to trial by jury before the defendant waives that right.⁶⁰ Those courts differ, however, over whether such failures are

53. *Id.*

54. *United States v. Boynes*, 515 F.3d 284, 286–87 (4th Cir. 2008) (citing *Patton*, 281 U.S. at 312–13); *see also United States v. Carmentate*, 544 F.3d 105, 107 (2d Cir. 2008) (“It is settled that a criminal defendant may waive his constitutional right to trial by jury if the waiver is ‘knowing, voluntary, and intelligent.’” (citing *Patton*, 281 U.S. at 312)).

55. *Polk v. State*, 567 A.2d 1290, 1294 (Del. 1989).

56. FED. R. CRIM. P. 23(a).

57. *United States v. Lilly*, 536 F.3d 190, 197 (3d Cir. 2008) (“Some form of waiver colloquy has been endorsed by the Courts of Appeals for the First, Second, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, as well as by our own.”).

58. *See, e.g., United States v. Williams*, 559 F.3d 607, 610 (7th Cir. 2009) (“[N]either a *Delgado* colloquy nor a written waiver is a constitutional mandate. . . . [T]he sole constitutional requirement is that the waiver be voluntary, knowing, and intelligent. The colloquy and the written waiver serve to document these qualities, but a jury waiver may be valid despite their absence.”).

59. *Jells v. Mitchell*, 538 F.3d 478, 510 (6th Cir. 2008) (quoting *Sowell v. Bradshaw*, 372 F.3d 821, 836 (6th Cir. 2004)).

60. *See, e.g., Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 851 (3d Cir. 2017)

structural error or whether the defendant must satisfy the prejudice prong of the ineffective assistance of counsel test from *Strickland v. Washington*.⁶¹ On one side, the Eighth Circuit has held that the failure to advise is structural error without the requirement of proving prejudice.⁶² Conversely, the Seventh Circuit has held that the failure to advise can be harmless error if the court finds the defendant was nonetheless aware of this right through “his own education and experience” and would have waived it even if properly advised.⁶³

3. Conclusion

When a defendant waives his right to trial by jury by pleading guilty, there is a constitutional requirement that the judge inform the defendant on the record about the constitutional rights he is waiving before accepting his guilty plea/waiver.⁶⁴ Furthermore, a defendant’s waiver of the right to trial by jury in exchange for a bench trial must be knowing, voluntary, and intelligent, which courts safeguard through non-constitutionally required protections.⁶⁵ Finally, an attorney has a duty to advise his client about his right to a jury trial before he waives it, but courts are split over whether to presume prejudice based on dereliction of that duty.⁶⁶

(“[P]revailing professional norms required and continue to require counsel in this circumstance to verify, through a review of the record or an inquiry with the court or prior counsel, that the client formally waived his jury trial right.”); *Jells*, 538 F.3d at 509 (“Jells correctly notes that his counsel had a professional duty to inform him of the nature of his right to a jury trial and the consequences of waiving it so that he could make an intelligent and informed waiver decision.”).

61. See *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984) (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding even if the error had no effect on the judgment. . . . Accordingly, any deficiencies in counsel’s performance must be prejudicial in order to constitute ineffective assistance under the Constitution.”).

62. See, e.g., *Miller v. Dormire*, 310 F.3d 600, 604 (8th Cir. 2002) (“When a defendant is deprived of his right to trial by jury, the error is structural and requires automatic reversal of the defendant’s conviction.”).

63. *Williams*, 559 F.3d at 613.

64. See *supra* notes 33–54 and accompanying text (explaining how guilty plea must be knowing and voluntary because it is a conviction and waives several constitutional rights, so waiver cannot be presumed from a silent record).

65. See *supra* notes 54–59 and accompanying text (discussing how the Constitution requires defendant’s waiver of a jury trial be voluntary, knowing, and intelligent, and, under the Federal Rules of Criminal Procedure, the waiver should be in writing as well).

66. See *supra* notes 60–63 and accompanying text (illustrating how some courts consider the failure to instruct a defendant about his waiver rights plain error resulting in immediate reversal, while others hold that is the waiver’s validity depends on how well defendant understood his waiver rights even without instruction).

*C. The Decision About Whether to Appeal*1. *Roe v. Flores-Ortega* and the Duty to Consult

While a defendant decides whether to appeal,⁶⁷ the question of whether an attorney has a duty to consult with the defendant before waiving the ability to appeal was unanswered until the Supreme Court's opinion in *Roe v. Flores-Ortega*. In *Flores-Ortega*, Lucio Flores-Ortega was represented by public defender Nancy Kops when he pleaded guilty to second-degree murder pursuant to a plea agreement.⁶⁸ After sentencing Flores-Ortega to fifteen years' incarceration, the judge said that he could file an appeal within sixty days.⁶⁹ Although Kops wrote "bring appeal papers" in Flores-Ortega's file, she did not file a notice of appeal within sixty days.⁷⁰ About four months after sentencing, Flores-Ortega "tried to file a notice of appeal, which the Superior Court Clerk rejected as untimely."⁷¹

Flores-Ortega's claim that he received ineffective assistance of counsel eventually reached the United States Supreme Court.⁷² First, in terms of the "deficient performance" prong of the ineffective assistance test, the Court framed the issue as follows:

In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal.⁷³

The Court then clarified that it used the word "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.⁷⁴ If there is such consultation, "the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal."⁷⁵ Conversely, "[i]f counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to

67. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) ("Some decisions, however, are reserved for the client—notably, whether to . . . forgo an appeal.").

68. *Roe v. Flores-Ortega*, 528 U.S. 470, 473 (2000).

69. *Id.* at 474.

70. *Id.*

71. *Id.*

72. *Id.* at 476.

73. *Id.* at 478.

74. *Id.*

75. *Id.*

consult with the defendant itself constitutes deficient performance.”⁷⁶ The Court had to decide when an attorney has a duty to consult.⁷⁷

“Because the decision to appeal rests with the defendant,”⁷⁸ Justice Souter would have held that defense “counsel ‘almost always’ has a duty to consult with a defendant about an appeal.”⁷⁹ The majority, however, disagreed:

Such a holding would be inconsistent with both our decision in *Strickland* and common sense. For example, suppose that a defendant consults with counsel; counsel advises the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years’ imprisonment as expected and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and counsel concludes that there are no nonfrivolous grounds for appeal. Under these circumstances, it would be difficult to say that counsel is “professionally unreasonable,” as a constitutional matter, in not consulting with such a defendant regarding an appeal. Or, for example, suppose a sentencing court’s instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel’s duty to consult. In some cases, counsel might then reasonably decide that he need not repeat that information. We therefore reject a bright-line rule that counsel must always consult with the defendant regarding an appeal.⁸⁰

Rather than impose this bright line rule, the majority recognized a narrower duty, finding “a constitutionally imposed duty to consult with the defendant about an appeal,” only “when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”⁸¹

Second, regarding the prejudice prong of the ineffective assistance of counsel test, the Court “held that when an attorney’s deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed ‘with no further showing from the defendant of the merits of his underlying claims.’”⁸²

That said, the Court remanded rather than granted relief because the

76. *Id.*

77. *Id.*

78. *Id.* at 479.

