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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. ROBERT WARD FRAZIER, Defendant and Appellant.	Case No. S148863 Contra Costa County Superior Court No. 041700-6 **CAPITAL CASE**

Appeal from the Judgement of the Superior Court of the State of California for the County of Contra Costa

The Honorable John C. Minney

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) 31 Hofstra L.Rev. 913 42

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Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases* (2015) 56 B.C. L.Rev. 493 44

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Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty* (2001) 65 Alb. L.Rev. 181 31

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Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case* (2010) 90 B.U. L.Rev. 1147 .... 31, 42

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Kostik, *If I Have to Fight for My Life—Shouldn't I Get to Choose My Own Strategy? An Argument to Overturn the Uniform Code of Military Justice's Ban on Guilty Pleas in Capital Cases* (2014) 220 Mil. L.Rev. 242 30

Scudder, *With Friends Like You, Who Needs a Jury? A Response to the Legitimization of Conceding a Client's Guilt* (2006) 29 Campbell L.Rev. 137 25

State Bar of California, Rules of Professional Conduct Cross-Reference Chart (2023) <https://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of-Professional-Conduct.pdf> 48

Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.Rev. 1109 .... 43, 44

Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487 43

Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on McCoy v. Louisiana* (2018) 9 St. Mary's J. Legal Mal. & Ethics 92 31

White, *The Mental Illness Defense in the Capital Penalty Hearing* (1987) 5 Behav. Sci. & L. 411 43

Williams, *Criminal Law - The Sixth Amendment Right to Counsel - The Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys* (2005) 28 U. Ark. Little Rock L.Rev. 149 25

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. ROBERT WARD FRAZIER, Defendant and Appellant.	Case No. S148863 Contra Costa County Superior Court No. 041700-6 **CAPITAL CASE**

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

I.
APPELLANT WAS DENIED HIS FUNDAMENTAL SIXTH AMENDMENT RIGHT TO CHOOSE THE OBJECTIVE OF THE PENALTY PHASE DEFENSE

A criminal defendant's autonomy to determine the fundamental objectives of the defense is a critically important aspect of the Sixth Amendment right to the counsel. Nearly five decades ago, the United States Supreme Court thus held that a criminal defendant has a constitutional right to waive counsel and represent themselves at trial. (*Faretta v. California* (1975) 422 U.S. 806, 834 (*Faretta*); *McKaskle v. Wiggins* (1984) 465 U.S. 168, 178 [the "right to appear *pro se* exists to affirm the accused's individual dignity and autonomy."].) Following *Faretta*, however, the extent to which client autonomy extended "beyond self-representation" remained "muddied." (Astrich, *A Vociferous No Means No: How McCoy Mastered His Own Defense and Reestablished the Right to Autonomy* (2019) 93 Tul. L.Rev. 1005, 1007.)

In *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 (*McCoy*), the Court delivered a decisive victory for personal autonomy under the Sixth Amendment, reinforcing a defendant's "right to make the *fundamental* choices about his own defense." (*Id.* at p. 1511, italics added.) Observing that the Sixth Amendment requires a defendant be afforded "assistance" for "his" defense, the Court held 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 p. 1505.) Moreover, because "a client's autonomy, not counsel's competence" is implicated by an attorney's concession of guilt over objection, the error is structural and requires reversal. (*Id.* at pp. 1510-1512.)

The instant case presents a closely related yet unanswered question about the intersection of the Sixth Amendment right to counsel and defendant autonomy rights in a capital prosecution: Does a capital defendant have a Sixth Amendment right to *limit* but not fully preclude the mitigating evidence his attorney presents at the penalty phase? (See *People v. Poore* (2022) 13 Cal.5th 266, 312 (conc. opn. of Liu, J.) (*Poore*) ["Whether *McCoy* affects our precedent on the right of a capital defendant to control counsel's presentation of mitigating evidence awaits assessment by our court in a case in which the issue is presented."].)

Here, from the moment the guilt phase concluded until the completion of the penalty phase, appellant repeatedly informed the

court and appointed counsel[1] that he was opposed to certain categories of mitigating evidence appointed counsel planned to present. The trial court, however, deemed the dispute to be one of trial tactics that appointed counsel controlled. The court also denied appellant's numerous requests to substitute counsel or represent himself, which were made, in large part, to prevent appointed counsel from presenting the disputed mitigation evidence.[2] Appointed counsel thus presented the disputed evidence over appellant's objection and the jury returned a death verdict.

As discussed *infra*, *McCoy's* heightened focus on client autonomy applies with equal force to a request to limit the mitigating evidence presented at the penalty phase of a capital trial. This Court's prior jurisprudence regarding control over the penalty phase objective further supports permitting a defendant to limit the mitigating evidence. At least two other state supreme courts have expressly recognized that limiting the scope of mitigating evidence is an objective of the defense that the defendant controls. Mitigating evidence, moreover, is not a panacea and a defendant's desire to limit such evidence for personal reasons is neither per se unreasonable nor does it necessarily raise concerns about the reliability of the sentencing judgment. Finally, other public policy

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[1] Appellant was represented at both the guilt phase and penalty phases of his trial by Wendy Downing ("Downing") and Eric Quandt ("Quandt"). Unless otherwise indicated, Downing and Quandt are referred to collectively as "appointed counsel."

[2] Appellant has separately challenged the denial of his repeated requests to represent himself at the penalty phase. (Appellant's Opening Brief ("AOB"), filed 10/27/2014, pp. 69-143.)

considerations support recognizing a capital defendant's right to limit the presentation of mitigating evidence at the penalty phase.

Accordingly, the presentation of the disputed mitigation evidence, over appellant's repeated and express objections, violated his Sixth Amendment right to the *assistance* of counsel. Because the error is structural, the penalty judgment must be reversed.

A. Relevant proceedings below.

On November 5, 2004, appellant was charged with one count of murder (Pen. Code, § 187),[3] forcible rape (§ 261, subd. (a)(2)), and forcible sodomy (§ 286, subd. (c)(2)), as well as two special circumstances based on the murder occurring during the commission of the rape and sodomy (§ 190.2, subd. (a)(17)). (2CT 336-338.) On June 21, 2006, the jury found appellant guilty of all charges and found true the special circumstances. (6CT 1640-1641.)

Immediately following the verdicts, appointed counsel requested an in camera hearing because appellant was considering representing himself at the penalty phase. (46RT 9447-9452; Sealed 46RT 9456.) The court continued the matter, however, so that appellant had more time to confer with appointed counsel, who also hoped to resolve the issue before providing the prosecution with a penalty phase witness list. (Sealed 46RT 9456-9459.)

On June 23, 2006, the court granted appointed counsels' request to delay the penalty phase until July 31, 2006, because Downing was recovering from a broken arm. (47RT 9467-9469,

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[3] All further references are to the Penal Code unless otherwise indicated.

9505-9508.) Appointed counsel also orally provided a witness list to the prosecutor, which included: Dr. Douglas Tucker ("Dr. Tucker"), a psychiatrist with expertise on sexual assault; Dr. Gretchen White ("Dr. White"), a psychologist and mitigation expert; Dr. Stephen Seligman ("Dr. Seligman"), a clinical psychologist and expert on early childhood development; and Dr. Kimberly Merrill, a psychologist who treated appellant when he was a youth. (47RT 9485-9487.) At the end of the hearing, appellant stated that he was not yet moving to represent himself but reserved his right to do so prior to the start of the penalty phase. (47RT 9513.)

On July 17, 2006, the court held another in camera hearing. (Sealed 47RT 9543-9560.) Appointed counsel asked the court to facilitate a phone call between appellant and his biological mother, Barabra Tinsley ("Barbara").[4] (*Id.* at pp. 9544-9545.) Appointed counsel intended to call Barbara as a penalty phase witness, which appellant was opposed to doing because he worried that she was "pressured" to participate. (*Id.* at pp. 9543-9545.) The court ordered jail staff to arrange a fifteen-minute call with appellant, appointed counsel, and Barbara on the following day.[5] (*Id.* at pp. 9556-9558.)

On July 26, 2006, the court held a hearing to discuss penalty phase evidentiary matters. (47RT 9611-9709.) As relevant, the court heard argument about whether the defense could present certain videos to the jury during opening statements. (47RT 9626-9631,

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[4] For clarity, Barbara Tinsley and Larry Tinsley, Jr. are referred to by their first names. No disrespect is intended.

[5] Barbara subsequently testified at the penalty phase (50RT 10145-10201) and appellant did not object.

