No.

In the Supreme Court of the United States

JAMES ROSEMOND,

Petitioner,

v.

UNITED STATES,

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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QUESTION PRESENTED

In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), this Court held that the Sixth Amendment grants criminal defendants a right to "autonomy" that permits them to "maintain innocence" and precludes their lawyers from conceding to "criminal acts" over their objection. *Id.* at 1509. Defendants have the right "to avoid * * * the opprobrium that comes with admitting" criminal acts and "to make fundamental choices about [their] own defense." *Id.* at 1508, 1511.

Since *McCoy* was decided, federal and state courts have struggled to define the contours of the right to autonomy. A minority, including the Second Circuit in the decision below, has held that this right is violated only when an attorney unilaterally concedes *guilt*; here, the Second Circuit affirmed the petitioner's murder-for-hire conviction where his lawyer conceded, over his objection, that he ordered his associates to shoot (but not kill) the victim. Other courts have held that a lawyer may not unilaterally concede any *element* of an offense—even elements like the location of the crime. A third group of courts has taken a middle approach, holding that the right to autonomy encompasses *certain* elements of an offense, like the *actus reus*, but not elements that are arguably less central to a conviction. Finally, courts are split on the types of *cases* that implicate *McCoy*; some, but not others, have limited it to the capital context.

The question presented is: Does an attorney violate a criminal defendant's Sixth Amendment right to autonomy by admitting, over the defendant's objection, that the defendant ordered a shooting of the victim, thereby conceding the *actus reus* of the crime?

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PETITION FOR WRIT OF CERTIORARI

Petitioner James Rosemond was convicted of murder for hire and related charges for the shooting death of Lowell Fletcher. In March 2007, Fletcher and two other men assaulted Rosemond's son. The government alleged that, in an act of revenge, Rosemond hired several associates to kill Fletcher in September 2009. Rosemond maintained that he hired these associates only to bring Fletcher to him, and that he never intended for Fletcher to be shot or killed. In a fair trial, the jury would have been presented with the evidence relevant to this dispute, and it would have then decided which account was true: the government's or Rosemond's.

The jury, however, never actually heard Rosemond's account of the facts because—over his objection—his attorney decided to tell the jury an entirely different story: He *conceded* that Rosemond hired people to shoot Fletcher, arguing only that the government failed to prove that Rosemond intended a *fatal* shooting and that "one of the bullets" simply "hit the target in the wrong spot." Rosemond was convicted and sentenced to life imprisonment.

Shortly after Rosemond was convicted, this Court held in *McCoy v. Louisiana*, 138 S. Ct. 1505 (2018), that the Sixth Amendment grants a criminal defendant a right to "autonomy" that permits him to "maintain innocence" and precludes his lawyer from conceding to "criminal acts" over his objection. *Id.* at 1509. The Court explained that a defendant has the right "to avoid * * * the opprobrium that comes with admitting" criminal acts and "to make fundamental choices about his defense." *Id.* at 1508, 1511. The

violation of this right is a "structural" error, requiring that the conviction be vacated (*id.* at 1511); courts do not conduct the normal inquiry into prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

Based on *McCoy* and the cases it reaffirmed, Rosemond moved for a new trial in the district court. After this motion was denied, Rosemond appealed his conviction to the Second Circuit. He argued that, by conceding the *actus reus* of the murder-for-hire charge (as well as guilt to multiple uncharged felonies), his lawyer violated his right to autonomy. The Second Circuit disagreed. It held "that the right to autonomy is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged."

The Second Circuit's holding exacerbated a multi-layered split among the federal and state appellate courts that have addressed *McCoy*. Courts have disagreed about (1) whether the right to autonomy covers only admissions of guilt to the *entire* offense, or also admissions to individual *elements* of the offense; (2) what *kinds* of elements (if any) a lawyer may concede against his client's wishes; and (3) whether *McCoy* applies to all *criminal cases* or only those (like *McCoy*) that involve *capital* offenses.

Some courts have held that the right to autonomy is broad, and that an attorney may not concede a single element of an offense—even an alleged victim's age—without express consent from the client. Other courts have attempted to restrict *McCoy* to its facts, either by declining to apply it outside death penalty cases, or by limiting it to concessions of guilt to a charged crime. Still others

have taken a more nuanced approach, holding that *McCoy* is implicated by concessions to *certain* elements—like the *actus reus*—but not elements that are arguably less central to a conviction.

The Court should grant certiorari and hold that the right to autonomy is violated when an attorney concedes the *actus reus* of a crime over his client's objection—particularly under the circumstances here, where the concession went to the heart of Rosemond's account of the facts: that he did not order a shooting. The Second Circuit erred in holding otherwise. As even the dissent in *McCoy* recognized, the majority opinion "refers to the admission of criminal 'acts,'" not just charged offenses. 138 S. Ct. at 1512 n.1 (Alito, J., dissenting). The Court's opinion was based on the defendant's right to make "fundamental choices about his defense"—especially choices that, if ignored, would subject the defendant to "the opprobrium that comes with admitting" unlawful conduct. *Id.* at 1508, 1511.

Under the Second Circuit's rationale, the defendant's right to *autonomy* would turn on what the *government decides to charge*, not on what the *defendant wants to admit*. It would mean that the Sixth Amendment would cover admissions to minor one-element crimes (like simple drug possession), but not admissions to heinous acts (like ordering a shooting), so long as those acts are not dispositive of a conviction.

This issue is extraordinarily important. As the Court recognized in *McCoy*, the effects of violating the right to autonomy are "immeasurable," because jurors are "almost certainly swayed by a lawyer's concessions" to facts that are critical to a conviction.

138 S. Ct. at 1511. In the two years since *McCoy* was decided, a decision of a lower court has cited it nearly every other day. This Court's guidance is urgently needed. It should grant the petition for certiorari.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 958 F.3d 111 and reproduced at pages A1-A32 of the appendix. The opinion of the Southern District of New York is reported at 322 F. Supp. 3d 482 and reproduced at pages A33-A41 of the appendix.

JURISDICTION

The Second Circuit issued its opinion on May 1, 2020. By miscellaneous order of this Court dated March 19, 2020, the time for filing a petition for certiorari was extended to September 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

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

and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. James Rosemond And The Feud With G-Unit

James Rosemond was born in 1965 in New York City. A84. Although he was raised in poverty, he became a successful businessman and executive. In 1996, Rosemond founded Henchmen Records, which would eventually become Czar Entertainment, a music-management company based in Manhattan. A238-39. Czar represented several high-profile musicians, including The Game, Sean Kingston, Brandy, Gucci Mane, Salt-N-Pepa, and Akon. A1738.

Violator Records was a competing music management company with offices directly across the street from Czar. A251-52. Violator managed the hip-hop group G-Unit, which originally consisted of three artists: 50 Cent, The Game—who was separately represented by Rosemond—and Tony Yayo. A252-53. G-Unit had other associates who performed acts of violence for G-Unit and Violator, including Lowell Fletcher, a former lieutenant for the Bloods gang. A131, 133, 184.

After 50 Cent ousted The Game from G-Unit, a violent feud arose between Czar and G-Unit/Violator. A254, 257. In March 2017 three Violator associates, including Fletcher, accosted Rosemond's 14-year-old son on the street, pointed guns at him, and assaulted him. A272, 593, 797, 960-61. Fletcher served two years' imprisonment for the assault. A962, 1268.

During his prison term, Fletcher came into contact with Brian McCleod, a Czar associate who was imprisoned at the same facility. A1002-03.

B. Lowell Fletcher's Murder

McCleod was released in August 2009 and, according to his testimony at trial, he told Rosemond that Fletcher's release was imminent. A1009-10, 1021. Soon after, McCleod informed Rosemond that he knew someone who could "definitely get us next to" Fletcher when he was released. A1022-25. McCleod testified that Rosemond responded: "I have $30,000 for anybody *who brings Fletcher to me* cause I'mma hit him so hard and so fast he's not gonna see it coming." A1025 (emphasis added). McCleod then spoke to another Czar associate, Derrick Grant, and said that Rosemond had "30,000 for anybody who will *bring*, you know, [Fletcher] *to him*." A1049, 1058 (emphases added). Grant responded "OK." A1058. McCleod later told Rosemond that Grant had "said that's a go. He's cool with that." A1060.

McCleod testified that Rosemond never ordered either him or Grant to kill Fletcher. He said, for example, that Rosemond "never told [him] to murder Lowell Fletcher," and that Rosemond "never told [him] pointblank to kill Lowell Fletcher." A1215-16. But even though Rosemond's instruction was to "bring[] Fletcher to me," McCleod testified that he believed the purpose of contacting Grant was to recruit him "as a shooter." A1025, 1060. McCleod therefore set out to plan a shooting along with Grant.

Fletcher was released in September 2009. A1060-61. Two weeks later, McCleod lured him to a

predetermined location in New York City. A847-48, 1066-68, 1071, 1117. When Fletcher arrived, Grant shot him several times. A216, 854-55. Fletcher died after McCleod and Grant left the scene. A214-15, 1137-38. Another witness testified that Rosemond later told him to give McCleod a kilogram of cocaine as payment for the attack on Fletcher. A1176.

C. Rosemond's First Two Trials

In 2012 Rosemond was charged in the Southern District of New York with murder for hire (18 U.S.C. § 1958), conspiracy to commit murder for hire (*id.* §§ 2, 1958), possession of firearms during a murder-for-hire conspiracy (*id.* §§ 2, 924(c)(1)(A)(iii)), and murder through the use of a firearm (*id.* §§ 2, 924(j)). He was first tried in February 2014, and the case ended in a mistrial because the jury deadlocked.

Rosemond was retried in December 2014 and convicted on all counts. He appealed to the Second Circuit, arguing principally that the district court had "unduly restricted the permissible scope of his lawyer's argument and questioning of witnesses, in violation of the Sixth Amendment." A62. Rosemond had previously made a proffer agreement with the government in a separate federal case involving drug charges. A54, 72. The district judge had interpreted that agreement to preclude the defense from both (1) asking the government's witnesses about whether Rosemond had ordered Fletcher's murder, and (2) arguing during opening and closing statements that the prosecution had not proven an intent to kill. A73. The Second Circuit held that the "restrictions on Rosemond's ability to cross-examine his witnesses and mount an effective defense violated the Sixth

Amendment." A79. The court vacated the convictions and remanded for a new trial. A83.

D. Rosemond's Third Trial And Defense Counsel's Concession

At Rosemond's third trial, over his objection, his trial counsel admitted to the jury that Rosemond ordered a shooting of Fletcher.

1. Rosemond's Dispute With His Trial Counsel

Rosemond and his counsel submitted post-trial affidavits detailing their disagreement about the account to convey to the jury. Rosemond's affidavit states, in relevant part:

> Several times before and during trial, [counsel] and I discussed trial strategy. During these discussions, I learned that [counsel] intended to pursue a trial strategy which I strongly opposed. Specifically, [counsel] advised me that he planned to argue to the jury that, even if I had paid individuals to shoot at the victim, I did so without the intent to murder the victim. In other words, his strategy was, in effect, to concede that I had authorized the shooting, while disputing that I possessed the necessary intent.
>
> ***I made clear to [counsel], before and during trial, that I vehemently disagreed with his strategy. I asked***

> ***him to argue to the jury instead that I had never asked, directed or paid anyone to shoot at Fletcher. Instead, I wanted to assert that I had paid Brian McCleod only to bring Fletcher to me.*** I explicitly told [counsel] that I did not want to limit the defense to the argument that I lacked an intent to murder Fletcher. I made these statements to [counsel] repeatedly before and during trial.
>
> During the trial, I declined to bring this dispute to the attention of [the district court] because my understanding was that [counsel] had final authority about what trial tactics to pursue and what arguments to present to the jury. Accordingly, I did not think that there would be any benefit to informing [the court] about our disagreement.
>
> Nevertheless, I was very upset during trial about [counsel's] decision to pursue his trial strategy. Indeed, ***I opposed his approach not just as a matter of trial strategy, but also because I viewed it as a concession that I had committed an immoral and shameful act.***

A1705-06 (emphases added).

Rosemond's counsel acknowledged the dispute with his client, and provided a similar account:

> Before and during the trial, I made the determination that the best defense strategy would be to argue that, even if the government establishes that Rosemond asked other individuals to commit a shooting, the government could not prove the necessary element that he did so with the intent to murder the victim. I believed the Government did not have enough evidence to prove Mr. Rosemond intended to kill Mr. Fletcher beyond a reasonable doubt.
>
> I discussed this strategy with Mr. Rosemond before and during the trial. ***Mr. Rosemond repeatedly told me that he disagreed with the strategy. He said that he wanted to adopt a different strategy of denying that he ever paid anyone to commit the shooting***, rather than only disputing the element of intent.
>
> ***Despite Rosemond's preferences, however, I did not adopt his strategy.***
>
> My view at the time of the trial was that, as the designated defense attorney, I had the authority to decide upon the best trial strategy and the best trial tactics for gaining an acquittal.

A1707-08 (emphases added).

2. Closing Arguments

Defense counsel repeatedly conceded to the jury that Rosemond had paid for a non-fatal shooting of Fletcher. This argument became the centerpiece of both parties' summations.

Defense counsel told the jury that Rosemond's "intent" was for his associates "to shoot [Fletcher] and not to kill him." A1558. "[U]nfortunately for everyone involved, one of the bullets had to hit the target in the wrong spot," but "the plan was for Lowell Fletcher to survive." A1542-43. Counsel asserted that "there is no evidence that [Rosemond] paid the going rate for a homicide. *He paid for a shooting.*" A1534 (emphasis added). "[T]he only thing planned here was where the shooting was going to take place"; "[t]here was never a plan to shoot Lowell Fletcher to death." A1542. And perhaps most starkly, defense counsel told the jury: "*Jimmy [Rosemond] did set up the shooting. He set up the shooting.* The fact is somebody was killed. That happened. *Can't deny it.* * * * But that does not mean he entered that conspiracy with the intent to kill." A1564 (emphases added); *see also* A1552.

Understandably, the government seized on this concession during its rebuttal closing: "There is one thing that is important here. *Defense counsel in his closing conceded, he conceded, he said Rosemond did set up the shooting, and he's talking about the shooting of Lowell Fletcher.* He expressed that idea through different variations. He said it in different ways." A1583-84 (emphasis added).

Rosemond was found guilty on all charges. He was sentenced to life imprisonment plus 30 years.

E. *McCoy v. Louisiana*

On May 14, 2018, shortly after Rosemond's conviction, this Court issued its opinion in *McCoy v. Louisiana*. In that case, the government charged Robert Leroy McCoy with three murders and sought the death penalty. 138 S. Ct. at 1505-06. His counsel believed that "the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase." *Id.* at 1506. McCoy, by contrast, "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. But counsel did not abide by his client's instruction to contest guilt, conceding to the jury that McCoy killed the victims. *Id.* at 1505-06. McCoy was convicted and sentenced to death. *Id.*

This Court vacated the conviction, holding that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 1505. The Sixth Amendment's guarantee to a defendant of assistance of counsel "for *his* defence" grants him the "[a]utonomy * * * to assert innocence." *Id.* at 1505, 1508.

The Court explained that the Constitution "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* at 1508 (quoting *Faretta v. California*, 422 U.S. 806, 820 (1975)). "[T]he accused, and not a lawyer," remains "master of his own defense." *Id.* (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 n.10 (1979)). "Trial

management is the lawyer's province." *Id.* (emphasis added). But some decisions "are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* And "[w]ith individual liberty * * * at stake, it is the defendant's prerogative, not counsel's, to decide on the *objective of his defense*." *Id.* at 1505 (emphasis added).

These objectives may vary widely. A defendant may "wish to avoid, above all else, the opprobrium that comes with admitting" a crime. *Id.* at 1508. "Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration." *Id.* "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged *criminal acts*, his lawyer must abide by that objective." *Id.* at 1509 (second emphasis added). That is because this decision is not a "strategic choice[] about how best to *achieve* a client's objectives" it is "a choice[] about what the client's objectives in fact *are*." *Id.* at 1508.

The Court further held that, where "a client's autonomy * * * is in issue," it does "not apply" its "ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510-11. An attorney's "admission of a client's guilt over the client's express objection is error structural in kind," so a defendant need not "show prejudice" or survive "harmless-error review." *Id.* at 1511. "[T]he violation of [a] protected autonomy right [is] complete when" a counsel is allowed "to usurp control of an issue within [the defendant's] sole prerogative." *Id.*

F. The District Court's Decision On Rosemond's Motion For A New Trial

On August 1, 2018, Rosemond filed a motion for new trial under Federal Rule of Criminal Procedure 33, along with the two affidavits quoted above, arguing that defense counsel's admissions during closing argument violated his right to autonomy under *McCoy*. A1695-1704. The district court denied the motion, distinguishing *McCoy* primarily on the ground that (1) it was a capital case and (2) Rosemond's counsel did not concede guilt to the charged crimes. A33-41.

G. The Second Circuit's Decision

Rosemond appealed and the Second Circuit affirmed. A1-32. The court concluded that "the right to autonomy is not implicated when defense counsel concedes one *element* of the charged crime while maintaining that the defendant is not guilty as charged." A22 (emphasis added). "*McCoy*," the Second Circuit held, "is limited to a defendant's right to maintain his innocence of the charged crimes." A25. When Rosemond's counsel "merely conceded one element," "[t]his was trial strategy." *Id.*

The court recognized that defense counsel "admitted that Rosemond committed *a* crime," but dismissed Rosemond's concerns about that admission because he was supposedly "comfortable admitting to the jury that he paid for a kidnapping." A25-27. The court found that Rosemond's right to autonomy did not permit him to "pick[] and choose[] which crime he is comfortable conceding." A27. The court also found that Rosemond's concern about the "shame that comes

with admitting a criminal act" was not "genuine" because the *government* had alleged that Rosemond was involved in "rampant * * * criminal activity." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates A Conflict On The Breadth Of The Sixth Amendment Right To Autonomy.

Numerous courts have struggled to determine where the right to autonomy starts and where it stops. They have disagreed about whether *McCoy* applies to individual elements of a charged offense, what sorts of elements it covers, and what types of cases it covers. This multi-layered split becomes more complex and intractable by the day. The Court should resolve it.

A. The Courts Are Split On Whether The Right To Autonomy Extends Only To Full Concessions Of Guilt.

In its decision below, the Second Circuit held that "*McCoy* is limited to a defendant's right to maintain his innocence of the charged crimes"; "the right to autonomy is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged." A22, 24. That position is in the minority.

The Third Circuit has recognized that *McCoy* is implicated by a defense lawyer's unilateral concession to certain elements of a charged crime. In *United States v. Wilson*, 960 F.3d 136 (3d Cir. 2020), a lawyer declined to ask for his clients' consent before stipulating that a bank was federally insured, thereby

supplying the jurisdictional hook required for the offense of federal bank robbery. *Id.* at 142. The court found *McCoy* distinguishable because there was "no evidence that either defendant objected to the stipulation," and because "jurisdictional elements trigger no 'opprobrium' or stigma." *Id.* at 144 (quoting *McCoy*, 138 S. Ct. at 1508). But the court made clear that the situation would have been different if counsel had conceded the defendants' "*conduct, mental states, or involvement in the robberies*." *Id.* (emphasis added).

The Fourth Circuit has reached a similar conclusion, albeit in the context of a prosecutorial omission rather than an attorney concession. In *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), the defendant was charged with being a felon in possession of a firearm. *Id.* at 199. The defendant pleaded guilty, and during his plea colloquy, the prosecution recited the four elements of the charge that it believed it would have to prove at trial. *Id.* But the prosecution neglected to inform the defendant of an additional element it would need to prove: that "he knew he had the relevant status when he possessed the firearm." *Id.* (alteration omitted). The Fourth Circuit held that this "error violated [the defendant's] right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest." *Id.* at 205 (citing *McCoy*, 138 S. Ct. at 1508). The omission of a single element of the charged crime "deprived him of his right to determine the best way to protect his liberty." *Id.* at 206.

The Ninth Circuit has also held that the right to autonomy does not depend on a concession of guilt to the charged crime. In *United States v. Read*, 918

F.3d 712 (9th Cir. 2019), an attorney pursued an insanity defense against his client's wishes. *Id.* at 716-17. When the defendant appealed the resulting conviction based on *McCoy*, the government made the precise argument adopted by the Second Circuit here: that the case did not "implicate the *McCoy* 'objectives' because [the defendant] and his counsel agreed on the fundamental objective of the defense"—namely, acquittal. *Id.* at 721 (quotation marks omitted). The Ninth Circuit disagreed, explaining that the defendant's goal was not "merely to persuade the jury, in the best way possible, that he was not responsible for the alleged assaults." *Id.* His objective was also "to avoid contradicting his own deeply personal belief that he [was] sane." *Id.* "Just as conceding guilt might carry 'opprobrium' that a defendant might 'wish to avoid, above all else,' a defendant, with good reason, may choose to avoid the stigma of insanity." *Id.* at 720 (quotation marks and citation omitted) (quoting *McCoy*, 138 S. Ct. at 1508).

A recent California appellate decision is even more closely analogous. In *People v. Flores*, 34 Cal. App. 5th 270 (2019), the defendant was charged with attempted murder after hitting a police officer with his car. *Id.* at 274-75. Over the defendant's objection, his lawyer conceded that he "was driving the car that seriously injured the officer," but argued that he "never formed the premeditated intent to kill." *Id.* at 272. The defendant appealed based on *McCoy*, and the government contended that *McCoy* merely "confirmed that a defendant had the right to insist that counsel refrain from admitting guilt" to the charged crimes. *Id.* at 281 (emphasis and quotation marks omitted). California's Court of Appeal

disagreed: "Under *McCoy*, defense lawyers * * * *must not concede the acts alleged as the actus reus of a charged crime over a client's objection*." *Id.* at 277 (emphasis added). That is because the "Sixth Amendment afford[s] criminal defendants *the right to tell their own story*." *Id.* at 272 (emphasis added). The State's argument "disregard[ed] *McCoy*'s discussion of plausible objectives that a defendant might have at trial," including "the avoidance of the 'opprobrium that comes with admitting'" unlawful acts. *Id.* at 281 (quoting *McCoy*, 138 S. Ct. at 1508-09).

The Tenth Circuit, by contrast, has reached the same conclusion as the Second Circuit in an unpublished decision. In *Thompson v. United States*, 791 F. App'x 20 (11th Cir. 2019), the defendant's attorney unilaterally conceded the *actus reus* of a charged crime—the robbery of a Taco Bell—while arguing that the government was unable to prove "the interstate commerce element." *Id.* at 23, 27. The court held that this concession did not implicate *McCoy* because "counsel did not admit guilt" and "denied an essential element of the crime." *Id.* On panel rehearing, one judge opined that the court had "made a mistake" in the *McCoy* analysis, contending that the defendant should have been granted an evidentiary hearing because, if he "rejected counsel's advice and continued to insist that there be no concessions as to the Taco Bell robbery, then counsel's unilateral choice was likely structural error that violated [the defendant's] autonomy." *Thompson v. United States*, 2020 WL 4811363, at *7-8 (11th Cir. Aug. 19, 2020) (Jordan, J., dissenting in part).

A Minnesota case further illustrates the conflicting approaches to the "guilt vs. elements" question. In *State v. Huisman*, 2019 WL 4594082 (Minn. Ct. App. Sept. 23, 2019), the defendant's counsel conceded three elements of each charged offense—the ages of the two victims, and the location of the crime—in a written closing argument, and the record did not indicate that the defendant consented to the concessions. *Id.* at *1-2. Citing *McCoy*, Minnesota's Court of Appeals held that this was a Sixth Amendment violation. *Id.* at *2-4. But the Supreme Court of Minnesota overruled that decision, finding that "defense counsel's concessions of fewer than all of the elements was not a concession of guilt." *State v. Huisman*, 944 N.W.2d 464, 468 (Minn. 2020).

