

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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CLERK

No. 97221-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint Petition of

DENNIS SOMERVILLE,

Petitioner.

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**PERSONAL RESTRAINT PETITION**

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Jeffrey Erwin Ellis #17139  
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A. STATUS OF PETITIONER

Dennis W. Somerville, Petitioner, challenges his Thurston County Superior Court judgment and sentence for rape (Case No. 02-1-00908-9). Mr. Somerville (DOC # 810921) is currently incarcerated at the Airway Heights Correctional Center in Airway Heights, Washington.

Mr. Somerville has filed two previous Personal Restraint Petitions (PRPs). He asserts that this petition is both timely and does not constitute an abuse of the writ due to a retroactive and material change in the law.

B. FACTS

Mr. Somerville is confined pursuant to the Judgment and Sentence of the Thurston County Superior Court, based on Petitioner's conviction following a jury verdict for the crime of Rape in the First Degree, on August 8, 2002.

On October 18, 1998, D.W. was working at the Ed Wyse Beauty Supply Store in Olympia, Washington. [RP 23-24, 30]. A customer, Susan Peterson, entered the store. [RP 31, 94]. D.W. observed the man wander through the store and eventually asked if she could assist him. [RP 34-36]. The man asked D.W. if the store carried a particular type of

hairbrush, which the store did not. [RP 36, 98]. D.W. then went to ring up Peterson's purchase at the cash register. [RP 36, 98]. While D.W. was doing so, the man stepped behind the counter and told D.W. "this was a fucking robbery," "don't fuck with him," and "he had a gun." [RP 36-37, 39, 99]. The man removed all the money from the cash register and ordered Peterson to give him any money from her purse, which Peterson did. [RP 36-37, 40-43, 101].

The man then ordered Peterson into a bathroom in the store shutting Peterson inside, but stopped D.W. from going in too. [RP43-44, 108-109]. The man began fondling D.W.'s breasts. [RP 44]. Peterson, in the bathroom, heard D.W. pleading with the man, "Oh, God. Please don't." [RP 110]. The man then made D.W. place his penis in her mouth, which she did. [RP 45, 47-48]. The man ejaculated into D.W.'s mouth, and then ordered her into the bathroom with Peterson. [RP 48-49, 51, 110]. The man fled the scene. [RP 52]. Neither woman saw a gun throughout the entire incident. [RP 39-40, 73-74, 101-102, 118]. The two women left the bathroom, and D.W. ran to a nearby store and called the police. [RP 52-53, 111].

Both women described the man as a white male, in his 20s or 30s, approximately 6 feet tall, weighing approximately 200 pounds,

with sandy blond hair, wearing jeans, a sweatshirt, and a baseball cap. [RP 32-33, 95-96]. The man was not caught.

D.W. was taken to the hospital where a rape kit was performed. [RP 55-57, 130-132]. Semen was detected on swabs taken from D.W.'s mouth from which a DNA profile could be obtained. [RP 174, 176-178, 229-235]. In 2000-2001, the DNA sample obtained from the incident involving D.W. was tested against Washington's DNA data bank, and a match to Somerville was made. [RP 237-250]. Pursuant to a warrant, a blood sample was obtained from Somerville and compared to the DNA taken from the incident involving D.W. [RP 168-170, 248, 250-259, 264]. Again, a match was made. [RP 250-259]. Karen Lindell, a forensic scientist with the Washington State Patrol Crime Lab, opined, when asked to the probability of a certain result in the comparisons, "that the number indicated that this profile [Somerville's] would not be seen more than once in the world." [RP 259].

During opening statements and closing argument and contrary to Somerville's case objective, defense counsel conceded that Somerville sexually assaulted the store clerk.

### C. ARGUMENT

Mr. Somerville claims that he was denied his autonomous constitutional right to determine his defense.

Contrary to his wishes, Mr. Somerville's trial counsel conceded guilt in his opening statement and closing argument by telling the jury that Somerville committed a rape and the jury only had to determine the degree of rape. In his closing argument, Petitioner's counsel acknowledged the strength of the DNA-based identification evidence and argued only that the State had not proved a threat with a weapon.

