ORIGINAL

20-6013
NO._____

FILED
JUL 29 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

PETER PATRICK LAFORTE - Petitioner

vs.

STATE OF CALIFORNIA - Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SECOND DISTRICT COURT OF APPEAL, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

Mr. Peter LaForte
CDCR# BJ1115
Corcoran State Prison
PO BOX 8800
Corcoran CA 93212

In Propia Persona

QUESTIONS PRESENTED

1. Is it correct a conflict of interest claim "does not depend on the outcome of the case as in a more typical [federal] ineffective-assistance-of-counsel analysis." and is instead satisfied so long as the defendant establishes there was an actual conflict of interest?

2. Did the court violate My [U.S. Const., 6th Amend.; Wood v. Georgia [1981] 450 U.S. 261,271; United States v. Martinez [9th Cir., 1998] 143 F.3d 1266, 1269; When trial counsel was operating under a conflict of interest based on his own admission of error without obtaining a waiver of that conflict?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The unpublished opinion of the California Court of Appeal, Second Appellate District, Division One, the highest state court to address the merits of the question presented, appears at Appendix A to this petition.

JURISDICTION

The California Supreme Court denied discretionary review of petitioner,s state appeal on May 27, 2020, and the denial appears at Appendix B to this petition. This petition is filed within 90 days of the courts order, and is timely pursuant to Rule 13.1 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United State's Constitution, Amendment IV:"... Criminal defendants have a right to representation by counsel free of conflicts of interest.

TABLE OF AUTHORITIES

FEDERAL CONSTITUTION

FEDERAL CASES

STATE CASES

CALIFORNIA PENAL CODE

CALIFORNIA RULES OF COURT

STATEMENT OF THE CASE

On April 25, 2018, the San Diego County District Attorney filed an information accusing appellant of a single court of assault with a deadly weapon (245, subd. (a)(1)), with the additional allegations that appellant

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1 All subsequent statutory refernces are to the Penal Code unless otherwise noted had served three prior terms in prison and failed to remain free of custody for a period of five years (§ 667.5,subd.(b)),and that appellant had suffered a prior conviction that was both a "serious felony" (§ 667, subd.(a)) and a "strike"(§ 667,subd.(b),1170.12). (CT8-10.)

On December 7,2018,appellant pled guilty to the assault count, admitted the "strike" and "serios felony" prior conviction allegations, and admitted that he personally inflicted great bodily injury on the victim (§12022.7,subd, (a)). (CT21;2RT 205-206.)[2] As part of this agreement,appellant stipulated to a sentence of nine years in prison. (CT21; 2RT204.)

On January 24,2019,the court sentenced appellant to nine years in prison. (CT86;3RT311.) An additional consecutive sentence of 16 months was imposed for a second case that is not at issue here. (3RT 311.) At the sentencing hearing, counsel for appellant indicated that an error had been made in the plea, and that he believed a different attorney should be appointed for the purpose of pursuing a motion to withdraw the plea. (3RT 303-304.) However,after the court made comments about the risk of receiving much more time in prison, appellant stated that he simply wished to be semtenced, as discussed in the Arguments. (3RT 306.) He reiterated

2 In the same hearing, appellant admitted a violation of Penal Code section 530.05, subdivision (a) and a strike prior that had been alleged under a separate case number. (2RT 207.) No issue is raised related to that case. that point after additional consultation with his attorney. (See 3RT 309-310.)

Appellant filed a timely notice of appeal on February 15, 2019. (CT52.) He obtained a certificate of probable cause. (CT58.)

On March 5, 2019, appellant was brought back for a hearing that his attorney had calendared related to an intention to withdraw the plea, but appellant again asserted that he did not wish to withdraw the plea. (See 4RT 403-405.)

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **PETER PATRICK LAFORTE,** **Defendant and Appellant.**	**Court of Appeal No. D075609** **Superior Court No. SCD276593**

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and Appellant Peter Patrick LaForte files this Petition for Review following the March 3, 2020 affirmance of his conviction by Division One of the Fourth District Court of Appeal (per McConnell, P.J., Aaron, J., Dato, J.). A copy of the Opinion issued in this case is attached, only in copies filed electronically, as Appendix A.

ISSUE PRESENTED

If a potential conflict of interest between a defendant and his

attorney exists because of the attorney's admitted misadvisement about the consequences of entering a plea but the trial court does nothing to advise the defendant about the existence of the potential for conflict or obtain a waiver of that conflict, may a reviewing court conclude that this situation cannot have ripened into an "actual" conflict merely because the defendant did not attempt to withdraw his plea? Or, under such circumstances, must a reviewing court presume that that the potential conflict also functioned as an actual conflict?

NECESSITY FOR REVIEW

Review is necessary to address an unsettled legal question. (California Rules of Court, rule 8.500(b)(1).) As noted above, the trial lawyer in this case acknowledged having made a serious error in advising appellant about the consequences of his plea. On appeal, appellant argued that this situation created a conflict of interest between his lawyer and himself, and that the court failed to obtain a waiver of that conflict or discuss the fact that a conflict existed. (AOB 18-19.) Respondent also agreed that a conflict existed between the lawyer and appellant (RB 15-16), but asserted that the conflict was not "so severe that appellant's retained counsel could not continue to represent him." (RB 15.)

The Opinion concludes that there was a merely "potential" conflict

of interest between appellant and his attorney, which never ultimately ripened into an "actual" conflict of interest. (Opinion, p. 9.) The reason no actual conflict existed, the Opinion asserts, is that appellant "never pursued or expressed a desire to pursue a motion to withdraw his plea." (Opinion, p. 9.) Thus, even though the record had an obvious basis for concern about a conflict of interest, even though respondent agreed that a conflict existed, and even though the trial court did nothing to make appellant aware of that conflict, the characterization of the conflict as merely "potential" effectively defeats any claim that appellant was denied the effective assistance of counsel. (See Opinion, p. 9.)

The support for the theory that only a "potential" conflict existed here is this Court's opinion in *People v. Mai* (2013) 57 Cal.4th 986, but *Mai* is an odd fit for this case because in *Mai* the court "perceived a possible conflict of interest and, as the cases require, it **addressed the issue with considerable care**," in contrast to the complete lack of discussion of the issue here. (57 Cal.4th at p. 1010, emphasis added.) In *Mai*, the court

> appointed independent counsel to investigate and advise defendant on the subject [of a conflict], and confirmed that independent counsel had done so. Before taking defendant's waiver, the court warned him of the essential danger of conflicted representation, i.e., that the conflict might induce counsel to "pull their punches" when representing him in the instant case. It was further agreed on the record that defendant could withdraw the waiver at any time if a conflict actually materialized and he perceived it was affecting his counsel's

> performance. Hence, it appears defendant was generally apprised of the considerations that should influence his waiver decision.

(*Id.* at pp. 1010-1011.) All of this was done in response to the mere *possibility* of a conflict. Moreover, *Mai* also held that "the court must take steps to ensure that any waiver of a **possible** conflict meets those standards [of being voluntary, knowing, and intelligent]." (*Id.* at p. 1010, emphasis added.)

Thus, *Mai* does not suggest that a reviewing court can conclude that a "possible" conflict of interest was not "actual" merely because the defendant did not take some action that accentuated the tension with the attorney. Instead, *Mai* emphasizes that a potential conflict can be shown not to be actual through careful action and discussion **in the trial court**. The very point of requiring a "knowing" waiver of a conflict of interest, after all, is that a defendant cannot waive a right of which he is unaware. (See *People v. Mroczko* (1983) 35 Cal.3d 86, 109-110.) Therefore, a defendant's failure to push for a particular action cannot be adequate, in itself, to show that a serious potential for conflict did not "actually" constitute a conflict affecting the representation. That is particularly true here since, as discussed in Argument I, below, the court actively discouraged appellant from consulting with independent counsel.

In *Mroczko*, this Court noted that "We indulge **every reasonable**

presumption against the waiver of unimpaired assistance of counsel," (35 Cal.3d at p. 110, emphasis added, citing *Glasser v. United States* (1942) 315 U.S. 60, 70.) Given that presumption against waiver of conflict, a more reasonable approach when a trial court has entirely failed to address the potential for conflict would be to presume that an "actual" conflict did in fact exist. Appellant submits that review should be granted to clarify that point.

PROCEDURAL AND FACTUAL BACKGROUND

Appellant adopts the factual and procedural summary of the case at pp. 2-5 of the Opinion, with the exception of the characterization of the crime itself on page 3, which goes beyond the facts admitted in the plea colloquy.

ARGUMENT

I. THE COURT INTERFERED WITH APPELLANT'S RIGHT TO CONFLICT-FREE COUNSEL AFTER HIS RETAINED ATTORNEY ACKNOWLEDGED MISADVISING APPELLANT IN ENTERING HIS PLEA. THE COURT SUGGESTED, INCORRECTLY, THAT APPOINTING THE PUBLIC DEFENDER TO CONSULT WITH APPELLANT REGARDING HIS OPTIONS WAS EQUIVALENT TO WITHDRAWING HIS PLEA AND EXPOSING HIMSELF TO "SUBSTANTIALLY MORE TIME."

A. Introduction: After Initially Agreeing to Appoint the Public Defender to Consult with Appellant, the Court Inaccurately Suggested that Doing So Was Equivalent to Withdrawing His Plea and Risking Increased Prison Time.

The court inappropriately discouraged appellant from consulting with the public defender's office after his retained attorney acknowledged making a serious error in advising appellant related to the plea bargain.

Appellant was represented at the plea colloquy by a retained attorney. (See CT 15 [trial counsel's motion to substitute in as counsel after having been retained by appellant's mother].)

After the plea was entered on December 7, 2018, that attorney came to court on January 24, 2019 and stated that "I made a mistake in the plea that [appellant] entered. . . . I was not aware that the way the plea was structured caused it to be a violent felony as opposed to a serious felony." (3RT 303.) Trial counsel explained that appellant had been "adamant, and I

was also in agreement[,] that I would not plead him to a violent felony," but that the great bodily injury enhancement that had been admitted, imposed and stayed under Penal Code section 12022.7 had the effect of making appellant's plea to a "violent felony." (3RT 303.) Trial counsel apologized, said "I will fall on the sword if I caused a problem here," and told the court: "I think he needs to have a court-appointed lawyer attempt to set aside his plea." (3RT 303-304.)

Numerous factors in the plea form and the plea colloquy corroborated trial counsel's representation that an error had been made. The plea form that appellant had signed had the word "violent" crossed out in a paragraph referring to the possibility for the conviction to be a "serious/violent felony." (CT 22, paragraph 7c.) A paragraph noting consequences of the plea had various categories circled, but not the "violent felony" category. (CT 22, paragraph 7f.) And in the plea colloquy, appellant had merely been told that he was pleading to a "serious-and-or-violent felony," not that the conviction definitely was a violent felony. (2RT 205.) As the parties and the court understood on January 24, 2019, however, the admission of the great bodily injury enhancement, which turned the conviction into a "violent felony," prevented appellant from falling within the scope of Proposition 57. (See 3RT 305; see Pen. Code, § 667.5, subd. (c)(8).)

The court initially appeared to agree that "we're going to have to appoint [the] public defender to this matter to review it." (3RT 304; see 305 ["let's put this on for appointment of public defender"].) The court then stated that "so Mr. La Forte understands that if he wishes – if he gets his wish and gets to withdraw his plea, he can be looking at substantially more time." (3RT 305.) The court then made a lengthy statement describing appellant's potential sentencing exposure if he were to be convicted in a jury trial and receive the harshest possible sentence, emphasizing the possibility for a term of 20 years in prison. (3RT 305-306.) The court told appellant that "the facts still remain the same that the action that you think should only get you the 1192 allegation is splitting a guy's chin open and causing stitches, which qualifies for the .7, which is all over the notes of what the DA always wanted." (3RT 306.)

Continuing in this vein, the court told appellant "so we can put this on for withdrawing the plea as long as you know today, if you win on that and the court withdraws the plea, the people's motion could very well then be we're not negotiating. It's going to go to trial." (3RT 305-306.) Immediately after this statement, appellant announced that he would "take the ten years, four months." (3RT 306.)

The court then suggested that appellant consult with his attorney – the same one who had already requested to be replaced by the public

defender. (3RT 306-310.) After that break, still represented by the same attorney, appellant was sentenced. (3RT 310-312.)

In framing appellant's situation, inaccurately, as a choice between being represented by the same attorney or (1) withdrawing his plea, (2) being stuck in a situation where the prosecutor would refuse to accept any other deal, (3) going to trial and being convicted, and (4) being sentenced to the highest possible term and thereby ending up with roughly twice as much prison time as he had agreed to in the plea, the court interfered with appellant's right to conflict-free counsel.

It is true that appellant did not object after consulting with his attorney on January 24, 2019, and instead agreed to go ahead with sentencing. (See 3RT 310.) However, appellant would not necessarily have known that he was entitled to conflict-free counsel, or that his attorney now had a conflict of interest, or that the court had inaccurately described what was at stake in simply talking with a different attorney. Under the circumstances, where the court itself was painting a misleading picture of the options available to appellant, appellant could not have realized that he needed to object, and the claim consequently should be addressed on appeal.

It is also true that when appellant was brought back to court on March 5, 2019, he stated that he did not wish to withdraw his plea. (4RT

403-404.) The events of this hearing, however, simply reinforce the reality that the court had discouraged appellant from obtaining any independent perspective on his case, as appellant himself repeated his recollection that "you said last time I was here, I was looking at 19 years, okay?" (4RT 404.) Additionally, this March hearing illustrates the total breakdown of the relationship between appellant and his attorney that had occurred in the wake of the error in the plea bargain, with the attorney and appellant seemingly trying to accomplish contradictory goals. (See, e.g., 4RT 405 [appellant states "My lawyer got – made a motion . . . I didn't make the motion"].) Here again, appellant was unlikely to know what his options and rights were without ever having consulted with an independent attorney, and should not be faulted for not knowing what he had not been told.

B. Trial Counsel Was Operating Under a Conflict of Interest Based on His Own Admission of Error.

Trial counsel's admission to having made a serious error in analyzing the plea bargain created a conflict of interest in continued representation by that attorney. Criminal defendants have a Sixth Amendment right to representation by counsel free of conflicts of interest. (U.S. Const., 6th Amend.; *Wood v. Georgia* (1981) 450 U.S. 261, 271; *United States v. Martinez* (9th Cir., 1998) 143 F.3d 1266, 1269; *People v.*

Cornwell (2005) 37 Cal.4th 50, 74-75, 33 Cal. Rptr. 3d 1, 117 P.3d 622, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." (*People v. Bonin* (1989) 47 Cal.3d 808, 835.)

An attorney who is in the position of arguing his or her own ineffectiveness has an "obvious" conflict of interest even if the attorney candidly admits the error, as trial counsel did here. (*People v. Smith* (1993) 6 Cal.4th 684, 690 [recognizing "obvious conflicts defense attorneys have in defending themselves . . . and in arguing that their clients are entitled to some sort of relief . . . because of their own ineffectiveness"]; *Christeson v. Roper* (2015) 574 U.S. 373, 377 ["a 'significant conflict of interest' arises when an attorney's 'interest in avoiding damage to [his] own reputation' is at odds with his client's 'strongest argument'"].) Additionally, trial counsel's conclusion that he could *forego* making an argument based on his own ineffectiveness and could instead continue to represent appellant at sentencing also involved a conflict of interest. That lawyer's decision about whether to participate in further proceedings necessarily depended on his evaluation of whether his admittedly erroneous advice to appellant had nevertheless been in appellant's best interests. This was not a subject on

plead guilty. (*Id.* at p. 127.)

Here, in a similar vein, the court's comments telegraphed the notion that appellant had already done the best he could through the plea bargain and that it was a terrible idea to do anything other than move forward with sentencing. The court's discussion of the alternative to being sentenced was framed in the worst possible terms, based on a scenario in which the plea was withdrawn, the prosecution refused to negotiate further, appellant was convicted at trial, and appellant ended up with the highest possible prison sentence. (3RT 305-306.) None of these things were necessarily going to result simply from consulting with an unconflicted attorney, but the court's invocation of these frightening possibilities, like the comments about the "ordeal" of the victims testifying in *Weaver* and the comments about dragging the co-defendants "down" in *Sandoval* were used to psychologically coerce appellant into giving up his right to consultation with a new attorney.

D. Remand Should Occur for Appellant to Consult with the Public Defender.

In light of these considerations, remand should occur so that appellant can consult with the public defender to determine whether pursuing a motion to withdraw the plea is, in fact, in his best interests. That consultation should have been provided at the outset, given the error that

occurred in the plea bargain, and it is appropriate that it take place now so that appellant's right to conflict-free counsel is secured.

II. THE COURT ERRED IN PERMITTING APPELLANT TO PROCEED TO SENTENCING WITH AN ATTORNEY WHO HAD A CONFLICT OF INTEREST WITHOUT OBTAINING A WAIVER OF THAT CONFLICT.

The court's handling of the issue discussed in Argument I also gives rise to a second claim based on the failure to obtain appellant's waiver of his attorney's conflict of interest.

The existence of this conflict is based on the circumstances outlined in Argument IB – namely, that, as trial counsel himself acknowledged, any potential challenge to the plea would need to be predicated on that attorney's own ineffectiveness in mis-advising appellant in the first place. (CT 45.) At the same time, any decision by that attorney that it was *not* necessary to attempt to withdraw the plea also necessarily depended on that attorney evaluating the impact of his own ineffectiveness. Thus, the retained attorney had a conflict of interest in being involved in the case in any capacity, no matter what he action he took.

Nevertheless, after giving appellant a break to confer with that attorney, the court failed to determine whether appellant waived that conflict, or whether appellant was even aware that a conflict existed. (See 3RT 310-312.) The court simply asked appellant whether he was "prepared to go forward," and, after obtaining his assent, sentenced him to prison.

(3RT 310.)

As discussed above, a criminal defendant has a constitutional right to conflict-free representation. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 271; *Cornwell*, *supra*, 37 Cal.4th at pp. 74-75.) While this right may be waived, "waivers of constitutional rights must, of course, be 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' [Citation.]" (*Mroczko*, supra, 35 Cal.3d at pp. 109-110, quoting *Brady v. United States* (1970) 397 U.S. 742, 748.) "When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter. [Citations.]" (*Bonin*, *supra*, 47 Cal.3d at p. 836.) No particular form of inquiry is required, but,

> at a minimum, the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of [conflicted] representation with his attorney, or if he wishes, outside counsel; (2) that he has been made aware of the dangers and possible consequences of [conflicted] representation in his case; (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.

(*Mroczko*, *supra*, 35 Cal.3d at p. 110.)

None of these things occurred in this case. The court made no reference to the existence of a conflict and did nothing to inquire whether appellant understood or waived that conflict. In fact, the court still failed to

discuss the existence of that conflict on March 5, 2019, when it was obvious that there was a breakdown of communication between appellant and the retained lawyer. By that time, appellant was telling the court "He's the one doing all this right now" and trial counsel had filed a motion stating that a "conflict in representation" existed and that appellant "is not listening to me even though I am trying to help him." (4RT 403; CT 45, 47.) Nevertheless, the court made no reference to the existence of a conflict.

As discussed above in the Necessity for Review section, this Court's decision in *Mai, supra*, 57 Cal.4th 986, strongly suggests that the basis for evaluating the impact of a "potential" conflict cannot be merely a determination by a reviewing court that the defendant's actions did not accentuate that potential into an "actual" conflict. Instead, since this Court indulges in "every reasonable presumption against the waiver of unimpaired assistance of counsel," and since the record contains no evidence of any discussion of the potential for conflict, the better approach would be to presume that an actual conflict existed. (*Mroczko, supra*, 35 Cal.3d at p. 110.)

When an actual conflict of interest is demonstrated on the record, prejudice is presumed and a defendant merely needs to show "that some effect on counsel's handling of particular aspects of the trial was 'likely.'" (*United States v. Moore* (9th Cir. 1998) 159 F.3d 1154, 1157, quoting

United States v. Miskinis (9th Cir. 1992) 966 F.2d 1268; *Cuyler v. Sullivan* (1980) 446 U.S. 335 and *Strickland v. Washington* (1984) 466 U.S. 668, 692 [*Sullivan* "held that prejudice is presumed when counsel is burdened by an actual conflict of interest"].) This standard is more forgiving to the defendant than the "reasonable probability" standard of *Strickland*, which applies to merely potential conflicts of interest. (See *Moore, supra*, 159 F.3d at p. 1157.)

Moreover, as the California Supreme Court noted in *People v. Easley* (1988) 46 Cal.3d 712, the "prejudice" that is to be evaluated does not depend on the *outcome* of the case as in more typical ineffective-assistance-of-counsel analysis, but instead is satisfied if "counsel 'pulled his punches,' i.e., failed to represent the defendant as vigorously as he might have had there been no conflict." (45 Cal.3d at p. 725; see also *Mroczko, supra*, 35 Cal.3d at p. 104, fn. 16 ["the Supreme Court's formulation seems to envision an analysis of whether there has been some identifiable prejudice to the right of effective representation, but not an analysis of whether that prejudice affected the outcome of the case"].)

Here, the fact that sentencing went forward, even while a clear basis existed to attack the plea, without appellant conferring with an unconflicted attorney in a way that could have given him a clear picture of his rights and options, is itself the prejudice to appellant's situation under that fairly

undemanding standard.

The Opinion notes that *Easley* and *Mroczko* were disapproved "to the extent they imposed a standard for conflict of interest claims different from the federal ineffective assistance of counsel standard." (RB 11, citing *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) This is correct, but *Strickland* itself states that prejudice is presumed in an instance of actual conflict of interest. (466 U.S. at p. 692; see also *Mickens v. Taylor* (2002) 535 U.S. 162, 166.)

Review should be granted to clarify these points.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: July 27, 2020

Respectfully submitted,

PETER LAFORTE
In Propia Persona