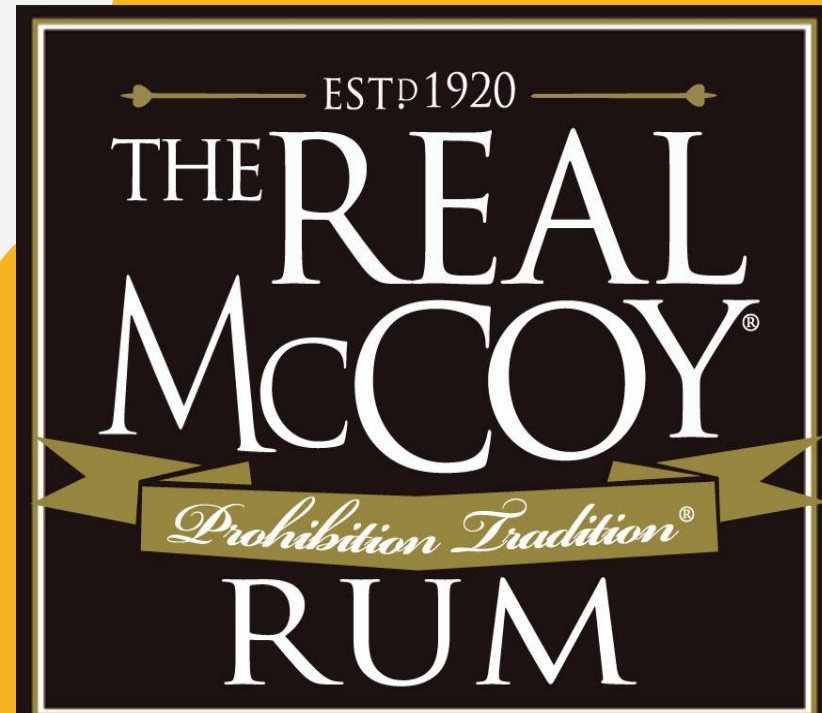


CAPITAL CASE ETHICS

PROFESSOR JULES EPSTEIN



WHAT'S IT ALL ABOUT?

MCCOY

- I did not engage in the charged acts
- and adamantly object to any admission of guilt.

COUNSEL'S OPENING

- **My client**
“committed three murders...
• [H]e’s guilty.”

THE RESPECTIVE ROLES

LAWYER'S DECISIONS

- what arguments to pursue,
- what evidentiary objections to raise, and
- what agreements to conclude regarding the admission of evidence.

CLIENT'S DECISIONS

- whether to
- plead guilty,
- waive the right to a jury trial,
- testify in one's own behalf, and
- forgo an appeal

A BOTTOM LINE

ONLY
THIS
PHASE?

- **CLIENT**
- may insist on maintaining his innocence at the guilt phase of a capital trial.

McCoy v. Louisiana, No. 16-8255, 2018
U.S. LEXIS 2802, at *13 (May 14, 2018)

"I didn't do it. Nobody saw me do it.
You can't prove anything"



WHY?

- he may hold life in prison not worth living and
- prefer to risk death for any hope, however small, of exoneration.



WHAT *MAY* COUNSEL DO?

- English could not interfere with McCoy's telling the jury "I was not the murderer,"
- although counsel could, if consistent with providing effective assistance, focus...on urging that McCoy's mental state weighed against conviction.
- **LOOK AT THEIR PROOF – IT SHOWS THE LACK OF SPECIFIC INTENT TO KILL.**

THE DISSENT SEEMS TO AGREE

- Constitutional: “I submit to you that my client did not have the intent required for conviction for that offense.”
- Unconstitutional: “I admit that my client shot and killed the victims, but I submit to you that he did not have the intent required for conviction for that offense.”

IS THERE ANY WIGMORE DOOM 10

EXCEPT “DID I
COMMIT THE *ACTUS
REUS*”

- These were not strategic disputes about whether to concede **an element** of a charged offense,
- they were intractable disagreements about the fundamental objective of the defendant’s representation.

IS THERE ANY WIGGLE ROOM – 2?

- when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy...



SOME CONCLUDING THOUGHTS – 1: WHAT ABOUT BORDERLINE COMPETENCE?

- In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.

Indiana v. Edwards, 554 U.S. 164, 175-76, 128 S. Ct. 2379, 2386 (2008)

SOME CONCLUDING THOUGHTS - 2