79. *Id.* at 480 (quoting *id.* at 488 (Souter, J., concurring in part and dissenting in part)).

80. *Id.* at 479–80 (internal citations omitted).

81. *Id.* at 480.

82. *Garza v. Idaho*, 139 S. Ct. 738, 742 (2019) (quoting *Flores-Ortega*, 528 U.S. at 484).

lower courts' factual findings did not provide "sufficient information to determine whether Ms. Kops rendered constitutionally inadequate assistance."⁸³ Instead, the findings suggested "that there may have been some conversation between Ms. Kops and respondent about an appeal, . . . but d[id] not indicate what was actually said."⁸⁴ Therefore, "[a]ssuming, arguendo, that there was a duty to consult in this case, it [was] impossible to determine whether that duty was satisfied without knowing whether Ms. Kops advised respondent about the advantages and disadvantages of taking an appeal and made a reasonable effort to discover his wishes."⁸⁵

2. *Garza v. Idaho* and Appeal Waivers

In *Garza v. Idaho*, the Supreme Court found this duty to consult applies even if the defendant has signed an appellate waiver. In *Garza*, Gilberto Garza, Jr., entered into two plea agreements with appeal waivers connected to drug and aggravated assault charges.⁸⁶ Shortly after sentencing, Garza notified and then "continuously reminded" his attorney that he wanted to appeal.⁸⁷ His attorney, however, refused to file a notice of appeal and "informed Mr. Garza that an appeal was problematic because he waived his right to appeal."⁸⁸

Garza later claimed that he received ineffective assistance of counsel, and the Supreme Court granted certiorari to decide whether "the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver."⁸⁹ The *Garza* Court answered this question in the affirmative, finding, *inter alia*, that "[m]ost fundamentally, courts agree that defendants retain the right to challenge whether [an appeal] waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary."⁹⁰

3. Conclusion

As the *Garza* Court noted, a defendant's waiver of his right to appeal must be knowing, voluntary, and intelligent.⁹¹ Moreover, in certain

83. *Flores-Ortega*, 528 U.S. at 487.

84. *Id.*

85. *Id.*

86. *Garza*, 139 S. Ct. at 742; *see also id.* at 750 (Thomas, J., dissenting) (noting specific charges Garza pled to).

87. *Id.* at 743.

88. *Id.*

89. *Id.* at 749.

90. *Id.* at 745.

91. *See id.* at 745 n.6 (first citing *United States v. Brown*, 892 F.3d 385, 394 (D.C. Cir. 2018) ("Like all other courts of appeals, our circuit holds that a defendant 'may waive his right to appeal

circumstances, defense counsel must consult with his client before he waives his right to appeal, with a presumption of prejudice attaching to dereliction of that duty.⁹²

D. *The Decision About Whether to Testify*

1. *Rock v. Arkansas* and the Recognition of the Right to Testify

The Supreme Court recognized defendant's right to testify in *Rock v. Arkansas*. In *Rock*, Vicki Rock was charged with manslaughter in connection with the shooting death of her husband.⁹³ When Rock could not remember the precise details of the shooting, her attorney suggested that she be hypnotized to refresh her recollection.⁹⁴ A neuropsychologist with training in hypnosis subsequently hypnotized Rock, who then "recalled that the gun had discharged when her husband grabbed her arm during [a] scuffle."⁹⁵ The trial court, however, precluded Rock from testifying, and the Supreme Court of Arkansas later affirmed, applying a per se ban on the admission of hypnotically refreshed testimony.⁹⁶

The United States Supreme Court disagreed, first finding that a criminal defendant has the right to testify based on several constitutional provisions, including the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, the Sixth Amendment right to self-representation, and the Fifth Amendment privilege against self-incrimination.⁹⁷ The Court then found Arkansas's per se ban on hypnotically refreshed testimony violated these rights.⁹⁸

2. Waiver of the Right to Testify

Courts across the country have held that a defendant's waiver of the right to testify "must be knowing, voluntary and intelligent."⁹⁹ The Supreme Court, however, "never has held that a trial court must engage in a personal colloquy with a defendant to determine whether he wishes to testify or that a waiver of the right to testify must occur formally on

his sentence as long as his decision is knowing, intelligent, and voluntary."); then citing *Spann v. State*, 704 N.W.2d 486, 491 (Minn. 2005) ("Jurisdictions allowing a defendant to waive his or her right to appeal a conviction require that the waiver be made 'intelligently, voluntarily, and with an understanding of the consequences.'").

92. See *Roe v. Flores-Ortega*, 528 U.S. 470, 479–80 (2000) (discussing defense counsel's duty to consult with client before waiving client's right to appeal if there is reason to think any rational defendant would want to appeal or if the specific defendant demonstrated an interest in appealing).

93. *Rock v. Arkansas*, 483 U.S. 44, 45 (1987).

94. *Id.* at 46.

95. *Id.* at 47.

96. *Id.* at 48–49.

97. *Id.* at 51–52.

98. *Id.* at 56–62.

99. *United States v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998).

the record.”¹⁰⁰ Moreover, most federal circuit courts of appeals “consistently have held that a trial court has no duty to explain to the defendant that he or she has a right to testify or to verify that the defendant who is not testifying has waived that right voluntarily.”¹⁰¹ Indeed, a number of courts have found that there should not be a colloquy because, *inter alia*, it “inadvertently might cause the defendant to think that the court believes the defense has been insufficient.”¹⁰² That said, a number of federal circuit courts have also recognized that “in exceptional, narrowly defined circumstances, judicial interjection through a direct colloquy with the defendant may be required to ensure that the defendant’s right to testify is protected.”¹⁰³

While judges generally do not need to conduct a colloquy on the right to testify, courts across the country have concluded that defense counsel has a duty to discuss the right to testify before the defendant can knowingly, voluntarily, and intelligently waive that right.¹⁰⁴ In the seminal case,¹⁰⁵ *United States v. Teague*, the Eleventh Circuit held that “if defense counsel never informed the defendant of the right to testify . . . counsel would have neglected the vital professional responsibility of ensuring that the defendant’s right to testify is protected and that any waiver of that right is knowing and voluntary.”¹⁰⁶ Therefore, “[u]nder such circumstances, defense counsel has not acted ‘within the range of competence demanded of attorneys in criminal cases,’ and the defendant clearly has not received reasonably effective assistance of counsel.”¹⁰⁷ Nonetheless, like the *Teague* court, most courts have held that a defendant still needs to establish the prejudice prong of the ineffective-assistance-of-counsel test and that the failure to advise can constitute harmless error.¹⁰⁸

3. Conclusion

A defendant’s waiver of the right to testify must be knowing,

100. *Arredondo v. Huijbregtse*, 542 F.3d 1155, 1165 (7th Cir. 2008).

