No. 24-5910

In the Supreme Court of the United States

ROBERT WARD FRAZIER,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

A California jury convicted petitioner Robert Ward Frazier of first-degree murder and other charges. At the penalty phase of his capital trial, he and his attorneys both sought to avoid a death sentence, but disagreed regarding what mitigation evidence and arguments to present to the jury. Over Frazier's objection, his attorneys presented certain evidence regarding his upbringing and mental health. The jury returned a verdict of death. The question presented is:

Whether the Sixth Amendment right of an accused to determine the fundamental objective of his or her defense requires a trial court to allow a defendant to override defense counsel's tactical decisions regarding what mitigation evidence and arguments to present during the penalty phase of a capital trial.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

In re Robert Ward Frazier on Habeas Corpus, No. S285842 (filed July 8, 2024) (pending).

People v. Robert Ward Frazier, No. S148863 (August 5, 2024) (direct appeal) (this case below).

California Court of Appeal, First Appellate District

Robert Ward Frazier v. Superior Court of Contra Costa County, et al., No. A113790 (May 18, 2006) (petition for writ of mandate denied).

Contra Costa County Superior Court:

People v. Robert Ward Frazier, No. 5-041700-6 (December 15, 2006) (entering judgment of conviction and sentence of death).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

STATEMENT

1. In May 2003, petitioner Robert Ward Frazier repeatedly bludgeoned Kathleen Louise Loreck over the head with an iron bar and raped and sodomized her. Pet. App. A 1, 3-8. She died hours later. *Id*. at 1, 3-4. A jury convicted Frazier of first-degree murder, forcible rape, and forcible sodomy, and found true beyond a reasonable doubt the special circumstances of murder in the commission of rape and murder in the commission of sodomy. *Id*. at 1.

At the penalty phase of his trial, Frazier made several motions to represent himself under *Faretta v. California*, 422 U.S. 806 (1975), and to substitute his two appointed counsel under *People v. Marsden*, 2 Cal. 3d 118 (1970). Pet. App. A 37-45. In those motions, Frazier complained about certain aspects of the mitigation evidence his attorneys sought to present.

For example, Frazier objected to his attorneys' plan to play a video discussing a study in which monkeys were deprived of maternal contact to illustrate attachment theory, which defense counsel believed would lend credence to their arguments regarding Frazier's family circumstances and childhood. Pet. App. A 38. Frazier also objected to a video contrasting his family and upbringing with that of his half-brother, who was raised in a different household. *Id*. Frazier asserted that the evidence "'misrepresent[ed]' him" and amounted to "'cheap emotionalism.'" *Id*. at 39-40. He objected because "'promoting the theory that [Frazier is] a product of a dysfunctional family while projecting images of maternally-deprived apes is likely to be considered by the jury as pure monkey business rather than [a] mitigating

factor.'" *Id*. at 40; *see also id.* at 41 (Frazier believed the strategy "'likely would only anger the jury, ultimately costing [him his] life'"). Instead, Frazier "wished to present to the jury evidence of 'how [his] friends and loved ones will be affected'" if he were to be executed. *Id.* at 40-41.

Frazier objected to several other aspects of his attorneys' strategy as well. They presented a witness's testimony that, as a child, Frazier had said that he had been molested by an uncle. Pet. App. A 42-43. Frazier disagreed with counsel's approach in soliciting that testimony, *id.* at 43, which Frazier regarded as "'slanderous'" of his uncle, *id.* at 42. Frazier also objected to his attorneys' plan to present evidence that he suffered from "'a genetic brain abnormality.'" *Id*. Frazier expressed concern that his attorneys' strategy was an "'attempt to try to make me look like I'm suppressing some kind of mental illness'" that would "'be viewed by the jury as nothing more than people trying to help me because they like me.'" Pet. 7-8 (quoting 51 RT 10381).[1]

The trial court denied Frazier's motions for self-representation and for substitution of counsel, in part because they amounted to tactical disagreements with his attorneys regarding the presentation of certain evidence. Pet. App. A 40-45; *see* 47 RT 9658 ("I understand your right to be concerned and to have a personal opinion about whether this is somehow insulting to you, denigrating to you, improper from your point of view, but it is

[1] "RT" refers to the Reporter's Transcript filed in the court of appeal.

a decision on trial tactics and strategy[.]"). At the conclusion of the penalty phase, the jury returned a verdict of death. Pet. App. A 1.

