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. 5-041700-6 **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 REPLY BRIEF

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INTRODUCTION

Appellant's Supplemental Reply Brief is limited to the rebuttal of specific points in the Supplemental Respondent's Brief ("SRB"). This limitation does not constitute a waiver of any points raised in Appellant's Supplemental Opening Brief ("SAOB"). Appellant submits that any points in the SRB for which a partial or no reply has been made are fully covered in the SAOB and only those points requiring additional comment will be addressed herein.

ARGUMENT

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

McCoy v. Louisiana (2018) 584 U.S. __, 138 S.Ct. 1500 (*McCoy*), was a watershed decision that elevated Sixth Amendment

autonomy rights beyond inflexible distinctions between a defendant's "objectives" and trial "strategy" controlled by counsel. Specifically, the Court recognized that a defendant's personal objectives, beyond pleading guilty or seeking a life sentence, can overlap with and supersede what might otherwise be considered reasonable strategic choices controlled by counsel. (SAOB 23-32.) While *McCoy* arose in the context of a dispute over a guilt phase concession, its reasoning applies with equal force to disputes over mitigation evidence at the penalty phase of a capital trial. (*Id.* at pp. 23-50.) Here, appellant's autonomy rights were violated when counsel presented certain mitigation evidence over his express and repeated objections, based on his objective to avoid a penalty phase defense that would misrepresent who he was and was thus unlikely to persuade the jury to spare his life. (*Id.* at pp. 50-56.) The error is structural and requires reversal. (*Id.* at pp. 56-57.)

Respondent disagrees, arguing that *McCoy* should be narrowly interpreted and does not apply where a defendant seeks to limit only a portion of the mitigation evidence. Respondent's unreasonably narrow interpretation of *McCoy*, which fails to honor the important autonomy right at issue, must be rejected.

A. Respondent misconstrues the nature and scope of the dispute over the mitigation evidence in this case.

Before turning to the merits of appellant's Sixth Amendment claim, it is important to clarify the nature of the dispute over the mitigation evidence in this case. Respondent frames the dispute here as a purely tactical disagreement motivated by appellant's desire to delay the penalty phase of his trial and to "substitute[] the

admissible evidence his lawyers sought to present with evidence that was inadmissible." (SRB 23; see also *id.* at pp. 6-7, 20-21, 23, 35, 48, 51, 53.) Respondent thus claims that appellant "did not seek to … limit the mitigating evidence, as he claims on appeal." (*Id.* at p. 23.) Respondent's characterization of the dispute is incorrect.

Most significantly, appellant did not oppose substantial portions of the penalty phase evidence counsel ultimately presented. (SAOB 54-55.) He did not object to the testimony of two prison experts about his future dangerousness if sentenced to life in prison. (See 52RT 10618-10660 [George De Tella]; 54RT 10893-10930 [James Esten].) He did not object to his mother testifying after he was assured that she was not pressured to participate. (Sealed 47RT 9543-9560.) He objected to Jeff Triolo's ("Triolo") testimony about childhood molestation, but he did not complain about other aspects of his testimony. (See Sealed 49RT 10088; 51RT 10333, 10341, 10377; Sealed 51RT 10381.) Accordingly, while appellant disagreed with significant aspects of counsel's mitigation defense, he did not universally object to the entire penalty phase defense.

Respondent is also mistaken that appellant only wanted to present inadmissible evidence. Respondent points out that appellant wanted to "present evidence of how his loved ones would be affected by his execution," noting that the evidence was inadmissible for that purpose. (SRB 20.) Appellant continued, however, explaining that "[w]hat I mean to only one other person is a mitigating factor." (Sealed 47RT 9795.) While appellant – who is not an attorney – may not have stated his rationale with legal precision, the jury was permitted to consider testimony demonstrating his redeeming

qualities. (*People v. Ochoa* (1998) 19 Cal.4th 353, 456 ["jury may take into account testimony from the defendant's mother that she loves her son if it believes that he must possess redeeming qualities to have earned his mother's love."].) Counsel similarly highlighted this evidence in closing argument. (57RT 11613-11616 ["these things can be considered not for sympathy for the family but to the extent that they reflect a goodness within Bob Frazier…"].)

Additionally, while appellant stated a desire to give a closing statement without being subject to cross-examination, he did so in the context of trying to persuade the trial court that his pro per motion was timely and that granting it would not cause a significant delay. (Sealed 48RT 9792-9795; Sealed 52RT 10519-10520.) Appellant was, of course, desperate to represent himself because of his concerns about the mitigation evidence. (SAOB 12-23.) Appellant's representations about how he would proceed if granted pro per status, therefore, are not dispositive of the mitigation defense he would have agreed to with counsel if his autonomy right had been recognized.

Respondent also argues that appellant had advance notice of the mitigation evidence and only objected after the guilt phase in a disingenuous attempt to delay the penalty phase of his trial. (SRB 7, 34-35, 48, 53.) Respondent cites a February 3, 2006, pre-guilt phase hearing, where defense counsel "discussed Frazier's alleged mental disorders and the fact that she intended to present them in the mitigation case." (SRB 34, citing sealed 1RT 234-235.) And, at a March 16, 2006, hearing, counsel discussed a plan to contrast

appellant to his half-brother, and to develop evidence of organic brain damage. (SRB 34, citing sealed 3RT 701-710.)

As Respondent acknowledges, however, appellant was not present at either hearing. (SRB 34.) Moreover, the brief comments by defense counsel fail to demonstrate that appellant had adequate notice of the specific mitigation evidence to which he later objected. For example, counsel's statements at the pre-guilt phase hearings were made before a brain scan was even conducted. (Sealed 3RT 703-704, 708-709.) Counsel also did not mention attachment theory at either hearing, or the evidence that appellant was molested by his uncle as a child. (See sealed 1RT 234-235; Sealed 3RT 701-710.)

Instead, the record demonstrates that the dispute over the mitigation evidence began to percolate only after the guilt phase concluded on June 21, 2006. (46RT 9447-9452; Sealed 46RT 9456.) As the focus of the defense naturally turned to the penalty phase at this time, it makes sense that appellant and counsel had begun to discuss the anticipated mitigation evidence in more detail.

It was not until July 26, 2006, however, only a few days before the penalty phase began, that appellant began to receive meaningful notice of the mitigation evidence, as the trial court held an evidentiary hearing that included, inter alia, an extensive discussion of the videos related to attachment theory. (47RT 9626-9635.) Appellant promptly demanded substitute counsel after listening to counsel's arguments (*id.* at p. 9632) and the court held an in camera hearing where appellant explained precisely why he felt some of the mitigating evidence would "misrepresent[]" him. (Sealed 47RT 9643-9645.) Appellant also indicated that he had not discussed this

evidence with counsel, did not "understand" it, and did not think it was a "good idea." (*Id.* at pp. 9644-9645.) Four days later, on July 31, 2006, he reiterated his disapproval of the attachment theory videos, noting he had only seen some of the video. (Sealed 48RT 9794-9795.)

Similarly, defense counsel received word only three days before the penalty phase commenced, on July 28, 2006, that an expert had prepared a report concluding that appellant had organic brain damage. (See 48RT 9724-9727; 53RT 10777.) Counsel discussed the evidence at an in camera hearing on July 31, 2006, and appellant immediately noted his disagreement. (Sealed 48RT 9800 [appellant joked that, given counsel's offer of proof, it was surprising he could remember what she had said].) There is also no indication that appellant was aware that Triolo would testify about childhood molestation until the first day of the penalty phase trial, when it was mentioned in counsel's opening statement. (See 48RT 9835-9836, 9860; see sealed 51RT 10381-10383 [after attempting to pass a note to the prosecutor during Triolo's testimony, appellant explained that counsel had been "quite hidden on these things."].)

The record thus demonstrates that as appellant learned more about the intended penalty phase defense in the weeks after the guilt phase verdicts, he promptly objected to the specific mitigation evidence that conflicted with his fundamental personal objectives.

B. The reasoning of *McCoy v. Louisiana* applies with equal force to appellant's fundamental objectives at the penalty phase of his capital trial.

According to Respondent, "*McCoy* should not be extended to the circumstances of this case" because, as a form of structural

error, *McCoy's* "scope is necessarily limited." (SRB 21-22.) Respondent also asserts that "[a]llocating decisions to clients regarding the type of mitigating evidence presented would swallow much of counsel's long-recognized authority to manage the defense." (*Id*. at pp. 21-22) Respondent further worries that "the promise of automatic reversal would promote ever more litigation about a defendant's autonomy right to select from myriad potential 'objectives.'" (*Id*. at p. 22.) Respondent's contentions, which fail to acknowledge the significant autonomy interest implicated by the dispute over the mitigation evidence in this case, must be rejected.

First, Respondent cites *People v. Mil* (2012) 53 Cal.4th 400, 410, for the proposition that structural error applies to a " "'very limited class of cases.'" "[1] (SRB 21.) *Mil*, however, analyzed whether an *instructional error* in a *non-capital* case was structural and is thus inapposite to appellant's Sixth Amendment claim, which – like *McCoy* – goes to the heart of how he would be portrayed to a jury tasked with deciding whether to sentence him to death.

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[1] The violation of a defendant's autonomy right is structural error because it affects the "'framework within which the trial proceeds'" and is thus "complete" the moment a court permits counsel to "usurp control of an issue within the [defendant's] sole prerogative." (*McCoy*, *supra*, 138 S.Ct. 1500, 1511.) Error is also structural when "its effects are too hard to measure," a principle doubly implicated where a defendant's autonomy rights are violated at the penalty phase. (*Ibid*.; see also *People v. Brown* (1988) 46 Cal.3d 432, 448 [applying heightened prejudice standard for *state law error* at penalty phase because jury's "role is not merely to find facts, but also—and most important—to render an individualized, normative determination about the penalty appropriate for the particular defendant—i.e., whether he should live or die."].)

Second, the tension between allocating some control to a defendant over the mitigating evidence and counsel's ability to manage the defense does not require this Court to discount appellant's autonomy rights. In *McCoy*, the defendant's objective to maintain his factual innocence conflicted with counsel's strategy of conceding the actus reus but contesting McCoy's intent, to set up a more effective penalty phase defense. The Court resolved this tension in favor of a defendant's right "to make the fundamental choices about his own defense." (*McCoy*, *supra*, 138 S.Ct. 1500, 1511.) *McCoy* thus recognized that a defendant's autonomy rights can extend to significant strategic decisions that might otherwise be controlled by counsel. Nothing about *McCoy's* reasoning suggests that the supremacy of this client autonomy right evaporates at the penalty phase of a capital trial. (SAOB 28-32.)

Third, while the promise of automatic reversal may "promote ever more litigation" (SRB 22), prior attempts to draw rigid lines between a defendant's autonomy and counsel's control over defense strategy have similarly failed to prevent further litigation. (SAOB 23-26.) Moreover, a defendant can only raise *McCoy* error if he has expressly objected to trial counsel's tactics. (*McCoy*, *supra*, 138 S.Ct. 1500, 1505, 1509, distinguishing *Florida v. Nixon* (2004) 543 U.S. 175, 187.) Accordingly, Respondent's fear that every capital defendant will scour the record for possible "objectives" that were undermined by counsel's strategic approach is overstated.

More fundamentally, however, Respondent fails to confront *McCoy's* reasoning and application to the instant case. Here, both counsel and appellant shared the objective of avoiding a death

sentence and agreed to some extent about the evidence to present at the penalty phase. They disagreed, however, as to whether to present appellant as mentally deficient, or to present certain intimate (and possibly false) details about appellant's life and family. As appellant repeatedly expressed, these aspects of the mitigation evidence misrepresented who he was and were unlikely to move the jury to spare his life. (SAOB 12-23; see SAOB 41-47 [discussing why mental health mitigation evidence, particularly from expert witnesses, can be a double-edged sword and thus reasonable minds can disagree as to its utility in a particular case].)

Thus, as in *McCoy*, the dispute here was not over "strategic choices about how best to achieve a client's objectives; they [we]re choices about what the client's objectives in fact [we]re." (*McCoy*, *supra*, 138 S.Ct. 1500, 1508.) While counsel may have "reasonably assess[ed]" that a particular trial strategy was "best suited to avoiding the death penalty," appellant's competing personal objectives took precedence. (*Id.* at pp. 1507-1509.) Accordingly, appellant's autonomy rights were violated when counsel presented the disputed mitigation evidence over his express objections.

C. *Gonzalez v. United States* is inapposite.

In *Gonzalez v. United States* (2008) 553 U.S. 242, 243, a pre-*McCoy* decision, the Court cited the practical difficulty of having a client approve every decision and the benefit of counsel's informed decision about *procedural matters* to hold that "express consent by counsel suffices to permit a magistrate judge to preside over jury selection." (*Id.* at pp. 249-250.) Respondent argues that appellant's application of *McCoy* in the instant case "would frustrate the

purposes and rationale of the right to counsel as explained by the high court in *Gonzalez*." (SRB 22-23.) Respondent is mistaken.

Gonzalez involved a procedural choice – whether to permit a magistrate to preside over jury selection – which is wholly different from the personal trial objectives at issue here and in *McCoy*. More significantly, however, *Gonzalez* did not involve "action taken by counsel over his client's objection – which would have the effect of revoking the agency with respect to the action in question." (*Gonzalez*, *supra*, 553 U.S. 242, 254 (conc. opn. of Scalia, J.).) *McCoy* relied on this distinction, citing Scalia's concurrence with approval. (*McCoy*, *supra*, 138 S.Ct. 1500, 1509-1510.)

Gonzalez has no application where, as here, the defendant expressly objects to counsel's actions on a non-procedural matter.

D. Respondent fails to rebut appellant's reliance on this Court's pre-*McCoy* decisions recognizing a significant autonomy right at the penalty phase.

This Court has long held that a defendant does not receive ineffective assistance of counsel ("IAC") if his attorney follows his direction not to present mitigation evidence. (SAOB 32-33; *People v. Lang* (1989) 49 Cal.3d 991, 1031 (*Lang*), abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176.) *Lang* recognized that the "proposition that defense counsel should be forced to present mitigating evidence over the defendant's objection has been soundly criticized by commentators." (*Id.* at pp. 1030-1031 [citing ABA Model Code Prof. Responsibility, EC 7-8 for proposition that "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 ...."'].) Thus, while counsel generally has "ultimate control" over "trial tactics," counsel can comply with a request to limit or forego the presentation of mitigation evidence at the penalty phase. (*Id*. at p. 1031.)

Respondent dismisses appellant's reliance on *Lang*, arguing that its recognition of a client autonomy interest at the penalty phase was "dictum." (SRB 33.) To be sure, *Lang* did not address whether a defendant has an affirmative right to limit the mitigating evidence that counsel presents. It does not follow, however, that *Lang's* recognition of an important client autonomy interest at the penalty phase, or the attorney's duty of loyalty, are inapposite.

For example, Respondent claims that "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." (SRB 33.)[2] However, *McCoy*, decided after *Lang*, has now clarified that the constitutional autonomy right to control the fundamental objectives of the defense can no longer be dismissed simply because a particular decision could also be characterized as a tactical decision.

Similarly, Respondent claims that it "makes perfect sense to hold that a *defendant* does not have the right to 'limit' mitigating evidence—even though their 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.'" (SRB

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[2] The instant case demonstrates the truth of this assumption.

35-36.) "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." (*Id.* at p. 36.) The result in *Lang*, however, was very much premised on the defendant's underlying autonomy interest. (*Lang*, *supra*, 49 Cal.3d 991, 1031-1033.) In other words, counsel's actions in *Lang* were informed by the defendant's objectives, not a strategic calculation by counsel. Respondent fails to explain why a client autonomy interest that *permits* counsel to respect a demand to limit mitigation evidence in *Lang* does not *require* compliance following *McCoy*.

Respondent further argues that to "read *Lang* as Frazier insists unnecessarily pits *Lang* against *McCoy*." (SRB 36.) To the contrary, appellant recognizes that the same autonomy interest underpins *Lang* and *McCoy*, which together compel the conclusion that a capital defendant must be able to affirmatively preclude counsel from presenting mitigation evidence. (SAOB 37-38.)

Respondent also challenges appellant's reliance on *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9 (*Bloom I*), which held that a penalty judgment does not lack constitutional reliability if a defendant foregoes a mitigation defense, even for the purpose of obtaining a death sentence. Respondent points out that, unlike appellant, the pro per defendant in *Bloom I* chose not to present any mitigation defense. (SRB 37-38.) Like *Lang*, however, *Bloom I's* reasoning is relevant due to its recognition of the "importance . . . attached to an accused's ability to control his or her own destiny and to make fundamental decisions" at the penalty phase. (*Bloom I*,

supra, 48 Cal.3d 1194, 1222.) Respondent also acknowledges that, following *McCoy*, the client autonomy interest recognized in *Bloom I* would likely allow a defendant to "prevent his attorney from introducing any mitigating evidence," even to "pursue a death verdict." (SRB 38.) Whether a defendant requests to completely forego or merely limit some of the mitigation evidence to achieve his personal trial objectives, the underlying autonomy interest is the same and *McCoy* recognizes a defendant's right to make these fundamental choices.

Accordingly, *Lang* and *Bloom I*, in combination with the elevated autonomy right subsequently recognized in *McCoy*, support appellant's claim of a Sixth Amendment violation.

E. This Court's post-*McCoy* jurisprudence supports finding error in this case.

Respondent further argues that this Court's recent decisions "cement[] that there was no violation of [appellant's] autonomy right." (SRB 24-31.) Appellant disagrees. (SAOB 34-38.)

Most significantly, in *People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 926 (*Amezcua*), this Court rejected an argument that "the decision to present certain mitigating evidence" is an aspect of "trial management" that is "controlled by counsel even after defendants made clear their desire to present no penalty phase defense." As this Court observed, the preceding argument would "read out of existence the allocation of responsibilities … recognized in *McCoy*." (*Ibid.*) *Amezcua*, therefore, like *Lang* and *Bloom I*, recognized the significant autonomy right that is implicated by disagreements over the penalty phase evidence. (SAOB 34-35.)

Respondent attempts to distinguish *Amezcua* because the defendants' objective there was not to present any penalty phase defense, whereas appellant wanted to present at least some penalty phase defense. Respondent, therefore, argues that *Amezcua* stands for the proposition that a defendant's desire to *limit* the penalty phase defense cannot be an "objective" of the defense. (SRB 28.)

This argument cannot be squared with *McCoy*, which recognized that a defendant and counsel can share the objective of avoiding a death sentence but disagree as to other fundamental objectives personal to the defendant. Here, appellant and counsel shared the objective of avoiding a death sentence by putting on a mitigation defense. They disagreed, however, about appellant's concurrent objective to, inter alia, avoid presenting himself as mentally deficient or highlighting intimate and embarrassing details about his life and family. Accordingly, appellant's autonomy right takes precedence, even if trial counsel's alternative approach could be deemed a reasonable strategic choice. (SAOB 29-31.)

Moreover, under Respondent's application of *McCoy*, a defendant has no cognizable autonomy right to control the penalty phase, other than to instruct counsel not to present *any* penalty phase defense. This is true even if the defendant only objects to a discrete portion of the mitigation evidence and otherwise wants counsel to put on a defense. This approach unnecessarily forces capital defendants to choose between having no penalty phase defense or electing self-representation to achieve personal trial

objectives beyond just avoiding a death sentence.[3] *McCoy* rejected this kind of an all or nothing choice precisely because 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.) A capital defendant should not have to sacrifice the assistance of counsel to limit the use of mitigation evidence that conflicts with their personal or non-tactical objectives.

Respondent also cites *People v. Poore* (2022) 13 Cal.5th 266, where counsel complied with a defendant's request not to present a penalty phase defense after declining to present other testimony the defendant wanted. (*Id.* at pp. 300-305.) This Court cited *McCoy* to hold that the defendant could not force counsel to present evidence that would not be helpful. (*Id.* at pp. 300-307.) According to Respondent, *Poore* "demonstrates that a defendant does not choose the type of mitigating evidence presented" and only decides "whether he or she will present a mitigation case at all." (SRB 25.) This Court, however, expressly declined to resolve which decisions about the penalty phase "are among the 'objective[s] of the defense'

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[3] Respondent criticizes appellant's reliance on the concern expressed in *Lang* that disputes over mitigation evidence will cause defendants to invoke the right to self-representation. (SRB 33, fn. 4.) It is correct that *Lang* expressed this concern in the context of a defendant choosing self-representation prior to the guilt phase, "resulting in a significant loss of legal protection" at that stage. (*Lang*, *supra*, 49 Cal.3d 991, 1031.) Similar concerns, however, are implicated where a defendant waives counsel at the penalty phase, as a pro per defendant may be unable to effectively object to inadmissible prosecution evidence or advocate for relevant jury instructions.

over which a represented defendant retains control…" (*Poore*, *supra*, 13 Cal.5th 266, 306, fn. 14; *Poore*, *supra*, 13 Cal.5th 266, 311-312 (conc. opn. of Liu, J.).) Moreover, appellant agrees that *McCoy* likely would not require counsel to put on inadmissible or unhelpful mitigation evidence. (SAOB 55-56.) Accordingly, the instant case squarely presents the legal question left unaddressed in *Poore*.

Respondent's reliance on *Poore* is also premised on the conclusion that the only relevant penalty phase "objective" under *McCoy* is whether to put on a mitigation defense or not. (SRB 26.) Respondent thus repeats the mantra that the dispute here was "not about limiting mitigation evidence," it was "about substituting one kind of mitigation evidence for another – a plainly tactical dispute." (*Ibid*.) As discussed, *supra*, Respondent mischaracterizes the nature of the dispute over the mitigation evidence in this case.

Respondent next cites *People v. Morelos* (2022) 13 Cal.5th 722, 746, where the trial court precluded a pro per defendant from entering a guilty plea based on Penal Code section 1018,[4] which requires counsel's consent to plead guilty in a capital case. This Court rejected the argument that section 1018 violated the defendant's rights under *McCoy*. (*Id*. at p. 749.) According to Respondent, *Morelos* "undermines" appellant's Sixth Amendment claim because if section 1018 "does not run afoul of *McCoy*, then neither do the tactical disputes over penalty phase evidentiary issues at issue here." (SRB 29 [the "right to plead guilty in a capital case arguably has much greater legal and moral magnitude than

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

the presentation of particular mitigating evidence for the agreed-upon goal of obtaining an LWOP sentence."].) Section 1018, however, has no application here because appellant was always represented by counsel and never sought to enter a guilty plea. *McCoy*, moreover, did not suggest that client autonomy is evaluated on a sliding scale based on the "legal and moral magnitude" of the objective the defendant seeks to achieve. The defendant in *McCoy* would likely fail this test, as his decision to plead not guilty had a greater legal magnitude than his objective of avoiding a trial concession by counsel.

Finally, Respondent cites *People v. Bloom* (2022) 12 Cal.5th 1008, 1038 (*Bloom II*), which found *McCoy* error where counsel conceded, over the defendant's objection, that he killed two victims. (SRB 30-31.) *Bloom II* did not involve a dispute over mitigation evidence and adds little to the analysis beyond the reasoning in *McCoy*. However, like *McCoy*, *Bloom II* demonstrates that a defendant can maintain two objectives – one of which is opposed by counsel and is arguably tactical – and yet retains the autonomy to pursue both. The same principle applies here, where appellant and counsel shared the objective of avoiding a death sentence by presenting *some* mitigation evidence but disagreed about other evidence appellant found offensive and unlikely to persuade the jury to spare his life.

Accordingly, this Court's recent jurisprudence supports recognizing a capital defendant's autonomy to limit specific aspects of the mitigation evidence at the penalty phase.

F. Respondent fails to undermine appellant's reliance on other state supreme courts' approaches to client autonomy at the penalty phase of a capital trial.

At least two other state supreme courts have similarly concluded that the Sixth Amendment autonomy interest grants a capital defendant the right to limit mitigating evidence. (*State v. Brown* (La. 2021) 330 So.3d 199 [post-*McCoy*] and *State v. Maestas* (Utah 2012) 299 P.3d 892 [pre-*McCoy*].) While *Brown* and *Maestas* are not binding on this Court, they offer a persuasive rationale for applying *McCoy* to the instant case. (SAOB 38-41, 50, 53.)

Respondent, however, asks this Court to reject the reasoning in *Maestas* because, as a pre-*McCoy* decision, it is "not clear" the court would have reached the "same result or engaged in the same reasoning had it applied *McCoy's* test." (SRB 51.) *Maestas*, however, considered the boundaries between client autonomy and trial management, before concluding that the decision to waive mitigating evidence "is a fundamental decision that goes to the very heart of the defense." (*Maestas*, *supra*, 299 P.3d at p. 959.) As the Court aptly observed, "[m]itigating 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." (*Ibid.*) "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.*)

Maestas, therefore, tracks perfectly with and is reinforced by *McCoy's* reasoning and Respondent fails to explain why *McCoy* would lead to a different result. Moreover, the Louisiana Supreme Court subsequently adopted *Maestas's* reasoning in *Brown*, a post-

McCoy decision, further illustrating the consistency between *Maestas* and *McCoy*. (SAOB 40-41.) Respondent's attempts to undermine *Brown* thus fail for the same reason. (See SRB 51-53 [arguing that *Brown's* "importation of *Maestas*'s" reasoning expands *McCoy* into the "territory of choices that are left to attorneys rather than clients" and should "not be followed."].)

Respondent also argues that *Maestas* and *Brown* are distinguishable because appellant did not "seek to waive his right to the presentation of further mitigating evidence," or to "limit the mitigation evidence." (SRB 51, 53.) Respondent again claims that appellant sought to only "introduce completely different mitigating evidence that was inadmissible." (*Id.* at p. 51.) As discussed, *supra*, Respondent mischaracterizes the nature of the dispute. Instead, appellant objected to only some of the mitigation evidence because it conflicted with his personal objective of avoiding a penalty phase defense that misrepresented who he was, relied on intimate and potentially false details about his life and family, and which he viewed as unlikely to convince the jury to spare his life.

Respondent thus fails to distinguish *Brown* and *Maestas*.

G. The federal circuit decisions cited by Respondent should not be followed.

Finally, Respondent cites several post-*McCoy* federal circuit decisions to argue that appellant suffered no Sixth Amendment violation. (SRB 38-49.) These federal cases are either inapposite, distinguishable, or interpret *McCoy* so narrowly that they cannot be squared with the client autonomy right recognized in that case.

For example, in *United States v. Roof* (4th Cir. 2021) 10 F.4th 314, 352 (*Roof*) (SRB 38-40), the court found no *McCoy* error where the trial court advised a defendant that he could not choose, as an objective of his defense, that he not be labeled mentally ill. The court reasoned that the decision to present "mental health mitigation evidence" was a "classic tactical decision" left to counsel. (*Ibid.*; compare *United States v. Read* (9th Cir. 2019) 918 F.3d 712, 720 [*McCoy* error where trial court permitted counsel to raise insanity defense over 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.'"].) The court further concluded that the defendant's interpretation of *McCoy* would permit defendants to exercise undue control over their trial by declaring a particular tactic to be an objective of their defense. (*Roof*, *supra*, at p. 353.)

According to Respondent, the "same concerns underpin" appellant's position. (SRB 39-40.) In support of this argument, Respondent claims that appellant advocates for "full control of the presentation of evidence," which "risks eviscerating a defense attorney's ability to make competent tactical decisions to achieve the defendant's objectives." (SRB 41.) Respondent thus urges this Court to adopt the reasoning in *Roof* because it "accounts for the countervailing interest of preserving the 'the efficiencies and fairness that the trial process is designed to promote.'" (*Ibid.*)

Respondent's reliance on *Roof* fails for several reasons. First, while *McCoy* recognized the need to give counsel control over most strategic decisions, the Court held that those concerns must yield to

the defendant's fundamental objectives, even if they could be deemed strategic. The countervailing concerns expressed in *Roof* were equally implicated in *McCoy* and provide no basis to depart from *McCoy's* elevated recognition of client autonomy rights.

Second, "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." (SAOB 55-56.) Appellant simply asks this Court to recognize his autonomy to choose the fundamental objective of his penalty phase defense, which, as relevant, was to avoid a defense that he felt would misrepresent his mental condition and relied on intimate and possibly false details about his life and family. Counsel would continue to control all tactical and strategic decisions so long as they were consistent with appellant's more fundamental penalty phase objectives.

Respondent also cites *United States v. Audette* (9th Cir. 2019) 923 F.3d 1227, 1236, which rejected a defendant's argument that he did not validly waive the right to counsel because he did so after counsel refused to honor his desire to assert innocence at trial. (SRB 41.) The Ninth Circuit found that *McCoy* was not implicated, however, not because the purported dispute did not concern the defendant's trial objectives, but because the record failed to establish the basis for the disagreement. (*Audette*, *supra*, at p. 1236.)

Unlike *Audette*, the record here provides ample evidence about why appellant objected to the specific aspects of the mitigation evidence that were inconsistent with his fundamental objectives at

the penalty phase.[5] Moreover, *Audette* cited with approval, *Read*, *supra*, 918 F.3d 712, 720, which found *McCoy* error where the trial court permitted counsel to raise an insanity defense over objection, in recognition of the opprobrium associated with such a defense. *Audette's* approval of *Read* supports applying *McCoy* where a defendant objects to mitigation evidence based on the opprobrium of being labeled mentally deficient. (SAOB 45-46, 50-51.)

Respondent's reliance on *United States v. Rosemond* (2d Cir. 2020) 958 F.3d 111 (SRB 45-47) is also misplaced. There, the court found no *McCoy* error where counsel conceded that the defendant paid for the victim to be killed, but also argued that the government failed to prove the defendant intended for the victim to be killed. (*United States v. Rosemond*, *supra*, at p. 119.) Rejecting this claim, the court reasoned that "[c]onceding an element of a crime while contesting the other elements falls within the ambit of trial strategy." (*Id.* at p. 122.)

Rosemond's reasoning cannot be squared with *McCoy*. (See *Sixth Amendment--Right to Autonomy--Second Circuit Holds That Counsel Admitting to Element of Crime over Defendant's Protests*

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[5] For similar reasons, Respondent's reliance on *United States v. Holloway* (10th Cir. 2019) 939 F.3d 1088, is misplaced. (SRB 42-43.) While the defendant there disagreed with counsel's unsuccessful, *pre-trial* focus on his competency to stand trial, counsel did so in pursuit of the intent based defense the defendant had requested. (*Holloway*, *supra*, at pp. 1092-1096, 1101-1102.) The discussion of *McCoy* in *Holloway* was also dictum. (*Id.* at p. 1101, fn. 8 [while *McCoy* "permits a free-standing autonomy claim," the defendant did not present that issue to the district court or obtain a certificate of appealability.].)

Does Not Violate Defendant's Autonomy.-- *United States v. Rosemond*, *958 F.3d 111* (2d Cir. 2020) (2021) 134 Harv. L. Rev. 1921 [criticizing *Rosemond* for interpreting *McCoy* too narrowly].) Instead, *Rosemond's* reasoning mirrors that of the dissent in *McCoy*, which would not have found Sixth Amendment error because while counsel conceded that the defendant killed the victims, he also argued that the defendant lacked the mens rea for first degree murder. (*McCoy*, *supra*, 138 S.Ct. 1500, 1512 (dis. opn. of Alito, J.).) *Rosemond's* unreasonably narrow application of *McCoy* should not be followed.

Respondent also relies on a second aspect of *Rosemond's* reasoning, based on the defendant's claim that he was comfortable conceding that he paid for a kidnapping but not for the victim to be shot. (SRB 47.) The court found the defendant's desire to avoid the opprobrium of admitting a crime "loses its thrust" where he "picks and chooses which crime he is comfortable conceding." (*Rosemond*, *supra*, at p. 124.) Seizing on this analysis, Respondent argues that:

> 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." [Citation.] Frazier's argument "loses its thrust" because "he picks and chooses which [emotionally charged evidence] he is comfortable" admitting.

(SRB 47.) This argument must be rejected.

First, the record demonstrates appellant's sincere concern over being depicted as mentally deficient both because he was personally offended and felt misrepresented by the evidence. (SAOB

50-53.) He also reasonably believed the jury would not be persuaded by the evidence of mental impairment. (SAOB 51-53.)

Second, appellant's discomfort with the mental impairment evidence, or slandering a family member, was in no way inconsistent with his desire to have the jury consider the testimony about his positive qualities from those who knew and loved him. Regardless of the objective reasonableness of appellant's preference for one form of mitigation over another, these decisions are precisely the kind of personal trial "objectives" that a defendant controls. (See *People v. Flores* (2019) 34 Cal.App.5th 270, 272 ["fundamental principles of personal autonomy … 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..."].)

Respondent's reliance on *Kellogg-Roe v. Gerry* (1st Cir. 2021) 19 F.4th 21, must also be rejected. There, the trial court precluded the defendant from directing counsel not to present a defense in a non-capital case. (*Id.* at pp. 23-24.) Respondent argues that "*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." (SRB 44.) As Respondent acknowledges (SRB 44-45), *Kellogg-Roe's* reasoning conflicts with *Amezcua*, which rejected a similar argument that whether "to present certain mitigating evidence" is an aspect of "trial management" controlled by counsel even if the defendant makes clear that they do not want to put on a penalty defense. (*Amezcua*, *supra*, 6 Cal.5th 886, 926.)

Accordingly, to the extent the federal authorities cited by Respondent undermine appellant's claim of Sixth Amendment error, they are not binding on this Court and should not be followed.

CONCLUSION

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

Dated: January 12, 2024

Respectfully Submitted,

GALIT LIPA
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 6,223 words in length.

Dated: January 12, 2024

/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 REPLY 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 **January 12, 2024**, at Sacramento County, California.

Christopher Gonzalez

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CHRISTOPHER GONZALEZ

STATE OF CALIFORNIA
Supreme Court of California

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/s/Christopher Gonzalez
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Feeser, Mark (252968)
Last Name, First Name (PNum)