No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LEMKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal defendant's right to autonomy with respect to his defense applies to his sentencing?

2. Whether questions of a criminal defendant's mental health are so closely tied to his right to autonomy in seeking to protect his liberty, that his attorney may not ignore the defendant's express wishes in connection with sentencing?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States of America against Robert Lemke.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Lemke prays for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, by unpublished summary order, reproduced in the appendix at App. 1, affirmed the December 20, 2021, judgment of the United States District Court for the Southern District of New York, which, inter alia, imposed as sentence of 36 months' imprisonment. The ruling of the district court is reprinted starting at App. 15.

JURISDICTION

The summary order in the Court of Appeals was decided on January 17, 2023. This Petition for a writ of certiorari is being timely filed within 90 days of the summary order, in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUITONAL PROVISION INVOLVED

United States Constitution, Amendment 6, provides the following, in pertinent part:

> In all criminal prosecutions, the accused shall … have the assistance of counsel for his defense.

STATEMENT OF THE CASE

1. Petitioner stands convicted pursuant to December 29, 2021, judgment of conviction in the United States District Court for the Southern District of New York (Alvin Hellerstein, U.S.D.J.), following a plea of guilty to a single count of transmitting a threat in interstate commerce, in violation of Title 18, United States Code, Section 875(c). Although the guilty plea was entered pursuant to a plea agreement in which the parties stipulated an estimated sentencing guidelines range of 15-to-21 months' imprisonment, the district court imposed a sentence of 36 months' imprisonment, well above the top end of the stipulated range.

2. The case arose out of the circumstances connected to the controversial 2020 Presidential election and its aftermath. Petitioner, a native and resident of California, was arrested on January 26, 2021, pursuant to a complaint, filed January 14, 2021. The complaint alleged principally that, following the election in November, 2020, Petitioner sent audio and electronic messages to numerous individuals, specifically relating to the outcome of the election an expressing the view that the reported victory of Joe Biden as President was fraudulent. Most of the recipients of the messages were journalists, politicians, and other public figures.

The complaint alleged that in some of the messages, Petitioner had threatened violence against the recipients unless they stopped reporting or otherwise making statements regarding the outcome of the election. Petitioner obtained recipients' contact information from the internet, and used different telephone numbers and electronic accounts to send the communications. There was no allegation that he attempted any actual acts of violence or even sought to approach any of the recipients in person.

By indictment filed on February 16, 2021, Petitioner was charged with sending threatening communications, in violation of 18 USC §§ 875(c) and 2, and was subsequently charged by superseding indictment with three discrete counts with respect to communications sent on November 22, 2020, November 29, 2020, and January 6, 2020, to recipients based in New York City. On October 15, 2021, Petitioner entered a plea of guilty to a single count of sending threatening a threatening communication, pursuant to a plea agreement that included a stipulated sentencing guidelines range of 15-21 months imprisonment. (2d Cir. Appx. 21; Plea Agreement at 4)

2. In its presentence report, the Probation Department recommended a sentence of 15 months, at the bottom of the stipulated guidelines range, stating that Petitioner suffered from numerous health issues, took several medications, had been diagnosed with ADHD and possibly suffered from a mild form of

bipolar disorder. (PSR at 29) In its sentencing submissions, and subsequently at the sentencing proceeding itself, the Government expressly asserted that an upward variance was warranted due to the nature of the offense.

In defense counsel's sentencing submission, Petitioner's attorney asked for a sentence of time served, based on Petitioner's history and characteristics, the nature and circumstances of the offense, and the special concerns caused by the worldwide COVID-19 pandemic. Of particular note, the defense attorney sought to connect Petitioner's conduct to psychological issues. (2d Cir. Appx. 47; Def. Sentencing Letter at 5)

Several days after the sentencing letter was filed, defense counsel filed a supplemental letter which contained as an attachment a letter written by Petitioner in connection with the scheduled sentencing. (2d Cir. Appx. 136; Supplemental Sentencing Letter at 1) At the outset, Mr. Lemke's letter stated as follows:

> I am writing in regards to a letter that my attorney, Mrs. Julia Gatto, is submitting for purposes of my sentencing hearing on Tuesday, 12/14/2021. I received a copy of her letter yesterday, 12/6, when she visited me in-person at MDC. Mrs. Gatto attempts to paint the wrong picture of my life, perhaps to better my chances at sentencing, but I want the truth to be known. She wrongly and incorrectly asserts that I am a, "...sad...mentally ill...lonely..." person that needs mental treatment, when in fact, I am an extremely happy, stable and fortunate person. She apparently does not know me whatsoever. Her letter is also contradictory to the details in the PSR report, to note, my lengthy employment and entrepreneurial history, as I reference

by page and paragraph in the following sections. (2d Cir. Appx. 137; Supplemental Sentencing Letter at 2)

Petitioner then went on to detail "several concerns I have regarding inaccuracies and falsehoods in the letter":

- "Mrs. Gatto falsely asserts that I was socially awkward and the target of bullies. Furthermore, she asserts I was a loner who chose the company of my computer screen to the company of my peers. This was not true as a child, nor is it true to this day. I have a healthy balance of personal and social time." Mr. Lemke then listed an extensive catalog of mainstream activities and organizations in which he had been involved throughout his life. He further described his adult employment history which involved working for startups and entrepreneurial businesses, one of which sold for millions of dollars, although Mr. Lemke expressed regret at having sold it. (2d Cir. Appx. 137-38; Supplemental Sentencing Letter at 2-3)

- "Section A describes how my grandparents were my only close friends and contacts, and financially supported me. This pains me to read, as my grandparents were like my parents, and I dearly loved them, however, they were just a portion of my life. My grandparents also did not financially support me. [PSR, Page 24, Paragraph 72] I had investments, such as real estate and stocks, from the funds I received after we sold our startup company, and obtained various contract employment positions in the years following. [PSR, Page 24, Paragraphs 72-78] The PSR details this. I had countless social contacts, and friends outside of my grandparents household; not just in business and political circles, but also in social circles. These were people I'd see often outside of my otherwise busy schedule." (2d Cir. Appx. 138; Supplemental Sentencing Letter at 3)

- "Section A is correct in one aspect, that I attained sobriety - since 2017 - through a combination of medication. I argue that my drinking was not to excess, but that I was a heavy social drinker. Part of the misunderstanding here, may be exaggerations I told to Dr. Scott Lines regarding my drinking, in an effort to get released on bail. As a matter of fact, much of what I told Dr. Scott Lines was not true, or was an exaggeration, based on advice from my counsel, Mr. Daniel Blank, in California, during my bail hearings. Dr. Lines took the statement that

I had attained sobriety, and warped it into the fallacy that I had a drinking problem before I attained sobriety. Put simply, I stopped social drinking with the help of medication. I was not dependent on alcohol, nor did I meet the criteria for alcoholism." (2d Cir. Appx. 138; Supplemental Sentencing Letter at 3)

- "Section B goes on to explain that I yearned for community, and found that community online. Even during COVID-19, I found very little if any community online. I was still very involved with various political groups, both in person, and during COVID-19, over Zoom meetings. I found my community like I had done for over a decade prior: Through political groups and official organizations, in person. I had a healthy social life even into and during the COVID-19 pandemic, as many of us still would meet and have social functions during the pandemic, at my house, or at other friends houses." (2d Cir. Appx. 138; Supplemental Sentencing Letter at 3)

- "Your honor, I also want it to be known that my mental health did not contribute to the instant crime." (2d Cir. Appx. 138; Supplemental Sentencing Letter at 3)

Remarkably, defense counsel submitted a second supplemental letter in which she disavowed the express statements made by Petitioner in his own letter, stating, among other things, that:

> Mr. Lemke's mental health issues are on full display in his December 7th letter to the Court. In that letter, Mr. Lemke reiterates—and the government takes significant issue with—the employment history he reported to the Probation Department. According to Mr. Lemke, his employment history includes high-paying and prestigious jobs. As reported by his parents, however, Mr. Lemke's work history is limited to being a bagger at a Safeway supermarket when he was a teenager. Viewed through the lens of Mr. Lemke's mental health diagnoses, Mr. Lemke's version of his employment history is not a willful lie intended to curry favor with the Court (or the Probation Department). Instead, it is part of the "grandiose thinking" that is the cornerstone of Mr. Lemke's mental health condition. In this way, Mr. Lemke's reporting of his employment history is not willful nor obstructive, but the product of illness.

