No. 20-464

In the Supreme Court of the United States

JAMES J. ROSEMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioner's Sixth Amendment claim under *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), where petitioner's defense attorney pursued petitioner's objective of acquittal by contesting petitioner's guilt at trial and petitioner did not inform the district court that he disagreed with his attorney's trial strategy at any point before or during the trial.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. *Rosemond*, No. 10-cr-431 (Nov. 14, 2018)

United States Court of Appeals (2d Cir.):

United States v. *Grant*, No. 14-3941 (Nov. 25, 2015)

United States v. *Johnson*, No. 15-2367 (Aug. 30, 2016)

United States v. *Rosemond*, No. 15-940 (Nov. 1, 2016)

United States v. *Rosemond*, No. 18-3561 (May 1, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 958 F.3d 111. The order of the district court (Pet. App. A33-A41) is reported at 322 F. Supp. 3d 482. A prior opinion of the court of appeals (Pet. App. A42-A83) is reported at 841 F.3d 95.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2020. The petition for a writ of certiorari was filed on September 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958; murder for hire, in violation of 18 U.S.C. 1958; possessing a firearm during and

in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii); and murder through the use of a firearm, in violation of 18 U.S.C. 924(j). 2018 Judgment 1-2. The court sentenced him to an aggregate term of life plus 30 years of imprisonment. *Id.* at 3. The court of appeals affirmed. Pet. App. A1-A32.

1. Petitioner was the head of a music management company in Manhattan that represented hip-hop, rap, and R&B artists, and was also the head of a large cocaine-trafficking business. Pet. App. A4 & n.1. He was involved in a long-running and violent feud with G-Unit, a hip-hop group that included Curtis Jackson (also known as 50 Cent), Marvin Bernard (also known as Tony Yayo), and Jayceon Taylor (also known as The Game). *Id.* at A5. The feud began in 2005 after Taylor, who was represented by petitioner's company, was ousted from G-Unit and publicly insulted by Jackson. *Ibid.* In response, petitioner sent an associate to confront Jackson; the confrontation ended in a shooting. *Ibid.* The next year, petitioner and Bernard became involved in a physical altercation at an awards ceremony; that altercation, too, ended in a shooting. *Id.* at A5-A6. The violence escalated further in 2007, when Bernard and two associates accosted petitioner's 14-year-old son on the street, pushed him against a wall, and threatened him with what appeared to be a gun. *Id.* at A6.

After the incident involving his son, petitioner told one of his associates that his feud with G-Unit would not end "until they carrying a coffin." Pet. App. A283. He told another associate that "these dudes ain't gon be happy until they go to a funeral." *Id.* at A613. Petitioner followed through on those statements by committing or paying others to commit numerous acts of vio-

lence against G-Unit, including shooting at a house belonging to Bernard's mother, shooting at a house belonging to an associate of G-Unit, throwing a Molotov cocktail at a truck belonging to an associate of G-Unit, attempting to shoot Jackson, burning one of Jackson's cars, trying to lure G-Unit's manager to a restaurant where he would be shot, and shooting at a van filled with G-Unit associates in an attempt to "make it a coffin." *Id.* at A7 (citation omitted).

Ultimately, petitioner hired two associates to kill Lowell Fletcher, one of the men who had accosted his son. Pet. App. A7-A12. He also instructed two more associates to act as "back-up shooters in case something went wrong." *Id.* at A12. On September 27, 2009, petitioner's team lured Fletcher to a street in the Bronx and shot him five times in the back, killing him. *Id.* at A11-A12, A53. Petitioner paid the shooters with a kilogram of cocaine, worth approximately $30,000. *Id.* at A53.

