No. 20-464

In the Supreme Court of the United States

JAMES ROSEMOND,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

The government does not dispute that the appellate courts have applied *McCoy* in inconsistent ways; they have disagreed about whether *McCoy* applies to individual elements of a charged offense, what sorts of elements it covers, and what types of cases it covers. The government does not dispute that the proper construction of *McCoy* is critical; 40 opinions have cited it just in the days since Rosemond's petition was filed. Nor does it dispute that, because of the clarity of the record below, this case presents the ideal vehicle to resolve the question presented. Instead, the government tries to downplay the depth of the circuit split and limit *McCoy* to its facts. We respectfully disagree with the government's reading of *McCoy* and the cases applying it, and urge the Court to intervene in this important area.

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT.

In its decision below, the Second Circuit held that *McCoy*'s "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." A22. The court thus affirmed Rosemond's murder-for-hire conviction even though his lawyer conceded, over his objection, that he ordered his associates to shoot Lowell Fletcher. This exacerbates an existing circuit split. Pet. 15-22. Some courts have held that the an attorney may not concede a single element of an offense without the client's consent. Others, like the Second Circuit, have limited *McCoy* to concessions of guilt to the charged crime. Others have taken a middle approach, holding

that *McCoy* is implicated by concessions only to *certain* central elements. And still others have declined to apply *McCoy* outside capital cases.

The government does not dispute that courts across the country have disagreed on these points. Instead, its brief analyzes in isolation each of the cases cited in our petition, and contends that each, individually, would not merit review by this Court. Taken alone, the government's distinctions are unavailing. But more broadly, the government's arguments underscore that lower courts are taking widely varying approaches to interpreting *McCoy*.

We argued that the Third Circuit has applied *McCoy*'s rule to attorney concessions of elements of a charged crime, not just concessions of guilt. Pet. 15-16. In *United States v. Wilson*, 960 F.3d 136 (3d Cir. 2020), the Third Circuit upheld a counsel's unilateral concession that a bank was federally insured—one element of federal bank robbery—because there was "no evidence that either defendant objected to the stipulation," and because "*jurisdictional* elements trigger no 'opprobrium' or stigma." *Id.* at 144 (emphasis added) (quoting *McCoy*, 138 S. Ct. at 1508).

The government emphasizes that the court "*rejected* [the] claims under *McCoy*" (Opp. 11), but what matters is *why* the court rejected those claims: because conceding a jurisdictional element does not carry the possibility of opprobrium. The Third Circuit then went out of its way to distinguish a concession of "conduct, mental states, or involvement in the robberies." *Wilson*, 960 F.3d at 144. The government dismisses this statement as a "passing observation" (Opp. 11), but the fact remains that if Rosemond had

been tried in the Third Circuit, his conviction would have been vacated under the reasoning of *Wilson*.

The Fourth Circuit is on the same side of the issue. Pet. 16. In *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), the court held that the failure to inform the defendant of each element of a charged crime—even one as straightforward as the defendant's knowledge of his status as an armed felon—"violated [his] right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest." *Id.* at 205 (citing *McCoy*, 138 S. Ct. at 1508).

The government responds by distinguishing *Gary* on its facts, arguing that *Gary* "involved a district court's advice to the defendant about the elements of an offense in the course of a plea colloquy," as opposed to "counsel's strategic choice to concede a single element during trial." Opp. 12. The government does not explain why this distinction matters. If anything, a failure to *inform* a defendant about an element of a crime is less offensive to his right to autonomy than a *concession* of that element. But either way, the defendant is "deprived * * * of his right to determine the best way to protect his liberty." *Gary*, 954 F.3d at 206.

The Ninth Circuit held that *McCoy* applies not only to concessions indicating *guilt*, but also to those suggesting that the defendant is *not guilty* by reason of insanity. Pet. 16-17. In *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), the court held that such a concession violated the right to autonomy because the client's goal was not "merely to persuade the jury, in the best way possible, that he was not responsible for

the alleged assaults," but also "to avoid contradicting his own deeply personal belief that he [was] sane." *Id.* at 721.

The government focuses on the Ninth Circuit's statement "that an insanity defense 'is tantamount to a concession of guilt.'" Opp. 12 (quoting *Read*, 918 F.3d at 720-21). But the *reason* the Ninth Circuit viewed them as comparable is that they both carry opprobrium: "a defense of insanity, like a concession of guilt, carries grave personal consequences," including the violation of a "firmly held feeling that [the defendant] was not mentally ill at the time of the crime," as well as the "stigma of insanity." *Read*, 918 F.3d at 720. The same is true of the concession at issue here: that Rosemond ordered a shooting that turned out to be fatal.

The government all but admits that the California's Appellate Court has applied *McCoy* in the exact way we are advocating. *See* Pet. 17-18. In *People v. Flores*, 34 Cal. App. 5th 270 (2019), the court held that "[u]nder *McCoy*, defense lawyers * * * must not concede the acts alleged as the actus reus of a charged crime over a client's objection." *Id.* at 277. That is because the "Sixth Amendment afford[s] criminal defendants the *right to tell their own story*." *Id.* at 272 (emphasis added).

The government's only response is that "*Flores* was decided by a state intermediate court rather than a state court of last resort." Opp. 13. While it is true that a split between a federal circuit court and a state intermediate appellate court does not ordinarily warrant this Court's review on its own (*see* Sup. Ct. R. 10(a)), *Flores* is another data point showing that

courts interpreting *McCoy* have landed all over the map.

This point is further driven home by the cases the government does *not* address—presumably because it believes they support the decision below. The Eleventh Circuit[1] has held that an attorney's concession of the *actus reus* of a crime does not implicate *McCoy*, *Thompson v. United States*, 791 F. App'x 20, 23, 27 (11th Cir. 2019), but one Eleventh Circuit judge wrote separately on rehearing to opine that the court had "made a mistake" and that a concession to the *actus reus* would "likely" be "structural error that violated [the defendant's] autonomy," 826 F. App'x 721, 730-31 (11th Cir. 2020) (Jordan, J., dissenting in part). The government also does not discuss the conflicting decisions in the state courts of Minnesota reflecting both expansive and narrow understandings of *McCoy*. *See* Pet. 19.

The government also contends that "petitioner errs in arguing that the district court in this case held that *McCoy* is limited to death penalty cases," and that it "expressly declined to decide the issue." Opp. 13 (citation, quotation marks, and brackets omitted). The district court's opinion is somewhat unclear on this point, because it said that the government's decision not to seek the death penalty "set[s] this case far apart from the holding of *McCoy*." A38-39. But even if the government were correct, it would be immaterial, because our petition identifies other cases

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[1] Our petition mistakenly referred to *Thompson* as a decision of the Tenth Circuit.

that have split on this question. Pet. 21-22. The government does not address those cases.

Because courts are split along multiple lines about the scope of the right articulated in *McCoy*, this Court's review is appropriate.

II. THE DECISION BELOW WAS ERROR.

The Court should hold that the right to autonomy is violated when an attorney concedes the *actus reus* of a crime over his client's objection—particularly when the concession goes to the heart of the defendant's case. *McCoy*'s holding is not limited to concessions of guilt; it speaks of criminal "acts," "fundamental choices," and "objective[s]." That makes sense: a defendant's right to *autonomy* should not depend on what the *government* decides to charge. *See* Pet. 22-24.

The government's contrary position is, at the outset, irreconcilable with the *facts* of *McCoy*. *McCoy* did not involve any concession of guilt to the charged crime: McCoy's attorney "admitted that petitioner committed one element of that offense, *i.e.*, that he killed the victims," but "strenuously argued that [he] was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense." 138 S. Ct. at 1512 (Alito, J., dissenting). The government asserts that Justice Alito's description reflects a "factual disagreement" with the majority. Opp. 9. But the majority did not dispute Justice Alito's articulation of the facts. And the only way to square those facts with the outcome is that *McCoy*'s holding applies to Rosemond's precise situation:

where an attorney admits the *actus reus* but disputes the *mens rea*.

The government contends next that "petitioner errs in asserting that it is 'irrational' for the scope of the right recognized in *McCoy* to 'depend on what the *government* chooses to charge.'" Opp. 10 (citation omitted) (quoting Pet. 23). The government finds such a limitation in "the text of the Sixth Amendment," arguing that "the scope of the 'defence' in any particular case will necessarily be a function of the crimes of which [the defendant] has been 'accused.'" *Id.* (quoting U.S. CONST. AMEND. VI). The government's quotation is a bit of a sleight of hand, because the word "accused" is a noun referring to the *defendant*—"the accused"—not a verb somehow limiting a defendant's Sixth Amendment rights to the charged crimes. U.S. CONST. AMEND VI ("In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."). This Court has never held that the government's selection of charges affects a defendant's Sixth Amendment rights. To the contrary, "the Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," before charges are even asserted. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 203 (2008) (brackets omitted).

More fundamentally, the government has no answer to our commonsense point: If its position were correct, a defendant's Sixth Amendment rights would be *diminished* when he faces *more* serious charges. The right to autonomy would be implicated by admissions to minor charged crimes, but not major

uncharged criminal acts—here, the shooting of a victim. And if Rosemond had been charged with a lesser crime, like assault under state law, the government would agree that he would have the right to preclude his lawyer from admitting exactly what was admitted at his murder-for-hire trial. That is not a just regime, and it is not what *McCoy* holds.

Finally, the government argues that "this case does not present the kind of 'stark scenario' and 'intransigent objection' at issue in *McCoy*," because "[u]nlike 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.'" Opp. 8 (quoting *McCoy*, 138 S. Ct. at 1509-10).

The government made this point below, and the Second Circuit did not adopt it. The language quoted above is from the section of *McCoy* distinguishing *Florida v. Nixon*, 543 U.S. 175 (2004), where the defendant "'*never* * * * protested' counsel's proposed approach." 138 S. Ct. at 1509 (emphasis added) (quoting *Nixon*, 543 U.S. at 181). *McCoy* never suggested that a defendant must object exactly as McCoy himself did. To the contrary, the Court explained that when "*[p]resented* with express statements of the client's will * * * , counsel may not steer the ship the other way." *Id.* (emphasis added). The whole thrust of the opinion is that "a defendant has the right to insist that *counsel* refrain from admitting guilt." *Id.* at 1505 (emphasis added).

The government does not dispute that Rosemond raised his objection with counsel both "before and during trial." Pet. 8. Instead, its position

seems to be that, to vindicate his Sixth Amendment rights, Rosemond had to "fire his attorney," "seek out a new one," and refuse to "proceed[] with trial." Opp. 8-9. Interestingly, the government cites Justice Alito's dissent for this proposition—a mere paragraph before criticizing us for "invoking the dissent's rather than the Court's interpretation" of the case. *Id.* at 9. But in any event, this argument has no basis in *McCoy*.

And particularly in a context like Rosemond's, such a requirement would be grossly unfair. As Rosemond explained in his affidavit below, he "declined to bring th[e] dispute to the attention of [the district court] because [his] understanding was that [counsel] had final authority" to decide "what arguments to present to the jury." Pet 9. Indeed, counsel told him that he "had the authority" to make such decisions. Pet. 10. In addition, although Rosemond registered his disagreement early, the magnitude of the concession was not fully apparent until closing arguments, when counsel repeatedly told the jury that Rosemond "set up [a] shooting" and the bullet just hit Fletcher "in the wrong spot." Pet. 11. It was not then incumbent on Rosemond to jump up, object, and fire his counsel—if the trial court had denied the objection (as its decision below indicates it would have), that spectacle would have been devastating to the defense.

The decision below deepens a multi-pronged circuit split on a question of exceptional importance. This Court should grant review to reaffirm that a criminal defense lawyer is not allowed to tell the jury an account of the *facts* that his client expressly

disagrees with, and certainly not when those facts amount to a concession of an essential element of the charged offense.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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