DONALD R. TICKLE ATTORNEY AT LAW
CAL. STATE BAR NO. 142951
909 NEW JERSEY AVE. SE, NO. 1302
Washington, D.C., 20003-5316
Telephone: (202) 695-9405
E-mail: dontickle@gmail.com

November 1, 2024

Jorge E. Navarrete
Clerk and Executive Officer
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

CAPITAL CASE

Re: *People v. Mao Hin*, Case No. S141519

Dear Mr. Navarrete:

Appellant Mao Hin ("appellant") submits the following letter brief in response to the Court's October 22, 2024, Order instructing the parties to file letter briefs address the following question:

> "Does double jeopardy apply in circumstances where evidence of a legally valid theory of murder liability was presented to the jury along with another theory that was legally invalid?"

Appellant's answer is that double jeopardy applies and bars retrial under any legally valid theory if there is an appellate determination of insufficient evidence of an element or fact issue necessary to proof of that theory.

Principles of double jeopardy.

The Fifth Amendment of the United States Constitution provides "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb …." It applies "to the states through the due process clause of the Fourteenth Amendment." (*In re Martin* (1987) 44 Cal. 3d 1, 53, citing *Benton* v. *Maryland* (1969) 395 U.S. 784, 793-796.)

Article I, section 15, of the California Constitution similarly provides that "[p]ersons may not twice be put in jeopardy for the same offense."

The state provision is also implemented by statute:

> "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading." (Pen. Code, § 1023.)

"Our cases have repeatedly stated the bright-line rule that 'jeopardy attaches when the jury is empaneled and sworn.'" (*Martinez v. Illinois* (2014) 572 U.S. 833, 834, quoting *Crist* v. *Bretz* (1978) 437 U.S. 28, 35.)

Appellant's jury was empaneled and sworn on September 14, 2005. (5 CT 1288, 1445.)

Double jeopardy bars retrial after a finding of legally insufficient evidence on direct appeal.

Double jeopardy does not bar retrial after an appellate finding of prejudicial trial errors, such as resulting from the erroneous admission of evidence or misinstruction of the jury. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 38 ["It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction. [Citations]."]; *accord People v. Memro* (1995) 11 Cal. 4th 786, 821.)

However, when an "appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial." (*Monge v. California* (1998) 524 U.S. 721, 729; *Oregon v. Kennedy* (1982) 456 U.S. 667, 676, fn. 6 [The "Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence."].)

The rationale for the distinction between ordinary trial error and insufficient evidence is based on the greater interest in preventing a second trial when a reviewing court decides as a matter of law that the jury could not properly have returned a guilty verdict on a theory of liability and the prosecution had a "fair opportunity" to present that theory to the jury:

> "when a defendant's conviction has been overturned due to a failure of proof at trial,

> in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. … Since we necessarily afford absolute finality to a jury's *verdict* of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (*Burks v. United States* (1978) 437 U.S. 1, 16 (*Burks*).)

Stated differently, a "'reversal based on the insufficiency of the evidence has the same effect [as a judgment of acquittal] because it means that no rational factfinder could have voted to convict the defendant.'" (*People v. Seel* (2004) 34 Cal.4th 535, 544 [insert by this Court], quoting *Tibbs v. Florida* (1982) 457 U.S. 31, 41.) This "prevents the state from having a second opportunity to marshal evidence which it failed to produce at the first opportunity." (*In re Mendes* (1979) 23 Cal. 3d 847, 855.)

The same double jeopardy principles apply to special circumstance findings in California capital cases. (*People v. Dalton* (2019) 7 Cal. 5th 166, 249; *see also Bullington* v. *Missouri* (1981) 451 U.S. 430, 439.)

In particular, double jeopardy bars retrial where there has been a determination of insufficient evidence of an element or factual issue necessary to a theory of liability or punishment.