2. Based on the Fletcher murder, a grand jury in the Southern District of New York indicted petitioner for conspiring to commit murder for hire, in violation of 18 U.S.C. 1958; murder for hire, in violation of 18 U.S.C. 1958; possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii); and murder through the use of a firearm, in violation of 18 U.S.C. 924(j). D. Ct. Doc. 237 1-4 (Dec. 9, 2013). The first trial resulted in a hung jury and a mistrial. See Pet. App. A13. After the second trial, the jury found petitioner guilty on all counts, and the district court sentenced him to a total term of life plus 20 years of imprisonment. 2015 Judgment 1-2. The court of appeals, however, vacated the convictions on the ground that the district court had made an erroneous evidentiary ruling. Pet. App. A62-A80.

In November 2017, petitioner was tried for the third time. Pet. App. A14. In his opening argument, petitioner's lawyer stated that the government "will present no evidence to prove that [petitioner] intended that Fletcher be murdered, as opposed to being shot or injured." *Id.* at A116. Similarly, in his closing argument, the lawyer acknowledged that petitioner had planned and paid for Fletcher's shooting, but stated that "[t]he only thing planned here was where the shooting was going to take place" and that "[t]here was never a plan to shoot Lowell Fletcher to death." C.A. App. A1551; see *id.* at A1543 ("[T]here is no evidence that [petitioner] paid the going rate for a homicide. He paid for a shooting."); *id.* at A1587 ("[I]t is unimportant if [petitioner] hired * * * others to shoot Fletcher. * * * The one and only important question is, [d]id the prosecution prove to you beyond a reasonable doubt * * * that [petitioner] intended anyone, including Lowell Fletcher, to be killed."). The jury found petitioner guilty on all counts. Pet. App. A35.

Before sentencing, petitioner, represented by new counsel, moved for a new trial based on the assertion that trial counsel had "adopted [a trial] strategy 'over [petitioner's] express opposition.'" C.A. App. A1734. In particular, petitioner claimed that he had asked trial counsel "to argue to the jury * * * that [he] had never asked, directed or paid anyone to shoot at Lowell Fletcher," but that trial counsel instead argued that, "even if [petitioner] had paid individuals to shoot at the victim, [he] did so without the intent to murder the victim." *Id.* at A1705-A1706. Petitioner stated that he had previously failed to raise the issue with the district

court because he believed that counsel had "final authority about what trial tactics to pursue and what arguments to present to the jury." *Id.* at A1705.

The district court denied petitioner's motion. Pet. App. A33-A41. The court observed that, in *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), which was decided shortly after petitioner's trial, this Court had held that a defendant in a capital case "has the right to insist that counsel refrain from admitting guilt," even when counsel believes that "confessing guilt offers the defendant the best chance to avoid the death penalty." Pet. App. 38 (quoting *McCoy*, 138 S. Ct. at 1505). The court then stated that, "[e]ven if [it] were to assume that *McCoy* is not limited to capital cases, [petitioner's] motion would [still] fail." *Id.* at A39. The court explained that, in this case, petitioner and counsel "both maintained [petitioner's] innocence," but simply "disagreed about the best course to attempt to avoid conviction." *Ibid.* The court observed that "it is well established that the determination of which arguments to advance to achieve acquittal falls squarely within the purview of defense counsel." *Id.* at A40. The court sentenced petitioner to a total term of life plus 30 years of imprisonment. *Id.* at A14.

3. The court of appeals affirmed. Pet. App. A1-A32.

As relevant here, the court of appeals rejected petitioner's Sixth Amendment claim under *McCoy*. Pet. App. A16-A19, A22-A27. The court acknowledged that, under *McCoy*, "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *Id.* at A23 (quoting *McCoy*, 138 S. Ct. at 1505). The court observed, however, that "[o]nce a defendant decides on an objective"—*e.g.*, acquittal—"'trial management is the lawyer's province'" and counsel must decide, *inter*

alia, "'what arguments to pursue.'" *Ibid.* (quoting *McCoy*, 138 S. Ct. at 1508) (brackets omitted). And the court explained that "[c]onceding an element of a crime while contesting the other elements falls within the ambit of trial strategy." *Ibid.*

