The Self-Autonomous Accused: Is the Court-Martial System Ready for the Effects of *McCoy v. Louisiana*?

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"I don't have to be what you want me to be. I'm free to be who I wanna be and think what I wanna think."[1]

I. Introduction

As a trial defense counsel, practitioners, maybe for the first time in their career, feel like they are finally free to practice law as they see fit. Unrestricted from the everyday confines and oversight that is present in military justice offices, defense counsels are free to try their cases. Defense counsel do not have to structure their decisions around the staff judge advocate's, or more importantly, the general court-martial convening authority's military justice philosophy; they are permitted to practice in the best interests of their client. Because of this freedom, defense counsel have traditionally wielded an enormous amount of control in the military justice system—it was seen as strictly within their purview to dictate the strategy and the tactical direction that the accused's court-martial will

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[1] Muhammad Ali, Post-Heavyweight Championship Fight Press Conference at the Miami Beach Convention Center (Feb. 26 1964).

take.[2] Defense counsel have the ability to choose which witnesses to call, what objections to make, how to make and structure their opening statement, and the arguments to advance in closing.[3] At first glance, it appears that defense counsel are on an island; engaging in possibly the only truly autonomous practice of law in the Army, beholden to no master.

This thought, present in the mind of many defense counsel, poses an important question: what role does the accused play in the court-martial process? It is, after all, the accused's liberty that is at stake. The balance of power between defense counsel and the accused is something constantly fought over, written about, and fine-tuned by the appellate court system. For years, inherently tactical decisions were left to the attorney to make; defense counsel had no obligation to seek an accused's affirmative permission to make tactical decisions, as long as those decisions would not render defense counsel's performance ineffective.[4] Under this standard, the accused was left to live with the consequences of their attorney's tactical decisions or risk the perilous decision to proceed to trial representing themselves.[5]

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[2] *See* Florida v. Nixon, 543 U.S. 175, 187 (2004) ("An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" (internal citations omitted)).

[3] *See* Gonzalez v. United States, 553 U.S. 242, 249 (2008) ("Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote."); *see also* Taylor v. Illinois, 484 U.S. 400, 418 (1988) ("Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.").

[4] *See Nixon*, 543 U.S. at 192 ("When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.").

[5] *See* Faretta v. California, 422 U.S. 806, 832 (1975) (establishing the Sixth Amendment right to self-representation).

This division of responsibility left one question unanswered in Sixth Amendment jurisprudence: could a defense counsel make a tactical decision over their client's affirmative objection? In other words, could an attorney substitute their better judgment, which presumably has the benefit of at least three years of legal education, over their client's wishes? What is the right approach when a defense attorney decides to make a strategic factual admission, essentially conceding an element of an offense, when the accused objects to the admission—can they make that call over their client's protest? Viewing history, it seems the answer should be yes—the attorney gets to make the tactical calls. They are, after all, the trained, legal professional, and these are legal questions and strategies. What possibly no one expected is that the United States Supreme Court, in answering this question, would establish a new fundamental constitutional right: the right to factual autonomy.[6]

In announcing this new rule in its 2018 decision, *McCoy v. Louisiana*, the Supreme Court, perhaps unintentionally, initiated a fundamental shift in the way defense attorneys must engage in the practice of law and the way appellate courts judge their actions. Rather than focus on the effectiveness of the attorney's trial strategy, as the Court did pre-McCoy, courts now examine whether defense attorneys and the accused agree on the "fundamental objectives" of the defense, with a particular focus on whether the accused voiced an affirmative objection to any factual concessions their attorney made during the trial.[7] Presently, attorneys have to consider not only the effectiveness of their strategic decisions, but also must obtain consent, or at least avoid an affirmative objection to any factual concessions they think are in their client's best interests. Although seemingly a small distinction, this is not an inconsequential change. It has dramatically shaped the criminal practice of law in the United States—in

[6] *See* McCoy v. Louisiana, 584 U.S. 414, 422 (2018) (holding the autonomy to decide the objective of the defense is to assert innocence is a decision left to the client).

[7] *See id.* at 426-27 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence . . . the violation of [the accused's] protected autonomy right was complete when the court allowed counsel to usurp control of an issue with [the Accused's] sole prerogative.") (citing Strickland v. Washington 466 U.S. 668 (1984)).

the two years following McCoy, courts appear to have cited the opinion nearly every other day.[8]

This seismic shift would seemingly have repercussions for defense counsel out in the field trying their cases. Surprisingly though, the military appellate system has cited *McCoy* only three times.[9] This lack of attention by military appellate courts does not mean the accused's fundamental right to factual autonomy can be ignored; it means it is there lurking in the shadows. It is only a matter of time before the military appellate system—which is inclined to be paternalistic in its review of the defense counsel's representation of an accused—is presented with the right case, and then the broad-sweeping principles of *McCoy* will find their way into the court-martial practice.[10] Defense practitioners, and the court-martial system as a whole, should not wait for this imposition to act. Federal and state caselaw provide the answers to how the President, military judges, and the trial defense services can shape military justice practice now to prevent mass appellate reversals once this new fundamental right becomes firmly rooted. The military justice system can adjust now to the autonomous accused before it is forced to painfully adjust after the fact.

To proactively account for the imposition of the right to factual autonomy, this paper suggests four changes to the military justice practice. First, defense counsel should realize from the outset that they do not possess all the autonomy in their practice. The accused should be informed from the initiation of the attorney-client relationship that they have the prerogative to decide what factual concessions their defense counsel makes during the course of their court-martial. Defense counsel are already cautioned to advise their clients with a standard form, this form should be updated to account for the right announced in *McCoy*. Second, the Army's Rules of Professional Conduct, found in Army Regulation (AR) 27–26, should be updated to account for the accused's right to factual autonomy. Third, Rules for Court-Martial (RCM) 706 and 909 should be

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[8] *See* Rosemond v. United States., 958 F.3d 111 (2d Cir. 2020) *petition for cert. filed,* 2020 WL 5991229 (U.S. Sept. 28, 2020) (No. 20–464).

[9] *See* United States v. Hasan, No. 21-0193, 2023 CAAF LEXIS 639, at *16 (C.A.A.F. Sep. 6, 2023); United States v. Lancaster, No. 20190852, 2021 CCA LEXIS 219 at *3–7 (A. Ct. Crim. App. May 6, 2021); United States v. Hasan, 80 M.J. 682, 693 (A. Ct. Crim. App. 2020).

[10] *See infra* Section III (This paper will address the hallmarks of the military appellate system that make it susceptible to a broad interpretation of *McCoy* in Section III.).

revamped to account for the accused's role in shaping the overall goals of their court-martial. These standards need to be more exacting to ensure the accused is competent to make the decisions about the "fundamental objectives of the [accused's] representation."[11] Finally, the military judge should be required to engage in a colloquy with the accused to ensure that they do not object to any factual concessions their defense counsel make during the course of the court-martial.

II. The Sixth Amendment and *McCoy*: The Genesis and Development of Factual Autonomy

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[12]

Among the rights conferred to an accused, the Supreme Court has stated the right to counsel, "[I]s among the most fundamental . . . 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'"[13]

A. *Faretta* and the Personal Guarantees of the Sixth Amendment

Any consideration of the reaches of the Sixth Amendment right to assistance of counsel must begin with the Supreme Court's 1975 decision in *Faretta v. California*. Here, the accused, charged with grand theft in

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[11] *McCoy*, 584 U.S. at 426.
[12] U.S. CONST. amend. VI.
[13] Penson v. Ohio, 488 U.S. 75, 84 (1988) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

California, wished to represent himself because he believed the public defender's office was too busy to provide an adequate defense.[14] After originally granting Faretta's request, the trial judge *sua sponte* reversed his original ruling—finding that Faretta had no constitutional right to represent himself and that his waiver of the right to counsel was not knowing and voluntary because he could not intelligently answer questions on evidentiary rules and trial procedure.[15] Throughout the trial, Faretta renewed his request to represent himself and attempted to make motions on his own.[16] The judge denied all the requests and motions, and required that Faretta's defense be conducted solely through his appointed public defender.[17] The jury found Faretta guilty of all charges and sentenced him to prison, and the California appellate courts upheld the conviction.[18]

The Supreme Court, in reversing the lower courts, rendered an opinion that culminated over fifty years of jurisprudence on the right to assistance of counsel.[19] The Court, for the first time, spoke to the personal nature of the guarantees of the Sixth Amendment:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the

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[14] Faretta v. California, 422 U.S. 806, 807 (1975).
[15] *Id.* at 808–10.
[16] *Id.* at 810–11.
[17] *Id.* at 811.
[18] *Id.* at 811–812.
[19] *See, e.g.,* Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Betts v. Brady, 316 U.S. 455 (1942); Gideon v. Wainwright. 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

> accused; for it is he who suffers the consequences if the defense fails.[20]

The counsel provision, according to the Court, is not a requirement of the Sixth Amendment right to due process, it merely supplements the constitutional guarantees provided to an accused.[21] The assistance of counsel, like other guarantees afforded to an accused, "shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[22] To rule otherwise, according to the Court, would violate the logic of the Sixth Amendment; mandating a master, where the protections speak of an assistant.[23]

The Supreme Court notes that this personal right is guaranteed despite the fact that most accused would be better served by counsel.[24] The opinion reiterates:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case, counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."[25]

To force an accused to accept an attorney against their will deprives an individual of their constitutional right to conduct their own defense.[26] It is against this backdrop that subsequent Sixth Amendment assistance of counsel questions will be decided going forward. The *Faretta* case remained the last word on the personal nature of the Sixth Amendment right to the assistance of counsel for nearly fifty years, until *McCoy*.

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[20] *Faretta*, 422 U.S. at 819–20.
[21] *Id.* at 820.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 834.
[25] *Id.* (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J, concurring)).
[26] *Faretta*, 422 U.S. at 836.

B. *McCoy*—Autonomy is Born

On May 5, 2008, Robert McCoy (McCoy) shot and killed his estranged wife's mother, stepfather, and son in Louisiana.[27] McCoy was arrested several days later in Idaho and extradited to Louisiana.[28] He was indicted on three counts of first-degree murder and was notified that the prosecutor intended to seek the death penalty.[29] Throughout his trial, McCoy insisted that he was innocent.[30]

McCoy advanced this theory by stating that he was out of the state at the time of the murders and that corrupt police officers had killed the victims because a drug deal had gone wrong.[31] McCoy advanced this theory despite overwhelming evidence.[32] Prosecutors presented evidence that: McCoy had abused and threatened to kill his estranged wife; that one of the victims called the police before being killed and could be heard screaming his name; witnesses saw a man fitting McCoy's description fleeing the scene in his car, which he later abandoned in an ensuing chase; when his car was recovered it contained the victim's stolen phone that was used to call the police; and McCoy was arrested hitchhiking in Idaho with a loaded gun that was later identified as the one that killed the victims in Louisiana.[33]

After his arrest, McCoy was provided appointed counsel from the public defender's office.[34] When his counsel learned of McCoy's intent to present a defense based on a police conspiracy, McCoy's counsel sought and attained a court-appointed sanity examination, which found him competent to stand trial.[35] Based on his appointed counsel's refusal to present his proposed defense, McCoy informed the court in January 2010 that his relationship with counsel was irretrievably broken.[36] During this time, he sought and gained permission to represent himself until his

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[27] McCoy v. Louisiana, 584 U.S. 414, 418 (2018).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 430 (Alito, J., dissenting).
[33] *Id*.
[34] *Id.* at 418.
[35] *Id.*
[36] *Id.* at 418-19.

parents could obtain new representation.[37] In March 2010, McCoy's parents retained new counsel, Mr. Larry English, who eventually concluded that the evidence against McCoy was overwhelmingly strong and that the only way to avoid the death penalty was to concede that McCoy committed the murders and ask for leniency based on contrition.[38]