2. The California Supreme Court affirmed. Pet. App. A 1-72. As relevant here, the court rejected Frazier's claim that the trial court violated his Sixth Amendment right to choose the objective of his defense under *McCoy v. Louisiana*, 584 U.S. 414 (2018), by allowing defense counsel to present certain pieces of mitigating evidence over Frazier's objection. Pet. App. A 60-68. The court reasoned that *McCoy* repeatedly acknowledged defense counsel's authority to choose the evidence presented in a criminal trial. *Id*. at 64. Frazier argued "that his objective 'was to avoid a death sentence by putting on a penalty defense that did not require presenting himself as mentally deficient, slandering a family member, or otherwise presenting intimate and possibly repugnant details about his life, background, and family.'" *Id.* at 65. But the court rejected this "attempt to relabel [Frazier's] disagreements with counsel over the presentation of evidence as pertaining to the *objective* of his penalty phase defense." *Id*. "[H]aving elected to put on a defense in mitigation," the court explained, "a defendant cedes to his lawyer the right to control tactical decisions in furtherance of that defense[.]" *Id*. at 68.

Justices Liu and Evans each authored opinions dissenting on an unrelated state law issue. The dissent by Justice Evans explained why, notwithstanding her disagreement as to the state law issue, she "agree[d]" with the Court's conclusion that "Frazier was not denied his Sixth Amendment

right" under *McCoy*. Pet. App. A 10 (Evans, J.).[2] She noted that "Frazier's disagreement with counsel . . . was not a disagreement over the objectives of the defense[,] but instead over the ways to achieve those objectives." *Id.* (internal quotation marks and alterations omitted). She observed, as a result, that "[t]his case does not present, and the court today therefore does not consider, what the result would have been if a defendant had objected to certain evidence for *nontactical*, purely personal reasons." *Id.*

ARGUMENT

Frazier asserts that the California Supreme Court's decision "cannot be squared with" this Court's decision in *McCoy v. Louisiana*, 584 U.S. 414 (2018), Pet. 15, and conflicts with decisions of other federal and state courts, Pet. 20-26. Neither argument is persuasive.

1. a. The decision below faithfully implements this Court's precedent. In *McCoy*, "the defendant vociferously insisted" that he did not commit the three charged murders and objected to his attorney's plan to admit guilt as to the charged murders. 584 U.S. at 417. Nevertheless, during the guilt phase of the capital trial, at which the defendant testified that he had *not* committed the murders at issue, defense counsel told the jury the evidence was "'unambiguous'" that "'my client committed three murders'"—an issue on

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[2] Because the petition appendix does not contain its own page numbers, and each Justice's slip opinion is paginated separately, the citations in this paragraph refer to the page numbers at the bottom of Justice Evans's opinion, which follows the majority opinion in the appendix.

which defense counsel told jurors he "'took [the] burden off of [the prosecutor].'" *Id.* at 419-420.

This Court held that those circumstances violated the defendant's Sixth Amendment right to counsel because "a defendant has the right to insist that counsel refrain from admitting guilt[.]" *McCoy*, 584 U.S. at 417. "[I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *Id*. at 417-418. Like other fundamental trial decisions, such as "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal," a decision about conceding guilt is not a "strategic choice[] about how best to *achieve* a client's objectives," but rather a "choice[] about what the client's objectives in fact *are*." *Id.* at 422.

But the Court emphasized that "[p]reserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles." *McCoy*, 584 U.S. at 423. In particular, "[t]rial management is the lawyer's province," *id.* at 422, and "'numerous choices affecting the conduct of the trial' do not require client consent, 'including the objections to make, the witnesses to call, and the arguments to advance.'" *Id.* at 423 (brackets omitted) (quoting *Gonzalez v. United States*, 553 U.S. 242, 249 (2008)).

The California Supreme Court correctly applied those principles here. It observed that *McCoy* "emphasized that a criminal defendant's Sixth Amendment autonomy right does not encompass tactical evidentiary decisions." Pet. App. A 63. Unlike in *McCoy*, where counsel and the defendant disagreed over the objective of whether to concede or contest guilt, here, Frazier and his attorneys were united in the decision to fight the imposition of a death sentence. Their disagreements concerned "the presentation of evidence," *id.* at 65—that is, "'the witnesses to call, and the arguments to advance'" in support of mitigation—which, under *McCoy*, are the sort of "trial management" decisions that "do not require client consent," 584 U.S. at 422-423.

