NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2020

MALCOLM MOORE,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Section 403 of the First Step Act of 2018, which is expressly titled a "clarification" of the penalty provisions of 18 U.S.C. § 924(c)(1)(C), should apply to defendants who were sentenced before the enactment of the Act but whose convictions and sentences remain pending on direct review and, therefore, are not yet final.

Whether counsel violates a defendant's right to autonomy when the defendant intends to contest all of the government's evidence and counsel stipulates without his consent to a jurisdictional element of the offense.

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

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MALCOLM MOORE,

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On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Malcom Moore respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The Third Circuit's opinion is reported at 960 F.3d 136 (3d Cir. 2020). Pet. App. 1-10.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on January 8, 2018. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and issued its published opinion on May 25, 2020. This Petition is filed within 150 days of that date, as required by Supreme Court Rule 13.3 and this Court's March 19, 2020 Order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Before December 2018, Section 924(c)(1)(C) of Title 18 of the United States Code provided:

> (C) In the case of a second or subsequent conviction under this subsection, the person shall--
> (i) be sentenced to a term of imprisonment of not less than 25 years . . . .

Since the First Step Act was passed in December 2018, Section 924(c)(1)(C) of Title 18 of the United States Code now provides:

> (C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--
> (i) be sentenced to a term of imprisonment of not less than 25 years . . . .

Section 403 of the First Step Act, titled "Clarification of Section 924(c) of Title 18, United States Code," states in full:

> (a) IN GENERAL. — Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."
>
> (b) APPLICABILITY TO PENDING CASES. — This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

§ 403, 132 Stat. 5194, 5221–22.

STATEMENT OF THE CASE

This case asks the Court to hold that the First Step Act's clarification of the draconian stacking provision of 18 U.S.C. § 924(c) applies to defendants for whom direct appeal is pending. This case also asks the Court to hold that counsel violates a defendant's right to autonomy by stipulating without the client's consent to a jurisdictional element of the offense when a defendant intends to contest all of the government's evidence.

PROCEEDINGS BELOW

Petitioner Malcolm Moore and co-defendant Marquis Wilson were charged in a five-count indictment with conspiracy to commit armed bank robbery, 18 U.S.C. § 371 (Count One); armed bank robbery and aiding and abetting, 18 U.S.C. §§ 2113(d) & 2 (Counts Two and Four); and carrying, using, or brandishing a firearm during and

in relation to a crime of violence and aiding and abetting, 18 U.S.C. §§ 924(c)(1) & 2 (Counts Three and Five). The two young men had never been charged with or convicted of an offense under § 924(c) before. The indictment alleged that Mssrs. Moore, Wilson, and others robbed two Wells Fargo banks in Pennsylvania on November 4 and 12, 2013. Between the two robberies, Mssrs. Moore and Wilson, and another young man had been stopped in a car while driving south on I-85 and the proceeds of the November 4 bank robbery were seized from the car.

Mssrs. Moore and Wilson both pleaded guilty to the indictment. Each then moved to withdraw his guilty plea and have his attorney removed. Both motions were granted. Almost immediately, another appointed attorney for Mr. Wilson was removed and a third attorney was appointed for trial.

Mssrs. Moore and Wilson then proceeded to trial. At trial, by stipulation, defense counsel for Mssrs. Moore and Wilson agreed that a loss enforcement officer at one Wells Fargo branch would testify that, at the time of the robberies, Wells Fargo was insured by the FDIC, a necessary element to establish federal jurisdiction. The defendants did not object on the record to their attorneys' concession, nor did the District Court address the defendants regarding this concession.

Both defendants were convicted on all counts.

In post-trial motions, Mssrs. Moore and Wilson objected to counsels' stipulation to the jurisdictional element of the offense on their behalf. They both sought and were granted change of attorneys regarding this error.