9665-9696; see 6CT 1830-1838 [Defense In Limine Motion to Admit Videotape].) The videos were intended to help summarize studies that a defense expert, Dr. Seligman, relied upon in formulating his testimony. (47RT 9626-9631.) The videos depicted infants and monkeys who were separated from their mothers and summarized scientific research on "attachment theory," which is the study of the detrimental effect upon a child's psychological and brain development that can result from a lack of maternal attachment. (*Ibid.*) Appointed counsel argued that the videos were relevant because appellant was given up for adoption when he was less than a year old. (47RT 9628.) Appointed counsel also informed the court that they intended to call as a witness appellant's half-brother, Larry Tinsley, Jr. ("Larry") who, unlike appellant, was raised by their biological mother. (47RT 9631-9634.) Appointed counsel planned to contrast Larry, who was raised in a "nurturing, loving environment" and had gone on to graduate from college and start his own family, to appellant, who was raised by his "cold, unnurturing, [and] rigid" paternal grandmother. (47RT 9632-9635.)

During the discussion of this mitigation evidence, appellant interjected that he wanted to substitute appointed counsel. (47RT 9632.) After appointed counsel further described Larry's anticipated testimony, appellant moved for a mistrial because his request for substitute counsel was not being heard. (47RT 9635.) The court responded that it wanted to make sure he heard the full presentation about the intended mitigation defense before deciding whether to substitute counsel. (*Ibid.*) Appellant indicated that he had "heard it all before." (*Ibid.*)

After conferring further with appointed counsel, appellant again requested to substitute counsel. (47RT 9638-9639.) The court thus held an in camera hearing and appellant explained that he wanted to discharge his attorneys, in large part[6] because "the approach that they're taking in the penalty phase misrepresents me." (Sealed 47RT 9643-9662.) As appellant explained:

> … I'm not trying to get by the legal system by presenting cheap emotionalism to the jury of who -- whatever their interpretation of what documentation they have means about me. Basically just looking at my brother makes more money than me and for representing a video with babies in an orphanage as if one of them is me or something like that. I don't understand this. I haven't discussed it with them. I don't think that it's a good idea.

(*Id*. at pp. 9644-9645.) In response, Downing described the defense team's efforts to prepare a "very complex penalty phase" based on a "huge institutional history." (*Id*. at p. 9646.) She was "sorry" appellant disagreed with the defense mitigation strategy but felt it was her "duty" to present the evidence. (*Ibid.*)

The court then stated the following regarding the dispute over the mitigation evidence:

> As to the choices for presentation of the penalty phase issue, *that is very definitely a trial tactic, or strategy,*

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[6] Appellant also noted that trial counsel had been suffering from a broken arm during the guilt phase and he believed the injury had interfered with her ability to represent him. (Sealed 47RT 9644, 9655-9656) Quandt further suggested that some of appellant's frustration was related to an incident at the jail with a correctional officer, which appellant felt his attorneys were unable to effectively address. (*Id.* at pp. 9647-9651)

> *that counsel is entitled to work up in this very serious second phase.*
>
> …
>
> I understand your right to disagree with the way they want to do it. *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 a decision on trial tactics and strategy.*

(Sealed 47RT 9657-9658, italics added.) The court denied appellant's request to substitute counsel. (*Id.* at pp. 9658-9659.)

Appellant then stated that he would not make a *Faretta* motion until he had another chance to confer with appointed counsel. (Sealed 47RT 9659.) Appellant also asked that the court limit what was put on the record in front of the prosecutor about the disputed mitigation evidence until he had more time to decide whether to request pro per status. (*Id.* at pp. 9659-9662.) The court went back on the record with the prosecutor and, after hearing further argument, ruled that the defense could present the videos depicting monkeys and infants during the opening statement and as part of Dr. Seligman's testimony. (47RT 9687-9697.)

On July 31, 2006, the first day of the penalty phase, appellant filed a handwritten *Faretta* motion. (6CT 1866, 1873-1876.) The court held an in camera hearing and appellant again expressed disagreement with the mitigating evidence. (Sealed 48RT 9792-9805.) Appellant clarified that he was not alleging ineffective assistance of counsel, but "[f]rom what I've seen -- or from what I've been allowed to see with regard to video testimony, it is my appointed counsel's intention to mitigate the why of this sickening crime I've been convicted of." (*Id.* at p. 9794.) Appellant believed that

"promoting the theory that I'm 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 mitigating factor." (*Ibid.*) He explained that declining to present evidence about his reduced culpability did not mean that "there is no mitigation worthy of the jury's consideration." (*Ibid.*) In appellant's view, the jury was not "so heartless that they would silently reject hearing how my friends and loved ones will be affected if they decided to have me executed." (*Id.* at p. 9795.)

> What I mean to only one other person is a mitigating factor. While video images of motherless monkeys might be cute, it does not even come close to reflecting accurately how I was raised. In fact, the human child in the video appears to be much older than I was when I was given to my adopted mother. Using so-called primates and studies to determine why or how humans act the way they do is an evolutionary science.

(*Ibid.*) He was also concerned about the focus on evolutionary science, which he did not think he should be forced to present. (*Ibid.*)

Downing responded that appellant's case was one of the "most complex and difficult" penalty defenses she had prepared. (Sealed 48RT 9796-9800.) She explained that appellant suffered from "severe and numerous psychiatric symptoms" that presented throughout his life from a "very young age." (*Id.* at pp. 9796-9799.) An MRI scan further showed that he had a "highly unusual brain structure" and the "probability that his brain is normal is much less than five percent." (*Id.* at pp. 9797, 9800.) Downing also believed appellant was in denial about his mental impairments and would

thus be unable to present the evidence if granted pro per status. (*Id.* at p. 9796.)[7]

Responding to Downing's comments, appellant joked that "the way she described the probability statistics of my brain damage, I'm surprised I could have remembered anything she said, sir." (Sealed 48RT 9800.) Appellant continued:

> It's not an expert's opinion to say that I'm not capable of discerning what mitigation is most beneficial for me in this case. It doesn't have to be about the why. The absence of a mitigating factor is not aggravation. You've [the trial court] instructed the jury yourself on that. And if I'm allowed to call my choice of witnesses, I believe I could effectively represent myself.

(*Id.* at pp. 9800-9801.)

The court denied the *Faretta* motion. (Sealed 48RT 9804.) First, the court was unsure if appellant could competently waive counsel considering the issues highlighted by appointed counsel. (*Id.* at pp. 9801-9802.) The court also found the motion was equivocal because appellant made it out of frustration. (*Id.* at pp. 9802-9803.) As to the timing of the motion, appellant explained that he had not requested pro per status at the prior *Marsden* hearing because he was waiting to "see what other evidence was going to be admitted." (*Id.* at p. 9804.) The court, however, found the motion was untimely on the first day of the penalty trial due to the unitary nature of the

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[7] Downing also described other aspects of the mitigation evidence, which included prison experts who could give context to a prior incident the prosecutor planned to present as an aggravating factor, and about appellant's likelihood of future dangerousness if sentenced to life in prison. (Sealed 48RT 9797-9799.) Appellant, however, did not indicate any objection to this evidence.

capital trial and denied a subsequent motion for a mistrial. (*Id.* at pp. 9804-9805.)

Appellant continued to object to specific categories of mitigating evidence and to request to be pro per throughout the penalty phase based on the dispute over the mitigation evidence.

On August 1, 2006, during another in camera hearing, he explained that his intended penalty phase defense "would not have included such complicated issues that I believe likely would only anger the jury, ultimately costing me life…" (Sealed 49RT 9917.) "How they intend to first represent me essentially as brain damaged and then this selfless nice guy teaching [a longtime friend] the secrets of family is like a very Dr. Jekyll and Mr. Hyde story." (*Ibid.*) The court declined to reconsider pro per status and denied appellant's related motion for a mistrial. (*Id.* at pp. 9918-9919.)

On August 3, 2006, appellant renewed his *Faretta* motion and the court held another in camera hearing. (Sealed 49RT 10087-10091.) Appellant explained that he was also opposed to testimony from a childhood friend that indicated appellant had been molested by his uncle as a child because the molestation "never took place" and the testimony would lead to the "slandering of an innocent person." (*Id.* at p. 10088.) Appellant also questioned whether he had a brain abnormality, noting he had passed the GED and California High School Exit exam, the latter of which he had taken to "see if my abnormal brain needs sharpening." (*Ibid.*) He denied that he "harbored any suppressed memories." (*Id.* at p. 10089.) The court again denied the *Faretta* motion. (*Id.* at pp. 10089-10091.)

On August 9, 2006, prior to the testimony of Dr. Seligman, which included the video depicting infants and monkeys as part of a research study related to attachment disorder, appellant objected and again asked to be pro per. (51RT 10271-10272.) The court denied the request without a confidential hearing. (*Id.* at pp. 10272-10274.) Later that day, during the testimony of Jeff Triolo ("Triolo"), a friend who claimed that appellant had disclosed sexual abuse when they were kids, appellant attempted to slip a note to the prosecutor urging him to object based on a lack of personal knowledge by the witness. (*Id.* at pp. 10333, 10341, 10377.)