b. Frazier's criticisms of the decision below are without merit. He faults the state court for failing to recognize that his objective was "to avoid the opprobrium of being labeled mentally and cognitively deficient, and to avoid falsely maligning his family[.]" Pet. 14. But *McCoy* does not allow a defendant to simply "'declare[] a particular strategy or tactic to be of high priority and label[] it an "objective."'" Pet. App. A 65-66 (quoting *United States v. Roof*, 10 F.4th 314, 353 (4th Cir. 2021)). Frazier and his attorneys shared the same objective at the penalty phase: convincing the jury not to impose a death sentence. Frazier's "disagreement with counsel over the evidence to present during the penalty phase" was "not a disagreement over the objectives of the defense[,] but instead over the ways to achieve those objectives." *Id.* at 66

(internal quotation marks and alterations omitted). That situation contrasts sharply with the facts of *McCoy* itself and with the other examples *McCoy* discussed of disputes regarding what the client's "objectives in fact *are*"—such as a defendant who opts to pursue even a "'minuscule'" chance of acquittal rather than seek to avoid a death sentence. 584 U.S. at 423.

Moreover, the disagreement between Frazier and his attorneys primarily stemmed from their contrasting assessment of which arguments, themes, and evidence would be most persuasive to the jury. For example, in objecting to the proposed mitigation evidence regarding his difficult upbringing, Frazier told the trial court that he believed the jury would consider it "'pure monkey business rather than [a] mitigating factor'" and "'likely would only anger the jury, ultimately costing [him his] life.'" Pet. App. A 40, 41; *see id.* at 66. Instead, Frazier proposed to present evidence regarding how his "'friends and loved ones [would] be affected'" by his execution. *Id.* at 40-41. Choosing between those approaches is a quintessential decision of trial tactics reserved for defense counsel.[3]

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[3] To be sure, some of Frazier's objections were more personal in nature. For instance, he viewed as "'slanderous'" certain evidence that he had been "molested by an uncle," and he "disputed the suggestion that he had 'a genetic brain abnormality.'" Pet. App. A 42. But those objections likewise did not undermine or affect Frazier and his attorneys' shared "*fundamental* objective" at the penalty stage of avoiding a death sentence. *McCoy*, 584 U.S. at 426 (emphasis added). In any event, as the California Supreme Court reasoned, where a defendant offers both tactical and non-tactical reasons for objecting to evidence, *McCoy* does not "require a court to untangle" the defendant's rationales. Pet. App. A 66.

Frazier compares himself to the defendant in *McCoy*, who this Court hypothesized might have objected to conceding guilt because of a desire to "avoid . . . the opprobrium that comes with admitting he killed family members." 584 U.S. at 423; *see* Pet. 14. That passage of *McCoy* explained why a defendant may value a slight chance of acquittal as his objective over that of avoiding a death sentence by conceding that he was guilty. The Court's analysis does not suggest that a defendant's concern about "opprobrium" can transform tactical decisions about the presentation of evidence into a different objective that gives the defendant a Sixth Amendment veto over his attorney's tactical judgment.

Frazier next contends that even if his attorneys' penalty-phase choices were otherwise "an aspect of trial management that counsel [could] decide without express consent" from the client, the attorneys were obligated to follow his wishes "once Mr. Frazier was fully informed of counsel's strategy and made it clear that he objected to certain aspects of the penalty phase defense." Pet. 17. But *McCoy* does not support that view. When this Court distinguished between the client's right to control "the fundamental objective of the defendant's representation" and counsel's ability to decide matters such as "'the objections to make, the witnesses to call, and the arguments to advance,'" the point was that the client's veto power extends only to the former, not the latter. *McCoy*, 584 U.S. at 423, 426.

For similar reasons, there is no merit to Frazier's complaint that, under the decision below, his only methods to avoid the mitigation evidence to which he objected would have been to "waiv[e] counsel or direct[] counsel to wholly forego a penalty defense"—an "all or nothing approach" that, he asserts, this Court rejected in *McCoy*. Pet. 18-19 (citing *McCoy*, 584 U.S. at 421). The Court's reference to an "all or nothing" requirement in *McCoy* concerned whether a defendant who desires counsel must accept his counsel's pursuit of a different "fundamental objective," such as conceding rather than contesting guilt. 584 U.S. at 421, 426. It does not suggest that the Constitution empowers a client to override his lawyer's determination regarding tactical decisions. *See id.* at 422.

Finally, Frazier suggests that a defendant in California who wishes to limit the presentation of mitigation evidence at the penalty phase may find himself unable to either "direct counsel to forego a penalty defense" or seek self-representation. Pet. 19-20. But Frazier's petition does not present any such issues for review, because he never sought to forgo a penalty-phase defense, *see* Pet. App. A 37-45, and he does not take issue with the state court's determination that his request to represent himself was untimely, *see id.* at 46-52; *see generally Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000) ("most courts" require a defendant requesting self-representation to "do so in a timely manner"). Frazier's arguments also lack merit. The California Supreme Court has suggested that, under *McCoy*, a defendant may direct

counsel to forgo a penalty-phase defense. *See People v. Amezcua*, 6 Cal. 5th 886, 925-926 (2019). And California trial courts retain discretion to grant self-representation to defendants seeking it for the first time after the guilt phase. *See* Pet. App. A 50-52; *People v. Windham*, 19 Cal. 3d 121, 124 (1977).

2. Frazier also contends that the decision below conflicts with decisions by other state and federal courts. Pet. 20-26. That too is incorrect.

a. Frazier argues that the California Supreme Court's decision conflicts with three other state high court decisions: *State v. Maestas*, 299 P.3d 892 (Utah 2012); *State v. Brown*, 330 So. 3d 199 (La. 2021); and *State v. Montoya*, 554 P.3d 473 (Ariz. 2024). *See* Pet. 20-23. It does not.

In both *Maestas* and *Montoya*, the defendants wished to "waive the right to present mitigating evidence" at the penalty phase, and the trial courts allowed them to do so. *Maestas*, 299 P.3d at 955; *see Montoya*, 554 P.3d at 491, 506.[4] After they were sentenced to death, they argued on appeal that in accepting their waivers of the right to present mitigation evidence, the trial courts had violated their right to counsel under the Sixth Amendment. *See Maestas*, 299 P.3d at 958; *Montoya*, 554 P.3d at 506. In each case, the state

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[4] In *Maestas*, the defendant initially presented some mitigation evidence regarding his upbringing and family circumstances, 299 P.3d at 955-956, but the following day "'knowingly, voluntarily, and intelligently . . . waived [the] right to present'" "'any other mitigating evidence,'" *id.* at 957. In *Montoya*, the defendant "generally waived the presentation of mitigation evidence," but "permitted his attorneys to submit the records of his guilty plea and mitigation waiver hearings as evidence of his acceptance of responsibility[.]" 554 P.3d at 491.

high court rejected the claim. As the Utah Supreme Court explained, "the decision to waive the right to present mitigating evidence is not a mere tactical decision that is best left to counsel," but is rather "a fundamental decision" that "often involves information that is very personal to the defendant, such as intimate, and possibly repugnant, details about the defendant's life, background, and family." *Maestas*, 299 P.3d at 959 (footnotes omitted); *see also Montoya*, 554 P.3d at 507.

These cases differ from Frazier's in two respects. First, *Maestas* and *Montoya* held that the Sixth Amendment does not *require* counsel to override their clients' considered decisions as to aspects of the mitigation case. That does not conflict with the decision here, which held that the Constitution does not *forbid* counsel from overriding their clients' choices. Second, both *Maestas* and *Montoya* involved defendants who wished to waive or abandon the presentation of mitigation evidence. *See supra* pp. 10-11 & n.4. Here, Frazier sought to require his counsel to present evidence and argument supporting a different theory of mitigation that Frazier thought would be more persuasive to the jury than the approach his trial counsel proposed. *See supra* pp. 1-2; Pet. App. A 40-41. Even assuming the Sixth Amendment affords capital defendants a right to waive the presentation of mitigation evidence, it does not necessarily follow that they also have a right to order their attorney to present different mitigation evidence and arguments than the attorney proposes. *Cf. McCoy*, 584 U.S. at 422-423.

Nor does the decision below conflict with *Brown*. There, the defendant objected to counsel's plan to call the defendant's mother and uncle to testify as mitigation witnesses during the penalty phase. 330 So. 3d at 219. He did so not for tactical reasons, but for personal reasons: He believed that there was "'stuff that's in the past that . . . should stay in the past'" and that had taken his mother "'many, many years to get over.'" *Id.* at 219. The defendant told the court: "'I'm willing to accept death before I let my mother get on the stand.'" *Id.* Given that stark and emphatic preference, the Louisiana Supreme Court held that the defendant had a Sixth Amendment right to prevent counsel from calling the mother and uncle as witnesses. *Id.* at 217.[5] The court apparently concluded that, on the facts of that case, the decision whether to put the defendant's mother and uncle on the witness stand was a "fundamental choice" (*McCoy*, 584 U.S. at 428) about the objectives of the defense. *See Brown*, 330 So. 3d at 224-225 (citing and discussing *McCoy*).[6]

That holding, on the unique and extreme facts of *Brown*, does not imply that the Louisiana Supreme Court would grant relief in a case like this one.

