No. S148863 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
ROBERT WARD FRAZIER,
Defendant and Appellant.

Contra Costa County Superior Court, Case No. 041700-6
The Honorable John C. Minney, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

ROB BONTA (SBN 202668)
Attorney General of California
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II (SBN 161306)
Senior Assistant Attorney General
ALICE B. LUSTRE (SBN 241994)
Supervising Deputy Attorney General
VICTORIA RATNIKOVA (SBN 280386)
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3848
Fax: (415) 703-1234
Victoria.Ratnikova@doj.ca.gov
Attorneys for Plaintiff and Respondent

December 13, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Frazier was convicted and sentenced to death after he beat the victim on the head with a fencepost at least 10 times and forcibly raped and sodomized her on a popular walking trail in Contra Costa County.

Relying on *McCoy v. Louisiana* (2018) 584 U.S. __ [138 S.Ct. 1500], in his supplemental opening brief, Frazier argues he was denied his Sixth Amendment right to autonomy because during the penalty phase, his lawyers presented mitigating evidence with which he disagreed. Frazier's claim fails because his attorneys pursued the objective of his penalty defense—to attain a verdict of life without the possibility of parole (LWOP) rather than death. Frazier's complaints regarding the mitigating evidence amounted to a disagreement about tactics falling exclusively in his attorneys' province.

ARGUMENT

FRAZIER WAS NOT DENIED HIS SIXTH AMENDMENT AUTONOMY RIGHT

Contrary to Frazier's contentions, there was no violation of his Sixth Amendment autonomy right under *McCoy*, *supra*, 584 U.S. __ [138 S.Ct. 1500]. (SAOB 9-58.) Case law spanning many jurisdictions—including the high court's and this Court's jurisprudence—demonstrates that a defendant may control only the objective of the defense, i.e., the overarching goal the defendant seeks to accomplish. Tactical decisions—i.e., the details of how to accomplish that goal, including which evidence to present—are reserved to attorneys. Moreover, the Sixth Amendment does not protect a defendant's attempts to present

inadmissible evidence or to cause delay by challenging his or her counsel's planned mitigation case.

A. Background

On June 23, 2006, the trial court and parties discussed logistics, discovery, and the experts the defense expected to call at the penalty phase scheduled to begin on July 31. (47RT 9475-9495, 9505-9506, 9508.) At the end of the proceedings, Frazier indicated that he might bring a *Faretta*[1] motion before the start of the penalty phase. (47RT 9513.)

On July 26, 2006, the trial court heard in limine motions during which the defense sought to play for the jury videos illustrating attachment theory to support Dr. Seligman's testimony regarding Frazier's family circumstances and childhood. (47RT 9626-9631.) The defense also described Frazier's childhood and sought to play a video contrasting Frazier's family and upbringing with that of his half-brother. (47RT 9631-9638.) Frazier objected and moved for appointment of new counsel and mistrial, and said he would be filing a *Faretta* motion. (47RT 9632, 9635-9636.) The court stated it would allow the parties to make their record before hearing Frazier's motions and denied the mistrial motion. (47RT 9635-9636.)

Later, Frazier made a *Marsden*[2] motion based in part on his complaints about the mitigating evidence his lawyers intended to present. Frazier stated the approach counsel wished to take in the penalty phase misrepresented him and called counsels'

---

[1] *Faretta v. California* (1975) 422 U.S. 806.

[2] *People v. Marsden* (1970) 2 Cal.3d 118.

strategy "cheap emotionalism." (47RT 9644.) Frazier continued, "Basically just looking at my brother makes more money than me [*sic*] 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." (47RT 9644-9645.) Defense counsel Wendy Downing responded that she and Frazier simply disagreed on strategy. (47RT 9647.) Defense counsel Eric Quandt opined that Frazier was distracted by his issues with jail personnel, which were preventing him from making "rational decisions about how to proceed in this case." (47RT 9647, 9650-9651.)

The trial court denied the motion, reasoning, in relevant part, that the penalty phase was scheduled to start next Monday, July 31 after the court had already granted the defense a continuance. The court noted disagreements between a defendant and counsel regarding trial tactics did not automatically warrant substitution of counsel and that counsel were entitled to their tactical strategy regarding the evidence presented in the penalty phase. (47RT 9656-9658.) The court stated, "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*." (47RT 9658, italics added.) Frazier indicated he might file a *Faretta* motion and asked the court not to discuss the penalty phase evidence in public until that time. (47RT 9659-9660.)

The court observed Frazier's request "put [it] in a difficult position because Monday [was] the start of the penalty phase" and the prosecutor was "entitled to have his day" on evidentiary issues pertaining to that phase. (47RT 9660-9661.) The court observed that discussion of the mitigating evidence had already taken place on the public record. (47RT 9661.) The court stated that it would "listen to the D.A.'s opposition to what he's already heard on the record." (47RT 9662.) The court allowed Frazier to "reserve" to make motions and his "right to tell [it] [he] do[es not] want certain things on the record if something new comes in," but it would "go ahead with what we planned to do." (47RT 9662.)

On July 31, 2006—the first day of the penalty phase—Frazier filed a *Faretta* motion. (6CT 1873-1876.) During an in-camera hearing on the motion, upon being informed that his motion was untimely, Frazier countered, in part, "[P]romoting 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 [a] mitigating factor," and maintained that the videos defense counsel sought to show did not accurately reflect how he was raised. (48RT 9792-9795.) Instead of that evidence, Frazier wished to show how his "friends and loved ones [would] be affected if [the jury] decided to have [him] executed." (48RT 9795.) Frazier continued, "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. Although 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." (48RT 9795.)

Defense counsel Downing stated that Frazier "was mentally impaired in the extreme from a very young age," explained the evidence of mental impairment, and represented that a "severe injustice" would be done without the mitigation evidence she intended to present. (48RT 9796-9800.) Frazier responded, "Well, the way she described the probability statistics of my brain damage, I'm surprised I could have remembered anything she said, sir. 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." (48RT 9800-9801.) Frazier represented that if he were "allowed to call [his] choice of witnesses," he "could effectively represent [him]self." (48RT 9801.)

The trial court found Frazier's *Faretta* request to be untimely and equivocal. (48RT 9802-9805.) The court acknowledged that Frazier was "angry" and "upset" by some of the proposed evidence, but noted that Frazier had "skilled, competent, experienced counsel assessing the need to do certain things . . . ." (48RT 9803.) The court also considered Downing's

response to the motion, stating, "Ms. Downing has gone to some extent to indicate to me the devotion and intensity and work that she has done in your interest in this case and that they wish to proceed. That's fairly important." (48RT 9803.) Frazier again made motions for mistrial, which the court denied. (48RT 9804-9805.)

On August 1, 2006, Frazier asked the court to reconsider his *Faretta* motion. (49RT 9916.) He argued his motion was timely and his strategy would not include the complicated issues his counsel sought to present, which he believed "would only anger the jury," thereby "costing [his] life." (49RT 9917-9918.) Frazier stated, "How they intend to first represent me essentially as brain damaged and then this selfless nice guy teaching Kelly Ayers the secrets of family is like a very Dr. Jekyll and Mr. Hyde story." (49RT 9917.) In denying the motion, the court disagreed it was timely and found no grounds to reconsider its prior ruling. (49RT 9918-9919.) Frazier again moved for mistrial, which the court denied. (49RT 9919.)

On August 3, 2006, Frazier reasserted his request for self-representation and continued to dispute the mitigation evidence, including evidence of his sexual molestation by his uncle, his brain abnormality, and his failure to finish high school. (49RT 10087-10088.) Frazier asked the court to consider "the slanderous effects another denial will permit." (49RT 10088.) Frazier said, "Some of appointed defense counsel's statements have no basis in fact. An entire country, via mass media, has been led to believe that I was the victim of sexual molestation as

a child by my uncle, an event which never took place, the slandering of an innocent person." (49RT 10088.) Frazier argued there was no documentation supporting his attorneys that he had a genetic brain abnormality and that his counsels' allegations that he never finished high school were incorrect because he passed the "GED" exam. (49RT 10088.) Appellant offered "a copy of [his] passing scores for the . . . California High School Exit exam," which he took "to see if [his] abnormal brain needed sharpening." (49RT 10088.) The trial court incorporated by reference the remarks it had made in ruling on Frazier's prior *Faretta* motions—including that Frazier's motion continued to be late—and denied the motion. (49RT 10089-10091.)