On March 6, 2018, the District Court sentenced Mr. Moore to 385 months

imprisonment, which included what the Court and all parties believed was the mandatory minimum sentence pursuant to 18 U.S.C. § 924(c), seven years for brandishing a firearm during the November 4, 2013 bank robbery, and an additional 25-years for brandishing a firearm during the November 12, 2013 bank robbery, to run consecutive to each other and to all other counts (*i.e.*, stacking).

While Mr. Moore's appeal was pending, President Trump signed into law the First Step Act of 2018 ("FSA") on December 21, 2018. Pub. L. 115-391 (2018). Prior to the enactment of the FSA, this Court had read the statute as requiring a seven-year mandatory minimum penalty for a first violation of 18 U.S.C. § 924(c) (if the jury found brandishing), and, "[i]n the case of a second or subsequent conviction," an additional 25-year mandatory minimum term of imprisonment. *See Deal v. United States*, 508 U.S. 129, 132-37 (1993). The FSA clarified that the sentencing scheme of § 924(c) does not mandate such draconian stacking.

To achieve this clarification, the FSA amended § 924(c)(1)(C) by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final." In other words, multiple violations of § 924(c) charged in a single indictment do not trigger the additional 25-year mandatory minimum terms unless a defendant has a prior final conviction under § 924(c). Because Mr. Moore had no prior convictions under § 924(c), he is subject only to a seven-year sentence for each count of brandishing under § 924(c). Instead of a mandatory minimum term of 7 + 25 years totaling 32 years, his mandatory minimum sentence should have been 7 + 7 years

totaling 14 years. Although Mr. Moore did not include this challenge to his sentence in his opening appellate brief, he petitioned the Third Circuit for permission to supplement his appeal, which was granted.

The Third Circuit (Hardiman, Greenaway, and Bibas, JJ.), in a precedential opinion authored by Judge Bibas, affirmed the conviction and sentence, determining that its precedent controlled and Section 403 of the FSA did not apply to defendants who had already been sentenced. (A9 (discussing *United States v. Hodge*, 948 F.3d 160 (3d Cir.), *cert. denied*, S.Ct. No. 19-889, 2020 WL 5883242 (Oct. 5, 2020)). *Hodge* had rejected the defendant's argument that the District Court should have applied the FSA when resentencing him after a limited remand because the FSA "conditions the reduced mandatory minimum's retroactive application on the imposition of a sentence — not the sentence, an ultimate sentence, or a final sentence"). Thus, Mr. Moore remains subject to the 25-year mandatory consecutive minimum for a second § 924(c)(1)(C) conviction on Count Five.

The Third Circuit also ruled that counsel's stipulation to a jurisdictional element without his client's consent did not violate the Sixth Amendment because whether to contest a crime's jurisdictional element is a tactical decision reserved for counsel and casts no stigma upon a defendant.[1] (A2-4).

REASONS FOR GRANTING THE PETITION[2]

[1] The Third Circuit rejected six other arguments that Mr. Moore raised on appeal that are not at issue here.

[2] Co-defendant and co-appellant Marquis Wilson, Crim. No. 14-209 (E.D.Pa), Appeal No. 18-1079 (3d Cir.), is simultaneously filing a Petition for Writ of Certiorari raising

I. Under 18 U.S.C. § 924(c)(1)(C), as clarified and amended by the First Step Act of 2018, Mr. Moore's stacked 25-year sentence is illegal and violates due process.

This Court should grant certiorari to hold that under 18 U.S.C. § 924(c)(1)(C), as clarified and amended by the FSA of 2018, Mr. Moore's stacked 25-year sentence is illegal and violates due process. Section 924(c) requires the vacation of the stacked sentence and resentencing, because that provision, both as written prior to the FSA, and as clarified by the FSA, prohibits a consecutive 25-year sentence absent an intervening final conviction on a first § 924(c) offense, and only permits conviction and sentence under § 924(c)(1)(A) for simultaneously charged offenses (seven years for each § 924(c) conviction if a weapon was brandished). The circuits interpreting § 924(c) following enactment of the FSA have decided that the amendment's language that a sentence "has not been imposed" means it has no application to a direct appeal where the district court pronounced a sentence before the date of enactment.[3] But many courts considering re-sentencing following either a successful appeal or motion under 28 U.S.C. § 2255 motion, or other motions, have applied the new FSA

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the same two issues, which were briefed together and are therefore replicated here substantially verbatim.