The court then held another in camera hearing and appellant explained that he was not "concerned about the embarrassment" of Triolo's testimony but felt it was "slandering my uncle who never did anything like that." (Sealed 51RT 10381.) Moreover, "[a]s far as the reliability goes and this repeated attempt to try and make me look like I'm suppressing some kind of childhood mental illness and their interpretation of everything is just going to be viewed by the jury as nothing more than people trying to help me because they like me." (*Ibid.*) Appellant asked the court to reconsider pro per status, but the court declined. (*Id.* at pp. 10381-10382.) The court also reiterated its view that any disagreement about the mitigating evidence was one of "strategies and tactics," which appointed counsel was "entitled" to control. (*Id.* at p. 10383.)

On August 10, 2006, the court held a hearing related to several issues implicating appellant's competency. The hearing was prompted by Dr. White's testimony the preceding day, which questioned appellant's ability to assist his attorneys due to his

inability to acknowledge his mental health and other cognitive issues. (52RT 10491-10493.) Appointed counsel, however, informed the court that they had "extensively" examined the issue and had no basis, under current legal standards, to declare a doubt as to appellant's competency. (*Id.* at pp. 10495-10496.)

The court then held another in camera hearing and appellant continued to express disagreement with the mental impairment evidence, describing it as having "no basis in fact." (Sealed 52RT 10518-10520.) He singled out Dr. White, objecting to her opinion that he could not assist his attorneys as outside the scope of her expertise and not based on personal or accurate knowledge. (*Id.* at p. 10519.) He also stated that if granted pro per status he would only need one day to prepare, after which he would read a prepared statement to the jury. (*Ibid.*) The court declined to reconsider pro per status. (*Id.* at p. 10521.) The court also advised appellant that he would not be allowed to make a statement to the jury in lieu of testifying, even if granted pro per status, because the statement would not be subject to cross-examination. (*Ibid.*)

Following the in camera hearing, the court indicated that it had no doubt about appellant's competency. In support of this finding, the court noted appellant was able to research and quote case law and his "issues are targeted at things that are of concern to him, and not wandering and ambivalent." (52RT 10534-10535.)

On August 14, 2006, the court held another in camera hearing after appellant made a "*Marsden* or *Faretta* motion." (53RT 10785; Sealed 53RT 10790.) Appellant informed the court that he had decided not to testify after consulting with his attorneys. (Sealed

53RT 10797-10798.) Appellant, however, noted that he would not need to testify if granted pro per status because he could make a closing argument that was not subject to cross examination. (*Id.* at p. 10798.) The court denied both motions. (Sealed 53RT 10796, 10799-10800.) The court also informed appellant that while he could make a closing statement if pro per, he would be limited to arguing facts that were supported by admissible evidence. (*Ibid.*)

On August 15, 2006, during an in camera hearing about appellant's desire to testify against the advice of counsel, appellant renewed his *Marsden* and *Faretta* motions. (Sealed 54RT 10881, 10885.) The court denied both motions. (*Id.* at pp. 10890-10891.) Appellant then stated that he had decided not to testify and had asked to be pro per to avoid the need to do so. (*Id.* at p. 10892.)

On August 16, 2006, at another in camera hearing, appellant informed the court that he decided not to testify under "duress," which he again attributed to the denial of his *Marsden* and *Faretta* motions. (Sealed 55RT 11239.) The court responded that to the extent appellant was attempting to renew his *Faretta* motion, it was denied. (*Id.* at p. 11240.) Following the in camera hearing, the court found appellant had knowingly waived his right to testify. (55RT 11243-11245.) The defense rested shortly thereafter. (*Id.* at p. 11294.)

In the end, appointed counsel presented all the evidence to which appellant objected, including testimony about: 1) attachment theory and its connection to appellant's childhood and separation from his biological mother; 2) how appellant's half-brother, who was raised by his biological mother, led a happy and successful life; 3)

appellant's longstanding mental health issues and brain abnormality; and 4) purported sexual abuse by an uncle. Appointed counsel also presented other mitigation evidence, including: 1) testimony about his life and current relationship with friends and family, including his birth mother; and 2) testimony about appellant's record of institutional violence and likelihood for future violence if sentenced to life without parole. (AOB 21-35 [Statement of Facts describing defense case in mitigation].)

On August 21, 2006, the jury began deliberating. (57RT 11632.) The jury continued deliberating on August 22nd and 23rd, asking to review, inter alia, video of appellant being interrogated by police and for portions of Dr. White's testimony about her qualifications and regarding similar testimony she gave about a defendant in another case. (57RT 11652; 58RT 11655-11656; 7CT 2032, 2034-2035, 2198-2199.) On August 24, 2006, the jury returned a death verdict. (58RT 11670-11671; 7CT 2043.) On December 15, 2006, the court denied an automatic motion to modify the verdict and imposed a sentence of death. (8CT 2263.)

B. Capital defendants have a sixth amendment right to control the fundamental objectives of the penalty phase defense, including limiting certain aspects of the mitigating evidence.

1. *McCoy v. Louisiana* and the primacy of client autonomy under the sixth amendment.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to "Assistance of Counsel for his defence." The Sixth Amendment, however, also gives criminal defendants the right to reject counsel and represent themselves at

trial. (*Faretta*, *supra*, 422 U.S. 806, 816.) This right to self-representation is derived from the language of the Sixth Amendment itself, which "speaks of the 'assistance' of counsel," because "an assistant, however expert, is still an assistant." (*Id.* at pp. 819-820 ["The language and spirit of the Sixth Amendment contemplate that counsel … shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself."].) "Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." (*Id.* at p. 821.) Importantly, the right to self-representation "exists to affirm the accused's individual dignity and autonomy." (*McKaskle v. Wiggins*, *supra*, 465 U.S. 168, 178.)

Following *Faretta*, however, it remained unclear whether and to what extent client autonomy extended to disagreements with counsel over trial strategy and objectives. On the one hand, the Court held that "the accused has the 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* (1983) 463 U.S. 745, 751; *Florida v. Nixon* (2004) 543 U.S. 175, 187 (*Nixon*).) The Court also held, however, that counsel generally controlled matters of "trial management" as a matter of "practical necessity," including "the objections to make, the witnesses to call, and the arguments to advance." (*Gonzalez v. United States* (2008) 553 U.S. 242, 249; *Wainwright v. Sykes* (1977) 433 U.S. 72, 93 (conc. opn. Burger, J.); see also *Taylor v. Illinois*

(1988) 484 U.S. 400, 418 ["The adversary process could not function effectively if every tactical decision required client approval."].)

Whether a particular dispute involved a defendant's "objectives" or the lawyer's ability to control "trial management" was not always clear. As a result, "[i]n the Court's jurisprudence, the autonomy interest has sometimes prevailed, but it has also been undercut in other cases." (Astrich, *A Vociferous No Means No: How McCoy Mastered His Own Defense and Reestablished the Right to Autonomy*, *supra*, 93 Tul. L.Rev. 1005, 1007.)

For example, in *Nixon*, *supra*, at pp. 178, 186-187, the Court considered whether counsel could concede guilt in a capital trial without the defendant's express consent. In an opinion by Justice Ginsburg, the Court held that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." (*Id.* at p. 192.) Thus, "if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." (*Ibid.*)

Nixon was met with criticism as it appeared to categorize the decision to concede guilt as a matter of trial strategy rather than an objective of the defense, significantly undermining a criminal defendant's autonomy at trial. (See, e.g., Fox, *No Ethics for Capital Defendants* (2005) 16 No. 1 Prof. Law. 2, 10; Scudder, *With Friends Like You, Who Needs a Jury? A Response to the Legitimization of Conceding a Client's Guilt* (2006) 29 Campbell L.Rev. 137; Williams,

Criminal Law - The Sixth Amendment Right to Counsel - The Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys (2005) 28 U. Ark. Little Rock L.Rev. 149.) The defendant in *Nixon*, however, "never verbally approved or protested" the concession. (*Nixon*, *supra*, 543 U.S. 175, 181.) *Nixon*, therefore, did not address whether counsel could concede guilt if the defendant objected. Fourteen years later, after briefing in appellant's current appeal was completed, the Court addressed the question left unanswered in *Nixon* and delivered a clear victory for client autonomy.

In *McCoy*, *supra*, 138 S.Ct. 1500, 1505-1506, the defendant was charged with murdering three family members during a dispute with his estranged wife. McCoy "insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong." (*Id.* at p. 1506.) Appointed counsel, however, concluded that the evidence was "overwhelming" and "absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase." (*Ibid.*) Despite McCoy's express insistence that he did not wish to concede guilt, the trial court refused to substitute counsel and counsel conceded to the jury that McCoy was guilty of the three murders. (*Id.* at pp. 1506-1507.) McCoy also testified, "maintaining his innocence and pressing an alibi difficult to fathom." (*Id.* at p. 1507.) The jury found McCoy guilty and returned "three death verdicts" at the penalty phase. (*Ibid.*) McCoy appealed, arguing his rights were violated when counsel conceded guilt over his objection.

