REL: May 29, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0169

Brodrick Lewayne Morgan

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-17-3266)

MINOR, Judge.

We consider whether defense counsel violates his client's Sixth Amendment right to set the objective of his defense when defense counsel disagrees with the defendant's decision to

claim absolute innocence and advises the trial court--but not the jury--that he believes that self-defense is his client's only viable defense. The answer is no.

The defendant, Brodrick Lewayne Morgan, contends that he wanted to pursue a defense of absolute innocence at his murder trial for the shooting death of Drakkar Christian but that his trial counsel wanted to--and did--argue that Morgan acted in self-defense. Morgan argues that under McCoy v. Louisiana, ___ U.S. ___, 138 S. Ct. 1500 (2018), a defendant's Sixth Amendment[1] right to determine the objective of the defense is violated "any time counsel usurps the defendant's control over the ultimate objective of the case," whether counsel concedes guilt to the jury or not. Morgan argues that he had a Sixth Amendment right to determine the objective of his defense--including the right to deny that he shot Christian, even in self-defense--and that because his counsel presented, he says,

[1]The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to have "the Assistance of Counsel for his defence." U.S. Const. amend. VI.

a theory of self-defense, under McCoy Morgan is entitled to a new trial.[2]

We hold, as a matter of first impression, that McCoy does not extend to those situations in which defense counsel does not present to the jury a defense that is tantamount to a concession of guilt.[3]

"'The standard of review for pure questions of law in criminal cases is de novo.'" Stallworth v. State, 171 So. 3d 53, 63 (Ala. Crim. App. 2013) (quoting Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003)).

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[2]The jury convicted Morgan of murder, see § 13A-6-2(a)(1), Ala. Code 1975, and the circuit court sentenced him as a habitual felony offender to life in prison without the possibility of parole. Morgan filed a motion for a new trial, which the circuit court denied. This appeal followed.

[3]No Alabama appellate court has considered McCoy, and of the two opinions of the United States Court of Appeals for the Eleventh Circuit that discuss McCoy, neither addresses the issue presented in this case--that is, whether McCoy extends to those situations in which defense counsel does not concede the defendant's guilt to the jury. See Saunders v. Warden, Holman Correctional Facility, [No. 19-10817, Feb. 21, 2020] ___ F. App'x ___ (11th Cir. 2020) (not selected for publication in the Federal Reporter); Thompson v. United States, 791 d. App'x 20 (11th Cir. 2019) (not selected for publication in the Federal Reporter).

Although Morgan does not challenge the sufficiency of the evidence, a summary of the State's evidence is necessary to put into context Morgan's argument on appeal.

The State's evidence at trial showed that on the evening of May 26, 2017, Morgan got into a dispute with Shaneria Nash, the mother of Morgan's six-year-old son, at a party at Shaneria's cousin Brittany's apartment. Several people at the party, including Christian, tried to calm Morgan down and get him to leave. Morgan eventually left the apartment with his son, and, after dropping off his son with Angela Nash, Shaneria's mother, he returned to Brittany's apartment. Several men at the party went outside and confronted Morgan. Christian told Morgan that the police were on their way and to "calm down." Shaneria's sister, Kameran Smith, testified that she did not see Christian threaten Morgan and that no one pulled a gun on Morgan. According to Kameran, Trayveon[4] was the only person at the party who was mad and who wanted to fight Morgan. Morgan left the party and returned to Angela's house. He parked his car in a dark area behind her house and did not get out of the car.

[4]Trayveon's last name is not provided in the record.

After Morgan left Brittany's apartment, Christian took Kameran and her infant daughter to Angela's house. Morgan walked up to them and accused Christian of being romantically involved with Shaneria. Christian, who was getting Kameran's daughter's infant carrier out of the car, said nothing to Morgan. As Christian began walking toward Angela's house carrying Kameran's daughter in the infant carrier, Morgan went to his car and returned carrying an AK-47 assault rifle. Morgan came up beside Christian and again confronted him about whether he was involved with Shaneria. Morgan told Christian, "I know you got your gun." (R. 89.) Angela tried to grab the infant carrier from Christian, but he would not let go of it. Angela testified that she heard one gunshot and then "we all fell." Kameran testified that she saw Morgan's gun and she heard a gunshot. She saw Christian drop to the ground still holding the infant carrier. Angela testified that she never saw Christian with a gun, and Kameran testified that, although she knew that Christian had a gun and that he always carried the gun, she never saw Christian reach for his gun. Both Angela and Kameran testified that after Christian was shot they saw a handgun lying on the ground.

The State presented evidence that the handgun found on the ground after the shooting belonged to Christian. Investigators did not find any shells on the scene matching the handgun, but they found a spent shell casing at the scene that matched the shell casings commonly used in AK-47 rifles. The medical examiner testified that Christian died from a gunshot wound to his abdomen and that the muzzle of the gun was in contact with his skin when he was shot.

Morgan's argument on appeal--that his trial counsel did not honor his "clearly-stated theory of defense"--rests entirely on McCoy, supra. In McCoy, the United States Supreme Court held that defense counsel may not admit the defendant's guilt over the defendant's express objection to the contrary. The facts and holding of McCoy are sufficiently set out by the Texas Court of Criminal Appeals in Rubio v. State, 596 S.W.3d 410 (Tex. Crim. App. 2020):

> "In May 2018, the United States Supreme Court decided McCoy v. Louisiana. Id. at 1503–07. In McCoy, Robert McCoy was charged with first-degree murder for killing the mother, stepfather, and son of his estranged wife. McCoy pleaded not guilty to the charges. The State gave notice of intent to seek the death penalty. Before trial, McCoy's attorney concluded the evidence against his client was overwhelming and that, absent a concession at the guilt stage that he was the killer, a death

sentence was inevitable. When told that his attorney planned to concede his commission of the murders at trial, McCoy was 'furious,' and he instructed his attorney 'not to make that concession' and to pursue acquittal. Nevertheless, in his opening statement at trial, McCoy's attorney told the jury there was 'no way reasonably possible' that they could hear the prosecution's evidence and reach 'any other conclusion than Robert McCoy was the cause of [the victims'] deaths.' McCoy protested, and out of the jury's earshot, he told the trial court that defense counsel was 'selling [him] out' by maintaining that McCoy 'murdered' his family. When allowed to proceed with his opening statement, defense counsel told the jury the evidence was 'unambiguous' and that McCoy 'committed three murders.' He argued, however, that McCoy did not have the requisite mental state to warrant a first-degree murder conviction and was guilty, instead, of the lesser-included offense of second-degree murder.

"Testifying at trial, McCoy maintained his innocence and presented an improbable alibi. He claimed the victims were killed by the local police, and he had been framed by a conspiracy of state and federal officials, his attorney, and the trial judge. In his closing argument, defense counsel reiterated that McCoy was the killer, and he told the jury he 'took [the] burden off of [the prosecutor]' on that issue. The jury convicted McCoy of first-degree murder on all three counts. At the penalty phase, McCoy's attorney again told the jury, 'Robert McCoy committed these crimes,' but he asked for leniency due to McCoy's serious mental and emotional issues. The jury sentenced McCoy to death.

"The Supreme Court reversed McCoy's conviction and remanded the case for a new trial. The Court held that the Sixth Amendment to the United States Constitution demands that 'a 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.' Id. at 1505. The Supreme Court explained that maintaining one's innocence is not merely an issue of trial tactics, i.e., the attorney's strategic choices about how best to achieve a client's objectives. See id. at 1508. Rather, the decision to assert innocence is an objective of representation. Id. at 1505, 1508. As such, it is a decision reserved for the client, and his attorney may not override that objective by conceding guilt:
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> > "'With individual liberty--and, in capital cases, life--at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.'
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> "Id. at 1505; see also id. at 1509 ('When a client expressly asserts that the objective of "his defen[s]e" is to maintain innocence of the charged criminal acts, his lawyer must abide by the objective and may not override it by conceding guilt.')."

Rubio, 596 S.W.3d at 422-23. McCoy is concerned, then, with whether defense counsel overrides a defendant's express wish to maintain his innocence by admitting the defendant's guilt to the jury.

Unlike in McCoy, when the defendant told his counsel before trial that he did not want to concede guilt to the

jury, here the first suggestion in the record of self-defense comes from a discussion between the circuit court and counsel after trial had begun. During a brief recess during the testimony of the State's second witness, the circuit court asked defense counsel, outside the presence of the jury, whether Morgan intended to assert a stand-your-ground defense.

> "The Court: I think it was in relation to the opening statement where the defense mentioned something about self-defense. And Mr. Wilson [the prosecutor] basically came up, and I don't remember if it was in the form of an objection or what it was, but mentioned the stand-your-ground issue and that that had not been raised in the past, and we haven't specifically addressed that. But I just want to make sure, Mr. Mathis, that's something that has at least been considered by the defense and didn't want any kind of pretrial stand-your-ground immunity type hearing on this case; is that right?
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> "Mr. Mathis [defense counsel]: It's untimely anyway. I'm not going to make a stand-your-ground defense. It will be part of the case that would go back to the jury, but nothing whatsoever as far as me--and I may ask you to rule at the close of the State's case, but nothing pretrial. That's untimely. I wouldn't do it."

(R. 34-35.) (Emphasis added.) The record on appeal does not include a transcript of the opening statements. See § 12-17-275, Ala. Code 1975 ("The official court reporter shall ... where directed by the judge or requested by a party thereto, he shall take full stenographic notes of the oral testimony

and proceedings, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon and exceptions taken or reserved thereto ...." (emphasis added)); see also Reeves v. State, 518 So. 2d 168, 172 (Ala. Crim. App. 1987) ("Alabama law does not require the court reporter to take down the complete argument of counsel."). This Court is limited to reviewing the record on appeal, and we will "'not presume a fact not shown by the record and make it a ground for reversal.'" Gamble v. State, 791 So. 2d 409, 418 (Ala. Crim. App. 2000) (quoting Carden v. State, 621 So. 2d 342, 345 (Ala. Crim. App. 1992)).

But even taking as true the circuit court's recollection of what Morgan's counsel said to the jury in his opening statement, there is nothing in the record reflecting that Morgan informed his counsel, before opening statements, that he did not want to argue self-defense to the jury. In McCoy, the Court distinguished those situations in which the defendant expressly objects to a concession of guilt from those situations in which the defendant is merely silent and

neither consents nor objects to counsel's proposed strategy of conceding guilt.

> "In Florida v. Nixon, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial 'when [the] defendant, informed by counsel, neither consents nor objects,' id., at 178, 125 S. Ct. 551. In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. Id., at 186, 125 S. Ct. 551. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, id., at 181, 125 S. Ct. 551, '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy, id., at 192, 125 S. Ct. 551.
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> "....
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> "Florida v. Nixon ... is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon 'was generally unresponsive' during discussions of trial strategy, and 'never verbally approved or protested' counsel's proposed approach. 543 U.S., at 181, 125 S. Ct. 551. Nixon complained about the admission of his guilt only after trial. Id., at 185, 125 S. Ct. 551. McCoy, in contrast, opposed [his lawyer's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. See App. 286–287, 456, 505–506. See also Cooke [v. State], 977 A.2d [803], at 847 [(Del. 2009)] (distinguishing Nixon because, '[i]n stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but

> mentally ill, and asserted his factual innocence consistent with his plea of not guilty'). If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way. See Gonzalez [v. United States], 553 U.S. [242], at 254, 128 S. Ct. 1765 (2008) (Scalia, J., concurring in judgment) ('[A]ction taken by counsel over his client's objection ... ha[s] the effect of revoking [counsel's] agency with respect to the action in question.')."

McCoy, ___ U.S. ___, 138 S. Ct. at 1505-10. Because there is nothing in the record showing that Morgan told his counsel, before trial, that he wanted to pursue a theory of absolute innocence rather than a theory of self-defense, Morgan's counsel's statements about self-defense in his opening statement did not, as Morgan argues, violate McCoy or Morgan's Sixth Amendment right to determine the objective of his own defense.[5] Cf. Turner v. State, 570 S.W.3d 250, 276-77 (Tex.

[5]In his brief, Morgan states:

> "At trial, Mr. Morgan wanted to present a theory of defense showing that he did not shoot Drakkar Christian on the night in question. He wanted to pursue a theory of absolute innocence. Counsel admitted this on the record. See R. 170 ('My client is telling me that I can't use self-defense from the beginning.') Despite this directive from his client, counsel ignored Mr. Morgan's instruction and prepared for a showing of self-defense."

Crim. App. 2018) ("[I]t is apparent from the defense's opening statement that his attorneys knew at the beginning of trial that their strategy was contrary to Appellant's. McCann's statement that Appellant 'can't admit what he did, to himself or anybody else' shows that he knew Appellant denied killing the victims. At that point, McCann clearly knew he and Appellant were still at odds on how to proceed, and that fact would have been apparent to the judge and jury as well.").

Even so, Morgan argues, his counsel's calling Shaneria Nash as a witness "clearly centered around setting up testimony that Christian had threatened Mr. Morgan" and was testimony that Morgan's counsel used, Morgan says, "to set up

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(Morgan's brief, p. 15.) But this admission by Morgan's counsel came much later during the trial, after the State rested, and Morgan's counsel did not pinpoint the timing of Morgan's rejection of self-defense as "from the beginning":

> "Mr. Mathis [defense counsel]: Judge, I have several written requested charges that I would like to present. I have a problem in that I have planned to try this case based on self-defense from the beginning. My client is telling me that I can't use self-defense."

(R. 170.)

his theory that Mr. Morgan acted in self-defense." (Morgan's brief, p. 16.)

Shortly before the State rested, Morgan's counsel informed the circuit court, outside the presence of the jury, that he was having trouble getting one of his witnesses, Shaneria Nash, to appear at trial. He told the circuit court that Shaneria's testimony "was essential to our defense." (R. 139.) The circuit court issued a subpoena for Shaneria to appear at trial. After the State rested, the circuit court, while waiting on Shaneria to arrive, discussed jury charges with the parties. Morgan's attorney informed the circuit court that Morgan did not want to pursue a defense of self-defense.

> "Mr. Mathis [defense counsel]: Judge, I have several written requested charges that I would like to present. I have a problem in that I have planned to try this case based on self-defense from the beginning. My client is telling me that I can't use self-defense. But I don't think, if we don't use self-defense, that we have any defense at all. And I have prepared requested jury instructions asking that the Court charge on self-defense, among other things.
>
> "....
>
> "[Mr. Mathis:] Until I can get a response from my client about that, thus far, he has told me, no, I

> am not to claim self-defense. Am I wrong; do you not want me to do it?
>
> "(The defendant shook head).
>
> "[Mr. Mathis:] He's shaking his head no. He said he did not want me to do it. I don't have any requested jury instructions, none whatsoever.
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> "The Court: So a burden of proof case?
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> "Mr. Mathis: Yes, sir."

(R. 170-71.)

When Shaneria arrived, the circuit court allowed Morgan's counsel to question Shaneria outside the presence of the jury. Shaneria testified that she saw Christian with a gun on the day of the shooting but that when she told him to put the gun away he put it in the trunk of his car. She testified that, although Trayveon was acting like he had a gun when he confronted Morgan outside the apartment, she saw no one with a gun when they were outside the apartment with Morgan. Shaneria denied that she told Morgan's counsel before trial that she had seen Christian and Trayveon with guns when they were outside talking with Morgan at Brittany's apartment.

After Shaneria's testimony outside the presence of the jury, Morgan's counsel told the circuit court that Shaneria had told him before trial that she had seen Trayveon and

Christian with guns when they confronted Morgan outside the apartment.

> "Mr. Mathis: I based my entire case coming here this week on her testimony, and now I don't have it. I feel like I have been thrown under the bus. I feel like he has, too, and at this point I move for a mistrial. I don't know anything else I can do."

(R. 183.) The circuit court denied Morgan's motion for a mistrial, and Morgan's counsel decided to call Shaneria as a witness, stating:

> "I would like to call [Shaneria] to testify to what she talked about just a minute ago .... I do want her to at least testify that one guy was out there acting like he had a gun and the other guy was out there with him and that she had seen the other guy with a gun earlier in the day."

(R. 186.) In front of the jury, Shaneria testified that, after Morgan left Brittany's apartment, Shaneria looked outside and saw several people, including Christian, around Morgan. She testified that "Tray[veon] was the one that--he was out there clenching like he got a gun, and he was the loudest, doing all this motion." Morgan's counsel asked her, "Did you see anybody else with a gun?" and Shaneria said, "Earlier that day." Morgan's counsel asked Shaneria, "Who did you see earlier in the day with a gun?" Shaneria responded, "Drakkar [Christian]." (R. 189-90.)

After Shaneria testified, Morgan's counsel again brought up to the circuit court his disagreement with Morgan about whether to claim that Morgan shot Christian in self-defense.

> "Judge, I would like to ask for a charge on self-defense. I have been told by my defendant I cannot do that. I need to put on the record at this point that while we were waiting, trying to find [Shaneria], the defendant indicated to me that--when I was trying to explain to him about self-defense and the necessity for it, his testimony, that it was just too much for him right now; that he had been in [and] out of mental institutions all his life. I was hired to represent him in January. This is the very first time anybody ever told me anything about a mental problem, this afternoon, while we were waiting for [Shaneria] to come, and I was trying to talk him into a self-defense charge. I have been trying cases for 37 years, and I have never been posed with a problem like this at this particular time in the trial. But because of that, I still believe I need a charge on self-defense. And at this point, I believe I need to move for a mistrial because this individual may not be capable of understanding well enough what's going on as far as this case is concerned to assist his attorney ...."

(R. 206-07.) The State argued against charging the jury on self-defense, and Morgan's counsel responded, "Judge, I have been told not to even argue." (R. 208.) The circuit court did not charge the jury on self-defense.

Morgan argues that by calling Shaneria to testify in front of the jury, Morgan's counsel "continued to pursue self-defense even though Mr. Morgan told him not to." But Morgan

admits that Shaneria's testimony outside the presence of the jury "did not support counsel's preferred theory of self-defense" and would have "undercut a theory of self-defense." (Morgan's brief, p. 17.) Although Morgan's counsel apparently hoped that Shaneria's testimony about Christian having a gun earlier in the day would aid Morgan's defense, that testimony, without more, cannot be considered a presentation of self-defense to the jury. And, although Morgan's counsel was seemingly caught off guard by Morgan's mid-trial refusal to allow him to argue self-defense to the jury, from that point forward Morgan's counsel acquiesced--however reluctantly--to Morgan's wishes and did not present a theory of self-defense to the jury.[6]

Morgan argues that, even if his counsel did not present a theory of self-defense to the jury, under McCoy, he says, "a concession of guilt in front of the jury" is the result of a Sixth Amendment violation, not the violation itself.

[6]Although defense counsel's closing argument is not part of the record on appeal, in its order denying Morgan's motion for a new trial the circuit court noted that "[u]nlike the attorney in McCoy v. Louisiana ... defense counsel in this case did not admit Morgan's guilt during his trial [and] [c]ounsel also formulated his closing argument to reflect the wishes of his client as much as possible." (C. 32.)

(Morgan's reply brief, p. 3.) (emphasis added). Morgan cites United States v. Read, 918 F.3d 712 (9th Cir. 2019), in which the United States Circuit Court of Appeals for the Ninth Circuit held that a court commits reversible error "by permitting defense counsel to present a defense of insanity over a competent defendant's clear rejection of that defense." Read, 918 F.3d at 719. Morgan contends that "the constitutional violation in Read occurred the moment counsel usurped control of the overall objective from the defendant" and that what Read's counsel said to the jury was simply "evidence of that usurpation, not the usurpation itself." (Morgan's reply brief, p. 4.) So, Morgan says, his counsel's "repeatedly" telling the circuit court that he wanted to argue self-defense was in itself a usurpation of Morgan's right to determine the objective of his defense, regardless of what Morgan's counsel argued to the jury.

In Read, the defendant stabbed his cellmate 13 times with a homemade knife. Read claimed that he had no memory of the attack and, based on a mental examination by a neuropsychologist, Read's appointed counsel filed a notice of intent to plead not guilty by reason of insanity. Read

requested to proceed pro se, and the trial court appointed his counsel as standby counsel. Before trial Read's standby counsel informed the trial court that Read was considering abandoning an insanity defense "in favor of a defense based on demonic possession" and, at the final pretrial conference, Read confirmed that he did not wish to present an insanity defense. Read, 918 F.3d at 716-17. The trial court considered whether it should reappoint Read's standby counsel as his counsel. Read's standby counsel told the trial court that the reason Read had wanted to proceed pro se in the first place was because Read did not want to present an insanity defense and that, if reappointed, he (standby counsel) would present an insanity defense. Over Read's objection the trial court reappointed standby counsel to serve as Read's counsel, and at trial Read's counsel presented an insanity defense to the jury.

The Ninth Circuit held that "[a]n insanity defense is tantamount to a concession of guilt" and that, "in light of McCoy, Read's Sixth Amendment rights were violated when the trial judge permitted counsel to present an insanity defense against Read's clear objection." Read, 918 F.3d at 719, 720.

In Read, as in McCoy, it was not the disagreement between the defendant and his counsel--which, in both cases, was brought to the trial court's attention before trial--that created the Sixth Amendment problem, but defense counsel's presentation to the jury, against the defendant's express wishes, of a defense that was either an actual concession of guilt or "tantamount to a concession of guilt." And in McCoy, the Court did not rest the Sixth Amendment violation on McCoy's counsel's disagreement with McCoy in the trial judge's presence about whether to concede guilt, but on McCoy's counsel's insistence, despite his client's express wishes, to concede McCoy's guilt to the jury. The Court stated:

> "Once [McCoy] communicated that to court and counsel, strenuously objecting to [his counsel's] proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of [McCoy's counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment."

McCoy, 138 S. Ct. at 1512. The Sixth Amendment violation in McCoy occurred, not when McCoy's counsel made the trial court aware of McCoy's objection to a concession of guilt, but when McCoy's counsel conceded McCoy's guilt to the jury over McCoy's objection. Here, though, because Morgan's counsel did

not present to the jury a defense tantamount to a concession of guilt, McCoy is inapplicable and there is no Sixth Amendment violation.

In holding that McCoy does not apply when defense counsel does not concede the defendant's guilt to the jury, we do not reach the issue whether defense counsel's presentation of a theory of self-defense to the jury over the defendant's objection would be "tantamount to a concession of guilt." See Read, 918 F.3d at 720. In Read, the Ninth Circuit said that "[a]n insanity defense is tantamount to a concession of guilt" and, like a concession of guilt, "carries grave personal consequences that go beyond the sphere of trial tactics." The Court said:

> "A defendant may not wish to plead insane because of a firmly held feeling that he was not mentally ill at the time of the crime. Just as conceding guilt might carry 'opprobrium' that a defendant might 'wish to avoid, above all else,' McCoy, 138 S. Ct. at 1508, a defendant, with good reason, may choose to avoid the stigma of insanity. A defendant may also prefer a remote chance of exoneration to the prospect of indefinite commitment to a state institution."

Read, 918 F.3d at 720–21 (some internal quotations and citations omitted.) The Alabama Supreme Court has said, though, that self-defense is "condoned" as a "complete defense

to a killing." Carter v. State, 843 So. 2d 812, 815 n.2 (Ala. 2002).

> "For public policy reasons, some motives for killing are deemed criminally less culpable than other motives. Provocation manslaughter is one of those, probably because the people sympathize with, but do not condone, the response. In contrast, self-defense is condoned because it is a complete defense to a killing."

Because we have held that McCoy does not extend to those situations in which defense counsel does not concede a defendant's guilt to the jury, we need not decide today whether self-defense is "tantamount to a concession of guilt" so that defense counsel violates McCoy if he or she argues self-defense to the jury over the defendant's objection.[7]

The judgment of the circuit court is due to be affirmed.

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[7]We also note that, in his dissent in McCoy, Justice Alito believed that McCoy's holding was "effectively confined" to capital cases, and other courts have questioned whether McCoy applies in noncapital cases. See, e.g., People v. Kuntz, [No. F074975, Jan. 7, 2020] (Cal. Ct. App. 2020) (not reported in official reporter); Thompson v. State, [No. 02-18-00230-CR, Mar. 7, 2019] (Tex. App. 2019) (not reported in South Western Reporter). But cf. Thompson v. Cain, 433 P.3d 772, 774 (Or. Ct. App. 2018) (vacating noncapital defendant's judgment under McCoy); People v. Eddy, 244 Cal. Rptr. 3d 872, 880 (Cal. Ct. App. 2019), as modified on denial of reh'g (Apr. 5, 2019) (applying McCoy and reversing conviction in noncapital murder case). Because we have held that McCoy is inapplicable here for other reasons, we express no opinion about whether McCoy would apply in other noncapital cases.

AFFIRMED.

Windom, P.J., and Kellum and McCool, JJ., concur. Cole, J., recuses himself.