(2d Cir. Appx. 143; Second Supplemental Sentencing Letter at 3)

In a final letter to the Court, Petitioner expressly made clear, in light of allegations by the prosecution that he had not accepted responsibility for his conduct, that "I am very remorseful and I accept full responsibility for my actions. I am disgusted and appalled by my behavior[, and t]o the victims in this case, I want them to understand I am truly sorry and that I wish I chose different words when communicating with them or had not reached out to them at all." (2d Cir. Appx. 146; Third Supplemental Sentencing Letter at 1)

3. At the December 20, 2021, sentencing proceeding, the district court immediately noted the highly unusual exchange of letters, stating that: "I've also had three letters from Mr. Lemke, which I've read. Mr. Lemke stresses that he is accountable for his acts and doesn't want any mitigation on the ground of some limited capacity and takes issue with the way his mental condition was portrayed by his counsel, though he expresses confidence in his counsel and doesn't want her discharged." (2d Cir. Appx. 154-55; Sentencing Tr. at 6-7; emphasis added) The court did not engage in any further colloquy regarding the correspondence, however, despite the clear indication that counsel and Petitioner were directly at odds regarding the approach to sentencing.

Ultimately, the Court imposed an above-guidelines sentence of 36 months, based principally on the number of threats made, the need to promote respect for the law, to provide deterrence, to protect society, and to provide just punishment. (App. 16-20) In imposing the sentence, the district court noted:

> THE COURT: Lemke's able counsel ascribes Lemke's conduct to a psychological imbalance, citing to a psychiatric report that supported one of his bail applications. Lemke takes exception to counsel's ascription, admits that he procured the psychiatric report through lies and exaggerations, and accepts full responsibility for his guilty plea. The dispute is not relevant. Lemke knew that he was making threats intended to intimidate, and his many threats over a three-month period make that clear. This criminal prosecution and this sentencing holds him accountable for his crimes.

(App. 18-19)

4. Petitioner promptly filed a notice of appeal, and new counsel was assigned. On appeal, Lemke argued that the counsel, in having expressly disregarded Petitioner's wishes at sentencing, had a conflict of interest that called for an inquiry by the sentencing court, and further, that Petitioner had been deprived of his right to autonomy with respect to his defense by defense counsel's actions and the court's failure to address them.

The Second Circuit affirmed the judgment here in a summary order dated January 17, 2023, holding as follows:

> Here, Lemke fails to establish that his counsel at sentencing, Assistant Federal Defender Julia Gatto, suffered from any possible conflict of interest that would be cognizable under the Sixth Amendment. As a result, he has not identified a conflict that was

"sufficiently apparent" to require the district court to undertake a sua sponte inquiry, Velez, 354 F.3d at 198 (citation omitted), much less one that was so "clear or obvious" as to justify a finding of plain error, Reichberg, 5 F.4th at 246 (citation omitted).

As evidence of a putative conflict of interest, Lemke primarily focuses on the tension between Gatto's sentencing submission, which "sought to connect Mr. Lemke's conduct to psychological issues discussed in a [medical expert] report . . . stat[ing] that [he] suffered from mental illness[es] including grandiosity," Lemke Br. at 12–13 (citing App'x at 47), and Lemke's subsequent letter to the district court, "in which [he] 'took exception to [Gatto's] ascription[s]' regarding his psychological condition," characterizing them as "falsehoods," id. at 24 (first quoting App'x at 192–93; then quoting id. at 137). But the apparent tensions in this case do not "show[] that [Lemke's] counsel actively represented . . . interests" adverse to her client's, Mickens, 535 U.S. at 175 (2002) (emphasis and citation omitted); they merely show that Gatto made a strategic decision to cite Lemke's mental health as a mitigating factor at sentencing, and that Lemke later came to disagree with that strategy. As we have repeatedly held, such disagreements over legal strategy are not cognizable as conflicts of interest under the Sixth Amendment. See United States v. Jones, 482 F.3d 60, 75 (2d Cir. 2006) ("As the only basis asserted by [defendant] for his claim that his attorneys had a conflict of interest is that he and they disagreed as to tactics, he has not shown an actual conflict of interest."); see also, e.g., United States v. Doe No. 1, 272 F.3d 116, 126 (2d Cir. 2001); United States v. Rahman, 189 F.3d 88, 144 (2d Cir. 1999); United States v. White, 174 F.3d 290, 296 (2d Cir. 1999). Nor do such disagreements deprive defendants of their autonomy in violation of the Sixth Amendment. While the constitutional guarantee of effective assistance requires counsel "to consult with the defendant on" certain "important decisions," Strickland v. Washington, 466 U.S. 668, 688 (1984), over which a defendant has "ultimate authority," Florida v. Nixon, 543 U.S. 175, 187 (2004)– such as "whether to plead guilty, waive the right to a jury trial, [or] testify [on] one's own behalf," McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018) – Lemke cites no authority to suggest that the tactical

decision as to what arguments to advance in a sentencing memorandum is among them.

Lemke also attempts to manufacture a conflict of interest out of Gatto's response to his letter. Namely, he contends that when Gatto "submitted her own letter . . . contend[ing] that" Lemke's objections to his medical expert's diagnoses of mental illness "were in fact manifestations of" the very "psychological imbalance" referred to in the expert report, she placed herself in "an untenable position" in which she "would . . . be motivated to undermine [Lemke's] credibility . . . in order to protect [her] own reputation." Lemke Br. at 24 (citing App'x at 143). In effect, Lemke argues that his "mere making of . . . an accusation" that Gatto's sentencing submission had misrepresented his mental illness "ipso facto resulted in a conflict of interest because [Gatto could] []not defend h[er]self without contradicting [Lemke]." United States v. Moree, 220 F.3d 65, 71 (2d Cir. 2000). We have roundly rejected that argument in the past, and we do so again here. See id. at 71–72 (holding that "common complaints [that] defendants make in efforts to be rid of an appointed attorney" – "unlike a claim" of formal "attorney[] misconduct," such as a defendant's "accus[ing] his attorney . . . of having coerced his plea" – "do not give rise to a conflict of interest, even though the attorney may contradict the defendant's allegation in responding to the accusation"); see also White, 174 F.3d at 295 (finding no conflict of interest where defendant "argue[d] that, as a result of" his complaints about his attorney, the attorney "contradicted him in open court" (alteration omitted)).

In sum, we find nothing in the record to suggest the existence of a conflict of interest between Lemke and Gatto. It cannot have been error – much less plain error – for the district court to have declined to inquire sua sponte into potential conflicts of interest where none existed.

(App. 6-9)

This Petition followed.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Make Clear That, A Criminal Defendant's Right To Autonomy With Respect To His Defense Applies To His Sentencing.

1. Certiorari is warranted here so the Court can determine that a criminal defendant's right to autonomy and dignity regarding his mental health under the Sixth Amendment, pursuant to this Court's decision in McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018), applies to all critical stages including sentencing, as suggested by the Ninth Circuit, or whether the Second Circuit's narrow interpretation of McCoy should apply. Because the defendant's right to autonomy regarding his own sanity is at the core of his right to make autonomous decisions regarding his defense, the Court should reject the Second Circuit's holding and make clear that an attorney violates a defendant's rights under the Sixth Amendment when the attorney argues at sentencing--over the defendant's express objection—that the defendant's statements and actions, and even the defendant's objection to counsel's arguments, are manifestations of mental illness.

2. In rejecting Petitioner's argument that McCoy should be applied to the circumstances here, the Second Circuit concluded:

> While the constitutional guarantee of effective assistance requires counsel "to consult with the defendant on" certain "important decisions," Strickland v. Washington, 466 U.S. 668, 688 (1984), over which a defendant has "ultimate authority," Florida v. Nixon, 543 U.S. 175, 187 (2004)– such as "whether to plead

> guilty, waive the right to a jury trial, [or] testify [on] one's own behalf," McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018) – Lemke cites no authority to suggest that the tactical decision as to what arguments to advance in a sentencing memorandum is among them.

(App. 8)

This question, however, is nowhere near as cut-and-dried as the Second Circuit panel suggested, however. In applying McCoy to the question of the defendant's mental health, the Ninth Circuit recognized that "pleading insanity has grave, personal implications that are separate from its functional equivalence to a guilty plea." United States v. Read, 918 F.3d 712, 721 (9th Cir. 2019). The Ninth Circuit expanded as follows:

> True, one reason that an insanity defense should not be imposed on a defendant is that it can sometimes directly violate the McCoy right to maintain innocence. However, even where this concern is absent, the defendant's choice to avoid contradicting his own deeply personal belief that he is sane, as well as to avoid the risk of confinement in a mental institution and the social stigma associated with an assertion or adjudication of insanity, are still present. These considerations go beyond mere trial tactics and so must be left with the defendant.

Id. (emphasis added).

Similarly, in United States v. Sueiro, 946 F.3d 637, 641 (4th Cir. 2020), also pertaining to this Court's McCoy decision, the Fourth Circuit observed that "[l]ike the right not to be forcibly medicated, the right to represent oneself protects the autonomy and dignity of criminal defendants." Id. at 641, citing McKaskle

v. Wiggins, 465 U.S. 168, 176–77 (1984) ("The right to appear pro se exists to affirm the dignity and autonomy of the accused").

3. The observations of those courts are consistent with the reasoning behind the very concept of structural error. "The precise reason why a particular error is not amenable to [harmless error] analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error." Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-08 (2017). There are, however, at least three broad rationales for identifying errors as structural.

First, an error has been deemed structural in instances where "'the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.' " McCoy, 138 S. Ct. at 1511 (quoting Weaver, 137 S. Ct. at 1908). Deprivations of the Sixth Amendment right to self-representation are structural errors not subject to harmless error review because "[t]he right is either respected or denied; its deprivation cannot be harmless." McCoy, 138 S. Ct. at 1511 (quoting McKaskle, 465 U.S. at 177 n.8).

Second, an error has been deemed structural if the effects of the error are simply too hard to measure; i.e., where "the precise 'effect of the violation cannot be ascertained.'" United States v.

Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006), (quoting Vasquez v. Hillery, 474 U.S. 254, 263 (1986)). Such is the case where the consequences of a constitutional deprivation "are necessarily unquantifiable and indeterminate," Gonzalez-Lopez, 548 U.S. at 150. For example, when a defendant is denied the right to select his or her own attorney, the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt." Weaver, 137 S. Ct. at 1908.

An error has also been deemed structural if the error always results in fundamental unfairness," such as in the denial of the right to an attorney, or in the failure to give a reasonable doubt instruction. In these circumstances, it "would therefore be futile for the government to try to show harmlessness." Weaver, 137 S. Ct. at 1908. However, these categories are neither rigid nor all-encompassing, and more than one of these rationales may be part of the explanation for why an error is deemed structural in a particular set of circumstances. Weaver, 137 S. Ct. at 1908. Further, an error can count as structural even if the error does not necessarily lead to fundamental unfairness in every case. Id., see Gonzalez-Lopez, 548 U.S. at 149, n.4 (rejecting the idea that structural errors "always or necessarily render a trial fundamentally unfair and unreliable").

4. Those principles plainly apply to the circumstances here. As the Ninth Circuit in Read pointed out, the defendant's right to

avoid contradicting his own person belief regarding his sanity, or to avoid any stigma associated with mental illness, is one that goes beyond the simple goal of avoiding an unfair conviction, and directly to the defendant's dignity and autonomy. See 918 F.3d at 721. Likewise, these considerations simply cannot be measured by the quantum of evidence or the length of the sentence, but rather "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." Weaver v. Massachusetts, 137 S. Ct. at 1908. Nevertheless, to the extent that the issue did not relate to the binary question of guilt or innocence, no stage is as crucial to the protection of the defendant's liberty than the sentencing itself, and the circumstances indicated that counsel sought to overcome Petitioner's will about how to protect that liberty.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 17, 2023

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