In sum, the above discussion shows that "whenever a jury agrees or an appellate court decides that the prosecution has not proved its case" (*Bullington, supra,* 451 U.S. at p. 443), the

prosecution is entitled to "one fair opportunity" to prove its case and it should not be given "another opportunity to supply evidence which it failed to muster in the first proceeding" (*Burks, supra,* 437 U.S. at p. 11) or "afford[ed] … an opportunity for the proverbial 'second bite at the apple.'" (*Id*. at p. 17.)

A series of decisions by the Supreme Court of the United States and this Court show that these principles bar retrial of an element or fact essential to a conviction or penalty allegation for which the prosecution failed to present sufficient evidence at a first trial.

In *Ashe v. Swenson* (1970) 397 U.S. 436 (*Ashe*), a jury found the accused not guilty of the armed robbery of a player at a poker game but, after the prosecutor charged him with the armed robbery of another player at the same game, a different jury found him guilty of that charge. (*Id.* at pp. 437-440.) *Ashe* held that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Id*. at p. 443.) Therefore, the collateral estoppel doctrine embodied within the Fifth Amendment protection of double jeopardy barred the second trial. (*Id.* at pp. 443, 445.) "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not," so that the accused's second prosecution was "wholly impermissible." (*Id.* at p. 445; *accord Simpson v. Florida* (1971) 403 U.S. 384, 386-387, citing *Ashe*, 397 at p. 443.)

This Court has similarly recognized that the doctrine of collateral estoppel, or issue preclusion, requires only "'the *opportunity to litigate* . . . not whether the litigant availed himself or herself of the opportunity.'" (*People v. Curiel* (2023) 15 Cal.5th 433, 452-453, original emphasis, citation omitted.) This includes

an "incentive to litigate ... intent to kill" if it is an element of any theory presented at trial. (*Id*. at p. 459.)

In *Hudson v. Louisiana* (1981) 450 U.S. 40 (*Hudson*), a jury convicted the defendant of first degree murder but the trial court in granting a motion for a new trial found insufficient evidence that the defendant struck the fatal blow. (*Id.* at pp. 41, 43.) At a second trial, a jury convicted defendant of the murder after the prosecution presented an eyewitness whose testimony it had not presented at the first trial and the Louisiana Supreme Court affirmed the conviction. (*Id*. at p. 42.)

Petitioner sought a writ of habeas corpus, contending that the Double Jeopardy Clause as construed by *Burks* "'precludes a second trial once the reviewing court has found the evidence legally insufficient' to support the guilty verdict. 437 U.S., at 18." (*Id*. at p. 42.) The trial court denied the request for relief and the Louisiana Supreme Court affirmed, "read[ing] *Burks* to bar a second trial only if the court reviewing the evidence -- whether an appellate court or a trial court -- determines that there was *no* evidence to support the verdict. Because it believed that the trial judge at petitioner's first trial had granted petitioner's motion for new trial on the ground that there was *insufficient* evidence to support the verdict, although some evidence, the Louisiana Supreme Court concluded that petitioner's second trial was not precluded by the Double Jeopardy Clause." (*Id*. at p. 42.)

The high court reversed. "Nothing in *Burks* suggests, as the Louisiana Supreme Court seemed to believe, that double jeopardy protections are violated only when the prosecution has adduced no evidence at all of the crime or an element thereof." (*Id*. at p. 43.) A finding of insufficient evidence of the identity element barred retrial. (*Ibid*.)

More recently, in *Yeager v. United States* (2009) 577 U.S. 110 (*Yeager*), the court held that double jeopardy barred a second trial of crimes after the jury at the first trial hung on insider trading and money laundering counts but acquitted the defendant of securities fraud charges which required proof of an element (possession of insider information) common to all counts. (*Id*. at pp. 115-116.) On appeal, the Fifth Circuit denied relief because it concluded that a conflict between the acquittals and the hung counts barred application of issue preclusion. (*Id*. at p. 1116.)