The court of appeals observed that, in this case, petitioner and counsel "shared the same goal: acquittal." Pet. App. A25. It noted that, "[i]n pursuit of that goal, [counsel] never conceded that [petitioner] was guilty of the charged crimes; instead, [counsel] merely conceded one element as part of his strategy to argue that the government had failed to meet its burden to prove [petitioner] intended for Fletcher to be killed." *Ibid.* The court thus found this case to be "far different from *McCoy*, where the attorney immediately conceded that his client was guilty of the charged crime." *Ibid.*

The court of appeals also found that petitioner's argument "loses force when its nuance is considered." Pet. App. A26. Petitioner claimed that "he did not want [counsel] to tell the jury he paid to have Fletcher shot because he 'viewed it as a concession that he had committed an immoral and shameful act.'" *Ibid.* (brackets and citation omitted). Yet, the court observed, petitioner "'asked [counsel] to argue to the jury instead . . . that [he] had paid [an associate] only to bring Fletcher to [him]'"—meaning that petitioner "was comfortable admitting to the jury that he paid for a kidnapping, but * * * drew the line at paying for a shooting." *Id.* at A27 (citation omitted). The court also noted that petitioner "ran a drug operation and was involved in a series of violent acts," "many of which involved the use of guns." *Id.* at A27. "While avoiding the shame that comes with admitting to a criminal act can be a genuine concern,"

the court reasoned, "that concern seems highly unlikely here." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 15-25) that he was denied his rights under the Sixth Amendment when defense counsel argued that he was not guilty of the charged offenses because, even if he intended to have Fletcher shot, he did not intend to have the victim killed. The court of appeals correctly rejected petitioner's contention, and its decision does not conflict with any decision of this Court, any other court of appeals, or any state court of last resort. Further review is unwarranted.

1. In *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), this Court "h[e]ld 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.* at 1505. The Court explained that, under the Sixth Amendment, a counseled defendant retains the "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* at 1508. And it concluded that, "[w]hen a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts" rather than to avoid the death penalty, "his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (quoting U.S. Const. Amend. VI).

In reaching those conclusions, however, the Court distinguished "choices about what the client's objectives in fact *are*" from "strategic choices about how best to *achieve* a client's objectives." *McCoy*, 138 S. Ct. at 1508. The Court emphasized that "[t]rial management is the lawyer's province" and that "[c]ounsel provides his or

her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what arguments to conclude regarding the admission of evidence.'" *Ibid.* (citation omitted). The Court also distinguished "intractable disagreements about the fundamental objective of the defendant's representation" from "strategic disputes about whether to concede an element of a charged offense." *Id.* at 1510.

In this case, the court of appeals correctly rejected petitioner's contention that his rights under *McCoy* had been violated. Petitioner and counsel "shared the same goal: acquittal." Pet. App. A25. Counsel never overrode that goal; he "zealously defend[ed] [petitioner's] innocence," and he "never conceded that [petitioner] was guilty of the charged crimes." *Ibid.* Rather, in pursuit of that shared goal, counsel "conceded one element as part of his strategy to argue that the government had failed to meet its burden to prove [petitioner] intended for Fletcher to be killed, a necessary element to convict on a murder-for-hire charge." *Ibid.* That decision fell within the scope of the lawyer's proper role: making "strategic choices about how best to *achieve* a client's objectives." *McCoy*, 138 S. Ct. at 1508; see *id.* at 1510 (describing decisions about "whether to concede an element of a charged offense" as "strategic").

Moreover, this case does not present the kind of "stark scenario" and "intransigent objection" at issue in *McCoy*. 138 S. Ct. at 1510. Unlike the defendant in *McCoy*, petitioner did not oppose the "assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.* at 1509. Nor did he fire his attorney and attempt to seek out a new one. See *id.* at 1515 (Alito, J., dissenting) ("[W]here a capital defendant and his retained attorney

cannot agree on a basic trial strategy, the attorney and client will generally part ways[.] * * * The client will then either search for another attorney or decide to represent himself."). Instead, with full awareness of the strategy that the lawyer he had hired would pursue, he proceeded to trial with that counsel and allowed him to pursue it. See Pet. App. A34.