101. *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995).

102. *Id.*

103. *Id.* at 12.

104. Kenneth Duvall, *The Defendant Was Not Heard . . . Now What?: Prejudice Analysis, Harmless Error Review, and the Right to Testify*, 35 *HAMLIN L. REV.* 279, 282–84 (2012).

105. *Id.* at 283.

106. *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992).

107. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

108. See Duvall, *supra* note 104, at 295–303 (exploring how, in determining whether his or her constitutional rights were violated, defendant bears a higher burden of proof to prove prejudice (reasonable probability) versus error (reasonable doubt), which may or may not be found to be harmless).

voluntary, and intelligent.¹⁰⁹ Courts have found that attorneys render deficient performance by failing to discuss with their clients whether this right should be waived, but courts have found that defendants need to establish the prejudice that flows from this failure to consult.¹¹⁰

III. RIGHT TO AUTONOMY

In opinions separated by fourteen years, the Supreme Court dealt with two cases that both involved an attorney who admitted his client's guilt without obtaining his client's express consent. But there was a key difference between the cases that led the Court to recognize a right to autonomy in the latter, creating a fifth decision reserved for the defendant rather than defense counsel.

A. *Florida v. Nixon and Silent Acquiescence*

In *Florida v. Nixon*, Joe Nixon was charged with first-degree murder and related charges in connection with the death of Jeannie Bickner.¹¹¹ His public defender, Michael Corin, sought a plea deal, but “the prosecutors indicated their unwillingness to recommend a sentence other than death.”¹¹² Faced with overwhelming evidence implicating his client, “Corin concluded that the best strategy would be to concede guilt, thereby preserving his credibility in urging leniency during the penalty phase.”¹¹³ Corin tried to explain this trial strategy to Nixon at least three times, but “Nixon was generally unresponsive during their discussions” and “never verbally approved or protested Corin’s proposed strategy.”¹¹⁴ Corin thus forged ahead with his strategy, telling jurors during his opening statement:

In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death. . . . [T]hat fact will be proved to your satisfaction beyond any doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.¹¹⁵

109. See *United States v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998) (describing the recognized standard for a waiver of the right to testify requiring the waiver be knowing, voluntary, and intelligent).

110. See Duvall, *supra* notes 104–105, 108 and accompanying text (illustrating requirements imposed on counsel when waiving their clients' right to testify); see also *Teague*, 953 F.2d at 1534 (providing that defendant must show defense counsel made serious errors and deficient performance prejudiced the defense thus depriving defendant of a fair trial).

111. *Florida v. Nixon*, 543 U.S. 175, 179–80 (2004).

112. *Id.* at 181.

113. *Id.*

114. *Id.*

115. *Id.* at 182–83 (quoting from the trial court record).

After he was convicted and sentenced to death, Nixon appealed, claiming he received ineffective assistance of counsel.¹¹⁶ The Supreme Court of Florida agreed, finding that counsel's comments were the "functional equivalent of a guilty plea."¹¹⁷ As such, Nixon's "silent acquiescence" to Corin's trial strategy was not enough; instead, Nixon needed to give "affirmative, explicit acceptance" to counsel's strategy."¹¹⁸

The United States Supreme Court later granted certiorari to determine, inter alia, "whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient"¹¹⁹ The Court began by noting that "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy."¹²⁰ But the Court then cited *Taylor v. Illinois* for the proposition that this duty "does not require counsel to obtain the defendant's consent to 'every tactical decision.'"¹²¹

The Court again recognized the defendant "has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'"¹²² And, according to the Court, for each of these four decisions, "an attorney must both consult with the defendant and obtain consent to the recommended course of action."¹²³

The Court, however, rejected the Supreme Court of Florida's conclusion that Corin's comments were the functional equivalent of a guilty plea.¹²⁴ Rather, the Court distinguished this case from *Brookhart v. Janis*, where defense counsel had "agreed to a 'prima facie' bench trial at which the State would be relieved of its obligation to put on 'complete proof' of guilt or persuade a jury of the defendant's guilt beyond a reasonable doubt."¹²⁵ Conversely, "there was in Nixon's case no 'truncated' proceeding shorn of the need to persuade the trier 'beyond a reasonable doubt,' and of the defendant's right to confront and cross-examine witnesses."¹²⁶

This distinction allowed the Court in this case to draw a dichotomy.

116. *Id.* at 185.

117. *Id.* (quoting *Nixon v. Singletary*, 758 So.2d 618, 625 (2000)).

118. *Id.* at 185–86 (quoting *Nixon*, 758 So.2d at 624).

119. *Id.* at 186.

120. *Id.* at 187 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

121. *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988)).

122. *Id.* (first quoting *Jones v. Barnes*, 751 (1983); then quoting *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)).

123. *Id.*

124. *Id.* at 188.

125. *Id.* (citing *Brookhart v. Janis*, 384 U.S. 1, 5–6 (1966)).

126. *Id.* at 188–89 (quoting *Brookhart*, 384 U.S. at 6).

On the one hand, “Corin was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon.”¹²⁷ On the other hand, “[g]iven Nixon’s constant resistance to answering inquiries put to him by counsel and court, Corin was not additionally required to gain express consent before conceding Nixon’s guilt.”¹²⁸ Put another way, “[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant’s best interest and the defendant is unresponsive, counsel’s strategic choice is not impeded by any blanket rule demanding the defendant’s explicit consent.”¹²⁹ Instead, a court must determine on a case-by-case basis whether counsel’s choice constituted ineffective assistance.¹³⁰ Specifically, “if counsel’s strategy, given the evidence bearing on the defendant’s guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.”¹³¹

B. McCoy v. Louisiana and the Right to Autonomy

Fourteen years later, in *McCoy v. Louisiana*, the Supreme Court dealt with the question of what happens when a defendant does not silently acquiesce in his counsel’s decision to admit guilt but instead loudly objects. In *McCoy*, Robert McCoy was charged with three counts of first-degree murder.¹³² McCoy’s parents hired attorney Larry English who “concluded that the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.”¹³³ McCoy was “furious” with this decision and told English “not to make that concession,” maintaining that “he was out of State at the time of the killings.”¹³⁴ McCoy subsequently moved to terminate English’s representation of him, but the trial judge denied the motion, telling English, “[Y]ou are the attorney,” and “you have to make the trial decision of what you’re going to proceed with.”¹³⁵ Thereafter, in his opening statement, English told the jurors that the evidence was “unambiguous” that “my client committed three murders.”¹³⁶

127. *Id.* at 189.

128. *Id.* (internal citations omitted).

129. *Id.* at 192.