However, the high court resolved the issue in the defendant's favor on double jeopardy grounds rather than issue preclusion. (*Id*. at pp. 121-123.) As a matter of double jeopardy, the relevant inquiry was whether there was an acquittal on "an essential element" of any charge the prosecution sought to retry:

> "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." (*Id*. at p. 123.

Therefore, "the Double Jeopardy Clause precludes the Government from relitigating" the same element at a retrial. (*Id*. at p. 119.)

In *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*), this Court applied similar reasoning to hold that double jeopardy barred retrial of a penalty provision. In *Seel*, the jury convicted the defendant of attempted murder and found true the penalty provision of premeditation. (Pen. Code, § 664, subd. (a).) The Court of Appeal found insufficient evidence of premeditation but remanded for retrial on that penalty allegation. (*Id*. at p. 540.)

Seel reversed the grant of a retrial. "Because the premeditation allegation (§ 664(a)) effectively placed defendant in jeopardy for an 'offense' greater than attempted murder ([quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19]), the Court of Appeal's finding of evidentiary insufficiency bars retrial of the allegation under the federal double jeopardy clause." (*Id*. at p. 541.)

Conclusion.

The foregoing precedent shows that double jeopardy applies and bars retrial under any legally valid theory if there is an appellate determination of insufficient evidence of an element or a fact issue necessary to proof of that theory.

Thank you for bringing this letter brief to the Court's attention.

Very truly yours,

/s/ *Donald R. Tickle*

Counsel for Defendant-Appellant
Mao Hin

PROOF OF SERVICE
(*People v. Mao Hin,* S141519)

I declare that I am over the age of 18, not a party to this action and my business address is 909 New Jersey Ave. SE, No. 1302, Washington, D.C., 2003. My electronic service address is dontickle@gmail.com. On the date and by the means shown below, I served **Appellant's Letter Brief Addressing Double Jeopardy** as follows:

Mr. Jeffrey White
Deputy Attorney General
(Counsel for Respondent)
(Via True Filing)

Neoma Kenwood
California Appellate Project
(Via True Filing)

Ronald J. Freitas
District Attorney
Joaquin County
(Via True Filing)

Clerk of the Court,
San Joaquin County
Superior Court,
180 East Weber Ave.
Stockton, CA 95202
(Served by Mail)

Hon. Antonio Agbayani
180 East Weber Ave.
Stockton, CA 95202
(Trial Counsel for San
(Appellant Mao Hin)
(Served by Mail)

Appellant Mao Hin (F-17048)
Mule Creek State Prison
P.O. Box 409099
Ione, CA 95640
(Served by Mail)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 1, 2024, at Washington, D.C.

/s/ *Donald R. Tickle*

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. HIN (MAO)**
Case Number: **S141519**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **dontickle@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
LETTER BRIEF	S141519_Hin_Mao-Letter-Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Donald Tickle Law Office of Donald R. Tickle 142951	dontickle@gmail.com	e-Serve	11/1/2024 3:09:29 PM
Jeffrey White DOJ Sacramento/Fresno AWT Crim 255664	jeff.white@doj.ca.gov	e-Serve	11/1/2024 3:09:29 PM
Attorney Attorney General - Sacramento Office Court Added	sacawttruefiling@doj.ca.gov	e-Serve	11/1/2024 3:09:29 PM
Ronald J. Freitas, District Attorney	Ronald.freitas@sjcda.org	e-Serve	11/1/2024 3:09:29 PM
AJ Kutchins, OSPD 102322	aj.kutchins@ospd.ca.gov	e-Serve	11/1/2024 3:09:29 PM
Neoma Kenwood, CAP 101805	NKenwood@capsf.org	e-Serve	11/1/2024 3:09:29 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/1/2024
Date

/s/Donald Tickle
Signature

Tickle, Donald (142951)

Last Name, First Name (PNum)

Law Office of Donald R. Tickle

Law Firm