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[5] This Court then denied Louisiana's certiorari petition, which argued in part that the Louisiana Supreme Court had improperly extended *McCoy* to the facts of that case. Pet. for Writ of Cert. at 14-23, *Louisiana v. Brown*, No. 21-871 (Dec. 9, 2021); *see* 142 S. Ct. 1702 (2022).

[6] To the extent Frazier reads *Brown* as holding more broadly that the Sixth Amendment affords capital defendants an unlimited "right to limit the amount and/or type of mitigating evidence counsel may present," 330 So. 3d at 226 (citing *Boyd v. State*, 910 So. 2d 167, 189-190 (Fla. 2005)), that theory could not be squared with *McCoy*, which emphasizes that decisions regarding what evidence to present generally rest with counsel, *see* 584 U.S. at 422.

Unlike the defendant in *Brown*, Frazier objected to his attorneys' proposed mitigation evidence for both tactical and non-tactical reasons. *See supra* at 1-2; Pet. App. A 40-41. The California Supreme Court explained that in that situation, *McCoy* does not "require a court to untangle such objectives," Pet. App. A 66, and the Louisiana Supreme Court could well reach the same conclusion if presented with such a scenario. For that matter, it is not clear that the California Supreme Court would deny relief to a defendant on the facts of *Brown*. Justice Evans, who joined the majority in rejecting Frazier's Sixth Amendment claim, expressed her view that "[t]his case does not present, and the court today therefore does not consider, what the result would have been if a defendant had objected to certain evidence for *nontactical*, purely personal reasons." Pet. App. A 10 (Evans, J., dissenting on other grounds).

b. Frazier further contends that the decision below implicates a conflict among lower courts "about the type of 'opprobrium' that is relevant to a capital defendant's right to control the fundamental objectives of their trial." Pet. 23. Specifically, Frazier perceives a conflict between the Fourth Circuit's decision in *Roof*, 10 F.4th 314, which the California Supreme Court cited approvingly here, and *United States v. Read*, 918 F.3d 712 (9th Cir. 2019). Pet. 24-26. That alleged conflict does not merit review either.

In *Roof*, the Fourth Circuit rejected the defendant's argument that he had a Sixth Amendment autonomy right to "'prevent the presentation of mental health mitigation evidence.'" 10 F.4th at 350. It reasoned that "[t]he

presentation of mental health mitigation evidence is . . . a classic tactical decision left to counsel even when the client disagrees." *Id.* at 352 (internal quotation marks and alteration omitted). In *Read*, the Ninth Circuit held that a criminal defendant has a "Sixth Amendment right to demand that counsel not present an insanity defense," 918 F.3d at 715, because "[a]n insanity defense is tantamount to a concession of guilt" and "carries grave personal consequences that go beyond the sphere of trial tactics," including "the prospect of 'indefinite commitment to a state institution,'" *id.* at 720.

The decision below aligns with *Roof* in rejecting the defendant's "attempt to relabel his disagreements with counsel" regarding the presentation of penalty-phase mitigation evidence "as pertaining to the *objective* of his penalty phase defense." Pet. App. A 65-66 (citing *Roof*, 10 F.4th at 352-353). There is no conflict between those two decisions and *Read*. As the California Supreme Court and the Fourth Circuit have each recognized, asserting an insanity defense is not analogous to introducing mental-health or family-history mitigation evidence. Unlike asserting an insanity defense, the presentation of mitigation evidence does not "plac[e] the defendant at risk of 'confinement in a mental institution.'" *Id.* at 67; *see also Roof*, 10 F.4th at 352-353 (distinguishing *Read* on similar grounds). Similarly, any "'stigma'" associated with mental health problems is "'simply not of the same legal magnitude as a confession of guilt.'" Pet. App. A 67; *see also Roof*, 10 F.4th 352-353. Indeed, this Court denied a certiorari petition in *Roof* that asserted a conflict with

Read, among other cases. Pet. for Writ of Cert. at 10-21, *Roof v. United States*, No. 21-7234 (Dec. 10, 2021); *see* 143 S. Ct. 303 (2022). There was no conflict then, and there is no conflict now.

CONCLUSION

The petition for a writ of certiorari should be denied.

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