130. *See id.* (noting that the standard set forth in *Strickland v. Washington*, asking if counsel’s representation “fell below an objective standard of reasonableness,” controls in a claim for ineffective assistance of counsel (466 U.S. 668, 687–88 (1984))).

131. *Id.*

132. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1506 (2018).

133. *Id.*

134. *Id.* (quoting the trial court record).

135. *Id.* (quoting the trial court record).

136. *Id.* at 1507 (quoting the trial court record).

After he was convicted and given three death sentences, McCoy appealed, with that appeal eventually reaching the United States Supreme Court.¹³⁷ The Court began by observing that “[t]rial management is the lawyer’s province,” but that “[s]ome decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.”¹³⁸ The Court then recognized a right to autonomy, concluding that “[a]utonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.”¹³⁹ According to the Court, just as a defendant may refuse to plead guilty or choose to proceed pro se, “so may she insist on maintaining her innocence at the guilt phase of a capital trial.”¹⁴⁰ The Court reached this conclusion by finding that “[t]hese are not strategic choices about how best to *achieve* a client’s objectives; they are choices about what the client’s objectives in fact *are*.”¹⁴¹

Specifically, while defense counsel might conclude that conceding guilt and begging for forgiveness is the superior trial objective, “the client may not share that objective.”¹⁴² Instead, the client “may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.”¹⁴³

The Court then cautioned that “[p]reserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel’s, or the court’s, respective trial management roles.”¹⁴⁴ And the Court acknowledged that “[c]ounsel, in any case, must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option.”¹⁴⁵ The key question distinguishing *Florida v. Nixon* and *McCoy* is what happens after that discussion.¹⁴⁶

The Court found *Nixon* factually distinguishable because, unlike English, “Nixon’s attorney did not negate Nixon’s autonomy by overriding Nixon’s desired defense objective, for Nixon never asserted any such objective.”¹⁴⁷ Instead, “Nixon ‘was generally unresponsive’

137. *Id.*

138. *Id.* at 1508 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 1509.

145. *Id.* (internal citations omitted).

146. *See id.* (comparing *Nixon*’s and *McCoy*’s respective approaches to carrying out defendant’s objectives when defendant remains silent versus when defendant rejects counsel’s advice).

147. *Id.*

during discussions of trial strategy, and ‘never verbally approved or protested’ counsel’s proposed approach.”¹⁴⁸ The *McCoy* Court thus concluded *Nixon* stands for the proposition that “[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant’s best interest.”¹⁴⁹

Conversely, if an attorney tells his client that he is going to concede guilt, the client objects, and the attorney proceeds with this strategy, it is not just error, but structural error.¹⁵⁰ According to the Court, “[v]iolation of a defendant’s Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called ‘structural’; when present, such an error is not subject to harmless-error review.”¹⁵¹ The *McCoy* Court could reach this conclusion because attorney override implicates at least two of the rationales necessitating a finding of structural error:

(1) “if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,” such as “the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty;” and

(2) “when its effects are too hard to measure, as is true of the right to counsel of choice.”¹⁵²

With regard to the first rationale, “[s]uch an admission blocks the defendant’s right to make the fundamental choices about his own defense.”¹⁵³ Furthermore, under the second rationale, “the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer’s concession of his client’s guilt.”¹⁵⁴

IV. THE REAL *MCCOY*

McCoy clearly stands for the proposition that a defendant is entitled to a new trial when, over his objection, his attorney admits he is legally guilty of the crime(s) charged. But it arguably left open two questions: (1) What happens when an attorney admits his client’s legal guilt without running the decision by his client; and (2) What happens when an attorney admits that his client committed one or more but not all of the elements of the crime(s) charged?

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

149. *Id.*

150. *Id.* at 1511.

151. *Id.*

152. *Id.* (quoting *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017)).

153. *Id.*

154. *Id.*

A. *Attorneys Not Consulting with Their Clients About the Decision to Admit Guilt*

1. Post-*McCoy* Precedent

In the wake of *McCoy*, seemingly all courts have found *Florida v. Nixon* applies and the right to autonomy does *not* apply when an attorney fails to consult with his client before admitting his legal guilt. For example, in *Atwater v. State*, Jeffrey Atwater was charged with first-degree murder and the lesser-included offense of second-degree murder in connection with the death of Kenneth Smith.¹⁵⁵ During closing arguments, Atwater's attorney stated, "We're not hiding anything from you. We're asking you to do your duty, to render the only verdict that is fair and just, and that is as to Count One of the indictment, that Jeffrey Atwater is guilty of Murder in the Second Degree."¹⁵⁶

After being convicted of first-degree murder and receiving a death sentence, Atwater appealed, claiming that his right to autonomy under *McCoy* was violated because his attorney did not "discuss with [him] the potential trial strategy of conceding guilt."¹⁵⁷ The Supreme Court of Florida disagreed, finding that Atwater's claim that his attorney failed to discuss trial strategy with him was covered by *Florida v. Nixon*.¹⁵⁸ The court concluded, "[a]t its heart, Atwater's claim is not a *McCoy* claim; Atwater has not alleged that counsel conceded guilt over Atwater's objection."¹⁵⁹ As a result, the state supreme court held that "the trial court was right to conclude that Atwater's allegations are facially insufficient to warrant relief under *McCoy*."¹⁶⁰

Similarly, in *Pennebaker v. Rewerts*, Danny R. Pennebaker was convicted of felonious assault and assault with intent to rob while armed.¹⁶¹ After he was convicted, Pennebaker appealed, claiming, *inter alia*, that his attorney improperly admitted his guilt at trial without first consulting with him.¹⁶² The United States District Court for the Eastern District of Michigan disagreed, concluding that:

Even if, as Petitioner alleges, his attorney never discussed trial strategy with him, he was on notice of counsel's defense theory as soon as counsel made his opening statement. Yet Petitioner failed to oppose this

155. *Atwater v. State*, 300 So.3d 589, 589 (Fla. 2020).

156. Initial Brief of the Appellant at 22, *Atwater v. State*, 300 So.3d 589 (Fla. 2020) (No. SC19-1709), 2019 WL 6273372, at *22.

157. *Atwater*, 300 So.3d at 591.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Pennebaker v. Rewerts*, No. 17-12196, 2020 WL 4284060, at *1 (E.D. Mich. July 27, 2020).

162. *Id.*

strategy with his attorney or before the court; nor did he clearly and consistently insist on a defense of innocence. Instead, Petitioner, like the defendant in *Nixon*, only objected to counsel's defense strategy after trial. As a result, this is not a case of structural error, as in *McCoy*, but rather, invokes *Nixon*'s analysis of ineffective assistance of counsel.¹⁶³

Similarly, in *People v. Santana*, Juan Carlos Santana was convicted of burglary, receiving stolen property, and second-degree murder.¹⁶⁴ At trial, "[i]n closing argument, [defense counsel] conceded Santana's guilt for burglary, receiving stolen property, and second-degree murder, and even argued the evidence showed Santana was guilty."¹⁶⁵ After he was convicted, Santana appealed, claiming that defense counsel violated his right to autonomy by failing to consult with him about his decision to admit legal guilt.¹⁶⁶ The court disagreed, finding that "[t]he record in this case is silent as to Santana's objectives, so it falls closer to *Nixon* [than *McCoy*] and compels us to reject his claim."¹⁶⁷ In other words, *McCoy* was inapplicable even though defense counsel "did not tell Santana of his planned concession strategy"¹⁶⁸

2. Conclusion: The Right to Autonomy Recognized in *McCoy* Should Cover Admissions Made Without Client Consultation

These courts are incorrectly concluding that attorney admissions made without client consultation are not covered by the *McCoy v. Louisiana* right-to-autonomy framework. In *McCoy*, the Court placed the right to autonomy in the category of decisions reserved for the defendant, along with decisions about whether to (1) plead guilty; (2) waive the right to a jury trial; (3) testify in one's own behalf; and (4) forgo an appeal.¹⁶⁹ As explained in Section II, to be constitutionally valid, each of these decisions must be knowing, voluntary, and intelligent, but the Supreme Court and lower courts have established different mechanisms for determining whether this standard has been satisfied.

For a defendant's decision to plead guilty to be constitutional, there must be an affirmative showing on the record that the judge accepted the plea only after determining defendant's decision to waive several trial rights was knowing, intelligent, and voluntary.¹⁷⁰ With regard to a

163. *Id.* at *4.

164. *People v. Santana*, No. B286320, 2019 WL 3425294, at *1 (Cal. Ct. App. July 30, 2019).

165. *Id.* at *7.

166. *Id.* at *6.

167. *Id.* at *9.

168. *Id.*

169. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

170. See *supra* notes 33–42 and accompanying text (discussing *Boykin v. Alabama* and the Supreme Court's holding that for trial court's acceptance of defendant's guilty plea to be

defendant's decision to waive a jury trial in favor of a bench trial, Federal Rule of Criminal Procedure 23(a) sets forth a procedure for waiver, and many courts also require a colloquy, but neither of these are constitutional requirements.¹⁷¹ Meanwhile, in terms of ineffective assistance of counsel, defense counsel renders deficient performance by failing to advise a defendant of his right to trial by jury, but courts are split over whether such failures are structural error or whether the defendant must establish prejudice.¹⁷²

For a defendant's decision not to appeal, under the ineffective-assistance test, in limited circumstances, defense counsel has a duty to consult with his client before the client makes that decision, and the failure to consult under those circumstances is per se prejudicial.¹⁷³ Finally, with regard to a defendant's decision not to testify, defense counsel has a duty to consult with his client before the client makes that decision, but the defendant must establish that the failure to consult was prejudicial.¹⁷⁴

Although the Court in *Florida v. Nixon* did not cite *Roe v. Flores-Ortega*, its opinion in the latter case fully explains its opinion in the former case. As noted in Section II.C.1, the Supreme Court held in *Flores-Ortega* there is "a constitutionally imposed duty to consult with the defendant about an appeal" only "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."¹⁷⁵ And, as noted, one of the rationales the Court gave for this limited duty to consult is there can be cases in which (1) defense counsel "informs the defendant of his appeal rights;" (2) "the defendant does not express any interest in appealing;" and (3) "counsel concludes that there are no nonfrivolous grounds for appeal."¹⁷⁶

This is essentially the same analysis the Supreme Court applied in *Florida v. Nixon*, but in connection with the right to claim innocence

constitutional, court must affirmatively show waiver of jury trial and other constitutional rights was knowing, intelligent, and voluntary).

171. *See supra* notes 54–59 and accompanying text (discussing Federal Rule of Criminal Procedure 23(a) and the evolution of procedure for valid waiver of jury trial right).

172. *See supra* notes 60–63 and accompanying text (discussing situations where the court has found defense counsel rendered deficient performance).

173. *See supra* notes 78–85 and accompanying text (discussing *Roe v. Flores-Ortega*'s holding regarding when counsel must consult with their client about an appeal and what constitutes deficient performance).

174. *See supra* notes 104–108 and accompanying text (discussing counsel's obligation to inform a defendant of their right to testify, and in situations where this doesn't occur, defendants need to prove failure to consult caused prejudice to prove ineffective counsel).

175. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

176. *Id.* at 479.

rather than the right to appeal. Specifically, in *Nixon*, (1) defense counsel informed the defendant that he planned to admit guilt at trial; (2) the defendant did not express any interest in maintaining his innocence; and (3) counsel concluded that admitting guilt was the best way to preserve “his credibility in urging leniency during the penalty phase.”¹⁷⁷

This is entirely consistent with the *McCoy* Court’s characterization of *Florida v. Nixon*. As noted, the *McCoy* Court concluded *Nixon* stands for the proposition that “[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant’s best interest.”¹⁷⁸ Breaking this down, as with the other four decisions reserved for the client, the defendant must knowingly, voluntarily, and intelligently waive the right to autonomy, i.e., the right to maintain innocence. When defense counsel informs the defendant that he plans to concede his guilt at trial and the defendant is unresponsive, the defendant knowingly, voluntarily, and intelligently waives this right and allows defense counsel to decide whether to concede guilt, with defense counsel’s decision subject to a traditional ineffective-assistance-of-counsel analysis.

Conversely, when defense counsel does not inform the defendant that he plans to concede guilt, the defendant does not—*cannot*—knowingly, voluntarily, and intelligently waive his right to autonomy. This is where the right to autonomy differs from the right to appeal. As the Court held in *Flores-Ortega*, there can be situations in which a defendant is aware of his right to appeal from statements made by the judge and/or his attorney and therefore is deemed to have knowingly, voluntarily, and intelligently waived that right based on failure to affirmatively exercise it.

On the other hand, if defense counsel never tells his client that he plans to admit his guilt, there is no way for the defendant to have knowledge of that decision. In a case like *McCoy*, there is a violation of the right to autonomy because the defendant knowingly, voluntarily, and intelligently asserted his right to maintain his innocence after his attorney told him that he planned to admit his guilt. But in a case like *Atwater*, there should be a similar violation of the right to autonomy because the defendant was never given a chance to knowingly, voluntarily, and intelligently assert his right. Unlike in *Nixon*, such a defendant does not decline to participate in his defense but instead is never afforded the opportunity to participate. Therefore, the *McCoy* right to autonomy should apply when defense counsel never informs the defendant of his plan to concede guilt.

177. *Florida v. Nixon*, 543 U.S. 175, 181–83 (2004).

178. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018).

B. Attorneys Admitting Some, But Not All, of the Elements of a Crime

1. Courts Concluding That the Right to Autonomy Doesn't Cover Partial Admissions

In the wake of *McCoy*, several courts have held that the right to autonomy does not entitle a defendant to prevent his attorney from admitting that the defendant committed some, but not all, of the elements of a crime. For example, in *United States v. Rosemond*, James Rosemond, the owner of Czar Records, was “engaged in a contentious, often-violent rivalry” with neighboring Violator Records and one of its acts, G-Unit.¹⁷⁹ In March 2007, Lowell Fletcher and another G-Unit associate pushed, slapped, and threatened Rosemond’s fourteen-year-old son, who was wearing a “Czar” sweatshirt.¹⁸⁰ Subsequently, Brian McCleod, who had met Rosemond in jail in the late 1990s, told Rosemond that “he had ‘a line on the guy that slapped your son.’”¹⁸¹ Thereafter,

Rosemond and McCleod met up again around a week-and-a-half later. They talked more about “the line” McCleod had on Fletcher, and Rosemond said: “I have \$30,000 for anybody who brings him to me cause I’mma hit him so hard and so fast he’s not gonna see it coming.” After Rosemond said he was considering “doing this” himself, he asked for McCleod’s thoughts. McCleod believed it was unwise for Rosemond to be involved in any violence himself, so he mentioned involving [Derrick] Grant. Rosemond instructed McCleod to see whether Grant would be interested. Grant was, but he wanted more than \$30,000. McCleod agreed with Grant that a larger fee was required because the \$30,000 was McCleod’s fee for luring Fletcher to an attack, and Grant would need “at least twice that amount, if not more, maybe even close to a hundred [thousand dollars]” to be the shooter. McCleod then informed Rosemond that Grant was now involved in the plan.¹⁸²

After Grant later killed Fletcher with McCleod’s assistance, Rosemond “was charged with murder-for-hire, conspiracy to commit murder-for-hire, possession of a firearm during a murder-for-hire conspiracy, and murder through use of a firearm.”¹⁸³ At the end of trial, “[i]n his closing argument, Rosemond’s attorney, David Touger, acknowledged that Rosemond paid for Fletcher to be shot, but he argued that the government failed to prove beyond a reasonable doubt that Rosemond intended for Fletcher to be killed.”¹⁸⁴ This argument was over the objection of Rosemond, who “maintained that he hired these associates only to bring

179. *United States v. Rosemond*, 958 F.3d 111, 115 (2d Cir. 2020).

180. *Id.* at 116.

181. *Id.* at 117 (quoting trial court record).

182. *Id.* (internal citations to trial court record omitted).

183. *Id.* at 115.

184. *Id.* at 119.

Fletcher to him, and that he never intended for Fletcher to be shot or killed.”¹⁸⁵ Rosemond thus argued his counsel violated his right to autonomy under *McCoy*.¹⁸⁶

The Second Circuit disagreed, concluding “the right to autonomy is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged.”¹⁸⁷ The court advanced two arguments in support of this conclusion. First, the Second Circuit noted that “[t]hroughout its opinion, the *McCoy* Court’s use of the word ‘guilt’ [was] explicitly limited to the charged crime.”¹⁸⁸

Second, the court observed that the *McCoy* “majority repeatedly made clear that its decision was meant to safeguard the ‘objective of [one’s] defense,’” with one such objective being an acquittal.¹⁸⁹ But then, “[o]nce a defendant decides on an objective—e.g., acquittal—‘[t]rial management is the lawyer’s province’ and counsel must decide, inter alia, ‘what arguments to pursue.’”¹⁹⁰ Therefore, the Second Circuit found that Rosemond’s right to autonomy was not violated because “[c]onceding an element of a crime while contesting the other elements falls within the ambit of trial strategy.”¹⁹¹ As support for this holding, the Second Circuit cited similar opinions of the Ninth, Tenth, and Eleventh Circuits.¹⁹²

Some state courts have reached similar conclusions. For instance, in *Matter of Somerville*, Dennis Somerville was charged with first-degree rape after DNA evidence collected from the victim implicated him in the crime.¹⁹³ In his opening statement, Somerville’s attorney told the jurors that “essentially, we are not going to have a lot to say. . . . [F]rankly, we don’t have argument with the State’s science here or the handling of their evidence I’m not anticipating defense evidence about the science.”¹⁹⁴ Defense counsel went on to explain “to the jury that their focus during

185. Appellant’s Opening Brief at 1, *United States v. Rosemond*, 958 F.3d 111 (2d Cir. 2020) (No. 18-3561-CR), 2019 WL 1991995, at *1.

186. See *Rosemond*, 958 F.3d at 119 (discussing the Sixth Amendment as it “provides certain procedural safeguards” to criminal defendants); see also *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979) (discussing the Sixth Amendment).

187. *Rosemond*, 958 F.3d at 122.

188. *Id.* (quoting *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018)).

189. *Id.* (quoting *McCoy*, 138 S. Ct. at 1505, 1508–10, 1512).

190. *Id.* (quoting *McCoy*, 138 S. Ct. at 1508).

191. *Id.*

192. See *id.* at 123 (citing *United States v. Holloway*, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019); *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019); *Thompson v. United States*, 791 F. App’x 20, 26–27 (11th Cir. 2019)) (discussing sister circuits’ decisions interpreting *McCoy* and holding that *McCoy* is limited to a defendant’s right to maintain his innocence of the charged crimes).

193. *In re Somerville*, No. 53586-6-II, 2020 WL 6281524, at *1 (Wash. Ct. App. Oct. 27, 2020).

194. *Id.* (quoting respondent opening brief).

the trial should be on whether there was reasonable doubt that a threat was made to [the victim], and if there was any evidence of a gun.”¹⁹⁵

After he was convicted, Somerville appealed, claiming, *inter alia*, that his attorney “effectively conceded . . . the actus reus of the charged offense.”¹⁹⁶ The Court of Appeals of Washington disagreed, concluding that, “even if this was true, a crime also requires a mens rea element;” therefore, “defense counsel’s conduct at trial did not indicate a concession of guilt rising to the level recognized in *McCoy*.”¹⁹⁷ Similarly, in *State v. Crump*, the Court of Appeals of North Carolina found that defense counsel’s comments during closing arguments admitting defendant committed the actus reus of second-degree forcible sexual offense did not trigger *McCoy* because those comments “were at most an admission of an element of the offense without Defendant’s consent.”¹⁹⁸

2. The Right to Autonomy Recognized in *McCoy* Should Cover Admissions That Might Lead to Opprobrium

a. *McCoy* and Actus Reus Admissions

The Second Circuit in *Rosemond* and other courts reaching similar results are fundamentally misreading *McCoy* by holding that the question of whether to admit an element of a crime is a matter of trial strategy. Rather, the *McCoy* majority clearly concluded that a client’s objective can be—and indeed *McCoy*’s overriding objective was—to avoid the opprobrium that comes with admitting a heinous act. This is the inexorable conclusion that must be drawn from *McCoy*, tracking Justice Ginsberg’s majority opinion.

In *McCoy*’s merits brief to the Supreme Court, he advanced two reasons why the decision to admit guilt at trial must lie with the defendant. First, “[i]t is the defendant who will lose his liberty or face the executioner.”¹⁹⁹ Second, “[i]t is the defendant who will face the opprobrium of admitting guilt to a capital offense, reserved for the ‘narrow category of the most serious crimes.’”²⁰⁰

At oral arguments, Justice Kagan seemed to pick up on this argument, asking Elizabeth Murrill, Solicitor General of Louisiana, the following question:

195. *Id.*

196. *Id.* at *4 (quoting respondent reply brief).

197. *Id.*

198. *State v. Crump*, 848 S.E.2d 501, 508 (N.C. Ct. App. 2020).

199. Brief for Petitioner at 26, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (No. 16-8255), 2017 WL 5495452, at *26.

200. *Id.* at 26–27 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008)).

Well, for sure we've given lawyers a lot of leeway to make quite a number of decisions when they're representing a defendant, troubled and untroubled, and the idea is that lawyers know better, sometimes, than their clients and that we should want to lodge a great many strategic decisions in their hands rather than in the client's.

But you're not talking about here, or we're not talking about here, about how to pursue a set of objectives. Is it better to pursue it this way or is it better to pursue it that way?

We're talking about a client saying: You have to follow—I have—I have an overriding objective in this case, and that's to avoid the opprobrium that comes with admitting that I killed family members. And that's my overriding objective.

And you're saying that the lawyer can say it doesn't matter that that's your overriding objective. And I guess what I want to know is why.²⁰¹

Murrill then responded,

Well, because—first, Your Honor, I—I don't think that that's entirely how Mr. McCoy characterized his objective. I—I would describe it more as though he said I know a better way to cross this divide and we're going to cross it by letting me drive the—this car over the cliff because the car will fly.²⁰²

Justice Ginsberg, however, clearly disagreed with this characterization of McCoy's overriding objection by responding to Murrill, "But he didn't say that. He said, and I think this much is clear from the record, he said in no uncertain terms: *I do not want to concede that I killed these three people.*"²⁰³

After Murrill responded, "Yes, Justice Ginsburg," the Justice made clear that McCoy's decision not to admit he killed the victims was a trial *objective* rather than trial *strategy*. Specifically, in her response to Murrill, Justice Ginsberg stated, "He wasn't talking about strategy at that time. He just said I do not want to concede that I killed these people."²⁰⁴

A straight line can be drawn from McCoy's merits brief, to this portion of oral arguments, to Justice Ginsberg's majority opinion. In finding McCoy's attorney violated McCoy's right to autonomy by overriding his objective, Justice Ginsberg ruled:

Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did here. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members, or he

201. Transcript of Oral Argument at 37–38, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (No. 16-8255), 2018 WL 1368611, at *37–38 (emphasis added).

202. *Id.* at 38.

203. *Id.* (emphasis added).

204. *Id.*

may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.²⁰⁵

b. Courts Applying *McCoy*'s Opprobrium Language to Cover Partial Admissions

In *People v. Flores*, Roberto Flores was prosecuted in separate trials on weapons charges and an attempted murder charge based on striking a police officer with his car.²⁰⁶ At both trials, Flores's objective "was express and unambiguous: to maintain his innocence of the acts alleged as the actus reus of the charged crimes—i.e. driving the car and possessing the weapons—irrespective of the weight of the evidence against him."²⁰⁷ His attorney, however, "in pursuit of the understandable objective of achieving an acquittal, . . . conceded the actus reus of the charged crimes at both trials."²⁰⁸ Flores, however, was convicted at both trials.²⁰⁹

In addressing Flores's ensuing appeal, the Court of Appeals of California acknowledged "[i]t was not unreasonable for counsel to conclude that conceding the actus reus offered Flores the best chance to achieve an acquittal at either trial."²¹⁰ The court, however, rejected the State's presumption "that Flores's objective was an acquittal, not maintaining innocence of the alleged acts."²¹¹ Instead, the court concluded that this presumption "disregard[ed] *McCoy*'s discussion of plausible objectives that a defendant might have at trial, among others the avoidance of the 'opprobrium that comes with admitting [one] killed family members.'"²¹²

Similarly, in *United States v. Read*, Jonathan Read was charged with assault with a deadly weapon with intent to do bodily harm and assault with a deadly weapon resulting in serious bodily injury.²¹³ At trial, over Read's objection, his attorney unsuccessfully presented an insanity defense.²¹⁴ In granting Read a new trial on appeal, the Ninth Circuit held that "*McCoy*'s emphasis on the defendant's autonomy strongly suggests that counsel cannot impose an insanity defense on a non-consenting

205. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1503–04 (2018).

206. *People v. Flores*, 246 Cal. Rptr. 3d 77, 81 (Cal. Ct. App. 2019).

207. *Id.* at 84–85.

208. *Id.* at 79.

209. *Id.* at 81.

210. *Id.* at 85–86.

211. *Id.* at 86.

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

213. *United States v. Read*, 918 F.3d 712, 715 (9th Cir. 2019).

214. *See id.* at 717 (noting that Read's appointed counsel, whom the court insisted on reappointing after Read had attempted to proceed pro se after objecting to counsel's planned insanity defense, nevertheless maintained the insanity defense over Read's objections).

defendant.”²¹⁵

In reaching this result, the Ninth Circuit held that “[a]n insanity defense is tantamount to a concession of guilt. Moreover, a defense of insanity, like a concession of guilt, carries grave personal consequences that go beyond the sphere of trial tactics.”²¹⁶ Specifically, “[a] defendant may not wish to plead insane because of a firmly held ‘feeling that he was not mentally ill at the time of the crime.’”²¹⁷ According to the court, “[j]ust as conceding guilt might carry ‘opprobrium’ that a defendant might ‘wish to avoid, above all else,’ . . . ‘a defendant, with good reason, may choose to avoid the stigma of insanity.’”²¹⁸

C. Conclusion: The Right to Autonomy Recognized in McCoy Should Cover Admissions That Might Lead to Opprobrium

Justice Ginsberg’s *McCoy* majority opinion, especially when read in conjunction with oral arguments and McCoy’s merits brief, makes clear that a defendant’s trial objective can include avoiding opprobrium. In his merits brief, McCoy argued the decision to admit guilt must lie with the defendant because (1) “[i]t is the defendant who will lose his liberty or face the executioner;” and (2) “it is the defendant who will face the opprobrium of admitting guilt.”²¹⁹ Thereafter, at oral arguments, (1) Justice Kagan stated that McCoy’s “overriding objective in this case . . . [was] to avoid the opprobrium that comes with admitting that [he] killed family members;” and (2) Justice Ginsberg concluded that McCoy’s objective, and not merely his strategy, was to avoid conceding he killed the three victims.²²⁰ Finally, Justice Ginsberg’s majority opinion recognized the right to autonomy in *McCoy* because, inter alia, a defendant might want to avoid the opprobrium accompanying admissions or preserve the possibility of an exoneration.²²¹ From this, it is clear that: (1) McCoy’s objective was to avoid the opprobrium accompanying the admission that he killed his family members; (2) avoiding opprobrium is a trial objective and not merely a trial strategy; and (3) although they can overlap, avoiding opprobrium and avoiding conviction are distinct trial objectives.

