22-5360 ORIGINAL

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

WAYNE CHIN

PETITIONER

vs.

JOSEPH NOETH

RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULE ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

WAYNE CHIN
(Your Name)

354 HUNTER STREET
(Address)

OSSINING, NEW YORK 10562-5442
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

WHETHER A DEFENSE COUNSEL CAN OVERRIDE AN ACCUSED'S FINAL AND INFORMED DECISION FOR AN ACTUAL INNOCENCE DEFENSE AND IMPOSE AN UNWELCOME DEFENSE UPON THE ACCUSED AGAINST HIS OBJECTIONS, RESULTED IN A VIOLATION OF THE SIXTH AMENDMENT SECURED AUTONOMY?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Eric Gonzalez, Esq. District Attorney Kings County,

350 Jay Street, Brooklyn, New York 11201

RELATED CASES

People v Chin, 2013 WL 990955, New York Supreme Court, Kings County, Judgment entered February 20, 2013

People v Chin, 148 A.D.3d 925 (2d Dept. 2017) Appellate Division, Second Department, judgment entered march 15, 2017

People v Chin, 148 A.D.3d 926, (2d Dept. 2017) Appellate Division, Second Department, Judgment entered March 15, 2017.

People v Chin, 29 N.Y.3d 1124, New York Court of Appeals, Judgment Entered August 1, 2017,

People v Chin, 30 N.Y.3d 978, New York of Appeals, Judgment entered October 20, 2017.

People v. Chin, 163 A.D.3d 986 (2 Dept. 2018) Appellate Division Second Department, judgment entered July 25, 2018

People v. Chin, 32 NY 1110, New York Court of Appeals, Judgment entered November 14, 2018.

People v. Chin, 169 A.D.3d 916 (2 Dept. 2019) Appellate Division Second Department judgment entered February 20, 2019.

People v. Chin, 33 N.Y. 3d 1030, New York Court of Appeals, judgment entered May 13, 2019

Chin v Noeth, 19-CV-02729: 2021 Wl 33722984 (E.D.N.Y. 2021), U.S. District Court for the Eastern District of New York, Judgment entered August 3, 2021.

Chin v.Noeth, 21-2044 U.S. Court of Appeals for the Second Circuit denying Certificate of Appealability judgment entered February 23, 2022.

Chin v. Noeth, No. 21-2044 U.S. Court of Appeals for the Second Circuit denying reconsideration En Banc, judgment entered June 9, 2022.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix 1-A1 to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[X] is unpublished.

The opinion of the United States district court appears at Appendix 1-B to the petition and is

[] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at

Appendix 1-D, 2-D to the petition and is

[X] reported at 29 NY 3d 1124; 30 N.Y.3d 979; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the Appellate Division court

appears at Appendix 1-E & 2-E to the petition and is

[X] reported at 148 A.D.3d 925; 148 AD3d 926 ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case

was February 23, 2022 .

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 9, 2022, and a copy of the order denying rehearing appears at Appendix 1-C.

[ ] An extension of time to file the petition for a writ of certiorari was granted

to and including _____ (date) on _____ (date)

in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was August 1, 2017; Oct. 20, 2017.

A copy of that decision appears at Appendix 1-D, 2-D.

[X] A timely petition for rehearing was thereafter denied on the following date:

October 30, 2017, and a copy of the order denying rehearing

appears at Appendix 3-D

[ ] An extension of time to file the petition for a writ of certiorari was granted

to and including _____ (date) on _____ (date) in

Application No. __ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment-Secured Autonomy

The Fifth Amendment right to a fundamental fair trial.

STATEMENT OF THE CASE

The People contended that on June 12, 2001, the petitioner phone his former girlfriend, Renee Aarons, and lured her to her mother's home at 95 Linden Boulevard, Brooklyn, New York, to kill her for fifty thousand dollars, a percentage of lawsuit settlement she received from a car accident. At approximately 10:30 p.m., Renee was talking on her cell-phone while seated in a dark green Lexus vehicle, parked in front of 95 Linden Boulevard, when she was assaulted and shot three times.

