No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARMANDO MOLINA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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Appointed Under the Criminal Justice Act of 1964

QUESTION PRESENTED FOR REVIEW

Whether the Sixth Amendment right to determine the objectives of one's own defense is violated when defense counsel, against the defendant's wishes, stipulates to presentation of an entrapment defense in which guilt is conceded.

STATEMENT OF RELATED PROCEEDINGS

The proceeding identified below are the directly related to the above-captioned case in this Court.

- *United States v. Armando Molina*, No. 18-CR-124-MWF, U.S. District Court for the Central District of California. Judgment entered October 14, 2022.
- *United States v. Armando Molina*, No. 22-50244, U.S. Court of Appeals for the Ninth Circuit. Memorandum Opinion entered October 30, 2024.

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The Ninth Circuit's unpublished memorandum opinion is reprinted in the Appendix to the Petition.

JURISDICTION

On October 30, 2024, the Court of Appeals entered its decision affirming the conviction and sentence of the petitioner for one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846, 841(a)(1), (b)(1)(A)(viii), and (b)(1)(B)(viii); four counts of distribution of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1),(b)(1)(A)(viii) and 18 U.S.C. § 2(a); and one count of distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(viii), and 18 U.S.C. § 2(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI

INTRODUCTION

In November 2013, Mr. Molina was charged with selling methamphetamine on five occasions to a customer who turned out to be a confidential informant ("CI") for the Federal Bureau of Investigation ("FBI"). Count One alleged conspiracy to distribute methamphetamine and Counts Three to Seven alleged distribution of methamphetamine.

Shortly before the case proceeded to trial, defense counsel and government counsel entered into an unusual stipulation, signed only by the lawyers. Under this agreement, the defense withdrew its motion to exclude highly prejudicial evidence of Mr. Molina's gang membership and association with the Mexican Mafia, and the government withdrew its opposition to the defense's presentation of an entrapment defense. The agreement came as a surprise to Mr. Molina himself – although he had expressed interest in the affirmative defense of entrapment, mounting it would require supporting evidence which had not been collected, and the judge had warned that it likely would open the door to prejudicial evidence. Critically, under the facts of the case, it would require admission of the offense elements, Mr. Molina's waiver of his right against self-incrimination, and his testimony at trial.

When this agreement unfolded at trial – with defense counsel telling the jury that Mr. Molina had sold drugs on five occasions and would testify concerning entrapment, and the government presenting extensive prejudicial gang evidence – Mr. Molina registered his objection on the record, explaining that he had not agreed to the stipulation. He asked for and was denied a substitution of counsel. He declined to testify and he was convicted of all counts.

In *United States v. McCoy*, 138 S. Ct. 1500 (2018), this Court reaffirmed that a defendant retains "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *See* 138 S. Ct at 1508-1509, citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983). This Court held that the defendant's right to autonomy to determine the "objectives" of his defense precluded a defense lawyer from conceding guilt in a death penalty case against the defendant's wishes where there was overwhelming evidence of guilt and the lawyer believed doing so was the only way to avoid the death penalty.

In the Ninth Circuit Court of Appeals, Mr. Molina argued that under *McCoy*, stipulating to an entrapment defense without his consent

violated his right to autonomy. As in other circuits, the Ninth Circuit has grappled with the application of *McCoy* where defense counsel admits the elements of the offense but argues that the defendant is not guilty based on an affirmative defense like insanity or entrapment. The Ninth Circuit rejected Mr. Molina's claim based on his purported failure to insist on factual innocence. This Court should grant certiorari to decide the important federal question of the scope of *McCoy* in the context of entrapment and other affirmative defenses.

STATEMENT OF THE CASE

A. District Court Proceedings

On December 3, 2013, the Grand Jury issued an indictment charging six defendants, including Mr. Molina, with conspiracy to distribute methamphetamine and five substantive methamphetamine distribution counts. After the final remaining co-defendant pled guilty on the eve of trial, Mr. Molina proceeded to trial on September 10, 2019, as the sole remaining defendant.

The government's case focused on methamphetamine purchases made by a paid informant between October 2012 and March 2013. Each sale was alleged as a substantive count. The overt acts of the conspiracy

count alleged these same sales and tax payments to the Mexican Mafia. The government decided not to call the confidential informant as a witness.

Mr. Molina had been interested in the possibility of mounting an entrapment defense from early in the case, and he was frustrated by the lack of investigation into evidence that would help present the defense. The government filed a pre-trial motion to exclude the entrapment defense, arguing in the alternative that were it permitted, the government should be allowed to present evidence of Mr. Molina's membership in the Surtown Chiques street gang, the gang's affiliation with the Mexican Mafia, and Mr. Molina's criminal record. The defense moved pre-trial to exclude gang and Mexican Mafia evidence.

The district court granted in part the motion to exclude evidence of gang membership, but warned that the defendant could open the door to the evidence during cross-examination, particularly if an entrapment defense were presented. The district court denied without prejudice the government's motion to preclude the entrapment defense. The defense later submitted an *in camera* offer of proof on entrapment based on testimony Mr. Molina would give at trial.

At the final pretrial conference, government counsel announced that the parties were likely to reach a stipulation allowing the government to admit gang affiliation in its case-in-chief and the defense to raise entrapment. Defense counsel informed the court that the parties would not be able to submit the stipulation immediately as more time would be needed to allow Mr. Molina to review and sign it. The district court ordered the parties to submit the stipulation by close-of-business the following day. 5-ER-778.

The stipulation that was filed the next day, signed by all counsel but not by Mr. Molina himself, provided that Mr. Molina would withdraw his motion to exclude evidence of gang membership and allow the government to present evidence of the gang's involvement in drug trafficking and its relationship with the Mexican Mafia. In return, the government agreed to allow the entrapment defense and instruction. Mr. Molina sent an email to his lawyer, asking to see the stipulation because he did not know what it said. Jury selection began the following morning.

In opening statement, the government stated that the evidence would show that Mr. Molina was a drug dealer, making the five sales

alleged in the indictment. "But these drug deals, ladies and gentlemen, did not occur in a vacuum. They were instead part of a larger drug trafficking enterprise that the defendant was a part of. You see, the defendant is a member of the Surtown Chiques street gang. And that gang pays homage to a powerful prison organization known as the Mexican Mafia." 6-ER-1037.[1]

In the defense opening, counsel admitted the essential facts charged in the indictment: "The evidence will show that over the course of I think about five months between October of 2012 and March of 2013, my client, Armando Molina, did, in fact, deliver narcotics to a person who will be referred to as the confidential informant." Defense counsel told the jury that it would learn through Mr. Molina's testimony that he had joined the Surtown Chiques gang at age 16, and was "convicted of a crime for which he served a rather significant prison sentence." 6-ER-1044. After Mr. Molina was released from custody, the CI started calling him for drugs. The CI was an associate of the Mexican Mafia and a "scary individual." 6-ER-1045. "You will hear

[1] "ER" refers to the excerpts of record filed in the Ninth Circuit Court of Appeals, preceded by the volume number and followed by the page number.

testimony from my client, Armando Molina, and how it was that [the CI], this seasoned criminal from a rival gang, entrapped him to commit these crimes." 6-ER-1046.

After a police officer gave dramatic testimony about the violence of the local gang of which he opined Mr. Molina was a member, Mr. Molina asked to address the court. The judge cleared the courtroom, and Mr. Molina made the following statement:

> I was never consulted about this sentencing entrapment about the – I mean, about the entrapment thing, about the rewarding they did to it on Wednesday, that was due on Wednesday or Thursday. I was never even verified of what was rewarded or anything. I was never consulted. I never agreed to it from the beginning, and now it's playing a major factor in the case because all this evidence is coming in. None of it has to do with the case. I'm not here for a RICO. I'm not here for being a gang member. I'm here for controlled purchase.

9-ER-1702-03. In response, his lawyer stated:

> Your Honor, when it was both [the Deputy Public Defender] and I on the case, I believe we had reached a stipulation with the government at the prior status conference that the government was going to withdraw its opposition to the entrapment defense and we were going to agree, that I believe Agent Collet was going to be testifying with regard to some of the gang information which we expected in an entrapment case because I expected my client to take the stand. And once he takes the stand, I've explained to him that it opens the door. And since we will be defending on the entrapment defense --- … yeah, these issues would be

relevant for trial, Your Honor.

9-ER-1703. The district court informed Mr. Molina that the stipulation, which the court accepted, was a strategic matter for his counsel to decide, so the court"[s]o I don't have a basis upon which to take action…." 9-ER-1704. Mr. Molina further stated that none of the entrapment evidence he had conveyed to his lawyer had been presented to the Court as part of the defense's *in camera* offer of proof on entrapment, and that although he was present at the hearing where the stipulation was discussed, "I don't know what was handed over to you to accept or not accept because everything was done without my knowledge." *Id.* Mr. Molina asked for a new lawyer. Defense counsel acknowledged that there had been a breakdown in the attorney/client relationship. The judge denied the request.

The defense called just one witness at trial, Ventura County Probation Officer Marco Flores, who supervised the CI from January to October 2013. He testified about the CI's use of drugs, possession of firearms, and general failure to comply with the terms of supervision. Officer Flores also testified that during the period of supervision, the CI had given him or called him from at least four different phone numbers,

none of which were the one monitored by the FBI.

The jury was given an instruction on entrapment, and the government argued it had proven predisposition and lack of inducement. *See* 7-ER-1500. The defense lawyer pointed to hints in calls introduced by the government that there had been earlier contact between the CI and Mr. Molina. 7-ER-1506. He argued that the CI was a member of Ventura Avenue Gangsters, and that the sanitized version of him presented by the government hid a drug addict and criminal who was using unmonitored phone numbers, and was allowed to do whatever he wanted.

On September 13, 2019, the jury returned guilty verdicts on all counts. On October 13, 2022, the district court sentenced Mr. Molina to 162 months in custody.

B. The Appellate Case

Mr. Molina appealed his convictions to the Ninth Circuit Court of Appeals. Among other arguments, he claimed that his Sixth Amendment right to autonomy to determine his own defense as articulated by this Court in *McCoy v. Louisiana* was violated by his lawyer's stipulation to an entrapment defense without his consent.

A panel of the Ninth Circuit affirmed. The panel found that the record did not reflect that Mr. Molina objected to his counsel's presentation of an entrapment defense and that he could not show that he "adamantly insisted on maintaining his factual innocence." Mem. Op. at *2. "As such, the district court did not violate his Sixth Amendment right to present a defense of his own choosing." *Id.* at *2-3.

REASONS FOR GRANTING THE PETITION

"The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aide 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, 820 (1975). While defense counsel controls tactical decisions at trial, the defendant retains the right to be the "master" of his or her own defense. *See id.* Defense counsel can make strategic decisions such as which objections to make, witnesses to call, and arguments to present, but the defendant "retains ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463

U.S. 745, 751 (1983). This latter category of fundamental decisions "are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." *McCoy*, 138 S. Ct. at 1508-09.

In *McCoy*, there was overwhelming evidence that the defendant had committed the capital murders of his estranged wife's mother, stepfather, and son. He pled not guilty, asserting a bizarre and uncorroborated story that he had been out of town while corrupt local police officers had killed the victims, working with state and federal officials, his attorney, and the trial judge to frame him for the crimes. 138 S. Ct at 1513 (Alito, J., dissenting). Evaluating the circumstances, the defense lawyer determined that the best way to avoid the death penalty was to admit the killings and focus on trying to avoid a death sentence based on the client's serious mental illness. *Id*. The defendant, however, opposed this course of action, accusing his lawyer of "selling him out." 138 S. Ct. at 1506. Over the client's objection, the lawyer told the jury in both opening statement and closing argument that his client had committed the three murders. *Id.* at 1506-1507. The defendant testified in his own defense "maintaining his innocence and pressing an

alibi difficult to fathom." *Id*. at 1507. The jury returned death verdicts. *Id*. Post-trial, new defense counsel moved unsuccessfully for a new trial, arguing that the trial court had violated the defendant's Sixth Amendment rights by conceding that he had committed the murders. *Id*.

This Court reversed the defendant's convictions. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *See* U.S. Const. amend. VI. An accused may nonetheless choose to represent himself, "however counterproductive that course may be" as "the right to defend is personal and a defendant's choice in exercising that right must be honored out of respect for the individual which is the lifeblood of the law." *McCoy,*138 S. Ct. at 1507 (cleaned up), quoting *Faretta*, 422 U.S. at 834. But "[t]he choice is not all or nothing: To gain assistance a defendant need not surrender control entirely to counsel." *Id*. at 1508. Trial management and strategic decisions are "the lawyer's province" but some decisions, such as pleading guilty, deciding whether to testify, or deciding not to appeal, are reserved for the client. *Id*. This Court held that "[a]utonomy to decide that the objective of the

defense is to assert innocence belongs in this latter category." *Id.* Even though defense counsel reasonably assessed that conceding guilt was the best way for his client to avoid the death penalty, he had to abide by his client's insistence to maintain innocence. *Id.* at 1508-1509. The Court noted that the client might have "wish[ed] to avoid, above all else, the opprobrium that comes with admitting he killed family members" or "to risk death for any hope, however small, of exoneration." *Id.* at 1508. This violation of the defendant's Sixth Amendment right to autonomy was structural error, requiring automatic reversal of the convictions and an order for a new trial without any showing of prejudice. *Id.* at 1511.

The lower courts have struggled with whether *McCoy* applies in the context of affirmative defenses such as insanity, duress,or entrapment. *See Kellogg-Roe v. Gerry*, 19 F.4th 21, 27 (1st Cir. 2021) ("Sister circuits that have considered *McCoy*'s reach have grappled with the question of whether the presentation of mental illness or the invocation of the insanity defense over a defendant's objection invoke the same concerns that a lawyer's decision to concede a defendant's guilt over the defendant's objection do"), comparing *United States v.*

Read, 918 F.3d at 720-21 (9th Cir. 2021) (defendant has right under Sixth Amendment to decide whether to mount an insanity defense at trial), and *United States v. Roof*, 10 F.4th 314, 352-53 (4th Cir. 2021) (defendants have no Sixth Amendment right to prevent their attorney from offering mental health evidence at the sentencing phase of a capital trial after guilt has been established).

In *Read*, the Ninth Circuit relied on *McCoy* to reverse a defendant's conviction where the defense counsel presented an insanity defense over the defendant's clear objection. *Read,* 918 F.3d at 719. The defendant, charged with assaulting his cellmate, had been found competent to proceed to trial but suffered from severe mental illness. Appointed counsel filed a Notice of Insanity Defense. *Id*. at 716. After the defendant asked to represent himself, the trial court conducted a *Faretta* hearing and found that he had knowingly and voluntarily waived the right to counsel. But shortly before trial, the defendant indicated he was going to abandon insanity in favor of a "demonic possession" defense – that is, that "he is possessed by demons and that other inmates are also possessed" – a path, the district court noted, that was "not a legal defense and is based on his bizarre beliefs." *Id*. at 717.

The district court reappointed counsel, who proceeded on an insanity defense against the wishes of the defendant. *Id*. at 717.

In reversing, the Ninth Circuit noted the trial judge's "difficult dilemma: whether to permit a defendant, competent and allowed self-representation but clearly mentally ill, to eschew a plausible defense of insanity in favor of one based in delusion and certain to fail." *Id*. at 719. Nonetheless, "*McCoy*'s emphasis on the defendant's autonomy strongly suggests that counsel cannot impose an insanity defense on a non-consenting defendant" as "[a]n insanity defense is tantamount to a concession of guilt." *Id*. at 720. The Ninth Circuit rejected the government's arguments that the insanity defense did not implicate the defendant's "objectives" because insanity is not the same as factual innocence and because defendant and his counsel both had the same objective – to persuade the jury that the defendant was not mentally responsible for the assault. *Id*. at 721. The Ninth Circuit noted that "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, " and "go beyond mere trial

tactics and so must be left with the defendant." *Id.*

Here, Mr. Molina argued to the Ninth Circuit that his defense lawyer's decision to stipulate with the government to an entrapment defense violated his Sixth Amendment right to autonomy to determine the objectives of his defense. "[T]he affirmative defense of entrapment has two elements: (1) government inducement of the crime and (2) absence of predisposition on the part of the defendant to engage in the criminal conduct." *United States v. Gomez*, 6 F.4th 992, 1001 (9th Cir. 2021) (cleaned up). Inducement is broadly defined as "any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." *Id.* For predisposition, five factors are considered: "(1) the character or reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement." *Id.* The government has the burden of proving that the defendant was not

entrapped because he was predisposed to break the law. *Id.* No notice of the defense is required, and the defendant may rely on evidence presented by the government in its case-in-chief. *Id.* at 1001-1002.

As with the insanity defense, presentation of entrapment "carries grave personal consequences that go beyond the sphere of trial tactics." 918 F.3d at 720. This Court and lower courts have observed that the entrapment defense nearly always requires admission of the elements of the offense, and, to be successful, it generally requires the defendant's testimony:

> Of course, it is very unlikely that the defendant will be able to prove entrapment without testifying and, in the course of testifying, without admitting that he did the acts charged. Unless the Government's case-in-chief discloses entrapment as a matter of law (an unusual phenomenon), the defendant must come forward with evidence of his non-predisposition and of governmental inducement. A defendant can rarely produce such evidence without taking the stand as did both defendants in the case at bar and admitting that he did the acts to which the Government's witnesses attested. When he takes the stand, the defendant forfeits his right to remain silent, subjects himself to all the rigors of cross-examination, including impeachment, and exposes himself to prosecution for perjury. Inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility. While we hold that a defendant may both deny the acts and other elements necessary to constitute the crime charged and at the same time claim entrapment, the high risks to him make it unlikely as a strategic matter that he will choose to do so.

United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (*en banc*); *see also Mathews v. United States*, 485 U.S. 58, 65-66 (1988) (citing *Demma*). As with insanity, while asserting inconsistent defenses is permissible – for example, to argue that the government has the wrong guy or the crime didn't actually happen *and also* that the defendant was insane or entrapped – "they might not be the wisest course." *See*, *e.g.*, *Nelson v. Booker*, 2008 WL 2915117 (E.D. Michigan 2008) (discussing petitioner's proposed trial defense that the cocaine was not his at all *and* that the police were framing him). Furthermore, entrapment opens the door to highly prejudicial evidence such as gang membership, prior convictions, and, in this case, association with the Mexican Mafia which would otherwise be inadmissible. *See*, *e.g.*, *Gomez*, 6 F.4th 992, 998 (9th Cir. 2021) (affirming district court's admission of gang membership and connection to the Mexican Mafia to prove defendant was not entrapped). Indeed, during the *in limine* motion hearing, the district court warned the defendants that presentation of the entrapment defense (which, based on the offers of proof submitted by defense counsel, would be presented nearly entirely through the defendant's testimony) would result in the introduction of gang evidence which the court previously

had excluded as overly prejudicial, as well as impeachment with prior convictions were the defendants to testify.

As in *Read*, the entrapment defense presented by Mr. Molina's counsel was "tantamount to a concession of guilt." 918 F.3d at 720. In opening statement, Mr. Molina's counsel stated that "[t]he evidence will show that over the course of I think about five months between October of 2012 and March of 2013, my client, Armando Molina, did, in fact, deliver narcotics to a person who will be referred to as the confidential informant." 6-ER-1043. *McCoy* holds that "the decision of whether to admit guilt, even in the face of overwhelming evidence, is one of the choices that must remain with the defendant." *See* 918 F.3d at 720, citing 138 S. Ct. at 1505-1507. Also in opening statement, Mr. Molina's counsel told the jury that the case would turn on "a lot of other evidence," leaning heavily on evidence the jury would "learn through my client." *See e.g.* 6-ER-1044. Whether to testify is also a decision firmly in the hands of the defendant. *See* 918 F.3d at 720.

Although Mr. Molina had expressed early interest in pursuing an entrapment defense, many developments had since occurred – including the court's ruling that the defense would open the door to gang

membership, relationship with the Mexican Mafia, and prior convictions, as well as the failure to develop evidence that would support the affirmative defense. Mr. Molina's lawyer did not dispute his claim that he "was never consulted about … the entrapment thing" and "never agreed to it from the beginning …." 9-ER-1866-67 (sealed). Counsel merely explained that he had expected Mr. Molina to take the stand which would open the door to the prejudicial evidence the government had already presented.

Counsel for Mr. Molina appeared to recognize that he needed his client's consent for the stipulation, explaining to the district court that counsel would need additional time to review the stipulation with his client and have him sign; it is unclear why this was not completed, but, contrary to the Ninth Circuit's findings, Mr. Molina made clear that he objected to the course of action taken by his attorney. By allowing a stipulation without the consent of the defendants to proceed on entrapment, a defense which required admission of the elements as well as the defendant's testimony, and presentation of prejudicial evidence that would otherwise be excluded, the district court violated Mr. Molina's right to autonomy over the objectives of his defense.

This Court should grant the petition for writ of certiorari to address the important federal question confounding lower courts concerning the application of *McCoy* to affirmative defenses requiring admission of the elements of the offense.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for writ of certiorari to resolve this important federal question.

Date: January 27, 2025

Respectfully Submitted,

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