At the time of Somerville's trial and appeal, the law did not recognize a defendant's autonomous right to determine his defense. *See State v. Silva*, 106 Wash.App. 586, 596-597, 24 P.3d 477 (2001).

Previously, Washington courts viewed a partial concession as neither an unauthorized guilty plea nor prejudicial error when the evidence on the conceded point is strong and when the concession is made for the tactically sound reason of gaining credibility with the jury to avoid conviction on a more serious charge. *Silva*, 106 Wn.App. 596-97. And a lawyer "need not consult with a client before making such a tactical move." *Silva*, 106 Wash.App. at 596.

That rule has changed.

A defendant has the autonomy to decide that the objective of the defense is to assert innocence.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” Under Supreme Court precedent, this right contains two distinct guarantees. First, the Sixth Amendment entitles a defendant to “effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). A defendant is “deprived” of this right when an attorney “fail[s] to render adequate legal assistance” and the defendant is prejudiced by it. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Second, a defendant's right to assistance of counsel in “his defence” encompasses a “right to autonomy” that allows him to decide whether to “assert innocence.” *McCoy v. Louisiana*, 138 S. Ct 1500, 1508-09 (2018). A defendant is deprived of this right when his attorney “override[s]” such a decision “by conceding guilt.” *Id.* at 1509.

In *McCoy*, the government charged the defendant with three murders and sought the death penalty. 138 S. Ct. at 1505-06. His counsel concluded that “the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty

phase.” *Id.* at 1506. McCoy “vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt.” *Id.* at 1505. But counsel refused to take that position, conceding to the jury that McCoy killed the victims. *Id.* McCoy was convicted and sentenced to death. *Id.* at 1506-07.

The Supreme Court reversed, holding that “a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.” *Id.* The Sixth Amendment's guarantee to a defendant of assistance of counsel “for his defence” grants him the “[a]utonomy . . . to assert innocence.” *Id.* at 1505, 1508. Despite the risks involved, a defendant may “wish to avoid, above all else, the opprobrium that comes with admitting” a crime. *Id.* at 1508. “And the effects of [an] admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt.” *Id.* at 1511.

The Court recognized that “[t]rial management is the lawyer's province.” *Id.* at 1508 (emphasis added). But “[w]ith individual liberty . . . at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense.” *Id.* at 1505 (emphasis added). “When a client expressly asserts that the objective of ‘his defence’ is to maintain

innocence,” it violates the Sixth Amendment for his lawyer to “override” that wish “by conceding guilt.” *Id.* at 1509. That is because “[t]hese 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.” *Id.* at 1508.

The Court further held that, where “a client's autonomy . . . is in issue,” it does “not apply” the traditional “ineffective-assistance-of-counsel jurisprudence.” *Id.* at 1510-11 (citing *Strickland*). An attorney's “admission of a client's guilt over the client's express objection is structural in kind,” and a defendant therefore need not “show prejudice” or survive “harmless-error review.” *Id.* at 1511. “[T]he violation of [a] protected autonomy right [is] complete when” when a counsel is allowed “to usurp control of an issue within [the defendant's] sole prerogative.” *Id.*

Although this Court does not appear to have construed *McCoy*, other courts have recognized that “*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense.” *State v. Horn*, 251 So. 3d 1069, 1075 (La. 2018). The Ninth Circuit, for example, has held that *McCoy*'s rule applies outside of the capital context. In *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), an attorney in a noncapital case pursued an insanity defense against

his client's wishes. *Id.* at 716-17. The court held that this decision was inconsistent with *McCoy*: “pleading insanity has grave, personal implications that are separate from its functional equivalence to a guilty plea,” and “a defendant, with good reason, may choose to avoid the stigma of insanity.” *Id.* at 720. Although the defendant was “clearly mentally ill,” his “choice to avoid contradicting his own deeply personal belief that he is sane” raised concerns that “go beyond mere trial tactics and so must be left with the defendant.” *Id.* at 719, 721.