2. Petitioner's contrary arguments lack merit. As a threshold matter, petitioner's reliance (Pet. 22) on "the *McCoy* dissent" for the proposition that "the defense lawyer in that case" conceded one element of the crime, but not all elements, is unavailing. The correct reading of the record was an explicit point of dispute between the majority and dissent in *McCoy*. See 138 S. Ct. at 1512 (Alito, J., dissenting). Regardless of that factual disagreement, however, all nine Justices agreed about what legal rule the Court applied: counsel "may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission," but may make "strategic" choices about "whether to concede an element." *Id.* at 1510 (majority opinion); see *id.* at 1512 (Alito, J., dissenting). Petitioner errs in seeking to change that legal rule by invoking the dissent's rather than the Court's interpretation of the facts.

There also is no merit to petitioner's effort (Pet. 23) to characterize his alleged dispute with his lawyer as a disagreement about the "objectives" of his defense. *McCoy* recognized an autonomy right "to decide that the objective of the defense is to *assert innocence*," 138 S. Ct. at 1508 (emphasis added); it did not suggest that an approach at trial to a single element can likewise be characterized as a similarly fundamental "objective." Indeed, *McCoy* expressly distinguished "intractable disagreements about the fundamental objective of the

defendant's representation" from "strategic disputes about whether to concede an element of a charged offense." *Id.* at 1510. Petitioner accordingly cannot simply recharacterize a dispute about whether to concede a particular element as a disagreement over objectives rather than strategy.

In any event, as the court of appeals observed, petitioner's arguments about the objectives of his defense lack force in the circumstances of this case. See Pet. App. A26-A27. Petitioner argues that he sought to avoid the opprobrium "conceding that he 'had committed an immoral and shameful act.'" Pet. 23 (citation omitted). As the court pointed out, however, petitioner's own preferred trial strategy involved "admitting to the jury that he paid for a kidnapping." Pet. App. A27. In addition, "[t]he evidence at trial demonstrated that [petitioner] ran a drug operation and was involved in a series of violent acts." *Ibid.* Thus, "[w]hile avoiding the shame that comes with admitting to a criminal act can be a genuine concern, that concern seems highly unlikely here." *Ibid.*

Finally, petitioner errs in asserting (Pet. 23) that it is "irrational" for the scope of the right recognized in *McCoy* to "depend on what the *government* chooses to charge." *McCoy* itself refers repeatedly to guilt or innocence of "the charged criminal acts." 138 S. Ct. at 1509; see *id.* at 1505, 1510. That limitation reflects the text of the Sixth Amendment: the Amendment guarantees "the accused" the right "to have the Assistance of Counsel for his defence," and the scope of the "defence" in any particular case will necessarily be a function of the crimes of which he has been "accused." U.S. Const. Amend. VI.

3. Contrary to petitioner's contention (Pet. 15-22), the decision below does not conflict with any decision of any other court of appeals or state court of last resort. Rather, as the court of appeals observed, other courts have rejected claims that the Sixth Amendment is violated when a defense attorney, over the defendant's objection, concedes particular facts or elements without conceding guilt of the charged offenses. Pet. App. A24; see *United States* v. *Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019); *United States* v. *Holloway*, 939 F.3d 1088, 1102 n.8 (10th Cir. 2019); *State* v. *Huisman*, 944 N.W.2d 464, 468 (Minn. 2020). Petitioner's contrary citations do not show otherwise.

In *United States* v. *Wilson*, 960 F.3d 136 (2020), petition for cert. pending, No. 20-6427 (filed Oct. 16, 2020), and petition for cert. pending *sub nom. Moore* v. *United States*, No. 20-6099 (filed Oct. 16, 2020), the Third Circuit *rejected* two defendants' claims under *McCoy*, explaining that "[w]hether to contest a crime's jurisdictional element is not a fundamental decision reserved for the defendant." *Id.* at 143 (emphasis omitted). Petitioner focuses on (Pet. 16) *Wilson*'s statement that the jurisdictional element at issue in that case was "quite separate from [the defendants'] conduct, mental states, or involvement in the robberies." 960 F.3d 144. That passing observation, however, does not indicate that the panel would have held that concession of a nonjurisdictional element over the defendant's objection violates the Sixth Amendment—a situation that the case did not present. *Ibid.* And even if it would have, any statement regarding nonjurisdictional elements was dictum and would not bind a future panel of the Third Circuit.