McCoy vociferously objected to this strategy, voicing instead his desire to proceed with the police conspiracy, and two days before trial, sought to terminate Mr. English's representation.[39] Citing the lack of time to obtain new representation, the court denied McCoy's request, telling Mr. English: "[Y]ou are the attorney . . . you have to make the trial decisions that you are going to proceed with."[40] Mr. English proceeded with his concession strategy; telling the jury during his opening statement that they could not reach any other conclusion except that McCoy killed the victims—doing this even over his client's verbal objection.[41] McCoy voiced his verbal objection to the trial judge at several points during the trial and reiterated his desire to present his alternate theory.[42] Despite this, Mr. English repeated that McCoy had killed the victims again during his closing argument and the penalty phase, asking the jury to take mercy on his client due to mitigating mental and emotional issues.[43] Upon seeking a new trial after receiving three death sentences, both the appellate court and the Louisiana Supreme Court affirmed the sentence; finding Mr. English had the authority to concede McCoy's guilt over his client's objection because he had the reasonable belief this was the best tactic to avoid a death sentence.[44]

The United States Supreme Court disagreed, announcing for the first time that a criminal accused has a fundamental right to factual autonomy—whether to decide that the objective of the defense is to assert innocence is a category of decision that belongs solely to the accused.[45] The Sixth Amendment, in guaranteeing the assistance of counsel, does not require

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[37] *Id.* at 419.
[38] *Id.* at 418.
[39] *Id.* at 419.
[40] *Id.*
[41] *Id.* at 419-20.
[42] *Id.*
[43] *Id.* at 420.
[44] *Id.*; *see also* State v. McCoy, 218 So. 3d 535 (La. 201).
[45] *McCoy*, 584 U.S. at 422.

that an accused cede all control of their case.[46] The Sixth Amendment, in conferring the right to counsel, speaks of an assistant—no matter how expert an attorney may be, their role is to assist; some decisions will always belong to the client.[47] In the words of the Court:

> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives are.[48]

In holding this, the Court noted that counsel may assess that conceding guilt may be the best strategic decision to avoid an undesired punishment, but that the client's desire to avoid the opprobrium of admitting guilt or holding out for even the remote chance of an acquittal must still direct counsel's reasonable tactical decisions.[49]

The Court concluded its opinion by stating that violations of a client's right to factual autonomy should not be analyzed under ineffective assistance of counsel jurisprudence.[50] Since the violation of McCoy's Sixth Amendment rights was complete when the lower court allowed Mr. English to present a case based on factually conceding the murders, there is no testing for prejudice.[51] Going even further, the Court concluded, "Violation of a defendant's Sixth Amendment-secured autonomy ranks as an error of the kind our decisions have called 'structural;' when present,

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[46] *Id.* at 421.
[47] *Id*.
[48] *Id.* (quoting Weaver v. Massachusetts, 137 S.Ct. 1899, 1908 (2017)) ("[S]elf-representation will often increase the likelihood of an unfavorable outcome but 'is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.'").
[49] *McCoy*, 584 U.S. 422-23.
[50] *Id.* at 426.
[51] *Id.* at 426-27; *see also* Strickland v. Washington, 466 U.S. 668 (1984) (outlining the test for a successful claim based on ineffective assistance of counsel).

such an error is not subject to harmless-error review."[52] The error is structural, the Court explained, because an admission of factual guilt over the objection of the client "blocks the defendant's right to make the fundamental choices about his own defense[,] [a]nd the effect of the admission would be immeasurable."[53] Therefore, the only true remedy is a new trial, without the need to show prejudice.[54]

The dissent, in arguing the imposition of this new right to factual autonomy should not be read into the Sixth Amendment, noted that situations like these are "rare," and do not require such a broad rule.[55] Justice Alito also argues that if the Court's decision were read to affect a defense counsel's ability to make unilateral decisions to concede an element of an offense, it would have important and wide-ranging implications.[56] The fact that the Court did not address this particular issue, but instead announced a comprehensive new right under the Sixth Amendment left this open for the lower courts to decide.[57]

C. The Imposition, or Lack Thereof, of Autonomy Throughout the United States

Justice Alito's warning appears to have been prophetic—the broad language and application of the right to autonomy found in the majority's

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[52] *McCoy*, 584 U.S. 414, 427 (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006); Waller v. Georgia, 467 U.S. 39, 49–50 (1984); Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

[53] *McCoy*, 584 U.S. at 428.

[54] *Id.*

[55] *Id*. at 433 (Alito, J., dissenting). The true rarity of this type of conflict in the military justice system will be addressed in section III. Of note, for now, many of the hallmarks that Justice Alito notes as rare, are common in the military justice system: panels that, until the recent changes that took place in December 2023, decide both guilt and the imposition of a sentence; the ability, or past lack thereof, to plead guilty in a capital case; the availability and imposition of assigned counsel in almost every court-martial, even for non-indigent accused; and the ability to voice an objection to defense counsel's trial strategy through the use of appellate fact-finding.

[56] *Id.* at 435.

[57] *See id.* at 437. Arguably, the fact that Justice Alito asks this question, indicates that the dissenting justices believe that this rule applies broadly to these specific circumstances. By indicating that the Court's decision may have unintended consequences, it is arguable that the dissent was attempting to draw a more limited opinion from the majority, something it failed to accomplish.

holding in *McCoy* has led to more questions than answers. The lack of clarity has led to a split amongst jurisdictions concerning the true reach of the right to factual autonomy and caused lower courts to cite *McCoy* at what appeared to be nearly every other day in the two years following the decision.[58] Jurisdictions either apply *McCoy* broadly, finding the right to factual autonomy extends to almost all factual concessions; or narrowly, limiting the holding to the particular circumstances where a capital defendant affirmatively objects to conceding guilt during the merits phase. Two cases exemplify each approach, with a third highlighting the sole time a military appellate court has addressed an accused's right to autonomy.

1. United States v. Read – True Unfettered Autonomy

In *United States v. Read*, the Ninth Circuit held, in an expansive view of *McCoy*, that the right to autonomy extends beyond the facts present there and extended *McCoy's* holding to prevent counsel from presenting an insanity defense over the accused's objection.[59] In *Read*, the accused was indicted for assaulting his cellmate with a homemade knife while he was serving a prison sentence for attempted robbery.[60] Jonathan Read (Read) claimed he had no memory of the attack and was later admitted to a treatment facility where he was diagnosed with schizophrenia and was found incompetent to stand trial.[61] After undergoing treatment for four months and being found competent, Read's court-appointed lawyer arranged for him to be evaluated to determine his state of mind at the time of the assault.[62] The report concluded that Read's psychosis rendered him unable to form the requisite intent to commit the charged offense, and indicated that he was still suffering from the disorder at the time of the evaluation.[63] Read's counsel provided the court with notice that he intended to present an insanity defense, and successfully petitioned the court to have Read re-admitted for a competency evaluation.[64] During his treatment and evaluation, Read stated he was suffering from demonization

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[58] Rosemond v. United States., 958 F.3d 111 (2d Cir. 2020) *petition for cert. filed,* 2020 WL 5991229 (U.S. Sept. 28, 2020) (No. 20–464).
[59] United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019).
[60] *Id.* at 715.
[61] *Id.* at 715–16.
[62] *Id.* at 716.
[63] *Id.*
[64] *Id.*

rather than mental illness, and sought to represent himself, relying on this defense.[65] Read's request was denied and his counsel put forward an unsuccessful insanity defense, over Read's affirmative objection.[66]

In reaching its conclusion, the Ninth Circuit likened the insanity defense to a concession of guilt, finding that this strategy carries the opprobrium that the Supreme Court noted an accused may wish to avoid.[67] The court found the government's argument that both Read and his counsel shared the same fundamental objective of convincing the jury that Read was not mentally responsible for the offense to be unpersuasive.[68] Read's affirmative indication that he did not want to pursue an insanity defense was enough to trigger his right to autonomy; his counsel could not take a contrary approach.[69] This analysis represents a broad interpretation of *McCoy*, finding this precedent is not limited solely to instances where the accused wants to maintain complete factual innocence—the personal belief that he was sane was enough to trigger the right to autonomy.[70] The Ninth Circuit, along with several other jurisdictions, echoes the sentiment found in Justice Alito's warning, finding that the majority's reasoning had extensive implications beyond the essential holding of *McCoy,* expanding the notion of autonomy in the process.[71] While this represents the broad approach to autonomy, other courts remain strict in their interpretation of this newly-created Sixth Amendment protection.

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[65] *Id.*
[66] *Id.* at 716–17.
[67] *Id.* at 721.; *see also* McCoy v. Louisiana, 584 U.S. 414, 422-23 (2018).
[68] *Read*, 918 F.3d at 721.
[69] *Id.*
[70] *See id.*
[71] *See generally* United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

2. United States v. Rosemond –The Limited Approach

In *United States v. Rosemond,* the Second Circuit, interpreting *McCoy* much more narrowly, held, "[T]he right to autonomy is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged."[72] After being charged with and convicted of murder for hire, James Rosemond (Rosemond) asked the Second Circuit to find that his attorney violated his autonomy rights when he conceded, over Rosemond's objection, that Rosemond had paid other individuals to shoot the victim, but that he did not intend for the victim to die.[73] In an affidavit filed with the trial court, Rosemond stated that he disagreed with his attorney's proposed trial strategy, but that he did not raise the issue with the court because he believed that his attorney had final authority to decide which trial tactics to pursue and what arguments to present to the jury.[74]

The Second Circuit, in limiting *McCoy's* reach, distinguished defense counsel's right to make factual concessions over an accused's objection from the right to deviate from an accused's fundamental objective of their defense.[75] It reasoned that, "Once a defendant decides on an objective—e.g., acquittal—'[t]rial management is the lawyer's province' and counsel must decide, *inter alia*, 'what arguments to pursue.'" [76] The court continued, "Conceding an element of a crime while contesting the other elements falls within the ambit of trial strategy."[77] Accordingly, under these principles, "[W]hen a lawyer makes strategic concessions in pursuit of an acquittal, there is no *McCoy* violation assuming, of course, the defendant's objective was to maintain his non-guilt."[78]

According to the Second Circuit's reasoning, because Rosemond and his attorney shared the same goal—an acquittal—his attorney was free to undertake that pursuit using any constitutionally effective strategy.[79] In

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[72] United States v. Rosemond, 958 F.3d 111, 122 (2d Cir 2020).
[73] *Id.* at 119.
[74] *Id.*
[75] *Id.* at 122-23.
[76] *Id.* at 122 (citing McCoy v. Louisiana, 584 U.S. 414, 422 (2018)).
[77] *Rosemond*, 958 F.3d at 122 (citing United State v. Jones, 482 F.3d 60, 76–77 (2d Cir. 2006); United States v. Arena, 180 F.3d 380, 397 (2d Cir. 1999)).
[78] *Rosemond*, 958 F.3d at 122–23.
[79] *See id.* at 123.

this case, that included making strategic concessions concerning the factual underpinning of the alleged crime.[80] This fundamental objective test represents a narrowing of the *McCoy* holding, giving back some of the strategic autonomy to an accused's attorney.[81] The Second Circuit, along with several other jurisdictions, do not find *McCoy* limits an attorney's discretion to make concessions over an accused's objection as long as they share the same desired outcome or goal of a defense.[82] This is the view the military appellate courts seemed to have relied heavily on, ignoring broader interpretations, during their first review of the right to autonomy.

3. United States v. Lancaster – The Military Dips its Toes into the Autonomy Waters

In the only military justice appellate decision that directly addresses the autonomy rights guaranteed by *McCoy*, the Army Court of Criminal Appeals (ACCA), in *United States v. Lancaster*, took the limited approach articulated in *Rosemond.* [83] Echoing the fundamental objective test eschewed by the Second Circuit, the ACCA held, "[A]s long as attorney and client share the same objective, an attorney may make strategic concessions in pursuit of an acquittal—including conceding some elements of the crime—without running afoul of *McCoy*."[84]

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[80] *Id.; see also Jones*, 482 F.3d at 76–77 (finding, under a *Strickland* effectiveness standard, that it was objectively reasonable for an attorney to admit his client shot the victim but argue that the shooting was unrelated to a drug conspiracy).