Ms. Deanna Cobbs and Ms. Odette Gatson, who had both resided in their respective fourth floor apartment, located at 100 Linden Blvd., across from the scene of the crime, were among twelve individuals to contacted 911 emergency systems. Ms. Cobbs allegedly reported that she observed two individuals fleeing the crime scene in a black vehicle (T. 272-275). [1] Ms. Gaston allegedly reported that she observed a black male dressed in a gray Esco short set, accompanied by Hispanic female, who referred to him as Johnny, assaulting and shooting the victim. Petitioner was not known as Johnny.

Ms. Aisha White who was the only individual using a cell-phone to contact the 911 emergency system, informed operator 2249; "a man shot a female two times in the head, fled in a black vehicle." (Appendix_3-G.)

Within forty-eight hours of the crime, Police telecommunication Technician, Officer Jackson, destroyed all the original 911 master tape recordings because of their exculpatory values and created two audio cassette tape recordings of the purported 911 calls which did not corresponded with the Fire Department of New York ("FDNY") Computerized Aid Dispatch

[1] "T" referes to the trial transcripts, followed by the page number "H" refers to the minutes of the pretrial hearing and voir dires followed by the page number.

reports or the New York Police Department ("NYPD"), Sprint reports. Further, the two audio cassette tape recordings contained two diametrical opposing version of Ms. Cobbs' statement.[2]

The evidence recovered consisted mainly of the victim's cell-phone, handbags, purse, jewelry, three bullets and three shell casings, the green Lexus, and the gold Lexus both registered to the victim. Thirty-four prints were also lifted from the vehicles.

On July 3, 2001, Forensic Technician, Detective Gregg Timpanaro, conducted fingerprints comparison of the thirty-four prints and determined that there was no match with the petitioner's fingerprints on file with the police department.

In February 2003, an indictment was filed in the Supreme Court of New York, Kings County, charging the petitioner with two counts of murder in the second degrees, weapon possession in the second and third degree, and endangering the welfare of a child. Subsequently, the trial prosecutor requested a re-examination of the thirty four fingerprints. Detective Otero allegedly concluded that the petitioner's palm-prints came from the green Lexus' interior visor–mirror, and two index-fingerprints came from the back-bumper lid of the gold Lexus. There were no DNA evidence connecting the petitioner to the crime, and no weapon was recovered.

Petitioner was arrested in Tucson, Arizona, on November 17, 2005, upon charges unrelated to the instant case. Petitioner was extradited to New York February 29, 2008, arraigned on March 10, 2008, in the Supreme Court (D'Emic., J)

Two different attorneys's represented the petitioner before Phillip Smallman, Esq., was appointed by the court (D'Emic., J.,). Petitioner wanted to advance an actual innocent defense on the foundation of his cell phone records (cell site location information) and requested that

[2] Petitioner sought reasonably necessary funds and discovery of the two audio-cassette tape recording to prove that prosecutor committed fraud, and counsel's ineffectiveness. On May 18, 2020, the District Court (Roslynn R. Mauskopf, D.J.,), denied discovery of the audio-cassette tapes and funding for experts' service.

counsel subpoena the records from Sprint Telephone Company. Counsel did obtain the records nor answer the many communication sent to his office. Consequently, petitioner sought substitution of counsel of counsel which the court denied.

At a conference call on September 9, 2009, Petitioner renewed his request to substitute counsel on the basis that counsel was sabotaging the objective of an actual innocent defense. The Court (D'Emic, J.,), inquired whether the petitioner was advocating an alibi defense. Petitioner responded; "that what I am referencing." (Appendix 1-G, at page 4-5).

On the eve of trial, during the Rosario/Molineaux hearing, the court (Konviser, J.,) told counsel to consult with petitioner regarding what defense would be advance at trial (H. 9.) In an off-the –record discussion with the court, counsel's stated that the petitioner instructed him to advance an affirmative alibi defense. Respondent the State, acknowledged the substance of counsel's off the record conversation in it N.Y.C.P.L 330.30 Memorandum of law (Appendix 2-G at page 5).