[3] Like the Third Circuit relying on its precedent in *Hodge* to reject application of § 403 here (*see* A3), other circuit courts have similarly rejected the application of § 403 to cases pending on appeal. *See United States v. Voris*, 964 F.3d 864, 875 (9th Cir. 2020); *United States v. Gomez*, 960 F.3d 173, 178 (5th Cir. 2020); *United States v. Cruz-Rivera*, 954 F.3d 410 (1st Cir.), *cert. denied*, S.Ct. No. 20-5650, 2020 WL 6037371 (Oct. 13, 2020); *United States v. Jordan*, 952 F.3d 160, 163, 171-74 (4th Cir. 2020), *cert. petition docketed at* S.Ct. No. 20-256; *United States v. Richardson*, 948 F.3d 733, 748-53 (6th Cir.), *cert. denied*, S.Ct. No. 19-8878, 2020 WL 5883230 (Oct. 5, 2020).

sentencing provisions, and refused to stack sentences under the previous judicial interpretation of § 924(c). Other courts, like the Third Circuit in *Hodge*, have not.

Section 403 of the FSA plainly and expressly states that its clarification and amendment of § 924(c) applies to "any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." Thus, there is no question the FSA's remedial, punishment-reducing effects have retroactive application to past conduct. The disputed question is whether the FSA separates defendants entitled to the Act's ameliorative penalties by the date their sentences were pronounced. The circuits that claim to see the line clearly drawn, however, are embracing a literalism that ignores the Act's intent to clarify the law as written *ab initio* and ignores an ambiguity that justice and lenity require resolving in favor of criminal defendants.

Interpretation of a statute begins with its text, read as a whole, informed by express statutory purpose and context. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Contrary to these norms, the Third Circuit and several other circuits pin their construction of the statute's application on a single word read in isolation, finding that a sentence "imposed" can only have a single literal meaning, the pronouncement of sentence by a district court, regardless of finality. The circuits base their understanding on analogies to, and usage in, statutes addressing sentencing, and not sentencing reform. However, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v.*

United States, 461 U.S. 574, 586 (1983). A court should "not look merely to a particular clause" but also "take in connection with it the whole statute and the objects and policy of the law." *Id.*; *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006) (interpretation of a word must consider "whole statutory text, considering the purpose and context of the statute" and the "definition of words in isolation . . . is not necessarily controlling").

By passage of Section 403, Congress expressly "clarified" the penalty provisions of § 924(c), correcting this Court's erroneous interpretation of that statute in *Deal v. United States*, 508 U.S. 129, 132-37 (1993):

> Sec. 403 Clarification of Section 924(c) of Title 18, United States Code.
>
> (a) In General, Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection becomes final."
>
> (b) Applicability to Pending Cases. This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Id. at Sec. 403.

The term "imposed" in Section 403 must be read within the broader statutory context, and that section includes three other crucial pieces of text that further support Mr. Moore's position: namely, Congress' express statements in Section 403 that (1) the amendment was a "clarification" to be applied to (2) "any offense that was committed before the date of enactment," (3) if a "case" was still "pending" (because the "sentence for the offense has not been imposed as of such date of enactment").

Under the express language, Section 403 merely clarifies an old provision by providing clearer guidance on applicable penalties -- that the 25-year mandatory minimum sentence does not apply unless a prior § 924(c) conviction has previously become final.

Congress did not designate any other provision of the FSA – either Section 401 (reducing drug penalties), Section 402 (broadening safety valve), or Section 404 (giving District Court's power to grant compassionate release) – as a "clarification." This designation is so significant here because a "clarification" of a penal statute, even after a conviction has been entered, merely interprets the meaning of the statute at the time of conviction, is not new law, and thus "presents no issue of retroactivity." *Fiore v. White*, 531 U.S. 225, 228 (2001) (holding that clarification by highest state court made clear that Fiore had been convicted "for conduct that [Pennsylvania's] criminal statute, as properly interpreted, does not prohibit" such that defendant's conviction and continued incarceration violated due process).

This Court should consider this clearly expressed intent to clarify in interpreting the FSA's provisions. *See Church of Holy Trinity v. United States*, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the intent of the legislature is the title of the act."); *see also Brown v. Thompson*, 374 F.3d 253, 259-61 & n.6 (4th Cir. 2004) (where Congress expressly provided Medicare amendments were "clarifying," panel explained and Congress may amend "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases" and "need not ipso facto constitute a change in meaning or effect," passing an amendment

"purely to make what was intended all along even more unmistakably clear."). "Subsequent legislation which declares the intent of an earlier law" while "not, of course, conclusive in determining what the previous Congress meant," "is entitled to weight when it comes to the problem of construction." The "purpose of the Act, its [ ] construction, and the meaning which a later Congress ascribed to it" all guide a court's interpretation. *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958).

Furthermore, Section 403 plainly articulates that the "applicability" of § 924(c) as rewritten is "to pending cases" and that its new language applies "if a sentence for the offense has not been imposed as of such date of enactment." The phrase "pending cases" should be construed, as it always has been, to mean cases that have not completed direct judicial review. A criminal sentence does not have finality and has not been finally imposed until the completion of review. In *Griffith v. Kentucky*, a criminal case, this Court held that "[b]y 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. 314, 321 n.6 (1987). The FSA does not distinguish between initial sentence, ultimate sentence, or final sentence, and the statutory intent to abate the harsh punishment calls for the reading that provides the most relief to the most defendants. Moreover, Congress is presumed to legislate with knowledge of the rules of construction and thus understands when a case is deemed "pending." *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Albernaz v. United States*, 450 U.S. 333, 340-42 (1981).

When a statute is repealed while an appeal is pending, including any "repeal and re-enactment with different penalties," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), it must be applied by the court of appeals absent "statutory direction . . . to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974). There is no "statutory direction" in the FSA that would bar application of the reduced penalty structure to cases on direct appeal. To the contrary, Congress indicated its intent that Section 403 be applied to pipeline cases like Mr. Moore's by expressly titling Section 403 "Clarification of Section 924(c)," and addressing applicability of that "clarification" to "pending" cases in Section 403(b). Its statement in Section 403(b) that the amendment shall apply to any offense committed before the date of enactment if a sentence for the offense has not been "imposed" as of such date, suggests that Congress intended the amendment to apply to cases on direct appeal, but not to those on collateral review. The word "imposed" – read in conjunction with "pending cases" and Congress' intent to "clarify" its original intent – indicates that Congress intended its now-clarified language to apply to cases on direct appeal. *See Johnson v. United States*, 559 U.S. 133, 139-40 (2010) (statutory "context determines meaning").

The division of authority in appellate and district courts as they resentence defendants under the FSA demonstrates that Section 403's application provision is susceptible to two interpretations. Many district courts are applying Section 403's anti-stacking clarification at resentencing proceedings, following remands from successful appeals, successful motions under 28 U.S.C. § 2255, or in resentencing

under Section 404(b) (retroactivity of Fair Sentencing Act of 2010). In some of these cases, the District Courts explicitly reject that sentence reductions are unavailable because the initial sentences were "imposed" before the FSA's date of enactment. *See, e.g.*, *United States v. Uriarte*, -- F.3d --, 2020 WL 5525119, at *4 (7th Cir. Sep. 15, 2020) (en banc); c*f. United States v. Brown*, 935 F.3d 43, 45 n.1 (2d Cir. 2019) (stating that Section 403 "provides no benefit in the pending appeal" but at resentencing defendant "will have the opportunity to argue that he is nevertheless entitled to benefit" from the FSA); *United States v. Brown*, Crim. No. 14-509 (S.D.N.Y.) (amended judgment Dec. 13, 2019); *United States v. Crowe*, Crim. No. 11- 20481 (E.D. Mich.) (amended judgment Sept. 24, 2019); *United States v. Jackson*, Crim. No. 15-453, 2019 WL 2524786 (N.D. Ohio June 18, 2019) (government appeal to 6th Cir. pending in Appeal No. 19-3623); *United States v. Jones*, Crim. No. 98-10, 431 F. Supp. 3d 740 (E.D. Va. Jan. 6, 2020); *United States v. Jones*, Crim. No. 97-118, (S.D. Ind.) (amended judgment March 28, 2019); *United States v. McCoy*, Crim. No. 92-96 (S.D. Ind.) (amended judgment Dec. 10, 2019); *United States v. Robinson*, Crim. No. 02-80 (E.D.N.C.) (§ 403 applied following successful § 2255); *United States v. Joyner*, Crim. No. 15- 255 (N.D. Ga.); *Acosta v. United States*, Crim. No. 3- 11, 2019 WL 4140943 (W.D.N.Y. Sept. 2, 2019). Some district courts are applying Section 401 at re-sentencings. *See, e.g., United States v. Ortega*, Crim. No. 10-825 (C.D. Ca.); *United States v. Beneby*, Crim. No. 13-20577 (S.D. Fla.) (amended judgment Aug. 28, 2019).

Other courts have refused to give defendants the benefits of the new law at

resentencing. *See, e.g., United States v. Hodge*, 948 F.3d 160 (3d Cir. 2020) (in context of limited remand to Virgin Islands); *United States v. Mapuatuli*, Crim. No. 12-1301 (D. Haw.) (refusing to apply Section 401) (appeal pending in 9th Cir. Appeal No. 19-10233).

The fact that many courts at resentencing have rejected that the initial imposition of sentence is the demarcation line where cases benefit from the FSA shows the statute's ambiguity. The rule of lenity, then, should resolve this issue. That requires the FSA be read in favor of criminal defendants. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980) (lenity applies to penalties); *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (explaining lenity "is founded on the 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department'") (internal citations omitted).

II. Counsel's stipulation to a jurisdictional element without the defendant's consent violated the Sixth Amendment autonomy principle

A. The autonomy principle

Criminal defendants have a right to choose the objectives of their defense:

> The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Faretta v. California, 422 U.S. 806, 819-21 (1975); *accord United States v. Cronic*, 466 U.S. 648, 654 (1984). While authorizing a lawyer to act on his behalf, the defendant retains the right to define the objectives of the representation, subject only to the bounds of legality. *See*, *e.g.*, Pa. R. Prof. Conduct 1.2 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."). A defense attorney acts as the agent of the principal (defendant) and "the agent shall act on the principal's behalf and subject to the principal's control . . . ." Restatement (Third) of Agency § 1.01 (2006). The role of counsel is thus to aid and assist the defendant. *Faretta,* 422 U.S. at 820; *see also*. J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1179 (2010) (explaining when the Sixth Amendment was enacted "[t]he role of counsel was not to supplant the defendant as the primary decision-maker but instead to ensure that the defendant could adequately assert his rights").

"Implicit in the Sixth Amendment is the criminal defendant's right to control

his defense." *State v. Lynch*, 309 P.3d 482, 485 (Wash. 2013) (holding court may not instruct the jury on lesser included offenses over the defendant's objection). "Even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic,* 466 U.S. at 656-57 n.19 (1984); *cf. Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017) (recognizing a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certain [ ]" conviction); Hashimoto, *Resurrecting Autonomy*, 90 B.U.L. Rev. at 1178 (for some defendants, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence").

This Court recently recognized that "the right to defend is personal" and that "a defendant's choice in that right must be honored out of that respect for the individual which is the lifeblood of the law." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507-08 (2018) (internal quotations and citations omitted).[4] In assisting a defendant with his defense, an attorney makes certain decisions about how a theory of defense unfolds, such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *McCoy*, 138 S. Ct. at 1508. Under the Sixth Amendment, however, the defendant maintains the authority in making the ultimate decisions: which theory of defense to pursue,

[4] But if a defendant is not responsive to his attorney's strategy to concede guilt at penalty phase of a death penalty case with overwhelming evidence that he committed the kidnapping and brutal murder, this Court has found an attorney is not ineffective. *Florida v. Nixon*, 543 U.S. 175, 192 (2004).

whether to plead guilty or go to trial, whether to testify or not, or whether to appeal or not. *Id.* Indeed, counsel is responsible for making tactical and strategic decisions *after* consultation with the client. American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-5.2(b) (4th ed. 2014) (hereafter ABA Standard). Notably, the ABA Standard do not allocate responsibility for deciding the defense to the attorney.

Indeed, these constitutional obligations overlap with a defense attorney's ethical obligations to her client. Counsel has an overarching duty to advocate for the client, consult with the client about important decisions, and keep the client informed of important developments in the course of the prosecution. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Counsel owes the client a duty of loyalty and to avoid conflicts of interest. As an assistant to the defendant, counsel has an overarching duty to advocate for the defendant's cause, consult with the defendant on important decisions, and keep the defendant informed. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See RPC 1.2(a); ABA Standard 4-5.2(b).

B. Stipulation to an element of the offense, without consent, violates a defendant's autonomy

The decision to stipulate to an element of the offense at trial is exclusively within the defendant's discretion. The decision implicates more than trial tactics. A defendant has a right to have a jury find every element of the charged offenses beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000);

United States v. Gaudin, 515 U.S. 506, 511 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970); *see also Mathews v. United States*, 485 U.S. 58, 64-65 (1988). This right is also anchored in principles of due process from the Fifth Amendment. When the parties stipulate to the facts that establish an element of the charged crime, the jury need not find the existence of that element, and the stipulation therefore constitutes a waiver of the "right to a jury trial on that element." *United States v. Mason*, 85 F.3d 471, 472 (10th Cir. 1996).

Where a stipulation concedes an element of the offense, it is tantamount to a guilty plea. *See, e.g.*, *Commonwealth v. Davis*, 322 A.2d 103, 105 (Pa. 1974) (holding that where stipulation to witnesses' testimony made a verdict of not guilty "extremely unlikely," that stipulation was to the defendant's guilt so that an on-record colloquy demonstrating the defendant's understanding of the consequences and his consent were necessary).

Lower courts have agreed with the proposition that trial courts cannot compel a defendant to enter stipulations to elements of a crime where an objection is made. *See, e.g.*, *United States v. Williams*, 632 F.3d 129, 131, 133 n.2 (4th Cir. 2011) (violation of Sixth Amendment right to confront witness and maybe right to a jury trial where stipulation as to forensic chemist's determination that drugs tested positive for heroin entered over defendant's objection); *see also United States v. Read*, 918 F. 3d 712 (9th Cir. 2019) (finding Court violated autonomy principle where it permitted counsel to pursue insanity defense whereas defendant maintained a defense of demonic possession). *Cf. United States v. Ferreboeuf*, 632 F.2d 832 (9th

Cir. 1980) (holding that when a stipulation is agreed to by the defendant's attorney in the presence of the defendant, the trial court may presume that the defendant consents, unless the defendant objects at the time the stipulation is made).

When a defendant expressly disagrees with his attorney, such decisions are not called tactical but instead are found to implicate constitutional rights. In *State v. Humphries*, the defendant was charged with second- and third-degree assault and unlawful possession of a firearm based upon two juvenile convictions for robbery. 336 P.3d 1121 (Wisc. 2014). Defense counsel wanted to stipulate that Humphries had a conviction for a "serious offense" so that the jury would not hear about the robberies, but he informed the court that his client disagreed. The court determined this was a tactical decision and admitted the stipulation. *Id.* at 1123-24. The Wisconsin Supreme Court disagreed. It determined admitting over a defendant's objection a stipulation to facts that establish an element of the crime "constitute[d] a waiver of the right to a jury trial on that element as well as the right to require the State to prove that element beyond a reasonable doubt." *Id.* at 1124. *See also Cooke v. State*, 977 A.2d 803, 840-46 (Del. 2009), *cert. denied*, 559 U.S. 962 (2010) (ruling that defendant's constitutional rights to plead not guilty, to testify in his own defense, and to an impartial jury were violated by his attorney's decision to enter a defense of guilty but mentally ill over his objection).