A recent California appellate decision is even more closely analogous. In *People v. Flores*, 2019 WL 1577743 (Cal. Ct. App. Apr. 12, 2019), the defendant was accused of striking a police officer with his car and was charged with attempted murder. *Id.* at \*2. Over the defendant's objection, his lawyer conceded that he “was driving the car that seriously injured the officer,” but asserted that he “never formed the premeditated intent to kill.” *Id.* at \*1. The defendant appealed based on *McCoy*, and the government argued that a defense lawyer could “reasonably decide[] that the most effective way to achieve an acquittal is to concede the actus reus.” *Id.* at \*4.

The court disagreed: “Under *McCoy*, defense lawyers must allow their clients to dictate the fundamental objective at trial, and must not concede the acts alleged as the actus reus of a charged crime over a

client's objection.” *Id.* (emphasis added). That is because the “fundamental principles of personal autonomy inherent in the Sixth Amendment afford criminal defendants the right to tell their own story.” *Id.* at \*1 (emphasis added). The court rejected the government's argument that *McCoy* merely “confirmed that a defendant had the right to insist that counsel refrain from admitting guilt” to the charged crimes. *Id.* at \*7 (emphasis and quotation marks omitted). This argument “fail [ed] to acknowledge” a defendant's right to “maintain [] innocence of the alleged acts throughout trial.” *Id.* (emphasis added). It “also disregard[ed] *McCoy*'s discussion of plausible objectives that a defendant might have at trial,” including “the avoidance of the ‘opprobrium that comes with admitting’” unlawful acts. *Id.* (quoting 138 S. Ct. at 1508-09). Finally, the court explained that “the principles guiding the Court in *McCoy* have greater force outside the capital context, because respect for a seemingly-irrational defendant's desire to maintain innocence would have the same benefit at a lesser cost.” *Id.* at \*8 (emphasis added).

The change in the law brought about by *McCoy* makes this petition timely, not improperly successive, and meritorious.

## CONCLUSION

Because Mr. Somerville's trial was conducted in violation of his Sixth Amendment rights, his conviction should be vacated.

DATED this 20<sup>th</sup> day of May 2019.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis

Jeffrey Erwin Ellis #17139

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DECLARATION OF DENNIS SOMERVILLE

I, Dennis Somerville declare:

1. I am the Petitioner in this case.
2. During opening statements, my attorney conceded to the jury that I had sex with the complaining witness without her consent.
3. I did not expect my attorney to make this concession. We did not discuss it and I most definitely did not authorize him to do so.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

4-13-2019, A.H.C.C.  
Date and Place

Dennis Somerville  
Dennis Somerville

VERIFICATION OF PETITION

I, Dennis Somerville, verify that the Personal Restraint Petition filed by my counsel, Jeffrey Ellis, is true and correct and filed on my behalf.

4-13-2019, A.H.C.C.  
Date and Place

Dennis Somerville  
Dennis Somerville

**CERTIFICATE**

I, Dennis Somerville, certify as follows:

1. That I have previously been found indigent by this court.

2. That the highest level of education I have completed is:

Grade School       High School G.E.D.     College or greater

3. That I have held the following jobs: Construction, Warehouse.

4. That I:       have not received job training  
                   have received the following job training: (while in carcerated) I received training in, Welding, Dry Wall, Roofing & Siding.

5. That I:       do not have a mental or physical disability that would affect my ability to work  
                   have the following mental or physical disability that would affect my ability to work: \_\_\_\_\_

6. That I:       do not have children or family members that normally depend on me for financial support  
                   have the following children or family member that normally depend on me for support \_\_\_\_\_

7. That I:       do not anticipate my financial condition improving in the foreseeable future through inheritance, sale of land, or similar.  
                   anticipate my financial condition improving in the foreseeable future as follows: \_\_\_\_\_

Dennis Somerville  
I, Dennis Somerville, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

4-13-19  
Date

Dennis Somerville  
Signature

Airway Heights Correction  
Place

**ALSEPT & ELLIS**

**May 20, 2019 - 7:46 AM**

**Filing Personal Restraint Petition**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Trial Court Case Title:** State of Washington Vs Somerville, Dennis Wayne  
**Trial Court Case Number:** 02-1-00908-9  
**Trial Court County:** Thurston Superior Court  
**Signing Judge:**  
**Judgment Date:**

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Personal Restraint Petition  
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