The court's inquired whether a notice of alibi was filed, and counsel's replied that none was file nor was he aware of any. (H: 17). [3] Subsequently, counsel informed the court that his investigation reveals, there are other possible persons responsible for the crime, other than then defendant (H. 500). Petitioner was forced into a situation of accepting counsel's representation, or self-representation.

Over the petitioner's objection and against his will, counsel advanced a "quality of police investigation defense" at trial, interjecting a factually and logically inconsistent defense upon petitioner, undermining his assertion of innocence. Thus, impermissibly compromising his

[3] A non-tradition alibi case can be presented circumstantially where no notice is required. See, People v Green, 70 A.D.3d 39 (2d Dept., 2009); People v. Peace, 256 A.D.2d 1014 (3d Dept., 1998) (original citations and quotations marks omitted).

Sixth Amendment secured autonomy to make fundamental decision about how to protect his own life and liberty.

After a jury trial, petitioner was found guilty of murder in the second degree (Penal Law 125.25(1), all other charges were dismissed.

Following the verdict, petitioner filed a C.P.L. 330.30 post-conviction motion to the trial Court, challenging the conviction. Among the issues, was that the court allowed counsel to override the petitioner's instruction to advance an innocent defense. The court (Konviser, J.,), summarily denied the motion on November 17, 2009 (Appendix 1-F), and sentenced the petitioner to an indeterminate prison term of twenty five years to life. Petitioner's C.P.L. 440.10 post-conviction motion to vacate the judgment and sentence was also denied February 20, 2013 (Appendix 2-F), and he unsuccessfully appealed his conviction to both the New York Appellate Division, and the New York Court of Appeals.

Petitioner then filed two petitions for writ of Error Coram Nobis to the Appellate Division, Second Department, both was denied simultaneously on July 25, 2018, (163 A.D.3d 986), and February 20, 2019 (169 A.D.3d 916) Appendix 3-E, 4-E. The Court of Appeal simultaneously denied both appeals on November 14, 2018 (32 N.Y.3d 1110), and May 13, 2019 (33 N.Y.3d 1030); Appendix 4-D,5-D.

Having exhausted his state claims, Petitioner's submitted a timely habeas corpus petition, pursuant to 28 U.S. C. §§ 2254,on April 25, 2019, to the District Court for Eastern District of New York. In a Memorandum, judgment, and order dated August 3 2021, Honorable Allyne R. Ross, denied the habeas petition and declined to grant a certificate of Appealability. (Appendix 1-B) A timely Notice of Appeal was filed August 19, 2021.

Subsequently, the petitioner filed a motion for Certificate of Appealability to the Court of Appeal for the Second Circuit on October 5, 2021. A Penal of The Second Circuit (Guido Calabresi, C.J.; Susan Carney, C.J.; Beth Robinson, C.J.,) denied the petitioner's motion on February 23, 2022.(Appendix 1-A) An extension of time was granted by the Second Circuit for the petitioner to file a motion for reconsideration on March 17, 2022. (Appendix 2-C) A Petitioner's motion for reconsideration to the Second Circuit was filed on May 14, 2022. The Second Circuit denied reconsideration-reconsideration en banc on June 9, 2022. (Appendix 1-C) This action is the result of that judgment.

The historical facts of this case are set forth in the District Court's decision. The following fact provides a short narrative of the evidence given by the prosecution's main witnesses and the defense case.

SUPPRESSED EVIDENCE

Prior to trial, the lead detective in the case, Patrick Henn, suppressed the decedent's cell-phone on June 15, 2001, and no one could recalled the phone number at trial. The vehicle and their contents were also suppressed before the evidence could be examined by defense counsel. Henn also claimed he recovered dry cleaners clothing wrapped in plastic, affixed with receipts in the name of Michael Gillings (T.242-246). All receipts were suppressed by Henn.

The People's case

There members of Ms. Renee Aarons' family and Aisha White who allegedly claimed she was the decedent's niece, testified at trial. The three members were Renee's mother, Chinwe Ifeoma, her sons, Ryan Aarons, and Rashawn Aarons.

Chinwe Ifeoma

Ms. Ifeoma testified that at the time of the shooting, Renee had an on-again, off-again relationship with the defendant for the past eighteen years (T. 20-21). They lived in Trenton, New Jersey, with Ryan, age 19, and Rahawn, age 11. She did not know who was Rashawn's biological father, but Rashawn referred to the defendant, as daddy (T. 23-24). Renee supported herself and family from a financial settlement after she was injured in a car-accident, -----Renee brought a gold Lexus vehicle for Wayne, and a dark green Lexus for Ryan (T. 22-24).

Ryan Aarons

According to Ryan, about a month before the shooting, Renee asked Wayne to leave her alone (T. 122) ---- Wayne initially said he would if she gave him fifty thousand dollars, but later said he was joking and they would probably die together (T. 122-23). Ryan added that Wayne stated he would never do anything to Renee in front the children, since they would testify against him (T. 123). During the argument Wayne supposedly reached in his waistband for a firearm, cocked it, and tossed it on the bed (T. 123-24).

Ryan was never impeach with his prior inconsistent statements which had mentioned no weapon, and the substance of the argument relates to Renee's intentions to relocate to Florida, (See, Appendix 4-G).

Rashawn Aarons

Rashawn testified at on June 12, 2001, Wayne picked him up from school in Trenton, New Jersey ---, Wayne told him its your grandmother's birthday and bough him to Brooklyn, New York, at 4:45 p.m. --- Wayne dropped him off at his grandmother's home and Rashawn went to visit a friend a few doors away. He left his friend's home about 10:30 p.m., and saw his mother parked in front of 95 Linden Boulevard in his brother's green Lexus, --- he got into the

passenger's seat beside his mother who was talking on her cell-phone. --- Wayne drove up in his car alongside them and asked what happened to Ryan, who was arrested earlier that day, --- his mother told Wayne, it's all your fault. --- Wayne got out of his car, walked over to them, asked something, and punched her in the face. --- Wayne then pulled out a nine-millimeter gun, and shot her three times. (T. 75-83).

Rashawn maintained that he got out of the vehicle--- ran over to Wayne, pulling him and telling Wayne to stop, saying daddy, "no." Wayne pushed him away and walked off ---. Rashawn's added, that his mother called out his name, --- Wayne realizing she was not dead, went back and shot her two more times ---, Wayne got back into his car, made a U-turn, and drove up Linden Boulevard. En-route to the precinct with the officers, he saw Wayne car parked, two blocks away, near the corner of Linden and Nostrand Avenue. ---, He recognized the vehicle because it contained dry cleaners' clothing that Wayne had picked up earlier that day (T. 83-86)

Despite the three bullets and shell castings recovered and introduced into evidence, Rashawn's testimony that the decedent was shot five times was never tested, nor was he impeach with his prior inconsistent statement (Appendix 5-G).

Aisha White

The audio-cassette tape recording created by Officer Jackson, which described a gold Lexus vehicle to bolster Aisha White's testimony, was played a second time to the jury and identified by White as the 911 call she made to Operator 2249.

White who was privy to listened Rashawn's station-house interview before she made her incriminating statements, testified she was in front of 95 Linden Boulevard on June 12, 2001. Approximately 10:30 p.m., she was standing about fifteen to twenty feet from Renee's vehicle when she observed Wayne drove up in his gold Lexus, and double parked beside Renee's car.

She did not knew Rashawn was in his mother's vehicle (T. 143-45), but heard Wayne arguing about money and Ryan's arrest (T. 145-46). White maintained that Wayne exited his vehicle and punched Renee in the face, at which time she dial 911. --- While on the cell-phone with the operator, she observed Wayne shooting Renee. She added that Rashawn jumped out of his mother's car and bear-hugged Wayne, saying daddy, "no" ---, Wayne pushed Rashawn away, and went back to Renee's car, and fired more shots, Wayene got back into his gold Lexus, made a U-turn, and drove up Linden Boulevard (T. 145-147).

There was no evidence that the police ever investigated Renee's finances or determined who benefited financially when she died. Nor was there any evidence that they investigated Renees other boyfriend, or the children biological fathers.

During summation, defense counsel argued, inter alia, that Renee Aarons' sons and nice had "an axe to grind" and may have testified untruthfully because of their 'hated' for the defendant (T. 413-414).

The Witnesses Who Did Not Testify At Trial

Defense counsel told the court that a Ms. Deanna Cobbs had called 911 and told the operator that she saw two people leaving the crime scene in a black vehicle. (T. 272-275). Ms. Cobbs was unavailable for trial and counsel tried to elicit Ms. Cobbs's statement from Detective Henn. The prosecutor's objected on hearsay ground. The court sustained the prosecutor's objection, and curtailed counsel's inquiry to a single question about different people and car. (T. 272-276) The audio-cassette recordings of Ms. Cobbs' alleged statements was never introduce into evidence.

Later, when counsel sought to call "Detective Crick" who had interviewed Ms. Odette Gaston because she was unavailable for trial. The prosecutor objected that counsel wanted to

call Crick "to put in evidence that is rank [ ] hearsay." (T. 296, 305-306). The prosecutor argued that counsel "should call Ms. Gaston, who was the source of that information (T. 306). The court precluded any such evidence on hearsay grounds, but ordered the prosecutor to make an effort to secure Detective Crick's presence. (T. 306-08) Ms. Gaston's specific statements to the police nor the recordings of her 911 call were never made a part of the record on appeal or introduced into evidence.

The Defense

The petitioner did not testify at trial and counsel who had not prepared any witnesses to testify, was offered a witness by the prosecutor and he readily accepted. (T. 336)

Crime Scene Detective Matthew Steiner, who was not involved with the case, testified that his unit which responded to all homicides, was responsible for safeguarding crime-scene and retrieving and preserving evidence. (T. 354-356, 359, 362). In cases where there is ballistics evidence, the Crime Scene Unite normally took photographs and made detailed sketches.

The jury deliberated for the better of two days before returning a guilty verdict.

REASONS FOR GRANTING THE PETITION

POINT ONE

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT UNREASONABLY FAILED TO GRANT A MOTION FOR RECONSIDERATION OF THE EARLIER DENIAL OF A CERTIFICATE OF APPEALABILITY IN THIS MATTER, IN WHICH THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FAILED TO EXPAND THE HOLDING OF MCCOY V. LOUISIANA, SIXTH AMENDMENT SECURED AUTONOMY TO MAKE FUNDAMENTAL DECISIONS ABOUT HOW BEST TO PROTECT ONES OWN LIFE AND LIBERTY.

The Fifth and Sixth Amendments of the United States Constitution and New York's Constitution guarantees an accused personally the right to make his own defense. **Faretta v. California**, 422 U.S. 806, 819 (1975); *People v. DeGina*, 72 N.Y. 2d 768, 776 (1988); *People v. Clark*, 129 A.D.3d 1, 11-12 (2nd Dept. 1991)("Defendant has the right to chart his own defense"); *People v. Morton*, 173 A.D. 2d 1081, 1085 (3d Dept. 1991) ("[C]ounsel has no authority to pursue any defense other than the one authorized by defendant")

But to what extent does a defendant give up the constituent right to make choices about his defense if he chooses to be represented by counsel?[4] This question is an important one because it bears on individual autonomy as well as the accuracy and perceived legitimacy of the Criminal Justice System.[5] The Supreme Court considered the issue in *McCoy v. Louisiana*, 138

[4] Compare, e.g., Monroe H. Freedman and Abba Smith, Understanding Lawyer's Ethics § 3.07, at 57 (5th ed. 2016) (arguing that the defendant should control most decisions because it is "not the lawyer's day in court, but the defendant's"). With Christopher Johnson,"The Law's Hard Choice;" Self-Inflicted Indignity, 93 KY. L.J.39, 132-41 (2004)(arguing that lawyers "least damage is done by a rule committing [almost] all decisions to the lawyer," Id. @ 140-41)

[5] Defendants have greater autonomy if they can make more decisions about their case. Yet, counsel may be better aware of which defenses are likely to succeed. See, Johnson, Supra, note 2, @ 132-33. Greater accuracy implies greater legitimacy, See: Id., but "Client control of the case is a significant element in a litigant's perception that justice has been done, regardless of the outcome," Freedman & Smith, Supra note 2, § 3.07, @ 58.

S. Ct. 1500 (2018), holding that a defense counsel may not override a defendant's choice as to the objectives of his defense and recognizing a right to autonomy under the Sixth Amendment.

There, this Court's reaffirmed that the Sixth Amendment "right to defend is personal" and a defendant's choice in exercising that right "must be honored out of that respect for the individual, which is the lifeblood of the law." Id., 138 S. Ct. @ 1507 (quoting *Faretta*, 422 U.S. @ 834); *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n. 10 (1979) ("*The Sixth Amendment contemplates a norm in which the accused, and not his lawyer is master of his own defense); Weaver v. Massachusetts,* 137 S. Ct. 1899, 1908 (2017)("*The defendant's right to conduct his own defense,...*, is *based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty*")

Consonant with those precepts, the State argued in *Petrovich* v. *Leonardo*, 229 F.3d 384 (2nd Cir. 2000), that: "because the right to defend is given directly to the accused, it is important to remember that while defense counsel serves as an advocate for the client, it is the client who is master of his...own defense, ...and that respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open." See also: *Martinez v. Court of Appeals of Cal.*, 528 U.S. 152, 165 (2000)(Scalia, J., concurring in judgment)("Our system of laws generally presumes that a criminal defendant, after being fully informed, knows his own best interests, and does not need them dictated by the State.)" Id.

In *United States v. Campbell*, 266 F. Supp. 3d 624, 631-32 (E.D.N.Y. 2017), the District Court, in addressing the jurisprudence of the Sixth Amendment enunciated: "This right encompasses the decision of what defenses a particular defendant wishes to advance and other 'fundamental trial decisions, such as the decision to plead to a lesser charge or to assert a plea of

insanity," citing *United States v. Plattner*, 330 F. 2d 271, 274 (2nd Cir. 1964)*("Implicit...is the right of the accused personally to manage and conduct his own defense in a criminal case"*); *United States v. Marble*, 940 F. 2d 1543, 1547 (D.C.Cir.1991)(original citations and quotations marks omitted).

Prior to this Court's decision in *McCoy*, disputes over the scope of a defendant's autonomy generally arise from a conflict between a defendant and his attorney, which means these issues often came before Court's as claims of ineffective assistance of counsel. Thus, courts sometimes treat the defendant's right to make fundamental decisions as a question of what does and does not constitute effective assistance. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 749-50 (1983) (*failure of appellate counsel to press the client's desired non-frivolous ground for appeal was not ineffective assistance*); See generally, *Wayne R. LaFave, et. al., 3 Criminal Procedure § 11.6(a)*, (4th. ed. 1992) ([*A] claim of ineffective assistance..., is probably the most common avenue for presenting [the] issue [of client control]...*). But conceptually, ineffective assistance jurisprudence was an inapt framework for understanding defendant autonomy and this United States Supreme Court settled that question when it held:

> **"A violation of the client's right to maintain his...defense of innocence implicates the client's autonomy (not counsel's effectiveness) and is complete once counsel usurps control of an issue within the defendant's sole prerogative," (Id., 138 S. Ct. @ 1511)... "Error of this kind is structural and not subject to harmless error review because it 'blocks the defendant's right to make fundament choices about his own defense"..., Id., 138 S. Ct. @ 1505.**

Despite this constitutional mandate, the District Court below, transmuted the violation of the petitioner's Sixth Amendment-secured autonomy to make fundamental decisions about his own life and liberty, into one of ineffective assistance and ruled:

> **"[The] decision not to pursue an alibi defense, is a strategic choice that is virtually unchallengeable if adequately investigated, or if**

'reasonable professional judgment support the limitations on the investigation." (citing *Velazquez v. Poole*, 614 F. Supp. 2d @ 338).

(Id., Court's decision @pages 18-19; Appendix 1-B).

The McCoy's Court emphasized an accuser's informed and final decision to his counsel to advance an actual innocence defense, "are not strategic choices about how best to achieve the client's objectives, they are choices about what the client's objectives in fact are." Id., 138 S. Ct. @ 1508; see: also, *Frierson*, 705 P. 2d @ 403-04 (*recognizing that "a defendant chooses to exercise a personal right..., over counsel contrary advice [,]..., the attorney obligation is simply to provide the best representation that he can under the circumstances.*") (Emphasis in the original); ***1 Restatement [third] of the law Governing Lawyers §§ 23 CMT**, @ 186 (2002)("however, a lawyer has no right to remain in a representation and insist, contrary to the client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action*")

The logic underlying these principles of a client's instruction control and not counsel's perceived strategy was addressed in *Petrovich v. Leonardo*, 229 F. 3d @ 386-87; where the client's instruction to his attorney not to present an extreme emotional disturbance defense, was akin to other fundamental trial decisions, such as the decision to plead to a lesser charge or to assert a plea of insanity, ... which are reserved to the client. If that analogy is sound, courts must accept a defendant's will in such matter as to assert one's own defense over counsel's perceived strategy or tactics. (Citation omitted), cert. denied 532 U.S. 981 (2001)

To further illustrate the point, in *People v. Clark*, supra, the defendant's insisted that his attorney advanced a defense based solely on misidentification and affirmatively rejected an alternative justification defense offered by his attorney.

On appeal, *Clark's* argued that his conviction should be reversed because his attorney was in charge of strategic decisions and should have presented the justification defense. The Appellate Division rejected his argument and held that counsel could not override Clark's final and informed decision for a misidentification defense because it involved matters that was "personal and fundamental" to him and "did not implicate a matter of trial strategy or tactics." Id., 129 A.D. 3d @ 11-12; See also, *People v. Bergerud*, 223 P. 3d 686, 691 (Colo. 2010)("*Although defense counsel is free to develop defense theories based on reasonable assessments of the evidence, as guided by her professional judgment, she cannot usurp those fundamental choices given directly to criminal defendants by the Untied States..., Constitution*")

According to Justice Ginsburg's opinion, these clashes "were not strategic disputes about whether to concede an element of a charge offense,...they were intractable disagreements about the fundamental objective of the defendant's representation." *McCoy*, 138 S. Ct. @ 1510.

District courts in the Second Circuit seems to limit *McCoy's* holding to capital cases (*United States v. Rosemond*, 322 F. Supp. 3d 482, 486 (S.D. N.Y. 2018), but the broad understanding of McCoy, has been applied in the context of insanity. In *United States v. Read*, 918 F. 3d 712 (9th Cir. 2019), the Ninth Circuit held that in light of *McCoy*; "counsel cannot impose an insanity defense on a non-consenting defendant." *Id.* 918 F. 3d @ 720. Read was charged with assault, he wanted to claim he was possessed by demons but instead, over his repeated objections, his counsel put on an insanity defense. The Court found structural error implicating Read's autonomy to determine the objectives of his own defense. *Id.*

Most of these cases draw primarily from *Faretta's* emphasis on the personal character of the Sixth Amendment right to make a defense which never focused on the nature of the defense the defendant sought to assert. For example, in *Johnson v. State*, 17 P. 3d 1008, 1013 (Nev.

2001), a murder case, counsel presented both claims of self-defense and, over Johnson's objection, an insanity defense. On appeal, Johnson contended counsel undermined his self-defense claim by interposing an insanity defense. Rather than addressing this contention, the Supreme Court of Nevada held that counsel's presentation of an insanity defense against Johnson's expressed objections was per se improper. The error was deemed structural, not subjected to harmless analysis. *Id.*, 17 P. 3d @ 1013, & n. 6

By imposing an unwelcomed "quality of police investigation defense" upon the petitioner against his will and objection, defense counsel, Phillip Smallman became an arm of the State, and took from the petitioner before trial, the very thing the prosecutor sought to take by conviction. Therefore, a manifest injustice has occurred. See: e.g., *Marble*, supra, 920 F. 2d @ 1546 ("*Unless the accused has acquiesced, the defense presented is not the defense guaranteed him by the Constitution, for in a real sense, it is not his defense*") (quoting *Faretta*, 422 U.S. @ 821).

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Wayne Chin
Din: 09-A-6287
Petitioner: pro se
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Ossining, New York 10562-5442

Date: Aug. 4, 2022