ORIGINAL

No. 20-6144

IN THE

SUPREME COURT OF THE UNITED STATES

David Allen Kuntz — PETITIONER
(Your Name)

vs.

The People — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals, Fifth Appellate District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Kuntz BB-9713
(Your Name)
Salinas Valley State Prison
P.O. Box 1050 A3-149
(Address)

Soledad, CA. 93960
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether appellant's waiver of his rights under Miranda v. Arizona and the Fifth and Fourteenth Amendments was not knowing, intelligent, and voluntary where the detective used overreaching tactics on an impaired appellant and whether the detectives's psychological coercion in the form of minimization and implied leniency render the confession involuntary within the meaning of the Fifth and Fourteenth Amendments.

2. Whether appellant's right to personal autonomy under the Sixth Amendment, (M^c Coy v. Louisiana (2018) U.S. [200 L.Ed. 821, 138 S.Ct. 1500]) and (People v. Eddy (2019) 33 Cal.App.5th 472) was violated when trial counsel conceded guilt in closing argument as to Count 1 without appellant's express consent.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION .....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....

STATEMENT OF THE CASE .....

REASONS FOR GRANTING THE WRIT .....

CONCLUSION .....

INDEX TO APPENDICES

APPENDIX A Opinion in the Court of Appeal CA. Fifth Appellate Dist.

APPENDIX B Decision in the Supreme Court of CA. Denying Review

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

Federal cases

Brooks v. Tennessee (1972)
406 U.S. 605 . . . . . .

Colorado v. Connelly (1986)
479 U.S. 170 . . . . . .

Faretta v. California (1974)
422 U.S. 806 . . . . . .

Florida v. Nixon (2004)
543 U.S. 175 . . . . . .

Gonzalez v. United States (2008)
553 U.S. 242 . . . . . .

View Attached document (Table of Authorities continued)

STATUTES AND RULES

Penal Code
Section 286, Subdivision (a)
Section 288, Subdivision (a)
Section 288.7, Subdivision (a)
Section 288.7, Subdivision (b)
Section 654
Section 664
Section 667.61, Subdivision (e)(4)

OTHER

California Rules of Court
Rule 8.504 (e)(1)(B)

Table of Authorities Cited (Continued)

Cases — Page(s)

Federal Cases

Jones v. Barnes (1983)
463 U.S. 745

Lee v. United States (2017)
-U.S.-[137 S.Ct. 1958, 198 L.Ed.2d 476]

McCoy v. Louisiana (2016)
-U.S.-[200 L.Ed.2d 821, 138 S.Ct. 1500] — Passim

McKaskle v. Wiggins (1984)
465 U.S. 168

Miranda v. Arizona (1966)
384 U.S. 436 — Passim

North Carolina v. Butler (1979)
441 U.S. 375

Rock v. Arkansas (1987)
483 U.S. 44

Rodriguez v. McDonald (2017)
872 F.3d 908

Rogers v. Richmond (1961)
365 U.S. 534

Simmons v. United States (1968)
390 U.S. 377

Spano v. New York (1959)
360 U.S. 315

United States v. Balsys (1998)
524 U.S. 666

United States v. Craighead (9th Cir. 2008)
539 F.3d 1073

Cases — Page(s)

Federal cases

United States v. Gonzalez-Lopez (2006)
548 U.S. 140

California cases

People v. Eddy (2019)
33 Cal.App.5th 472

People v. Hogan (1982)
31 Cal.3d 815

People v. Tully (2012)
54 Cal.4th 952

People v. Whitson (1998)
17 Cal.4th 229

In re T.F. (2017)
16 Cal.App.5th 202

Other State Cases

Commonwealth v. DiGaimbattista (2004)
442 Mass 423

State v. Rettenberger (Utah 1999)
984 P.2d 1009

Constitutions

United States Constitution

Fifth Amendment — Passim

Sixth Amendment — Passim

Fourteenth Amendment — Passim

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.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was Jul 8 2020. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[1] The Sixth Amendment guarantees criminal defendants the right to assistance of counsel in his or her defense. U.S. Const. Amend. 6.

[2] Sixth Amendment right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law. U.S. Const. Amend. 6.

[3] To gain assistance of counsel under the Sixth Amendment, a defendant need not surrender control entirely to counsel. U.S. Const. Amend. 6.

[4] While trial management, including decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence, is the attorney's province. Some decisions are reserved for the defendant, notably whether to plead guilty, waive right to jury trial, testify in one's own behalf, and forego an appeal.

[5] Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. U.S. Const. Amend. 6

[6] Under the Sixth Amendment, a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. U.S. Const. Amend. 6.

[7] A violation of defendant's right to maintain his or her defense of innocence implicates defendant's autonomy, not counsel's effectiveness, and is thus complete once counsel usurps control of an issue within the defendant's sole prerogative U.S. Const. Amend. 6.

[8] Violation of defendant's right to maintain his or her defense of innocence is structural error and not subject to harmless error review. U.S. Const. Amend. 6.

[9] Preservation of the Sixth Amendment right to maintain a defense of innocence does not turn on whether a defendant objects in court before his or her conviction; rather, the record must show (1) that defendant's plain objective is to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt. U.S. Const. Amend. 6.

[10] When a client expressly asserts that the objective of his defense is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U.S.C.A. Const. Amend. 6.

[11]
Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the Court's, respective trial management roles; counsel, in any case, must still develop a trial strategy and discuss it with her client explaining why, in her view, conceding guilt would be the best option. U.S.C.A. const. Amend. 6

[12]
If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest; presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way. U.S. Const. Amend. 6.

[13]
Trial court's error, in allowing defense counsel's admission of defendant's guilt during guilt phase of capital murder trial despite defendant's insistent objections to such admission, was structural, and thus, defendant would be accorded new trial without any need to show prejudice; admission blocked defendant's right to make fundamental choices about his own defense, and effects of the admission would be immeasurable because jury was almost certainly swayed by counsel's concession of his client's guilt. U.S.C.A. Const. Amend. 6.

[14]
Structural Error, which is not subject to harmless error review, affects the Framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself.

[15]
An error may be ranked structural, such that it is not subject to harmless error review, if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest, such as the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.

[16]
An error might count as structural, such that it is not subject to harmless error review, when it's effects are too hard to measure, as is true of the right to counsel, or where the error will inevitably signal fundamental unfairness, such as a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. U.S. Const. Amend. 6.

STATEMENT OF THE CASE

In Kern County Superior Court case number BF161652A, a jury found appellant guilty of four counts of lewd and lascivious acts--one each against B.R. (count 1), G.S. (count 5), D.S. (count 8), and J.S. (count 11) (Pen. Code, § 288, subd. (a)); two counts of sodomy against a child less than 10 years of age--one each against G.S. (count 2) and D.S. (count 6) (Pen. Code, § 288.7, subd. (a)); one count of sodomy against a child less than 10 years of age against G.S. (count 3; Pen. Code, § 288.7, subd. (b)); one count of attempted lewd and lascivious acts against D.S. (count 7; Pen. Code, §§ 664/288, subd. (a)); one count of attempted lewd and lascivious act by force against J.S. (count 9; Pen. Code, §§ 664/288, subd. (b)); and one count of attempted sodomy against a child younger than 14 years of age and 10 years younger than the defendant against J.S. (count 10; Pen. Code, §§ 664/286, subd. (c)). In addition, the jury found true appellant committed an enumerated sexual offense against more than one victim (Pen. Code, § 667.61, subd. (e)(4)) as to counts 1, 5, 8, and 11. (1CT 207-209, 210-216, 3CT 681-700; 9RT 976-981.)

As to counts 1, 3, and 11, appellant was sentenced to a term of 15 years to life for each count. As to counts 2 and 6, appellant was sentenced to a term of 25 years to life for each count. As to count 9, appellant was sentenced to the midterm of four years. As to count 7, appellant was sentenced to one year (one-third the midterm). Sentences for counts 5, 8, and 10 were imposed but

stayed pursuant to Penal Code section 654. Appellant's total prison term was 95 years to life plus five years. (3CT 701-709, 715-718; 10 RT 990-1003.)

Appellant appealed, and, in an unpublished opinion in case number F074975, filed on January 7, 2020, the Court of Appeal, Fifth Appellate District directed the trial court to correct the abstract of judgment to reflect the oral pronouncement of the trial court and affirmed the judgment in all other respects.

The remittitur in case number F074975, issued on March 9, 2020. (Appendix B, Court of Appeal Order filed April 23, 2020, p. 62, attached pursuant to rule 8.504(e)(1)(B).) On the same day, this Court received a paper copy of a petition for review to exhaust state remedies from Kuntz in pro per and extended the time for ordering review on its own motion to and including May 6, 2020 in Supreme Court case number S261104. (*Ibid.*; see Supreme Court docket.) As a result the Court of Appeal recalled the remittitur the same day it issued. (Appendix B, Court of Appeal Order filed April 23, 2020, p. 63.) On March 25, 2020, this Court permitted Kuntz to file an untimely petition. (*Ibid.*) However, on March 30, 2020, this Court ordered Kuntz's petition stricken "pursuant to the order from the Court of Appeal issued on March 9, 2020, recalling the remittitur." (*Ibid.*) Remittitur again issued on April 1, 2020. (*Ibid.*)

Appellant's counsel filed a Motion to Recall the Remittitur Issued on April 1, 2020, Vacate the Opinion, and Reissue the

Opinion. (Appendix B, Court of Appeal Order filed April 23, 2020, p. 62.) It appeared that this Court construed the Court of Appeal's recalling the remittitur on March 9, 2020, as taking back jurisdiction over the case. (*Ibid.*) It appeared to the Court of Appeal that "but for the above sequence of events, Kuntz's petition to exhaust state remedies would still be pending in the Supreme Court." (*Ibid.*) Based on the foregoing, the Court of Appeal found good cause to recall the remittitur in the appeal. (*Ibid.*) The Court of Appeal recalled the remittitur, vacated the appellate opinion of January 7, 2020, vacated submission of the appeal, and directed the Clerk to refile said appellate opinion. (*Id.* at p. 63.)

The Court of Appeal then issued the opinion in case number F074975, filed on April 23, 2020, directing the trial court to correct the abstract of judgment to reflect the oral pronouncement of the trial court and affirmed the judgment in all other respects. (Appendix A, Court of Appeal opinion, pp. 34, 60.)

STATEMENT OF THE FACTS

For purposes of this petition for review only, appellant adopts the Factual Background set forth by the Court of Appeal in its opinion. (Appendix A, typed opn., pp. 34-39.)

ARGUMENTS

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE IF THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT REFUSED TO EXCLUDE APPELLANT'S CONFESSION BECAUSE IT WAS OBTAINED IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND *MIRANDA* AND IN VIOLATION OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND *SPANO V. NEW YORK* AS INVOLUNTARY.

On appeal, appellant argued that the trial court erred in failing to suppress appellant's statements made to police during his interrogation because his waiver under the Fifth and Fourteenth Amendments and *Miranda v. Arizona* (1966) 384 U.S. 436 ("*Miranda*") was not a knowing, intelligent, and voluntary implied waiver and his confession was rendered involuntary under the Fifth and Fourteenth Amendments to the United States Constitution because his free will was overborne by psychological coercion in violation of *Spano v. New York* (1959) 360 U.S. 315, 324, depriving him of his right to remain silent and his rights to a fair trial and due process of law. (Appellant's Opening Brief ("AOB"), pp. 59-78.)

The government must prove a waiver was knowing, intelligent and voluntary. (*North Carolina v. Butler* (1979) 441 U.S. 375, 373, 375-376; *People v. Whitson* (1998) 17 Cal.4th 229, 247-248.) The police methods used to produce the waiver and the individual characteristics of the suspect must be examined to determine whether the suspect's will was overborne. (*Rodriquez v. McDonald* (2017) 972 F.3d 908, 922.)

Involuntary statements are inadmissible because they violate due process of law. (U.S. Const., 5th, 14th Amends.; *Rogers v. Richmond* (1961) 365 U.S. 534, 543-545; *People v. Hogan* (1982) 31 Cal.3d 815, 841.) A statement is involuntary and inadmissible when the motivating cause of the decision to speak is an express or clearly implied promise of leniency. (U.S. Const. 5th, 14th Amends.; *Butler*, *supra*, 441 U.S. at p. 373; *Colorado v. Connelly* (1986) 479 U.S. 157, 169-170; *People v. Tully* (2012) 54 Cal.4th 952, 985.) "[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law." (*People v. Tully*, *supra*, 54 Cal.4th at p. 985.)

The opinion of the Court of Appeal disagreed with both of appellant's contentions, that appellant's waiver was not knowing, intelligent, and voluntary and that his confession was involuntary. (Appendix A, typed opn., pp. 43-49.)

As to appellant's implied waiver of his *Miranda* rights, the opinion found appellant's waiver was knowing, intelligent, and voluntary. (Appendix A, typed opn., pp. 43-46.) In part, the opinion found the waiver sufficient because appellant had no characteristics which would hinder his understanding of the rights as explained to him. (*Id.* at pp. 44-45.) The opinion also found the trial court's finding that, despite drug use earlier that day, appellant was not so impaired so as to inhibit understanding of his rights or of the questioning. (*Id.* at p. 45.)

The opinion further rejected appellant's claim that Detective O'Nesky's tactics were "overreaching." (Appendix A, typed opn., p. 45.) Rather, the opinion asserts, although the detective was persistent, none of the strategies pointed out by appellant were such to "overbear" appellant's "will to resist," contending that appellant's argument was mostly premised on mischaracterizations and exaggerations of several of O'Nesky's comments. (*Id.* at p. 46.) However, the opinion's own recitations of methods and tactics which took unfair advantage of appellant, i.e., "overreached," are self-evident by their very nature – O'Nesky "showed solicitousness for appellant's well-being" by taking off his handcuffs and offering him water; "mis-stated the law" by explaining he had to advise appellant of his rights because they were at the police station and did not alert appellant he would be asking him questions; read the *Miranda* advisements in a "rapid-fire, monotone delivery"; and "distracted" appellant from consideration of his *Miranda* rights by asking "humdrum, bureaucratic questions" before asking directly about the criminal allegations. (*Ibid.*)

In the opening brief, appellant accurately describes the detective's recitation of the *Miranda* warnings as a rapid-fire monotone, in comparison to slow, intense speech when he attempts to persuade appellant, thus downplaying the *Miranda* warnings. (AOB 67.) The opinion does not deny the *Miranda* warnings were rattled off or dispute the veracity of the other criticisms of the detective's tactics. The law can achieve a balance which protects both an appellant's constitutional rights and

legitimate law enforcement needs. (See., e.g., *United States v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1086.)

Moreover, the opinion erroneously states that appellant cited no authority to support his argument that the conduct constituted overreaching. (Appendix A, typed opn., p. 46.) The opinion overlooks United States Supreme Court case cited in the opening brief that holds overreaching renders a waiver involuntary, citing (*Colorado v. Connelly, supra,* 479 U.S. at p. 170 ["voluntariness of a waiver ... has always depended on the absence of police overreaching"].) In fact, the core purpose of *Miranda* remains the prevention of government overreaching. (*United States v. Balsys* (1998) 524 U.S. 666, 691-692.) Certainly anyone experiencing similar conduct by a salesperson would view the listed behaviors as overreaching, as a matter of common sense. Moreover, as cited in Appellant's Reply Brief, there certainly is authority supporting the rapid-fire monotone as a tactic or technique to undermine the warnings. In *In re T.F.* (2017) 16 Cal.App.5th 202, the court found that the detective "rapidly rattled off the *Miranda* admonition without taking time to determine whether T.F. understood all of his rights." (*Id.* at p. 211.) The court viewed "quickly dispensing the *Miranda* warning" as part of its calculus that T.F. did not knowingly, voluntarily, and intelligently waive his *Miranda* rights. (*Id.* at p. 212.)

As to appellant's claim that his confession was involuntary because of the psychological coercion overcoming appellant's rational intellect and free will, the opinion found the statements

voluntary because it did not view the detective's tactics as rising to the level of police coercion. (Appendix A, typed opn., p. 47.) The opinion describes the detective as merely "persistent" but not overbearing of appellant's will to resist. (*Ibid.*) The opinion dismisses appellant's argument and examples as "mischaracterizations of several of O'Nesky's comments." (*Ibid.*) The opinion attempts to distinguish the facts of the cases cited in the opening brief – *Commonwealth v. DiGaimbattista* (2004) 442 Mass. 423 and *State v. Rettenberger* (Utah 1999) 984 P.2d 1009 – by minimizing the facts of appellant's interrogation and amplifying the facts in the cases. (Appendix A, typed opn., pp. 47-49.) The opinion states that, in the two cited cases, police told the suspect they had physical scientific evidence against him which in reality did not exist, whereas, here, O'Nesky told appellant that, if the crime had been committed, they would find DNA evidence on G.S. (*Id.* at p. 48.) The opinion distorts what O'Nesky said. O'Nesky told appellant there would be irrefutable physical scientific evidence implicating appellant, i.e., appellant's DNA on G.S.'s penis. (2 CT 494.) O'Nesky told appellant "DNA doesn't lie"; DNA from appellant's saliva could not accidently get on the penis; O'Nesky was not pulling the wool over appellant's eyes; DNA will stay on for quite a while, even if you take a bath or shower; "DNA is far beyond what it's been in the past"; DNA was going to tell the truth; it was obvious what the DNA would say; DNA was not going to "fly across the room"; appellant would be unable to explain once the DNA test comes back; they knew what it was going to say; appellant touched G.S.; and there was

no point in delaying the inevitable. (2CT 497-501, 507.) The opinion is splitting hairs, as there is no difference between misstating what scientific evidence will show (e.g., DNA stays on skin after a bath, is far advanced) and that police know what it will show and stating that police have physical scientific evidence against you.

Similarly, the opinion erroneously fails to see the minimization of appellant's crimes and the implied indications of leniency. (Appendix A, typed opn., p. 48.) The opinion focuses on O'Nesky's statement that he did not believe appellant hurt or intended to hurt children "but what happened has happened," parsing the word "but" and claiming that its use showed appellant O'Nesky did view the offenses as harmful crimes. (*Ibid.*) The opinion seems to suggest that, out of all the minimizations spouted by O'Nesky, appellant would have clearly seen O'Nesky's real meaning if only he had paid more attention to O'Nesky's use of conjunctions.

This Court should grant review to determine what level of overreaching is permissible such that an implied waiver is still knowing, intelligent, and voluntary and to determine what level of psychological coercion is acceptable before a confession is rendered involuntary.

II. [redacted] REVIEW TO DETERMINE WHETHER THE EVIDENCE AS TO AN CONVICTION FOR LEWD AND LASCIVIOUS ACT ON A CHILD UNDER 14 IS CONSTITUTIONALLY SUFFICIENT UNDER *JACKSON V. VIRGINIA* AND THE FOURTEENTH AMENDMENT, WHERE THE ACT WAS A BEHAVIOR BY THE CHILD WHICH THE CHILD DID OR ATTEMPTED TO DO TO MANY OTHERS.

[redacted] evidence to support Count [redacted] of lewd and lascivious act on a child under 14 years [redacted] (a) B.R.), was constitutionally insufficient under the Fourteenth Amendment to the United States Constitution. [redacted] 79-80, citing *Jackson v. Virginia* (1979) 443 U.S. 307; *People v. Johnson* [redacted] 80) 26 Cal.3d 557.)

[redacted] Court of Appeal found the evidence sufficient, rejecting appellant's claim that there was no evidence that appellant willfully touched B.R.'s body and that the [redacted] done with a lewd intent. (Appendix A, typed opn. [redacted]

The touching that is required, however, must be the [redacted] willfully touching the child's body or the defendant instigating the child to touch the defendant's body. (*People v. Meachan* (1984) 152 Cal.App.3d 142, 152-153; *People v. Austin* (1980) 111 Cal.App.3d 110, 115-116, approved in *People v. Mickle* (1991) 54 Cal.3d 140, 175-176.) The behavior at issue, B.R. sucking on appellant's nipples, was not instigated by appellant, and was a behavior that B.R. did to many people. [redacted] ncy looks to the whole record and substantial evidence, not to isolated [redacted] *Johnson*, *supra*, 26 Cal.3d at pp. 577- [redacted] ed in a variety of statements, that

ARGUMENT I. CONTINUED

Furthermore, the appellate Court failed to address other critical Factors Considered for the Voluntariness of a confession. These factors are (1) drug problems, (2) Physical/mental condition, (3) experience with the Criminal Justice system, (4) location of questioning, and (5) suspect's capacity to resist Pressure Created by law enforcement.

Prior to the interrogation I had the barest of experience with the criminal justice system. Four years prior to the interrogation I Plead no contest to a misdominor DUI, to which I wasn't even guilty of, as evidence showed that I wasn't over the legal limit for a DUI. This just Proves my inexperience.

The interrogation took Place in a tiny room, about 7ft long by 4ft wide, inside of the Kern County Sheriff's dept. I was escorted to the Sheriff dept. in the back of an unmarked car by Civilian dressed detectives, after being arrested. I can be seen entering the interrogation room handcuffed. <u>At NO TIME</u>, Prior to or during, the interrogation, was I informed that I was not, in fact, under arrest or that I could leave at any time. The video shows O'Nesky Purposly sit himself between the door and myself, signifying there was no escape and blocking any cognative idea that I could leave at any time. This was just one intimidation tactic used by O'Nesky to creat Pressure.

Most importantly the Appellate Court failed to Properly address the critical factors of drug use and mental condition. I told O'Nesky multiple times that I was under the influence of both methamPhetamine and marijuana. That I had been doing both drugs for a couple days, and had consumed drugs moments before the arrest. The Court failed to recognize that on multiple occassions I couldn't recall

basic information, such as my own Phone number or address, or understand simple questions. The video shows O'Nesky had to read me my own Phone number, to a Phone I'd owned for a year. O'Nesky repeatedly asked my address as I couldn't accurately recall it and misstated it multiple times. He had to repeat simple questions such as, "when the last time you went somewhere without your Phone?". O'Nesky had to ask me this question seven times. This shows that I was in a diminished state of mind during the interrogation.

Furthermore, I can be seen telling O'Nesky that hours before I had seen a meteor in the sky and believed it might hit the Earth. O'Nesky can then be seen reading, out loud, a text messege authored hours before Proving that I actually believed I saw a meteor and telling my loved ones, in case it hit us, I loved them. This text messege was admitted as evidence. O'Nesky's response to evidence that I appeared to experience a hallucination and was under the delusion that the world might end was, stupifyingly, "is that it?".

O'Nesky had an obligation to end the interrogation when he had reason to believe that I was under the influence, saw me exhibit signs of impairment, and had evidence that I had experienced a hallucination and thought the world might end.

All of these factors, drug use, signs of mental impairment, minimal experience with the justice system, The rapid-fire monotone Miranda warning, no time to consider rights being waived or consequences of waiving rights, not being informed that I was not under arrest or could leave anytime, a tiny interrogation room with exit blocked, and O'Nesky's conduct in creating extreme pressure with exaggeration of evidence, minimization of charges, threats, and implied promises of leniency, render Miranda waiver invalid and confession involuntary.

[redacted]).

[redacted].

III. THIS COURT SHOULD GRANT REVIEW TO DETERMINE IF APPELLANT'S RIGHT TO PERSONAL AUTONOMY UNDER THE SIXTH AMENDMENT AND *MCCOY V. LOUISIANA* WAS VIOLATED WHEN TRIAL COUNSEL CONCEDED GUILT IN CLOSING ARGUMENT AS TO COUNT 1 WITHOUT APPELLANT'S EXPRESS CONSENT.

On appeal, appellant argues that he was deprived of his federal and state constitutional rights when counsel, without consultation with appellant and without appellant's express consent, overrode his personal choice to defend against the charges, rather than to admit guilt, and to put the prosecution to its burden of proof rather than to concede guilty wholly or partially, and instead conceded guilt as to Count 1, a charge of lewd and lascivious act on a child under 14 years old (§ 288, subd. (a); B.S.). (AOB 89-97; Supp. AOB 5-12.) Under the recent authority of *McCoy v. Louisiana* (2018) ___ U.S. ___ [200 L.Ed.2d 821, 138 S.Ct. 1500]), appellant was deprived of his Sixth Amendment right, as applied to the states under the Fourteenth Amendment, to choose the objective of his defense and to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt results in some advantage to the defendant. (*Id.* at p. ___ [138 S.Ct. at p. 1505].) "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.*)

The opinion of the Court of Appeal found there was no violation of appellant's autonomy under the Sixth Amendment and McCoy because defense counsel did not concede guilt. (Appendix A, typed opn., p. 53.) This conclusion was erroneous, rejecting the prosecutor's view of the concession and his informing the jury of the concession of guilt.

In *McCoy, supra*, ___ U.S. ___ [138 S.Ct. 1500], the defendant was charged with the capital murder of three in-laws. (*Id.* at p. ____ [138 S.Ct. at p. 1506].) His attorney concluded that the evidence against him was overwhelming and that, absent a concession at the guilt stage that the defendant was the killer, a death sentence would be impossible to avoid at the penalty stage. (*Ibid.*) When consulted two weeks before trial, the defendant told his attorney not to make that concession and to instead pursue acquittal. (*Ibid.*) In opening statements, the attorney told jurors they could not hear the prosecution's evidence and reach any other conclusion than that the defendant had committed three murders. (*Id.* at p. ___ [138 S.Ct. at pp. 1506-1507].)

The Supreme Court examined "the question of whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." (*McCoy, supra*, ___ U.S. at p. ___ [138 S.Ct. at p. 1507].) The high court held that "[t]he Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence" and that "the right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law." (*Ibid.*, citations

and internal quotation marks omitted.) To gain that assistance, "a defendant need not surrender control entirely to counsel," although "[c]ounsel 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." (*Id.* at p. ___ [138 S.Ct. at p. 1508], citations and internal quotation marks omitted.) "Some decisions, however, are reserved for the client – notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*Ibid.*)

"Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category." (*McCoy*, *supra*, ___ U.S. at p. ___ [138 S.Ct. at p. 1508].) Like refusing to plead guilty in the face of overwhelming evidence despite an almost certain conviction or rejecting representation by counsel despite lack of professional qualifications and an increased likelihood of an unfavorable outcome, a defendant may insist on maintaining his innocence at trial because the defendant may not share counsel's objective. (*Ibid.*) "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (*Ibid.*, emphasis original.) If, following consultation with the defendant regarding the management of the defendant's defense, counsel may not override that objective or interfere with the defendant's decision to tell the jury he was not guilty. (*Ibid.*)

Here, as did the defendant in *McCoy*, appellant clearly expressed his personal decision about the objective of his defense, pleading not guilty to *all* counts and denying *all* allegations when arraigned (1CT 26) and re-arraigned (1CT 207-208), testifying under oath that he had not touched or sexually assaulted *any of the boys* (6RT 734-736), "[t]hat's the *truth*" (6RT 733), and that he had told the *truth* at the beginning of the interrogation, when he told the detective he had never touched *any of the boys* (6RT 733).

Shortly thereafter, counsel conceded appellant's guilt as to Count 1, implicitly conceding guilt as to all the counts, since this was the type of case where all or none of the offenses occurred, and tacitly admitting his client was a liar and a perjurer. (8RT 840.) Counsel was required to abide by appellant's personal decision about the objective of his defense. This decision was reserved to appellant under the Sixth Amendment. Instead, counsel overrode that objective by conceding guilt, expressly forbidden by *McCoy*. Appellant's Sixth Amendment right to control the objective of his defense was violated.

Alternatively, appellant argued, counsel was ineffective for failing to consult with appellant and obtain his consent to plead guilty as to Count 1. (AOB 89-107, citing U.S. Const., 6th Amend.; *Faretta v. California* (1974) 422 U.S. 806, 819; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144, 146; *Rock v. Arkansas* (1987) 483 U.S. 44, 49, 52; *Brooks v. Tennessee* (1972) 406 U.S. 605, 610; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 174; *Jones v. Barnes* (1983) 463 U.S. 745, 751; *Gonzalez v. United*

States (2008) 553 U.S. 242, 240-251; *Lee v. United States* (2017) ___ U.S. ___ [137 S.Ct. 1958, 1968-1969, 198 L.Ed.2d 476]; *Simmons v. United States* (1968) 390 U.S. 377, 394; *Florida v. Nixon* (2004) 543 U.S. 175, 178, 192.)

This Court should grant review to determine whether counsel conceded guilt in violation of appellant's rights under the Sixth Amendment and *McCoy*.

ARGUMENT II CONTINUED

The Appellate Court held that defense counsel never countermanded my objective, which was to maintain my innocence, Proceed to trial, and Put Prosecution to it's burden of Proof. While this is true, the lower Court failed to realize that that objective included Contesting the interrogation and EVERY Confession given therein. This was the core objective in taking the Stand and testifying that EVERY confession was a lie given under false Pretenses (i.e. Fear, Coercion, and Promises of leniency). For more authority I cite the recent case [People V. Eddy (2019) 33 Cal. App. 5th 472] (Eddy) where "[t]he right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law." [citations]. Such is this case that I exercised my Personal right in taking the Stand to defend against the interrogation and contest every Confession. In argument (I) of this appeal I still maintain the objective of contesting the interrogation. (Eddy) "[P]reservation of the Sixth Amendment right to maintain a defense of innocence does not turn on whether a defendant objects in Court before his or her conviction; rather, the record must show (1) that defendant's Plain objective is to maintain absolute innocence and Pursue an aquittal, and (2) that trial Counsel disregards that objective and overrides his client]. The Court of Appeal in its Opinion (Appendix A, typed opn., P. 5(6) stated "[T]o the extent defense Counsel in any way contradicted appellant's testimony, however, he may have done so because he intuited the jury was not accepting appellant's testimony and made a strategic decision to focus on defeating the counts where evidence of leading Confession was stronger]." Both (McCoy) and (Eddy) hold that "[U]nder the Sixth Amendment, a defendant has the right to insist that Counsel refrain from admitting

guilt, even when Counsel's experienced-based view is that confessing guilt might yield the best outcome at trial]"

Furthermore, the Appellate Court held that because jurors were instructed that "what the attorney's say is not evidence," then Counsels concession could have no bearing on jurors decisions. The Court can not know this beyond a reasonable doubt, therefore, their judgement is erroneous. (McCoy) held "[a]dmission blocked defendant's right to make fundamental choices about his own defense, and effects of the admission would be immeasurable because jury was almost certainly swayed by Counsel's concession]." Here counsel told jurors, during closing argument, "I'd like to think my job isn't to pull the wool over your eyes." "Count 1 is the only confession," "It's the one my client actually cops to," and was, "arguably, a righteous confession." Prosecution knew, regardless of Court instructions, defense Counsel's words would ecko in jurors minds. Prosecution jumped on the "concession" in rebuttle and repeatedly refered to it as a concession stating, "There's nothing he [counsel] can say about that, so he has to concede to Count 1," "And he [counsel] did. He has nothing to say," "so he [counsel] concedes Count 1." Prosecution used defense Counsel's concession as a golden opportunity to drive home guilt in regards to Count 1, BECAUSE WORDS MATTER. Just like seeing a defendant handcuffed has the potential of swaying juror's decisions so too, a concession, however minor, by it's existance alone, has the potential of swaying juror's minds.

Barring defense Counsel's concession it is reasonably likely that juror's would not have found guilt in regards to Count 1. Therefore, making it more difficult to find guilt on the other counts.

DECLARATION OF DAVID KUNTZ

I, David Kuntz, declare:

1. I am the defendant in People v. David Allen Kuntz (Kern County Superior Court No. BF161652A) and the appellant in Fifth District Court of Appeal Case No. F074975.

2. I am competent to testify in a court of law, and, if called to testify, would testify of my own personal knowledge to the following facts.

3. Richard Ramos was the attorney who represented me in superior court in this case.

4. I wanted to plead Not Guilty to all charges, and I wanted to go to trial. The reason for this is because I am not guilty of the charges against me. I was manipulated and psychologically coerced during my interrogation while in a mentally debilitated state of mind.

5. Sometime between December 2015 and February 2016, during my first or second meeting with Mr. Ramos, I told Mr. Ramos I wanted to plead NOT guilty and go to trial. I asked Mr. Ramos, "Isn't it your job to make sure I get found innocent?" Mr. Ramos stated firmly, "Let me be clear, my job is not to give you false hope, or to tell you you will win this. My job is to tell the truth to the best of my knowledge and ability. My job, if possible, is to get you the best deal, and if all else fails, negotiate a better sentence."

6. I had two discussions with Mr. Ramos regarding possible plea deals, between October and December 2016. The first discussion concerned a plea deal of 15 years to life, when I explicitly told Mr. Ramos, "I don't want to plead guilty to something I didn't do." Mr. Ramos stated he understood. The second discussion occurred a few days later. Mr. Ramos informed me that the only deal was 25 years to life. We both agreed that 25 years to life was not a deal, and we both determined that trial was our only option.

7. Mr. Ramos never discussed his plans for closing argument with me. Before trial, we had two meetings in which we discussed what would happen at trial. The only topics during those discussions were the credibility and motivation of Veronica, my interrogation by police, and whether I should take the stand. Mr. Ramos never discussed his closing arguments with me.

8. I did not know Mr. Ramos was going to concede my guilt to any count during closing argument. I thought Mr. Ramos and I were in complete agreement when we determined that my taking the stand and testifying was our best bet at discrediting the interrogation and claiming my innocence as to *all* charges and allegations.

9. During closing arguments, when I heard Mr. Ramos say that "Count 1 is the only confession" and "It's the one my client actually cops

to," I remember being dumbfounded and confused, trying to figure out what Mr. Ramos just said and why. I remember thinking, "Can I object to this?" and "Can I say anything at all?" I didn't know what to think or what to do.

10. I didn't even fully comprehend what had happened until the prosecutor, during his closing argument, stated that Mr. Ramos had, in fact, conceded my guilt as to Count 1. At that point, Mr. Ramos whispered in my ear "I didn't do that." Again, I was completely dumbfounded and did not know what to say. I didn't know if I could say anything at all. I didn't know if I could address the court. I didn't know if I could object. I didn't know if I could do anything other than sit there and trust the one person, Mr. Ramos, who was supposed to be defending me.

11. I had no opportunity to speak with Mr. Ramos about his conceding guilt as to Count 1. After the jury received its instructions, I was immediately escorted to a holding cell. I did not see Mr. Ramos again until the jury had reached a verdict. Even then I was in the court room only long enough for the jury to read its verdict, and then I was escorted back to the holding cell. I did not see Mr. Ramos again until sentencing a month and a half later.

12. At no time did Mr. Ramos reveal, suggest, or imply that he was going to concede guilt to any count. Mr. Ramos conceded my guilt without

my knowledge, without my consent, against my express "not guilty" plea, and against my explicit instructions to him that I wanted to plead not guilty and go to trial. At trial, I took the stand and testified specifically to express my innocence of all counts. Mr. Ramos was in error when he conceded guilt to Count 1.

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

Executed on 06/10/2019 in Soledad, California.
(date)

David Kuntz

REASONS FOR GRANTING THE PETITION

This writ Presents issues of fundamental importance to all defendants facing Criminal Prosecution in California: Whether the Fifth and Fourteenth Amendments to the United States Constitution and Miranda v. Arizona (1966) 384 U.S. 436 (Miranda), affords to the defendant the right to be free of Police overreaching and Psychological Coercion in violation of Spano v. New York (1959) 360 U.S. 315, 324, depriving him of his right to remain silent and his rights to a fair trial and due Process of law?

Whether the Sixth Amendment to the United States Constitution, as interpreted by the Supreme Court of the United States in McCoy v. Louisiana (2018) 584 U.S. —, 138 S.Ct. 1500, [200 L.Ed.2d 821] (McCoy), affords a defendant an absolute right to decide the objective of his defense and to insist that his Counsel refrain from admitting guilt, even when Counsel's experience-based view is that confessing guilt might yield the best outcome at trial, affirmed by the California Appellate Court in People v. Eddy (2019) 33 Cal.App.5th 472?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David Kuntz

Date: Oct. 06 2020