[81] This discretion is not unlimited. As was done in *Rosemond*, reviewing courts will always ensure that counsel's strategic choices were effective—determining whether an attorney's choices "fell below an objective standard of reasonableness." *Rosemond*, 958 F.3d at 121 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

[82] *See generally* United States v. Holloway, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019) (defendant's right to autonomy was not violated when attorney and defendant had "strategic disputes" about how to achieve same goal); United States v. Audette, 923 F.3d 1227, 1236 (9th Cir. 2019) (defendant's right to autonomy was not violated because he disagreed with his attorney about "which arguments to advance"); Thompson v. United States, 791 F. App'x 20, 26–27 (11th Cir. 2019) (vacated on other grounds) (defendant's right to autonomy is not violated because attorney conceded some, but not all, elements of a charged crime).

[83] *See* United States v. Lancaster, No. 20190852, 2021 CCA LEXIS 219, at *3–7 (A. Ct. Crim. App. May 6, 2021).

[84] *Id.* at *4 (citing *Rosemond*, 958 F.3d at 123).

In *Lancaster*, the accused asked the ACCA to rule that her attorney violated her Sixth Amendment autonomy rights by conceding that she had the requisite *mens rea* for larceny of government property under Article 121, Uniform Code of Military Justice (UCMJ).[85] The accused was charged with larceny for wrongfully receiving basic allowance for housing (BAH) for her and her dependent spouse from 2014 to 2018, despite being divorced since 2013.[86] To convict the accused of Article 121, UCMJ, the Government was required to prove, among other elements, that the accused had the intent to permanently deprive the United States of the use and benefit of its property, here funds established to pay soldiers BAH.[87]

The defense counsel predicated their case on the notion that the government could not prove the accused knew she was divorced, and therefore did not intend to deprive the United States of its property because she believed she was entitled to receive BAH.[88] Their strategy included conceding that the accused and her ex-husband divorced in 2013.[89] The defense counsel pursued this strategy, seemingly unaware that the government could also prove the accused's intent by showing she deliberately avoided the truth concerning her marital status.[90] After being convicted of larceny for receiving BAH from 2017 to 2018, the accused appealed, arguing her defense counsel violated her autonomy by making concessions sufficient for the panel to find she deliberately avoided the knowledge she was divorced.[91]

The ACCA, in affirming the accused's conviction, noted "Put simply, *McCoy* stands for the proposition that when an accused unequivocally states their desire to maintain their innocence, counsel may not 'steer the ship the other way.'"[92] Despite this general principle, the ACCA went on to delineate that *McCoy* did not address whether an attorney violates an

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[85] *Lancaster*, 2021 WL 1811735, at *3; UCMJ art. 121 (2016).
[86] *Lancaster*, 2021 WL 1811735, at *1.
[87] *Id.* at *4; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV ¶ 46.6 (2016) (establishing the elements for Article 121, UCMJ). At the time of the accused's trial, the 2016 version of the Manual for Courts-Martial was in effect. The 2016 version of the MCM did not change the elements of Article 121, UCMJ, as the statute remained untouched from 2012 until after 2016.
[88] *Lancaster*, 2021 WL 1811735, at *2.
[89] *Id.*
[90] *Id.* at *2–3.
[91] *Id.* at *3.
[92] *Id.* (citing McCoy v. Louisiana, 138 S.Ct. 1500, 1509 (2018)).

accused's autonomy by conceding an element of an offense and reasoned, "subsequent federal court decisions interpreting *McCoy* clarify an attorney may, as a strategic decision, effectuate a client's overall objective of acquittal by conceding certain elements of a crime, while still contesting others."[93]

This reasoning, and ultimate holding, adopting *Rosemond's* fundamental objective test seemingly narrowly tailors the reach of *McCoy* for the Army. But it is hard to imagine that this will be the final word on the matter. The military appellate system has not appropriately dealt with a constitutional issue that was cited at least once every other day in federal court in the years that followed the *McCoy* decision—*Lancaster* is the only case to address autonomy rights in the court-martial system.[94] In its sole decision addressing the issue, the ACCA ignores the dearth of federal and state cases that have taken an expansive view of *McCoy* following the Supreme Court's announcement of this new right to autonomy.[95] Finally, and most importantly, the ACCA does not undertake a discussion of the features of the military justice system which may make it susceptible to a broad reading of *McCoy*, features that were outlined by Justice Alito in his dissent.[96] A true look at the holding of *McCoy*, an examination of the cases that have interpreted this holding broadly, and scrutiny of the features of the military justice system that lend the system to a wide-ranging reading of the right to autonomy likely lead to the opposite result. Ultimately, it may be that *Lancaster* was a bad initial test case for the imposition of this new fundamental right. If this is true, and *McCoy* is imposed expansively, the military justice system needs to adapt to this new paradigm where an accused will have greater autonomy in their defense.

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[93] *Lancaster*, 2021 WL 1811735, at *4 (citing United States v. Rosemond, 958 F.3d 111, 123 (2d Cir. 2020)).

[94] *See* Petition for Writ of Certiorari at 4, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020) (No. 20–464), 2020 WL 5991229 at *2–3.

[95] *See generally* United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

[96] *See McCoy*, 138 S.Ct. at 1514 (Alito, J., dissenting).

III. The Susceptibility of the Military Justice System to a Broad Interpretation of *McCoy's* Autonomy Rights

In his dissent in *McCoy*, Justice Alito envisioned a criminal justice system where overriding an accused's autonomy rights would be a rare occurrence.[97] Emphasizing this point, he argued that the majority created an overly broad autonomy right for a condition that would seldom arise, without thinking about the wide-ranging implications of this new pronouncement.[98] Justice Alito's warning was prophetic in a way: appellate courts struggled to adapt to this new, judicially created right for years after *McCoy*.[99] Where Justice Alito may have had a blind spot was in his description of the rarity of this situation arising. Many of the circumstances that Justice Alito cited as making *McCoy* an extraordinary confluence of events are hallmarks of the modern military justice system.

In laying out his case for the rarity of the violation of an accused's autonomy rights, Justice Alito goes to great lengths to explain: "The constitutional right that the Court now discovered . . . is like a rare plant that blooms every decade or so."[100] In his mind, this circumstance is rare for five reasons: 1) a true conflict is only likely in capital cases, where the jury decides both guilt and sentence; 2) few rational defendants are likely to contest guilt where there is no real risk of an acquittal and risk the possibility of a harsh sentence; 3) where attorney and client cannot agree on a strategy, they are likely to part ways; 4) if counsel is appointed and this disagreement as to strategy exists, the judge is likely to delay trial and appoint substitute counsel; and 5) this right will not come into play unless the accused specifically voices his objection to his attorney's assertions during trial.[101] A close examination of each of these reasons reveals that this rare plant, autonomy, may be more like a dandelion in the military system, popping up and spreading uncontrollably.

What is rare in the civilian legal system is common in military practice because of the nature of the UCMJ and its implementation. First, "An

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[97] *See id.*
[98] *See id.*
[99] *See* Petition for Writ of Certiorari at 4, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020) (No. 20–464), 2020 WL 5991229 at *2–3 (explaining that federal courts cited *McCoy* at least once every other day in the years following the Court's decision).
[100] *McCoy*, 138 S.Ct. at 1514 (Alito, J., dissenting).
[101] *Id.* at 1514–15.

accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution and effectuated by Article 25, UCMJ's member selection criteria and Article 37, UCMJ's prohibition on unlawfully influencing a court-martial."[102] The accused could—until December 27, 2023—elect to be sentenced by the members that decided their guilt, even in non-capital cases.[103] Second, Justice Alito's general assessment of a "rational defendant" may not fit with actual criminal trial practice. The accused has an unequivocal right to plead not guilty and contest the charges against him or her.[104] Sometimes, even though the rational choice may be for the accused to admit guilt, not testify, or accede to a specific trial strategy, the accused goes against their counsel's advice. Justice Alito does not give enough credence to human nature—it is hard to admit wrongdoing. Third, unlike in civilian practice, where only indigent defendants are appointed counsel, every military accused has the right to appointed counsel.[105] Finally, *United States v. Dubay* provides the accused with a mechanism to voice their contention that their counsel violated their autonomy rights during the appellate phase, an ability which is unmatched in civilian practice.[106]

It appears when Justice Alito called these circumstances rare, he did not have the military justice system in mind. Each of these unique characteristics makes it much more likely that a question concerning whether an accused's autonomy rights have been violated will arise. When

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[102] United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020).

[103] UCMJ art. 25(d)(1) (2019). The Fiscal Year 2022 National Defense Authorization Act makes sentencing by military judge mandatory for all non-capital cases. National Defense Authorization Act for Fiscal Year 2022, Pub. L. Mo. 117-81, § 539E, 135 Stat 1541, 1700–01 (2021).

[104] *See* United States v. Garren, 53 M.J. 142, 143 (C.A.A.F. 2000) (reasoning that the accused has a constitutional right to plead not guilty, and that right cannot be commented on); *see also* U.S. DEP'T OF ARMY, PAM. 27-9, Military Judge's Benchbook para. 2-2-9 (Feb. 29, 2020) [hereinafter DA PAM 27-9] ("Do you understand that even though you believe you are guilty, you have the legal right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?).

[105] *Compare* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (finding the right to counsel includes the right to appointed counsel for indigent defendants), *with* UCMJ art. 38(b) (2016) ("The accused has the right to be represented in his defense before a general or special court-martial or at a preliminary hearing under section 832 of this title (article 32) as provided in this subsection . . . the accused may be represented by military counsel detailed under section 827 of this title (article 27). . .").

[106] *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967) (creating the mechanism for appellate fact-finding).

it inevitably does, the courts, if they take *McCoy* at its word, will have no choice except to take a broad interpretation of its imposition of the right to autonomy. A closer examination of each of these hallmarks and the military appellate courts shows why.

A. The Old Military Panel—Judge, Jury, Executioner

In Justice Alito's mind, the only reason that this situation would arise in a capital case where the jury decides both guilt and punishment is because, "In all other cases, guilt is almost always the only issue for the jury, and therefore admitting guilt of all charged offenses will achieve nothing."[107] He argues that it is hard to imagine a competent attorney would admit guilt during the merits portion of the trial, only to receive no credit with the sentencing authority.[108] As stated above, this principle did not hold for the military justice system, where the accused had the right to be sentenced by the panel that decided their guilt.[109] This also is too narrow of a view, limiting his reasoning to a concession of complete guilt does not account for how extensively this new Sixth Amendment right could be applied. As Justice Alito realized, a broad reading of the accused's autonomy rights could prevent an attorney from making the unilateral decision to concede an element of any charged offense.[110] As *Read* and similar cases prove, this is a perfectly rational way to interpret *McCoy*'s mandate.[111] Given these realities, it is easy to see this could have been a frequent occurrence in the military justice system.

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[107] McCoy v. Louisiana, 138 S.Ct. 1500, 1514 (2018) (Alito, J., dissenting).
[108] *Id.*
[109] *See* UCMJ art. 25(d)(1) (2019).
[110] *McCoy*, 138 S.Ct. at 1516 (Alito, J., dissenting).
[111] *See generally* United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019) (holding the presentation of an insanity defense over the accused's objection violated his autonomy rights); United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

The accused's right to be sentenced by a panel was provided by Article 25, UCMJ. Specifically, Article 25(d)(1), UCMJ stated:

> Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members."[112]

This provision has been amended by the Fiscal Year 2022 National Defense Authorization Act, removing the accused's ability to elect member sentencing, and making sentencing by military judge mandatory.[113] This provision began to take effect on December 27, 2023.[114]

One can imagine there are cases currently pending appeal where the accused was given this option, elected sentencing by members, and where the attorney made concessions not considering the rights conferred to their client by *McCoy.* The cases scheduled to go forward under the current system and the ones pending appeal need to be closely scrutinized to examine whether the accused's autonomy rights were honored. The military appellate courts have a strong record of being protective of the accused's rights and are in the perfect position to perform this task.

B. Paternalism in Military Appellate Courts

The military appellate courts—like anything in the military justice system—are a creation of statute. Their existence and appellate mandate are governed by the UCMJ. Article 66, UCMJ requires each Judge Advocate General to: "[E]stablish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be

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[112] UCMJ art. 25(d)(1) (2019).
[113] National Defense Authorization Act for Fiscal Year 2022, Pub. L. Mo. 117-81, § 539E, 135 Stat 1541, 1700–01 (2021).
[114] *Id.*

composed of not less than three appellate military judges."[115] In cases in front of them, the Courts of Criminal Appeals (CCA) are tasked to:

> "[A]ffirm only such findings of guilty as the Court finds correct in law, and in fact . . . The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved."[116]

While the CCA are, "[C]ourts of limited jurisdiction, defined entirely by statute,"[117] the mandate found in Article 66 is uniquely far-reaching. The Court of Appeals for the Armed Forces (CAAF) has interpreted Article 66 to bestow broad plenary power on the CCAs to review the entire record of the trial below.[118] It is against this extraordinary power that all assessments of the military appellate system must begin. This statutory authorization has grown through caselaw over time to make the CCAs paternalistic courts, often creating judicial remedies to correct perceived wrongs.

1. United States v. DuBay

There may be no better example of the expansion of the CCA's powers than *United States v. DuBay*. A case that barely spans two pages in the Court of Military Appeals (CMA) reporter, settling an allegation of unlawful command influence at Fort Leonard Wood, Missouri, has had tremendous implications for the military justice system.[119] In *DuBay*, the accused was challenging his conviction by alleging unlawful command influence infected his court-martial.[120] Specifically, he alleged the General Court Martial Convening Authority (GCMCA) named a specific law officer to ensure harsh sentences were imposed in cases involving absence without leave and desertion.[121] Faced with an incomplete accounting concerning why the GCMCA appointed the specific law officer, the Board

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[115] UCMJ art. 66(a)(1) (2021).
[116] UCMJ art. 66(d)(1) (2021).
[117] United States v. Brubaker-Escobar, 81 M.J. 471, 473–74 (C.A.A.F. 2021) (citing United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015)).
[118] *See* United States v. English, 79 M.J. 116, 121 (C.A.A.F. 2019).
[119] See Andrew S. Effron, *United States v. Dubay and the Evolution of the Military Law*, 207 MIL. L. REV. 1, 2–5 (2011).
[120] *Id.* at 22–23.
[121] *Id.*

of Review—the CCAs precursor—sent the record back to the trial court to establish a record concerning this issue.[122]

When the Army Judge Advocate General refused to allow these fact-finding hearings to occur, the Board of Review reversed the accused's conviction, making adverse inferences based on the lack of information.[123] The Judge Advocate General then certified the case to the CMA, with the government now seeking, for the first time, a fact-finding hearing.[124]

The resulting opinion forever shaped military appellate practice. Finding itself unable to adequately answer the question concerning unlawful command influence, the CMA ordered:

> "In each such case, the record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command. That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the law officer will order an out-of-court hearing, in which he will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon."[125]

It is from these words that military appellate courts derive their fact-finding powers. When there is a dispute concerning the underlying factual predicate of an accused's assignment of error on appeal, the CCAs can resort to this mechanism to settle questions unknowable from the record. This is not a power that they use sparingly. As an example, the ACCA has ordered five *DuBay* hearings over the course of the last eighteen months on questions of ineffective assistance of counsel alone.[126]

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[122] *Id.* at 24–25.
[123] *Id.* at 27.
[124] *Id.* at 35–36.
[125] United States v. DuBay, 37 C.M.R. 411, 413 (C.M.A. 1967).
[126] *See* United States v. Miner, Army 2020063 (A. Ct. Crim. App. Sep. 21, 2021) (Order); United States v. Colbert, Army 20200259 (A. Ct. Crim. App. May 17, 2022) (Order); United States v. Marin, Army 20210375 (A. Ct. Crim. App. May 26, 2022) (Order); United

Given this reality, one thing is clear, Justice Alito's final point in his rarity argument does not apply to the military justice system. An accused does not need to raise his autonomy claim at the trial level during their court-martial for a violation to arise on appeal. *DuBay* provides the perfect vehicle for an accused to disagree with their attorney's concessions, sit idle during their court-martial, then raise the autonomy violation for the first time on appeal. Where this would be the end of the inquiry in the civilian system, military appellate courts can apply closer scrutiny to alleged violations because of the mechanism provided by *DuBay*. This scrutiny is likely to lead to a legitimate look at autonomy rights and potential violations.

2. Restrictions on Guilty Pleas: United States v. Care

This level of scrutiny is not new, nor is it limited to the appellate court's ability to fact-find, it is deeply rooted in the military justice system. The military appellate system has a history of carefully considering one of the most basic tasks in the American justice system, the guilty plea. Foundationally, the imposition of appellate review of guilty pleas in courts-martial was introduced in *United States v. Chancelor*, where the CMA announced the requirement for a detailed providence inquiry for the first time.[127] After this decision, the law officer was required to establish the accused's guilt by explaining the elements of the offense to the accused and having them explain in their own words why they violated them.[128]

Three years later, seemingly out of frustration with the lack of acceptance of *Chancelor*'s requirements, the CMA announced an even more stringent requirement in *United States v. Care*. Specifically, the Court imposed a requirement on the military judge to explain each element of the crime to the accused and to factually examine why the accused believed his actions met each element.[129] This judicially created mandate has never been fully codified in either the UCMJ or Rules for Courts-Martial (RCM), the only mention is the requirement that the military judge

States v. Forrest, Army 20200715 (A. Ct. Crim. App. Oct. 11, 2022) (Order); United States v. Pope, Army 20210501 (A. Ct. Crim. App. Dec. 9, 2022) (Order).

[127] United States v. Chancelor, 36 C.M.R. 453, 456–57 (C.M.A. 1966).

[128] *Id.*

[129] United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969)

resolves any statements by the accused inconsistent with his providence inquiry.[130]

It would not be a logical leap to assume this level of paternalism would extend to autonomy rights. The guilty plea is one of the most basic and common practices in the justice system.[131] The imposition of judicial review into this relatively simple practice, all for the sake of protecting the accused, highlights that military appellate courts are prone to imposing their judgment when a fundamental right is involved. The Supreme Court's designation of autonomy as structural error—error that calls into doubt the very fabric of the trial—makes this the very kind of issue the appellate courts are likely to strictly enforce. Given the nature of the attorney-client relationship in the military, this level of analysis may be needed.

3. Appointed Counsel and IAC

It is the nature of the attorney-client relationship in the military justice system that necessitates strict enforcement of the accused's right to autonomy. In the majority of courts-martial, the accused will be represented by appointed military counsel. This is due, in large part, to the guarantees afforded in Article 38, UCMJ. This provision provides, in pertinent part:

> "(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at a

[130] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910(h)(2) (2019) [hereinafter MCM] ("If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.").

[131] *See* Jeff A. Bovarick, *Plea Bargaining in the Military*, 27 FED. SENT. R. 95, 95 (2014) ("With an estimated 90 percent of courts-martial resulting in guilty pleas, plea bargaining procedures primarily in the form of pretrial agreements are critical to the fair administration of military justice and essential to the overall court-martial process.").

> preliminary hearing under section 832 of this title (article 32) as provided in this subsection.
>
> (2) The accused may be represented by civilian counsel if provided by him.
>
> (3) The accused may be represented—
>
> (A) by military counsel detailed under section 827 of this title (article 27); or
>
> (B) by military counsel of his own selection if that counsel is reasonably available . . ."[132]

The right articulated in Article 38(b)(1), UCMJ is applicable to all military accused, it is not reserved solely for those found indigent.[133] In practice, Article 38(b)(1), UCMJ's universal guarantee is often effectuated through Article 38(b)(3)(A), UCMJ's detailing mechanism. Detailing is accomplished through reference to Article 27, UCMJ, which mandates defense counsel be appointed to each court-martial in accordance with the regulation promulgated by each service.[134]

The Army has implemented the requirement to appoint defense counsel through AR 27-10, Military Justice. Specifically, paragraph 6-9 states:

> "In the [regular Army] and the [Army Reserves], the Chief, [Army Trial Defense Service] details trial defense counsel for [special and general courts-martial]. This authority may be delegated to the [Senior Defense Counsel] in all non-capital cases. Detail of counsel will be reduced to writing and included in the [record of trial] or

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[132] UCMJ art. 38(b) (2016).

[133] *Cf.* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (finding the right to counsel includes the right to appointed counsel for indigent defendants).

[134] *See* UCMJ art. 27(a) (2016) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.").

> announced orally on the record at courts-martial. The writing or announcement will indicate by whom the counsel was detailed."[135]

This system creates an interesting dynamic, an accused charged with a crime is sent to the local trial defense office to be assigned a defense counsel. Depending on the office, the accused may be randomly assigned an attorney solely based on the workload distribution amongst the defense attorneys, or the detailing authority may put thought into the factual predicate of each case. What is consistent is that the agency in choice of representation for anyone not seeking civilian representation is lost.

Given this system, military appellate courts have unsurprisingly exercised close scrutiny over defense counsel. The standard for ineffective assistance of counsel mirrors that found in the civilian justice system: "To establish that ineffective assistance of counsel occurred, an appellant must prove both that the defense counsel's performance was deficient and that the deficiency caused prejudice." [136] What differs, is the CAAF's willingness to examine a defense counsel's effectiveness, and the frequency they find deficient performance. In the past two terms, the CAAF has examined whether particular defense counsel were ineffective on five occasions, finding deficient performance twice.[137] At first glance, this does not seem like a large number of cases, but this must be compared against the fact that the CAAF only heard sixty cases in total over this two-

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[135] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-9 (Nov. 20 2020) [hereinafter AR 27-10].

[136] United States v. Palacios Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citing Strickland v. Washington, 466 U.S. 668, 698 (1984)).

[137] *See generally Palacios Cueto*, 82 M.J. at 326 (examining defense counsel's failure to admit mitigating evidence during sentencing, failure to advise the accused to mention sex offender registration during his unsworn, and failing to request specific sentencing instructions); United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022) (examining counsel's failure to argue the victim's patient-psychotherapist privilege could be pierced); United States v. Cooper, 82 M.J. 6, 10 (C.A.A.F. 2021) (examining whether the failure to forward a request for individual military counsel rises to the level of ineffectiveness); United States v. Furth, 81 M.J. 114, 117 (C.A.A.F. 2021) (assuming that counsel's failure to advise about the effects of a resignation for the good of the service was ineffective); United States v. Scott, 81 M.J. 79, 85 (C.A.A.F. 2021) (finding counsel ineffective for putting on a truncated sentencing case).

year period.[138] The CAAF is using almost ten percent of their discretionary docket to examine whether an accused was properly represented.[139]

What is evident is that the military appellate system is very interested in the relationship between the accused and their defense counsel. It is not a stretch to imagine this fascination extending into the realm of autonomy rights. The same fundamental features of appointed representation that make scrutiny into counsel's performance and choices for ineffectiveness purposes necessary, equally apply to an analysis considering whether a defense counsel violated an accused's fundamental right to autonomy. There is even an argument that the autonomy right requires an even closer look—while the test for ineffective assistance of counsel considers prejudice, autonomy rights are considered so fundamental, their violation constitutes structural error.[140] Given the nature of this type of violation, and the CAAF's constant forays into the attorney-client relationship, it is only a matter of time before an autonomy case catches the court's attention.

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[138] Each year, each of the services and CAAF submit an annual report to the Joint Service Committee on Military Justice that lists the number of cases tried or decided before each court. These numbers are derived from the reports for fiscal years 2021 and 2022. *See* JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2021 COMBINED ARTICLE 146A REPORT (Dec. 31, 2021), https://jsc.defense.gov/Annual-Reports/ (reporting 35 opinions rendered by the CAAF); JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2022 COMBINED ARTICLE 146A REPORT (Dec. 31, 2022), https://jsc.defense.gov/Annual-Reports (reporting 25 opinions rendered by the CAAF).

[139] While Article 67 makes review of some cases mandatory, the majority of cases are granted based on petition from an appealing party who has shown good cause for review. *See* UCMJ art. 67(a) (2021) ("The Court of Appeals for the Armed Forces shall review the record in— all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death; all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.").

[140] *Compare Palacios Cueto*, 82 M.J. at 327 (requiring a test for prejudice for ineffective assistance of counsel claims), *with* McCoy v. Louisiana, 138 S.Ct. 1500, 1511 (2018) (holding the violation of an accused's autonomy rights constitutes structural error).

C. A Storm Brewing—*United States v. Hasan*

The chance for the CAAF to weigh in on the role of autonomy rights in the military justice system presented itself last term. Under Article 67, UCMJ, the CAAF must review any case where the death penalty was adjudged.[141] *United States v. Hasan* presents such a case—the accused was sentenced to death in 2013.[142] This mandatory review presents a unique opportunity for appellate defense counsel to submit a plethora of issues to the CAAF, issues that may otherwise not have been granted certification.[143] Appellate defense counsel, seizing this opportunity, contended that Major (MAJ) Hasan's autonomy rights were violated.[144] Specifically, counsel argued that MAJ Hasan's decision to go pro se was not voluntary because he represented himself to avoid his counsel's plan to concede factual guilt.[145] Presented with the untenable choice of turning over the autonomy of his defense or going it alone, appellant, they argue, chose the latter.[146]

The CAAF, in deciding this issue, did not make a broad proclamation on the status of autonomy rights in the military justice system—the Court chose instead to rest their decision on the voluntary nature of MAJ Hasan's decision to proceed pro se.[147] Interestingly, in its opinion, the CAAF solely cites federal cases that restrictively interpreted the right to autonomy.[148] While this could provide a window into future interpretation, these references were made in response to MAJ Hasan's argument that *McCoy* also created a right to plead guilty to a capital offense—something

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[141] UCMJ art. 67(a)(1) (2016).
[142] United States v. Hasan, No. 21-0193, 2023 CAAF LEXIS 639, at *6–7 (C.A.A.F. Sep. 6, 2023).
[143] *Cf.* UCMJ art. 67(a)(3) (2016) ("The Court of Appeals for the Armed Forces shall review the record in all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.").
[144] *Hasan*, No. 21-0193, 2023 CAAF LEXIS 639, at *17 (C.A.A.F. 2023).
[145] *Id.* at *15–16.
[146] *Id.*
[147] *Id.* at *21.
[148] *See id.* at *59 (citing Kellogg-Roe v. Gerry, 19 F.4th 21, 28 (1st Cir. 2021) (declining to extend McCoy beyond the facts of that case); United States v. Rosemond, 958 F.3d 111, 123 (2d Cir. 2020) ("[W]e read McCoy as limited to a defendant preventing his attorney from admitting he is guilty of the crime with which he is charged.").

prohibited at the time by the UCMJ.[149] The court did not take the opportunity to address autonomy head on because it was not presented the proper case to do so. Arguably, self-representation cures any autonomy issue.

Although *Hasan* does not settle the autonomy question left by *McCoy*, this decision will ensure autonomy enters military justice practitioners' consciousness. As emphasized above, the military appellate system is almost the perfect vessel for an extensive interpretation of this right. Highlighting this relatively new right in a highly visible case will bring it to the forefront of the appellate world. Where this issue may not have been raised before, it now presents a new battleground for an accused to attempt to overturn their conviction. Given this, the military justice system needs to be ready to adapt. Luckily, there are mechanisms in place already that will require only slight alteration to adapt to the imposition of this new right and avoid mass upheaval.

IV. Implementing *McCoy's* Mandates into the Military Justice System

The paternalistic nature of the military appellate system should force prudent defense practitioners, and observant government counsel, into assuming that *McCoy* will be interpreted broadly. Military appellate courts are not likely to interpret *McCoy* to solely require defense counsel to stay within the "fundamental objective" of maintaining innocence.[150] Rather, given their propensity to closely examine the attorney-client relationship and their ability to develop an appellate record using the *DuBay* hearing, military appellate courts are likely to construct an expansive view of autonomy rights. Under a potentially far-reaching interpretation, defense counsel should be weary of admitting an element of any offense without first securing affirmative assent from their client.[151] Any decisions

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[149] *Hasan*, No. 21-0193, 2023 CAAF LEXIS 639, at *58 (C.A.A.F. 2023).

[150] *See* United States v. Rosemond, 958 F.3d 111, 122 (2d Cir 2020) (adopting the narrow "fundamental objective" test).

[151] *See generally* United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019) (holding the presentation of an insanity defense over the accused's objection violated his autonomy rights); United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead

concerning overarching trial strategy and how to wage a defense need to consider the accused's autonomy. This presents a specific challenge for military defense counsel. An examination of one of the most common charges a military accused faces, and the typical defense raised, shows why that is.[152]

Article 120(b)(2)(A), UCMJ, criminalizing sexual assault without consent, requires the government to prove: "That the accused committed a sexual act upon another person; and that the accused did so without the consent of the other person."[153] Under an expansive interpretation of *McCoy*, defense counsel would not be able to present a defense where they concede the sexual act and solely contest whether there was consent, without obtaining affirmative permission from the accused to proceed in this manner. What most attorneys would consider a tactical choice, left for them to decide, would run afoul of *McCoy's* mandates strictly enforced by the military appellate courts.[154] The potential frequency that this type of cases presents itself should cause practitioners to question their trial strategy. Going forward, all decisions concerning factual strategy need to be analyzed with this framework in mind.

Failing to account for the inevitable interpretation of this newly-discovered right could result in an automatic retrial for an accused—this error has been ruled structural, there is no test for prejudice.[155] Given the potential prevalence of the situation involving defending against sexual assault without consent, discussed above, the implications of this type of

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guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

[152] JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2022 COMBINED ARTICLE 146A REPORT (Dec. 31, 2022), https://jsc.defense.gov/
Annual-Reports (reporting 46 percent of Army courts-martial, amounting to 220 cases total for fiscal year 2022, involved a sexual offense either under Articles 120, 120b, or 120c, UCMJ).

[153] MCM, *supra* note 129, pt. VI, ¶ 60.b.(2)(d)(i)–(ii).

[154] *Compare* Florida v. Nixon, 543 U.S. 175, 187 (2004) ("An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision.") (internal citations omitted), *with* McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018) (Holding the autonomy to decide the objective of the defense is to assert innocence is a decision left to the client).

[155] *See* McCoy v. Louisiana, 138 S.Ct. 1500, 1511 (2018) (holding the violation of an accused's autonomy rights constitutes structural error).

decision by the CAAF could be massive. This right, if properly raised, could lead to mass reversals not seen since *United States v. Hills* and potentially imposed by *United States v. Anderson*; if the CAAF finds a right to a unanimous verdict.[156] The military justice system would be inundated by retrials in clear cases, and *DuBay* hearings where there is ambiguity, in an attempt to determine whether the accused's autonomy rights were violated.

Steps can, and should, be undertaken now to prevent any further possible damage. First, ensuring defense counsel advise their clients of their right to autonomy from the outset will confirm that any concessions are discussed early in the process. The attorney and client will be tasked with determining the nature of the defense case together. Next, capturing the accused's right to autonomy in the ethical rules regulating attorneys' conduct will require defense counsel to be cognizant of this guarantee throughout their representation of criminal clients. Third, updating the competency rules and the procedures for determining mental responsibility will provide a safeguard for both attorney and the accused, confirming the accused can appreciate the nature of the alleged misconduct and can truly assist under this new framework. Finally, requiring military judges to delve into the voluntariness of any concessions will prevent future appellate review by confirming that the accused has considered and properly waived this issue.

A. Advising the Accused—Trial Defense Counsel's Obligations to Inform their Client of Their Right to Autonomy

Even the savviest client is likely to be unaware of the fundamental role that they play in shaping their defense. The average accused, if pressed, would almost assuredly state that they have put their fate in their attorney's hands. The legal process is complex, has a unique set of rules, and uses a language that is foreign to the average person. It is not surprising, then, to represent a client that is uninformed about even their most fundamental rights, let alone something as nuanced as the right to autonomy. This problem is exacerbated when you consider this right is relatively new and

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[156] *See* United States v. Anderson, 83 M.J. 291, No. 22-0193/AF (C.A.A.F. 2023) (examining whether the accused has a right to a unanimous verdict); United States v. Hills, 75 M.J. 350, 352 (C.A.A.F. 2016) (holding that charged offenses may not be used for propensity purposes under Military Rule of Evidence 413).

is only known to those who follow criminal jurisprudence closely. The expectation that an accused will come in ready from the outset of representation to make important decisions that impact their right to autonomy is unreasonable. Given that most military accused will have an appointed attorney that they did not seek out, this expectation is almost certain to fail.

If the requirement is that the client will participate in a meaningful way in their defense—making decisions about what concessions can be made as part of the overall trial plan—the onus should be defense counsel to guarantee that the accused is informed of the role that they play. The unique nature of military defense counsel, who outrank their average client and have been automatically appointed, already requires defense counsel to take the time to explain their role and outline the rights that the accused retains.[157] The Army has come up with a workable solution that effectively outlines the attorney-client relationship and sets out the rights that the client possesses. This tool can easily be expanded to account for autonomy rights and establish the participation necessary to shape a successful defense with the parameters of *McCoy's* mandates.

The Defense Counsel Assistance Program (DCAP) provides defense counsel across the Army with standardized forms designed to effectively communicate the rights guaranteed to an accused. One of these forms, DCAP Form 8.3, is meant to outline the rights an enlisted accused has in the court-martial process.[158] This form explains the accused's rights to counsel and highlights the rights that they retain throughout the process.[159] Specifically, it informs the accused they have a right to choose trial by panel or military judge alone, to proceed with or waive their preliminary hearing, to decide to plead guilty or not guilty, and to choose to testify.[160]

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[157] *See* UCMJ art. 27(a) (2016) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial."); AR 27-10, *supra* note 134, para. 6-9 (Nov. 20, 2020).

[158] Defense Counsel Assistance Program Form 8.3, Acknowledgement of Rights (Mar. 15, 2019) (on file with author).

[159] *Id.*

[160] *Id.*; *see also* United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020) ("An accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution and effectuated by Article 25, UCMJ's member selection criteria and Article 37, UCMJ's prohibition on

The recitation of the fundamental rights reserved to the accused remains helpful, but has been rendered incomplete by *McCoy*.

Including a description of the right to autonomy would set the initial conditions necessary to ensure compliance with *McCoy*'s mandate. Informing the client that they have a right to maintain innocence and insist on a defense centered around this premise can help identify the accused's preference and assist defense counsel in building a strategy consistent with the accused's wishes. Any account of the right to autonomy should include the guarantee that defense counsel will confer with the accused and seek their permission before making a concession during any court-martial proceeding. This understanding would serve as a building block to establishing a defense within the parameters of the accused's autonomy rights and would survive even the widest interpretation of *McCoy* by military appellate courts.[161]

Informing the client, while a good starting point, is not sufficient to guarantee compliance with a far-reaching understanding of the right to autonomy. The obligations imposed on defense counsel by *McCoy* cannot begin and end with a brief introduction of the guarantees bestowed by the Sixth Amendment. Autonomy principles must also be reinforced by the ethical rules that govern attorneys. The Army provides a good springboard within AR 27-26, Rules of Professional Conduct for Lawyers. Although the rules currently do not directly consider the role autonomy plays in the ethical representation of the accused, by slightly altering the existing

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unlawfully influencing a court-martial."); United States v. Carter, 60 M.J. 31, 33 (C.A.A.F. 2005) ("The privilege against self-incrimination provides an accused with the right to not testify, and precludes "comment by the prosecution on the accused's silence.") (citing Griffin v. California, 380 U.S. 609, 615 (1965)); United States v. Garren, 53 M.J. 142, 143 (C.A.A.F. 2000) (reasoning that the accused has a constitutional right to plead not guilty); UCMJ art. 32(a)(1)(B) (2016) ("Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required."); UCMJ art. 45(a) (If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.").

[161] *See infra* Appendix A, para. 6 for complete recommended language.

framework, defense counsel can be informed of their obligations to provide representation within the bounds of *McCoy.*

B. Reformation of the Army's Ethical Rules—Aligning Army Regulation 27-26 with *McCoy*

It should be obvious to every counsel that they have a duty to the accused they represent. Common sense dictates that defense counsel advocate for their clients and protect the rights afforded to them. This general principle, while a helpful starting point, has been delineated into discreet rules codified for Army practitioners in AR 27-26. Army Regulation 27-26 applies to all active-duty Judge Advocates.[162] Its mandates are meant to "provide comprehensive rules governing the ethical conduct of Army lawyers . . ."[163]

If AR 27-26 is to accomplish its goal of providing comprehensive guidance, its directives must be updated to account for the new right guaranteed to an accused by *McCoy*. Several of the rules found in AR 26-27 come close to accomplishing this, but their language fails to reach what would be required under a broad reading of autonomy rights. In particular, the rules governing the representation of clients need to be altered to ensure defense counsel are aware of the obligation to ensure their client's autonomy is not overcome.

Rule 1.2 governs the scope of representation and allocation of authority between the client and lawyer. Concerning the authority left for the attorney, this rule states:

> "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by the client's well-informed and lawful decisions concerning case

[162] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 7.a.(1)(a) (June 28, 2018) [hereinafter AR 27-26].
[163] AR 27-26, *supra* note 158, para. 1.

> objectives, choice of counsel, forum, pleas, whether to testify, and settlements."[164]

The rule highlights the decisions traditionally reserved for the client and may even try to account for *McCoy* by reference to case objectives, but it does not go far enough.

Interestingly, the rule has a carve-out, it only requires abdication to the client's well-informed and lawful decisions concerning case objectives. Further, comment 2 of this rule states: "A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so."[165] *McCoy* may dictate the opposite approach—the right to autonomy seems to be absolute.[166] Where the rule allows for an assessment by defense counsel whether to cede to the client's wishes concerning their autonomy must be changed. The definitive statement at the beginning of the quoted language comes much closer to what is required and should stand alone. Also, the comments to this rule need to make clear that, while means may still be defense counsel's choice, the accused's objectives must be honored. Additionally, any updated language must clarify that the objectives of the accused's defense include concessions to any element or essential fact of the charged offenses.[167] This addition will guarantee defense counsel are considering autonomy rights throughout the accused's defense.

This strict adherence to *McCoy*'s mandates may leave defense counsel in the untenable position of having to present an unreasonable defense based on the accused's wishes.[168] Luckily, the rules provide a potential escape for counsel in some circumstances. Rule 1.16 provides: "[A] lawyer may seek to withdraw from representing a client if . . . the client

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[164] AR 27-26, *supra* note 158, app. B, Rule 1.2(a).
[165] AR 27-26, *supra* note 158, app. B, Rule 1.2, Comment 2.
[166] *See* McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018) ("Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are.") (citing Weaver v. Massachusetts, 137 S.Ct. 1899, 1908 (2017)).
[167] *See infra* Appendix B for complete recommended language.
[168] *See McCoy*, 138 S.Ct. at 1506 (explaining the accused's preference to present a case based on a conspiracy by the FBI to frame him for the charged murders).

insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. . . ."[169] This rule could be used to relieve defense counsel from having to present an absurd defense, or could even be used to help persuade the accused from pursuing a theory that has no chance of success.

Finally, candor to the court needs to be considered. There is a legitimate question of whether the accused's autonomy rights could force a defense counsel into presenting a defense that has no basis in reality. The Army's rules account for the dilemma that defense counsel sometimes face in Rule 3.1. This rule, governing meritorious claims and contentions, states:

> "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action, may nevertheless so defend the proceeding as to require that every element of the case be established."[170]

The rule contemplates that defense counsel may be placed in the perilous situation of having to defend a client against overwhelming evidence. This differs, however, from presenting affirmative evidence based on the accused's desire to put forward a specific defense. While *McCoy* does not dictate this, there is still the question of how far this principle could be pushed.[171] If autonomy is expanded to this extreme, the rules will have to

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[169] AR 27-26, *supra* note 158, app. B, Rule 1.16.
[170] AR 27-26, *supra* note 158, app. B, Rule 3.1.
[171] *See McCoy*, 138 S.Ct. at 1507 (reasoning that the right to counsel cognizes the right to an assistant; the right does not requiring ceding all authority); *see also* Faretta v. California, 422 U.S. 806, 834 (1975) ("The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'").

account for the position defense counsel have been placed to ensure harmony between the Sixth Amendment and the obligation of candor before the court.

Changes to client notification of rights and the Army's Rules of Professional Conduct for Lawyers will ensure that the accused and defense counsel are fully aware of their rights and obligations. In a majority of cases, this will be enough to ensure *McCoy* is not violated and will leave little room for the appellate courts to find this structural error requiring reversal. As the federal circuits have made clear, though, there is still room for error where the client's competency comes into question.[172] The Rules for Court-Martial's mechanisms meant to ensure that an accused is competent to stand trial are not currently sufficient to address the question concerning how much autonomy an incompetent client may have to shape their defense. For both defense counsel and the accused's sake, these deficiencies need to be addressed.

C. Competency's Heightened Importance in the Post-*McCoy* World—Ensuring Rule for Court-Martial 909 Protects both Client and Attorney

Armed with the knowledge of what is required to satisfy *McCoy*, defense counsel have a greater obligation than just to notify the accused of their right to autonomy, they must ensure that their client is capable of meeting this heightened expectation of them. The Rules for Court-Martial, like many other jurisdictions, require the accused to be able to "cooperate intelligently in the defense of their case."[173] What intelligent cooperation means may have been fundamentally altered after *McCoy.* If the expectation is that the accused is the "master of his own defense," deciding the fundamental objectives of the defense and whether to make concessions, the standard needs to be heightened to account for expectations placed on the accused.[174]

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[172] *See* United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019) (holding the presentation of an insanity defense over the accused's objection violated his autonomy rights).
[173] MCM, *supra* note 129, R.C.M. 909(a).
[174] *See McCoy*, 138 S.Ct. at 1508 ("[T]he Sixth Amendment 'contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.'") (citing *Faretta*, 422 U.S. at 819–20).

The competency standard, as currently composed, does not present a challenging hurdle. Rule for Court-Martial 909(a) states:

> "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case."[175]

The CAAF has interpreted this requirement to present a low bar, requiring only that an accused have, "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him."[176] The inability to remember the details of an offense does not render the accused incompetent to stand trial.[177]

This standard does not recognize the participation that is now required of the accused. Autonomy, broadly construed, presupposes that the accused has the mental capacity to correctly recall and relay the facts and circumstances as they occurred. To require anything less may force defense counsel, as the defense counsel in *Read* found himself, to present a defense based on delusion.[178] The appropriate competency standard would account for the accused's ability to accurately recall and relay the circumstances that led to the alleged charges.

The military justice system's mechanism for determining competence is also woefully unable to account for the imposition of the comprehensive

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[175] MCM, *supra* note 129, R.C.M. 909(a).

[176] United States v. Barreto, 57 M.J. 127, 130 (C.A.A.F. 2002) (citing United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993) (omission in the original).

[177] *See Barreto*, 57 M.J. at 130 ("Concededly, such an accused is at some disadvantage—for, if innocent, he does not demonstrate that quality by testimony that he ... does not remember. However, he is still quite competent to assume the witness stand, and to assure the court that he does not remember—and he is certainly able to analyze rationally the probabilities of his having committed the offense in light of his own knowledge of his character and propensities." (citing United States v. Olvera, 15 C.M.R. 134, 142 (C.M.A. 1954).

[178] *See* United States v. Read, 918 F.3d. 712, 716 (9th Cir. 2019) (outlining the accused's wishes to present the defense that he was suffering from demonization, rather than mental illness).

right to autonomy. Rule for Court-Martial 706 provides commanders, counsel, and the military judge the ability to transmit a request to an authorized official to order an inquiry into the mental condition of the accused.[179] When ordered, the board is tasked with determining four questions, the final of which is: "Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?"[180] Equipped with a faulty standard and mechanism for determining competence, defense counsel may be poised to fail.

Luckily, there is an example in state law of a competency standard that accounts for the accused's ability to understand and communicate the facts and circumstances of the criminal allegations against them.[181] Texas, in its Code of Criminal Procedure, requires an expert to consider: "[T]he capacity of the defendant during criminal proceedings to . . . disclose to counsel pertinent facts, events, and states of mind; [and] engage in a reasoned choice of legal strategies and options . . ."[182] This standard would guarantee that an accused not only understood the nature of the alleged offenses, but also the factual underpinning, and require them to engage in a discussion concerning rational trial strategy.

The expansion of the accused's right to autonomy should be accompanied by heightened expectations concerning the accused's ability to understand and shape their defense. Amending the standards in the RCM would adequately account for the requirements now imposed on the client. The new standards would not only ask whether the accused understood and could participate in the proceedings against them but would also determine whether they could effectively communicate the factual underpinning of the allegations against them and participate reasonably in building a trial strategy.[183] This would adequately protect

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[179] MCM, *supra* note 129, R.C.M. 706(a).
[180] MCM, *supra* note 129, R.C.M. 706(c)(2)(D).
[181] Texas adopted their competency standard before *McCoy* was released, so it could not have been crafted in response to the imposition of an accused's autonomy rights. The comparison is made solely to illustrate what a comprehensive standard would look like in the military system.
[182] TEX. CODE CRIM. PROC. ANN. art. 46B.024 (West 2015).
[183] *See infra* Appendix C for complete recommended language.

both attorney and client, and likely avoid the situation the Ninth Circuit dealt with in *Read.*[184]

Having ensured that defense counsel and the accused are adequately informed of the rights enshrined in *McCoy*, the final gap remains with the military judge. The role that they play in making a record of the client's waiver of the right to autonomy will prevent needless appellate litigation—avoiding the issues that are inherent in the structure of the military appellate system.

D. The Military Judge's Obligations—Establishing Waiver and Preventing Unnecessary Appeals

While the right to autonomy belongs to the accused, it is the military judge's obligation to see that the right is protected during the course of the court-martial. The military judge is the presiding officer of any court-martial and has tremendous responsibilities associated with this power.[185] Among the most important of these responsibilities is to ensure that the proceedings are conducted in accordance with the UCMJ, Rules for Court-Martial, and the constitutional protections afforded to the accused.[186] Given this, military judges will be tasked with determining whether any concessions made during the course of the trial were made in accordance with the client's Sixth Amendment rights. In other words, the military judge will engage with the accused to determine whether they assented to any factual strategy employed by defense counsel.

This function will prevent future litigation concerning defense counsel's concessions. The CAAF does not review issues that it deems waived: "[W]e cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal."[187] In the past, the CCAs would review waived claims under their inherent Article 66, UCMJ authority, but

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[184] *See* United States v. Read, 918 F.3d. 712, 716 (9th Cir. 2019) (outlining the accused's wishes to present the defense that he was suffering from demonization, rather than mental illness).

[185] MCM, *supra* note 129, R.C.M. 801(a) ("The military judge is the presiding officer in a court-martial.").

[186] MCM, *supra* note 129, R.C.M. 801(a)(3) ("Subject to the UCMJ and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual.").

[187] United States v. Davis, 79 M.J. 329, 332 (C.A.A.F. 2020).

Article 66 was amended on January 1, 2021, to remove the "should be approved" language, arguably limiting this authority.[188] By assuring that the accused has waived their right to challenge a violation of their Sixth Amendment right to autonomy, the military judge will prevent future review of defense counsel's concessions.

The CAAF's jurisprudence concerning waiver of a constitutional right disfavors applying this principle: "We have . . . applied a presumption against finding a waiver of constitutional rights."[189] This presumption is not absolute—the CAAF has been willing to find a waiver of a constitutional right effective if it, "clearly established that there was an intentional relinquishment of a known right."[190] Any waiver of the accused's rights to autonomy then will be viewed with suspicion by the appellate courts. Knowing this, it is incumbent on the military judge to make an extensive record concerning the accused's assent to the concessions made by his counsel during the course of the court-martial. Accomplishing this will require a colloquy between the military judge and the accused establishing that the accused was aware of their right to autonomy, that they discussed this right with defense counsel, and they assented to their attorney's concessions.

Military judges already engage in similar colloquies with the accused over other constitutional issues.[191] In each of these situations, the military judge takes care to establish that the right was known to the accused and that their waiver of the right was voluntary. In cases involving a concession by defense counsel, the military judge should engage the accused to determine whether their rights to autonomy have been violated. Such a colloquy would determine whether: 1) the accused knew they had a right to maintain their factual innocence; 2) their attorney informed them of this right; 3) the accused permitted defense counsel to make the concession presented; and 4) the accused agrees that the court-martial has

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[188] *See* Article 66(d)(1)(A), UCMJ (2021); Untied States v. Ramirez, Army 20210376, 2022 WL 17095059 at *7 (A. Ct. Crim. App. Nov. 16, 2022) (finding the removal of the should be approved language from Article 66 removes the court of criminal appeals' ability to review waived claims).

[189] United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (citing United States v. Sweeny, 70 M.J. 296, 304 (C.A.A.F. 2011).

[190] *Jones*, 78 M.J. at 44 (citing *Sweeny*, 70 M.J. at 304).

[191] *See* DA PAM. 27-9, *supra* note 103, paras. 2-7-3 (waiver of conflict free counsel), 2-7-9 (waiver of members), 2-7-10 (waiver of motions).

been conducted in accordance with their right to autonomy.[192] These questions would presumably meet the CAAF's requirement that the accused's waiver of his Sixth Amendment right to autonomy constitutes an "intentional relinquishment of a known right."[193]

The military judge's role in establishing a waiver of rights will serve as the finishing touch ensuring compliance with a broad interpretation of *McCoy*. The suggestions above will guarantee the accused and defense counsel are aware of the right to autonomy, that the accused can meet the heightened expectations of assisting in their defense, and that any concessions are approved by the accused on the record. To not implement these steps risks having the paternalistic military appellate system come in after the fact, overturning convictions and stressing the military justice system in the process. Although military justice practitioners are waiting for the final word concerning the reaches of *McCoy*, this decision will have to be addressed eventually, and proactivity represents the best option.

V. Conclusion

The nature of criminal defense practice in the military is likely to face a fundamental shift in the near future. The CAAF, poised to issue its initial interpretation of *McCoy* in *United States v. Hasan*, passed on the opportunity, thereby leaving the question open.[194] Given this, the debate will be thrust upon military practitioners as many are introduced to *McCoy's* mandate for the first time. What will inevitably follow, is the shaping of the accused's right of autonomy to the nature of the court-martial system. As the issue is dealt with more and more it becomes increasingly likely that the military appellate system will step in and implement a broad interpretation of the fairly new Sixth Amendment protection.

Ultimately, defense counsel—who once thought of themselves engaged in the unburdened practice of law, free to make their own strategic decisions—will need to adapt to this new reality. In this new system they will have to ensure their clients are informed about the right to autonomy,

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[192] *See infra* Appendix D for complete recommended language.
[193] *Jones*, 78 M.J. at 44 (citing *Sweeny*, 70 M.J. at 304).
[194] *See* United States v. Hasan, No. 21-0193, 2023 CAAF LEXIS 639, at *21 (C.A.A.F. 2023) (deciding the Sixth Amendment waiver of counsel on a voluntariness basis).

able to assist in making the difficult semi-tactical decisions that are now reserved to accused, and then implement a trial plan where they make no unauthorized concessions. Where they once viewed themselves as the master of the ship, they need to realize much of this power has been shifted to the person with the most to lose, the accused.

Federal appellate courts have been struggling with *McCoy* since its inception, it is time the military justice system does as well. Where there is still ambiguity in the civilian practice, expect none in the military. The system possesses the hallmarks that make the broad implementation of *McCoy* necessary, [195] the military appellate system has shown a willingness to dive into the attorney-client relationship, [196] and the mechanism exists for the appellate courts to find this error where it exists.[197] If this change is coming, defense counsel and the system as a whole need to be ready to change now, before it is too late.

The failure to recognize this invites disaster. The military appellate system will be ready to pounce where defense counsel infringes upon the right of autonomy, reversing without testing for prejudice because of the structural nature of this error. [198] There is a way to avoid this. Implementing rules that require notification of the right to autonomy, incorporating *McCoy's* principles into the ethical rules, adjusting the competency evaluation and standard to align with the accused's new role, and allowing the military judge to ensure waiver where concessions are made, will guarantee the accused's rights have not been violated and there

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[195] *See* McCoy v. Louisiana, 138 S.Ct. 1500, 1514 (2018) (Alito, J., dissenting).

[196] *See generally* United States v. Palacios Cueto, 82 M.J. 323, 326 (C.A.A.F. 2022) (examining defense counsel's failure to admit mitigating evidence during sentencing, failure to advise the accused to mention sex offender registration during his unsworn, and failing to request specific sentencing instructions); United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022) (examining counsel's failure to argue the victim's patient-psychotherapist privilege could be pierced); United States v. Cooper, 82 M.J. 6, 10 (C.A.A.F. 2021) (examining whether the failure to forward a request for individual military counsel rises to the level of ineffectiveness); United States v. Furth, 81 M.J. 114, 117 (C.A.A.F. 2021) (assuming that counsel's failure to advise about the effects of a resignation for the good of the service was ineffective); United States v. Scott, 81 M.J. 79, 85 (C.A.A.F. 2021) (finding counsel ineffective for putting on a truncated sentencing case).

[197] *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967) (creating the mechanism for appellate fact-finding).

[198] *See McCoy*, 138 S.Ct. at 1511 (holding the violation of an accused's autonomy rights constitutes structural error).

is no room for appellate intervention. Fight the battle now, knowing how to best shape it, rather than waiting for it to come.

Appendix A – Amended DCAP Form 8.3

Acknowledgement of Rights of an Accused Facing Court-Martial
(Enlisted accused. SPCM or non-capital GCM)

This document outlines the rights an enlisted accused has in the court-martial process and other information and advice.

1. **The attorney-client relationship.** There is an attorney-client (lawyer-client) relationship between my attorney and me that gives me protection and incentive to discuss everything I know about the charges with my attorney. Failure to disclose all information I know about the case will make it difficult for my attorney to advise and assist me effectively. Any false or inaccurate information I provide to my attorney will make it more difficult for him or her to defend and assist me. Information I discuss with my attorney is confidential and may not be revealed to anyone, to include family and friends, without my consent, except under certain circumstances, which have been explained to me.

2. **Rights to counsel.** I have the following rights to counsel:

a. I have the right to be represented at my trial by a lawyer qualified and certified by The Judge Advocate General to practice before military courts.

b. (*Name of detailed counsel*), of the Trial Defense Service, has been detailed to represent me at my court-martial and is licensed to practice law. This counsel is provided to me free of charge.

c. I have the right to be represented at trial by a civilian lawyer provided by me and at no expense to the government. If I decide to hire a civilian lawyer, my detailed counsel would serve as assistant counsel if I desire, or he or she may be excused with my consent.

d. I have the right to be represented free of charge by a military lawyer of my own selection, if that lawyer is reasonably available. If the lawyer I request is appointed to my case, my detailed counsel may be excused. I may request that my detailed counsel be retained as assistant counsel to assist my individual military counsel.

e. I choose to be represented by: _____.

3. **Who will hear my case.** I have the following rights concerning who will decide whether I am guilty or not guilty and, if found guilty, who will determine my sentence:

a. My court-martial will be composed of the court members (jurors) selected by the commander (usually the commanding general) who referred the charges to trial. If the commander referred the charges to be tried by a special-court-martial with a military judge alone, there will be no court members, but I may be subject to a lower maximum punishment.

(1) I may request to be tried by military judge alone. If the military judge approves my request, he or she will decide whether I am guilty. If he or she finds me guilty of any offense, he or she will determine the sentence.

(2) I may request that the membership of the panel (the jury) include all officers.

(3) I may request that the membership of the panel include at least one-third enlisted persons. No member of the court will be junior in rank to me.

b. At a Special Court-Martial with members, there will be four members. At a General Court-Martial with members, there will be eight members.

c. If I am tried by a panel, I may be found guilty only if three-fourths of the members agree that I am guilty of an offense.

d. If I am tried by a panel and it finds me guilty, the military judge alone will determine my sentence, unless I request, before any sentencing evidence is presented, that the court members on the panel determine my sentence. Three-fourths of the members must agree in determining a sentence. (*If any offense is alleged to have occurred before 1 January 2019, unless the alleged offenses straddle 1 January 2019 and the accused is going to elect under RCM 902A(b) to be sentenced under the new*

sentencing rules, replace this subparagraph with: "If I am tried by a panel and found guilty, the panel will determine my sentence. Three-fourths of the members must agree in determining my sentence.")

4. **Preliminary hearing (general court-martial only)**. If the government intends to have my case tried at a general court-martial, the government must conduct an Article 32 preliminary hearing to inquire into the truth and form of the charges. This hearing is not a trial; it is a process where an independent preliminary hearing officer will determine whether there is probable cause to support the charges. I will have the right to be present, be represented by counsel, make a sworn or unsworn statement, present and confront evidence, and request to have witnesses provide testimony on my behalf. At the conclusion of the hearing, the preliminary hearing officer will make recommendations as to disposition of the charges. The preliminary hearing officer may also make recommendations as to the form of the charges and may recommend changing the current charges or adding additional charges. These recommendations are not binding upon the government. Also, within 24 hours of closure of the preliminary hearing, my defense counsel may submit to the preliminary hearing officer information relevant to the convening authority's disposition of the charges and specifications. I also have the right to waive (give up) my right to an Article 32 preliminary hearing.

5. **Pleas to the charge(s) and plea agreements**. I should consider the following rights and other considerations regarding the appropriate plea in my case:

a. I may plead "guilty" or "not guilty" to any or all of the specifications and charges. I may legally and morally plead "not guilty" to any offense even though I am guilty and believe that I am guilty. I am not lying by pleading "not guilty" when I know I am "guilty." I may not plead "guilty" to an offense unless I am, in fact, guilty of every element of that offense.

b. A plea of "not guilty" places the burden upon the prosecution to prove my guilt beyond a reasonable doubt. I have the right to assert defenses and objections.

c. A plea of "guilty" to an offense admits every element of the offense to which I plead "guilty" and would permit the court to find me guilty of that offense without further proof. If I plead "guilty" to an offense, I waive my right against self-incrimination, my right to trial of the facts, and my right to confront and cross-examine the witnesses against me. I only give up these right with respect to the offenses to which I plead "guilty."

d. I may submit to the convening authority an offer to plead "guilty" that, if approved by the convening authority, limits the sentence that may be adjudged. Also, such a plea agreement may contain a promise by the convening authority not to prosecute certain charges or specifications. (If any offense is alleged to have occurred before 1 January 2019, unless the alleged offenses straddle 1 January 2019 and the accused is going to elect under RCM 902A(b) to be sentenced under the new sentencing rules, replace this subparagraph with: "I may submit to the convening authority an offer to plead "guilty" that provides that he will approve no sentence greater than a stated and negotiated amount when he takes action on the findings and sentence in my case. If the convening authority accepts such an offer, he is bound to reduce my sentence in his action to the agreed limits, if the sentence adjudged by the court exceeds those agreed limits.")

(6. My right to participate in my defense. I understand that during the course of my court-martial, my attorney cannot admit to any of the charged conduct without consulting me first. I understand that I not only have the right to plead not guilty, but I have the right to maintain my factual innocence throughout my court-martial. I understand my attorney will not admit to any offense, or any conduct surrounding any offense, without obtaining my permission first. I will assist with determining the best strategy for my defense, including whether to make any admissions.)

6. **My right to testify.** During my trial, I may decide to be sworn and take the stand as a witness in my own behalf for all or some of the offenses. Like any witness, I may be cross-examined if I testify. However, I cannot be required to testify at the trial, and I may decide to remain silent. If I remain silent, my silence will neither be held against me nor be considered as an admission of guilt.

7. **Rights during the sentencing phase.** If I am found guilty, I may present evidence in extenuation and mitigation of any offense of which I was convicted. I may testify under oath, or I may remain silent. In addition, I may make an unsworn statement during the pre-sentencing case in extenuation and mitigation. I cannot be cross-examined on this unsworn statement, but the prosecution may offer evidence to rebut any statement of fact in the unsworn statement. I may make this unsworn statement orally or in writing, or both, and either my counsel or I, or both of us, may make the statement. I may also present evidence of good duty performance and my potential for rehabilitation. This evidence may be in the form of documents or the testimony of witnesses.

8. **Other evidence the defense may present during the sentencing phase**. The extenuation and mitigation evidence that can be presented during the pre-sentencing phase of the trial can include my accomplishments, what people know about me from any part of my military and civilian life, and any mental or behavioral conditions that I had or have. I understand it is important that, under the direction of my attorney, I locate and secure existing documents, certificates, awards, and other evidence and information that I would like to present during pre-sentencing or after the trial, to the convening authority.

9. **Maximum sentence**. The maximum sentence that can be adjudged against me by if I am found guilty of all charges:

(General Court-Martial: Reduction to E-1, confinement for _____, forfeiture of all pay and allowances, a fine, and a [Bad Conduct] [Dishonorable] Discharge).

(Special Court-Martial: Reduction to E-1, confinement for _____ months, forfeiture of 2/3ds pay per month for _____ months, a fine, and a Bad Conduct Discharge.)

10. **Effect of punitive discharge and/or conviction**. If I am discharged with a Dishonorable or a Bad-Conduct Discharge, the discharge will be a permanent impediment on my employment opportunities and government and VA benefits. Conviction at a Special or General Court-Martial is a federal conviction. If I am not a US citizen or acquired my citizenship through having served in the Armed Forces, there may be adverse

immigration consequences. If I am convicted of certain sex offenses, I will be required to register as a sex offender.

11. **Appeal**. In the event I am found guilty of any charges and specifications and the judgment includes a punitive discharge or confinement for two years or more, my case will automatically be forwarded to the United States Army Court of Criminal Appeals. Also, if not automatically appealed and the sentence includes confinement for more than six months, I will be eligible to file an appeal with the United States Army Court of Criminal Appeals. I will have the right to have appellate counsel represent me at no cost to me. I may also be represented by a civilian appellate counsel at no cost to the government. If the United States Army Court of Criminal Appeals does not review my case on appeal, my case will be reviewed by a military lawyer.

12. **Effect of a sentence including confinement and/or a punitive discharge** (**The language within the three pairs of brackets does not apply if all offenses are alleged to have occurred on or after 1 January 2019 and before the effective date of any executive order the President signs to implement the amendments to automatic reduction under Article 58a*.) If a sentence adjudged by the court includes confinement, I will begin serving that confinement immediately, unless I request deferment and the request is approved. If my sentence includes a punitive discharge or confinement for more than six months, the sentence automatically includes [a reduction to E-1 and*] forfeiture of pay equal to the amount that can be adjudged by the court-martial during any period of confinement. These are called [automatic reduction and*] automatic forfeitures. Automatic forfeitures, adjudged forfeitures and adjudged reductions in rank are effective fourteen days after the court-martial adjudges my sentence. [An automatic reduction is effective at entry of judgment.*] I may request that the convening authority defer confinement, adjudged reduction, adjudged forfeitures, or automatic forfeitures until entry of judgment. I can also request that the convening authority waive the automatic forfeitures for up to six months. The request for waiver must establish that I have dependents who would benefit from continued receipt of my pay. Soon after trial, I may petition the convening authority to take some favorable action, within the convening authority's limited authority, in my case.

13. **The administrative portion of the charge sheet**. I have checked the information in blocks 1-9 of my charge sheet for accuracy. The information is accurate, except for the following:

14. **Discharge in lieu of trial**. Under the provisions of Chapter 10, AR 635-200, I may request administrative separation in lieu of court-martial. In my application, I have to admit that I am guilty of at least one of the charges against me, or of a lesser-included offense, the punishment for which, at a court-martial, includes a punitive discharge. If my request is approved, the charges will be withdrawn and I will be separated from the Army, reduced to E-1, and can expect to receive an "Other Than Honorable" Discharge. This is a possible means of avoiding a federal conviction and punishment, but it will likely result in my losing most of my veterans benefits.

15. **Parole.** Department of Defense Instruction 1325.07 (with Change 3), encl. 2, para. 18 specifies parole eligibility requirements. A prisoner is eligible for release on parole when requested by the prisoner, and (1) the prisoner has an approved unsuspended punitive discharge or an approved administrative discharge or retirement; and (2) the unsuspended sentence or aggregate sentence to confinement is 12 months or more. In cases where the sentence to confinement is less than 30 years, the prisoner must have served one-third of the term of confinement, but in no case less than six months. In cases where the sentence to confinement is 30 years or more, up to and including life, the prisoner must have served at least 10 years of confinement. In cases in which a prisoner is convicted of an offense committed after February 15, 2000 and has been sentenced to confinement for life, the prisoner must have served at least 20 years of confinement. A prisoner sentenced to death or life without eligibility for parole is ineligible for parole. A prisoner will be considered for parole when the prisoner becomes eligible and annually thereafter. See paragraph 18 of Enclosure 2 to Department of Defense Instruction 1325.07 (with Change 3) for special rules for unusual circumstances.

16. I have received the following additional advice:

a. **Following orders of the chain of command**. I must comply at all times with orders and terms of restriction placed upon me. Violation of any such restriction may result in additional charges and/or pretrial

confinement. If I have received a "no-contact" order, I must obey it. I will immediately tell my lawyer about any orders or restrictions placed upon me.

b. **Continuing to Soldier**. I must strive to perform all my duties professionally, obey the orders and instructions of my chain of command, and demonstrate a positive attitude. Doing so can help my situation. Failure to do so can make my situation worse.

c. **Consent searches**. If asked to consent to a search of my person, vehicle, home/quarters/barracks, or property, I should refuse and notify my lawyer immediately. If I have already consented to any search or seizure, I must notify my lawyer about it immediately.

d. **Let my counsel investigate**. I must not try to investigate this case on my own or attempt to interview witnesses.

e. **Keeping my attorney informed**. I must keep my attorney informed of matters that I learn about my case or changes in my situation.

f. **Pretrial punishment**. If I feel I am being punished by my command before trial, I will immediately let my defense counsel know.

g. **Do not discuss the case with others**. I must not discuss my case with anyone by any means (face-to-face, phone, text messages, letters, email, or social media such as FaceBook Instagram, Snapchat, or Twitter). "Anyone" includes roommates, friends, family, investigators, the media, members of Congress, and anyone in my chain of command. If I am asked about my case by anyone, I should simply reply that my lawyer has instructed me not to discuss the case. The only exception to this rule is if my attorney specifically instructs me to do something or talk to a specific person and I agree to do so. If I am read my rights, I will invoke my right to remain silent and my right to counsel. I will not answer questions.

After invoking my rights, I will not initiate any conversation with law enforcement personnel or members of my command. Law enforcement may re-approach me and try to interrogate me. If they do, I will invoke my rights and remain silent. I will immediately contact my defense counsel if anyone from law enforcement or my command tries to talk to me about my case.

Client _____

Defense Counsel _____

Date: _____

Appendix B – Updated Rule 1.2, Rules of Professional Conduct for Lawyers

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

(a) [Modified] Formation of client-lawyer relationships by Army lawyers with, and representation of, clients (whether the Army as client or individual clients) is permissible only when the lawyer is authorized to do so by competent authority. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation, ***although a lawyer may not take actions or present evidence inconsistent with the client's desire to maintain their factual innocence. This includes conceded any element of a charged offense during the course of a court-martial.*** A lawyer shall abide by the client's well-informed and lawful decisions concerning ~~case objectives,~~ choice of counsel, forum, pleas, whether to testify, and settlements.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) [Modified] A lawyer may limit the scope of the representation if the client consents after consultation, or as required by law, regulation, or policy and communicated to the client. Generally, the subject-matter scope of an Army lawyer's representation will be consistent with the terms of the assignment to perform specific representational or advisory duties. A lawyer shall inform clients at the earliest opportunity of any limitations on representation and professional responsibilities of the lawyer towards the client.

(d) [Modified] A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client

Allocation of Authority between Client and Lawyer

(2) Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, ***including the right to decide what concessions to make during the course of representation,*** within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives, and the lawyer may take such action as is impliedly authorized to carry out the representation. A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. ***A lawyer may not override the client's choice to maintain factual innocence and refusal to concede an element of any charged offense and may not present evidence or argument inconsistent with this desire.*** A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical, legal, and tactical matters, such as which witnesses to call, whether and how to conduct cross-examination, which court members to challenge, and what motions to make. Except where precluded by Rule 4.4, the lawyer should defer to the client regarding such questions as any expense to be incurred in the representation, and concern for third persons who might be adversely affected by decisions resulting from the representation.

Appendix C – Updated RCMs 706(c) and 909

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(c) *Inquiry*.

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to***:***

(i) understand the nature of the proceedings against the accused***;*** or ~~to conduct or cooperate intelligently in the defense?~~

(ii) disclose to counsel pertinent facts, events, and

states of mind, and engage in a reasoned choice of legal strategies and options?

Other appropriate questions may also be included.

Rule 909. Capacity of the accused to stand trial by court-martial

(a) In general. No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. ***Intelligent cooperation includes the ability to disclose to counsel pertinent facts, events, and states of mind, and engage in a reasoned choice of legal strategies and options.***

Appendix D – Proposed Military Judges Benchbook (DA Pam. 27-9)
Instruction

2–7–3. WAIVER OF RIGHT TO AUTONOMY (DC CONCESSIONS DURING TRIAL)

MJ: _____, do you understand that you have a constitutional right to not only contest the charges against you, but to maintain your factual innocence?

ACC: (Responds.)

MJ: Do you understand that as part of this right your lawyer cannot admit that you committed any element of any offense without first seeking your permission?

ACC: (Responds.)

MJ: Your lawyer just (stated in opening statement that the evidence would show you _____) (argued in closing that you _____). By doing that they (conceded an element of the offense of _____) (conceded you committed the offense of _____). Do you understand that?

ACC: (Responds.)

MJ: Have you discussed this matter with your defense counsel?

ACC: (Responds.)

MJ: After discussing this matter with (her) (him), did you voluntarily permit (him) (her) from pursing this course of action?

ACC: (Responds.)

MJ: Do you understand that if you told your defense counsel you did not want them to make any concessions, they would have to present their case following your wishes?

ACC: (Responds.)

MJ: In other words, if you desired to make no concessions your defense counsel would have to base your defense on this principle. Do you understand that?

ACC: (Responds.)

MJ: Knowing all this, do you still consent to your defense counsel's concessions?

ACC: (Responds.)

MJ: Do you have any questions about your right to assert your factual innocence?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his/her) right to Sixth Amendment autonomy.

REFERENCES: McCoy v. Louisiana, 138 S.Ct. 1500 (2018).