This logic is consistent with the law surrounding pleading. As noted

215. *Id.* at 720.

216. *Id.* (internal citations omitted).

217. *Id.* (quoting *McLaren v. State*, 407 P.3d 1200, 1213 (Wyo. 2017)).

218. *Id.* (first quoting *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018); then quoting *Freundak v. United States*, 408 A.2d 364, 377 (D.C. Ct. App. 1979)).

219. See Brief for Petitioner, *supra* note 199, at 26–27 (explaining why defendant should decide their plea).

220. See Transcript of Oral Argument, *supra* note 201, at 37–38 (emphasis added) (reiterating reasons and motives behind why McCoy would want to maintain his innocence).

221. See *id.* at 38 (explaining why a defendant may not want to admit guilt).

previously, it is the client, not counsel, who decides what plea to enter.²²² But the decision over what plea to enter is not a binary choice between “guilty” and “not guilty” pleas. In federal court, a defendant can proffer a nolo contendere plea pursuant to Federal Rule of Criminal Procedure 11(a)(3).²²³ Similarly, in state courts, defendants can proffer nolo contendere pleas²²⁴ or no contest pleas,²²⁵ depending on the jurisdiction. Nolo contendere and no contest pleas are the same: “When a defendant pleads nolo contendere or no contest, he does not admit his guilt; instead, the plea is merely an indication that he will not contest the charges brought against him.”²²⁶ While functionally a guilty plea, a nolo contendere or no contest plea is inadmissible against a defendant in a subsequent proceeding, unlike a traditional guilty plea.²²⁷

Defendants can also proffer *Alford* pleas pursuant to the Supreme Court’s opinion in *North Carolina v. Alford*.²²⁸ In *Alford*, the Supreme Court held that a court can accept a guilty plea in which the defendant affirmatively maintains his innocence but acknowledges the State has sufficient evidence to prove his guilt beyond a reasonable doubt.²²⁹ There is currently a split among courts over whether *Alford* pleas are admissible against defendants in subsequent proceedings.²³⁰

There are practical reasons why a defendant might choose to enter one of these pleas given that (1) nolo contendere and no contest pleas are inadmissible; and (2) *Alford* pleas may be inadmissible. If, for instance, a defendant is charged with involuntary manslaughter in connection with a fatal car accident, use of one of these pleas, rather than a standard guilty plea, would render the plea inadmissible at a subsequent civil wrongful-death lawsuit involving the same accident.

There are, however, practical reasons why an attorney would prefer his

222. See *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966) (emphasizing that counsel cannot override their client’s express desire to plead a certain way).

223. FED. R. CRIM. P. 11(a)(3).

224. See, e.g., FLA. R. CRIM. P. 3.170(b) (allowing nolo contendere pleas in Florida).

225. See, e.g., OHIO R. CRIM. P. 11(B) (allowing no contest pleas in Ohio).

226. Colin Miller, *The Best Offense Is a Good Defense: Why Criminal Defendants’ Nolo Contendere Pleas Should Be Inadmissible Against Them When They Become Civil Plaintiffs*, 75 U. CIN. L. REV. 725, 725 (2006).

227. FED. R. EVID. 410(a)(2).

228. See *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (explaining that a defendant may “voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence” although he denies guilt).

229. See *id.* at 38–39 (explaining the basis for *Alford*’s plea, and its validity).

230. Compare *United States v. In*, No. 2:09CR00070, 2010 WL 2869108, at *2 (D. Utah July 20, 2010) (“Defendant has provided no binding or persuasive authority that Defendant’s *Alford* plea should be treated as anything other than a standard guilty plea for purposes of Rule 410.”), with *United States v. Elizondo*, 277 F. Supp. 2d 691, 704 (S.D. Tex. 2002) (holding defendant’s *Alford* plea akin to a plea of nolo contendere and precluded by the Federal Rules of Evidence from admission in subsequent proceedings).

client to enter a standard guilty plea. Namely, a judge is likely to impose a more lenient sentence when a defendant pleads guilty and accepts responsibility for his actions, and impose a harsher sentence when a defendant simply does not contest the charges against him or affirmatively maintains his innocence. Indeed, a defendant is entitled to a two-level downward adjustment of his offense level under the United States Sentencing Guidelines if he “clearly demonstrates acceptance of responsibility for his offense.”²³¹

Professor Stephanos Bibas (now a federal judge) interviewed thirty-four veteran prosecutors, judges, and public and private defense lawyers to determine why defendants enter nolo contendere or *Alford* pleas even “when it would be in their interests” to enter a standard guilty plea.²³² In these interviews, “[t]he most common barrier to a classic guilty plea is the defendant’s fear of embarrassment and shame before family and friends.”²³³ Second, “[a]fter shame, the reason cited most frequently for defendants’ refusal to admit guilt is psychological denial, in which defendants refuse to admit guilt to themselves.”²³⁴

In other words, in the pleading context, defendants often choose to enter *Alford* or nolo contendere/no contest pleas to avoid the moral opprobrium associated with admitting guilt. Put another way, a defendant’s primary pleading objective might be to avoid such opprobrium in the same way that a defendant’s primary trial objective might be to avoid such opprobrium. It would thus be odd that a pleading defendant would have the right to effectuate that objective while a trial defendant would not.

But it’s not just odd that courts would treat such defendants disparately; it’s inconceivable. Courts allowing attorneys to make partial admissions without client consent are preventing defendants from having any ability to maintain their innocence. According to these courts, these defendants must admit legal guilt through guilty/*Alford*/nolo contendere pleas or proceed to trials where their attorneys can admit they committed opprobrious acts. Therefore, the *McCoy* right to autonomy should allow defendants to prevent their attorneys from making partial admissions.

V. CONCLUSION

McCoy clearly stands for the proposition that a defendant is entitled to a new trial when, over his objection, his attorney admits that he is legally

231. U.S. SENT’G GUIDELINES MANUAL § 3E1.1 (U.S. SENT’G COMM’N 2020).

232. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1377 (2003).

233. *Id.*

234. *Id.* at 1378.

guilty of the crime(s) charged. But it arguably left open two questions: (1) What happens when an attorney admits his client's legal guilt without running the decision by his client, and (2) What happens when an attorney admits that his client committed one or more but not all of the elements of the crime(s) charged? This essay has argued that there is a violation of the right to autonomy when: (1) an attorney admits his client's legal guilt without running the decision by his client, and (2) an attorney makes a partial admission.