No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FAGBEMI MIRANDA, Petitioner

v.

MASSACHUSETTS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the defendant's Sixth Amendment right to make fundamental decisions about his case include the right to choose which defense to present at trial?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case.

DIRECTLY RELATED PROCEEDINGS

Commonwealth v. Fagbemi Miranda, Supreme Judicial Court of Massachusetts, SJC-11690, judgment entered June 9, 2020

Commonwealth v. Fagbemi Miranda, Supreme Judicial Court for Suffolk County (MA), SJ-2018-M048, judgment (order) entered January 2, 2019

Commonwealth v. Fagbemi Miranda, Bristol County Superior Court, BRCR2008-00325, judgments entered June 5, 2013 (jury verdict and sentence) and August 20, 2018 (orders denying post-trial motions)

Fagbemi Miranda v. Commonwealth, Supreme Judicial Court of Massachusetts, SJC-10723, judgment entered July 27, 2010

Fagbemi Miranda v. Commonwealth, Supreme Judicial Court for Suffolk County (MA), SJ-2010-0161, judgment entered April 21, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules and Standards

Other Authorities

Fagbemi Miranda respectfully petitions this Court for a writ of certiorari to the Massachusetts Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, which affirmed the Petitioner's convictions and the order denying his motion for new trial, is reported at 146 N.E.3d 435 (2020), and included in Appendix A. The unreported opinion of the Bristol County (MA) Superior Court denying the motion for new trial is included in Appendix B.[1]

JURISDICTION

The Massachusetts Supreme Judicial Court entered its judgment on June 9, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Sixth Amendment:

> 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.

STATEMENT OF THE CASE

The Killing of Christopher Barros

A little before 8:30 PM on October 10, 2005, the Petitioner and Christopher

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[1] References to the Appendix are as follows: App.A Page(s) or App.B Page(s). References to the transcripts and record appendix below are as follows: T Volume or Date/Page(s) and RA Volume/Page(s).

Barros were engaged in a loud verbal argument on the pavement outside the house where the Petitioner lived with his family. App.A 3-4. A third, unidentified man looked on, standing next to a car parked on the street in front of the Miranda home. App.A 4.

The Petitioner's brother Wayne Miranda ("Wayne") ran out of the front door of the Miranda home, approached and shouted at Barros, ran back into the home, and reemerged with a black handgun. App.A 4. Ignoring the pleas of his grandmother, who was on the front porch, to go back in the house, Wayne approached the Petitioner and Barros. App.A 4. Barros yelled, "Are you serious, Waynie? Are you serious? It's like that? It's like that?" App.A 4. Wayne pointed the handgun at Barros's forehead, and Barros raised his hands and said, "No." App.A 4.

The Petitioner, yelling for Wayne to stop and shouting "no," tried to get the gun away from Wayne and to get him to return to the house. App.A 4-5. Barros ran across the street into an open driveway. App.A 5. Wayne chased him and the Petitioner followed, as did the unidentified man. App.A 5.

The shouting on the street drew the attention of three neighbors: Kim Reis, John (Buddy) Andrade, and Carmen Rodriguez. App.A 3.[2] Reis yelled, "No, Waynie, no. Think of your daughter." App.A 6. Two gunshots then rang out. App.A 6. The Petitioner and Wayne, but not Barros, emerged from the driveway,

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[2] The Supreme Judicial Court did not use these witnesses' names in its opinion, referring to Reis as "the neighbor" and Andrade as "the first reporter." App.A 6. For clarity, the witnesses' names are used in this petition, as they were in the Superior Court opinion. App.B 2-4.

followed by the unidentified man. App.A 6-7. The Petitioner and Wayne entered the Miranda family home together and the unidentified man drove off in the car. App.A 6-7.

When police responded to 911 calls, they found Barros unconscious on the opposite side of the fence at the end of the driveway. App.A 7, 9. Barros had been shot twice, in his left arm and his left leg. App.A 9. Barros was taken to the hospital, where he was pronounced dead. App.A 9. No weapons were found on Barros or nearby. App.A 9.

The Arrests of Wayne Miranda and the Petitioner

Police arrested Wayne the night of the shooting because the witnesses stated that they had seen Wayne chasing Barros with the gun and Andrade said in his 911 call that Wayne had shot someone. App.A 2, 14. The gun was not recovered. App.A 9. The Petitioner was questioned that evening but was not charged. App.A 7-8, 10-12.

Over two years later, after she had been arrested on drug charges, Reis offered cooperating testimony that Wayne handed the gun to the Petitioner, who shot Barros. App.A 2-3, 6, 12-13. On March 19, 2008, a grand jury of the Bristol County (Massachusetts) Superior Court indicted the Petitioner for the murder of Christopher Barros and other charges, and the Petitioner was arrested. App.A 1-2.

The Petitioner's Disagreement with Counsel About His Defense

The Petitioner's first counsel moved to withdraw on December 15, 2011, due to a breakdown of the attorney-client relationship. RA I/12, 285-287; T(12/15/11)/2-

3. First counsel explained that he thought the Petitioner's case was very defensible because Reis had credibility problems and she was the only one who identified the Petitioner as the shooter, but the Petitioner insisted he fired the gun in self-defense and would so testify. T(12/15/11)/3-10. A Superior Court judge allowed the motion to withdraw, cautioning the Petitioner that a similar disagreement with new counsel might require him to proceed with new counsel or to represent himself. T(12/15/11)/15-19.

The Petitioner informed his new lawyer ("defense counsel") that he intended to pursue a self-defense or necessity defense and to testify in his own behalf. RA II/16-17. However, like first counsel, this defense counsel instead planned to attack the credibility of Reis and blame Wayne for the shooting. RA II/16-19. He refused to obtain Barros's criminal record and to pursue other discovery the Petitioner requested, including evidence about Barros's enemies and police reports of shootings and weapons stashed in the neighborhood. RA II/17, 104-105, 116-117, 128-152. This led the Petitioner to file a *pro se* motion for a continuance of the trial for 120 days, and then to request that defense counsel file a motion to withdraw. RA I/307-310; RA II/17-18.

Defense counsel filed a motion to withdraw, which was denied by a Superior Court judge at a pretrial conference on May 9, 2013. RA I/14; T(5/9/13)/35-37. On the same date, defense counsel filed and had allowed two motions that the Petitioner believed undercut the defense theory he wanted to present: motions in limine to introduce Wayne's gunshot residue test and to exclude reference to his

neighborhood as a high crime area. RA I/14, 311-312; RA II/18; T(5/9/13)/10-11.

Defense counsel's motion to withdraw was again denied by the trial judge on May 28, 2013, just before the start of trial. T(5/28/13)/31. During the hearing on the motion, defense counsel described the Petitioner's theory of defense as "suicidal" and said he would not support a theory of defense (self defense/necessity) that was not based on the facts as he knew them and established case law. T(5/28/13)/4-11. The Petitioner told the trial judge he would insist on a self-defense defense and on testifying on his own behalf, and he could not go along with a trial strategy of blaming his brother Wayne, who came over in his defense and did not shoot anyone. T(5/28/13)/11, 14, 26-31. The Petitioner told the trial judge he was prepared to testify truthfully even if it resulted in life in prison without parole and even though Wayne had already been convicted. T(5/28/13)/26-31.[3] The Petitioner repeated afterward to defense counsel that he intended to tell the truth. RA II/102-105.[4]

The Commonwealth's Case at Trial

The Commonwealth presented its case principally through testimony by Reis,

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[3] The Petitioner was aware that, in affirming Wayne's conviction for second degree murder, *Commonwealth v. Miranda,* 934 N.E.2d 222 (Mass. 2010), *cert. denied,* 565 U.S. 1013 (2011), the Supreme Judicial Court held that it did not matter if Wayne was the shooter. *Id.* at 233. T(5/28/13)/27-30. In deciding Wayne's case, the Court applied its ruling in *Commonwealth v. Zanetti*, 910 N.E.2d 869, 879-886 (Mass. 2009) (holding that, in future cases involving joint venture liability, when there is evidence that more than one person may have participated in the commission of the crime, judges should simply instruct the jury that the defendant is guilty if the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense). *Miranda,* 934 N.E.2d at 233.

[4] The Supreme Judicial Court's summary of the proceedings on the first and second motions to withdraw is at App.A 27-31.

Andrade and Rodriguez, as well as police officers to whom the Petitioner made statements and witnesses who conducted gunshot residue tests indicating the presence of gunshot residue on both of the Petitioner's hands and Wayne's left hand. App.A 3-13. Defense counsel cross-examined the witnesses, challenging the credibility and reliability of Reis's identification of the Petitioner as the shooter and the significance of the gunshot residue results, and drawing out facts from Andrade and Rodriguez supporting the inference that Wayne was the shooter. App.A 13-14.

The Petitioner's Testimony in Narrative Form

After the Commonwealth rested, defense counsel reported to the trial judge that the Petitioner intended to testify. T6/3. At sidebar, defense counsel said that he had continued to advise the Petitioner not to testify, because of the way the evidence had come in, because he would be impeached by prior convictions, and because there was no guarantee his testimony would result in more favorable jury instructions. T6/4-5.

After the Petitioner confirmed to the trial judge that he still wanted to exercise his right to testify, defense counsel asked and was given permission by the trial judge to introduce the Petitioner to the jury and let him testify in narrative form. T6/5-7. Defense counsel told the trial judge he was not completely confident of what the Petitioner would say and did not want to interfere with the Petitioner's opportunity to tell his story the way he wanted. T6/6-7.

Defense counsel's associate, who had not previously examined any witness, called the Petitioner to the stand, had him state his name and address, and asked

him what he would like to tell the jury. T6/12-13. The Petitioner then testified in narrative form, stating that he wanted to tell the jury the truth of what happened and repeating several times that he was not a "bad person." T6/13-17.

The Petitioner gave the following account (although in a less-organized fashion): Driving home on the night of October 10, 2005, he pulled up outside his house, got out of his car, and saw Barros in a black car on the east side of the street. T6/13. He went to greet Barros, whom he knew, had taken care of, and had prevented others from beating up. T6/13, 16. Barros punched him for no apparent reason. T6/13. He stumbled and got up. T6/13. They began arguing in the street, and he put his hands up to fight. T6/13-14. Another person came from the passenger side of the black car, which led him to believe this would not be a fair fight and to call out for help. T6/14.

Continuing his narrative, the Petitioner testified that, without having seen what had happened, Wayne came out of their house, approached with a firearm, and was trying to get Barros and the other person away from him. T6/14, 16. Barros said, "Mother-fucker, I'm going to kill you. Come at me with that, I'm going to kill you." T6/14. Barros ran off and the Petitioner told Wayne not to follow, so Wayne stopped at the beginning of the driveway across the street. T6/14. Barros entered the driveway, kicked out a basement window at the side of the house and appeared to reach for a weapon. T6/15. The Petitioner took the firearm from his brother. T6/15. At this point, his grandmother was screaming on the porch of their house. T6/15. He followed Barros into the yard and thought Barros was reaching

for a firearm, so he aimed for his leg and arm in order to immobilize him, never intending to kill him. T6/15-16. The Petitioner wanted to protect Wayne and his grandmother; there were a lot of shootings in their neighborhood. T6/14, 16. Wayne had nothing to do with the situation and only came out to defend him. T6/16.

The prosecutor's cross-examination was extensive. T6/19-61. The Petitioner gave the following additional details: Barros got out of the car before punching him on the side of his face, which made him mad. T6/21-22. While arguing with Barros, he could not see a weapon on Barros or the other guy with him (who did seem to tuck something in his waistband) and Barros did not hit him again. T6/22-24, 28-29, 51-52. The 9mm handgun that Wayne brought out of the house belonged to the Petitioner; he had loaded it before that night, knew how to operate it, and had no permit for it, but had a Second Amendment right to bear arms in his household. T6/24-28, 47-49. Barros moved quickly or ran away from him and Wayne; although Barros could have run south along the street, he instead entered a dark driveway known as a place where people stashed weapons and drugs. T6/28-30, 37-38, 46.

The Petitioner denied there was nothing to prevent him and Wayne from turning around and walking into their house, because the driveway was directly across from the front door of their house and if Barros came out of the driveway shooting he, Wayne and his grandmother would be caught in crossfire. T6/30-35, 41. He admitted he made a choice to protect his house and family rather than to run, but said everything happened very fast and he was acting on instinct when he

followed Barros down the driveway. T6/31-32, 35, 39-41, 45-47, 52. He explained that when Barros kicked out the window he thought he saw him reach for something and that when he aimed for Barros's arm and leg and actually fired the shots he thought he saw Barros with a nickel-plated weapon, which looked like a firearm, in his hand. T6/36-39, 42-46. He admitted hiding his gun, lying to the police, and not coming forward when Wayne was charged and tried for murder, and he was impeached with prior convictions. T6/52-61.

There was no redirect examination. T6/61. The defense rested without presenting additional evidence. T6/68.[5]

Defense Counsel's Closing Argument

Although defense counsel emphasized that the jury could decide whether to credit all or none of what witnesses said, he spent most of his closing attacking the Commonwealth's case, especially Reis's testimony that she saw the Petitioner shoot Barros. T6/68-74, 76-79. He suggested that Wayne was the shooter, based on testimony by Andrade and Rodriguez that they saw Wayne enter the driveway behind Barros with the gun in his hand and hand the gun to the Petitioner upon emerging from the driveway. T6/69, 71-72; App. A 57.

Addressing the Petitioner's testimony, defense counsel said the jury could credit everything he said, in which case this was not deliberately premeditated murder, or it could disbelieve the Petitioner:

[Y]ou also have the option of not crediting [the Petitioner] at all.

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[5] The Supreme Judicial Court's summary of the Petitioner's testimony is at App.A 14-20.

> That's up to you . . . . Maybe [you think] he's doing that . . . to protect Wayne, his baby brother. [The prosecutor] asked [the Petitioner] himself, "You loved your brother?" Answer: "Yeah, I love him, he's my baby brother." . . . [M]aybe you think this guy is just out there protecting his brother.

T6/74-76. Defense counsel also argued that it was the *Commonwealth* who wanted the jury to believe the Petitioner ("now they are going to say, [l]isten to [the Petitioner], don't listen to anybody else."). T6/79.[6]

Although the trial judge said before closing arguments that he was inclined to charge on self-defense, defense counsel did not mention the Petitioner's testimony that he fired in self-defense because he thought he saw the victim with a gun. App.A 20, 58. Nor did he refer to the Petitioner's testimony that he did not intend to kill Barros. App.A 58.

Jury Instructions, Verdict, and Sentence

Following the prosecutor's closing and at his urging, the trial judge decided, over defense counsel's objection, not to instruct the jury on self-defense. T6/94-95. The jury returned guilty verdicts of first degree murder with deliberate premeditation and the other charges on June 5, 2013. T7/1, 10-11. The Petitioner was sentenced to life imprisonment without the possibility of parole and concurrent sentences. T7/21-22. The Petitioner appealed to the Supreme Judicial Court pursuant to Mass. Gen. Laws c. 278, § 33E, and the Supreme Judicial Court stayed the appeal pending a ruling in the Superior Court on the Petitioner's motion for new trial. RA I/16-17; Docket of SJC-11690.

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[6] The Supreme Judicial Court's summary of defense counsel's closing argument is at App.A 57-58.

The Decision of the Massachusetts Superior Court

A Superior Court judge held a non-evidentiary hearing on the motion for new trial shortly before this Court decided *McCoy v. Louisiana,* 138 S. Ct. 1500 (2018). RA I/20. He subsequently rejected all of the Petitioner's claims in an August 20, 2018 memorandum and order denying the motion for new trial. App.B 1-27. Among other things, he concluded that defense counsel did not violate the Petitioner's right to client autonomy discussed in *McCoy* (or his right to effective assistance of counsel) by failing to pursue the Petitioner's chosen defense, App.B 20-22, and had not effectively negated the Petitioner's right to testify by having him testify in narrative form or by arguing in the alternative in closing, App.B 12-20. The Petitioner appealed from the denial of the motion for new trial, and that appeal was consolidated in the Supreme Judicial Court with the appeal from his convictions. RA I/21; Docket of SJC-11690.

The Decision of the Massachusetts Supreme Judicial Court

On June 9, 2020, the Supreme Judicial Court affirmed the Petitioner's convictions and the denial of his motion for new trial. App.A 1, 3. The Supreme Judicial Court held that defense counsel did not violate the Petitioner's Sixth Amendment right to make fundamental decisions about his defense. App.A 34-46. Distinguishing *McCoy*, it stated that the Petitioner and defense counsel shared the same principal objective (acquittal) but disagreed on which approach to take to achieve that end. App.A 39-41, 46. The Supreme Judicial Court considered "[a]nalysis of the law as applied to the facts . . . the clear responsibility of counsel,

not the defendant," and it concluded that defense counsel was correct that the Petitioner's self-defense claim was not viable. App.A 42.[7]

The Supreme Judicial Court also held that, because defense counsel did not invoke Mass. R. Prof. C. 3.3(e) (2015) and did not make a good faith determination that there was a firm basis in fact to conclude the Petitioner was going to perjure himself, it was error for defense counsel and the trial judge to restrict the Petitioner's testimony to narrative form and for defense counsel not to prepare the Petitioner to testify and direct his testimony. App.A 48-52. Nevertheless, the Court decided that the error was not structural and, analyzed as an issue of ineffective assistance of counsel, the error did not prejudice the Petitioner. App.A 52-56, 67-70. The Court also decided that defense counsel's summation did not effectively negate the Petitioner's testimony that he acted in self-defense and never intended to kill Barros. App.A 57-61.

REASONS FOR GRANTING THE PETITION

I. Introduction

This Court should decide whether the defendant's Sixth Amendment right to make fundamental decisions about his case includes the right to choose which defense to present at trial. In this case, defense counsel pursued a defense the Petitioner rejected (that his brother was the shooter), and then undermined the

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[7] While noting the Petitioner's testimony that he believed Barros might have retrieved a weapon from a stash area in the driveway and that Barros appeared to be holding a nickel-plated firearm before he fired at him, the Court decided that the Massachusetts requirements for a self-defense instruction were not met because of the Petitioner's "combined failure to retreat and unnecessary escalation of conflict." App.A 20-26.

Petitioner's conflicting testimony (that he shot in self-defense) by requiring the Petitioner to testify in narrative form and arguing in closing the jury could disbelieve his testimony. The Supreme Judicial Court held there was no violation of the Petitioner's Sixth Amendment right to make fundamental decisions about his defense. The Petitioner's case is therefore a sequel to *McCoy v. Louisiana* and presents an important issue not decided in that case: whether it violates the Sixth Amendment for a criminal defense attorney to present a defense that his client has expressly rejected. Because the question of whether defense counsel or the defendant controls the choice of defense has divided the lower courts, is of great practical significance to criminal defendants, the criminal defense bar, and the judiciary, and is squarely presented by the record in this case, this petition for writ of certiorari should be granted.

II. This case presents the opportunity for the Court to address an important issue that it did not resolve in *McCoy v. Louisiana,* 138 S. Ct. 1500 (2018), and that has divided lower courts: whether the defendant's Sixth Amendment right to make fundamental decisions about his case includes the right to choose which defense to present at trial.

A. The Court did not decide in *McCoy* whether the defendant has a Sixth Amendment right to choose which defense to present.

In *McCoy v. Louisiana*, this Court held that it was a violation of the defendant's Sixth Amendment right to make fundamental decisions about his defense for defense counsel to admit, over his client's objection and with the hope of avoiding the death penalty, that his client killed the victim. 138 S. Ct. at 1507, 1512. Building on a series of cases including *Faretta v. California*, 422 U.S. 806

(1975), the Court determined that the decision to maintain innocence was one of the fundamental decisions reserved to a criminal defendant. *McCoy* at 1507-1509. It further held that the violation of McCoy's right to make a fundamental decision about his defense, sometimes described as the right of client autonomy, was a structural error requiring reversal. *Id.* at 1510-1511.[8]

The Petitioner's case is similar to McCoy's case. In both cases, the client strenuously and explicitly objected to his counsel's decision about how best to defend his case. *McCoy,* at 1505-1507, 1512; App.A 27-31. Both defendants testified in their own behalf (McCoy to an implausible alibi and the Petitioner to his belief that he was acting in self-defense and in any event did not intend to kill). *McCoy,* at 1507; App.A 14-20. Just as McCoy had a personal reason for maintaining his innocence (not wanting to admit to killing family members), the Petitioner had a personal reason for accepting responsibility for the shooting (not wanting to blame his brother for something he did). *McCoy*, at 1505-1506, 1508, 1510; App.A 30. In both cases, there was no genuine issue of client perjury (in *McCoy*, because the defendant sincerely believed his testimony, and in the Petitioner's case, because the Petitioner's testimony that he was the shooter aligned with that of the Commonwealth's star witness, the Petitioner insisted he was telling the truth, and counsel lacked the requisite basis for believing the Petitioner would perjure himself). *McCoy,* at 1510; App.A 2-3, 48-51.

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[8] The Court therefore did not have occasion to determine whether McCoy had been denied the Sixth Amendment right to effective assistance of counsel. *McCoy,* 138 S. Ct. at 1510-1511.

However, the two cases are different in important respects. Aside from the fact that the Petitioner's case, unlike McCoy's, is not a death penalty case, counsel for the Petitioner shared one of the Petitioner's objectives: to maintain innocence (and be acquitted). App.A 40-41. Furthermore, the Petitioner, unlike McCoy, was left to testify in narrative form. App.A 48.

In *McCoy*, this Court emphasized that the Sixth Amendment guarantees the defendant the right to "personally" make his defense, with defense counsel as an "assistant, however expert" to the defendant. *McCoy,* at 1507-1508, *quoting Faretta,* 422 U.S. at 819-820. The Court listed whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal as fundamental decisions reserved to the defendant, while mentioning that certain trial management decisions (such as what arguments to pursue, what evidentiary objections to raise, and what agreements to make regarding the admission of evidence) are for defense counsel. *McCoy*, at 1508-1509. The Petitioner's case presents an important question that this Court did not resolve in *McCoy:* Does a defendant's right to make fundamental decisions about his defense include the right to select which defense to pursue?[9]

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[9] At the beginning of the oral argument in *McCoy*, Chief Justice Roberts asked what would happen in a murder case if defense counsel thought the best defense was self-defense but the defendant wanted to deny shooting the person (the reverse of the disagreement between the defendant and defense counsel in the Petitioner's case); the Court found it unnecessary to decide this issue in *McCoy*. Docket Number 16-8255, Oral Argument Transcript at 4-6. Although the dissenting opinion in *McCoy* states that defense counsel is free to unilaterally choose the basic line of defense, it cites no authority so holding. *McCoy,* 138 S. Ct. at 1516 (Alito, J., dissenting).

B. Absent guidance from this Court, the division in the lower courts on this issue will continue.

Citing *McCoy*, the Massachusetts Supreme Judicial Court distinguished between fundamental decisions always reserved to the defendant and the lawyer's province of trial management. App.A 36-37. However, the Supreme Judicial Court noted that "[t]his division of authority is not always clear" and that the decision whether to testify is itself "an important tactical decision as well as a matter of constitutional right." App.A 37-38. It also remarked on the lack of guidance from this Court:

> The Supreme Court has not established any precise test to determine whether a particular decision is "tactical" as opposed to "fundamental" in this respect. At least one vocal critic [a Supreme Court Justice] has characterized this "tactical-fundamental dichotomy" as a "vague" and inadequate approach to establishing "reasonable limits upon the right of agency in criminal trials." *Gonzalez v. United States,* 553 U.S. 242, 256-258 (2008) (Scalia, J., concurring in judgment).

App.A 37 at n.28. Notably undefined is whether the choice of defense is a fundamental decision for the defendant as opposed to a trial management or tactical decision for counsel.[10]

In this vacuum, lower courts have taken various approaches. Some courts have stated in general terms that the choice of defense is reserved for defense

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[10] In *Godinez v. Moran,* 509 U.S. 389 (1993), Justice Thomas suggested that the choice of defense rests with the defendant. *Id.* at 398 ("In consultation with his attorney, he [a defendant] may be called on to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses."). In a concurring opinion in *Wainwright v. Sykes,* 433 U.S. 72 (1977), Chief Justice Burger suggested the contrary, that the choice of defense rests with counsel. *Id.* at 93 (counsel has the "ultimate" responsibility to determine "what defenses to develop"). The Court did not decide the issue in either case.

counsel. *E.g., United States v. Holloway,* 939 F.3d 1088, 1101 (10th Cir. 2019) ("defenses pursued or not pursued at trial are quintessentially strategic decisions"); *United States v. Ladd,* 215 Fed. Appx. 526, 529 (7th Cir. 2007), *cert. denied,* 552 U.S. 1103 (2008) (as a general rule choosing a defensive theory is a decision for counsel); *United States v. Wadsworth,* 830 F.2d 1500, 1509 (9th Cir. 1987) (defense counsel is in charge of trial tactics and the theory of defense); *People v. Ramey,* 604 N.E.2d 275, 281 (Ill. 1992) (the choice of theory of defense is not the defendant's, so defense counsel could present a self-defense defense against the defendant's wishes).

However, the Massachusetts Supreme Judicial Court itself, noting "the importance of protecting the defendant's autonomy in decisions relating to his defense," has decided that a competent defendant has the right to forgo an insanity defense, against the advice of counsel. *Commonwealth v. Federici,* 696 N.E.2d 111, 114-115 (Mass. 1998). Although courts have been divided on the issue, *id.* at 115 n.4; *Johnson v. State,* 17 P.3d 1008, 1015 (Nev. 2001) (following *Federici* and the majority view), at least one court has read *McCoy* to protect a defendant's right to reject an insanity defense. *United States v. Read*, 918 F.3d 712, 719-721 (9th Cir. 2019). In *Read,* as in *McCoy*, the defendant's right of autonomy allowed him instead to choose a defense with little to no chance of success. *McCoy,* 138 S. Ct. at 1506-1507, 1512 (an alibi "difficult to fathom"); *Read,* at 719 (a defense "based in delusion and certain to fail").[11]

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[11] It is therefore immaterial to the Petitioner's right to autonomy claim that defense counsel thought the Petitioner's desire to assert he acted in self-defense was "suicidal" and that the Massachusetts Supreme Judicial Court concluded self-

Beyond this, courts have debated whether the decision to request a lesser included defense instruction is the prerogative of defense counsel. *E.g., Arko v. People,* 183 P.3d 555, 558-560 (Colo. 2008) (noting division of authority but holding the decision to request a lesser offense instruction is a tactical decision for the attorney). Courts also disagree about whether counsel can make the decision to concede the defendant's guilt of a lesser included defense. *Lingar v. Bowersox,* 176 F.3d 453, 459 (8th Cir. 1999), *cert. denied*, 529 U.S. 1039 (2000) (counsel was not ineffective in conceding guilt of second degree murder); *People v. Eddy,* 244 Cal. Rptr. 3d 872, 878 (Ct. App. 2019) (*McCoy* governs where counsel conceded guilt of voluntary manslaughter against the defendant's wishes); *State v. Horn,* 251 So. 3d 1069, 1074-1076 (La. 2018) (same); *State v. Samuel,* 838 P.2d 1374, 1381-1382 (Haw. 1992) (defense counsel could change strategy to focus on defense of emotional disturbance supporting a manslaughter verdict). Courts are likewise divided about whether defense counsel can concede one element of a crime or the defendant's guilt of the *actus reus* while still maintaining the defendant's innocence. *United States v. Rosemond,* 958 F.3d 111, 122-123 (2nd Cir. 2020) (right to autonomy not implicated when defense counsel concedes one element of crime); *People v. Flores*, 246 Cal. Rptr. 3d 77, 79 (Ct. App. 2019) (under *McCoy*, defense lawyers may not concede *actus reus* over client's objection).

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defense was not a viable defense, due primarily to Massachusetts's strict duty to retreat. App.A 20-26, 29, 42.

Given the disarray in lower court rulings, this Court should provide guidance on the important question of whether the choice of defense is a fundamental decision to be made by the defendant in a criminal case.

C. The decision about which defense to present is fundamental and should be reserved to the defendant.

The Court should reject the simplistic notion that the choice of defense in a criminal case is a trial management, strategic, or tactical decision over which the defendant has no right of control. In reality, the selection of a defense—like self-defense—to a criminal prosecution *is* a fundamental decision. This is especially true where, as here, a defendant has an objective that leads him to prefer one defense over another and the defendant elects to testify in his own behalf.

The Court's decision in *McCoy* was based on the defendant's right to set the objectives of the defense. 138 S. Ct. at 1505, 1508-1509. A defendant's objectives can be multifaceted and can lead him to choose one defense and reject another. While in *McCoy* the Court defined the defendant's objective as maintaining innocence, to which defense counsel had to defer, McCoy's related objective was not to admit to killing family members. *Id.* at 1505-1506, 1508, 1510. Here, although the Petitioner also had the objective of maintaining innocence, this was coupled with his objective not to blame his brother for something he had done and to accept responsibility for the shooting, while explaining why his action was justified (in self-defense). App.A 27-31. The logic of *McCoy* extends to situations in which the defendant and defense counsel may share an objective to maintain innocence in

order to be acquitted, but the defendant has an additional objective that leads him to spurn the defense that defense counsel has chosen.[12]

In addition, a defendant's need to control the choice of his defense is particularly compelling where the defendant testifies in his own behalf. Whether to testify is a unquestionably a fundamental decision reserved to a defendant, *McCoy,* 138 S. Ct. at 1508, but that right is worth little if defense counsel can choose a defense that conflicts with the defense to which the defendant elects to testify. In other words, sometimes the choice of defense is inextricably intertwined with the defendant's right to testify. *State v. Soares,* 916 P.2d 1233, 1257-1258 (Haw. App. 1996) (defense counsel is obligated to abide by the defendant's choice of defense where the fundamental right to testify is involved), *overruled on other grounds, State v. Janto,* 986 P.2d 306, 316 (Haw. 1999).

The Petitioner's case amply demonstrates this point. Here, the Petitioner's right to testify that he believed he was acting in self-defense, without intent to kill, directly collided with defense counsel's pursuit of a conflicting defense: that Wayne was the shooter, not the Petitioner. In similar circumstances, a Magistrate Judge has said that once a defendant testified that he shot the victim in self-defense, the

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[12] Other examples of objectives in addition to acquittal come to mind: (1) A defendant might choose a defense of entrapment, motivated in part by another objective: the desire to challenge what he considers government misconduct. However, his defense counsel might view entrapment as a losing defense and recommend a different defense. (2) A defendant charged with rape might have strong personal reasons for insisting on a misidentification defense, even if defense counsel recommends a consent defense in the face of damning forensic evidence. One of the defendant's objectives could be to avoid admitting he had sex with someone who was not his partner.

defendant had a Sixth Amendment right to have his attorney further that defense, and not to present evidence that another person did the shooting. *Espinoza v. Hatton,* 2020 U.S. Dist. LEXIS 13942, *168-169 (S.D. Cal. Jan. 28, 2020).

Here, instead of supporting the defense to which the Petitioner testified, defense counsel undermined the Petitioner's testimony by securing the trial judge's permission to present it in narrative form. *See State v. Francis,* 118 A.3d 529, 535-541 (Conn. 2015) (structural error occurred where the defendant did not voluntarily waive his right to counsel and was forced to testify in narrative form or relinquish his right to testify).[13] Defense counsel then invited the jury to disbelieve the Petitioner's testimony in closing argument. *See People v. Bergerud,* 223 P.3d 686, 690-691, 701-703 (Colo. 2010) (defense counsel's opening statement completely contradicted the defendant's anticipated self-defense testimony, usurping his fundamental choice to testify).

As the Petitioner's case shows, allocating the choice of defense to defense counsel and allowing him to override the defendant's objections to that choice can deal a crushing blow to the defendant's right of autonomy and his corresponding right to testify in his own behalf. The Court should take the opportunity presented

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[13] This Court has spoken eloquently about the plight of the criminal defendant who does not have the guiding hand of counsel when taking the witness stand and attempting to present his version of what happened to the jury. *Ferguson v. Georgia,* 365 U.S. 570, 593-596 (1961) (requirement that a criminal defendant make an unsworn statement without being questioned by defense counsel violates due process of law).

by this case to clarify that the choice of defense is a fundamental decision reserved to the defendant under the Sixth Amendment.[14]

III. This case presents an important issue for the Court to resolve about the respective roles of attorney and client, which is unsettled and critical to the allocation of decision-making in a criminal case.

The question presented by this case is not only unresolved but also of great practical significance to criminal defendants, the criminal defense bar, and the lower courts. Defendants in criminal cases not infrequently disagree with counsel about important decisions, including which defense to present. Sometimes they seek to replace counsel because of those disagreements, as did McCoy and the Petitioner. *McCoy,* 138 S. Ct. at 1506; App.A 27-31. Criminal defense attorneys often have to consider their client's preferences and to determine which decisions they can make even if their client disagrees. If the attorney-client relationship breaks down due to such disagreements, defense counsel may file a motion to withdraw. The lower courts regularly address motions to withdraw for such reasons.

There are general standards that address the allocation of authority between attorney and client. *E.g.,* Mass. R. Prof. C. 1.2(a) (2015); ABA Model Rule of Professional Conduct 1.2(a) (2016); ABA Standards for Criminal Justice, Standard for the Defense Function 4-5.2 (2017). However, they do not resolve the question

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[14] *See* H. Richard Uviller, *Calling the Shots: The Allocation of Choice between the Accused and Counsel in the Defense of a Criminal Case,* 52 Rutgers L. Rev. 719, 725-729, 770-773, 777-780 (2000) (advocating the allocation of the choice of defense to the client).

presented by this case. Therefore, it would benefit criminal defendants, the bar, and the bench, as well as improve the administration of justice, for this Court to clarify the constitutional limits on what criminal defense counsel can do over the objection of their clients.

IV. This case presents an excellent vehicle for the Court to decide this important, unresolved issue.

In this case, the existence of and reasons for the disagreements between the Petitioner and his counsel on how to defend the Petitioner's case are crystal clear from the record. There were numerous hearings and conferences at which defense counsel and the Petitioner stated their conflicting positions. The Massachusetts Supreme Judicial Court wrote a lengthy decision addressing the question presented for review, leaving this Court well situated to decide the important constitutional issue this case raises.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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