The majority opinion in *McCoy*, again written by Justice Ginsburg, reversed the judgment, holding that a capital defendant has a right to insist that his attorney not concede guilt, even if the attorney reasonably believes that doing so gives the defendant the best chance to avoid a death sentence. (*McCoy*, *supra*, 138 S.Ct. 1500, 1505.) The Court, as it had in *Faretta*, observed that the choice to have counsel is not "all or nothing," and thus to "gain assistance, a defendant need not surrender control entirely." (*Id.* at p. 1508.) "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial." (*Ibid.*) "These 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*." (*Ibid.*)

The Court further observed that while counsel "may reasonably assess a concession of guilt as best suited to avoiding the death penalty," the "client may not share that objective." (*McCoy*, *supra*, at p. 1508.) For example, the defendant may wish to avoid, "above all else, the opprobrium that comes with admitting he killed family members." (*Ibid.*) Alternatively, the defendant "may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration." (*Ibid.*) The Court thus recognized that a defendant's "objectives" in a capital trial are broader than merely deciding whether to plead guilty or proceed to trial. The Sixth Amendment, which encompasses a "defendant's right to make the fundamental choices about his own defense" (*Id.* at p. 1511),

thus includes the autonomy to control significant strategic decisions at trial.

While the dispute in *McCoy* arose in the context of counsel's decision to concede *guilt* in a capital trial, the Court's renewed focus and elevation of client autonomy rights applies with equal force to disputes over the scope of mitigating evidence at the penalty phase.

First, *McCoy's* reasoning does not suggest that it is limited to guilt proceedings or that it does not extend to disputes over the objectives of the penalty phase. In fact, the dispute in *McCoy* was very much oriented towards the objective of the penalty phase as McCoy's attorney believed that "absent a concession at the guilt stage" a "death sentence would be impossible to avoid." (*McCoy, supra,* at p. 1506.) Moreover, the guilt and penalty phases constitute a single, "unitary capital trial."[8] (*People v. Hamilton* (1988) 45 Cal.3d 351, 369; *People v. Doolin* (2009) 45 Cal.4th 390, 454; *People v. Hardy* (1992) 2 Cal.4th 86, 193-195.) A defendant's autonomy interest, therefore, should be equal at both stages. There is no logical basis to limit *McCoy's* reasoning to only the guilt phase of a capital trial. (See *People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 926 (*Amezcua*) [citing *McCoy* to reject argument that counsel could present mitigating evidence "even after defendants made clear their desire to present no penalty phase defense."].)

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[8] The trial court denied appellant's repeated *Faretta* motions reasoning, in part, that they were untimely on the first day of the penalty phase because a capital trial is a unitary proceeding. (Sealed 47RT 9658-9659; Sealed 48RT 9792-9793)

Second, *McCoy* recognized that the "Sixth Amendment, in 'grant[ing] to the accused personally the right to make his defense,' 'speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.' [Citation.]" (*McCoy*, *supra*, 138 S.Ct. 1500, 1508.) Thus, while counsel may "reasonably assess" that a particular trial strategy is "best suited to avoiding the death penalty," the defendant may have other personal objectives that take precedence. (*Ibid.*) The Court also cited with approval prior cases recognizing that a fully informed defendant is in the best position to determine his or her own best interests. (*Ibid.*)

McCoy thus reflects a broad recognition of the importance of a criminal defendant's autonomy rights, rather than a narrow evaluation of whether a particular dispute is an objective of the defense or an aspect of trial management. For example, the Court could have resolved the constitutional issue in *McCoy* by narrowly defining the "objective" of the defense at trial to include only the defendant's decision to plead not guilty. Thus, if a capital defendant elects to plead not guilty, appointed counsel would have unfettered discretion to determine how to best achieve the objectives of seeking an acquittal and/or avoiding a death sentence as matter of trial strategy, including conceding guilt. The defendant would otherwise have no autonomy at trial, other than to decide whether to testify.

McCoy, however, rejected such an inflexible division of control as inconsistent with the Sixth Amendment where the defendant expressly objects to counsel's intended strategy. Instead, a defendant has the right to make "the *fundamental choices* about his own defense," including significant decisions that could also be

characterized strategic decisions about how to conduct the trial. (*McCoy*, *supra*, at p. 1511, italics added.) "By stating that a defendant has a 'right to make the *fundamental choices* about his own defense,' the Court indicated an intention to expand the extent of a defendant's control to encompass decisions beyond just the objective of the defense." (Hamilton, *The Right to Decide an Attorney Is Wrong: The Extent of A Defendant's Right to Control the Objective of the Defense and Reject Counsel's Trial Strategy* (2022) 74 Baylor L.Rev. 285, 299.)

In other words, *McCoy* was not just about the choice of plea. McCoy was permitted to plead not guilty at his trial. The Court, nevertheless, held that he had a further autonomy right to control how counsel went about litigating his case considering his personal objective of not being seen as a murderer of his family members. For the same reasons, a capital defendant who seeks the assistance of counsel at the penalty phase must also retain the right to object to categories of mitigation evidence for deeply held personal reasons.

It is also important to note that *McCoy* was decided in the context of the long running debate about how to best resolve conflicts between a defendant and counsel in capital cases. Proponents of client autonomy argued that a defendant is in the best position to determine the optimal defense strategy, whereas opponents of client autonomy cited the risk of unreliable judgments and state-assisted suicide. (See, e.g., Kostik, *If I Have to Fight for My Life—Shouldn't I Get to Choose My Own Strategy? An Argument to Overturn the Uniform Code of Military Justice's Ban on Guilty Pleas in Capital Cases* (2014) 220 Mil. L.Rev. 242, 286 & fn. 276;

Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty* (2001) 65 Alb. L.Rev. 181, 190-191.) Importantly, the majority in *McCoy* relied heavily on an influential article by Erica J. Hashimoto, which advocated elevating criminal defendant autonomy rights from a "constitutional value" to a "constitutional right." (See *McCoy*, *supra*, 138 S.Ct. 1500, 1508, citing Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case* (2010) 90 B.U. L.Rev. 1147, 1152-1160; Brand, *Reinforcing Autonomy: Legal Ethics and Constitutional Compliance in Indigent Criminal Defense McCoy v. Louisiana*, *138 S. Ct. 1500 (2018)*, (2019) 84 Mo. L.Rev. 1095, 1105-1106 [noting Justice Ginsberg's reliance on Hashimoto's sentiment that "the true optimal strategy for a defendant in a criminal case depends on how individual defendants define their own 'best possible result,'" thus supporting an "autonomy right for criminal defendants to control strategy decisions in their own defense."].)

McCoy thus represents "an important victory for defendants' autonomy interests after decades of confusion about when attorneys have authority to make decisions for defendants." (Astrich, *A Vociferous No Means No: How McCoy Mastered His Own Defense and Reestablished the Right to Autonomy*, *supra*, 93 Tul. L.Rev. 1005, 1006; Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on McCoy v. Louisiana* (2018) 9 St. Mary's J. Legal Mal. & Ethics 92, 102 [*McCoy* is "a decisive statement of the priority of the value of the defendant's autonomy" and apparent "victory for the vision of client-centered representation and the humanistic value of the inherent dignity of the accused."].)

Accordingly, *McCoy's* reasoning extends to a capital defendant the right to *limit* the presentation of certain mitigating evidence at the penalty phase to achieve his or her personal objectives.

2. This Court's jurisprudence supports recognizing a capital defendant's autonomy to limit the scope of mitigating evidence.

This Court has yet to address whether *McCoy's* recognition of client autonomy applies to disputes over the scope of mitigating evidence. This Court's prior jurisprudence, however, is consistent with applying *McCoy* to hold that a capital defendant has a Sixth Amendment right to *limit* mitigating evidence at the penalty phase.

First, this Court has long held that appointed counsel does not render ineffective assistance of counsel by acquiescing to a defendant's request not to present *any* mitigating evidence. (*People v. Lang* (1989) 49 Cal.3d 991, 1031 (*Lang*), abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176; see *Schriro v. Landrigan* (2007) 550 U.S. 465, [defendant not entitled to evidentiary hearing regarding ineffective assistance of counsel where he instructed counsel not to present any mitigating evidence].) In analyzing whether counsel had rendered effective assistance, this Court emphasized the right of defendants to prioritize non-legal factors in deciding whether to forego mitigation evidence. As this Court observed, "an attorney's duty of loyalty to the client means the attorney 'should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client. . . .'" (*Lang*, *supra*, 49 Cal.3d 991, 1031, citing ABA Model Code Prof.

Responsibility, EC 7-8.) To "require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation." (*Ibid.*) Requiring counsel to present mitigating evidence might also "cause some defendants who otherwise would not have done so to exercise their Sixth Amendment right of self-representation."[9] (*Ibid.*)

This Court has similarly rejected that a penalty judgement lacks constitutional reliability if the defendant forgoes a mitigation defense, even where the defendant actively seeks a death sentence. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9 ["failure to present mitigating evidence generally does not make a death judgment unreliable in a constitutional sense in the absence of misleading or erroneous instructions and argument."].) In doing so, this Court emphasized the "importance" "attached to an accused's ability to control his or her own destiny and to make fundamental decisions affecting trial of the action." (*Id.* at p. 1222.) Therefore, even a defendant's intent to actively seek a death sentence did not compel denial of a motion for self-representation. (*Ibid.*)

This Court's decisions in *Lang* and *Bloom* thus recognize a compelling client autonomy interest at the penalty phase of a capital trial. It makes little sense that counsel could completely forego a penalty phase defense at the defendant's direction, even where the

[9] As this Court predicted, the disagreement over the mitigating evidence caused appellant to repeatedly request to represent himself or to substitute counsel.

defendant actively seeks a death sentence, but a capital defendant cannot preclude counsel from presenting only specific aspects of the mitigation evidence.

Following *McCoy*, this Court has also recognized that the expanded autonomy right recognized there is applicable to decisions about the penalty phase objective. In *Amezcua*, *supra*, 6 Cal.5th 886, 920-926, the defendants were informed about the penalty phase evidence the attorneys wanted to present and about the increased risk of a death sentence if no mitigation was presented. (*Id.* at pp. 920-922.) The defendants, however, opposed the mitigating evidence. Flores opposed the mitigation evidence because, inter alia, he did not want his friends and family to have to testify and take the blame for what he had done. (*Id.* at p. 922.) Amezcua opposed the mitigation evidence because he did not want "nobody up there crying on my behalf…" (*Ibid.*) The court carefully admonished the defendants about the risks of their decision not to present the evidence, but they were unequivocal and the penalty phase "proceeded according to defendants' directives." (*Id.* at p. 925.)

On appeal, the defendants argued that because they had elected to be represented by counsel, they did not have the right to "control the attorney's strategic and tactical decisions regarding the defense." (*Amezcua*, *supra*, 6 Cal.5th 886, 925.) Rejecting that argument, this Court noted that it had "consistently held, among the core of fundamental questions over which a represented defendant retains control is the decision whether or not to present a defense at the penalty phase of a capital trial, and the choice not to do so is not a denial of the right to counsel or a reliable penalty

determination." (*Ibid.*) Importantly, this Court also found that *McCoy* supported the holding. As this Court explained:

> Defendants claim that the decision to present certain mitigating evidence or request particular jury instructions are aspects of trial management. As such they are controlled by counsel even after defendants made clear their desire to present no penalty phase defense. They are incorrect. To accept their argument would be to read out of existence the allocation of responsibilities the high court recognized in *McCoy*.

(*Id.* at p. 926.)

This Court's recent decision in *People v. Poore*, *supra*, 13 Cal.5th 266, does not undermine the conclusion that a defendant has a Sixth Amendment right to *limit* the scope of mitigating evidence. There, this Court rejected the defendant's argument that his death verdict was "constitutionally unreliable" where trial counsel complied with his request not to present mitigating evidence. (*Id.* at pp. 300-307.) The Court again reiterated that there is no Sixth Amendment violation where counsel acquiesces "'in the defendant's *own* decision that no defense shall be presented on his behalf.'" (*Id.* at p. 306, original italics.) This Court also cited *McCoy*, however, to hold that the defendant had "no right to control how his lawyer would present a defense if he chose one because '[t]rial management is the lawyer's province.'" (*Id.* at p. 307 ["Counsel properly has the prerogative to control 'choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance.'"].) The defendant, therefore, could not force his attorney to present evidence the attorney concluded would not be helpful. (*Ibid.*)

Justice Liu wrote a concurring opinion noting the “tension” between *McCoy* and this Court’s prior precedents regarding acquiescence to a defendant’s decision to present no mitigating evidence. (*Poore*, *supra*, 13 Cal.5th 266, 311-312 (conc. opn. of Liu, J.).) Justice Liu observed that it was “not obvious that decisions about the particular evidence to present at the penalty phase — or whether to present mitigation evidence at all — should be considered part of ‘the objective of the defense’ that remains within a represented defendant’s control under the division of roles articulated in *McCoy*. [Citation.]” (*Id.* at p. 312.) “Rather, those decisions would seem to be aspects of ‘[t]rial management’ reserved to counsel: They are ‘strategic choices about how best to *achieve* a client's objectives’ as opposed to ‘choices about what the client's objectives in fact are.’ [Citation.]” (*Ibid.*)

In Justice Liu’s view, “[f]ollowing *McCoy*, when a capital defendant at the penalty phase has decided to seek a verdict of life without the possibility of parole rather than death, counsel *may* be empowered to decide what evidence to bring forward to advance that objective, and ceding that authority to the defendant *may* constitute ineffective assistance.” (*Ibid.*, italics added.) The defendant in *Poore*, however, only raised an Eighth Amendment claim based on the right to a reliable judgment and did not claim that he received ineffective assistance under the Sixth Amendment. (*Id.* at pp. 311-312.) Accordingly, “[w]hether *McCoy* affects our precedent on the right of a capital defendant to control counsel’s presentation of mitigating evidence awaits assessment by our court in a case in which the issue is presented.” (*Ibid.*)

Poore, therefore, did not resolve whether a defendant can *preclude* the presentation of certain aspects of a mitigation defense for personal, strategic, or normative reasons. (See *Poore*, *supra*, 13 Cal.5th 266, 306, fn. 14 ["Because defendant does not contend the absence of a penalty phase defense deprived him of the effective assistance of counsel, we need not decide whether such decisions about penalty phase evidence are among the 'objective[s] of the defense' over which a represented defendant retains control, for purposes of the Sixth Amendment."].) Moreover, the issue in *Poore* was whether a defendant could *compel* counsel to present *additional* evidence at the penalty phase. The issue in the instant case, in contrast, involves the right to *limit* the mitigating evidence to conform to the defendant's personal objectives. *McCoy* was similarly premised on the defendant's personal objective of avoiding an admission that he killed his family members. *McCoy* did not suggest that the attorney there was required to affirmatively attempt to prove that McCoy did not kill his family members.

More importantly, however, the United States Supreme Court had long held, prior to *McCoy*, that a defendant controls the objectives of the defense while counsel controlled strategic decisions about the witnesses to call and objections to make. This Court, nevertheless, recognized in *Lang* that even where a defendant and his attorney share the objective of avoiding a death sentence, the defendant may still elect to forego a penalty phase defense precisely because of the personal nature of mitigation evidence. The tension noted by Justice Liu, between client objectives and trial management related to mitigation evidence, existed long before

McCoy. (See *Poore*, *supra*, at pp. 311-312 (conc. opn. of Liu, J.).) As long as *Lang* remains good law, it makes little sense that counsel can acquiesce in a command to completely forego a penalty phase defense, but the defendant has no right to limit the mitigating evidence for deeply held personal reasons.

Accordingly, while this Court has yet to address the specific issue of client autonomy raised in this case, its prior precedents, viewed in the context of the broad autonomy right recognized in *McCoy*, support granting capital defendants the right to limit the presentation of objectionable mitigating evidence.

3. Other jurisdictions have recognized a capital defendant's right to limit mitigating evidence at the penalty phase.

Even before *McCoy*, numerous state and federal courts concluded that there is no Sixth Amendment error where trial counsel honors the defendant's desire to *limit*, but not to totally forego, the presentation of mitigating evidence. (See e.g. *Boyd v. State* (Fla. 2005) 910 So.2d 167, 188-189; *Shaw v. State* (Ala.Crim.App. 2014) 207 So.3d 79, 116; *State v. Monroe* (Ohio 2005) 827 N.E.2d 285, 299-301; *State v. Roscoe* (Ariz. 1996) 910 P.2d 635, 650-651; *Summerlin v. Schriro* (9th Cir. 2005) 427 F.3d 623, 639; *United States v. Davis* (5th Cir. 2002) 285 F.3d 378, 384-385; *Mitchell v. Kemp* (11th Cir. 1985) 762 F.2d 886, 889.) The preceding authorities, however, addressed acquiescence to a request to limit the mitigating evidence in the context of ineffective assistance of counsel, not whether the defendant had an affirmative right to prevent counsel from presenting the evidence.