On August 9, 2006, in a public session, Frazier reiterated his desire to proceed in pro. per. for the remainder of the penalty phase and claimed there would be no delays. (51RT 10271.) Frazier objected to the proceedings and the calling of the next witness and incorporated by reference his previous arguments. The trial court again denied Frazier's motion on untimeliness, delay, and equivocation grounds. (51RT 10272-10274.) Frazier again moved for a mistrial, which the court tacitly denied. (51RT 10272.)

Later that day, the bailiff seized a note that Frazier had written to the prosecutor during the testimony of Frazier's childhood friend Jeff Triolo. The note stated, "'Objection. No personal knowledge to sexual abuse by uncle.'" (51RT 10333, 10377-10378, 10381.) Shortly thereafter, during an in-camera hearing, Frazier again asked the trial court to reconsider his

Faretta motions. (51RT 10380-10381.) Frazier explained that he wrote the note because although he was "not so concerned about the embarrassment" the testimony "would cause" him, the testimony purportedly slandered Frazier's uncle, who Frazier asserted "never did anything like that." (51RT 10381.) Frazier continued, "As 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. And I could have avoided all of this. There would have been no delay. And now my life is on the line, and I'm more likely to get executed now with appointed counsel than if you would have granted my Sixth Amendment right in the first place." (51RT 10381.) Frazier also expressed his displeasure with the prosecutor pointing out inconsistencies in Triolo's testimony. Frazier claimed that he had been prepared and ready to proceed in pro. per. when he made his earlier *Faretta* motions. (51RT 10382.)

The trial court observed that Frazier again disagreed with counsel regarding strategy. The court was "sure" that counsel had previously disclosed their tactics to Frazier because Frazier had mentioned those tactics "from time to time." (51RT 10382-10383.) Frazier stated that counsel had "been quite hidden on these things." (51RT 10383.) Nevertheless, the court denied the *Faretta* motion, observing that counsel provided Frazier with competent representation, and the motion continued to be late.

(51RT 10383.) Frazier moved for a mistrial, and the court denied the motion. (51RT 10383-10384.)

On August 10, 2006, during an in-camera hearing, Frazier asked the court to grant him "conditional *Faretta* rights." (52RT 10504, 10514-1517.) The court informed Frazier he did not have "conditional *Faretta* rights" but allowed him to state new points in support of his *Faretta* motion. (52RT 10517-10518.) Frazier summarized the August 3 proceedings and disputed Dr. Gretchen White's testimony regarding his psychological problems and information that had been published to the jury during her testimony. (52RT 10518-10519.) Frazier accused the court of not taking any action to ensure that sworn witnesses tell the truth. (52RT 10519.) Frazier asked the court to allow him to give a statement to the jury without the assistance of appointed counsel. (52RT 10519.) Frazier intended to recite the statement after all witnesses had testified and asked for one day following the conclusion of testimony to prepare it. (52RT 10519.) Frazier claimed the statement would likely take no longer than 10 minutes to present on the day of closing arguments. (52RT 10519-10520.)

The court found that Frazier's continued disagreement with counsels' presentation was not grounds for a *Faretta* motion. (52RT 10520.) The court also informed Frazier that it would not allow him to make an uncross-examined statement to the jury. (52RT 10521.) After Frazier expressed his belief that he was entitled to do so if he represented himself, the court explained that Frazier would be allowed to argue his case at the end, but he

could not simply pronounce evidence from the stand. (52RT 10521.) The court denied Frazier's motion. (52RT 10521.)

On August 14, 2006, Frazier made a "*Marsden* or *Faretta* motion" because during opening statements, defense counsel had represented that witness Kelly Ayers would testify in the penalty phase. However, counsel ultimately chose not to call Ayers. (53RT 10790.) Defense counsel Downing represented that Ayers would have testified about how Frazier, while in jail and facing the death penalty, still had "the sensitivity and the goodness" to counsel her regarding her marital problems. (53RT 10792-10793.) However, upon meeting Ayers, Downing decided not to present her testimony because "she would have been a nightmare on cross-examination [due to] her attitude." (53RT 10791.) Instead, counsel elected to rely on testimony by Dr. White regarding Frazier's interactions with Ayers. (53RT 10792.) Frazier argued that his lawyers should have decided not to call Ayers before representing to the jury that she should testify. Frazier added that during his August 1 *Faretta* motion, he "mentioned how [his lawyers] intended to first present [him] as essentially brain damaged, then this selfless nice guy teaching Kelly Ayers the secrets of family happiness like a Dr. Jekyll and Mr. Hyde story. And this continues to be the case." (53RT 10794.) The trial court concluded that counsel provided Frazier with adequate representation, incorporated its prior remarks, and denied the *Marsden* motion. (53RT 10794-10796.)

After the lunch recess, the court heard Frazier's *Faretta* motion. (53RT 10797.) Frazier stated that he partially agreed

with Quandt and a defense mitigation specialist that it would be best for him not to testify in the penalty phase. (53RT 10797-10798.) However, Frazier complained that the issue of his testimony would have been "moot" if he were allowed to proceed in pro. per. with his appointed counsel as standby counsel. In that scenario, Frazier would not take the stand but would instead make closing arguments and not be subject to cross-examination. (53RT 10797-10798.)

The trial court again denied Frazier's motion on lateness and equivocation grounds and incorporated its previous comments into its ruling. (53RT 10798-10800.) The court observed that Frazier sought advisory or standby counsel as a "strategy or tactic" to diminish his attorneys' participation and thereby acquire the right to address the jury himself without being subject to cross-examination. (53RT 10799.)

On August 15, 2006, the court held an in-camera hearing with defense counsel and Frazier. Defense counsel informed the court that Frazier wished to testify against counsels' advice. Counsel sought to have Frazier testify before defense expert Dr. Tucker as a matter of trial tactics and because the defense expected to finish their case that day. However, Frazier claimed that he was not ready and wished to testify later. (54RT 10881-10882.)

Frazier again made "a *Marsden* or *Faretta* motion." (54RT 10885.) He asserted that defense counsels' attempts to discourage him from testifying forced him to take the stand without adequate preparation. (54RT 10885.) Frazier stated

that his appointed counsel and the court underestimated his ability to effectively represent himself without causing unnecessary delays and without advisory counsel. (54RT 10886.) Defense counsel Downing countered that she wished to have Frazier testify before Dr. Tucker so that Dr. Tucker could explain Frazier's testimony to the jury. (54RT 10887-10888.)

The trial court asked Frazier what he meant when he said he needed time to prepare. Frazier responded that he needed time to determine what he would say in closing argument. Frazier acknowledged that defense counsel were correct in their assessment that he would be subjected to "harsh cross-examination." (54RT 10888.) As such, if his motion were denied, he would not testify. (54RT 10888.) The court denied Frazier's *Marsden* and *Faretta* motions, concluding counsel provided adequate representation and the *Faretta* motion was still late and equivocal. (54RT 10891.) Ultimately, after a discussion with defense counsel, Frazier decided not to testify. Frazier stated, "I wouldn't make an unintelligent decision like that [Y]our Honor. The reason for my motion was to avoid that from happening [*sic*]." (54RT 10891-10892.)

On August 16, 2006, during an in-camera hearing towards the end of the mitigation case, Frazier read a statement to the court:

> Since my *Faretta* motions have been denied by the [c]ourt, and since my appointed counsel has not factored my right to testify into their defense strategy, I have very logical reasons to not take the stand. However, this decision is made under duress, which is augmented by an ultimatum the [c]ourt created when it denied my

> *Faretta* and *Marsden* motions, thus abandoning me to counsel who claim they would not be able to effectively represent me if I were to take the stand.

(55RT 11239.)

The court disagreed that its actions legally compelled Frazier not to take the stand. (55RT 11239.) The court reiterated that it had denied Frazier's motions for self-representation because they were equivocal and late. (55RT 11240.)