B. The Courts Are Split On Which Kinds Of Elements Implicate The Right To Autonomy.

Among the courts that have held that *McCoy*'s principle extends to elements of a crime, there is a split over which *types* of elements implicate the right to autonomy. As discussed above, the Third Circuit has explained that the right extends to a defendant's "conduct, mental state[], or involvement in the [offense]," but not to "jurisdictional elements." *Wilson*, 960 F.3d at 144. The Fourth Circuit, by contrast, has suggested that any element counts—not only the question of whether a defendant "knew he possessed a firearm," but also the (arguably more technical) question of whether "he knew he belonged to a class of persons barred from possessing a firearm." *Gary*, 954 F.3d at 198. And the California Court of Appeals has gone a step further, broadly

interpreting *McCoy* to protect defendants' "right to tell their own story"—which most likely implicates allegations that do *not* even necessarily resolve an element of a charge. *Flores*, 34 Cal. App. 5th at 272.

C. The Courts Are Split On The Kind Of "Opprobrium" That Matters Under The Sixth Amendment.

In *McCoy*, this Court explained that the right to autonomy is grounded in part on the fact that a criminal defendant "may wish to avoid, above all else, the opprobrium that comes with admitting" criminal acts. 138 S. Ct. at 1508. The Second and Ninth Circuits are split on what kinds of acts carry a sufficient stigma to implicate the right to autonomy.

As discussed above, the Second Circuit determined in this case that a defendant's concerns about opprobrium should be respected only if he does not want to admit to *any* unlawful conduct: "Had Rosemond asserted his right to autonomy to prevent his attorney from conceding *any* crime because of the 'opprobrium' that accompanies such an admission, his argument might carry more weight. It loses its thrust, however, when he picks and chooses which crime he is comfortable conceding." A27 (citation omitted). "This is especially true," the court found, when considered "alongside the evidence the government presented of his rampant involvement in criminal activity." *Id.* In other words, the Second Circuit's opinion suggests that the right to autonomy depends on (1) whether the defendant's factual account is entirely crime-free; and (2) what the *government* alleges about the defendant.

The Ninth Circuit has reached a starkly different conclusion. In *Read*, the court held that *McCoy*'s conception of "opprobrium" extends to any concession that would "contradict[]" the defendant's "*deeply personal belief[s]*" and carry a "*social stigma*." 918 F.3d at 721 (emphases added). And the court found that "pleading insanity has grave, personal implications" that "go beyond mere trial tactics and so must be left with the defendant." *Id.* That was the case, moreover, even though the defendant wanted to pursue a defense of "demonic possession" that was "certain to fail," and even though the government had presented evidence that the defendant "stabbed his cellmate thirteen times." *Id.* at 716, 719. *See also Wilson*, 960 F.3d at 144 (finding that "jurisdictional elements trigger no 'opprobrium' or stigma," but concessions about "conduct" and "mental states" do).

D. The Courts Are Split On Whether The Right To Autonomy Is Limited To Capital Cases.

Finally, although the Second Circuit did not address this issue, courts are also split on whether *McCoy* applies outside the capital context.

The district court in this case held that *McCoy* is limited to death penalty cases. A38-39. And some state appellate courts have found the same. *See, e.g.*, *Thompson v. State*, 2019 WL 1065925, at *5 n.4 (Tex. App. Mar. 7, 2019) (Texas courts had "not applied the principles of *McCoy* to * * * a noncapital case").

As discussed above, the Third, Fourth, and Ninth Circuits have applied *McCoy*'s principle to non-capital cases. *Wilson*, 960 F.3d 136; *Gary*, 954

F.3d 194; *Read*, 918 F.3d 712. And in *Flores*, the California Court of Appeal concluded that "the principles guiding the Court in *McCoy* have *greater* force outside the capital context, because respect for a seemingly-irrational defendant's desire to maintain innocence would have the same benefit at a lesser cost." 34 Cal. App. 5th at 282-83 (emphasis added).

In short, the courts are split along four different lines about the scope of the right to autonomy articulated in *McCoy*. The Court should grant certiorari to resolve this disagreement.

II. The Decision Below Was Error.

The Second Circuit's conclusion—that "the right to autonomy is not implicated" so long as defense counsel "maintain[s] that the defendant is not guilty as charged" (A22)—cannot be squared with either the holding or reasoning of *McCoy*.

First, as the *McCoy* dissent explained, the defense lawyer in that case did *not* admit guilt to the charged crime; he conceded the killing (the *actus reus*) and argued that McCoy was not guilty because he lacked the necessary intent (the *mens* rea). 138 S. Ct. at 1512 (Alito, J., dissenting) ("[Defense counsel] did not admit that petitioner was guilty of first-degree murder. Instead, faced with overwhelming evidence that petitioner shot and killed the three victims, [counsel] admitted that petitioner committed one element of that offense, *i.e.*, that he killed the victims. But [counsel] strenuously argued that petitioner was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense."). That is why the majority opinion "refers to the admission of

criminal '*acts*,'" not just charged offenses. *Id.* at 1512 n.1 (emphasis added) (quoting 138 S. Ct. at 1505, 1508, 1510). *McCoy* is therefore indistinguishable from Rosemond's case. *See also Thompson*, 2020 WL 4811363, at *7-8 (Jordan, J., dissenting) ("As Justice Alito's dissent pointed out, the Court reached [its] conclusion even though counsel had not conceded guilt as to all of the elements necessary for murder.").

Second, *McCoy* was grounded in the principle that "it is the defendant's prerogative, not counsel's, to decide on the *objective of his defense*." 138 S. Ct. at 1508 (emphasis added). Nothing in *McCoy* suggests that the only "objective" that matters is an acquittal of the charged crime. In just about any criminal case, a lawyer and his client will share *some* objectives; in *McCoy*, for example, they both wanted to avoid the death penalty. Here, although both Rosemond and his counsel wanted the jury to deliver an acquittal, their objectives differed in critical ways: Rosemond wanted to avoid conceding that he "had committed an immoral and shameful act" (A1706), and "tell [his] own story" (*Flores*, 34 Cal. App. 5th at 272) about the Fletcher incident. Those objectives had to be respected.

Third, the decision below is irrational. A right to *autonomy* should not depend on what the *government* chooses to charge. If it did, then a defendant's rights would be *diminished* when he faces *more serious* charges. Under the Second Circuit's reasoning, Rosemond's right to autonomy would have been violated if he had been charged with assault under New York law, rather than murder for hire under federal law. The right to autonomy would be implicated if a lawyer unilaterally admits to *minor*

crimes, like possession of marijuana in a case where that offense is charged—but not *major criminal acts*, like ordering the shooting of a victim, in a case where murder for hire is charged. That does not make sense.

Finally, the Second Circuit's suggestion that Rosemond was not allowed to "pick[] and choose[] which crime he [was] comfortable conceding" (A27) has no basis in *McCoy* or any case applying it. Again, the right at issue is one of *autonomy*—it assuredly *does* allow a defendant to decide what he concedes and what he does not. By the Second Circuit's logic, the right would disappear if the defendant's theory of the case would implicate him in a traffic violation.

III. The Question Presented Is Critical.

In the two years since *McCoy*, over 300 public opinions have been issued citing it. And as discussed above, those opinions are all over the map—a state of confusion that will only be exacerbated with time.

As *McCoy* recognized, the effects of violating a defendant's right to autonomy are "immeasurable," because jurors are "almost certainly swayed by a lawyer's concessions" of facts central to a conviction. 138 S. Ct. at 1511. If that right has any meaning, it must mean that a lawyer is not allowed to tell the jury an account of the facts that the defendant contends is *untrue*—exactly what Rosemond's counsel did here.

Although the split in authority arose relatively recently, we respectfully submit that the Court should not wait for the issue to percolate further. This case presents an especially good vehicle for resolving the question presented, because there is a clear written

record of the disagreement between Rosemond and his lawyer, unlike in many of the other cases involving *McCoy* challenges. *See, e.g.*, *Broadnax v. State*, 2019 WL 1450399, at *6 (Crim. App. Tenn. Mar. 29, 2019) (holding that *McCoy* did not apply where "nothing in the record show[ed]" that the defendant "made an objection to" counsel's "defense strategy"); *State v. Johnson*, 265 So. 3d 1034, 1048 (La. App. 2019) (same). Both the nature of the disagreement and the devastating concession—emphasized during both parties' closing arguments at trial—are undisputed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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