



POST MC COY: COUNSEL'S PEROGATIVE VS. CLIENT'S

BACKGROUND CASES

Florida v. Nixon 453 U.S. 175 (2004) where defense counsel had discussed with his capital client his intent on conceding guilt since guilt was in fact overwhelming. Counsel's strategy was to focus, instead, on mitigation at the penalty phase.

"[no] blanket rule" requires the defendant's explicit consent to implement a specific strategy.

McCoy v. Louisiana __U.S. __; 138 S.Ct. 1500 (2018)

"defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."

FIRST CALIFORNIA CASES APPLYING MC COY OUTSIDE THE CAPITAL CASE CONTEXT

People v. Eddy (2019) 33 Cal.App.5th 472

The defendant was charged with non-capital first degree murder.

Defendant had directed counsel to argue that he was factually innocent. Instead, defense counsel conceded that the defendant committed the killing, arguing that it was manslaughter.

Held: Error under *McCoy*. Further, the failure of the defendant to object during final argument did not matter.

Conviction reversed, IAC.

People v. Flores (2019) 34 Cal. App. 5th 270

Applied *McCoy* in this attempted murder case of a police officer using a vehicle.

The defendant repeatedly objected to his lawyer's concession that he was the driver of the car, arguing instead *no mens rea*.

McCoy is controlling and conviction reversed.

NO MC COY ERROR BECAUSE THE RECORD DID NOT ESTABLISH THAT BEFORE OR DURING TRIAL, DEFENDANT OBJECTED TO THE CONCESSION

People v. Franks (2019) 35 Cal.App.5th 883

The defendant refused to communicate with his counsel. He told the police he was not guilty, but counsel implicitly conceded during argument that the defendant killed the victim. No violation of *McCoy*. The defendant never told his lawyer he wanted to dispute guilt.

People v. Palmer (2020) __ Cal.App.5th __; D074240

No *McCoy* violation.

This was a murder prosecution of a love interest. Defense counsel argued that a reasonable interpretation of the video evidence was that defendant was present but that he didn't have an intent to kill.

No *McCoy* violation because there was nothing in the record to establish that the defendant either before or during trial wanted to assert his innocence.

People v. Bernal (2019) 42 Cal.App.5th 1160

"*McCoy* does not assist defendant because the record here does not reflect a directive to counsel that defendant's objective at trial was to maintain innocence on all charges." *Id.*, at 1166.

See also: *People v. Burns* (2019) 38 Cal.App.5th 776: same result

People v. Lopez (2018) 31 Cal.App.5th 55 (*Lopez II*)

Murder, DUI, and hit and run prosecution. Defense counsel conceded the hit and run and essentially argued murder was overcharged. No *McCoy* foul because there was no evidence that the defendant objected to the concession that the defendant was guilty of a count.

People v. Marsh (2019) 37 Cal. App. 5th 474.

Case does not even mention *McCoy*, but relies on *Lopez II*, finding no violation.

Here, the defendant was charged with assault with a deadly weapon and vandalism. He was alleged to have manipulated the victim's car brakes so that they wouldn't work and the victim would crash. Counsel indirectly conceded guilt on the vandalism charge during closing argument.

Court's attempt to limit the *McCoy* principle when it held: "defense counsel's alleged concession of guilt on count 2 did not change the prosecutor's burden of proof, or otherwise 'limit the scope of the jury's role' in the instant case." (quoting *Lopez II*)

In re Smith (2020) __ Cal.App.5th __; E073871
Limited *McCoy*.

First degree murder prosecution at Patton State Hospital. Defendant told police he had committed the offense. At trial, defense counsel made no opening statement.

Defendant testified that his confession was a lie and he denied responsibility.

Defense counsel argued defendant's culpability, but that it was only second degree, not first-degree murder. As counsel was arguing, the defendant objected.

HOLDING: Since the record did not establish that the defendant insisted on an assertion of innocence before or during trial, *McCoy* did not require reversal.

IAC, McCOY DURING PENALTY PHASE

People v. Amezcua and Flores (2019) 6 Cal.5th 886.

Counsel did not present mitigation at penalty phase. No IAC on appeal because defendants directed that they did not want any mitigation presented. "Choice of the defense objective is the client's prerogative." (*Id.*, at 926, citing *McCoy*.)