While a stipulation may not be entered over the defendant's known and express objection, what of the case here, where the record is ambiguous? Here, in pleading not guilty, indeed in withdrawing his guilty plea, Mr. Moore clearly and

vigorously invoked his due process right to require that the government meet its burden of proof as to every element of the crime. But the stipulation to an element was entered quickly, without the defendants knowing its implication. In such an instance, requiring a colloquy with a defendant when a stipulation to an element is entered is not onerous. It ensures protection of fundamental rights. The Third Circuit Court of Appeals has cautioned so much in the commentary to its charge on stipulated evidence:

> In cases where a stipulation may amount to an admission to an element of the offense, the judge may wish to exercise caution. The Third Circuit has yet to address the question, but the judge may wish to ascertain that the defendant understands the contents of the stipulation and agrees to it.

Third Circuit Model Crim. Jury Instruction §4.02 (rev. Oct. 2017). But that was not done here.

Constitutional rights are implicated when a defendant proceeding to trial enters a stipulation to an element of the offense. Courts should be required to get record consent or not accept the stipulation. But the Third Circuit, in affirming the convictions below, did not draw the distinction between objection and non-responsiveness. Indeed, it held, "[e]ven if appellants had instructed counsel to fight the jurisdictional element, two more basic factors would distinguish *McCoy*." First, this case was not about conceding factual guilt: "litigating the jurisdictional element is but a technical, tactical means to achieve that objective." Second, jurisdictional elements trigger no "opprobrium" or stigma. (A4). While a jurisdictional element might not carry stigma, a criminal conviction carries more

than stigma: it threatens a defendant's liberty interest and other significant legal rights and benefits. By diminishing the role of a jurisdictional element, the Third Circuit's precedential decision permits a defense attorney to violate the autonomy principle even in the face of an explicit objection. Such a decision cannot stand and more should be required of trial courts to ensure that an attorney's concession of guilt is known and approved by the defendant.

III. The questions presented are important.

The questions raised herein, because they implicate criminal defendants' liberty and decades of incarceration, are matters of exceptional importance which warrant granting the petition, even if the circuits, to date, are uniform in interpreting that Section 403 of the FSA does not apply to cases already sentenced but pending on direct appeal. This Court has not hesitated to address important questions of law even when circuits were uniform. *See e.g., Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 505-06 (2007) (granting certiorari despite absence of circuit split in light of "unusual importance of the underlying issue"); *Rehaif v. United States*, 139 S. Ct. 2191 (2019). This Court should grant this petition to address these important questions of statutory interpretation, on which decades of incarceration hinge, and resolve the ambiguity evidenced by division among lower court authorities applying the FSA.

The important autonomy principal recently revived by this Court's decision in *McCoy* was improperly limited by the decision below calling the stipulation tactical,

regardless if a vigorous objection has been made. That decision was wrong and cannot stand because it is a structural error, "affect[ing] the framework within which the trial proceeds," and "so intrinsically harmful as to require automatic reversal." *See* McCoy, 138 S. Ct. at 1508; *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Neder v. United States*, 527 U.S. 1, 7 (1999). This Court's further explanation of this important principle is necessary to protect constitutional rights.

Accordingly, on both issues, this Court should grant certiorari pursuant to Supreme Court Rule 10(c) which provides for review on certiorari if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court[.]"

IV. This case presents an ideal vehicle to resolve these questions.

The issues were squarely pressed and passed upon below. This petition presents a simple case for this Court's evaluation and review of each.

CONCLUSION

Given the exceptional importance of the legal questions presented herein, this Court should grant the instant petition.

Respectfully submitted,

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