In *United States* v. *Gary*, 954 F.3d 194 (4th Cir. 2020), petition for cert. pending, No. 20-444 (filed Oct.

5, 2020), a criminal defendant pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g) and 924(a)(2), before this Court held in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), that conviction of that crime required proof that the defendant knew not only that he possessed a firearm but also that he was a felon. *Id.* at 2194; see *Gary*, 954 F.3d at 198. The Fourth Circuit concluded that, by failing to apprise the defendant of the *mens rea* requirement later articulated in *Rehaif*, the district court had "violated [the defendant's] right to make a fundamental choice regarding his own defense in violation of the Sixth Amendment autonomy interest." *Id.* at 205. The government has filed a petition for a writ of certiorari seeking review of the Fourth Circuit's decision, but regardless of whether the decision was correct, it does not conflict with the decision in this case. That case involved a district court's advice to the defendant about the elements of an offense in the course of a plea colloquy; this case, by contrast, involves defense counsel's strategic choice to concede a single element during trial.

In *United States* v. *Read*, 918 F.3d 712 (2019), the Ninth Circuit concluded that the defendant's "Sixth Amendment rights were violated when the trial judge permitted counsel to present an insanity defense against [the defendant's] clear objection." *Id.* at 719. The court stated that an insanity defense "is tantamount to a concession of guilt" and, "like a concession of guilt, carries grave personal consequences that go beyond the sphere of trial tactics," including "'the stigma of insanity'" and "the prospect of 'indefinite commitment to a state institution.'" *Id.* at 720-721 (citations omitted). This case, unlike *Read*, involves a strategic choice to concede one element of the crime, not the presentation of an insanity

defense. Such a concession is not "tantamount to a concession of guilt" and does not carry the risk of "grave personal consequences" such as "'indefinite confinement to a state institution.'" *Ibid.* (citation omitted). In addition, since *Read*, the Ninth Circuit has elsewhere reaffirmed the principle that "tactical decisions" about which arguments to make remain "within the attorney's province." *Audette*, 923 F.3d at 1236.

In *People* v. *Flores*, 246 Cal. Rptr. 3d 77 (Cal. Ct. App. 2019), a criminal defendant repeatedly and unambiguously complained to the trial court that his defense counsel wanted to admit, over his objection, "acts alleged as the actus reus of the charged crimes." *Id.* at 85. A California intermediate appellate court found a violation of the Sixth Amendment, concluding that the defendant was "entitled" to maintain "innocence of the alleged acts." *Id.* at 86. But because *Flores* was decided by a state intermediate court rather than a state court of last resort, any tension between *Flores* and the decision below would not warrant this Court's review. See Sup. Ct. R. 10(a) (stating that, in deciding whether to grant a writ of certiorari, the Court considers whether a court of appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort").

Finally, petitioner errs in arguing (Pet. 21) that "[t]he district court in this case held that *McCoy* is limited to death penalty cases," but that other courts "have applied *McCoy*'s principle to non-capital cases." In fact, the district court expressly declined to decide the issue: "While the Court well understands [petitioner's] contention that the narrow holding of *McCoy* should be extended beyond capital cases[,] * * * there is no need to

decide [that issue] here. Even if the Court were to assume that *McCoy* is not limited to capital cases, [petitioner's] motion would fail." Pet. App. A39 (footnote omitted). In any event, petitioner is seeking review of the judgment of the court of appeals, not the judgment of the district court. As petitioner acknowledges (Pet. 21), the court of appeals "did not address" whether *McCoy* applies only in capital cases. Rather, the court decided petitioner's claim within *McCoy*'s framework. That decision does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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