In *State v. Maestas* (Utah 2012) 299 P.3d 892, however, the Utah Supreme Court directly addressed whether the Sixth Amendment grants a criminal defendant the right to limit mitigating evidence. There, after trial counsel presented some mitigating evidence, the defendant requested to represent himself because he disagreed with counsel's plans to present additional unflattering evidence about his family. (*Id.* at p. 955.) Trial counsel insisted that the decision fell within the scope of his tactical control and ethical duties. (*Id.* at p. 956.) The trial court disagreed, and rather than granting the defendant's pro per motion, prohibited trial counsel from presenting the disputed evidence. (*Ibid.*)

The Utah State Supreme Court found no error, holding that "the decision to waive the right to present mitigating evidence is not a mere tactical decision that is best left to counsel; instead, it is a fundamental decision that goes to the very heart of the defense." (*State v. Maestas*, *supra*, 299 P.3d 892, 959.) As the court explained:

> Mitigating evidence 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. As such, like other decisions reserved for the defendant, the decision not to put this private information before the jury is a very personal decision. Additionally, like the decision to testify or plead guilty, the decision not to present mitigating evidence may be very significant to the outcome of the proceedings. Moreover, it would make little sense to allow defendants to incriminate themselves by testifying or to forgo a trial and plead guilty to an offense, but bar them from waiving the presentation of mitigating evidence in the penalty phase. For these reasons, the decision to waive the right to present mitigating evidence is a "fundamental decision[ ]

> regarding the case" that falls under the defendant's "right to control the nature of his or her defense."

(*Ibid.*) While *Maestas* preceded *McCoy* by six years, it mirrors both *McCoy's* reasoning and *Lang's* recognition of the importance of client autonomy based on the personal nature of mitigating evidence.

Following *McCoy*, the Louisiana State Supreme Court similarly recognized that capital defendants have a Sixth Amendment right to *limit* the scope of mitigating evidence. (*State v. Brown* (La. 2021) 330 So.3d 199.) There, prior to the penalty phase, the defendant moved to represent himself based on a conflict with counsel about the scope of the mitigating evidence. (*Id.* at pp. 217-220.) Trial counsel had "prepared a penalty phase defense that included, but was not limited to, evidence concerning the defendant's mother's abusive childhood." (*Id.* at p. 217.) The defendant "adamantly disagreed," because he wanted to "protect his mother and not require her to relive her past." (*Ibid.*) The defendant made it clear that he only objected to his mother and an uncle testifying and did not object to any other mitigation evidence. (*Id.* at p. 219.) In response to the disagreement, the court and trial counsel informed the defendant "that his choices were either to allow counsel to present the best defense possible, pursuant to their ethical obligation to do so, or to discharge defense counsel." (*Id.* at p. 218.) The defendant chose self-representation, explaining: "I just feel this is the decision I have to make to protect my mother, and whatever consequences I have to suffer I'm willing to take that." (*Id.* at p. 220.) The trial court granted the *Faretta* motion. (*Id.* at p. 221.)

On appeal, the defendant argued that the trial court erred by advising him that he did not have the right to limit the presentation

of mitigating evidence, which caused him to involuntarily waive counsel. (*State v.* Brown, *supra*, 330 So.3d 199, 217.) Specifically, he argued that "his counsel's obligation during the penalty phase was not to put on what counsel perceived to be the best possible defense; instead, counsel's obligation was to honor defendant's wishes pursuant to his right to limit his penalty phase defense." (*Id.* at p. 222.) Citing *McCoy*, the Louisiana State Supreme Court agreed and found the trial court's advisement to be "contrary to established principles embodied in the Sixth Amendment." (*Id.* at pp. 223-224.) The Court acknowledged that some decisions about "trial management" were up to counsel. (*Id.* at p. 224.) *McCoy*, however, was "'broadly written and focuses on a defendant's autonomy to choose the objective of his defense,'" which includes the right to limit the mitigation evidence. (*Id.* at p. 225.)

While the above authorities are not binding on this court, they are persuasive authority, consistent with *McCoy*, *Lang*, and *Amezcua*, for the proposition that a capital defendant has a Sixth Amendment right to limit the presentation of mitigating evidence.

4. A capital defendant's decision to limit evidence of mental impairment for personal or strategic reasons is not unreasonable.

To establish a Sixth Amendment violation, a defendant need not demonstrate that his desired approach to the trial is strategically sound or that the strategy preferred by counsel is ineffective. (See *McCoy*, *supra*, 138 S.Ct. 1500, 1507 [Finding Sixth Amendment error where trial counsel conceded guilt over objection despite describing the defendant's desired theory of the case as

"difficult to fathom."].) Nevertheless, mitigating evidence is not a panacea and a defendant may reasonably decide to forego categories of mitigating evidence for personal or strategic reasons.

For example, opponents of granting control to capital defendants over the presentation of mitigation evidence often characterize the decision to forgo or limit such evidence as a form of "state assisted suicide." (Eisenberg, *The Lawyer's Role When the Defendant Seeks Death* (2001) 14 Cap. Def. J. 55, 60; American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) 31 Hofstra L.Rev. 913, 1010.) This characterization is premised on the assumption that: 1) mitigation evidence, regardless of the character of that evidence, makes it less likely the defendant will be sentenced to death; 2) the attorney is best positioned to determine the optimal defense strategy. The reality, however, is far more complex. (See also Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, *supra*, 90 B.U. L.Rev. 1147, 1148 ["the paternalistic notion that lawyers should be entrusted with all decision-making in criminal cases because their law degrees qualify them to choose more wisely than defendants lacks empirical support, is inconsistent with landmark Supreme Court precedent, and too narrowly defines the 'best' results."].)

For example, a "[d]efendants' history of mental impairments may be perceived by jurors as stigmatizing, threatening, or not believable." (Jochnowitz, *How Capital Jurors Respond to Mitigating Evidence of Defendant's Mental Illness, Retardation, and Situational Impairments: An Analysis of the Legal and Social*

Science Literature (2011) 47 No. 5 Crim. Law Bulletin ART 2.) One study even concluded that jurors exposed to "a mental illness defense strategy at sentencing were the 'most punitive' in imposing death sentences, compared to cases where psychological mitigation was not introduced, even in 'no' mitigation cases." (*Ibid.*, citing White, *The Mental Illness Defense in the Capital Penalty Hearing* (1987) 5 Behav. Sci. & L. 411.)

One reason for this finding is that capital jurors may be particularly predisposed to distrust defense mental health experts. (Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487, 521 ["capital jurors tend to be intensely skeptical of mental health experts and mental health defenses presented in mitigation."]; Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.Rev. 1109, 1125-1126 [citing data showing that capital jurors often view defense mitigation experts as "hired guns."].) Evidence of mental impairment can also be a "double-edged sword" if the jury fears mental impairment will increase the risk that the defendant will be a future danger to society.[10] (Sundby, *The Jury As Critic: An Empirical Look at How*

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[10] Sundby further argues that the inability of some capital jurors to meaningfully consider mitigating evidence based on mental illness, and the impact this has on the reliability of the judgment, militates in favor of categorically excluding mentally ill defendants from capital punishment. (Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487,

Capital Juries Perceive Expert and Lay Testimony, *supra*, at pp. 1144, 1166-1167; but see Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases* (2015) 56 B.C. L.Rev. 493 [discussing study finding that "neuroscience evidence is only rarely used to argue a defendant's future dangerousness."].)

Evidence of mental impairment may also create "conflicts within the evidence" when other aspects of the defendant's personal characteristics or background belie the expert testimony. (Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, *supra*, at p.1143 [citing case where defendant put on evidence that he wrote poetry to show he was a "model prisoner," which some jurors felt undercut the evidence of neurological impairment].) Similarly, evidence of a defendant's positive relationships with friends and family can have a profound emotional impact on capital jurors. (*Id.* at pp. 1154-1162 ["At the most basic level, from an emotional viewpoint, the testimony [of family members] shows that someone cares about the defendant and believes that he has some redeeming value."].) Testimony by friends and family, however, may undermine or conflict with evidence of mental impairment. (*Id.* at p. 1169 [capital juror noted that description of the defendant by one of his friends was inconsistent with evidence of insanity or diminished capacity.].)

524-528.) This Court, however, has consistently rejected the exclusion of severely mentally ill defendants from capital punishment. (See e.g. *People v. Steskal* (2021) 11 Cal.5th 332, 373-379; *People v. Mendoza* (2016) 62 Cal.4th 856, 908-912.)

