



COMMENT

McCoy v. Louisiana's
**Unintended Consequences
for Capital Sentencing**

Elizabeth M. Klein*

Abstract. In *McCoy v. Louisiana*, the U.S. Supreme Court recognized an expanded Sixth Amendment autonomy right for capital defendants, allowing them to maintain their factual innocence at trial at all costs. The Court's concern with such defendants' dignity has an intuitive appeal, and its holding followed neatly from the Court's Sixth Amendment cases.

But *McCoy* has some troubling implications for another strand of the Court's capital jurisprudence: the requirement that death sentences be proportional both to the offense and to the offender. The core of proportionality is the bifurcated capital trial, which channels aggravating and mitigating evidence—that is, evidence pertaining to the appropriate penalty—into a separate hearing. But staunchly maintaining innocence at the guilt phase of a capital trial—as *McCoy* now enables capital defendants to do—will often undermine common mitigation strategies at the penalty phase. Moreover, *McCoy* can be read as shifting control of penalty-phase strategic decisions—classically the province of the lawyer—away from the lawyer and toward capital defendants. In these two ways, *McCoy* quietly privileges a capital defendant's autonomy over the proportionality requirement, offering some support for the notion that a defendant may waive his right to present mitigating evidence, notwithstanding the need for an individualized accounting of culpability in capital sentencing.

The proportionality requirement protects both individual defendants and society's interest in just, accurate sentencing. By intimating that waiver of mitigation is consistent with that requirement, the seemingly pro-defendant outcome in *McCoy* may contribute to the trend of narrowing the proportionality doctrine into oblivion.

* J.D. Candidate, Stanford Law School, 2019. Thanks to Emily Hughes for my first exposure to the essential work of capital mitigation specialists; to the dedicated and brilliant lawyers at the California Appellate Project for sparking my interest in this issue; and to Larry Marshall for his generous and immensely helpful feedback on more than one draft. Thanks also to my editors and friends at the *Stanford Law Review*—Jane Kessner, Annie Shi, Parker Cragg, Liza Starr, Meghan Palmer, Ethan Herenstein, and most of all Yoni Marshall, who makes everything better.

Table of Contents

Introduction.....1069

I. *McCoy v. Louisiana*.....1070

 A. “A Difficult Client”1070

 B. Defendant Autonomy as Sixth Amendment Right1071

 C. Levels of Generality.....1074

II. *McCoy* Within the Capital Sentencing Landscape.....1076

 A. Proportionality and Capital Sentencing.....1076

 B. The Penalty Phase, the Right of Self-Representation, and the
 Duty of Loyalty1079

 1. Mitigation and self-represented defendants.....1079

 2. Mitigation and defendants represented by counsel.....1084

 C. *McCoy* and Proportionality: How the Right to Maintain Innocence
 Can Undermine the Proportionality of Capital Sentences1086

 D. *McCoy* and the Allocation of Responsibility Between Lawyer
 and Client1088

Conclusion.....1090

Introduction

The U.S. Supreme Court granted certiorari in *McCoy v. Louisiana* to resolve a split among state supreme courts as to whether a criminal defense lawyer may concede her client's guilt at trial over his objection.¹ *McCoy* presents itself as reaching a pro-defendant outcome, invoking the criminal defendant's dignity and autonomy² and ultimately granting the petitioner a new trial.³ But *McCoy* is a tricky case with the potential to work a great deal of mischief. It implicates a surprisingly common capital trial dilemma: When a defendant opposes presenting some or all mitigating evidence, does his preference control, or does the need for accurate sentencing information take precedence?

This Comment explores the potential impact of *McCoy* on the proportionality doctrine in capital sentencing—that is, the requirement that a death sentence be proportional to both the seriousness of the offense and the characteristics of the offender. *McCoy* fits into a line of cases that manifest an urgent tension between the proportionality requirement and capital defendants' right to control what mitigating evidence is introduced at their penalty trials—or even to waive mitigation altogether. By constitutionalizing defendants' right to maintain innocence at the guilt phase of a capital trial, the *McCoy* majority unwittingly offers some support for waiver of mitigation and, thus, for the trend toward narrowing the proportionality requirement into oblivion. This may have dangerous consequences for capital defendants, who frequently resist presenting mitigating evidence only to change their minds and fight their sentences. *McCoy*'s surprisingly broad holding thus has troubling implications both for proportionality in capital sentencing and for the already muddied division between the decisions lawyers may make unilaterally and those only defendants themselves can make.⁴

1. See 138 S. Ct. 1500, 1507 (2018).

2. See, e.g., *id.* at 1507-08 (“[T]he right to defend is personal,’ and a defendant’s choice in exercising that right ‘must be honored out of “that respect for the individual which is the lifeblood of the law.”’ (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975))).

3. See *id.* at 1512.

4. For more on the professional responsibility issues that arise when capital defense counsel seeks to offer mitigating evidence over her client’s objections, see generally Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1380-89 (1988); and Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (1987).

I. *McCoy v. Louisiana*

A. “A Difficult Client”

On May 29, 2008, a grand jury indicted Robert LeRoy McCoy on three counts of capital murder.⁵ McCoy pleaded not guilty to the charges that he killed the mother, stepfather, and son of his estranged wife, Yolanda.⁶ McCoy proved to be “a difficult client.”⁷ By late 2009, McCoy’s relationship with his public defender “had broken down irretrievably.”⁸ He fired the public defender, briefly represented himself, and then hired Larry English as his attorney.⁹ That relationship, too, quickly soured: McCoy refused to submit to examination by the experts English had engaged, and he repeatedly filed pro se motions with the court over English’s objections.¹⁰ Finally, McCoy became furious when English informed him that McCoy’s best strategy to avoid a death sentence was to admit he killed the victims.¹¹ McCoy again sought to fire his lawyer, but with the trial set to begin two days later, the court refused to allow English to withdraw, instructing him that as the attorney it was his responsibility to decide how to proceed at trial.¹²

English concluded that McCoy was delusional; that the alibi he wished to present—a vast, seemingly preposterous conspiracy involving multiple corrupt police departments killing the victims and then framing McCoy—was certain to fail in light of the overwhelming evidence of McCoy’s guilt; and that McCoy’s only chance of avoiding a death sentence was to admit he was the killer to maintain credibility with the jury.¹³ Motivated by the desire to save his client’s life in a criminal justice system he saw as racially biased,¹⁴ English conceded at trial that McCoy had killed the victims, but argued that he could only be convicted of a lesser included offense because he lacked the mens rea required for first-degree murder.¹⁵ McCoy protested that English was “selling [him] out,” but the court nonetheless allowed English to tell the jury that the

5. *State v. McCoy*, 218 So. 3d 535, 541 (La. 2016), *rev’d*, 138 S. Ct. 1500.

6. *McCoy*, 138 S. Ct. at 1505-06.

7. See Transcript of Oral Argument at 35, *McCoy*, 138 S. Ct. 1500 (No. 16-8255), 2018 WL 1368611.

8. *McCoy*, 138 S. Ct. at 1506.

9. *Id.*

10. See *McCoy*, 218 So. 3d at 546-48.

11. See *McCoy*, 138 S. Ct. at 1506.

12. *Id.*

13. See *id.*; *id.* at 1513 (Alito, J., dissenting).

14. See Jeffery C. Mays, *To Try to Save Client’s Life, a Lawyer Ignored His Wishes. Can He Do That?*, N.Y. TIMES (Jan. 15, 2018), <https://perma.cc/EAD6-UDCR>.

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

evidence would “unambiguous[ly]” prove that McCoy killed three people.¹⁶ The jury convicted McCoy on all three counts of first-degree murder.¹⁷

At the penalty phase, McCoy continued to protest in open court that he was being “railroad[ed]” and that English had “piss-poorly represented [him],”¹⁸ and he asked “to go on and get the death sentence.”¹⁹ As mitigating evidence, English called a clinical psychologist as an expert witness to testify that McCoy, whose victims were relatives of his estranged wife, suffered from a narcissistic personality disorder and an attachment disorder, conditions which often lead sufferers like McCoy to become convinced that “the woman in their life . . . is having affairs.”²⁰ McCoy objected to this testimony, telling the judge, “They want to make it seem like something is wrong with me. There’s nothing wrong with me, Your Honor.”²¹ The jury returned a death verdict on each count.²²

B. Defendant Autonomy as Sixth Amendment Right

McCoy sought a new trial in light of English’s concession of McCoy’s guilt.²³ But the Louisiana Supreme Court “affirmed the trial court’s ruling that defense counsel had authority . . . to concede guilt.”²⁴ In light of a split on this issue between the Louisiana Supreme Court and the high courts of Colorado, Delaware, and Kansas,²⁵ the U.S. Supreme Court granted certiorari and reversed in a 6-3 decision, holding not only that English violated McCoy’s right to define the objective of his defense,²⁶ but that to override the client in this manner was structural error.²⁷

The Court’s holding in *McCoy* has an appealing doctrinal simplicity. First, the Court reaffirmed that the Sixth Amendment grants the right to the *assistance* of counsel, “and an assistant, however expert, is still an assistant.”²⁸

16. *Id.* at 1506-07 (majority opinion) (alteration in original) (quoting Joint Appendix at 505, 509, *McCoy*, 138 S. Ct. 1500 (No. 16-8255), 2017 WL 6939385).

17. *Id.* at 1507.

18. Joint Appendix, *supra* note 16, at 661.

19. *Id.* at 665.

20. *See id.* at 684-85, 692-94.

21. *Id.* at 701.

22. *McCoy*, 138 S. Ct. at 1507.

23. *See id.*

24. *Id.*

25. *See* *People v. Bergerud*, 223 P.3d 686, 699 (Colo. 2010); *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) (en banc); *State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000).

26. *See McCoy*, 138 S. Ct. at 1508.

27. *See id.* at 1511.

28. *See id.* at 1508 (quoting *Faretta v. California*, 422 U.S. 806, 820 (1975)).

McCoy v. Louisiana's *Unintended Consequences*
71 STAN. L. REV. 1067 (2019)

The lawyer's role, the Court emphasized, is to use her expertise to achieve the client's objective, not to displace the client's own determination of that objective.²⁹ Second, the Court applied this familiar principle—that decisions about the goal of the representation are entirely up to the client, while the lawyer is responsible for strategic decisions—to conclude that a defendant has the right to define the objective of his defense to be maintaining his innocence.³⁰ McCoy's Sixth Amendment right was therefore infringed when English defied his objective—maintaining innocence—by “admit[ting] [his] client's guilt” in pursuit of English's own objective of avoiding a death sentence for McCoy.³¹

McCoy is particularly remarkable for its expansion of the carefully circumscribed category of structural error. Most trial errors, even if properly preserved by contemporaneous objection, are subject to harmless error review: If the government can demonstrate on appeal that the error did not prejudice the defendant, relief will be denied.³² But there exists a narrow category of errors “so intrinsically harmful as to require automatic reversal”³³ because they “affect[] the framework within which the trial proceeds.”³⁴ This class of structural error is “very limited.”³⁵

29. *See id.* at 1508-09.

30. *See id.* at 1508 (“Counsel provides his or her assistance by making decisions such as ‘what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.’ Some decisions, however, 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. Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.” (citations omitted) (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008))); *see also* *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

31. *See McCoy*, 138 S. Ct. at 1510.

32. *See Neder v. United States*, 527 U.S. 1, 7 (1999).

33. *Id.* This analysis is more complicated where an error was not preserved by proper objection at trial. *See, e.g., Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-12 (2017) (holding that a defendant who fails to preserve or raise a claim for denial of a public trial on direct review and later raises it as an ineffective assistance claim must show prejudice).

34. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

35. *Johnson v. United States*, 520 U.S. 461, 468 (1997). Indeed, until *McCoy*, the only violations the Supreme Court had clearly included in this category were bias on the part of the trial judge, *see Tumey v. Ohio*, 273 U.S. 510, 531-35 (1927); the complete denial of counsel, *see Gideon v. Wainwright*, 372 U.S. 335, 340-42 (1963); the denial of the right to self-representation, *see McKaskle v. Wiggins*, 465 U.S. 168, 177-78, 177 n.8 (1984); the denial of a public trial, *see Waller v. Georgia*, 467 U.S. 39, 49-50 (1984); racial discrimination in grand jury selection, *see Vasquez v. Hillery*, 474 U.S. 254, 264 (1986); the failure to give an adequate jury instruction on reasonable doubt, *see Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993); and the erroneous denial of counsel of choice, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

McCoy v. Louisiana's *Unintended Consequences*
71 STAN. L. REV. 1067 (2019)

Within the framework of trial error versus structural error, it may be reasonable to call a concession of guilt to which the defendant objects “structural error” on a theory that it represents something like a complete denial of counsel (in that the defense lawyer joins forces with the prosecution to assert that her client committed a crime) mixed with a denial of self-representation (in that the defendant is deprived of the opportunity to set the direction of his defense). The Court’s decision to operate within this framework instead of the ineffective assistance of counsel framework urged by the State,³⁶ however, is somewhat surprising given the Court’s typical reluctance to add to the structural error category.³⁷ Under the ineffective assistance framework, which might have allowed the Court to resolve the case more narrowly, the Court would have first asked whether English’s performance “fell below an objective standard of reasonableness” in light of McCoy’s vociferous opposition to the concession strategy.³⁸ If it did, the Court would then have asked whether McCoy was prejudiced by English’s deficient performance.³⁹ Alternatively, the Court could have concluded that McCoy did not need to show prejudice because English’s concession represented a complete failure “to subject the prosecution’s case to meaningful adversarial testing.”⁴⁰

There was, it turns out, a perfectly good reason to conceive of this as a trial error case and not an ineffective assistance case. The trial error framework is focused on mistakes by the court itself,⁴¹ whereas the ineffective assistance framework is focused on the mistakes of counsel. Here, the trial court actually ruled on McCoy’s objection to the concession strategy,⁴² so the resulting deprivation of McCoy’s rights was most directly attributable to the trial court’s mistake, not to English’s actions. The Court ignored this, however, rejecting the ineffective assistance framework with the question-begging observation

36. See Transcript of Oral Argument, *supra* note 7, at 52-55; Brief for Respondent at 46-52, *McCoy*, 138 S. Ct. 1500 (No. 16-8255), 2017 WL 6524500.

37. See, e.g., *United States v. Brandao*, 539 F.3d 44, 60 (1st Cir. 2008) (“[T]he Supreme Court’s jurisprudence is increasingly wary of recognizing new structural errors . . .”).

38. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

39. See *id.* at 693-95.

40. See *United States v. Cronic*, 466 U.S. 648, 659 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice [is] required . . .”).

41. See, e.g., *Glebe v. Frost*, 135 S. Ct. 429, 430 (2014) (per curiam).

42. See Joint Appendix, *supra* note 16, at 450-61 (denying McCoy’s request to terminate English as counsel despite their “irrevocable disagreement” in strategy).

that “a client’s autonomy, not counsel’s competence, is in issue.”⁴³ Instead, the Court recognized a new kind of structural error: conceding guilt “over the client’s express objection.”⁴⁴

C. Levels of Generality

In dissent, Justice Alito—joined by Justices Thomas and Gorsuch—took issue with the Court’s characterization of English’s concession as “admitting guilt.”⁴⁵ The dissenters argued that this oversimplified the facts—that English conceded only that McCoy killed the victims, while still maintaining that McCoy lacked the *mens rea* required for first-degree murder.⁴⁶ This was a legitimate strategic decision, the dissenters claimed, in light of the overwhelming evidence that McCoy was the killer.⁴⁷ After all, to present McCoy’s conspiracy defense would have “severely damaged English’s credibility in the eyes of the jury, thus undermining his ability to argue effectively against the imposition of a death sentence at the penalty phase of the trial.”⁴⁸

At oral argument, Justice Kagan (among others) identified this as one of the problems with McCoy’s argument. At what “level[] of generality,” she wondered, should the Court analyze English’s concession?⁴⁹ The Court could hold that a lawyer may not concede the client’s *actual guilt*—that is, concede all elements of the offense—over the client’s objection.⁵⁰ Or it could hold that a lawyer may not concede the client’s commission of the *actus reus* over the client’s objection.⁵¹ Or, finally, it could hold that a lawyer may not concede *any* element over the client’s objection.⁵² Acknowledging the complexity of English’s actual strategy and engaging the level of generality question would have required the Court to confront difficult and subtle dilemmas trial lawyers face. “[C]hoosing the basic line of defense,” Justice Alito observed in his dissent,

43. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1510-11 (2018).

44. See *id.* at 1511 (“Violation 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.”).

45. See *id.* at 1512 & n.1 (Alito, J., dissenting) (quoting *id.* at 1505 (majority opinion)).

46. See *id.* at 1512 (Alito, J., dissenting).

47. See *id.* at 1513-14.

48. *Id.* at 1514; see also *infra* notes 115-19 and accompanying text.

49. See Transcript of Oral Argument, *supra* note 7, at 26-28.

50. See *id.* at 27.

51. See *id.*

52. See *id.* A fourth possibility—a lawyer’s concession of some or all elements over the client’s objection but accompanied by presentation of an affirmative defense—was not relevant to the fact pattern in *McCoy*.

is ordinarily a decision counsel is free to make unilaterally—but what if that line of defense requires conceding an element that really cannot be contested, like the existence of a prior felony conviction?⁵³

Glossing over this complication, the Court ultimately conceived of English's strategy at the first level of generality, holding that a lawyer may not *concede guilt* over the client's objections.⁵⁴ The majority offered only one explicit response to Justice Alito's point that English did not, in fact, concede McCoy's guilt. In a footnote, the majority observed that Louisiana law would not have allowed English to introduce evidence of McCoy's diminished capacity unless McCoy had pleaded not guilty by reason of insanity.⁵⁵ But English did not need to introduce evidence of diminished capacity in order to argue that the prosecution had not met its burden of proving the requisite mental state. Indeed, testing the prosecution's case without offering separate, affirmative evidence is a common defense strategy.⁵⁶

A more plausible reason to conceive of English's strategy as conceding guilt is found nowhere in the Court's opinion but came up briefly at oral argument. Under Louisiana law, first- and second-degree murder have the same "specific intent" element.⁵⁷ When English told the jury it could find McCoy guilty of second-degree murder, therefore, he effectively conceded guilt on the charged offense—first-degree murder—because he had already conceded McCoy's commission of acts qualifying as first-degree murder.⁵⁸ Perhaps, then, the

53. See *McCoy*, 138 S. Ct. at 1516 (Alito, J., dissenting).

54. See *id.* at 1505 (majority opinion) ("We hold that a defendant has the right to insist that counsel refrain from *admitting guilt* . . ." (emphasis added)); see also *id.* at 1512 n.1 (Alito, J., dissenting) ("When the Court expressly states its holding, it refers to a concession of guilt."). The majority hinted that it did not mean its holding to apply to the elements question, characterizing decisions about whether to "concede an element" as "strategic disputes." See *id.* at 1510 (majority opinion).

55. See *id.* at 1506 n.1 (majority opinion); see also *State v. McCoy*, 218 So. 3d 535, 570 & n.35 (La. 2016) (discussing the lack of a diminished capacity defense under Louisiana law), *rev'd in other part*, 138 S. Ct. 1500.

56. See, e.g., Sharon LaFraniere, *Manafort Lawyers Rest Without Calling Witnesses in Fraud Trial*, N.Y. TIMES (Aug. 14, 2018), <https://perma.cc/WD9N-LKGP>. States can legitimately limit the use of incapacity evidence to rebut criminal intent, see *Clark v. Arizona*, 548 U.S. 735, 742 (2006), but there is no reason to think that a defendant can be required to plead not guilty by reason of insanity in order to merely *argue* that the prosecution has failed to meet its burden on the mental state element of the crime.

57. Compare LA. STAT. ANN. § 14:30(A) (2018) (defining the requisite mens rea for each type of first-degree murder as "specific intent to kill or to inflict great bodily harm"), with *id.* § 14:30.1(A)(1) (defining the requisite mens rea for the relevant type of second-degree murder as "specific intent to kill or to inflict great bodily harm").

58. See Transcript of Oral Argument, *supra* note 7, at 62. Notably, in addition to the structural error of conceding guilt, English may have *also* rendered ineffective assistance under this logic, because after he redefined the objective of the defense as

footnote continued on next page

Court was right to characterize English's strategy as conceding guilt, but the trickier line-drawing questions about conceding particular elements remain for another day.

II. *McCoy* Within the Capital Sentencing Landscape

Prior to *McCoy*, important tensions had already emerged between several pillars of capital sentencing procedure. First, the Supreme Court had repeatedly insisted that individualized determinations of culpability were the only reliable way to sentence a capital defendant.⁵⁹ To that end, the Court had required that capital sentencing include an opportunity for presenting aggravating and mitigating evidence to the sentencing judge or jury.⁶⁰ But this proportionality requirement was already in tension with a consensus (albeit not a unanimous one) that had emerged among lower federal courts and state supreme courts that capital defendants could waive the presentation of mitigating evidence if they chose, seemingly rendering their own sentences unconstitutionally unreliable.⁶¹ *McCoy* exacerbates this tension without resolving or even acknowledging the question whether capital defendants are permitted to waive mitigation affirmatively.

Second, the classic maxim about the allocation of responsibility between lawyers and their clients—that fundamental decisions about objectives belong to the client, while lawyers may make strategic decisions unilaterally⁶²—had already begun to break down at the penalty phase. State courts and lower federal courts had held, without grounding in Supreme Court authority, that even represented capital defendants who *do* wish to present mitigation may control strategic decisions about the penalty phase, like which arguments to pursue and which witnesses to present.⁶³ *McCoy* further confuses the fuzzy line between decisions about objective and decisions about strategy.

A. Proportionality and Capital Sentencing

The Supreme Court has repeatedly recognized that arbitrariness in the imposition of the death penalty violates the Eighth Amendment's guarantee

avoiding a death sentence, he pursued that goal ineffectively by misunderstanding the elements of first- and second-degree murder.

59. See *infra* notes 73-78 and accompanying text.

60. See *infra* notes 75-78 and accompanying text.

61. See *infra* Part II.B.1.

62. See *supra* note 30 and accompanying text.

63. See *infra* notes 131-33 and accompanying text.

against cruel and unusual punishment.⁶⁴ Among other factors, a death sentence that is disproportionate either to the seriousness of the offense or to the characteristics of the offender is unacceptably arbitrary.⁶⁵ The principles animating the Court's "narrowing jurisprudence," through which the Court has winnowed down the range of death-eligible offenses and offenders,⁶⁶ are that punishment must be "graduated and proportioned to [the] offense,"⁶⁷ and that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"⁶⁸

Even as the Court has carefully avoided interpreting the Eighth Amendment to require proportionality in punishment generally, there has been a continued acknowledgement that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."⁶⁹ Though it has declined to impose structural protections that could improve proportionality in capital sentencing,⁷⁰ the Court has consistently held that a disproportionate death sentence is constitutionally problematic in ways that other dispropor-

64. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (plurality opinion) (indicating that a mandatory death penalty scheme is no less arbitrary, and therefore no less constitutionally suspect, than a scheme giving sentencing juries absolute, unguided discretion to impose death); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) ("Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." (citing *Furman v. Georgia*, 408 U.S. 238 (1972))); *see also Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (plurality opinion) ("A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" (alteration in original) (quoting *Gregg*, 428 U.S. at 188 (plurality opinion))).

65. *See Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that the death penalty is unconstitutionally disproportionate to the offense of rape of a child); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (same for rape of an adult); *see also Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding that the death penalty is unconstitutionally disproportionate for offenders under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (same for offenders with severe intellectual disabilities).

66. *See Atkins*, 536 U.S. at 319.

67. *See Weems v. United States*, 217 U.S. 349, 366-67 (1910).

68. *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

69. *E.g., Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (opinion of Scalia, J.).

70. Notably, the Court has never required comparative proportionality review, in which either a sentencing jury or a reviewing court would take into consideration the sentences similarly situated defendants have received in other cases, as a condition of a constitutional death sentence. *See Glossip v. Gross*, 135 S. Ct. 2726, 2763 (2015) (Breyer, J., dissenting) (citing *Pulley v. Harris*, 465 U.S. 37 (1984)). The Court's refusal to require such review raises real questions about its commitment to proportionality as a requirement in capital sentencing at all.

tionate sentences are not.⁷¹ At work in the background is the principle that society has a particular interest in a capital sentencing scheme that reliably gets it right—that is, in ensuring that states' resources are not used to execute innocent people.⁷²

In short, a disproportionate sentence of death is arbitrary, and an arbitrary sentence of death is unconstitutional. The Court's chosen mechanism to avoid disproportionate death sentences—to ensure that capital defendants receive a death sentence only if they are among the “worst of the worst”⁷³—is the bifurcated capital trial.⁷⁴ Sentencing juries at such a trial must have access to the information the Court has deemed essential to producing a reliable sentence: aggravating and mitigating evidence.

A constitutional death penalty statute must include a narrow, well-defined set of aggravating factors juries may consider.⁷⁵ These factors are meant to narrow the set of death-eligible offenses by directing juries to consider those characteristics that make the offense particularly serious or the offender particularly culpable.⁷⁶ Whereas aggravating factors must be enacted by statute, capital defendants must be permitted to present *any* mitigating evidence that might persuade the sentencing judge or jury of the defendant's

71. Concurring in *Glossip v. Gross*, Justice Thomas wrote that the idea of a proportionality requirement in capital sentencing “has long been discredited.” See *id.* at 2750-51 (Thomas, J., concurring) (citing *Harmelin*, 501 U.S. at 966 (opinion of Scalia, J.)). But in support of that proposition, he cited only Justice Scalia's opinion in *Harmelin*, which itself acknowledged that proportionality is required in capital sentencing, even though Justice Scalia argued that other disproportionate sentences outside the capital context do not pose constitutional problems. See *Harmelin*, 501 U.S. at 993-94 (opinion of Scalia, J.).

72. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

73. See *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting) (quoting *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting)).

74. See *Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting from denial of application for stay) (“This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after a painstaking review of aggravating and mitigating factors. In this case, that assumption has proved demonstrably false. Instead, the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death.” (footnote omitted)).

75. See *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989), *abrogated in other part by Atkins v. Virginia*, 536 U.S. 304 (2002). For example, Georgia's death penalty statute provides twelve aggravating factors, including murder for hire, murder of a public safety official, and murder committed during an act of domestic terrorism. See GA. CODE ANN. § 17-10-30(b)(4), (8), (12) (2018).

76. Scholars have criticized the overbreadth and vagueness of some statutory aggravating factors, arguing that they fail to narrow down meaningfully the set of death-eligible defendants. See, e.g., Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 363-74 (1998).

reduced culpability.⁷⁷ Mitigating evidence may address any relevant subject matter, including the nature of the defendant's role in the offense; his personal characteristics; and his background, including mental health, intellectual disability, and history of trauma.⁷⁸

B. The Penalty Phase, the Right of Self-Representation, and the Duty of Loyalty

The requirement of proportionality in capital sentencing stands in tension with a criminal defendant's fundamental right to set the course of his defense, whether he is represented by counsel or not. This Subpart explores the conflict between the constitutional need for reliable sentencing outcomes based on a weighing of aggravating and mitigating evidence, on the one hand, and the right to control one's own defense, on the other.

1. Mitigation and self-represented defendants

Recognizing that "[t]he right to defend is personal," the Supreme Court has long held that criminal defendants have a constitutional right to proceed without counsel if they choose to do so intelligently and voluntarily.⁷⁹ But an obvious conflict arises when a capital defendant insists upon representing himself and refuses to present the mitigating evidence that, according to the Court, is critical to a proportional—and therefore reliable—sentencing determination.

Why would a defendant reject his opportunity to present mitigating evidence that could save his life? Some defendants decline to present any penalty-phase defense at all because they affirmatively prefer a death sentence.⁸⁰ Some seek a death sentence because they are suicidal.⁸¹ Others simply find the prospect of death more appealing than that of life in prison,⁸²

77. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

78. See, e.g., Carter, *supra* note 4, at 101; Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 238-45 (2007-2008).

79. See *Faretta v. California*, 422 U.S. 806, 834 (1975).

80. Indeed, McCoy himself at one point appeared to request a death sentence. See *supra* text accompanying note 19.

81. See, e.g., Richard J. Bonnie, *Mental Illness, Severe Emotional Distress, and the Death Penalty: Reflections on the Tragic Case of Joe Giarratano*, 73 WASH. & LEE L. REV. 1445, 1454-59 (2016).

82. See, e.g., C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 850 (2000) ("An inmate might want to volunteer for execution for any number of reasons: because he does not want to grow old in prison; because of the dehumanizing conditions of most death row facilities; because of severe depression or pre-existing suicidal urges; because of lingering guilt

footnote continued on next page

or perhaps believe their appeals will be scrutinized more carefully by reviewing courts if they are sitting on death row. Alternatively, defendants may not reject mitigation wholesale, but rather object only to certain kinds of mitigating evidence or to the testimony of particular witnesses.⁸³ Mitigating evidence often touches on highly personal, potentially embarrassing subjects like mental illness, intellectual disability, and sexual abuse. Some capital defendants may not find it worthwhile to put these subjects on display for strangers on the jury to examine, dissect, and deliberate about, even when their lives depend on it. Likewise, in an effort to protect family members, defendants may prefer not to present evidence of poor parenting or of a traumatic childhood.⁸⁴

There are good reasons, however, to require a robust mitigation case even when the defendant prefers to waive his right to a penalty-phase defense. First, and more controversially, some scholars suggest a defendant's rejection of mitigation cannot be relied upon because defendants are likely to change their minds.⁸⁵ If defendants who elect to forgo mitigation predictably come to regret

and remorse about the crime(s) committed; to escape the roller-coaster experience of the habeas appeals process or to seize control over it; to spare family and friends ongoing pain; or as a 'macho' confrontation with death." (footnote omitted) (citation omitted)).

83. For example, McCoy vociferously objected to the presentation of mitigating evidence about his mental health, taking great umbrage at the notion that he was mentally ill. See *supra* text accompanying notes 20-21.
84. See *The Supreme Court, 2006 Term—Leading Cases: Criminal Law and Procedure*, 121 HARV. L. REV. 194, 260 (2007) [hereinafter *Leading Cases: Criminal Law and Procedure*] ("Defendants may experience 'defensiveness, shame, [or] repression,' regarding episodes of abuse. . . . Defendants may also want to prevent certain . . . individuals from testifying." (first alteration in original) (footnote omitted) (quoting Alan M. Goldstein et al., *Assessing Childhood Trauma and Developmental Factors as Mitigation in Capital Cases*, in FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 365, 373 (Steven N. Sparta & Gerald P. Koocher eds., 2006))).
85. See Richard W. Garnett, Essay, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 801 (2002) ("In fact, according to one experienced capital defense litigator, every capital defendant, at one point or another, expresses a preference for execution over life in prison."); see also J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 158 (2006) ("Anecdotal evidence (as well as the scant empirical evidence available on the subject) suggests that most death row inmates consider volunteering at least once throughout the course of their appeals."). The ABA Guidelines for capital defense counsel appear to contemplate precisely this probability. See AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES guideline 10.7(A)(2) (2003) [hereinafter ABA GUIDELINES FOR DEATH PENALTY COUNSEL], reprinted in 31 HOFSTRA L. REV. 913, 1015 (2003) ("The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.").

their decision,⁸⁶ then in light of the irreversibility of execution, perhaps courts should err on the side of requiring a reliable airing of relevant sentencing information regardless of defendants' preferences. Indeed, there is an existing obligation for capital defense counsel to conduct a thorough mitigation investigation even when the defendant initially opposes it, since he may change his mind before the penalty phase concludes.⁸⁷ Presenting a mitigation case over the defendant's objections would merely extend this logic to defendants who change their minds after their sentences have become final.

Second, even if we were confident that a defendant's stated preference to forgo mitigation was reliable, it is not clear why a court should be required to honor it. After all, a defendant's decision to waive his constitutional rights is not necessarily binding on the court; in other contexts, courts are free to "decline a proffer of waiver" in pursuit of the "institutional interest in the rendition of just verdicts" and the appearance of fair proceedings.⁸⁸ The interest in achieving reliable outcomes via adversarial presentation of aggravating and mitigating evidence—which the Supreme Court has called

86. Notably, defendants who initially resist particular avenues of mitigation find it almost impossible to claim ineffective assistance of counsel later on, even if counsel's mitigation investigation was actually deficient and failed to turn up mitigating evidence the defendant would have allowed, since the defendant's resistance leads courts to believe that any mitigation investigation would inevitably have been futile. *See, e.g., Schriro v. Landrigan*, 550 U.S. 465, 469-70, 475-77 (2007) (holding that the state postconviction court reasonably determined that a capital defendant who instructed relatives not to testify at the penalty phase and repeatedly interrupted counsel as he tried to present mitigating evidence could not prove he was prejudiced by an inadequate mitigation investigation, since he "would have undermined" any evidence counsel attempted to present); *see also Taylor v. Horn*, 504 F.3d 416, 455 (3d Cir. 2007) ("[W]hatever counsel could have uncovered, [defendant] would not have permitted any witnesses to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence."); *Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995) ("[C]ounsel's failure to investigate what witnesses might have said on [defendant's] behalf at the punishment phase of his trial could not have prejudiced [defendant]: He would not have permitted those witnesses to testify anyway, so what they might have said is academic.").

87. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam) ("[Defendant] may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation."); *West v. Bell*, 550 F.3d 542, 568 (6th Cir. 2008) (Moore, J., dissenting in part and concurring in the judgment only in part) ("[C]ounsel has an independent duty to investigate mitigating evidence, even if the defendant is reluctant."); *Silva v. Woodford*, 279 F.3d 825, 838 (9th Cir. 2002) ("[C]ounsel's duty to *investigate* mitigating evidence is neither entirely removed nor substantially alleviated by his client's direction not to *call* particular witnesses to the stand.").

88. *See Wheat v. United States*, 486 U.S. 153, 160-62 (1988) (prioritizing the institutional interest in fair outcomes by permitting courts to reject a defendant's waiver of the right to conflict-free counsel in the joint representation context).

“constitutionally indispensable” in capital cases⁸⁹—might trump the defendant’s usual ability to waive his personal rights.⁹⁰ If a defendant has “evidence that conclusively proves he is not ‘death-worthy,’” constitutionally speaking, allowing him to withhold that evidence from the court would result in a death sentence that violates the Eighth Amendment.⁹¹

This tradeoff seems particularly relevant in the capital sentencing context. The penalty phase, some scholars point out, is not just about evoking sympathy for the particular circumstances of an individual defendant; it also serves to examine the collective social responsibility for the person the defendant has turned out to be.⁹² The sentencing phase of a capital trial “introduces into the decisional mix matters that the capital defendant ought have no power to veto,” invoking “collective responsibility and guilt” in ways that “enrich the moral nature of the jury’s decisionmaking.”⁹³

Without on-point guidance from the Supreme Court, it is not completely clear which constitutional value—the Sixth Amendment right of self-representation, or the Eighth Amendment interest in just, proportional, and accurate sentencing—takes precedence.⁹⁴ The constitutional indispensability of

89. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

90. See Carter, *supra* note 4, at 110-11.

91. See Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 TEMP. POL. & C.R.L. REV. 1, 1-2 (2011); cf. *United States v. Farhad*, 190 F.3d 1097, 1107-08 (9th Cir. 1999) (Reinhardt, J., concurring specially) (warning against a gratuitous obsession with defendants’ “implied” Sixth Amendment autonomy right, arguing instead for an approach that balances the “competing and countervailing interests” of self-representation against the need for fair trials, and noting that “[n]othing inherent in the implied right of self-representation justifies exalting that right over all others in the constitutional constellation”).

92. See, e.g., Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 698-99 (2006).

93. *Id.* at 698.

94. Some courts have read the Supreme Court’s decision in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), as resolving this conflict in favor of a defendant’s unilateral right not to present mitigating evidence. See, e.g., *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990). But *Blystone*—which affirmed a death sentence after a penalty phase in which the defendant was permitted to present mitigating evidence but chose not to do so—merely considered whether Pennsylvania’s death penalty statute was impermissibly mandatory because it automatically imposed death when aggravating evidence was found to outweigh mitigating evidence, and did not address whether mitigation could be waived. See 494 U.S. at 305-09, 306 n.4.

Similarly, in dicta in *Schriro v. Landrigan*, both the majority opinion and the dissent intimated that the “constitutional right to have the sentencing decision reflect meaningful consideration of all relevant mitigating evidence” could be waived. 550 U.S. 465, 482, 486-87 (2007) (Stevens, J., dissenting); see also *id.* at 479 (majority opinion). But because of the procedural posture of that case, which came before the Court on habeas

footnote continued on next page

a thorough accounting of culpability has led some courts to decide that capital defendants may not waive the presentation of mitigating evidence.⁹⁵ But most jurisdictions that have ruled on this conflict permit defendants to represent themselves at the penalty phase and to refuse to present mitigation (and even to prevent standby counsel from doing so).⁹⁶ Since criminal defendants can always elect to represent themselves (barring significant intellectual limitations⁹⁷), this effectively amounts to a right to waive mitigation.

The obvious Eighth Amendment problem with waiver of mitigation is not diminished by the fact that any disproportionality in the resulting sentence is at least in part of the defendant's own devise. It is not clear why a defendant's consent—informed though it may be—should save an otherwise unconstitutional death sentence.⁹⁸ After all, there is a general societal interest in avoiding unjust executions,⁹⁹ and criminal defendants are not typically thought to have the right to select one available sentence over another, even if they prefer the harsher of two options.¹⁰⁰ Executing a defendant who is constitutionally

review, the Court did not decide whether a capital defendant can waive mitigation. Rather, the Court held only that the district court did not abuse its discretion in finding that the state postconviction court reasonably determined that the defendant instructed his attorney not to present any mitigation. *See id.* at 477 (majority opinion); *see also* James Michael Blakemore, Note, *Counsel's Control over the Presentation of Mitigating Evidence During Capital Sentencing*, 111 MICH. L. REV. 1337, 1347-48 (2013) (remarking on this habeas distinction as applied in another case).

95. *See, e.g.*, *Barnes v. State*, 29 So. 3d 1010, 1022-25 (Fla. 2010) (per curiam) (rejecting the defendant's argument that the trial court was bound by his "refus[al] to present any witnesses or evidence of mitigation"); *State v. Koedatich*, 548 A.2d 939, 993-95 (N.J. 1988) ("[W]e find persuasive policy reasons exist for not allowing a defendant in a capital case to execute even a knowing and voluntary waiver of his right to present mitigating evidence during the penalty phase."); *see also, e.g.*, *Morrison v. State*, 373 S.E.2d 506, 508-09 (Ga. 1988) (permitting the defendant to waive a mitigation presentation by the defense, but reserving the question whether the trial court had an independent obligation to conduct a mitigation investigation).
96. *See, e.g.*, *Silagy*, 905 F.2d at 1008; *People v. Bloom (In re Bloom)*, 774 P.2d 698, 718-19 (Cal. 1989); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 560 (Ky. 2004); *Bishop v. State*, 597 P.2d 273, 276 (Nev. 1979); *State v. Arguelles*, 63 P.3d 731, 752-54 (Utah 2003); *see also id.* at 753 (noting the similar position of the "vast majority of courts considering this issue").
97. *See Indiana v. Edwards*, 554 U.S. 164, 174, 177-78 (2008) (holding that states may abridge the self-representation right when "the defendant lacks the mental capacity to conduct his [own] trial defense").
98. *See Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting from termination of stay) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.").
99. *See id.* at 1019 (Marshall, J., dissenting from termination of stay).
100. *See* Welsh S. White, Essay, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 863 (1987) ("Clearly, an individual who has not been convicted of a criminal offense has no right to demand that he be executed by the state. Moreover, even a criminal defendant who has been convicted of a capital offense has no right to dictate to the government which of the two authorized penalties, death or life imprisonment, should be imposed.

footnote continued on next page

undeserving is a lawless, unauthorized act. Leaving mitigation up to individual defendants, therefore, is intolerably irreconcilable with the Court's jurisprudence on proportionality in capital sentencing.

2. Mitigation and defendants represented by counsel

A distinct but related problem arises when defendants who are represented by counsel resist mitigation. In this context, it is the lawyer's duty of loyalty—not the right of self-representation—that arguably conflicts with the need to introduce mitigating evidence.¹⁰¹ Some scholars conclude that professional responsibility standards require capital defense counsel to present a mitigation case even over the client's express objections.¹⁰² But here too, most jurisdictions have concluded that even represented defendants have the final say as to whether to present a penalty-phase defense,¹⁰³ subordinating the constitutional interest in proportionality to individual defendants' preferences.¹⁰⁴

There is an eminently reasonable solution to this conflict: When defendants refuse to offer a penalty-phase defense, whether they are represented by counsel or not, courts could appoint independent amicus counsel to present mitigating evidence.¹⁰⁵ Courts are generally free to appoint amicus counsel in the interest of a full adversarial airing of the issues, particularly when one party in the litigation refuses to defend its position.¹⁰⁶ The amicus solution

In all cases, the sentencing authority should determine the appropriate penalty based on the criteria set forth in the sentencing statute.”).

101. See Carter, *supra* note 4, at 145-48.

102. See generally, e.g., Susan F. Henderson, *Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?*, CAP. DEF. DIG., Fall 1993, at 32.

103. See, e.g., Frye v. Lee, 235 F.3d 897, 906-07 (4th Cir. 2000); Gilreath v. Head, 234 F.3d 547, 550 n.10 (11th Cir. 2000); Singleton v. Lockhart, 962 F.2d 1315, 1322 (8th Cir. 1992); Adkins v. State, 930 So. 2d 524, 539-40 (Ala. Crim. App. 2004) (per curiam); State v. Ashworth, 706 N.E.2d 1231, 1236-39 (Ohio 1999); Zagorski v. State, 983 S.W.2d 654, 657-59 (Tenn. 1998).

104. In some jurisdictions, this general conclusion appears to have grown out of the self-representation version of the doctrine, as a logical consequence of the notion that a defendant could always go pro se and then refuse to present mitigation. Compare, e.g., People v. Bloom (*In re Bloom*), 774 P.2d 698, 715-16 (Cal. 1989) (pro se defendant), and Bishop v. State, 597 P.2d 273, 276 (Nev. 1979) (same), with People v. Lang, 782 P.2d 627, 652-53 (Cal. 1989) (citing *Bloom* in extending the same logic to represented defendants), abrogated in other part by People v. Diaz, 345 P.3d 62 (Cal. 2015), and Kirksey v. State, 923 P.2d 1102, 1112-13 (Nev. 1996) (per curiam) (citing *Bishop* in extending the same logic to represented defendants).

105. See generally, e.g., Carter, *supra* note 4 (advocating the appointment of penalty-phase amicus counsel when capital defendants refuse to present mitigation).

106. See, e.g., Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580-81 (1946) (noting that “a federal court can always call on law officers of the United States to serve as
footnote continued on next page”)

gives jurors the data they need to make an accurate sentencing determination, while forcing neither the defendant to accept an unwanted representation strategy nor defense counsel to breach her duty of loyalty to her client by offering mitigating evidence over his objections. Some courts have appointed “standby counsel”¹⁰⁷ or “special mitigation counsel”¹⁰⁸ on similar reasoning.

There is reason to doubt, though, that all courts would find this solution acceptable in light of the rule under *Faretta v. California* that defendants have the right to represent themselves.¹⁰⁹ In one interesting example, a federal district judge ordered that a pro se defendant who intended not to present mitigation be represented at the penalty phase by counsel, who would be responsible for presenting mitigating evidence notwithstanding the client’s objections.¹¹⁰ The Fifth Circuit disagreed on *Faretta* grounds.¹¹¹ On remand, the district judge instead appointed independent amicus counsel to present mitigating evidence¹¹² and was overridden *again*, with the Fifth Circuit holding that even the appointment of amicus counsel violated the defendant’s *Faretta* right.¹¹³

amici,” especially “to represent the public interest in the administration of justice”); see also *United States v. Windsor*, 133 S. Ct. 2675, 2687-88 (2013) (allowing a nonparty’s participation on the grounds that a “sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree”).

107. See *State v. Reddish*, 859 A.2d 1173, 1203-04 (N.J. 2004).

108. See *Barnes v. State*, 29 So. 3d 1010, 1022-26 (Fla. 2010) (per curiam).

109. See 422 U.S. 806, 807 (1975).

110. See *United States v. Davis*, 150 F. Supp. 2d 918, 919-20, 923 (E.D. La. 2001), *mandamus granted and case remanded*, No. 01-30656, 2001 WL 34712238 (5th Cir. July 17, 2001).

111. See *Davis*, 2001 WL 34712238, at *3 (“The jury will have the benefit of whatever defense [the defendant] chooses to mount, as well as any evidence the Government . . . offers. The district court itself may interpose questions to witnesses. The Eighth Amendment prohibition against arbitrary and capricious imposition of the death penalty does not prohibit a jury, thus armed with information, from reaching a verdict.”).

112. See *United States v. Davis*, 180 F. Supp. 2d 797, 798-800 (E.D. La. 2001) (appointing independent amicus counsel on the grounds that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion))), *mandamus granted and case remanded*, 285 F.3d 378 (5th Cir. 2002).

113. See *Davis*, 285 F.3d at 381 (“This right [to self-representation] certainly outweighs an individual judge’s limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant.”). *But see* *State v. Reddish*, 859 A.2d 1173, 1204 (N.J. 2004) (disagreeing with *Davis* and finding it “difficult to square” with *Gregg v. Georgia* and the requirement of a proportional, individualized sentencing determination (citing *Gregg v. Georgia*, 428 U.S. 153 (1976))); see also *Barnes*, 29 So. 3d at 1022-25 (per curiam) (agreeing with the Supreme Court of New Jersey that *Davis* is unpersuasive and holding that the

footnote continued on next page

The majority of jurisdictions to face this issue thus appear to recognize the clear conflict between *Faretta* (or, in cases involving represented defendants, the lawyer's duty of loyalty to the client), on the one hand, and the need for proportionality in capital sentencing, on the other. But most of these courts have tentatively concluded that the defendant has the right to waive mitigation notwithstanding the requirements of proportionality and individualized sentencing.

C. *McCoy* and Proportionality: How the Right to Maintain Innocence Can Undermine the Proportionality of Capital Sentences

Although Justice Alito's dissent argues that the exact situation in *McCoy* is unlikely to recur,¹¹⁴ the case can be read to have dangerous, wide-ranging consequences for defense strategy at both the guilt and penalty phases of capital trials.

The bifurcation scheme used in capital trials aims to steer capital jurors to consider the question "did the defendant do it?" separately from the question "how culpable is the defendant?" Yet experienced capital defense lawyers understand that the dividing line between the guilt phase and the penalty phase of a capital trial is blurry. After all, the bifurcated trial does not provide separate juries for guilt and sentencing—rather, the same decisionmaker will almost always both decide the defendant's guilt and recommend his punishment.¹¹⁵ To present a vigorous case of outright innocence at the guilt phase, only to turn around and ask for mercy in the event of a conviction, can undermine both the lawyer's and the client's credibility with the decisionmaker.¹¹⁶ Integrating the guilt-phase and penalty-phase defense

appointment of mitigation counsel, "where [defendant] essentially refused to provide any mitigation evidence, was intended to provide . . . a safeguard and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty").

114. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1512 (2018) (Alito, J., dissenting) (referring to the underlying facts of the case as "a freakish confluence of factors").

115. See Carter, *supra* note 4, at 99-100. And even if a defendant who was found guilty by a jury opts to switch after the guilt phase and be sentenced by a judge, that judge will be the one who presided over the trial and thus will witness inconsistencies in strategy between the guilt and penalty phases.

116. See ABA GUIDELINES FOR DEATH PENALTY COUNSEL, *supra* note 85, guideline 10.10.1, at 1047 ("As the investigations mandated by [the ABA Guidelines] produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies."); PAULA SITES, IND. PUB. DEF. COUNCIL, DEFENDING A CAPITAL CASE 55-56 (2013), <https://perma.cc/RM8F-3UWK> ("Consistent guilt-innocence and penalty phase theories not only preserve your credibility, they allow you to begin building your case for life throughout the trial, beginning with voir dire."); Andrea D. Lyon, *footnote continued on next page*

strategies is therefore essential. Competent guilt-phase representation will typically involve “mitigation-emphasizing . . . strategies that eclipse, and often sit uncomfortably with, arguments for outright innocence.”¹¹⁷ This is especially so given the important role that remorse plays in capital juries’ sentencing decisions.¹¹⁸ Convincing expressions of remorse are often the difference between life and death.¹¹⁹ But intuitively, an admission of guilt is a prerequisite to remorse.

Consequently, laying the groundwork for mitigation at the guilt phase is critical to avoiding a death sentence, but it will often—perhaps more often than not—conflict to some extent with a defense of outright innocence. It is worrisome, then, that the *McCoy* majority constitutionalizes a right to insist upon maintaining innocence at the guilt phase without acknowledging that maintaining innocence may, in many cases, preclude an effective penalty-phase defense. After all, it is easy to imagine a defendant like McCoy refusing to let his counsel “frontload” mitigation¹²⁰ if he perceived it as undermining his preferred defense of outright innocence.

There is, admittedly, some appeal to the *McCoy* majority’s argument that a capital defendant has a right to choose a less effective defense in order to pursue some external, nonlegal goal.¹²¹ But the Court fails to acknowledge the important tradeoff that comes with this choice, suggesting it may not have considered the penalty-phase implications of maintaining innocence at the guilt phase. At the very least, one would expect to see a discussion of informed

Defending the Death Penalty Case: What Makes Death Different?, 42 MERCER L. REV. 695, 708 (1991) (“Just as it would be foolish to try a case with two conflicting defenses (‘I wasn’t there, but if I was, I was insane’), it is *literally* deadly to fail to integrate the theory of the case with the theory of mitigation. If the jury perceives defense counsel as insincere or tricky because his theories conflict, a jury will undoubtedly take that out on the client.”); Mary Ann Tally, *Capital Cases: Integrating Theories for Capital Trials; Developing the Theory of Life*, NAT’L ASS’N CRIM. DEF. LAW.: CHAMPION (Nov. 1998), <https://perma.cc/68PS-BYYD> (“The capital defense team must present and argue a theory of defense at the guilt/innocence phase of the case which will be consistent with the theory of mitigation in the penalty phase in case of a capital conviction. Such consistency is absolutely critical to the defense lawyer’s credibility with the jury.”).

117. Jesse Cheng, Commentary, “Mitigate from Day One”: *Why Effective Defense Advocates Do Not Prioritize Liberty over Life in Death Penalty Cases*, 14 OHIO ST. J. CRIM. L. 231, 233 (2016).

118. See generally Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) (exploring the importance that jurors ascribe to sincere expressions of remorse).

119. See *id.* at 1560-70.

120. See Jesse Cheng, *Frontloading Mitigation: The “Legal” and the “Human” in Death Penalty Defense*, 35 LAW & SOC. INQUIRY 39, 41 (2010) (defining “frontloading” as “integrat[ing] . . . mitigating sentencing factors into the guilt phase”).

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

waiver. But the majority neglects to note the importance of capital defense lawyers adequately advising their clients of the risk that maintaining innocence at the guilt phase may preclude an effective penalty-phase defense.¹²²

An even stronger reading of *McCoy* is possible: By categorizing a deprivation of the right to maintain innocence as structural error,¹²³ the Court arguably creates a hierarchy of values in capital sentencing in which autonomy is paramount and proportionality is secondary. In other words, because the structural error category is so exclusive,¹²⁴ adding any new right to it places that right at the top of the defendants'-rights food chain. Similarly, the majority's acknowledgement that a capital defendant "may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration" hints at the idea that leaving capital decisionmaking up to the defendant's personal preferences may be tolerable.¹²⁵ It would be troubling indeed if the *McCoy* majority intended to rank defendant autonomy above proportionality. Clearly, *McCoy* cannot reasonably be read as definitively resolving this tension. But time will tell whether jurisdictions that already compromise proportionality in favor of autonomy will seize on *McCoy*'s language as evidence that the Court endorses their approach.

D. *McCoy* and the Allocation of Responsibility Between Lawyer and Client

McCoy also wades into another problem that has percolated through the lower courts: whether penalty-phase strategic decisions should be made by the lawyer or the client. The Supreme Court has long adhered to a "division of decisional labor" between lawyers and their clients.¹²⁶ Only defendants may make certain fundamental choices about how the defense will proceed, such as whether to plead guilty, whether to testify, and whether to appeal.¹²⁷ Decisions

122. Nothing in the Court's opinion in *McCoy* creates or even suggests such a requirement, allowing for the possibility that a defendant could insist upon maintaining innocence at the guilt phase without fully understanding that doing so will effectively waive his right to present a meaningful penalty-phase defense.

123. See *supra* text accompanying note 27.

124. See *supra* notes 32-35 and accompanying text.

125. See *McCoy*, 138 S. Ct. at 1508.

126. See Blakemore, *supra* note 94, at 1340-44.

127. See, e.g., *id.* at 1340-42.

about legal strategy, on the other hand, may be made unilaterally by lawyers.¹²⁸ Notably, counsel may decide—among other things—which arguments to pursue¹²⁹ and which witnesses to call.¹³⁰

Setting aside the issue of whether a defendant may waive mitigation entirely, once a defendant decides he does want to present a penalty-phase defense, decisions about how to do so would appear to be strategic.¹³¹ These decisions have clear analogs at the guilt phase, and those guilt-phase analogs have explicitly been held to be within the exclusive discretion of the lawyer.¹³² Yet some courts, prior to *McCoy*, had held not only that defendants could waive mitigation altogether, but also that defendants could exert absolute control over penalty-phase strategic decisions—which arguments to pursue, which witnesses to present—and could not later complain that their lawyer should have steered them right.¹³³ These decisions are disquieting in light of the well-documented pattern of capital defendants initially rejecting mitigation, but later changing their minds and fighting their sentences,¹³⁴ and the Supreme Court had never endorsed this line of cases.

McCoy arguably—and troublingly—provides some support for the notion that capital defendants are entitled to control strategic decisions about the presentation of mitigation.¹³⁵ It reiterates the familiar formula that defendants

128. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

129. See *id.*

130. See *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

131. See Blakemore, *supra* note 94, at 1349-52. Admittedly, some models of the allocation of responsibility between lawyers and clients are muddier, letting clients have the final say whenever their decision is motivated by external, nonlegal considerations. See Marcy Strauss, Essay, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 324-26 (1987). For example, in one model, the lawyer may decide which witnesses to call for maximum effectiveness, but if the defendant refuses to call his mother to spare her the trauma of testifying, the lawyer must abide by that decision. See *id.* at 325.

132. See *Taylor*, 484 U.S. at 418 (choosing witnesses); *Jones*, 463 U.S. at 751 (selecting arguments).

133. See, e.g., *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985) (“When a defendant preempts his attorney’s [penalty-phase] strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.”); *People v. Lang*, 782 P.2d 627, 653-54 (Cal. 1989) (holding that counsel could not have been ineffective for acquiescing in the defendant’s request not to present the penalty-phase testimony of his grandmother), *abrogated in other part by* *People v. Diaz*, 345 P.3d 62 (Cal. 2015); *Larette v. State*, 703 S.W.2d 37, 39 (Mo. Ct. App. 1985) (holding that counsel was not ineffective for respecting the defendant’s wish not to call his father as a witness at the penalty phase).

134. See *supra* notes 85-87 and accompanying text.

135. Granted, in some places the *McCoy* majority seems to be at pains to limit its holding to the particular factual situation presented, as when the Court specifies that a capital defendant’s autonomy guarantees the right to maintain innocence “at the guilt phase of a capital trial.” See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (emphasis added). But

footnote continued on next page

are entitled to make their own decisions about what their objectives are, while lawyers may unilaterally decide which strategies will best achieve those objectives.¹³⁶ But the Court goes on to make some bold assertions, albeit in dicta, about what kinds of decisions belong exclusively to the defendant in the capital context. For example, the Court observes that a capital defendant “may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members.”¹³⁷ This language is apt to be seized on as supporting the notion that a capital defendant—even one who wishes to present a penalty-phase defense and avoid a death sentence—may override his counsel’s strategic decisions about which kinds of mitigation to present. After all, many common types of mitigating evidence will tend to invite “opprobrium,” or at least shame.¹³⁸

Yet the *McCoy* majority seems unaware that its decision may implicate the allocation of penalty-phase decisionmaking.¹³⁹ Despite the active trend among lower courts toward allowing defendants to control these decisions, the majority insists that its holding “should not displace counsel’s, or the court’s, respective trial management roles.”¹⁴⁰ But of course, the holding in *McCoy* could easily displace those roles by fueling the movement toward a defendant-controlled penalty phase.

Conclusion

McCoy presents itself as a defendant-sympathetic decision, using the language of dignity and autonomy. But read for all it is worth, it has potentially catastrophic consequences for the many capital defendants who elect to forgo some or all mitigation at trial, only to change their minds and fight their death sentences later.¹⁴¹ By holding that deprivations of the right to maintain

the thrust of the majority opinion is that clients need not “surrender control entirely to counsel” and that the “lawyer’s province” is mere “[t]rial management.” *See id.*

136. *See id.*

137. *Id.*

138. *See supra* text accompanying note 84. Indeed, lower courts have already latched onto the “opprobrium” language to extend *McCoy* to new contexts. *See, e.g.,* United States v. Read, No. 17-10439, 2019 WL 1196654, at *4-5 (9th Cir. Mar. 14, 2019) (holding, under *McCoy*, that “permitting defense counsel to present a defense of insanity over a competent defendant’s clear rejection of that defense” was structural error).

139. Justice Alito’s dissent does warn that the Court’s opinion dodges difficult questions about when a lawyer may concede particular elements of an offense. *See McCoy*, 138 S. Ct. at 1516-17 (Alito, J., dissenting). But he does not engage the issue of whether penalty-phase strategic decisions belong to the lawyer or to the client.

140. *Id.* at 1509 (majority opinion).

141. *See Leading Cases: Criminal Law and Procedure, supra* note 84, at 261-62 (noting that “many defendants in the mitigation phase of a capital sentencing trial are prone to
footnote continued on next page

McCoy v. Louisiana's *Unintended Consequences*
71 STAN. L. REV. 1067 (2019)

innocence are “structural error,” the Court ignores the realities of capital defense strategy. Worse, it arguably prioritizes autonomy above proportionality, implicitly endorsing the view among many lower courts that defendants who waive mitigation should be denied relief. Likewise, *McCoy* may make it harder for defendants to obtain postconviction relief on the ground that trial counsel should not have acquiesced in their penalty-phase strategic decisions. In striving to accord capital defendants a measure of dignity, we may find that the Court has only made them easier to execute.

impulsive behavior and oscillating preferences” and that such defendants “often change their minds about their course of action”).