B. Frazier was not denied the right to choose the objective of his penalty phase defense under *McCoy v. Louisiana*

In *McCoy*, *supra*, 138 S.Ct. 1500, "the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." (*Id*. at p. 1505].) Nevertheless, during the guilt phase of the capital trial, defense counsel conceded the defendant's guilt of three murders. (*Ibid*.) The United States Supreme Court held "that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." (*Ibid*.) The court explained, "Guaranteeing a defendant the right 'to have the *Assistance* of Counsel for *his* defen[s]e,' the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide *on the objective of his defense*: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." (*Ibid*., last italics added.)

The high court distinguished between decisions made by attorneys and those left to clients. Regarding decisions made by attorneys, the court stated, "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" (*McCoy*, *supra*, 138 S.Ct. at p. 1508, quoting *Gonzalez v. United States* (2008) 553 U.S. 242, 248.) Regarding decisions "reserved for the client," the court listed, "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*McCoy*, at p. 1508.)

The court reasoned, "Autonomy to decide that the *objective of the defense* is to assert innocence belongs in this latter category. 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 [he or] she insist on maintaining [his or] her innocence at the guilt phase of a capital trial." (*McCoy*, *supra*, 138 S.Ct. at p. 1508, italics added.) The court emphasized, "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*.)

Applying the foregoing principles, the court stated, "Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed

family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration." (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) The *McCoy* court held that violation of the Sixth Amendment autonomy right constitutes structural error. (*Id*. at pp. 1511-1512.)

Here, there was no violation of Frazier's autonomy right. Frazier's disagreement with his lawyers centered on "'what arguments to pursue'" and "'what agreements to conclude regarding the admission of evidence.'" (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) At no point did Frazier assert that his penalty phase objective was not to introduce any mitigating evidence. Nor did Frazier assert that he wanted to receive the death penalty. Rather—as Frazier concedes (SAOB 56)—he and defense counsel shared the goal of avoiding the death penalty. However, they disagreed on how best to achieve that objective. Frazier sought to present evidence of how his loved ones would be affected by his execution (48RT 9795) and to make uncross-examined statements to the jury after all other witnesses had testified, essentially making up his own evidence with the benefit of having listened to all other testimony (52RT 10519, 10521; 53RT 10797-10799). At bottom, the disagreements centered on trial strategy.

Moreover, neither type of evidence that Frazier sought to introduce was admissible. (*People v. Williams* (2013) 56 Cal.4th 165, 197, abrogated on another ground in *People v. Elizalde* (2015) 61 Cal.4th 523, 533-538 & fn. 9 ["'The impact of a defendant's execution on his or her family may not be considered by the jury in mitigation'"]; *People v. Barnum* (2003) 29 Cal.4th

1210, 1227, fn. 3 [testifying defendant—whether self-represented or not— "relinquishe[s] his privilege against compelled self-incrimination with respect to cross-examination on matters within the scope of the narrative testimony he provided on direct examination, as well as on matters that impeach[] his credibility as a witness"].) Frazier acknowledges that under *McCoy's* reasoning, "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." (SAOB 56.) By Frazier's own acknowledgment, therefore, there was no error.

Frazier maintains that he wished to achieve his objective of obtaining an LWOP 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." (SAOB 56.) Frazier's contention only further illustrates that his quarrel was with his lawyers' "strategic choices about how best to *achieve* [his] objectives," not "choices about what [his] objectives in fact [*were*]." (*McCoy*, *supra*, 138 S.Ct. at p. 1508.)

Moreover, Frazier's argument fails on a more fundamental level. Because the constitutional violation identified in *McCoy* is a structural one, its scope is necessarily limited. (See *People v. Mil* (2012) 53 Cal.4th 400, 410 [structural error exists "only in a 'very limited class of cases'"].) Allocating decisions to clients regarding the type of mitigating evidence presented would swallow much of counsel's long-recognized authority to manage

the defense. Inevitably, the promise of automatic reversal would promote ever more litigation about a defendant's autonomy right to select from myriad potential "objectives." Accordingly, *McCoy* should not be extended to the circumstances of this case.

C. *Gonzalez v. United States* underscores Frazier did not have the right to choose his mitigating evidence

In addition to *McCoy*, *Gonzalez*, *supra*, 553 U.S. 242, establishes Frazier did not have the right to dictate the mitigating evidence his attorneys presented. In that case, the high court faced "the question whether it suffices for counsel alone to consent to [a federal] magistrate judge's role in presiding over *voir dire* and jury selection or whether the defendant must give his or her own consent." (*Id*. at p. 243.) The court held "that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial." (*Id*. at p. 250.) The court distinguished between the realms of the attorney and the accused, stating, "Giving the attorney control of trial management matters is a practical necessity. 'The adversary process could not function effectively if every tactical decision required client approval.' *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the right to counsel." (*Gonzalez*, at p. 249, parallel citation omitted.)

The court continued, "Numerous choices affecting conduct of the trial, including the objections to make, *the witnesses to call, and the arguments to advance, depend not only upon what is*

permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; *and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote*. In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process. In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume." (*Gonzalez*, *supra*, 553 U.S. at pp. 249-250, italics added.)

Frazier's proposed rule would frustrate the purposes and rationale of the right to counsel as explained by the high court in *Gonzalez*. The penalty phase "'could not function effectively if every tactical decision'" regarding the evidence presented "'required client approval.'" (*Gonzalez*, supra, 553 U.S. at p. 249.) Indeed, as noted, Frazier did not seek to forgo presenting a case in mitigation or even just to limit the mitigating evidence, as he claims on appeal. (SAOB 23, 32, 35, 37-42, 47-50.) Instead, Frazier insisted on substituting the admissible evidence his lawyers sought to present with evidence that was inadmissible. His claim boils down to a complaint that he did not give his approval to his counsels' tactical decisions. Frazier's claim thus fails under *Gonzalez*.

D. This Court's jurisprudence establishes Frazier's autonomy right was not violated

This Court's authority cements there was no violation of Frazier's autonomy right. For example, in *People v. Poore* (2022) 13 Cal.5th 266, the defendant instructed his attorney not to present a penalty phase defense or any mitigating evidence after the attorney declined to present the defendant's desired testimony from gang members. (*Id*. at pp. 300-305.) On appeal, the defendant argued a "'capital defendant cannot unilaterally waive his Eighth and Fourteenth Amendment right to have the jury consider mitigating evidence.'" (*Id*. at p. 305.) The defendant further complained "that he *did* want to present mitigating evidence, but his lawyer unreasonably refused to call the two witnesses he wanted to testify." (*Id*. at pp. 306-307.) This Court rejected the argument. (*Id*. at pp. 305-307.)

Citing *McCoy* and *Gonzalez*, *supra*, 553 U.S. 242, the Court reasoned, "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.' [Citation.] 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.' [Citations.]" (*Poore*, *supra*, 13 Cal.5th at p. 307.) The Court reaffirmed the principle that "'[w]hen a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.'" (*Ibid*.) The Court continued, "Defendant's attorney was not required to present testimony from gang members Terflinger and Hayes

simply because defendant wanted these witnesses to appear. Counsel reasonably believed the witnesses would not help the defense." (*Ibid*.) The Court determined, "Defense counsel's refusal to call them did not render the death verdict unreliable." (*Ibid*.)

Poore demonstrates that a defendant does not choose the type of mitigating evidence presented in the penalty phase. A defendant's choice extends only to whether he or she will present a mitigation case at all. Indeed, in his concurring opinion, Justice Liu recognized, "Following *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* . . . ." (*Poore*, *supra*, 13 Cal.5th at p. 312 (conc. opn. of Liu, J.), italics added.)[3]

Frazier attempts to distinguish *Poore*, arguing, "[T]he 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

---

[3] Justice Liu also stated, "[C]eding that authority to the defendant may constitute ineffective assistance." (*Poore*, *supra*, 13 Cal.5th at p. 312 (conc. opn. of Liu, J.).) This statement is not necessarily true. Ineffective assistance claims are rooted in reasonableness and therefore do not involve bright-line rules. Moreover, ineffective assistance claims based on an attorney's acquiescence to his client's adamant wishes are barred under the invited-error doctrine. (*People v. Lang* (1989) 49 Cal.3d 991, 1031-1032, overruled on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

objectives." (SAOB 37.) However, Frazier's distinction is without a difference. Frazier's problem is still at bottom a dispute *about what evidence to present to meet his objective* of avoiding the death penalty, *not what the objective actually is*. Moreover, as noted, this case is not about limiting mitigation evidence. It is about substituting one kind of mitigation evidence for another—a plainly tactical dispute.

People v. Amezcua and Flores (2019) 6 Cal.5th 886 further supports the conclusion that *McCoy* does not aid Frazier. In *Amezcua and Flores*, "[t]he day before closing guilt phase arguments," the defendants informed their lawyers "repeatedly and emphatically that they did not want any defense presented should there be a penalty phase." (*Id*. at p. 920.) After a discussion with the trial court, "[b]oth defendants confirmed they wanted no mitigating evidence presented, no prosecution witness cross-examined, and no argument made on their behalf." (*Id*. at p. 924.) "The penalty phase proceeded according to defendants' directives. When counsel requested certain penalty phase instructions, each defendant objected. The instructions were not given." (*Id*. at p. 925.) On appeal, the defendants argued "the court's permitting them to override their attorneys' efforts to present a penalty defense, including the selection of jury instructions, denied them their rights to counsel and a reliable penalty determination. They also assert[ed] that the state's independent interest in fair, accurate, and reliable penalty verdicts was violated." (*Ibid*.)

This Court rejected the arguments, stating, "Thirty years of precedent . . . has 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." (*Amezcua and Flores*, *supra*, 6 Cal.5th at p. 925.) The Court added, "Despite the general rule that counsel is responsible for the selection of jury instructions, the requested instructions were properly refused in the face of defendants' objection. As the [trial] court implicitly recognized, the only reason for requesting them would be to seek a sentence of life without parole rather than death, the very decision the law commits to the defendant personally." (*Id*. at pp. 925-926.)

The Court supported its reasoning with that of *McCoy*, noting, "Choice of the defense objective is the client's prerogative." (*Amezcua and Flores*, *supra*, 6 Cal.5th at p. 926.) The Court rejected the defendants' "claim that the decision to present certain mitigating evidence or request particular jury instructions are aspects of trial management" and thus "they are controlled by counsel *even after defendants made clear their desire present no penalty phase defense*." (*Ibid*., italics added.) The Court explained, "To accept their argument would be to read out of existence the allocation of responsibilities the high court recognized in *McCoy*. The record clearly demonstrates defendants' objectives in this case." (*Ibid*.)

Frazier's reliance on *Amezcua and Flores* fails. (SAOB 28, 34, 41.) That case underscores that *McCoy* pertains to a defendant's choice of defense objective—i.e., whether to present any penalty phase defense at all. Here, Frazier did not ask his attorneys not to present any penalty phase defense. Indeed, he wanted a defense. This was a dispute about tactics to achieve the objective of presenting an effective case in mitigation.

Other opinions by this Court interpreting *McCoy* similarly demonstrate there was no error here. In *People v. Morelos* (2022) 13 Cal.5th 722, the trial court precluded the defendant from pleading guilty under Penal Code section 1018. (*Id*. at p. 746.) That statute provides, in part, "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." (Pen. Code, § 1018.) Subsequently, Morelos "represented himself at trial and waived his right to a jury trial at both the guilt and penalty phases.'" (*Morelos*, at p. 740.) On appeal, "Morelos . . . argue[d] that section 1018's consent-of-counsel requirement violates a defendant's Sixth Amendment right to control the prerogative of his or her defense" underscored in *McCoy*. (*Id*. at p. 746.)

This Court rejected Morelos's argument, stating that *McCoy* "did not consider a defendant's wish to admit guilt, let alone whether states can preclude a capital defendant from pleading guilty without counsel's consent in order advance the state's

strong interest in reliable capital convictions." (*Morelos*, *supra*, 13 Cal.5th at p. 749.) The Court continued, "As we have previously discussed, a guilty plea has unique consequences. [Citation]. 'Indeed, it serves as a stipulation that the People need introduce no proof whatever to support the accusation: the plea ipso facto supplies both evidence and verdict.' [Citation]. While *McCoy*'s dictum that '[s]ome decisions . . . are reserved for the client—notably, whether to *plead guilty*' [citation] certainly reiterates the critical importance of a defendant's autonomy interests, absent a clearer directive, we are not convinced it renders section 1018 unconstitutional." (*Ibid*.) The Court concluded, "In . . . view of the high stakes consequences for a defendant in a capital case, we are unpersuaded that *McCoy*'s passing dictum precludes the state from concluding 'that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subject to the requirement of his counsel's consent.'" (*Id*. at p. 750.)

Morelos undermines Frazier's claim in this case. If Penal Code section 1018—which involves a defendant's right to plead guilty in a capital case—does not run afoul of *McCoy*, then neither do the tactical disputes over penalty phase evidentiary strategy at issue here. The right to plead guilty in a capital case arguably has much greater legal and moral magnitude than the presentation of particular mitigating evidence for the agreed-upon goal of obtaining an LWOP sentence. (See *United States v. Roof* (2021) 10 F.4th 314, 353 ["Confessing guilt is of such

enormous legal and moral consequence as to properly be reserved to the defendant's sole discretion. By contrast, mental health evidence presented at sentencing as a form of mitigation is far less consequential, even if very important"].)

This Court has previously addressed a demonstrable autonomy right violation, and it bears no resemblance to this case. In *People v. Bloom* (2022) 12 Cal.5th 1008, "[a]t trial, defense counsel conceded Bloom's responsibility for the deaths of all three victims in an effort to pursue a mental capacity defense to the murder charges. Bloom, however, was willing to accept responsibility only for the killing of his father and expressly objected to admitting responsibility for the deaths of the other two victims." (*Id*. at p. 1015.) This Court held, "In conceding responsibility for these victims against Bloom's wishes, defense counsel violated Bloom's Sixth Amendment right to choose the fundamental objectives of his defense under *McCoy*." (*Ibid*.) The Court reasoned, "Defense counsel conceded, over Bloom's objection, both that Bloom killed Josephine and Sandra and that Bloom should be held criminally liable for the killings. Counsel's decision to concede Bloom's guilt on these counts cannot be squared with a rule that gives the criminal defendant the right to 'oppos[e] . . . any admission of guilt' [citation] and instead 'pursue acquittal' as the object of the representation [citation]." (*Id*. at p. 1038.)

This case is distinguishable from *Bloom*. In *Bloom*, the defendant and his lawyer disagreed about the fundamental objective of his defense—to concede guilt or maintain innocence.

Here, Frazier and his lawyers had the same objective—to avoid the death penalty. Their dispute centered on how to achieve that objective tactically, not on the objective itself. This case's contrast with *Bloom* demonstrates Frazier's right to autonomy was not violated.

Frazier's reliance on this Court's pre-*McCoy* cases *Lang*, *supra*, 49 Cal.3d 991 and *People v. Bloom* (1989) 48 Cal.3d 1194 is unavailing. (SAOB 32-33, 37-38, 41, 48-49, 55.) In *Lang*, defense counsel abided by the defendant's wishes not call his grandmother as a witness at the penalty phase. (*Lang*, at p. 1029.) The only mitigating evidence presented at the penalty phase was testimony by a correctional officer "that [the] defendant had not been involved in any disciplinary problems during the 14 months that he had been housed in . . . jail." (*Id*. at p. 1008.) On appeal, the defendant argued "that trial counsel, in agreeing to abide by [the] defendant's wishes, rendered ineffective assistance and defeated the state's independent interest in assuring a reliable penalty determination." (*Id*. at p. 1029.)

This Court rejected the arguments, reasoning, "Given the attorney's ethical duty of loyalty to the client, it is 'not outside the range of competent attorney actions to fail to present mitigating evidence when the defendant adamantly endorses that position.'" (*Lang*, *supra*, 49 Cal.3d at p. 1031.) The Court further determined that even had the attorney acted improperly, the invited-error doctrine "estop[s] a defendant from claiming ineffective assistance of counsel based on counsel's acts or

omissions in conformance with the defendant's own request." (*Id*. at pp. 1031-1032, fn. omitted.)

That Lang's counsel acted competently by acquiescing to Lang's wishes does not mean that Frazier was deprived of his right to autonomy because his own attorneys did not do the same. Indeed, the *Lang* court acknowledged that "selection of defense witness is generally a matter of trial tactics over which the attorney, rather than the client, has ultimate control." (*Lang*, *supra*, 49 Cal.3d at p. 1031.) The *Lang* simply observed "it does not necessarily follow that an attorney acts incompetently in honoring a client's request not to present certain evidence for nontactical reasons." (*Ibid*.) *Lang* thus supports the conclusion that presentation of the mitigation evidence in this case fell within the purview of Frazier's attorneys.

Frazier relies on the following language in *Lang*: "The proposition that defense counsel should be forced to present mitigating evidence over the defendant's objection has been soundly criticized by commentators. [Citations.] As these commentators point out, an attorney's duty of loyalty to the client means the attorney 'should always remember that the decision to forego legally available objectives or methods because of non-legal factors is ultimately for the client . . . .' [Citation.] 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, existing between

attorney and client." (*Lang*, *supra*, 49 Cal.3d at pp. 1030-1031; SAOB 32-33.)[4] That language does not aid Frazier.

First, the language is dictum because it was not necessary to the disposition of the issue on appeal in *Lang*. (*People v. Squier* (1993) 15 Cal.App.4th 235, 240 ["'The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum and not as the law of the case'"].) Second, even assuming a disagreement about mitigation evidence could undermine the trust between attorney and client, that does not mean that clients necessarily have a *constitutional right* to dictate the mitigation evidence presented at the penalty phase of a capital trial. As the United States Supreme Court has observed, "Giving the attorney

---

[4] Frazier also cites language stating, "Moreover, imposing such a duty could cause some defendants who otherwise would not have done so to exercise their Sixth Amendment right of self-representation [citation] *before commencement of the guilt phase* ([citations]) in order to retain control over the presentation of evidence at the penalty phase, *resulting in a significant loss of legal protection for these defendants during the guilt phase*." (*Lang*, *supra*, 49 Cal.3d at p. 1031, italics added; SAOB 33.) In a footnote, Frazier points out his disagreement regarding the mitigating evidence caused him to repeatedly request self-representation or substitution of counsel. (SAOB 33, fn. 9.) Notably, Frazier omits the italicized portions of the quoted language. The quotation in its proper context does not aid Frazier because he belatedly requested self-representation on the first day of the penalty phase, and thus did not run the risk of losing legal protection during the guilt phase. The quoted language also reinforces that Frazier's *Faretta* motions were untimely, thereby undermining his *Faretta* claims on appeal. (See AOB 69-159.)

control of trial management matters is a practical necessity," and involving the client to too great an extent in such matters "could risk compromising the efficiencies and fairness that the trial process is designed to promote." (*Gonzalez*, *supra*, 553 U.S. at p. 249.)

Indeed, as discussed in the respondent's brief (RB 84-86, 94-95), the record suggests Frazier was made aware of the mitigating evidence the defense intended to present in this case before the start of the guilt phase and started disagreeing with it and raising alternative *Marsden* and *Faretta* motions only when the penalty phase was about to commence. During a February 3, 2006 in-camera hearing,[5] Downing discussed Frazier's alleged mental disorders and the fact that she intended to present them in the mitigation case. (1RT 234-235.) During another in-camera hearing on March 16, 2006, Downing discussed additional mitigation evidence, including (1) her intention to contrast Frazier's life with that of his half-brother, Larry Junior; (2) Frazier's habit of sniffing gasoline; (3) Frazier's alleged organic brain damage and scans that the defense intended to conduct to assess that damage; (4) and expert opinions regarding Frazier's correctional and institutional history in the Illinois prison system. (3RT 701-710.) Although Frazier was not present at those hearings, Frazier's attorneys represented that they visited him in jail and were "at a point where [they were] making critical trial strategy decisions that require[d] his input," but he was

[5] Jury selection commenced over a month after this hearing on March 27, 2006. (4CT 1123.)

"often very distracted by [other] issues." (1RT 234-235.) Counsel sought to mitigate Frazier's distraction by preventing their meetings from infringing on his free time in jail, and the trial court signed an order to that effect. (1RT 234-235.) It is thus apparent Frazier's lawyers made great effort to discuss their mitigation strategy with Frazier long before the penalty phase commenced. Frazier's belated objections strongly suggest his disagreement with defense counsel was intended to delay the proceedings. Frazier should not be rewarded for any dilatory behavior with a finding of a violation of his autonomy.

Frazier argues, "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 a defendant has no right to limit the mitigating evidence for deeply held personal reasons." (SAOB 38.) Frazier is wrong.

Lang examined whether the defense attorney "perform[ed] with reasonable competence." (*Lang*, *supra*, 49 Cal.3d at p. 1031.) The *Lang* court simply determined that *despite* an attorney having "ultimate control" in the "selection of defense witnesses," the attorney in that case did not "act[] incompetently in honoring a client's request not to present certain evidence for nontactical reasons." (*Ibid*.) *Lang* did not address a *defendant's* right to autonomy. It makes perfect sense to hold that a *defendant* does not have the right to "limit" mitigating evidence—even though his or her attorney may otherwise reasonably acquiesce to such a limitation—because it is the attorney's job to

assess "tactics," over which the attorney "has ultimate control." (*Ibid*.)

In other words, the reasonableness of the attorney's performance in *Lang* was not predicated on the existence of a defendant's right to limit or control the type of mitigating evidence admitted in the penalty phase. To read *Lang* as Frazier insists unnecessarily pits *Lang* against *McCoy*. (See *Poore*, *supra*, 13 Cal.5th at p. 311 (conc. opn. of J. Liu) [acknowledging that *Lang*'s "rule appears in some tension with" *McCoy*].) The *McCoy* court acknowledged that the ineffectiveness of counsel analysis under *Strickland v. Washington* (1984) 466 U.S. 668 is *distinct* from the analysis governing client autonomy. (*McCoy*, *supra*, 138 S.Ct. at pp. 1511-1512.)

Bloom, *supra*, 48 Cal.3d 1194 also does not aid Frazier. (SAOB 33.) In *Bloom*, the trial court granted the defendant's motion for self-representation at the penalty phase with his lawyer as cocounsel to pursue his stated purpose of obtaining a death verdict because he did not want to spend the rest of his life in an institution. (*Bloom*, at pp. 1214-1218.) On appeal, this Court determined "the defendant's stated intention to incur the death penalty does not in and of itself establish an abuse of discretion in the granting of the self-representation motion." (*Id*. at p. 1220.)

The Court reasoned, "Given the importance which the decisions of both this court and the United States Supreme Court have attached to an accused's ability to control his or her own destiny and to make fundamental decisions affecting trial of the

action, and given this court's recognition that it is not irrational to prefer the death penalty to life imprisonment without parole [citation], it would be incongruous to hold that a trial court lacked power to grant a midtrial motion for self-representation in a capital case merely because the accused stated an intention to seek a death verdict." (*Bloom*, *supra*, 48 Cal.3d at pp. 1222-1223, fn. omitted.) The Court stated, "While we do not suggest that trial courts must or even should grant such midtrial motions, we do not find the trial court's ruling on the motion in this case to be violative of defendant's rights or contrary to any fundamental public policy," including "the policy against state-aided suicide." (*Id*. at p. 1223.)

The Court rejected the defendant's argument that his trial attorney "had an independent obligation to present an effective penalty defense on defendant's behalf." (*Bloom*, *supra*, 48 Cal.3d at p. 1226.) The Court reasoned the "defendant's attorney acted in a limited and largely advisory capacity at the penalty phase. Once defendant requested and was granted self-representation, and assumed control of the defense case, his attorney was under no obligation to act in a manner directly contrary to defendant's express instructions." (*Ibid*.) The Court held, "A self-represented defendant may not claim ineffective assistance on account of counsel's omission to perform an act within the scope of duties the defendant voluntarily undertook to perform personally at trial." (*Id*. at pp. 1226-1227.)

Bloom is distinguishable and *McCoy* undermined certain aspects of *Bloom*'s reasoning. *Bloom* examined the pre-*McCoy*

boundaries between a defendant's autonomy *when representing himself* and situations where the exercise of that autonomy deprives him of other rights. This case involves a different scenario—the post-*McCoy* boundary between a defendant's autonomy as a represented client and his or her lawyer's job to make tactical decisions. Moreover, the *Bloom* court implied that had Bloom been represented by counsel, counsel could have had the "obligation to act in a manner directly contrary to [Bloom's] express instructions." (*Bloom*, *supra*, 48 Cal.3d at p. 1226.) Under *McCoy*, however, Bloom likely had the right to pursue a death verdict and prevent his attorney from introducing any mitigating evidence.

In any event, unlike Bloom, Frazier did not seek a death verdict. Frazier and his attorneys shared the fundamental objective of pursuing an LWOP verdict. Therefore, holding that Frazier's right to autonomy was not violated in this case does not contradict *Bloom*.

In sum, this Court's jurisprudence before and after *McCoy* establishes there was no error here. Accordingly, Frazier's claim fails.

E. Federal circuit court decisions establish there was no error

Like the precedent of this Court and that of the high court, federal circuit court decisions show that no violation of Frazier's right to autonomy occurred. In *Roof*, *supra*, 10 F.4th 314, "[r]elying on *McCoy*, Roof claim[ed] that the district court misadvised him that he could not choose as a primary 'objective' of his defense that he not be labeled as mentally ill or autistic.

Defense counsel wished to present evidence that conflicted with Roof's aversion to any suggestion of a diminished mental capacity. Roof contend[ed] that counsel should have been forced to conform to his objective and that he should have been advised that he could constrain his counsel in that way." (*Id*. at p. 352.) The Fourth Circuit held that under *McCoy*, "preventing the presentation of mental health evidence cannot be the 'objective' of a defense." (*Id*. at p. 350.)

The Fourth Circuit explained, "We do not subscribe to Roof's interpretation of *McCoy*. When one 'chooses to have a lawyer manage and present his case,' he cedes 'the power to make binding decisions of trial strategy in many areas.' [Citation.] The presentation of mental health mitigation evidence is, in our view, 'a classic tactical decision left to counsel . . . even when the client disagrees.'" (*Roof*, *supra*, 10 F.4th at p. 352.) The Fourth Circuit observed, "Roof's interpretation of *McCoy* is flawed because *it would leave little remaining in the tactics category by allowing defendants to define their objectives too specifically*. In other words, as the government rightly contends, *Roof's position would allow a defendant to exercise significant control over most important aspects of his trial—such as the presentation of particular evidence, whether to speak to a specific witness, or whether to lodge an objection—as long as he declares a particular strategy or tactic to be of high priority and labels it an 'objective.'* That cannot be." (*Id*. at p. 353, italics added.)

The same concerns underpin Frazier's position in this case. The Fourth Circuit's analysis cogently illuminates why Frazier's

purported entitlement to substitute mitigation evidence as he sees fit despite being represented by counsel cannot be squared with *McCoy*. Frazier stretches the holding of *McCoy* too far, completely blurring the line between the objective of a defense and the means by which that objective is reached by trial counsel.

The Fourth Circuit also distinguished *United States v. Read* (9th Cir. 2019) 918 F.3d 712—relied upon by Frazier (SAOB 45-46)—"where the Ninth Circuit held that a defendant has the right to prevent an insanity defense under *McCoy* because '[a]n insanity defense is tantamount to a concession of guilt' and 'carries grave personal consequences that go beyond the sphere of trial tactics.'" (*Roof*, *supra*, 10 F.4th at p. 352 [discussing *Read*].) The Fourth Circuit stated that *Read* is "distinguishable on the key point that an insanity defense entails an admission of guilt. [Citations.] The Ninth Circuit's suggestion in dicta that avoiding the stigma of mental illness can constitute a trial objective regardless of the admission of guilt is not persuasive. Acknowledging mental health problems, and bearing any associated stigma, is simply not of the same legal magnitude as a confession of guilt." (*Id*. at p. 353.)

Roof's reasoning undercuts that of *Read* and Frazier. (See SAOB 30-31, 42-50.) *Roof*'s reasoning is sounder because it accounts for the line between a client's defense objective and a lawyer's tactics to achieve that objective. As the *Roof* court observed, allowing a defendant essentially to take full control of the presentation of evidence risks eviscerating a defense attorney's ability to make competent tactical decisions to achieve

the defendant's objections. (*Roof*, *supra*, 10 F.4th at p. 353.) *Roof*'s holding also accounts for the countervailing interest of preserving "the efficiencies and fairness that the trial process is designed to promote." (*Gonzalez*, *supra*, 553 U.S. at p. 249.) Accordingly, Frazier's reliance on *Read* and secondary sources that blur the line between a defendant's autonomy and attorney tactics is unavailing. (SAOB 30-31, 42-50.)

Other federal circuit court decisions further demonstrate there was no violation of Frazier's right to autonomy. In *United States v. Audette* (9th Cir. 2019) 923 F.3d 1227, the district court granted the defendant's motion for self-representation and appointed advisory counsel. (*Id*. at p. 1232.) The Ninth Circuit rejected Audette's contention on appeal "that the district court erred under *McCoy* because '. . . [his] request for self-representation was based on his desire to assert his innocence and his attorney's refusal to honor that objective.'" (*Id*. at p. 1236.) The Ninth Circuit observed the record showed Audette simply did not like some of the arguments the attorney intended to make. (*Ibid*.) The court explained *McCoy*, stating, "*McCoy*'s upshot is that a criminal defendant has the autonomy to decide the objectives of his defense," but the "represented defendant *surrenders control over tactical decisions, such as which witnesses to call and which arguments to advance . . . .*" (*Ibid*., italics added.)[6] The court concluded the disagreement between Audette

[6] *Audette* also distinguished *Read*, noting that case "was not implicated" because Audette's attorney was not going to present an insanity defense over Audette's objection. (*Audette*, *supra*, 923 F.3d at p. 1236.)

and his attorney was not about the objectives of the defense. (*Ibid*.)

Similarly, in *United States v. Holloway* (10th Cir. 2019) 939 F.3d 1088, defense counsel sought a competency evaluation "to determine if [Holloway] could form the requisite intent to defraud the victims." (*Id*. at p. 1101.) Holloway "adamantly opposed an incompetency defense, and his counsel's supposed fixation on his mental health frustrated him." (*Id*. at p. 1093.) Instead, Holloway wanted his lawyer to argue that he "did not intently [*sic*] mislead any investor." (*Id*. at p. 1094.) On appeal, the defendant argued his lawyer's "intent-based defense usurped his ability to control the objective of his case." (*Id*. at p. 1101.)

The 10th Circuit rejected Holloway's argument, reasoning, "Holloway expressly represented to Murphy that he wanted to contest the intent element of the wire fraud charges against him. Indeed, Holloway asked Murphy to convince the jury that he 'did not intent[ionally] mislead any investor.' Because Holloway sanctioned a defense based on intent, we are not convinced that Murphy 'usurped' his ability define the objective of his defense." (*Holloway*, *supra*, 939 F.3d at p. 1101, fn. omitted.) The 10th Circuit addressed *McCoy*, stating, "[T]he Supreme Court recognized in *McCoy* that the disputes there 'were *not* strategic disputes about whether to concede an element of a charged offense.' [*McCoy*, *supra*, 138 S.Ct.] at 1510 (emphasis added). Meanwhile, the disputes here *are* strategic disputes. And as noted above, Holloway expressly requested his counsel attack the

intent element of the government's case against him." (*Id*. at p. 1101, fn. 8.)

This case analogous to *Audette* and *Holloway*. Frazier sought to present a penalty phase defense to avoid the death penalty, but disagreed with his lawyers about which witnesses to call and what arguments to advance. Frazier's objective was always to avoid death, which his counsel attempted to achieve. The dispute thus plainly fell firmly into the realm of decisions that a defendant surrenders to his or her lawyers.

Some federal appellate authority even suggests the right to autonomy would not be violated if an attorney disregarded his client's wishes to present no guilt or penalty phase defense at all. In *Kellogg-Roe v. Gerry* (1st Cir. 2021) 19 F.4th 21, the defendant "instructed his counsel multiple times to present no defense at all at trial. Counsel informed the state trial judge of the request." (*Id*. at p. 23.) When the trial court questioned Kellogg-Roe regarding his wishes, "it was clear that [he] did not want his counsel to present a defense. The trial judge told Kellogg-Roe that he could not direct his counsel to present no defense, noting that he always had the choice of representing himself with counsel on standby, which would place Kellogg-Roe in 'complete control' of his own defense." (*Ibid*.) "Kellogg-Roe proceeded to trial represented by counsel. At trial, Kellogg-Roe's counsel presented an active defense, making an opening statement, cross-examining six of the prosecution's witnesses, and offering three defense witnesses." (*Id*. at pp. 23-24.)

On appeal, Kellogg-Roe argued "he was denied autonomy to direct the objectives of his defense when his trial counsel presented an active defense contrary to his express wishes." (*Kellogg-Roe*, *supra*, 19 F.4th at p. 25.) The First Circuit disagreed and distinguished *McCoy*, stating, "The presentation of an active defense, even over the client's objection does nothing to subvert the client's desire to maintain his innocence. By choosing to go to trial . . . Kellogg-Roe availed himself of the presumption of innocence. Counsel did nothing to contradict this presumption. His lawyer's actions—presenting an opening argument, cross-examining the prosecution's witnesses, and putting forward defense witnesses—were quite the opposite of conceding guilt. *Trial counsel in this case made the typical kinds of decisions attorneys are charged with in order to protect their client's innocence*." (*Id*. at p. 27, italics added.)

The First Circuit continued, "Kellogg-Roe's 'silent defense' also does not fall into any of the other categories of fundamental decisions that the Supreme Court has reserved to the defendant under the Sixth Amendment: 'whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forgo an appeal.'" [Citation.] By mounting a defense at trial, counsel did not take any of these choices away from Kellogg-Roe." (*Kellogg-Roe*, *supra*, 19 F.4th at p. 27.)

Kellogg-Roe's reasoning suggests that a defendant who proceeds to trial has no autonomy right to ask his attorney not to present active guilt or penalty phase defenses. While that reasoning is in tension with this Court's decision in *Amezcua and*

Flores, *supra*, 6 Cal.5th at pages 925-926, *Kellogg-Roe* nevertheless underscores that Frazier's lawyers made the typical decisions defense attorneys must make to protect their clients from the death penalty. By presenting the challenged mitigating evidence, Frazier's counsel did not take away Frazier's choices about whether to present a mitigation case, testify on his own behalf, or forgo an appeal. Extending *McCoy* to evidentiary disputes such as the one in this case would "confuse, rather than clarify, *McCoy*'s careful delineation between decisions reserved to the client and those left to the attorney." (*Kellogg-Roe*, *supra*, 19 F.4th at p. 28.)

United States v. Rosemond (2d Cir. 2020) 958 F.3d 111 further illustrates the delineation articulated in *McCoy* does not compel reversal here. In *Rosemond*, the defendant was accused of committing murder for hire. (*Id*. at pp. 118-119.) During closing argument, Rosemond's attorney "acknowledged that Rosemond paid for [the victim] to be shot, but he argued that the government failed to prove beyond a reasonable doubt that Rosemond intended for [the victim] to be killed." (*Id*. at p. 119.) On appeal, Rosemond argued his Sixth Amendment rights to autonomy and effective assistance of counsel were violated because his attorney "admitted 'guilt of criminal acts over Rosemond's express objection.'" (*Id*. at pp. 119, 122.)

The Second Circuit rejected the argument, reasoning, "The [*McCoy*] majority repeatedly made clear that its decision was meant to safeguard the 'objective of [one's] defense,' [citation], plainly stating that it is the defendant's prerogative, not

counsel's, to decide on the objective of his defense,' [citation]. Once a defendant decides on an objective—*e.g.*, acquittal—'[t]rial management is the lawyer's province' and counsel must decide, *inter alia*, 'what arguments to pursue.' [Citation.] Conceding an element of a crime while contesting the other elements falls within the ambit of trial strategy. [Citations.]" (*Rosemond*, *supra*, 958 F.3d at p. 122.)[7]

Rosemond further addressed an argument regarding "opprobrium" similar to that raised by Frazier in this case. (*Rosemond*, *supra*, 958 F.3d at p. 124; see SAOB 27, 45, 51.) In *Rosemond*, the defendant "was comfortable admitting to the jury that he paid for a kidnapping, but he drew the line at paying for a shooting." (*Rosemond*, at p. 124.) The Second Circuit reasoned, "Had Rosemond asserted his right to autonomy to prevent his attorney from conceding any crime because of the 'opprobrium' that accompanies such an admission [citation], his argument might carry more weight. It loses its thrust, however, when he picks and chooses which crime he is comfortable conceding."

---

[7] The *Rosemond* court also "read *McCoy* as limited to a defendant preventing his attorney from admitting he is guilty of the crime with which he is charged." (*Rosemond*, *supra*, 958 F.3d at p. 123, italics added; see also *United States v. Wilson* (3d Cir. 2020) 960 F.3d 136, 144 [distinguishing *McCoy* from Wilson's lawyer's "failure . . . to heed [Wilson's] instruction to contest a jurisdictional element" on the ground that *McCoy* was "about conceding factual guilt"]; but see *People v. Flores* (2019) 34 Cal.App.5th 270, 273, 280-283 [defense counsel violated client's Sixth Amendment autonomy right by conceding "the actus reus of the charged crimes" "in pursuit of the understandable objective of achieving an acquittal"].)

(*Ibid*.) The court stated, "While avoiding the shame that comes with admitting to a criminal act can be a genuine concern, that concern seems highly unlikely here." (*Ibid*.)

In this case, Frazier maintains he was "concern[ed] with the opprobrium and other consequences that could result from the evidence of mental impairment and attachment theory" analogously "to the type of personal objective *McCoy* recognized as inherent to the Sixth Amendment right to counsel." (SAOB 51; see also SAOB 45 ["a defendant may oppose mental impairment evidence to avoid the opprobrium or stigma of being labeled mentally ill or incompetent"].) But Frazier's assertions on appeal are belied by his explanations in the trial court that he objected to that evidence because he believed it was "cheap emotionalism," "monkey business," and "people trying to help [him] because they like[d] [him]." (47RT 964; 48RT 9794-9795; 51RT 10381.) Frazier also apparently opposed the use of evolutionary science. (48RT 9795.)

Frazier's explanations in the trial court do not establish that his goal in objecting to the mitigating evidence was to avoid the opprobrium or stigma of mental illness. Indeed, Frazier apparently sought to substitute one kind of "emotionalism" for another, impermissible type—how his "friends and loved ones [would] be affected if [the jury] decided to have [him] executed." (48RT 9795; *Williams*, *supra*, 56 Cal.4th at p. 197.) Frazier's argument "loses its thrust" because "he picks and chooses which [emotionally charged evidence] he is comfortable" admitting. (*Rosemond*, *supra*, 958 F.3d at p. 124.)

Frazier argues, "[I]t is apparent that [he] was personally offended by the expert testimony about attachment theory and his mental health and brain abnormality" because "in response to appointed counsel's offer of proof regarding" that evidence, "he joked that 'the way she described the probability of [his] brain damage, [he was] surprised [he] could have remembered anything she said." (SAOB 50-51.) Frazier also cites his sarcastic remarks about his "brain need[ing] sharpening"; his alleged concerns about slandering his uncle; his tactical disagreements about how the prosecutor and jurors would view the challenged evidence; and the trial court's observation during one of the in-camera proceedings that Frazier viewed the challenged mitigating evidence as "insulting" or "denigrating." (SAOB 51-53.) Frazier's contentions are unavailing.

While certainly emotional, the lateness of Frazier's objections, his desire to present inadmissible mitigation evidence of his choosing, and his wish to speak to the jury without being subjected to cross-examination cast doubt on the sincerity of his purported indignation at the "opprobrium" he claims accompanied the challenged evidence.[8] To be sure, the circumstances surrounding Frazier's objections point to a desire to delay the proceedings and present improper evidence—tactics that should not be rewarded in this appeal. In any event,

---

[8] Frazier's assertions bolster respondent's arguments that he made his untimely *Faretta* requests under a cloud of emotion, thereby further undermining his *Faretta* claims. (RB 78, 96-97; *People v. Marshall* (1997) 15 Cal.4th 1, 21 [a *Faretta* request made "under the cloud of emotion may be denied"].)

regardless of Frazier's opinions about the challenged mitigation evidence, his strategic disagreements about the effectiveness of the mitigation case defense counsel intended to present are not grounds for *McCoy* error.

F. The decisions of other state courts do not support Frazier's contentions

Frazier relies on authorities from other states in support of his contentions—the pre-*McCoy* case *State v. Maestas* (Utah 2012) 299 P.3d 892 and the post-*McCoy* case *State v. Brown* (La. 2021) 330 So.3d 199. (SAOB 39-41, 50, 53.) Neither case aids him.

In *Maestas*, "[f]ollowing the State's presentation of aggravating circumstances [in the penalty phase of a capital trial], the defense began to present evidence of mitigating circumstances." (*Maestas*, *supra*, 299 P.3d at p. 955.) After the first witness testified, Maestas objected to the remainder of the mitigating evidence on which his attorneys planned to rely. (*Ibid*.) The trial court ordered the lawyers to abide by Maestas's wishes. (*Id*. at pp. 955-957.) The lawyers complied and argued the evidence already introduced in advocating for an LWOP sentence. (*Id*. at pp. 957-958.)

On appeal, Maestas argued "the trial court erred . . . in granting his request to waive the right to present mitigating evidence." (*Maestas*, *supra*, 299 P.3d at p. 955.) The Utah Supreme Court rejected the claim, reasoning, "[A] defendant has a Sixth Amendment right to make important decisions about his or her defense. This suggests that, under the Sixth Amendment, a defendant may waive the right to presentation of mitigating

evidence." (*Id*. at pp. 955, 958, fn. omitted.) The *Maestas* court observed that in another pre-*McCoy* case—*State v. Arguelles* (Utah 2003) 63 P.3d 731—it had "specifically held that a defendant's Sixth Amendment right to 'control the course of the proceedings carries with it the right to choose how much—if any—mitigating evidence is offered.'" (*Maestas*, at p. 959, fn. omitted.)

The *Maestas* court further explained, "Like other decisions that a represented defendant has the right to make, such as the decision to plead guilty to an offense or testify in the proceedings, 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. 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." (*Maestas*, *supra*, 299 P.3d at p. 959, fns. omitted.)

The court continued, "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.'" (*Maestas*, *supra*, 299 P.3d at p. 959, fns. omitted.)

Maestas does not aid Frazier. *Maestas* was decided before *McCoy* articulated the proper test for a defendant's right to autonomy in light of the boundaries between the objective of a defendant's defense and the lawyer's province of trial management. (*McCoy*, *supra*, 138 S.Ct. at pp. 1505, 1508.) It is not clear whether the *Maestas* court would have reached the same result or engaged in the same reasoning had it applied *McCoy*'s test. Indeed, as discussed above and for the reasons articulated by the Fourth Circuit in *Roof*, *supra*, 10 F.4th at pages 352 to 353, *Maestas*'s reasoning blurs the boundaries between client autonomy and lawyer trial management, erasing that important distinction.

In any event, *Maestas* is distinguishable. Unlike Maestas, Frazier did not seek to waive his right to the presentation of further mitigating evidence. Nor did he insist that his attorneys present no mitigation case whatsoever. Rather, Frazier sought to introduce completely different mitigating evidence that was inadmissible. This is a classic disagreement about trial tactics and management, not about the objective of the penalty phase defense.

For similar reasons, *Brown*, *supra*, 330 So.3d 199 also does not aid Frazier. In *Brown*, the defendant argued "that the trial

court erroneously forced him to choose between allowing defense counsel to introduce mitigation evidence concerning his mother or forego counsel at the penalty phase altogether, resulting in a violation of his Sixth Amendment right to counsel. Defendant contend[ed] that he would have preferred to proceed with the assistance of counsel on the condition that this particular evidence not be introduced. Citing *McCoy* . . . , defendant assert[ed] 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 pp. 221-222.) The defendant also argued "that his waiver of his right to counsel was constitutionally infirm" because "the trial court's erroneous instruction as to his right to limit the mitigation evidence during the penalty phase rendered his waiver unknowing, unintelligent, and involuntary." (*Id*. at p. 222.)

The Louisiana Supreme Court agreed. (*Brown*, *supra*, 330 So.3d at pp. 223-230.) The *Brown* court observed that for a waiver of the right to counsel "to be knowing and intelligent, the trial court must necessarily provide an accurate description of the defendant's right to counsel that he or she is relinquishing." (*Id*. at p. 223.) Relying in part on *McCoy* and *Maestas*, the *Brown* court concluded "the trial court erroneously advised defendant he could not direct his counsel to limit the mitigation evidence presented during the penalty phase." (*Id*. at pp. 223-228.)

The *Brown* court's importation of *Maestas*'s reasoning into the *McCoy* rule expands *McCoy* beyond its scope into the territory of choices that are left to attorneys rather than clients. Accordingly, *Brown* should not be followed. Moreover, this case bears no resemblance to *Brown*. As noted, Frazier did not seek to limit the mitigation evidence or waive a mitigation defense case. There are also strong indications in the record that Frazier objected to the mitigation evidence to delay the penalty phase. The Sixth Amendment right to autonomy does not authorize Frazier's aims.

CONCLUSION

Based on the arguments and authorities set forth above, in respondent's opposition to Frazier's motion to stay the appeal, and in the respondent's brief, the judgment and sentence of death should be affirmed in their entirety.

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
ALICE B. LUSTRE
Supervising Deputy Attorney General

/S/ VICTORIA RATNIKOVA
VICTORIA RATNIKOVA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

December 13, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Century Schoolbook font and contains 12,088 words.

ROB BONTA
Attorney General of California

/S/ VICTORIA RATNIKOVA
VICTORIA RATNIKOVA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

December 13, 2023

SF2007400002
43982604.docx

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *People v. Frazier*
No.: S148863

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On December 13, 2023, I electronically served the attached

SUPPLEMENTAL RESPONDENT'S BRIEF

by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on December 13, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

County of Contra Costa
Wakefield Taylor Courthouse
Superior Court of California
725 Court Street
Martinez, CA 94553-1233
via U.S. mail

CAP - SF
California Appellate Project (SF)
345 California Street
Suite 1400
San Francisco, California 94104
via U.S. mail

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 13, 2023, at San Francisco, California.

A Bermudez	*/s/ A. Bermudez*
Declarant	Signature

SF2007400002
43992385.docx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. FRAZIER (ROBERT WARD)**
Case Number: **S148863**
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: **Victoria.Ratnikova@doj.ca.gov**

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

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	S148863_SRB_People.PDF
APPLICATION	S148863_App to File_People.PDF

Service Recipients:

Person Served	Email Address	Type	Date / Time
District District Attorney - Contra Costa County Court Added	appellate.pleading@contracostada.org	e-Serve	12/13/2023 3:26:31 PM
Mark Feeser Office of the State Public Defender 252968	mark.feeser@ospd.ca.gov	e-Serve	12/13/2023 3:26:31 PM
Attorney Attorney General - San Francisco Office Court Added	sfagdocketing@doj.ca.gov	e-Serve	12/13/2023 3:26:31 PM
Office Office Of The State Public Defender - Sf Evan Young, Supervising Deputy State Public Defender	young@ospd.ca.gov	e-Serve	12/13/2023 3:26:31 PM
Christina Spaulding Office of the State Public Defender 228631	christina.spaulding@ospd.ca.gov	e-Serve	12/13/2023 3:26:31 PM
Attorney Attorney General - San Francisco Office Glenn R. Pruden, Supervising Deputy Attorney General 195089	GLENN.PRUDEN@DOJ.CA.GOV	e-Serve	12/13/2023 3:26:31 PM
Office Office Of The State Attorney General Court Added	SFAG.Docketing@doj.ca.gov	e-Serve	12/13/2023 3:26:31 PM
Victoria Ratnikova Office of the Attorney General 280386	victoria.ratnikova@doj.ca.gov	e-Serve	12/13/2023 3:26:31 PM
Superior Superior Court Of Contra Costa County Court Added	bmasi@contracosta.courts.cagov	e-Serve	12/13/2023 3:26:31 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.

12/13/2023

Date

/s/Alissa Bermudez

Signature

Ratnikova, Victoria (280386)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm