

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT LEROY McCOY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 16-8255  
 )  
LOUISIANA, )  
 )  
 ) Respondent. )  
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Pages: 1 through 63

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ROBERT LEROY McCOY, )  
 Petitioner, )  
 v. ) No. 16-8255  
 LOUISIANA, )  
 Respondent. )

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Washington, D.C.

Wednesday, January 17, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

SETH P. WAXMAN, Washington, D.C.; on behalf of the Petitioner.

ELIZABETH MURRILL, Solicitor General of Louisiana, Baton Rouge, Louisiana; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 16-8255, McCoy versus  
5 Louisiana.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. WAXMAN: Mr. Chief Justice, and  
10 may it please the Court:

11 When a defendant maintains his  
12 innocence and insists on testing the  
13 prosecution on its burden of proof, the  
14 Constitution prohibits a trial court from  
15 permitting the defendant's own lawyer, over the  
16 defendant's objection, to tell the jury that he  
17 is guilty.

18 The Sixth Amendment guarantees a  
19 personal defense that belongs to the accused,  
20 and whether to admit or contest guilt is the  
21 paradigmatic example of that personal defense,  
22 not only because it singularly affects the life  
23 and liberty of the accused, but also because  
24 making that decision requires weighing  
25 subjective aspirations and value judgments that

1 are unique to every individual. How --

2 CHIEF JUSTICE ROBERTS: Suppose the --  
3 the charge is murder and -- and the lawyer  
4 says: Based on what I've looked -- I think  
5 your best case is self-defense, you know. And  
6 -- and the other guy's -- the defendant says:  
7 No, I didn't shoot the person. And the lawyer  
8 says: Well, I think the evidence is going to  
9 show that you did, self-defense.

10 If the lawyer goes ahead and presents  
11 that defense, is -- does that fall under your  
12 theory?

13 MR. WAXMAN: Mr. Chief Justice, I  
14 think your question raises a question both of  
15 what defense counsel may constitutionally do  
16 and also what defense counsel may not  
17 constitutionally do.

18 I'll also note first that your  
19 hypothetical, in dramatic contrast to this  
20 case, involves, at a minimum, the shared  
21 objective of obtaining a -- an acquittal on the  
22 charged crimes.

23 But, in addition, our position is that  
24 the one thing that counsel in that case and in  
25 no case may do is -- this isn't about what

1 counsel can argue. It's not about what  
2 evidence can be introduced. It's that counsel  
3 may not stand up and affirmatively vouch, admit  
4 that his client is guilty.

5 CHIEF JUSTICE ROBERTS: That was --

6 MR. WAXMAN: Now, your example --

7 CHIEF JUSTICE ROBERTS: -- a big --

8 MR. WAXMAN: Yes.

9 CHIEF JUSTICE ROBERTS: -- that was a  
10 big wind-up with the --

11 MR. WAXMAN: That's a --

12 CHIEF JUSTICE ROBERTS: But my  
13 particular question is obviously, when you say  
14 simply that my client shot the guy, that  
15 doesn't mean he's guilty. If he did it in  
16 self-defense, he's not guilty. And then the  
17 defense is it was self-defense. So --

18 MR. WAXMAN: That's right. So  
19 recognizing that that is not this case, our  
20 position is -- and I think the framers utterly  
21 would agree -- that if a defendant stands up  
22 and says, look, I did not shoot that guy, as  
23 Mr. McCoy said, I did not kill my own family  
24 members and I do not want my lawyer standing up  
25 and telling the jury that I did --

1 CHIEF JUSTICE ROBERTS: Okay. So --

2 MR. WAXMAN: -- that is for the  
3 defendant --

4 CHIEF JUSTICE ROBERTS: -- your  
5 position is not -- your position is not limited  
6 to the situation where the lawyer admits the  
7 client's guilt; it goes beyond that?

8 MR. WAXMAN: We -- that's a  
9 hypothetical, and our position is that the  
10 framers -- that the -- that the meaning of the  
11 Sixth Amendment, the meaning of the right to  
12 defend, that the framers enshrined, that is  
13 recognized in all common law jurisdictions, is  
14 that if the defendant contests and decides to  
15 put the prosecution to its proof beyond a  
16 reasonable doubt as to an element of the  
17 offense, particularly at the actus reus, the  
18 Constitution precludes the defense -- his own  
19 lawyer from telling the jury --

20 CHIEF JUSTICE ROBERTS: Any element --

21 MR. WAXMAN: -- that he did it.

22 CHIEF JUSTICE ROBERTS: -- any element  
23 of the offense?

24 MR. WAXMAN: So --

25 CHIEF JUSTICE ROBERTS: Offenses have

1 a lot of -- I mean, some -- is venue an element  
2 of an offense sometimes? Or --

3 MR. WAXMAN: Well, the -- the most  
4 extreme hypothetical I can think of is: Was  
5 there a mailing in interstate commerce? And --

6 CHIEF JUSTICE ROBERTS: All right.  
7 Well, that's a good one.

8 (Laughter.)

9 MR. WAXMAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Is that --

11 MR. WAXMAN: I think --

12 CHIEF JUSTICE ROBERTS: -- is that --  
13 I mean, the Hobbs Act or something? Did you  
14 cross -- cross state lines?

15 MR. WAXMAN: So --

16 CHIEF JUSTICE ROBERTS: That's an  
17 element of the offense.

18 MR. WAXMAN: Yeah.

19 CHIEF JUSTICE ROBERTS: So, if a  
20 lawyer says it's obvious that you did cross  
21 state lines, you've got 48 witnesses, I'm not  
22 going to argue that you didn't cross state  
23 lines; and the person says that's an element of  
24 the offense, you have to say I didn't or  
25 withdraw.



1           MR. WAXMAN: No, no, no. You don't --  
2           the -- the client doesn't get to decide what  
3           you will affirmatively say. The client can  
4           say, even if it's just an element of the  
5           offense --

6           CHIEF JUSTICE ROBERTS: Okay. So the  
7           lawyer gets up, look, they've got to prove  
8           these things. Crossing state lines, that's  
9           clearly proved, but we want to talk about these  
10          other things. So that violates this  
11          fundamental right?

12          MR. WAXMAN: Just so that we're -- you  
13          and I are very clear about this, we don't think  
14          that this case presents the question because  
15          this is a case in which -- in which there was  
16          not an agreement on whether to pursue  
17          acquittal. This wasn't a disagreement about  
18          strategy, about how to be acquitted of murder.

19          And that's a huge difference, and our  
20          position in this case only depends on that.  
21          But the logic I --

22          CHIEF JUSTICE ROBERTS: No, I know.  
23          You -- you know how hypotheticals work.

24          MR. WAXMAN: I do.

25          CHIEF JUSTICE ROBERTS: This is a

1 different case. And I just want to make sure  
2 that I understand that your position is that  
3 the lawyer cannot vouch for any element of the  
4 defense, not just that, you know, it was  
5 self-defense, not that you didn't shoot him,  
6 all that, but any element of an offense, if the  
7 lawyer tells the jury that that's satisfied  
8 contrary to the client's wishes, that violates  
9 the --

10 MR. WAXMAN: Our position is that the  
11 defense that the framers enshrined in the Sixth  
12 Amendment and that is recognized in the entire  
13 rest of the common law world is that, whether  
14 it's admitting guilt or not, if the defendant  
15 says I did not do X, I did not kill my parents  
16 -- my family members, defense counsel may not  
17 affirmatively tell the jury that he did and ask  
18 that he be required to spend the rest of his  
19 life in prison.

20 JUSTICE BREYER: Well, then that's the  
21 problem.

22 CHIEF JUSTICE ROBERTS: So I did not  
23 -- I did not cross the Pennsylvania state line  
24 in the course of committing this crime.

25 MR. WAXMAN: That's right. The

1 defense lawyer doesn't have to say to the  
2 jury -- he doesn't have to say one word about  
3 crossing state lines.

4 What he can't say is: I am telling  
5 you that Mr. McCoy killed these three family  
6 members.

7 JUSTICE ALITO: Your answer is that --  
8 this is fairly simple. The -- the defense  
9 attorney cannot concede any element of the  
10 defense -- of -- of the offense.

11 MR. WAXMAN: If there is a  
12 contemporaneous objection, the trial court may  
13 not permit the defense lawyer to admit any  
14 element of the offense. That's --

15 JUSTICE BREYER: Right there is the  
16 problem. I mean, that's the problem in my  
17 mind.

18 Faretta itself poses a problem because  
19 a large percentage of the people that insist on  
20 representing themselves, particularly in death  
21 cases, are going to walk right into the death  
22 -- the death chamber. A lot of the people  
23 there are just not really capable of managing  
24 their own defense.

25 So now we have a lawyer. And,

1 suddenly, we come in with a constitutional rule  
2 that's going to tell the lawyer how to argue  
3 his case. How do I know what you say is true?  
4 The people who know this are the trial bar, if  
5 anybody. But how do you know whether there are  
6 cases where, in fact, to make a sensible  
7 defense for this person who might have one, the  
8 lawyer has to say to the jury, because of what  
9 other witnesses have said and so forth, that  
10 letter did cross state lines?

11 And if we agree with you in this,  
12 which is a very different case, the argument  
13 against agreeing with you in this is it will be  
14 like a balloon expanding into we don't know  
15 where what, because they're filled with  
16 elements, the federal code. And before you  
17 know it, lawyers will have a hard time  
18 defending this person. And you're walking  
19 right into jail when you start telling your  
20 lawyer how to run his case.

21 Now, that's the concern that I think  
22 is there in the Chief's question. And I -- I  
23 would like to know your response to what I  
24 consider a very practical concern.

25 MR. WAXMAN: My response, as Your

1 Honor's question noted, is there is -- there is  
2 no need for this Court to decide the elements  
3 question or any other hypothetical in which  
4 there is a shared objective of acquittal in  
5 order to decide this case.

6 JUSTICE GORSUCH: Well --

7 MR. WAXMAN: My position with respect  
8 --

9 JUSTICE BREYER: That's surprising.

10 MR. WAXMAN: -- my -- excuse me?

11 JUSTICE BREYER: That's -- that's  
12 surprising, because if we announce that we're  
13 not deciding it, there are like 200,000  
14 criminal cases in the lower courts and there  
15 will be a kind of chaos, I mean, I fear, that  
16 as to what -- there are lots of people, you  
17 know, there are many, many defendants who go  
18 through dozens of lawyers while they're  
19 objecting to this one or that one or the other  
20 one.

21 MR. WAXMAN: Justice Breyer --

22 JUSTICE BREYER: And you see what I'm  
23 worried about?

24 MR. WAXMAN: I --

25 JUSTICE BREYER: I think we should

1 decide it.

2 MR. WAXMAN: Okay. I --

3 JUSTICE BREYER: But -- yeah.

4 MR. WAXMAN: -- I invite you to decide  
5 it. It will be dicta, but I invite you to  
6 state what the logic is.

7 And our position is simply this: We  
8 are talking about the defense that was  
9 enshrined in the Sixth Amendment, and there is  
10 no contest from the state about the  
11 contemporary understanding of this at the time.  
12 But if --

13 JUSTICE GORSUCH: But, Mr. Waxman, if  
14 we have to draw a line, it seems to me we have  
15 at least two axes we have to worry about. One  
16 is, where do we stop on the concession? You  
17 say it goes down to elements.

18 I -- I -- I press you why it wouldn't  
19 go further than that, if the client instructs  
20 the lawyer not to accede to admission of a  
21 piece of evidence as particularly damning but  
22 the lawyer sees no good faith basis for  
23 objecting.

24 MR. WAXMAN: So --

25 JUSTICE GORSUCH: -- why -- why

1 doesn't it go down to that level? That's one  
2 axis.

3 MR. WAXMAN: The --

4 JUSTICE GORSUCH: The other axis would  
5 be you say it's -- the lawyer can't admit the  
6 element. But what if the lawyer casts doubt on  
7 the element? I mean, what if the lawyer here  
8 hadn't admitted guilt but had presented a mens  
9 rea defense that really cast aspersions on the  
10 actus reus defense, right, it really cast --  
11 any reasonable person would know what the  
12 lawyer is up to. He didn't use the magic words  
13 "I admit," but he did, in fact, essentially do  
14 that.

15 So we have ambiguity on both these  
16 axes. Where would we draw the lines?

17 MR. WAXMAN: So I think this Court has  
18 been -- as to your first axis, the Court has  
19 been very, very clear that decisions, once a --  
20 once a defendant chooses to be represented by  
21 counsel, decisions about what evidence to  
22 admit, what objections to raise, what witnesses  
23 to call, with the exception of the defendant,  
24 and what witnesses not to call and what  
25 arguments to be made are for the lawyer,

1 reviewable if at all under the ineffective  
2 assistance of counsel defense.

3 So evidence, arguments, witnesses,  
4 this case is only about -- and you say there's  
5 a small difference, but this is all the  
6 difference in the world.

7 JUSTICE GORSUCH: But sometimes --  
8 sometimes -- sometimes, though, a piece of  
9 evidence is far more important than an element.  
10 Take -- take the Chief Justice's example of a  
11 Hobbs Act. I mean, the interstate commerce  
12 element is usually not that big a deal in those  
13 cases. But admission of a piece, a letter or,  
14 you know, an admission by the defendant is a  
15 huge deal.

16 MR. WAXMAN: I mean, in the real  
17 world, what defendants object to -- and I've  
18 been representing death row inmates for --

19 JUSTICE GORSUCH: I know.

20 MR. WAXMAN: -- this is my 40th year  
21 -- defendants are not drawing a line and saying  
22 you can't admit that something moved in  
23 interstate commerce across state lines. What  
24 they are concerned about and what they have an  
25 -- an autonomy, dignitary right to have



1 protected is I didn't do this, I didn't commit  
2 the actus reus.

3 JUSTICE GINSBURG: Mr. Waxman, may I  
4 -- may I ask if we -- if we concede the general  
5 proposition that you're right, the client has a  
6 right to say I didn't do it, but that's a  
7 defense. And what the client wants to put on  
8 to make out that defense, the lawyer says I  
9 can't present that because you say there are  
10 witnesses, I've talked to the witnesses, they  
11 say the opposite. I can't put on the defense.

12 So if -- if -- take this very case.  
13 So the lawyer can't say: My client shot these  
14 three people. But then what? What -- what --  
15 how -- how does the lawyer back up that  
16 defense, I didn't do it, when, in the lawyer's  
17 view, there is no basis for taking that  
18 position?

19 MR. WAXMAN: Justice Ginsburg, the  
20 defendants, and even clients in civil cases,  
21 all the time do things that make counsel's job  
22 either difficult or impossible.

23 The defendant can say: Look, I don't  
24 care, I am going to testify and I am going to  
25 give my side of the story, or I don't care,

1 I've instructed all of my family members not to  
2 talk to you, not to provide you any  
3 information.

4 The lawyer's professional  
5 responsibility, nonetheless, is just exactly  
6 how Justice White explained it at pages 257 and  
7 258 of his opinion in United States versus  
8 Wade.

9 What happens in these cases is that  
10 the lawyer doesn't have -- the -- the principle  
11 at stake here is not in any way a restriction  
12 on how the lawyer presents evidence, what  
13 defenses he actually does present, how he goes  
14 about cross-examining witnesses.

15 JUSTICE GINSBURG: Can we be -- can we  
16 --

17 MR. WAXMAN: His obligation --

18 JUSTICE GINSBURG: Can we be concrete  
19 about this case? So the lawyer doesn't say to  
20 the jury he did it. The lawyer says nothing.

21 And then the client wants to present  
22 this alibi that is inherently incredible. What  
23 does the lawyer do? How does the lawyer assist  
24 the client in making out the defense that the  
25 client has chosen?

1           MR. WAXMAN: The -- the lawyer will  
2 cross-examine the government's witnesses, as  
3 Justice White explained, attempting to find  
4 holes in their testimony even if the lawyer  
5 believes that they are testifying truthfully.

6           That is the hallmark of the adversary  
7 system. And although it is not this case,  
8 because Mr. English testified repeatedly under  
9 oath that -- that his client's belief that he  
10 was not there and he did not do this was  
11 sincere -- sincerely reflected his  
12 understanding, even if he thought that Mr.  
13 McCoy -- Mr. McCoy said, look, I was there, but  
14 I'm going to get up and say that I wasn't.

15           JUSTICE SOTOMAYOR: Mr. --

16           MR. WAXMAN: The ethics rules are very  
17 clear about what lawyers can and can't do.

18           JUSTICE ALITO: Now, Mr. Waxman --

19           JUSTICE SOTOMAYOR: Mr. Waxman --

20           MR. WAXMAN: None of that is at issue  
21 in this case.

22           JUSTICE ALITO: Mr. Waxman, let me --

23           JUSTICE SOTOMAYOR: Mr. Waxman, this  
24 sounds like a -- my ethics class in law school,  
25 and this very hypothetical of what do you do

1 with a lying client?

2 And it was my understanding that every  
3 ethics rule requires the lawyer to put the  
4 client on the stand but not assist the client  
5 in telling the lie by -- you can put him on the  
6 stand and say tell your story. And if the  
7 judge or someone objects that your -- that this  
8 person's rambling on, you say to the judge: I  
9 cannot ask questions. My client has directed  
10 me to put him or her on the stand.

11 People can walk themselves into jail.  
12 They can walk themselves, regrettably, into the  
13 gas chamber. But they have a right to tell  
14 their story.

15 MR. WAXMAN: They have -- they have  
16 the same -- I mean, Your Honor's understanding,  
17 this is not a question of ethics rules --

18 JUSTICE SOTOMAYOR: Absolutely not.

19 MR. WAXMAN: -- about perjured  
20 testimony or anything.

21 JUSTICE SOTOMAYOR: But the question  
22 --

23 MR. WAXMAN: Your Honor's  
24 understanding is correct as to --

25 JUSTICE SOTOMAYOR: So let me find --

1           MR. WAXMAN: -- the vast majority of  
2           jurisdictions.

3           JUSTICE ALITO: Well, could I ask you  
4           about --

5           JUSTICE SOTOMAYOR: So may I ask --  
6           may I just --

7           JUSTICE ALITO: Mr. Waxman, could I  
8           ask you about, because I want to understand  
9           where the -- the line is here.

10          So let's imagine a case where the  
11          evidence of the actus reus is overwhelming,  
12          there's not a chance in the world that the  
13          defense is going to be able to convince a jury  
14          that the defendant did not commit the actus  
15          reus, but there's a plausible defense, maybe a  
16          pretty good defense, on mens rea.

17          So -- but the client insists: I  
18          didn't do it, I did not commit the actus reus.  
19          Now, two ways of -- of approaching this on the  
20          part of the defendant -- defense attorney, and  
21          I want you to explain whether one is required  
22          or whether -- whether both are permissible or  
23          only one is permissible.

24          One is for the attorney to concede in  
25          the opening, yes, he committed the actus reus,

1 but there's a good mens rea defense, and  
2 develop that.

3 I take it you would say that's not  
4 permissible?

5 MR. WAXMAN: Correct.

6 JUSTICE ALITO: But could the attorney  
7 open by saying: Now, they have to prove he  
8 committed certain acts but also that he had a  
9 certain mental state, and our defense here is  
10 going to be that he didn't have the requisite  
11 mental state, and everything that's done during  
12 the trial is directed toward that. There's no  
13 attempt to put the government to its proof, to  
14 try to poke holes in the witnesses who are  
15 going to be called to establish the actus reus.

16 Is the latter permitted?

17 MR. WAXMAN: So the latter --

18 JUSTICE ALITO: So long as he doesn't  
19 say the magic words he actually committed the  
20 -- the -- the physical acts charged, it's okay?

21 MR. WAXMAN: Right. The core -- it  
22 may or may not be okay. Let me be very clear  
23 about this.

24 The core Sixth Amendment right that is  
25 at issue here is where a defendant says this is

1 a personal defense, I can make my own value  
2 judgments about whether I do or do not want to  
3 -- to take a minuscule chance of not being  
4 convicted and spending a life in -- in prison.

5 The -- the -- the Sixth Amendment  
6 prohibits the lawyer from affirmatively telling  
7 the jury: I'm telling you he is guilty and he  
8 should spend the rest of his life --

9 JUSTICE ALITO: I -- I understand  
10 that.

11 MR. WAXMAN: That's -- that's the  
12 right at issue here, and your --

13 JUSTICE ALITO: I -- I -- I -- I  
14 understand your --

15 MR. WAXMAN: And that would --

16 JUSTICE ALITO: I understand --

17 MR. WAXMAN: Yeah.

18 JUSTICE ALITO: -- your position, but  
19 what is the answer -- I want to understand  
20 where the line is.

21 MR. WAXMAN: So the line --

22 JUSTICE ALITO: What is the answer to  
23 my question?

24 MR. WAXMAN: Yes, the answer to your  
25 question is, if I understood your hypothetical

1 correctly, there would not be a violation of  
2 this fundamental Sixth Amendment right and the  
3 defense counsel's strategy in focusing the jury  
4 on mens rea and saying nothing or  
5 cross-examining or not would be evaluated under  
6 the ineffective assistance of counsel  
7 standards.

8 JUSTICE SOTOMAYOR: Excuse me,  
9 Mr. Waxman --

10 CHIEF JUSTICE ROBERTS: That's okay if  
11 --

12 JUSTICE SOTOMAYOR: Mr. Waxman, can --

13 CHIEF JUSTICE ROBERTS: That's true --  
14 that's true even if -- Justice Sotomayor will  
15 have the next question, and I'll have this one.

16 MR. WAXMAN: I --

17 CHIEF JUSTICE ROBERTS: That's true  
18 even if the -- the accused says I want you to  
19 say that I didn't do it? The lawyer does not  
20 have to do that, right? That's your position?

21 MR. WAXMAN: Our position is that the  
22 lawyer --

23 CHIEF JUSTICE ROBERTS: Yes or no,  
24 please. Your -- the lawyer does not go in and  
25 say the client did it, but the client says I



1 want you to say I didn't do it -- that's a very  
2 clever defense you have on mens rea, but I want  
3 you to say I didn't do it. And the lawyer says  
4 I'm not going to do that.

5 MR. WAXMAN: I believe that the lawyer  
6 does not have to do that.

7 CHIEF JUSTICE ROBERTS: Okay.

8 MR. WAXMAN: But the --

9 CHIEF JUSTICE ROBERTS: Now Justice --

10 MR. WAXMAN: This is only a  
11 prohibition.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor.

14 JUSTICE SOTOMAYOR: Taking Justice  
15 Alito's hypothetical, I walk in and say it is  
16 the government's burden to prove this case  
17 beyond a reasonable doubt. It means that they  
18 have to prove each and every element of the  
19 offense. The actus reus, the mens rea,  
20 whatever other important element there is.

21 If the government were to prove every  
22 other element in this case beyond a reasonable  
23 doubt, the one they can't prove is that the  
24 person who shot this person did it with -- with  
25 the right mens rea. That would be okay?

1 Hasn't conceded the person committed the  
2 elements and is saying I'm putting your focus  
3 just on mens rea.

4 MR. WAXMAN: Right.

5 JUSTICE SOTOMAYOR: Right?

6 MR. WAXMAN: Well, I'm -- my defense  
7 -- I -- you know, the government alleges all  
8 these things. Ladies and gentlemen of the  
9 jury, it is going to be required to prove each  
10 and every element to your satisfaction beyond a  
11 reasonable doubt. I am going to introduce  
12 evidence in this case that is going to convince  
13 you that even if you find that the defendant  
14 committed these murders, he did not act with  
15 the requisite mens rea.

16 JUSTICE BREYER: That -- that's easy  
17 for you to say in a case that you're imagining.  
18 What I'm wondering, if there are other cases  
19 where it might be far more difficult to come up  
20 with that answer, and, therefore, I'm asking  
21 you this question: Suppose the opinion were to  
22 say in this case the lawyer explicitly said to  
23 the jury he is guilty of the crime charged.  
24 That the Sixth Amendment forbids.

25 But the rest of these complicated

1 matters, whether it's elements, whether it's  
2 this, whether it's that, we leave -- at least  
3 for now, we leave to the law schools, the bars,  
4 the ethics classes and the others because we  
5 don't want to freeze the answer into the Sixth  
6 Amendment.

7 Now, what would you think of that?

8 MR. WAXMAN: I think that the only  
9 holding that this Court can apply in this case  
10 is that under the -- that where -- was Your  
11 Honor's hypothetical -- was Your Honor's  
12 statement of the case, which is where the  
13 defendant says, and says to the judge, promptly  
14 and repeatedly: I did not kill the members of  
15 my family, my lawyer wants to stand up and tell  
16 the jury that I did and that I am guilty, and  
17 the judge -- if the judge says you're the  
18 lawyer, you decide, that is a violation of the  
19 Sixth Amendment and the due process clause.

20 JUSTICE ALITO: But you were drawing  
21 --

22 JUSTICE KAGAN: Mr. Waxman, can I take  
23 you back to the Chief Justice's question?  
24 Because here we do have a case where the  
25 defendant is saying you can't admit the actus

1 reus, which is killing. I didn't kill my  
2 family. You can't say I killed my family.

3 But there are different levels of  
4 generality, right? One is you can't say that I  
5 didn't kill my family. One is you -- you --  
6 you can't say that I committed the actus reus  
7 no matter what the actus reus is. And another  
8 is you can't say that I committed any element  
9 of the offense, actus reus or otherwise.

10 And if I understood your argument,  
11 you're saying that the logic of your position  
12 takes you from this case, which is an actus  
13 reus of killing, to any actus reus and then  
14 further from there to any element.

15 And I guess I wonder, why is it that  
16 the logic of your position insists that we go  
17 up that chain?

18 MR. WAXMAN: I don't think the logic  
19 of my position insists that you go all the way  
20 up the chain, but I'll explain to you why I  
21 think the better view would stop at  
22 affirmatively admitting -- nothing about what  
23 the trial -- how the trial is conducted, but  
24 affirmatively admitting any element.

25 And it -- it simply goes back to my

1 reading and my understanding -- maybe I'm wrong  
2 -- of the rule that existed, the law that  
3 existed at the time the Sixth Amendment was  
4 considered and adopted and what the framers  
5 must have understood.

6           And we -- we go over this at some  
7 length in our brief. There's no controversion  
8 about this. I think that at the time in the  
9 18th century in England and common law  
10 jurisdictions and at the time of the framing of  
11 the Sixth Amendment, the frame -- people would  
12 have been astonished, as the -- as the amicus  
13 brief of the bar of England and Wales  
14 expresses, that the notion that the defendant  
15 could say this is my defense and my decision to  
16 contest this invokes my own subjective  
17 judgments about what is important to me and  
18 what is not important to me, that it would be  
19 -- they would be astonished to hear that in  
20 that circumstance defense counsel could stand  
21 up and say --

22           JUSTICE GORSUCH: Mr. Waxman, I -- I  
23 --

24           JUSTICE ALITO: At that time --

25           JUSTICE GORSUCH: -- think you're

1 right about that, but my question would be --  
2 I'm sorry.

3 JUSTICE ALITO: No, go ahead.

4 MR. WAXMAN: No, no, no. I'll -- I --

5 JUSTICE GORSUCH: On that, it seems to  
6 me that that's Faretta, right? That you have a  
7 right to control your self-representation if  
8 you're unhappy with your lawyer.

9 The -- your client had an  
10 opportunity to -- this is on his second lawyer.  
11 And he -- he had notice before trial that there  
12 was a breakdown with his lawyer. And the trial  
13 court ruled he -- he came too late to replace  
14 him with a third lawyer yet or to go to  
15 self-representation. Why isn't this just an  
16 untimely Faretta problem, accepting everything  
17 you've said about the original understanding?

18 At some point, one can waive these  
19 rights too. These are personal rights that  
20 could be waived.

21 MR. WAXMAN: There -- there's no  
22 question about it, but the -- the right to the  
23 assistance of counsel and the right to your  
24 defense are not mutually exclusive rights.  
25 Justice Alito, and then, if I may, I'd like to

1 save some time for rebuttal.

2 JUSTICE ALITO: Well, in -- when the  
3 Sixth Amendment was adopted, there was not a  
4 right to appointed counsel. So I imagine that  
5 somebody in Mr. English's position would simply  
6 say: I'm not going to be part of this farce  
7 that you want to put on. I'm just withdrawing.

8 And Mr. McCoy would be -- would either  
9 have to come up with another attorney very  
10 quickly or go ahead without an attorney. So I  
11 don't know --

12 MR. WAXMAN: I agree.

13 JUSTICE ALITO: -- how much you can  
14 read into the -- into the original  
15 understanding because the situation here is  
16 dictated -- is dominated by the fact that now  
17 there is the right to have an appointed  
18 attorney.

19 MR. WAXMAN: Justice Alito, Daniel  
20 Webster himself could not constitutionally have  
21 done what Mr. English did in this case. And I  
22 don't think there would be any doubt in the  
23 framers' mind about that.

24 If I may -- may I reserve the balance  
25 of my time?

1 CHIEF JUSTICE ROBERTS: Certainly.

2 MR. WAXMAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Ms. Murrill.

4 ORAL ARGUMENT OF ELIZABETH MURRILL,

5 SOLICITOR GENERAL OF LOUISIANA,

6 ON BEHALF OF THE RESPONDENT

7 MS. MURRILL: Thank you, Mr. Chief

8 Justice, and may it please the Court:

9 The state proposes a -- a rule that,  
10 in a narrow class of death penalty classes,  
11 counsel sometimes might be required to override  
12 his client on a trial strategy when the  
13 strategy that the -- that the client wants  
14 counsel to pursue is a futile charade and  
15 requires him to defeat both their objectives of  
16 defeating the death penalty.

17 We submit that that should be treated  
18 as a Strickland ineffective assistance of  
19 counsel.

20 JUSTICE SOTOMAYOR: I'm sorry, you  
21 started by saying you want a narrow rule. Why  
22 is it narrow? It seems to me that it's a rule  
23 that you're saying is absolute. Why does it  
24 have to be just in death penalty cases?

25 MS. MURRILL: Your Honor --



1 JUSTICE SOTOMAYOR: How do you limit  
2 your -- why would we limit your rule?

3 MS. MURRILL: Because I think we've  
4 conceded, and we would -- we would agree that  
5 in most cases that the rules of professional  
6 conduct would dictate that a lawyer follow the  
7 directives of his client.

8 JUSTICE SOTOMAYOR: Is it the rules of  
9 professional conduct or is it the Sixth  
10 Amendment? The Sixth Amendment requires you to  
11 be represented by counsel, effective counsel,  
12 but counsel.

13 Or do you concede that generally or  
14 all the time -- let's not say this is a death  
15 case, let's just say this was a robbery case,  
16 all right? A robbery case.

17 The defendant says: I wasn't the  
18 robber. Can the lawyer come in and do what Mr.  
19 English did: Yes, he was the robber, but, no,  
20 he didn't intend to force -- to use force.

21 MS. MURRILL: I think that the rules  
22 of professional conduct inform the Sixth  
23 Amendment and that they would probably give  
24 some level of greater force to the client's  
25 wishes in certain situations, but, again, I

1 think that goes back to Strickland.

2 It's in -- if you -- if you evaluate  
3 it as a Strickland claim, then we're looking at  
4 it under the first prong of Strickland as a  
5 question of deficiency.

6 JUSTICE SOTOMAYOR: So you don't think  
7 it's a Sixth Amendment violation?

8 MS. MURRILL: I do not. I think it's  
9 an ineffective assistance claim and you have  
10 not proven that until you've --

11 JUSTICE SOTOMAYOR: So -- so you're  
12 not taking the position when you're saying  
13 generally that -- that a client has any right  
14 to say I didn't do this in court? I didn't do  
15 -- I didn't shoot, I didn't rob, I didn't make  
16 that call that that witness says I made, that  
17 the witness -- that a -- that a client, once he  
18 takes a lawyer, takes -- doesn't have a right  
19 to say I didn't do it --

20 MS. MURRILL: I -- I think we --

21 JUSTICE SOTOMAYOR: -- at all?

22 MS. MURRILL: -- we wouldn't  
23 characterize it as an independent autonomy  
24 right. We -- we -- we believe that it is a  
25 shared relationship inside the attorney-client

1 relationship when counsel -- when he has  
2 counsel.

3 JUSTICE SOTOMAYOR: One of my former  
4 colleagues said this isn't -- one must  
5 analogize these things to agency, that the  
6 defendant -- the lawyer is the agent of the  
7 defendant. And once they disagree, the agency  
8 ends.

9 MS. MURRILL: Yes, Your Honor.

10 JUSTICE SOTOMAYOR: So, if the agency  
11 has ended because the client has said: Don't  
12 do this, how can it not be a violation of the  
13 Sixth Amendment to do it?

14 MS. MURRILL: Because agency  
15 principles only take us so far. And because  
16 even the ABA standards on -- on criminal  
17 defense standards don't suggest that they do,  
18 that -- that agency principles, especially in a  
19 death penalty case, can only take you so far.

20 And that if -- if we -- if we look at  
21 this purely as a question of agency, then we  
22 are viewing the lawyer's relationship simply as  
23 the alter ego of the client, but I think --

24 JUSTICE BREYER: Your point -- I see  
25 your point. Normally, these are questions of

1 the bar rules of -- rules of ethics for lawyers  
2 and so forth. Normally, they do what the  
3 client says. That's the normal situation.

4 Right here, it was pretty clear that  
5 on the most major matter in respect to the  
6 trial, he did the opposite and said his client  
7 was guilty. So why didn't this work out just  
8 the way you said? Why didn't the defendant say  
9 it violates the ethics rules, it was therefore  
10 ineffective; therefore, give me a new trial?

11 MS. MURRILL: Your Honor, I think this  
12 was a very, very difficult client and that that  
13 -- that is part of the equation in this case.

14 JUSTICE BREYER: Do the ethics rule  
15 say it's all different when -- when -- when you  
16 have a difficult client? Maybe many are  
17 difficult.

18 MS. MURRILL: The ethics rules don't  
19 tell us what to do. They --

20 JUSTICE BREYER: No, but you just said  
21 the ethics rule say follow the wishes of your  
22 client. I mean, that's what's worrying me,  
23 obviously, in fact, about the case is the  
24 extent to which it's fed into the Sixth  
25 Amendment, because there's so many different

1 situations.

2 But if anything is fed into the Sixth  
3 Amendment, I would think the example of the  
4 lawyer going in against his wishes and saying  
5 he is guilty of the crime charged, which is  
6 basically what happened, that that might or  
7 must.

8 MS. MURRILL: Well, Your Honor, I  
9 mean, I think the state has been -- been very  
10 clear that we think that the -- the defense  
11 that Mr. McCoy wanted was inextricably  
12 intertwined with the alibi that Mr. McCoy  
13 wanted, that it was not purely a questionable  
14 --

15 JUSTICE BREYER: Yeah. But they're  
16 not saying about what you have to put on or not  
17 put on. They're just saying the Sixth  
18 Amendment says you can't go to the jury and  
19 say, as this lawyer did, my client is guilty of  
20 the crime charged.

21 Now -- now, that's the extreme case  
22 that's put to us. Now why doesn't that violate  
23 the Sixth Amendment?

24 MS. MURRILL: Because, at the end of  
25 the day, it leaves him with a less -- less of a

1 defense, a less -- the defense is not as  
2 strong. It is a weaker defense.

3 He has not waived his right to  
4 counsel. He hasn't waived the remedy of  
5 ineffective assistance of counsel.

6 And so he's -- he's -- he is tying his  
7 counsel's hands.

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

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

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

1 that's my overriding objective.

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

6 MS. MURRILL: Well, because -- first,  
7 Your Honor, I -- I don't think that that's  
8 entirely how Mr. McCoy characterized his  
9 objective. I -- I would describe it more as  
10 though he said I know a better way to cross  
11 this divide and we're going to cross it by  
12 letting me drive the -- this car over the cliff  
13 because the car will fly.

14 JUSTICE GINSBURG: But he didn't say  
15 that. He said, and I think this much is clear  
16 from the record, he said in no uncertain terms:  
17 I do not want to concede that I killed these  
18 three people.

19 MS. MURRILL: Yes, Justice Ginsburg.

20 JUSTICE GINSBURG: He wasn't talking  
21 about strategy at that time. He just said I do  
22 not want to concede that I killed these people.

23 I think we -- we've heard that -- that  
24 -- from Mr. Waxman, a lawyer can't make that  
25 concession, but the lawyer doesn't have to do

1 anything else. They can just stand there and  
2 let the client get on the stand and tell  
3 whatever story the client wants to tell.

4 MS. MURRILL: No, Your Honor. I mean,  
5 I don't think that we -- I think that the  
6 problem that that presents is that the lawyer  
7 is now less effective than he could be,  
8 especially in a case like this when -- and --  
9 and we will -- I will give Mr. English the  
10 benefit of the doubt that he did not believe  
11 that his client was going to lie and yet he  
12 believed the alibi was entirely falsified.

13 So he -- he's giving him the benefit  
14 of the doubt. He -- he believed his client was  
15 delusional. And -- and so that does bring into  
16 play other rules of ethics. It doesn't really  
17 give him the answer of what to do and how to do  
18 it, but his ultimate objective, his ultimate  
19 objective is to try and do the right thing for  
20 his client, to defeat the death penalty, and to  
21 save his life.

22 JUSTICE ALITO: But --

23 JUSTICE KAGAN: But the client is  
24 saying that -- that his ultimate objective is  
25 not to defeat the death penalty. In other



1 words, you just have conflicting objectives.

2 I mean, I totally understand that this  
3 lawyer was in a terrible position because this  
4 lawyer wants to defeat the death penalty. And  
5 he has a client who says: That's not my goal  
6 here.

7 But the question is, when that  
8 happens, does the lawyer have to step back and  
9 say: You know what? That's not his goal. His  
10 goal is to avoid admitting that he killed his  
11 family members.

12 MS. MURRILL: Well, and so, if that's  
13 all he had said and that was the totality of  
14 the circumstances, was I don't want to admit  
15 that, and it was -- it was a rational, fine  
16 discussion, I don't want to admit that, I don't  
17 want everybody to hear that, that's fine.

18 JUSTICE ALITO: When we got to this --

19 MS. MURRILL: That's not what  
20 happened.

21 JUSTICE ALITO: -- we got to this --

22 JUSTICE KAGAN: He --

23 JUSTICE ALITO: -- the situation here  
24 occurred. It's an extreme situation, and a --  
25 and a difficult one -- but it -- it only

1 occurred because of a number of prior steps,  
2 many of which I think are debatable.

3 One, the -- the -- the decision that  
4 McCoy is competent to handle -- to stand trial.

5 The second, the -- the judge's ruling,  
6 I understand the reason, that English couldn't  
7 withdraw. The decision that there couldn't be  
8 a continuance so that McCoy could find another  
9 attorney, if he could find one who would put on  
10 his far-fetched alibi defense. And McCoy's  
11 refusal to waive his right to counsel and  
12 represent himself.

13 Now, if any of those had gone  
14 differently, the situation wouldn't have been  
15 presented. So what about the issue of -- what  
16 about the issue of competence and allowing  
17 English to withdraw?

18 If a -- if somebody like McCoy really  
19 sincerely believes that he did not commit these  
20 physical acts, but it was all done by -- as  
21 part of an elaborate conspiracy, is he -- is he  
22 capable of assisting in his own defense?

23 MS. MURRILL: Your Honor, that's a  
24 very difficult question. I -- I agree it's a  
25 very tough question, and I think it is a -- it

1 is a question in tension in this case, but it's  
2 not the question that was presented.

3 JUSTICE GINSBURG: Wasn't -- wasn't  
4 there --

5 MS. MURRILL: And -- and so the  
6 question is really about counsel --

7 JUSTICE GINSBURG: Wasn't there a  
8 motion -- there was a determination that he was  
9 competent to stand trial?

10 MS. MURRILL: There -- there was a  
11 determination that he was competent. There was  
12 a subsequent review of that determination on  
13 the motion for new trial by the trial judge,  
14 and there was a third review of that decision  
15 by the Louisiana Supreme Court.

16 JUSTICE ALITO: All right. If I  
17 could --

18 JUSTICE BREYER: The -- the lawyer put  
19 on a defense?

20 JUSTICE ALITO: -- just move on to the  
21 -- the other part of it. So, if English says  
22 to the judge, look, Your Honor, I can't be part  
23 of -- and I don't want to be part of this  
24 farce, it -- and this farce that has the  
25 predictable result of sending this -- my client

1 to a death sentence, I want to withdraw, why  
2 shouldn't the judge let him withdraw?

3 MS. MURRILL: Perhaps he should at a  
4 certain point in time, but I think that's a  
5 limited right in and of itself and -- and that  
6 the judge has to make that decision based on an  
7 abuse of -- and that's an abuse of discretion  
8 standard. And -- and that was raised in this  
9 case too.

10 So, I mean, maybe that would have been  
11 an answer. I think it has to happen at the  
12 right time and under the right circumstances.

13 JUSTICE BREYER: Would the lawyer --  
14 did -- did his lawyer put on a defense? He  
15 conceded that -- he didn't fight the  
16 competence. But did he put on a defense that  
17 the defendant was not competent at the time of  
18 the murder, that his -- that his mental state  
19 was such that he couldn't be convicted?

20 MS. MURRILL: The entire tenor of his  
21 defense was to attack mens rea and then  
22 subsequently to beg for mercy in the -- the  
23 penalty phase if there was --

24 JUSTICE BREYER: To attack mens rea on  
25 the ground that it was not -- he was not

1       mentally competent at that time?

2               MS. MURRILL:  Yes, Your Honor, that he  
3       didn't have the capacity to develop the  
4       specific intent of --

5               JUSTICE GORSUCH:  Counsel, you've been  
6       asking us to review this under Strickland, but  
7       why -- why isn't this a structural error?  The  
8       Sixth Amendment guarantees the assistance of  
9       counsel, as Mr. Waxman points out, and that is  
10      a fiduciary relationship.  And when someone  
11      doesn't just admit an element but admits guilt  
12      of second-degree murder, which is effectively  
13      what happened here, why isn't that structural  
14      error, a total denial of assistance of counsel,  
15      absence of an assistance of counsel, that we  
16      should take cognizance of and draw the line  
17      there?

18              MS. MURRILL:  Your Honor, first of  
19      all, because I don't think it fits within the  
20      class of cases that have been evaluated as  
21      Cronic, to complete failure of adversarial  
22      testing --

23              JUSTICE GORSUCH:  Well, why -- why  
24      isn't this just like Faretta, where we said,  
25      you know, that you have a right to have

1 assistance of counsel and not to have an agent  
2 of the state assist the state in prosecuting  
3 you?

4 MS. MURRILL: Well, initially, because  
5 I would suggest to you it was not a -- he was  
6 not an agent of the state. He was Mr. McCoy's  
7 counsel of choice.

8 JUSTICE GORSUCH: You'd agree, though,  
9 that he -- he effectively conceded guilt to  
10 second-degree murder?

11 MS. MURRILL: As a strategy and a  
12 means of defeating the death penalty and  
13 testing the state's case on specific intent.

14 JUSTICE SOTOMAYOR: I'm sorry, I  
15 thought it's been not disputed that he thought,  
16 quite wrongly, that there was no mens rea for  
17 second-degree murder but that it's been  
18 conceded that what -- there -- that there was a  
19 mens rea both for first and second degree and  
20 he was only arguing for second degree?

21 MS. MURRILL: Your Honor, on the facts  
22 of this case, he was arguing for second degree.  
23 Louisiana law does permit -- does -- does cover  
24 -- felony murder is not a specific intent to  
25 kill, but that was really never at issue in

1 this case. It was charged as a second degree.

2 JUSTICE SOTOMAYOR: I'm sorry, but  
3 there is a mens rea for second degree murder.

4 MS. MURRILL: There is, yes.

5 JUSTICE SOTOMAYOR: And so --

6 MS. MURRILL: Yeah, I mean, I --

7 JUSTICE SOTOMAYOR: -- you concede  
8 that there wasn't second degree?

9 MS. MURRILL: I think that that was a  
10 strategy decision that falls under the first  
11 prong of Strickland. And -- and if that was,  
12 in fact, the wrong decision, then it would  
13 still -- would fail, potentially, the first  
14 prong of Strickland, and then we would go to  
15 the second, but I think that does go back to  
16 Strickland and most -- all of the questions  
17 about how he did, what he did, and the choices  
18 that he made, ultimately, I think, fall under  
19 the first point.

20 JUSTICE BREYER: And that's -- I now  
21 understand why we are where we are. The --  
22 that in this case, he did not, the lawyer,  
23 concede that his client was guilty of the crime  
24 charged. Rather, he said he conceded that he  
25 had shot the people, killed the people, but

1 he's not guilty because of his state of mind.

2 So it's a question of the defense.

3 That's why he started with elements and so  
4 forth. You have to go down some road like  
5 that.

6 MS. MURRILL: Yes.

7 JUSTICE BREYER: All right. And so  
8 your view is that even here, where he's saying  
9 I did this thing, but I didn't have the mental  
10 element -- I did this thing -- the client says  
11 don't say I did this thing, and that's the  
12 problem and -- okay, I've got the problem.  
13 Sorry. I should have it before now, but --  
14 but --

15 MS. MURRILL: I -- Justice Breyer, I  
16 think -- I think that you captured where the  
17 state is when you said let's -- don't freeze  
18 that answer into the Sixth Amendment. That's  
19 --

20 JUSTICE BREYER: Well, what's your --  
21 what's -- that's fine to say in abstract terms,  
22 but -- but -- but our problem, I think, at  
23 least mine, is I have to write something --

24 (Laughter.)

25 JUSTICE BREYER: -- here that is going



1 to be taken as a rather authoritative account.

2 Now, what is your view as to what  
3 those words should be? That he can do  
4 anything, the lawyer, no matter how  
5 incriminating it is to the client as long as he  
6 says I want to follow a different defense, a  
7 different defense than my client wants? That's  
8 your view of it?

9 And leave the rest to the -- to  
10 Strickland, the bar association, et cetera. Is  
11 that your view?

12 MS. MURRILL: Well, then I -- I --

13 JUSTICE BREYER: What is your view, if  
14 you can say it in a sentence or two?

15 MS. MURRILL: That in a very narrow  
16 class of death penalty cases, counsel may be  
17 required to override the decision of his  
18 client, if that's -- if -- if the client's  
19 strategy is -- is futile and --

20 JUSTICE GORSUCH: Well, if -- if we're  
21 there, though, in Strickland, even in  
22 Strickland, on deficient performance, why isn't  
23 there at least deficient performance here by  
24 the lawyer admitting the element as opposed to  
25 remaining mute about it? That would have been

1 an option that I think the lawyer could have  
2 pursued.

3 So we'd still have prejudice prong, I  
4 understand your arguments there, but why not on  
5 deficient performance? I would have thought  
6 under the ethical rules, which I know are not  
7 controlling here, that you -- you would have  
8 had an argument for an ethical violation in  
9 conceding your client's guilt.

10 MS. MURRILL: And -- and I would  
11 expect them to make that argument. They've  
12 reserved their Strickland claims. They  
13 reserved them before the Louisiana Supreme  
14 Court. They can bring those claims in  
15 subsequent post-conviction review proceedings.  
16 And they have expressly reserved them in their  
17 proceedings here.

18 So I would suggest that it would not  
19 be appropriate to pretermitt that inquiry, that  
20 a state court should make that decision, and  
21 that those are factual findings that need to be  
22 made.

23 JUSTICE GINSBURG: But not if this is  
24 a case that comes under Cronic. If it's -- if  
25 it's a Cronic case, as Mr. Waxman urged that it

1 is, then there's no Strickland analysis,  
2 there's no prejudice inquiry; it's just  
3 automatic new trial because the Sixth Amendment  
4 right is violated, not --

5 MS. MURRILL: And -- and so, Justice  
6 Ginsburg, I would suggest that the Sixth  
7 Amendment is not violated until -- if it is a  
8 Strickland question, which we submit that it  
9 is, the Sixth Amendment isn't violated until he  
10 has the --

11 JUSTICE GINSBURG: But why isn't it --

12 MS. MURRILL: -- we have demonstrated  
13 both prongs.

14 JUSTICE GINSBURG: -- it a Cronin  
15 question? This is a -- a -- a lawyer who has  
16 said I concede my client did it, against the  
17 client's will, has made that concession.

18 Why isn't that a Cronin error?

19 MS. MURRILL: Because I think it's not  
20 a complete failure of adversarial testing and  
21 that it -- it fundamentally tested the state's  
22 case. It did not relieve the state of its  
23 burden of proof. The state put on overwhelming  
24 evidence of this man's guilt.

25 JUSTICE KENNEDY: Can I --

1 JUSTICE GINSBURG: What about the --

2 JUSTICE KENNEDY: Can I put in my  
3 notes in this case -- can I take away from your  
4 argument that the State of Louisiana says that  
5 if a defendant wants to plead not guilty, the  
6 defense attorney can plead guilty if the  
7 defense attorney thinks that's the best way to  
8 avoid the death penalty?

9 MS. MURRILL: No, Your Honor,  
10 because --

11 JUSTICE KENNEDY: So you do not agree  
12 with that proposition?

13 MS. MURRILL: I do not agree with that  
14 proposition --

15 JUSTICE KENNEDY: How is that  
16 proposition any different from what really  
17 happened in this case?

18 MS. MURRILL: Because the state was  
19 still put to its burden of proof. Because I  
20 think -- I think that in Florida v. Nixon, this  
21 Court did evaluate the nature of the defense  
22 itself and that it is not the equivalent of a  
23 guilty plea. So he didn't change the guilty  
24 plea. He tested the state's case. And he --  
25 he -- I mean, he --

1 JUSTICE GINSBURG: I thought -- I  
2 thought he said I'm relieving the prosecutor of  
3 that burden. That burden --

4 MS. MURRILL: He made that statement.  
5 He did make that statement in his closing  
6 arguments, but he couldn't actually do it. He  
7 had no power to relieve the state of its  
8 burden.

9 CHIEF JUSTICE ROBERTS: Is -- maybe  
10 this is the same question Justice Kennedy was  
11 getting at, but what if there was a discussion  
12 before and the client told the lawyer: So I  
13 understand you think you're doing your job  
14 keeping me from the death sentence, but I don't  
15 want -- it's worse for me to spend the rest of  
16 my life in jail, that's my perspective, so I  
17 don't want you to pursue your objective of  
18 saving the death penalty.

19 He said I've got this -- and so, if  
20 that's not the case, I don't want to make it an  
21 easier case on second degree. Our only chance  
22 is to defeat first-degree murder and here's how  
23 I'm going to do it; so you cannot stand up and  
24 say that he's -- he's guilty because that's  
25 just getting me life in prison and that's

1 worse.

2           And the lawyer -- does the lawyer then  
3 still have the -- the right to pursue his  
4 strategy? Still has the right to say: Yes,  
5 I'm going to tell you he's guilty, but he  
6 doesn't have the mens rea?

7           MS. MURRILL: I think in that -- I  
8 think at the -- in that situation, you probably  
9 are going to fail the deficiency prong of  
10 Strickland and probably the prejudice prong.

11           And -- and you are, in your  
12 hypothetical, talking about a rational  
13 conversation with someone who's cooperative. I  
14 mean, that's not correct on this case.

15           Mr. McCoy simply said I won't talk to  
16 you anymore, I want my alibi, I want to  
17 subpoena David Vitter, Senator David Vitter,  
18 and -- and put on all this crazy stuff. And --  
19 and I can -- I can prove --

20           JUSTICE SOTOMAYOR: So the further --

21           MS. MURRILL: -- that I wasn't -- that  
22 I was in Houston.

23           JUSTICE SOTOMAYOR: So the further  
24 footnote is it's -- only happens if your  
25 client's not rational, that that's where you

1 have the freedom to ignore your client?

2 MS. MURRILL: No, Your Honor. I think  
3 that -- I think that our rule, by placing it  
4 under Strickland, falls within the -- the --  
5 the principles that have been applied by state  
6 courts over and over again that you look at the  
7 totality of the circumstances, that the rules  
8 of ethics and norms of practice do inform  
9 counsel's judgment, and that in most cases you  
10 would validate the decision of the client.

11 JUSTICE KAGAN: But, Ms. Murrill, I --  
12 I think all these questions go to the same  
13 point, which is Strickland seems a very awkward  
14 fit here because there's nothing wrong with  
15 what this lawyer did if the goal is avoiding  
16 the death penalty. This lawyer probably did  
17 the best thing, the thing that a good lawyer  
18 would do if the goal were avoiding the death  
19 penalty.

20 The problem that this case presents is  
21 something different. It's the lawyer's  
22 substitution of his goal of avoiding the death  
23 penalty for the client's goal, as the Chief  
24 Justice said, I don't care about that. I don't  
25 want to avoid the death penalty. I -- I --

1 that's not my paramount goal. My paramount  
2 goal is to insist until my last breath that I  
3 didn't kill my family members.

4 MS. MURRILL: Well, Justice Kagan, I  
5 think the record reflects that's not -- that  
6 what Mr. McCoy wanted was to defeat the death  
7 penalty by the means that he wanted it, which  
8 was his alibi. So I --

9 JUSTICE GORSUCH: Well, let's take  
10 Justice Kagan's hypothetical then on its own  
11 terms. What would be the outcome in that case?

12 MS. MURRILL: I -- I think that  
13 probably to some degree goes back to Justice  
14 Roberts's hypothetical about a rational  
15 conversation with a defendant who was willing  
16 to have a conversation and not simply close the  
17 door to the discussion, which -- which is much  
18 more like the defendant in -- in Nixon.

19 JUSTICE GORSUCH: Let's posit all of  
20 that, that we have a competent, rational,  
21 thoughtful individual who makes a calculated  
22 decision autonomously, that that's the route he  
23 or she wishes to go.

24 Is it -- can we even call it  
25 assistance of counsel? Is that what it is when



1 a lawyer overrides that person's wishes?

2 MS. MURRILL: I -- I do believe it  
3 still falls within assistance of counsel. And  
4 I -- I think that that is answered by the  
5 deficiency prong and the norms of practice --

6 JUSTICE BREYER: Did he --

7 MS. MURRILL: -- and the totality of  
8 the circumstances. And he would probably win  
9 that.

10 JUSTICE BREYER: Did -- did -- I'm  
11 thinking back, I think the Chief asked you, or  
12 maybe it was Justice Kennedy, he quoted the  
13 language where he said "I've relieved you of  
14 your burden," so he says, "I've relieved you of  
15 your burden," he says to the jury, and he also  
16 says, "and he's guilty." That was earlier.

17 Now, in the context, was that --  
18 you're familiar with the record. All right.  
19 Was that, in fact, an admission that he  
20 committed a crime; namely, first-degree murder  
21 or second-degree murder or both, or are you  
22 saying, no, it was not an admission because --  
23 if -- if it was not an admission, then why  
24 didn't he tell the jury: But, you see, he had  
25 a mental state that makes it impossible for you

1 to convict. Or did he?

2 MS. MURRILL: He did. He did tell  
3 them that --

4 JUSTICE BREYER: He said you cannot  
5 convict because he has a mental state that  
6 prevents you from convicting him for either  
7 first- or second-degree murder?

8 MS. MURRILL: He argued that --

9 JUSTICE BREYER: And I'll find --

10 MS. MURRILL: -- consistently from  
11 start to finish.

12 JUSTICE BREYER: And he put -- and his  
13 closing statement said that too?

14 MS. MURRILL: Yes.

15 JUSTICE BREYER: Okay.

16 JUSTICE SOTOMAYOR: I'm sorry. I  
17 thought -- I'll go back to it, but I thought  
18 the essence of his closing statement was he's  
19 not deserving of the death penalty because, as  
20 you heard him, he's a sick man.

21 MS. MURRILL: It -- it -- the -- the  
22 specific words that he used -- the totality of  
23 his defense from start to finish was that he  
24 did not have the mens rea necessary to support  
25 the death penalty, the first-degree charge.

1 And that was the gist of it.

2 There's some creep in his arguments  
3 over time, I -- the words are there on the  
4 page, but I would submit to you, again, that is  
5 argument and that that is a deficiency question  
6 under Strickland, that that is always --  
7 argument has always been a question of  
8 deficiency under -- under Strickland. That's  
9 not a new proposition.

10 So I think that if we're -- he still,  
11 and I would submit go -- we should go back and  
12 look at what happened with the court and -- and  
13 that -- that ultimately to my very able friends  
14 to the left of me, this was not a court error.  
15 This was a counsel decision.

16 And the court and the prosecutor went  
17 over -- bent over backwards to try and protect  
18 this record. There was very little more that  
19 they could do to protect the record once trial  
20 had started, once they were at the point where  
21 they were choosing a jury.

22 So -- so I think that it was a very,  
23 very complicated situation and that when we get  
24 to that point, then it needs to be a Strickland  
25 question --

1 JUSTICE GINSBURG: I -- I still --

2 MS. MURRILL: -- because it's too  
3 hard.

4 JUSTICE GINSBURG: -- and when you say  
5 Strickland question, the -- the client says I  
6 didn't do it and I have a right to take that  
7 position. You agree that the client has a  
8 right to take that position?

9 MS. MURRILL: Certainly, Your Honor, I  
10 think the client can take that position.

11 JUSTICE GINSBURG: So the client can  
12 do that. And the client can say: When my  
13 lawyer tells you that I did it, he has violated  
14 my privilege against self-incrimination. He  
15 has incriminated me. He has said I've done  
16 something that I haven't conceded that I've  
17 done. What happened to my Fifth Amendment  
18 privilege?

19 MS. MURRILL: Justice Ginsburg, I  
20 think that the Fifth Amendment could be  
21 implicated in certain factual scenarios. I  
22 think in this particular case what we saw were  
23 a -- a repeated, consistent sequence of waivers  
24 of the Fifth Amendment so that everything he  
25 said was already in the record; that he had

1 repeatedly put this information with his alibi  
2 statements and his statements in the court  
3 where the court continued to Miranda and read  
4 him his rights over and over and over again.

5 And -- and so all of this information  
6 was in the record, and now counsel has to cope  
7 with it. And that was part of the problem too.

8 So it -- it -- it is a -- a situation  
9 where you certainly had a very difficult  
10 client. You had a death penalty case. We are  
11 very near the -- two days before trial, and  
12 that's where we are suggesting you draw the  
13 line and treat it as an ineffective assistance  
14 of counsel claim, but not that it doesn't  
15 implicate other rights potentially, depending  
16 on when it happens.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Three minutes, Mr. Waxman.

20 REBUTTAL ARGUMENT OF SETH P. WAXMAN

21 ON BEHALF OF RESPONDENT

22 MR. WAXMAN: I know I'll never --  
23 never do this. I'll try to make five points:

24 First, Justice Gorsuch, this is  
25 structural error. The fact of the matter is

1 that this was presented to the trial court not  
2 once but twice on the record that what the  
3 defendant was asking for is: I don't want my  
4 lawyer to admit that I am guilty, and the trial  
5 court's ruling in this case made that  
6 structural error and not ineffective -- not  
7 properly viewed as ineffective assistance of  
8 counsel. Just as in Gonzalez-Lopez and in  
9 Faretta, it was structural error.

10 Second, the notion that what Mr. McCoy  
11 was asking for was not that his lawyer not  
12 stand up and admit that he was guilty but that  
13 he -- he insists on putting on an alibi defense  
14 is simply refuted by the record.

15 At page 398 of the Joint Appendix,  
16 this is during an argument in -- six months  
17 before the trial, the argument was all about  
18 whether his -- Mr. McCoy's subpoenas had to be  
19 enforced or not and whether Mr. English should  
20 be supporting him.

21 Mr. McCoy tells the court: I am not  
22 asking him to validate any theory. This was --  
23 there was a dispute about whether Mr. English  
24 was, in fact, investigating his alibi defense.  
25 If there ever were a subsequent hearing about

1 that, that would be tested.

2 But this is flat out a case in which  
3 the judge was told as soon as this issue arose,  
4 twice on the record: I believe that I have an  
5 ethical duty to save my client's life; and the  
6 client telling the judge: I do not want my  
7 lawyer admitting that I am guilty. That's  
8 structural error.

9 Number 2, Justice Breyer, this was  
10 absolutely an admission of the charge -- guilt  
11 on the charged crime. At opening and at  
12 closing, Mr. English got up and said: I am  
13 telling you he is guilty of second-degree  
14 murder and he should spend the rest of his life  
15 in prison.

16 And under -- under Louisiana law, the  
17 jury -- the jury was required to be given the  
18 choice, the following choices, which it was:  
19 murder 1, murder 2, manslaughter, and not  
20 guilty. And there is no dispute in the record  
21 that murder 1, murder 2, and manslaughter all  
22 have exactly the same mens rea defense as  
23 murder 1. That is not what distinguishes those  
24 crimes.

25 As to Cronin, as -- as we've said, we

1 don't think -- I --

2 CHIEF JUSTICE ROBERTS: You can finish  
3 your third point.

4 MR. WAXMAN: As to Cronin, we don't  
5 think this is an ineffective assistance of  
6 counsel case, but it surely is -- it surely is  
7 Cronin if it were because if the constitutional  
8 right to defend means anything, it means the  
9 right to decide to test the prosecution on its  
10 burden of proof beyond a reasonable doubt.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 12:04 p.m., the case  
14 was submitted.)

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## Official

<b>1</b>	27:22,24 <b>agency</b> <sup>[6]</sup> 34:5,7,10,14,18,21 <b>agent</b> <sup>[3]</sup> 34:6 45:1,6 <b>agree</b> <sup>[9]</sup> 5:21 11:11 30:12 32:4 41:24 45:8 51:11,13 59:7 <b>agreeing</b> <sup>[1]</sup> 11:13 <b>agreement</b> <sup>[1]</sup> 8:16 <b>ahead</b> <sup>[3]</sup> 4:10 29:3 30:10 <b>alibi</b> <sup>[9]</sup> 17:22 36:12 39:12 41:10 53:16 55:8 60:1 61:13,24 <b>ALITO</b> <sup>[25]</sup> 10:7 18:18,22 20:3,7 21:6,18 22:9,13,16,18,22 26:20 28:24 29:3,25 30:2,13,19 39:22 40:18,21,23 42:16,20 <b>Alito's</b> <sup>[1]</sup> 24:15 <b>alleges</b> <sup>[1]</sup> 25:7 <b>allowing</b> <sup>[1]</sup> 41:16 <b>already</b> <sup>[1]</sup> 59:25 <b>alter</b> <sup>[1]</sup> 34:23 <b>although</b> <sup>[1]</sup> 18:7 <b>ambiguity</b> <sup>[1]</sup> 14:15 <b>Amendment</b> <sup>[30]</sup> 3:18 6:11 9:12 13:9 21:24 22:5 23:2 25:24 26:6,19 28:3,11 30:3 32:10,10,23 33:7 34:13 35:25 36:3,18,23 44:8 47:18 50:3,7,9 59:17,20,24 <b>amicus</b> <sup>[1]</sup> 28:12 <b>analogize</b> <sup>[1]</sup> 34:5 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