Perhaps most importantly, a defendant may oppose mental impairment evidence to avoid the opprobrium or stigma of being labeled mentally ill or incompetent. (See *United States v. Read* (9th Cir. 2019) 918 F.3d 712, 720 [*McCoy* error where trial court revoked pro per status and permitted counsel to raise insanity defense over defendant's objection because "[j]ust as conceding guilt might carry 'opprobrium' that a defendant might 'wish to avoid, above all else,' [citation], 'a defendant, with good reason, may choose to avoid the stigma of insanity.'"]; see also Collins, *Not Guilty by Reason of Insanity: Imprisonment As an Alternative to Prison* (2015) 18 Quinnipiac Health L.J. 157, 161-162; Blume, *Killing the Willing: "Volunteers," Suicide and Competency* (2005) 103 Mich. L.Rev. 939, 982 ["defendants may also 'malinger well' when they are sick, often because they wish to avoid the stigma of mental illness"]; but see *United States v. Roof* (4th Cir. 2021) 10 F.4th 314, 353 [distinguishing *Read* where defendant objects to evidence of mental illness because "[a]cknowledging mental health problems, and bearing any associated stigma, is simply not of the same legal magnitude as a confession of guilt" required for insanity defense.].)

It is true that an insanity defense, unlike presenting evidence of mental impairment at the penalty phase, can sometimes "directly violate" the right to maintain innocence. (*United States v. Read*, *supra*, 918 F.3d 712, 721.) However, "even where this concern is absent, the defendant's choice to avoid contradicting his own deeply personal belief that he is sane, as well as to avoid the risk of confinement in a mental institution and the social stigma associated with an assertion or adjudication of insanity, are still present."

(*Ibid.*) “These considerations go beyond mere trial tactics and so must be left with the defendant.” (*Ibid.*) The preceding reasoning is equally compelling where a defendant opposes mental impairment evidence at the penalty phase due to the social stigma and/or because the evidence contradicts his belief that he is not impaired.

This is not to suggest that evidence of mental impairment should not be investigated if the defendant opposes such evidence. All aspects of potential mitigating evidence must be investigated so that the defendant can make an informed choice about the objective of his defense. (See *McCoy*, *supra*, 138 S.Ct. 1500, 1509 [while the defendant may override his attorney as to the objectives of the defense, “[c]ounsel, in any case, must still develop a trial strategy and discuss it with her client, [citation], explaining why” the preferred trial strategy would be the “best option.”].)

The point, instead, is that decisions about the type of mitigating evidence to present are complicated and depend, in part, on a subjective and speculative evaluation of how the jury might receive the evidence. Where a defendant opposes the evidence for personal and deeply held reasons, the decision whether to present the evidence is a fundamental choice about the objective of the defense and the defendant is in the best position to determine how to achieve it. (*See* also *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 165 (conc. opn. of Scalia, J.) [“Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.”]; *People v. Flores* (2019) 34 Cal.App.5th 270, 272 [“fundamental principles of personal

autonomy inherent in the Sixth Amendment afford criminal defendants the right to tell their own story and define the fundamental purpose of their defense at trial, even if most other accused persons in similar circumstances would pursue a different objective and accordingly adopt a different approach."].)

5. Other public policy considerations support recognizing a capital defendant's autonomy to limit particular aspects of the mitigation evidence at the penalty phase.

Proponents of limited client autonomy have sometimes invoked rules of professional conduct or attorney ethics to justify limiting a defendant's control over the defense strategy.[11] To the extent rules of professional conduct are informative, however, it is important to note *McCoy's* reliance on ABA Model Rule of Professional Conduct 1.2(a) (2016), which provides that a "'lawyer shall abide by a client's decisions concerning the objectives of the representation.'" (*McCoy*, *supra*, 138 S.Ct. 1500, 1509.) *McCoy's* reliance on Model Rule 1.2 is significant.

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[11] In *McCoy*, the Louisiana Supreme Court found that trial counsel was obligated to concede guilt over the defendant's objection pursuant to a rule of professional responsibility prohibiting attorneys from suborning perjury. (*McCoy*, *supra*, 138 S.Ct. 1500, 1504.) *McCoy* rejected this reasoning because the attorney "harbored no doubt that McCoy believed what he was saying" when he professed his innocence but did not believe his client based on the prosecution evidence. (*Ibid.*) The disagreement in *McCoy*, therefore, did not implicate the anti-perjury rule. (*Ibid.*) There is similarly no concern with suborning perjury where a defendant requests that counsel limit the scope of the mitigating evidence.

First, Model Rule 1.2, like *McCoy*, approaches attorney-client disputes by deferring to the client's autonomy and personal objectives. Second, California recently adopted Rule of Professional Conduct, Rule 1.2, which mirrors ABA Model Rule 1.2.[12] (Rules Prof. Conduct, rule 1.2(a) ["a lawyer shall abide by a client's decisions concerning the objectives of representation."]; Comment [1] to Rule 1.2 ["Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."].)

Permitting a defendant to limit the scope of mitigating evidence, based on the defendant's unique personal objectives, is thus consistent with both the current rules of professional conduct and *McCoy*. It is also consistent with this Court's reliance on the attorney's duty of loyalty expressed in *Lang*. (*Lang*, *supra*, 49 Cal.3d 991, 1031 ["[t]o require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation."].)

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[12] Prior to 2018, California did not have any rule of professional conduct governing attorney/client disagreements about the allocation of authority over trial objectives and strategy. (See State Bar of California, Rules of Professional Conduct Cross-Reference Chart (2023) <https://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of-Professional-Conduct.pdf> [as of October 21, 2023] [cross-reference chart of the rules of professional conduct adopted in 2018 and the rules of professional conduct from 1992 to 2018, noting there was "No Former California Rule Counterpart" to Rule 1.2.].)

It is true, that a capital defendant's decision to limit the scope of mitigating evidence may make it more likely the trial will result in a death sentence. This Court has previously held, however, that the failure to present *any* mitigating evidence does not make a death judgment unconstitutionally unreliable. (*People v. Bloom*, *supra*, 48 Cal.3d 1194, 1222, 1228, fn. 9 [emphasizing the "importance" of defendant's "ability to control his or her own destiny and to make fundamental decisions affecting trial of the action."].) Moreover, it has long been recognized that a defendant has an affirmative Sixth Amendment right to "conduct his own defense ultimately to his own detriment." (*Faretta*, *supra*, 422 U.S. 806, 834; see *McCoy*, *supra*, 138 S.Ct. 1500, 1508.) These legal principles apply with equal force to all important trial strategies, including the decision to merely *limit* the scope of the mitigation evidence.

Finally, "[a]sking a defendant whose life and liberty are on the line to give up their ability to make decisions about their defense would only encourage a defendant to choose pro se representation to preserve their autonomy interest and maintain control over their case." (Hamilton, *The Right to Decide an Attorney Is Wrong: The Extent of A Defendant's Right to Control the Objective of the Defense and Reject Counsel's Trial Strategy, supra*,74 Baylor L.Rev. 285, 302-303.) A defendant represented by counsel, however, "will likely be more informed of the risks involved and alternative options than a defendant without an attorney." (*Ibid.*) "It is [also] inconsistent to hold that the decision to forgo counsel entirely can be intelligently made, but the decision to reject counsel's opinion about the best

defense is always unintelligently made and, therefore, not within the defendant's discretion." (*Ibid.*)

Accordingly, public policy further supports recognizing a capital defendant's right to limit the scope of mitigating evidence that appointed counsel presents at the penalty phase.

C. Appellant's sixth amendment right to the a*ssistance* of counsel was violated by the presentation of certain mitigating evidence over his express and repeated objections.

Appellant's right to autonomy was violated when he was deprived of the right to control whether certain types of highly personal mitigating evidence were presented at the penalty phase. Appellant objected to specific and readily identifiable categories of evidence related to 1) attachment theory and his dysfunctional childhood; 2) a comparison to his half-brother; 3) mental impairment or mental illness; and 4) purported molestation by appellant's uncle when he was a child. Appellant also consistently and rationally explained his objections to the disputed mitigation evidence, which involved "intimate, and possibly repugnant, details about [appellant's] life, background, and family." (*State v. Maestas*, *supra*, 299 P.3d 892, 959.) "As such, like other decisions reserved for the defendant, the decision not to put this private information before the jury is a very personal decision." (*Ibid.*)

First, it is apparent that appellant was personally offended by the expert testimony about attachment theory and his mental health and brain abnormality. For example, in response to appointed counsel's offer of proof regarding appellant's brain abnormality, he joked that "the way she described the probability

statistics of my brain damage, I'm surprised I could have remembered anything she said, sir." (Sealed 47RT 9800.) Appellant also noted that he passed the GED and California High School Exit exam, the latter of which he took to "see if my abnormal brain needs sharpening." (Sealed 49RT 10088.) The trial court similarly recognized that appellant viewed the evidence as "somehow insulting to you, denigrating to you, improper from your point of view." (Sealed 47RT 9657-9658.) Appellant's concern with the opprobrium and other consequences that could result from the evidence of mental impairment and attachment theory is analogous to the type of personal objective *McCoy* recognized as inherent to the Sixth Amendment right to counsel. (See *United States v. Read*, *supra*, 918 F.3d 712, 721 [the "choice to avoid contradicting his own deeply personal belief that he is sane" and "avoid the risk of confinement in a mental institution and the social stigma associated with an assertion or adjudication of insanity" goes "beyond mere trial tactics" and "must be left with the defendant."].)[13]

Second, appellant did not want to present evidence of mental impairment or attachment theory because he did not think the jury would find the evidence compelling and otherwise felt that he would be misrepresented. (See, e.g., Sealed 47RT 9643-9662 ["the approach that they're taking in the penalty phase misrepresents me."]; Sealed

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[13] Appellant also appears to have had a religious or moral objection to the studies and video evidence comparing primates and humans. (Sealed 48RT 9795 [appellant noted that "[a]lthough courts have prohibited some schools from teaching creationism, they did not nor are they obligated to force theories of evolution on defendant as if it's an established indisputable fact."].)

51RT 10381 ["this repeated attempt to try and make me look like I'm suppressing some kind of childhood mental illness and their interpretation of everything is just going to be viewed by the jury as nothing more than people trying to help me because they like me."].) He was further concerned that the mental impairment evidence would conflict with other mitigation evidence. (Sealed 49RT 9917 ["How they intend to first represent me essentially as brain damaged and then this selfless nice guy teaching [a longtime friend] the secrets of family is like a very Dr. Jekyll and Mr. Hyde story."].) For similar reasons, appellant took issue with the videos comparing him to infants and monkeys separated from their birth mothers. (Sealed 48RT 9794-9795 ["promoting the theory that I'm 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 mitigating factor."].)

Appellant's skepticism about how the jury might view the mental impairment evidence is notable because many of the potential drawbacks from presenting such evidence were realized. For example, the prosecutor: 1) depicted the defense experts as hired guns, noting that the defense paid hundreds of thousands of dollars for their testimony (57RT 11539); 2) argued that the fact that appellant made origami for his family and advised a longtime friend about her marriage was inconsistent with the expert testimony about his mental impairments (57RT 11537-11538); and 3) appeared to argue that appellant's mental issues contributed to the charged offenses. (57RT 11530-11531.) The jury also asked for a readback of a portion of Dr. White's testimony, which the prosecutor had pointed

out was nearly identical to testimony she gave in another case for a different defendant. (57RT 11652; 58RT 11655-11666.) The prosecutor further undermined the significance of appellant's mental issues and dysfunctional childhood by noting that he was 39 at the time of the charged offenses. (57RT 11505, 11520-11523.) Further, in denying the automatic motion to modify the death verdict, the trial court rejected the conclusion that appellant's background, "however pathological and dysfunctional," had on his "personal and active behavior" at the time of the murder. (58RT 11831-11833 ["While his psychological and dysfunctional family background may help explain who he is, it does not make his character and actions, nor the damage done by them, any less reprehensible."].)

Finally, appellant opposed offering Triolo's testimony that appellant was molested as a child because he denied it happened and did not want to slander his uncle. (Sealed 49RT 10087-10091; Sealed 51RT 10381.) Appellant's desire to protect his uncle's reputation is precisely the type of personal objective that falls within the Sixth Amendment right to counsel. (*State v. Maestas*, *supra*, 299 P.3d 892, [defendant had Sixth Amendment right to preclude counsel from presenting unflattering evidence about his family.]; see *Amezcua*, *supra*, 6 Cal.5th 886, 920-926 [Consistent with *McCoy's* "allocation of responsibilities," where defendants opposed mitigation evidence because they did not want family members to testify, decision not to present mitigation defense belonged to the defendants as an "objective" of the defense.].)

Conversely, appellant did not seek to micromanage the presentation of mitigation evidence by controlling which witnesses to present, the objections to make, or the arguments to make. Instead, this was a difficult case in which appellant and appointed counsel could reasonably disagree on the best approach. In that context, appellant's objective was to obtain a life sentence, by presenting only the mitigating evidence he felt was most likely to cause the jury to spare his life, while maintaining his personal dignity and avoiding slandering a family member. Appellant did not object to other penalty phase evidence, including testimony by friends and family about his life and what he meant to them, and expert testimony about a prior violent incident and his future dangerousness if sentenced to life without parole.

Despite the evidence that appellant suffered from mental health and other cognitive issues, appointed counsel conceded that he was competent, and the trial court agreed. And appellant was fully informed about the nature of the disputed mitigation evidence, as he sat through evidentiary hearings and discussed the evidence with counsel in private and with both the court and counsel at the numerous in camera hearings. He was also at least open to hearing from appointed counsel about the potential mitigation evidence, as demonstrated by the fact that he apparently withdrew any objection to his birth mother testifying after he was able to speak to her to confirm that she was not improperly pressured to testify. As in *McCoy*, "after consultations with [counsel] concerning the management of the defense" it "was not open" to appointed counsel

to "override" appellant's objections. (*McCoy*, *supra*, 138 S.Ct. 1500, 1509.)

It is also important to note, as this Court predicted in *Lang*, that allowing appointed counsel to override appellant's objections caused him to repeatedly move to represent himself or to substitute counsel. (*Lang*, *supra*, 49 Cal.3d 991, 1030-1031.) The dispute over the penalty phase evidence and the allocation of control to appointed counsel, therefore, negatively interfered with the attorney-client relationship. Moreover, telling appellant that he had no right to control the mitigation evidence made it less likely that he and appointed counsel could have reached a compromise strategy. Permitting counsel to completely override appellant's objectives also negatively impacted the penalty phase presentation in more subtle ways. (See e.g. 51RT 10377 [appellant attempted to slip a note to the prosecutor, in front of the jury, during testimony about purported childhood sexual abuse by appellant's uncle]; 51RT 10551-10553 [Dr. White, the defense psychosocial expert, testified that appellant was generally unwilling to talk about and denied that he was abused or molested as a child and she thus had to rely on inconclusive hearsay to corroborate the reported abuse].)

Finally, to be clear, appellant does not advocate for a rule that grants capital defendants represented by counsel absolute control over all technical, procedural, and strategic decisions that arise during the penalty phase. For example, if a fully informed defendant does not expressly object to the mitigating evidence, it is likely to be within the attorney's right to determine the witnesses to call and the questions to ask. (*Nixon*, *supra*, 543 U.S. 175, 178, 186-187.)

Additionally, counsel likely could not be compelled to present mitigation evidence the defendant requests but that the attorney reasonably determines to be unhelpful, irrelevant, or inadmissible (See *Poore*, *supra*, 13 Cal.5th 266, 307.) And if a defendant is incapable of knowingly and intelligently instructing counsel to withhold mitigating evidence, counsel might be permitted to present mitigating evidence even over an express objection. (See also *People v. Daniels* (2017) 3 Cal.5th 961, 1028-1031 (conc. and dis. opn. of Kruger, J.) [although defendant intended to waive guilt phase to accept responsibility for the crimes, his objective at the penalty phase was unclear and thus the Court could not find a knowing and intelligent waiver of his right to jury trial at penalty phase absent awareness of the nature of the right he relinquished].)

Simply put, the disagreement in this case was about appellant's fundamental objective at the penalty phase, which 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. Accordingly, appellant's Sixth Amendment right to the "assistance" of counsel was violated when appointed counsel presented the objectionable mitigating evidence over his express objections.

D. The error was structural and the penalty judgment must therefore be reversed.

Where counsel is permitted to override a defendant's control over the fundamental objectives of his defense at trial, the effectiveness of counsel is not at issue. (*McCoy*, *supra*, 138 S.Ct.

1500, 1510-1511.) Instead, the violation of the defendant's "autonomy right was complete when the court allowed counsel to usurp control of an issue within [the defendant's] sole prerogative." (*Id.* at p. 1511.) "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." (*Ibid.*)

As in *McCoy*, the court allowed trial counsel to usurp control over appellant's fundamental objectives at the penalty phase of his capital trial. The Sixth Amendment error is thus structural and requires reversal of the penalty judgment in this case.

CONCLUSION

For the reasons stated in this brief and in appellant's opening and reply briefs, the judgment must be reversed.

Dated: October 26, 2023

Respectfully Submitted,

Mary K. McComb
State Public Defender

/s/ ______________________________
Mark R. Feeser
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I am the Deputy State Public Defender assigned to represent appellant, ROBERT WARD FRAZIER, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, is 12,830 words in length.

Dated: October 26, 2023

/s/
Mark R. Feeser
Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Robert Ward Frazier***
Case Number: **Supreme Court Case No. S148863**
Contra Costa Co. Sup. Ct. No. 5-041700-6

I, **Christopher Gonzalez**, declare as follows: I am over the age of 18 and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **October 26, 2023**, at Sacramento, CA.

CHRISTOPHER GONZALEZ

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Feeser, Mark (252968)
Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm