No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAMES R.W.MITCHELL—PETITIONER

VS.

MARCUS POLLARD, Warden of Richard J. Donovan Correctional Facility, an individual —RESPONDENT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISON ONE (VOL. 1)

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INDEX TO APPENDIX

VOLUME 1-RELEVANT POST-CONVICTION PROCEEDINGS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re JAMES R. W. MITCHELL, on Habeas Corpus.	A160759 (Marin County Super. Ct. No. SC165475A)

BY THE COURT:

The petition for writ of habeas corpus is denied on the merits. Petitioner's Sixth Amendment rights were not violated because his counsel did not concede petitioner's guilt in closing argument. (*McCoy v. Louisiana* (2018) 584 U.S. ___, ___, 138 S.Ct. 1500, 1509 ["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."]; *id.* at p. 1509 ["[Defense counsel] could not interfere with McCoy's telling the jury 'I was not the murderer,' *although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction.*"], italics added; *People v. Franks* (2019) 35 Cal.App.5th 883, 891 ["*McCoy* makes clear, however, that for a Sixth Amendment violation to lie, a defendant must make his intention to maintain innocence clear to his counsel, and counsel must override that objective by conceding guilt."]; see *United States v. Rosemond* (2d Cir. 2020) 958 F.3d 111, 119, 123 [no violation of *McCoy* where counsel for defendant in murder-for-hire case admitted that defendant had paid for the victim to be *shot* but argued that the government failed to prove beyond a reasonable doubt that the defendant intended for the

victim to be *killed*]; *Merck v. State* (Fla. 2020) 298 So.3d 1120, 1121 [counsel for murder defendant did not violate *McCoy* by arguing the alternative defenses of reasonable doubt as to the identity of the perpetrator and voluntary intoxication]; *Truelove v. State* (N.D. 2020) 945 N.W.2d 272, 276 [counsel's admission that defendant charged with aggravated assault had struck the victim was not "not necessarily a definitive statement of guilt as was present in *McCoy*."]; see also *People v. Maynard* (N.Y. App. Div. 2019) 176 A.D.3d 512, 513–514, 112 N.Y.S.3d 706, 707 ["Rather—in light of testimony by the defendant that was decisively contradicted by the evidence and therefore transparently false—counsel made the permissible alternative argument [citation] that, if the jury determined that defendant was the perpetrator, it should still acquit him of the top count of burglary in the second degree."].)

Date: 11/18/2020 **Humes, P. J.** P.J.

Before: Humes, P.J., Margulies, J., and Banke, J. PRESIDING JUSTICE

Court of Appeal, First Appellate District, Division One - No. A160759

S265812

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAMES R. W. MITCHELL on Habeas Corpus.

The requests for judicial notice are granted.
The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

IN THE MATTER OF JAMES R.W. MITCHELL, F-63367 Petitioner, FOR WRIT OF HABEAS CORPUS.	Case No.: SC210551A ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Pursuant to jury trial, Petitioner James R.W. Mitchell (hereafter, Petitioner or Mitchell) was convicted of first-degree murder (Pen. Code §187), corporal injury on a co-habitant (Pen. Code §273.5), child abduction (Pen. Code §278), child endangerment (Pen. Code §273a), and stalking (Pen. Code §646.9). The jury also found that Mitchell personally used a deadly weapon in connection with the murder and corporal injury counts, and that he personally inflicted great bodily injury upon his victim. Briefly stated, the jury found that Mitchell, using an aluminum softball bat, beat to death the mother of his then one-year old daughter, and thereafter carried the daughter away. The jury acquitted Mitchell of a charge alleging felony-murder, finding the murder did not occur during the course of a kidnapping. On August 16, 2011 Mitchell was sentenced to 35 years to life in prison.

The convictions were affirmed on appeal. Mitchell's subsequent petition for review to the California Supreme Court was denied on October 15, 2014. The judgment against him became final

on January 14, 2015 (90 days after the petition for review was denied). (See Supreme Court Rule 13(1); *People v. Vieira* (2005) 35 Cal.4th 264, 306 [a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.])

Petitioner filed the instant Petition for writ of habeas corpus on October 3, 2019. Citing the recent U.S. Supreme Court decision in *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, Mitchell seeks an order reversing his convictions based on a structural Sixth Amendment violation. Specifically he argues that he was denied his Sixth Amendment right to dictate the ultimate objective of his defense, - that trial counsel pursue only his preferred defense of total factual innocence. He contends that, over his objections, trial counsel Stuart Hanlon wrongly refused to limit his closing argument to asserting his claim of total innocence. Petitioner complains that Mr. Hanlon's argument, that if the jury believes that Mitchell committed the killing, they should only find him guilty of a lesser offense of either second-degree murder or voluntary manslaughter, violated his Sixth Amendment right as announced in *McCoy*.

This court issued an Order to Show Cause on November 21, 2019, directing the People (hereafter, People or Respondent) to file a Return showing why the Petition should not be granted. The People filed their Return on December 20, 2019. Petitioner filed his Denial to the Return on April 27, 2020. All necessary and material evidence for the court's consideration is contained in the exhibits submitted by the parties, and in the record of conviction. The Petition can be decided without resolving any factual disputes. "'Where there are no disputed factual questions as to matters outside the trial record, the merits of a habeas corpus petition can be decided without an evidentiary hearing.' [Citations]" (*People v. Duvall* (1995) 9 Cal.4th 464, 478–479.) Here, an evidentiary hearing is not necessary.

For the reasons stated below, the Petition is DENIED.

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II. FACTUAL SUMMARY

A. The Prosecution's Evidence

Evidence of Mitchell's guilt was overwhelming.[1] As the Court of Appeal concluded in affirming his conviction, "[A] trial strategy based solely on defendant's testimony was doomed." (Petitioner's Exhibit (hereafter, "Ex.") L, p. 38) The evidence established the following:

Mitchell began his relationship with the victim D.K. after meeting in a San Francisco night club in August 2007. They moved in together in San Francisco two weeks later, and produced a child in 2008. During their brief relationship, Mitchell regularly used drugs, (principally marijuana and methamphetamine) and often fought with D.K., when one or both of them was drinking or using drugs. Mitchell committed several acts of domestic violence against D.K. during the course of their brief relationship. In 2008 Mitchell pleaded guilty to a domestic violence offense perpetrated upon D.K. He was placed on probation for that offense, and remained on probation at the time of the killing.

Even after being placed on probation, Mitchell continued to abuse D.K. D.K. obtained a restraining order restraining Mitchell from contacting her. Mitchell violated that restraining order which violation led to a revocation of his probation. After the violation, Petitioner moved briefly to Canada. He and D.K. continued to speak over the phone. In March, 2009, D.K. obtained a temporary restraining order against Petitioner from the Marin County Superior Court. Petitioner did not appear at the hearing wherein the order was made permanent. Telephone records reveal that in the weeks preceding D.K.'s death, Mitchell called D.K. incessantly. She did not answer any of his calls through July 12, 2009, the date of her murder.

D.K. and her child moved into D.K.'s mother's home in June 2009. The three resided in the top unit of a duplex located in Novato, California. An elderly couple, Bessie and Nick Tzafopoulos, lived in the lower unit. Ms. Tzafopoulos testified that shortly before 7:00 p.m. on July 12, 2009 she heard a scream and looked out her window. However, she did not see anything at that moment. Mr. Tzafopoulos testified that he heard a "thumping sound" and went outside to investigate. Standing

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[1] The summary of trial evidence is taken from the Court of Appeal decision. (Ex. L 1-65)

about 15 feet away, he saw a man repeatedly hitting D.K. in the head with a baseball bat as D.K. lay on the ground. Mr. Tzafopoulos went back into his apartment and told his wife to call the police "because he's here." Ms. Tzafopoulos told the dispatcher that the child's father was beating D.K. She then saw a man run past her window carrying the child. She said the man had a shaved head and wore a black T-shirt and blue jeans. Mr. Tzafopoulos described the man as wearing a dark shirt and carrying the child. He observed the man get into a vehicle with the child. Two other neighbors described the man running from the scene as white, bald or having a shaved head, about six feet tall and "built up" or "heavyset." This description matched defendant's physical appearance. (Ex. L pp. 4-5)

The descriptions of the suspect's clothing by the eyewitnesses were inconsistent. One neighbor identified him as wearing a big, white T-shirt. That neighbor could not pick Mitchell out of a photo lineup that night, but a week later identified Mitchell in a live line up as the perpetrator with 95% certainty. Mr. Tzafopoulos misidentified a different person (a police officer) out of a live lineup, but later testified that the man he saw hitting D.K. was the same man who ran off with the child. The neighbors testified to seeing only one man involved in the killing and the abduction. (Ex. L, p. 5)

Upon arrival, the police found D.K. dead on the ground. They observed multiple head wounds. Police found a blood-stained softball bat lying on the ground near D.K.

After the killing, Mitchell spoke to his brother and a cousin. Mitchell's cousin told him that D.K. was dead. Mitchell responded that he knew she was dead. However, he did not admit, nor deny, any involvement in her death. Mitchell appeared distraught and he cried. He stated that he was going to Mexico with the minor. (Ex. L pp. 5-6)

Later, the same night, Mitchell was found in Citrus Heights, California with his daughter, who was found in Mitchell's car, unharmed. Mitchell was arrested for the murder of D.K. At the time of his arrest, Mitchell was wearing a red and navy striped shirt and blue jeans. (*Id.* at p. 6) Mitchell had blood spatter on his jeans and shoes. Officers also found dried blood on the child's cheek. DNA analysis revealed that the blood found on the front of Mitchell's pants, on the softball bat, and on the child's face, was that of D.K. No blood was found on the back of defendant's pants or on the striped

shirt he was wearing when he was arrested. Two prosecution experts concluded that based on the blood spatter on Mitchell's pants, he had to be within five feet of D.K. at the time of the attack. (Ex. L, p. 37) Additional DNA collected from the bat handle was consistent with Mitchell's DNA. A latent fingerprint lifted from the barrel of the bat matched Mitchell's left index finger.

B. The Defense

Throughout the trial, Mitchell maintained his total innocence and claimed any identification of him was a matter of mistaken identity. He asserted that two unidentified assailants beat D.K. and attempted to kidnap their daughter. Defense counsel Stuart Hanlon presented evidence of mistaken identity largely through the Mitchell's own testimony.

Mitchell testified that on the day of the murder, July 12, 2009, he went to the home of his estranged girlfriend D.K. to wish their daughter a happy birthday. He claimed that D.K. invited him to visit, notwithstanding that he was subject to outstanding domestic violence restraining orders preventing such contact. Mitchell stated that he and D.K. had previously reunited on several occasions after the imposition of the restraining orders, sometimes at D.K.'s invitation. He testified that he was wearing a red and blue striped shirt at the time of his visit.

He stated that upon his arrival, as he opened the front gate, he heard D.K. cry "Help." He was immediately confronted by a man wearing a white shirt. The man hit Mitchell with a baseball bat, knocking him to the ground. At that moment, Mitchell saw another man, who was wearing a black T-shirt, run past him carrying his daughter. Mitchell got up from the ground and ran after the man and grabbed his daughter away. As he started to walk back towards the house, he heard someone shout "Call 9-1-1." Aware he was violating a restraining order by being there, he took the girl and drove north on Highway 101. He did not call D.K.'s house to check on her condition, stating he did not want to talk to her while the police were there.

As he drove northbound on Highway U.S. 101 he spoke to his brother and a male cousin, and told them he was driving to Mexico. He also spoke to his mother who informed him that D.K. was dead and that he was the suspect. He testified that he stopped at a gas station in Auburn, California, and coincidentally ran in to his long-time attorney. He was soon thereafter arrested in Citrus Heights. (Ex. L p. 8)

Mitchell further testified that he did not see anyone hit the victim. He could not explain how D.K.'s blood got on his pants. (Ex. L p. 8)

D.K.'s mother testified that the bat may have been in the laundry room of her apartment prior to the murder. (Ex. L p. 8)

C. Defense Counsel's Closing Argument

Consistent with Mitchell's testimony, defense counsel Hanlon spent much of his closing argument contending that Mitchell was not the assailant. He stressed that the conflicting eyewitness testimony, the physical evidence, the clothing, the testimony suggesting that Mitchell did not arrive with the subject bat, and the fact he did not have supplies for the minor, all created a reasonable doubt as to Mitchell's involvement in the killing. (Ex. J pp. 14-15, 25-26, 28-31, 39-47.)

Mr. Hanlon conceded that the blood on Mitchell's pants and shoes was D.K.'s blood, and that Mitchell must have been near D.K. when she was beaten because of the blood spatter on his jeans. (Ex. J, pp. 37, 47- 48) Mr. Hanlon argued that evidence of blood spatter on Mitchell's clothing is consistent with Mitchell's testimony that he did not commit the killing, but was nearby. He argued that Mitchell was not looking at D.K., but rather, was "locked in" to the assailant as they were engaged in "hand to hand combat." (Ex. J, p. 54)

Near the end of his argument, Mr. Hanlon offered an alternative theory that if the jury did not believe defendant's version of the events, and instead believed Mitchell was the assailant, the jury should find the killing was not premediated. Mr. Hanlon argued that under those circumstances, the jury should return a verdict of voluntary manslaughter. He argued that the evidence suggests the killing was committed out of an "explosion of anger and loss of control." He theorized that the jury could find that Mitchell went into a "rage" because D.K. told him he could not see the minor. (Ex. L, pp. 58-62.)

Mitchell asserts that this alternative argument proffered by Mr. Hanlon crossed the line into impermissibly conceding Mitchell's commission of the killing (the *actus reus*), as in *McCoy, supra.* (MPA pp. 15-17.) On this point, Mr. Hanlon argued to the jury,

> I want to talk to you about an issue that's very difficult, not because it's difficult to talk about, but because my job as an attorney is to be an advocate for my client. I'm also an officer of the Court. And I see my job in closing argument as arguing what I believe the evidence suggests and have you think about it.

> And I think even though you can tell from Mr. Mitchell's testimony, he would not agree with me going to where I'm going to go, which is, if you don't believe him, what occurred? If you don't believe what he testified to, if you believe he's a killer, what do you then do with the facts?
>
> And, I don't want you to take it to mean that I don't believe my client. As I pointed out to you, what Mr. Cacciatore and I believe is irrelevant, we can't argue what we believe, we can argue what the evidence shows.
>
> And one of my concerns was, if I argued to you, what do you do if you were convinced beyond a reasonable doubt that Mr. Mitchell is not telling the truth and did take the hammer [sic] and did kill her? Then you will say, 'Well, this is where he talked about honesty, being straightforward with us, and now he's going to talk out of two sides of his mouth. "He's innocent, but if you don't think he's innocent, what's he guilty of?" '
>
> [T]hat's why this is difficult, but it's something, as an officer of the Court and an advocate for my client, I have to do, because there certainly is evidence on which you could conclude, depending on how you understand the inferences for circumstantial evidence, that Mr. Mitchell is not being totally honest with you about what happened.
>
> So, I want to talk to you – what can we infer from the evidence, if you conclude that Mr. Mitchell is the person who killed [D.K.]?

(Ex. J, pp. 56-57.)

Consistent with this alternate theory, Mr. Hanlon then argued that if the jury concludes from the evidence that defendant attacked D.K. with the bat, the evidence that Mitchell did not bring the bat to the residence shows that he did not harbor a deliberate and premeditated intention to kill. (Ex. J, p. 58) He argued,

> I think the inferences of the facts are that Mr. Mitchell went there to see his daughter on her birthday. Either he heard [D.K.] tell him he could come, or he inferred it from what she said, but when he got there, she said 'no', she didn't want him to see the baby. Something happened, and there was an explosion.
>
> I don't think you can believe that someone just picks up a bat and beats someone, even they don't know, but someone they've been intimate with and loved, it just doesn't happen without an explosion of anger and loss of control. To do that more than once to somebody you care about, while they're holding a child, . . . there's nothing about Mr. Mitchell that indicates he's capable of that without a loss of control.
>
> And in that context, you have to answer the questions, what do we do with it? If that's what you conclude – and I'm not saying Mr. Mitchell is guilty, I'm saying, I think we

presented evidence to you and arguments to you that the inferences and circumstances - - that the Government has not proved their case beyond a reasonable doubt.

(Ex. J, p. 58- 59)

Mr. Hanlon then circled back to Mitchell's claim of total innocence, at least in part, arguing,

> You can never say 'I'm convinced he didn't do it,' but you can say, looking at this evidence, and I've spent three hours arguing to you, that the inference of the evidence, the circumstantial evidence is that they have not proved beyond a reasonable doubt that he did this.

(Ex. J, p. 59)

Addressing the elements of Premeditated First Degree Murder, Mr. Hanlon argued,

> That he acted in a cold, calculated manner in deciding to [kill] [D.K.] because of whatever. I would say there is no evidence that supports that, that the nature of the killing itself did not support that.
>
> The nature of the explosion of rage that caused someone to do this is not a cold, calculated decision. This is qualitatively so different than slapping someone in the face. It is a rage. To do this to someone - - whoever did this to her was in a rage. And you saw Mr. Mitchell – that's not a cold, calculated decision, weighing the pros and cons and then acting, it's not possible.
>
> You know – I mean you could say he made the decision really quickly, but his mind – if he – if he did this, his mind is not act – acting in a calculated manner. Because you can't do that – I mean, I – the evidence, I don't think supports that he went there to do it, that he brought a weapon to do it, that he was planning to take the baby, all these things you have to look at, in whatever theory you're going on. And when you look at 'em, they don't show a plan to do a criminal act.

(Ex. J, pp. 60-61)

Hanlon went on to argue that the evidence also did not support the People's alternate theory of felony murder during a kidnapping.

> So that, if something happened and Mr. Mitchell went in a rage and did this awful act, it wasn't done to kidnap [the minor], it was something going on between him and [D.K.], and at that point, he took the baby. There was no plan to do this, to take the baby. There's nothing that supports that. And, again, you look at the circumstances of what happened. Of getting ready, you know, there was no plan to do this.

(Ex. J, p. 61.)

Mr. Hanlon continued by arguing that if the jury decided Mitchell did kill D.K., the evidence supports a finding of manslaughter or at most second-degree murder. (Ex. J; p. 62)

> [I]f you decide that Mr. Mitchell did this act, the provocation, . . . is that she said no to him, and he exploded – she said, "No, I don't want you to have the baby today, I don't want you to see her." And the question becomes, is that passion reasonable in the sense that – not that you kill somebody, that's not the standard, the passion is, . . . if you knew what Mr. Mitchell knew and saw what he saw – and I disagree with [the prosecutor], I think his tweaking on drugs, you're in his situation, I think you do consider that, you put yourself in that situation of someone who is him, even though you talk to the ordinary, reasonable person and he can argue the law and you'll decide what it means, but I think you look at all the factors where he was, and decide if that type of explosion, when someone said you can't see your baby on her birthday, would cause other people to become – not to kill, it's not to kill, not to pick up a baseball bat, to have their judgment affected by passion. That's the standard.

(Ex. J, pp. 62-63.)

Mr. Hanlon, in closing, put his alternative argument in context of Mitchell's claim of total innocence. He argued,

> So the question becomes, has the Government proved Mr. Mitchell is guilty beyond a reasonable doubt? Have they proved his testimony is not only inconsistent with the facts, but beyond a reasonable doubt – doubt is not true? I don't think they have. I don't think the evidence has shown that. If you think they have, then you go to the next stage.

(Ex. J; p. 64)

Mr. Hanlon's argument relating to the alternative theory discussed above was against Mitchell's wishes and instructions. It is uncontradicted that during all phases of the trial (pre-trial, guilt phase, and sentencing), Mitchell consistently maintained his innocence of the beating death of D.K., and insisted that his counsel present only a mistaken identity defense. During several pre-trial motions Mitchell repeatedly and consistently voiced his desire to maintain a defense seeking total exoneration, and he rejected any proposed strategy to present a defense of mitigated culpability for lesser included offenses of second-degree murder or voluntary manslaughter due to heat of passion. (Ex. D, pp. 4-5 ["Mr. Mitchell has consistently told me [Hanlon] he would not go forward with the [mental] defense. He didn't do it, he's going to testify he didn't do it."]; Ex. F, p. 9 ["I'm not going to go with a manslaughter or with a provocation or with a heat of passion or with any other kind of defense because I did not commit this crime."]; Appellate Opinion - Ex. L pp. 24, 30 ["The gist of

defendant's complaint about Hanlon and Rief, as it ultimately emerged, was that he did not want them to present a defense or an argument based on any theory other than pure innocence."] 30-33, 33-34, 36.)

At his sentencing hearing, Mitchell made a motion to substitute counsel, asserting that Hanlon refused to argue defendant's total innocence. (Ex. K, p. 3 ["I instructed him not to argue [a] heat of passion case. I instructed him to maintain [a mistaken] identity defense because it is a fact I did not kill [D.K.]."].) Hanlon explained that he was not going to override defendant's position, *again*, by arguing for a lesser sentence based on heat of passion or lack of premeditation, since to do so "flies in the face of what he wants, and I – I made that decision once. I'm not going to do it again. [¶] I'm not prepared to do it again. I'm not prepared to fly in the face of what my client wants." (Ex. L p. 40-41) He said,

> [I]f you ask me to go forward at sentencing, I would probably submit it and not argue for the reasons I'm saying because again, it's Mr. Mitchell's life. I mean, my job as a professional goes only so far to do what I ought to do to the Court and to my client's interest, and my client comes first. . . . I'll be the lawyer. I'll be the body at sentencing, and I'll submit it because I don't have an argument. To argue to the Court at sentencing he didn't do it, given the jury verdict, is meaningless. And to argue anything else flies in the face of what he wants, and I – I made that decision once. I'm not going to do it again. [¶] I thought the evidence was overwhelming, as it was from the beginning, and I felt I had to do that to try to save him from life in prison without a chance of parole. That was my choice.
>
> Mr. Mitchell clearly expressed his desire that I not do it. I told him – I don't know when that conversation first came up, whether it was before the trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he's saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests. And I tried to make it, you know, it – it was a difficult situation, but, yes, there was a reason why I did it, and that's what it was.

(Ex. K, pp. 9-11.)

III. POST CONVICTION PROCEDURAL SUMMARY

After his conviction and sentencing, Mitchell filed a direct appeal in the First District Court of Appeal. In his direct appeal, Mitchell argued, *inter alia*, that in light of the irreconcilable breakdown of the attorney/client relationship over his desire to maintain his innocence defense: (1) the trial court

erred by refusing to allow defendant to represent himself on the eve of trial; (2) his retained attorneys provided ineffective assistance of counsel before trial and at sentencing; and (3) the trial court erred in refusing to permit defendant to appoint new counsel for purposes of a new trial motion and sentencing. (Ex. L 1-2.)

On July 28, 2014 the Court of Appeal issued its unpublished opinion and rejected Mitchell's arguments, concluding: "sharp disagreements as to strategy do not create an actual conflict", the evidence of Mitchell's guilt was overwhelming, and "a trial strategy based solely on his testimony was doomed." (Ex. L, pp. 31, 38.)

> Being appropriately deferential to counsel's tactical decisions, we cannot say Hanlon's reasoning was beyond the realm of competent lawyering. We conceive of counsel's argument on heat of passion not as a contradictory theory, but rather a backup argument, in recognition by counsel that the jurors would likely reject defendant's far-fetched testimony.
>
> Nor can we say Hanlon's strategic decision proved to be prejudicial under the second prong of the Strickland test. Hanlon did not altogether abandon defendant's favored theory of defense. In fact, he spent most of his closing argument attempting to support the theory to which defense had testified. The problem that defendant fails to come to grips with is that his testimony was wholly unbelievable in light of the other evidence, and the evidence of guilt was, in fact, overwhelming. Based on this record, counsel's argument on heat of passion clearly was aimed at making the best of a bad situation and cannot fairly be deemed either incompetent or prejudicial.

(Ex. L, p. 40.)

On October 15, 2014, the California Supreme Court denied Mitchell's petition for review.

On March 13, 2017 Mitchell, representing himself, filed a state habeas petition challenging his sentence only. The court denied this petition on March 22, 2017.

On October 26, 2015 Mitchell, representing himself, filed a federal habeas corpus petition challenging the validity of his conviction and raising Sixth Amendment claims stemming from the conflicting trial strategies between him and his trial counsel which he raised in his direct state appeal. He asserted: (1) the trial court erred in denying his motion to replace his retained attorneys with the public defender, in denying his motion to dismiss his attorneys and allow him to proceed in pro per; and in denying his motion to allow his attorneys to withdraw; (2) his trial counsel rendered ineffective assistance of counsel when counsel did not promptly inform Mitchell of the manslaughter

defense he would argue at trial, and when counsel would not argue on his client's behalf at sentencing; and (3) the trial court erred by denying Mitchell's motion to appoint new counsel to submit a motion for a new trial and to represent him at sentencing. (Ex. Q p. 1.)

The Federal District Court denied the petition on October 18, 2016. The court stated, in part,

> Counsel's decision to pursue a heat of passion defense in addition to Mitchell's mistaken identity defense did not constitute ineffective assistance because defense strategies are controlled by counsel, not by the client. See *Brookhart v. Janis*, 384 U.S. 1, 9 (1966) (attorney may properly make strategy decision about how to run a trial even if client disapproves); . . ."
> [¶]
>
> Counsel cannot be faulted for presenting both defenses, satisfying Mitchell by arguing mistaken identity and presenting a backup mitigating defense because he believed the evidence would not support a defense of mistaken identity. [Citation.] Furthermore, because counsel presented Mitchell's desired mistaken identity defense, Mitchell cannot show prejudice. [Citations.]

(Ex. Q, pp. 5-6, *internal citations omitted.*)

On June 9, 2017 the Ninth Circuit Court of Appeals granted Mitchell the right to appeal the trial court's rulings, wherein Mitchell is asserting: (1) the trial court erred in denying his requests to represent himself; and (2) the trial court erred in finding defense counsel did not render ineffective assistance at sentencing. In his opening brief, Mitchell also argued an uncertified issue based on *McCoy* - "Is Mitchell entitled to a new trial for structural error under the Sixth Amendment because defendant refused to confine the defense case to a claim of complete innocence and argued in the alternative that Mitchell was guilty of a mitigated homicide?" (Ex. T, pp. 11, 43, 59-60.) After Respondents filed their brief in the Ninth Circuit (Ex. U), on July 19, 2019 the Ninth Circuit granted Mitchell's request to stay the appeal so he could file the instant habeas corpus petition in state court. (Ex. S.)

IV. DISCUSSION

Petitioner contends that his convictions must be reversed because he was deprived of his Sixth Amendment right to dictate his defense as described in *McCoy v . Louisiana* (2018) 138 S.Ct.1500, and the California cases that follow. Specifically, Petitioner argues that his trial counsel committed reversible constitutional error when, *against Petitioner's wishes*, he suggested to the jury that if they

did not believe defendant's mistaken identity claim, they should reject any contention that the killing was deliberate and premeditated.

Respondent contends that (1) *McCoy* does not apply retroactively to Petitioner, where the judgment was long ago final; (2) even if *McCoy* did apply retroactively, the Petition still fails since Petitioner's counsel *did not concede* that Mitchell committed the killing, but rather properly argued an alternative theory applicable only if the jury rejected Petitioner's mistaken identity defense; and (3) Petitioner's claim is procedurally barred because it was raised, or could have been raised, on direct appeal and in his federal habeas corpus proceeding.

As discussed below, this court concludes that *McCoy* does not apply retroactively to Petitioner. For that reason alone, the Petition must be denied. Further, even if *McCoy* were applicable here, Mr. Hanlon's closing argument did not violate Petitioner's right to dictate his defense. Finally, the court finds the claim is not procedurally barred.

A. Habeas Corpus Principles, Generally

The right to habeas corpus is guaranteed by the state Constitution and "may not be suspended unless required by public safety in cases of rebellion or invasion." (Cal. Const., art. I, § 11.)

> Frequently used to challenge criminal convictions already affirmed on appeal, the writ of habeas corpus permits a person deprived of his or her freedom, such as a prisoner, to bring before a court evidence from outside the trial or appellate record, and often represents a prisoner's last chance to obtain judicial review. " ' "[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside ... and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." ' " (*In re Harris, supra,* 5 Cal.4th at p. 828, fn. 6, 21 Cal.Rptr.2d 373, 855 P.2d 391, quoting *Frank v. Mangum* (1915) 237 U.S. 309, 346, 35 S.Ct. 582, 59 L.Ed. 969.) "Historically, habeas corpus provided an avenue of relief for only those criminal defendants confined by a judgment of a court that lacked fundamental jurisdiction, that is, jurisdiction over the person or subject matter" (*Harris,* at p. 836, 21 Cal.Rptr.2d 373, 855 P.2d 391), but that view has evolved in modern times and habeas corpus now "permit [s] judicial inquiry into a variety of constitutional and jurisdictional issues" (*People v. Duvall, supra,* 9 Cal.4th at p. 476, 37 Cal.Rptr.2d 259, 886 P.2d 1252).

(*In re Reno* (2012) 55 Cal.4th 428, 449–450.)

Petitioner "bears the ultimate burden of proving the factual allegations that serve as the basis for his or her request for habeas corpus relief. [Citations.]" (*In re Serrano* (1995) 10 Cal.4th 447, 456.) "'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of

the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.'[Citation.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

B. The *McCoy* Standard

The United States Supreme Court, in *McCoy v. Louisiana, supra*, established that a criminal defendant has a Sixth Amendment right to dictate the ultimate goals of his defense. The defendant in *McCoy*, accused of murdering three individuals, consistently maintained his factual innocence of the crimes and testified at trial that he was out of state at the time of the killings. (*McCoy*, *supra*, 138 S.Ct. at 1506.) Notwithstanding the defendant's preferred defense of total factual innocence, and over his vehement objections to any admission of guilt, defense counsel conceded in his opening statement to the jury that the evidence is " 'unambiguous,' " and that " 'my client committed three murders.' " (*Id.* at pp. 1506-1507.) In his closing argument, McCoy's counsel reiterated that McCoy was the killer, telling the jury that he " 'took [the] burden off of [the prosecutor].' " (*Ibid.*) Counsel made these concessions believing that conceding guilt was the best hope to avoid a death verdict in the penalty phase based on counsel's argument of *McCoy*'s serious mental and emotional issues. (*Id.* at pp. 1506-1507.) The jury returned death verdicts for each murder charge.

McCoy then argued unsuccessfully in a new trial motion that his attorney's concession violated his constitutional rights. (*Id.,* 138 S.Ct. at p. 1507.) The trial court's ruling denying that motion was affirmed by the Louisiana Supreme Court on the ground that defense counsel had authority to concede guilt "because counsel reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence." (*Ibid.*) The United States Supreme Court granted certiorari to determine "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." (*Id.,* 138 S.Ct. at p. 1507.)

Justice Ginsburg wrote that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense, which includes the decision to maintain a defense of total innocence. (*Id.* at pp. 1508-1510). "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. Const. Amdt. 6 (emphasis added); see ABA Model Rule of Professional

Conduct 1.2(a) (2016) (a 'lawyer shall abide by a client's decisions concerning the objectives of the representation')." (*McCoy v. Louisiana, supra,* 138 S.Ct. at pp. 1508–1509.)

The high Court held that an attorney must abide his client's expressed defense objective of innocence, and shall not override defendant's express objection to the concession strategy, even if pursuing a complete innocence defense is against that attorney's better judgment and experience. (*Id.* 138 S.Ct. at pp. 1504–1505, 1507–1511.) The *McCoy* court explained that just as defendant has the absolute right to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal, the defendant also retains the:

> [a]utonomy to decide that the objective of the defense is to assert innocence. . . . 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. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*. See *Weaver v. Massachusetts,* 582 U.S. ——, ——, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but 'is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.'); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 165, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring in judgment) [" 'Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.' "].)

(*McCoy, supra,* 138 S.Ct. at p.1508.)

The court went on to conclude that this Sixth Amendment violation was "structural" because it affects the proceedings as a whole. Thus, the error was not subject to a harmless error analysis, and required reversal of the convictions without the need to show prejudice. (*McCoy, supra,* 138 S.Ct. at p. 1511.)

> Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.

(*McCoy v. Louisiana, supra,* 138 S.Ct. at p. 1511.)

Two recent California appellate decisions, *People v. Flores* (2019) 34 Cal.App.5th 270 and *People v. Eddy* (2019) 33 Cal.App.5th 472, followed *McCoy* and reversed convictions when defense

attorneys in those cases failed to heed their clients' wishes to assert a defense of complete innocence. In both cases, defense counsel expressly conceded to the juries that their clients committed the *actus reus* of the charged crimes, while arguing the defendants should be found guilty of lesser included offenses due to their lack of the requisite mental state.

In *Flores*, defendant was convicted in separate trials of attempted vehicular murder of a police officer and of unlawful weapons possession. The evidence of his guilt of both charges was overwhelming. In the attempted murder trial, over defendant's express desire to maintain his innocence, trial counsel decided to pursue a lack-of-premeditation defense. In closing argument, counsel conceded defendant was "acting in the spur of the moment" and was intoxicated when he deliberately drove his car into the officer.

Defendant was represented by the same trial counsel in the illegal weapons prosecution. There, counsel again conceded defendant's possession of the weapon while arguing that defendant did not understand that the modifications that he made to the firearm converted it to an illegal assault weapon. The *Flores* court held that despite counsel's experience-based decision, counsel's concessions that defendant committed the *actus reus* of both offenses violated defendant's Sixth Amendment right to maintain his defense of factual innocence, and thus required reversal under *McCoy*. (*People v. Flores, supra,* 34 Cal.App.5th at p. 273.) Although counsel's approach may have been the only method of achieving an acquittal on one or more charges in light of the overwhelming evidence of guilt, the court concluded that the reasonableness of counsel's strategy, or counsel's competence, did not mitigate this constitutional violation. (*Id.* at p. 281.)

In *Eddy*, defendant was found to have fatally stabbed the victim outside of their friends' apartment. He was convicted of first-degree murder. A neighbor observed the defendant and the victim fighting outside an apartment. The neighbor saw the defendant apparently punch the victim in the abdomen three times in a motion consistent with a stabbing. He heard the victim yell, "you stabbed me," and he observed the victim fall to the ground. (*Id.* at pp. 475-476.) He further observed the defendant reenter the apartment to grab a bag before running away. The witness did not see a weapon.

The police recovered a knife under the kitchen table inside the referenced apartment. DNA analysis of the knife blade revealed presence of the victim's blood, but did not reveal the presence of

defendant's DNA. Law enforcement did not perform a DNA analysis of the knife handle, and did not identify any possible fingerprints on the knife.

Another occupant of the apartment (Carl) testified that after the initial fight, but before the stabbing, he saw defendant grab something from the apartment. He could not determine whether it was a knife. After defendant left the apartment, he heard the victim yell, "Ooo, you stabbed me." The witness then found the victim lying on the ground, whereupon he called 911. (*Id.*, 33 Cal.App.5th at p. 476.)

Defendant did not testify and no affirmative defense was presented.

Defendant maintained a defense of factual innocence, which counsel presented in his opening statement. (*Id.* at pp. 478-479.) Counsel pointed out that there was no evidence that defendant ever wielded the knife, let alone committed the stabbing. To the contrary, counsel emphasized that the knife was used frequently by Carl, the second witness, who was present during the fight. (*Id.* at p. 477.) Trial counsel directed the attention away from defendant and argued that Carl's "evasive" and "dishonest" behavior following the crime was designed to avoid "revealing his own involvement in the stabbing." (*Id.* at p. 477.)

A day later, in his closing argument, trial counsel conceded that defendant "committed the crime [of voluntary manslaughter] on April 23, 2016," but maintained that defendant was not guilty of first or second degree murder. (*Id.* at p. 477.) The jury returned a verdict of first degree murder with a weapons enhancement.

Relying on *McCoy*, the *Eddy* court ruled the Sixth Amendment 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." (*Eddy, supra,* 33 Cal.App.5th at pp. 474–475.)

The court reversed the conviction without requiring a showing of prejudice. The court held that "even in the face of counsel's better judgment and experience" defense counsel cannot override the defendant's absolute autonomy to assert a defense of innocence by conceding defendant committed the criminal acts. (*Eddy, supra,* 33 Cal.App.5th at p. 480.)

In the present case, Petitioner asserts that his trial counsel committed similar constitutional, structural error by failing to heed Petitioner's wish to seek total exoneration based on mistaken identity. He argues that the wisdom or reason in counsel's argument does not mitigate the structural Sixth Amendment violation of his right to seek total exoneration. Petitioner argues that *McCoy* applies retroactively to his case, and demands the relief he seeks.

C. *McCoy* Does not Apply Retroactively to Convictions that are Final, and Thus, does not Apply here.

"The jurisprudence of retroactivity is a labyrinthine edifice of both critical importance and daunting complexity. It is located at one of those intersections of freedom, justice, and pragmatism that are all too common in the criminal law, and make its practice a humbling experience." (*In re Ruedas* (2018) 23 Cal.App.5th 777, 782.) Perhaps in light of this complexity, "our Supreme Court has not articulated a single test to determine when and under what circumstances a decision should be given retroactive effect to convictions that are final on appeal." (*In re Hansen* (2014) 227 Cal.App.4th 906, 916.)

California courts have variously used the federal test articulated in *Teague v. Lane* (1989) 489 U.S. 288, the state test articulated in *In re Johnson* (1970) 3 Cal. 3d 404, and *People v. Guerra* (1984) 37 Cal.3d 385, or both. (Compare *In re Moore* (2005) 133 Cal.App.4th 68, 75-77 [applied federal retroactivity standards to deny defendant's habeas corpus petition under the new procedural rule announced in *Crawford v. Washington* (2004) 541 U.S. 36], *In re Thomas* (2018) 30 Cal.App.5th 744, 753-754 [rejected federal standards in favor of California's retroactivity rules in refusing to grant retroactive effect to *People v. Sanchez* (2016) 63 Cal.4th 665], and *In re Ruedas* (2018) 23 Cal.App.5th 777 [applied both state and federal standards to the retroactive applicability of *Sanchez, supra*].)

Petitioner argues that under both the federal standard (*Teague*) and California standard (*Johnson* and *Guerra*), the *McCoy* decision must apply retroactively, notwithstanding that his conviction was final on appeal at the time the *McCoy* case was decided. (MPA p. 17)

Under both federal and state authorities the threshold question in determining retroactivity of a decision raising federal constitutional principles is *whether the decision states a new rule.*

"[N]ew rules generally should not be applied retroactively to cases in which the judgment was final when the new rule was established." (*In re Gomez* (2009) 45 Cal.4th 650, 656.) This is so, because the interests of comity and finality must also be considered in determining the proper scope of habeas review. (*Teague v. Lane, supra,* 489 U.S. at p. 309.)

Where the decision announces a new rule, "the new rule may or may not be retroactive, . . . ; but if it does not [announce a new rule], 'no question of retroactivity arises,' because there is no material change in the law.' [citations]," and under ordinary principles of stare decisis the new decision applies to cases on collateral review. (See *People v. Guerra, supra,* 37 Cal.3d at pp. 399 [citing federal and state authorities]; *Whorton v. Bockting* (2007) 549 U.S. 406, 416 [rules that are not new generally apply to cases on collateral review]; accord, *In re Ruedas, supra,* 23 Cal.App.5th at pp. 794, 799 [recognizing threshold issue under both federal and state retroactivity standards].)

As discussed below, the court concludes, pursuant to both the federal and state standards, that McCoy announced a new rule, and the new rule displaced a contrary rule or accepted practice. The court further finds, based on examination of the new rule pursuant to the factors outlined in the authorities below, that the rule may not be applied retroactively to the present case.

1. The California Standard

Under the state retroactivity standard first announced in *In re Johnson, supra,* the court must consider three factors in examining a new rule: (1) the purpose of the new rule of criminal procedure; (2) the reliance placed by law enforcement authorities on the old rule; and (3) the effect retroactive application would have on the administration of justice. (*In re Johnson, supra,* 3 Cal.3d at p. 410; *Guerra, supra,* 37 Cal.3d at p. 401; *In re Thomas* (2018) 30 Cal.App.5th 744, 760-761.) The *Johnson* court borrowed that three-part standard from the then-prevailing federal retroactivity test announced in *Desist v. United States* (1969) 394 U.S. 244, 249. (See *In re Johnson, supra,* 3 Cal.3d at p. 410.) Of course, as noted above, before examining the above factors, the court must first determine whether a new rule was established, and if so, whether the new rule displaced a previous contrary rule.

A judicial decision establishes a new rule under California law "when the decision (1) explicitly overrules a precedent of this court, (2) disapproves a practice impliedly sanctioned by prior decisions of this court, or (3) disapproves a longstanding and widespread practice expressly approved

by a near-unanimous body of lower-court authorities." (*Guerra, supra,* 37 Cal.3d at p. 401, *internal citations and quotations omitted*; *In re Thomas, supra,* 30 Cal.App.5th at p. 761; see also *Ruedas, supra,* 23 Cal.App.5th at pp. 799-800.)

Conversely, the Supreme Court in *Guerro* explained that judicial decisions do not establish a new rule of law if they: (1) simply explain or refine the holding of a prior case; (2) apply an existing precedent to a different factual situation, even if the result may be said to "extend" the precedent; or (3) draw a conclusion that was clearly implied in or anticipated by previous opinions. (*Guerra, supra,* 37 Cal.3d at p. 399; *In re Thomas, supra,* 30 Cal.App.5th at p. 762 [additionally, no new rule is established if the decision "give[s] effect to a statutory rule or existing binding decision of the United States Supreme Court."].) "In such cases, the rule in question already exists, and the case law merely applies it or fills out its boundaries." (*In re Thomas, supra,* 30 Cal.App.5th at p. 762.)

Relying on the California standard, Petitioner argues the *McCoy* decision did not establish a new rule because it "flowed directly and inevitably" from decisions in effect at the time his conviction became final. Petitioner cites *Faretta v. California* (1975) 422 U.S. 806 and *Florida v. Nixon* (2004) 543 U.S. 175 as supportive of this conclusion. (MPA p. 18-19)

a. *McCoy* expanded the holdings in *Faretta Nixon.*

The principle announced in *McCoy*, while resting on Sixth Amendment principles as did the decision in *Faretta,* did more than explain or refine the *Faretta* holding, apply *Faretta* to a different factual situation, or draw a conclusion that was clearly implied or anticipated by *Faretta*.

While the *McCoy* court referenced *Faretta*, the decision did not flow "inevitably" from the *Faretta* holding. The *Faretta* Court recognized that implicit in the criminal defendant's Sixth Amendment right to the "assistance of counsel" is the defendant's personal right to mount his own defense and to refuse that legal "assistance." (See *McCoy, supra,*138 S.Ct. at pp. 1507-1508, citing *Faretta, supra,* 422 U.S. at p. 834.) The Court held that under the Sixth and Fourteenth Amendments, a state criminal defendant has an independent constitutional right of self-representation to conduct his own defense when the trial court finds that he voluntarily and intelligently relinquished the right to counsel. (*Id.* at 422 U.S at p. 835.) The Court found the right of self-representation is implicit in the other rights that the Sixth Amendment affords a criminal defendant to assure a full defense and fair

trial, and that this right is personal to the defendant. (*Id.* at pp. 819-821). "Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." (*Faretta, supra,* 422 U.S. at pp. 819–820.) Consistent with this fundamental right of self-representation, the court concluded that a state cannot force a lawyer upon a defendant who intelligently and knowingly elects to conduct his own defense. (*Id.* at p. 817 ["[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."].) The court reasoned that the defendant's constitutional right to the "assistance" of counsel contemplates the attorney will serve as an "aid" to a willing defendant (*id.* at p. 820), and "implicitly embodies a 'correlative right to dispense with a lawyer's help.'" (*Faretta*, *supra,* at pp. 812-814.) To hold otherwise and "thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists." (422 U.S. at p. 820.)

The *Faretta* court made a point to distinguish the defendant's fundamental right to manage his own defense when proceeding without counsel, from defense counsel's traditional "power to make binding decisions of trial strategy in many areas" when the criminal defendant agrees to proceed to trial with counsel as his representative. (*Id.* at pp. 820-821.) On this point the *McCoy* court expanded *Faretta* beyond mere refinement or explanation. Similarly, the *McCoy* court did more than draw a conclusion that *Faretta* implied or anticipated. The *Faretta* opinion certainly did not prescribe limits to retained counsel's trial strategy when urging a jury to find lesser included offenses. Because of these differences in fact and law, it cannot be said the conclusion in *McCoy* was "clearly implied in or anticipated" by *Faretta*.

Similarly, *McCoy* did not simply explain, refine, or draw conclusions of a rule previously announced in *Florida v. Nixon*, *supra*. Defendant Nixon was charged with a particularly gruesome capital murder. His experienced defense counsel decided that the best strategy to avoid a death verdict was to concede that the defendant had committed murder in the guilt phase of the capital trial, thereby preserving his credibility in urging leniency during the penalty phase due to defendant's mental illness.

(543 U.S. at p. 181.) Counsel consulted with and informed the defendant that this strategy was the best way to attempt to avoid a death sentence, but his client did not respond either affirmatively or negatively, and so counsel proceeded with that strategy without the defendant's express consent. (*Id.* at pp. 181–182.)

In his opening statement, defense counsel acknowledged Nixon's guilt and urged the jury to focus on the penalty phase. (*Id.*, 543 U.S. at pp.182–183.) At trial, the People introduced overwhelming evidence of defendant's guilt, including introduction of Nixon's taped confession. During the People's case-in-chief, defense counsel cross-examined prosecution witnesses and objected to the introduction of evidence. Otherwise, counsel did not put on a defense.

In his closing argument, counsel again conceded Nixon's guilt and reminded the jury of the importance of the penalty phase. (*Id.* 543 U.S. at p. 183.) The jury convicted Nixon of all counts. At the penalty phase, counsel argued that because Nixon was afflicted with numerous organic, intellectual, emotional and educational disabilities, he was not an "intact human being" and the death penalty was not appropriate for someone like that. (*Id.* at pp. 183-184.) The jury convicted *Nixon* of first degree murder and imposed death.

The *Nixon* court overturned the lower court's reversal of the conviction, which treated the concession as the equivalent of an involuntary guilty plea. The higher court ruled that when counsel confers with defendant and defendant remains silent about the proposed concession trial strategy, "counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." (*Id.* 543 U.S. at p. 192; see *McCoy*, *supra,* 138 S.Ct. at p. 1505.)

The *Nixon* court held that a defense counsel typically has the authority to manage most aspects of the defense without obtaining the client's approval, but that certain basic trial rights cannot be relinquished without consulting with the defendant and obtaining the defendant's express consent. Those basic rights include the decision to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. (*Id.* 543 U.S. at p. 187.) The *Nixon* court rejected the lower court's holding that defense counsel's concession was the functional equivalent of an unauthorized guilty plea (*id.* at p. 188), emphasizing that Nixon retained all the rights accorded a defendant in a criminal trial. (*Id.* at pp. 188-189.)

Importantly, the *Nixon* court reviewed defense counsel's concession strategy under the familiar "ineffective assistance of counsel" standard in *Strickland v. Washington* (1984) 466 U.S. 668, 688-692 – which poses the questions whether counsel's performance was deficient, and if so, was the deficiency prejudicial under the circumstances. (See *Nixon*, *supra,* 543 U.S. at pp. 186-187, 189-192.) Applying *Strickland*, the court found that defense counsel's performance was not deficient, since counsel satisfied the obligation to explain the proposed concession strategy to Nixon, whereupon the defendant made no remarks accepting or rejecting that approach. (*Id.* at pp. 189 ["Corin fulfilled his duty of consultation by informing Nixon of counsel's proposed strategy and its potential benefits."].) Under those circumstances, the *Nixon* court concluded that counsel's tactic of conceding guilt in order to focus on the trial's penalty phase was reasonable and did not amount to ineffective assistance of counsel pursuant to *Strickland.* (*Id.* at pp. 190-192.) The *Nixon* Court did not opine on what would have been a hypothetical circumstance wherein a defendant affirmatively rejects a concession strategy. The Court certainly did not hold that error would result from such a circumstance.

The *Nixon* court did not decide the issue present in *McCoy* and in this petition – whether counsel may concede defendant's guilt as a rational trial strategy over defendant's objection to pursue total factual innocence. At most, *Nixon* suggests that if trial counsel overrides his client's express objections and deems it in the client's best interest to concede guilt, counsel's conduct must be analyzed under the *Strickland* standard. (*Nixon*, *supra*, 543 U.S. at pp. 189-190 ["The Florida court therefore did not hold Nixon to the standard prescribed in *Strickland v. Washington*, 466 U.S. 668 (1984) which would have required Nixon to show that counsel's concession strategy was unreasonable."].) By contrast, the *McCoy* court expressly dispensed with the *Strickland* analysis, concluding that "a client's autonomy, not counsel's competence, is in issue" and the defendant need not show prejudice to gain redress for this violation. (*Id.* at pp. 1510-1511.)

In light of the above discussion, the court finds that the *Nixon* court did not undertake to recognize an additional right, implicit within the Sixth Amendment, to prevent counsel from pursuing a concession strategy. It therefore cannot be said that the right announced in *McCoy* "inevitably flowed" from *Nixon*. To the contrary, *McCoy* created a <u>*new rule of criminal procedure*</u> and fashioned a new Sixth Amendment right from the criminal defendant's existing bundle of trial rights:

> 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.

(*McCoy, supra,* 138 S.Ct. at p. 1508.)

Petitioner, perhaps inadvertently, seemingly concedes this point in his Traverse/Denial, stating: "*McCoy* effected ***a sea change*** in the balance of power between client and counsel." (Denial, p. 28:1-2, *emphasis added.*) Indeed this is the court's view. *McCoy* created a new procedural rule that might be viewed as a sea change.

b. The principle announced in *McCoy* impliedly disapproved a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities.

Until *McCoy*, countless authorities upheld trial counsel strategy conceding a clients' guilt of a greater offense against the client's wishes, to pursue a lesser offense and a better result. The *McCoy* holding impliedly limited the California Supreme Court's long-standing recognition that "good trial tactics often demand complete candor with the jury, and that in light of the weight of the evidence incriminating a defendant, an attorney may be more realistic and effective by avoiding sweeping declarations of his or her client's innocence. [Citation.]" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1060–1061.) Before and after Mitchell's conviction, the California Supreme Court repeatedly upheld defense counsel's discretionary authority to pursue a trial strategy of conceding defendant's guilt in the face of overwhelming prosecution evidence. (E.g., *People v. Gamache* (2010) 48 Cal.4th 347, 391–393 ["We have repeatedly recognized that sensible concessions are an acceptable and often necessary tactic."]; *People v. Hart* (1999) 20 Cal.4th 546, 631 [Concessions are appropriate where the "surviving victim had testified in graphic detail regarding defendant's involvement in the charged offenses."]; *People v. Bolin* (1998) 18 Cal.4th 297, 334 ["Conceding some measure of culpability was a valid tactical choice under these restrictive circumstances."]; *People v. Lucas* (1995) 12 Cal.4th 415, 446–447 [admitting the defendant was at the scene was a competent tactical choice given the state of the evidence]; *People v. Jackson* (1980) 28 Cal.3d 264, 293 [" '[G]ood trial tactics demanded

complete candor' with the jury."].) In none of those cases is it suggested that such a tactical decision, made against the wishes of the client, would result in structural error.

In *People v. McPeters* (1992) 2 Cal.4th 1148, defendant was charged with murder and a robbery special circumstance. Defendant testified to an alibi defense. The evidence of his guilt was overwhelming. His fingerprints were on the murder weapon and five eyewitnesses identified him as the murderer or being at the scene of the crime. In his closing argument, defense counsel conceded the defendant's presence at the scene of the murder (thereby undermining defendant's alibi defense). Counsel tried to explain defendant's contrary testimony as a failure of recollection. (2 Cal.3d at pp. 1186-1187.)

In rejecting defendant's claim of ineffective assistance of counsel, the California Supreme Court held that counsel "attempt[ed] to make the best of a bad situation [citation]", and counsel's concession was a " 'plausible tactical explanation' for the defense argument in this case." (*Id.* at pp. 1186-1187; also e.g., *People v. Freeman* (1994) 8 Cal. 4th 450, 498 ["The decision of how to argue to the jury after the presentation of evidence is inherently tactical; . . ."].) Again, there was no suggestion that the conflict with the defendant's preferred alibi defense created structural error.

In light of this history, the court finds that the holding in *McCoy* – declaring that a criminal defendant has an absolute Sixth Amendment right to prevent counsel from conceding his guilt as a valid trial tactic – "disapproves a practice impliedly sanctioned by prior decisions of [the California Supreme Court]" (*Guerra*, *supra,*, 37 Cal.3d at p. 401), and establishes a new rule of criminal procedure. (See *McCoy*, *supra,* 138 S.Ct. at p. 1512 [the majority of the Court announced a "newly discovered fundamental right . . . .", Alito, J., dissenting.].)

Accordingly, this court finds that *McCoy* established a new rule and the new rule displaced a previously existing contrary rule. Having found the *McCoy* court established a new rule of criminal procedure, displacing a prior contrary rule or sanctioned practice, this court now must apply the test in *In re Johnson, supra,* to determine whether the new rule should be retroactively applied to Mitchell's case.

c. McCoy is Not Retroactive Under In re Johnson

As noted above, the court must examine the new rule, considering the following factors: (1) the purpose of the new rule of criminal procedure; (2) the reliance placed by law enforcement authorities on the old rule, and (3) the effect retroactive application would have on the administration of justice. (*In re Johnson, supra,* 3 Cal.3d at p. 410.)

The first factor, centering upon an examination of the purpose of the new rule, is said to be controlling. "[T]he factors of reliance and burden on the administration of justice are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered." (*In re Johnson, supra*, 3 Cal.3d at p. 410.) "When that purpose clearly favors retroactivity or prospectivity, it will be given effect without regard to the weight of the remaining factors. (*Ibid.*) In all such cases the test is essentially unipartite." (*Guerra, supra,* 37 Cal.3d at p. 402; accord. *In re Ruedas, supra*, 23 Cal.App.5th at p. 800.)

California courts have held that "the more directly the new rule in question serves to preclude the conviction of innocent persons, the more likely it is that the rule will be afforded retrospective application. Similarly, if the rule relates to characteristics of the judicial system that are essential to minimizing convictions of the innocent, it will apply retroactively regardless of the reliance of prosecutors on former law, and regardless of the burden which retroactivity will place upon the judicial system." (*Johnson,* at p. 413; accord. *Guerra, supra,* 37 Cal.3d at pp. 402-403 [where the primary purpose of the new rule is to promote reliable determinations of guilt or innocence, that new rule will be given retroactive effect without regard to the remaining factors].)

Conversely, retroactivity will likely be *denied* when the new rule is "seen as vindicating interests which are collateral to or relatively far removed from the reliability of the fact-finding process at trial." (*In re Johnson, supra,* 3 Cal.3d at pp. 411-412 [For example, new exclusionary rules announced in search and seizure cases were not given retroactive effect under principle that such cases have no bearing on guilt or the reliability of the truth-finding process at trial].)

The purpose of the Sixth Amendment right announced in *McCoy* is not to assure the integrity of the fact-finding process or to prevent the defendant from an erroneous conviction. Instead, it is intended to validate a different liberty interest – preserving defendant's autonomy to control the

objective of the defense, even in the face of overwhelming evidence of his guilt. In fact, enforcement of this right might well interfere in the search for truth since it will result in the exclusion of pertinent factual information and increase the chances a defendant will be convicted of a greater offense. Imposition of the rule may in fact bar counsel from introducing exculpatory evidence, presenting mitigating evidence, or evidence negating the mental elements of the greater charged offense, and may bar counsel from presenting the client's best closing argument.

In *People v. McDaniel* (1976) 16 Cal.3d 156 the California Supreme Court applied the state standard articulated in *In re Johnson* to the principle announced in *Faretta* and concluded that *Faretta* did not apply retroactively. The *McDaniel* Court found that this new rule was not intended to promote the reliability of the fact-finding process, and will most likely have the opposite effect:

> In considering the first of the criteria of retroactivity of the *Farretta* rule, we discover that it is readily apparent that the purpose of the rule is to secure to an accused the personal freedom to choose how and by whom he will defend against a criminal charge. It is manifest from those portions of the Farretta opinion quoted above that compliance with the rule is not intended by the majority of the court in Farretta to enhance the reliability of the truth-determining or fact-finding process, as the majority anticipate and indeed concede, that such compliance will most likely have the directly opposite effect.

(*People v. McDaniel, supra,* 16 Cal.3d at pp. 165–166.)

Having concluded that the new *Farretta* rule did not aid in the truth-determining process, the *McDaniel* court prohibited retroactive application and dispensed with the need to balance the remaining factors:

> When implementation of the new rule does not in some significant degree aid in the truth determining process, little or no weight is added to the balance in favor of retroactive application as little or no prejudice in the trial itself is suffered by an accused whose guilt was determined without benefit of the new rule. (*Stovall v. Denno, supra*, 388 U.S. 293, 296-299 [18 L.Ed.2d 1199, 1203-1205]; *Johnson v. New Jersey, supra*, 384 U.S. 719, 728-729 [16 L.Ed.2d 882, 889-890].)

(*People v. McDaniel* (1976) 16 Cal.3d 156, 166–167.)

The Court in *McCoy* likewise recognized that the purpose behind defendant's Sixth Amendment right to autonomy was *not* to protect defendant from an erroneous conviction, but rather

to protect a collateral interest removed from the determination of the truth – a defendant's right to make his own choices, regardless of the wisdom of that choice:

> An error may be ranked structural, we have explained, "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." *Weaver,* 582 U.S., at ——, 137 S.Ct., at 1908 (citing *Farretta,* 422 U.S., at 834, 95 S.Ct. 2525).

(*McCoy, supra,* 138 S.Ct. at p. 1511, *internal citations omitted.*)

This court is persuaded that the right recognized in *McCoy* and asserted by Mitchell was not intended to, and does not, promote the reliability of the fact-finding process, and for that reason no purpose would be served in applying *McCoy* retroactively to Mitchell's conviction.

Accordingly, under the state standard, the Petition fails to establish retroactivity of the *McCoy* rule.

2. The Federal Standard

The United States Supreme Court in *Teague v. Lane, supra,* 489 U.S. 288 adopted a more restrictive test for use in determining the retroactive effect of any new rule announced by the high Court to cases that are final. Where retroactive application of a new rule would result under the federal standard, as a policy matter California courts will heed that conclusion and will not reweigh the issue under *In re Johnson.* (*Gomez, supra,* 45 Cal.4th at p. 655 ["As a matter of practical policy, it would not make sense for our state courts to reject claims grounded upon [a new constitutional rule] if those claims would be granted in the federal courts."].) Thus, notwithstanding the conclusion reached based on application of the state standard, above, analysis under the federal standard is appropriate.

a. <u>*McCoy* is Not Retroactive Under *Teague v. Lane* (1989) 489 U.S. 288</u>

Petitioner asserts the new rule announced in *McCoy* is retroactive pursuant to *Teague v. Lane* (1989) 489 U.S. 288. (MPA p. 21-22, Denial p. 26.) This court disagrees.

> Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. See *Griffith v. Kentucky,* 479 U.S. 314 (1987). A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a " 'watershed

> rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle, supra,* at 495, (quoting *Teague, supra,* at 311 (plurality opinion).)

(*Whorton v. Bockting, supra,* 549 U.S. at p. 416; *In re Ruedas, supra,* 23 Cal.App.5th at p. 799 [the federal retroactivity standard is narrower and thus is generally more difficult to meet than the state standard].)

"A new rule is defined as 'a rule that ... was not "*dictated* by precedent existing at the time the defendant's conviction became final." ' [Citations.]" (*Whorton v. Bockting, supra,* 549 U.S. at p. 416; *In re Gomez, supra,* 45 Cal.4th at p. 656.) "Therefore, unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* by existing precedent to apply the rule in question, the rule will be considered new and presumed not to apply on collateral review. (*Graham v. Collins* (1993) 506 U.S. 461, 468, italics added, quoting *Saffle v. Parks* (1990) 494 U.S. 484, 488.)" (*In re Ruedas, supra,* 23 Cal.App.5th at p. 794, *internal citations omitted.*) As discussed in detail above, the result in *McCoy* was not "dictated" by the prior holdings in *Farretta*, *Nixon* or any other authority. The *McCoy* court announced a new Sixth Amendment right that restricted the historic discretion of trial counsel to concede defendant's guilt as a rational trial strategy even where defendant insists on presenting a defense of factual innocence. The court finds that *McCoy* stated a "new rule" under the federal standard. Thus, the court turns to the analysis described in *Teague, supra.* That is, the court must determine whether either of the exceptions to the general principle that the new rule is not applied retroactively, is present.

There is no dispute that the rule announced in *McCoy* is a rule of criminal procedure, and it therefore does not fall within the first exception in *Teague* for "substantive" rules. Here, Petitioner contends that the *McCoy* rule falls within the second exception as being a "watershed rule of criminal procedure." (*Whorton v. Bockting, supra,* 549 U.S. at p. 417.)

The Supreme Court has ruled that this exception is "extremely narrow" and observed "that it is unlikely that any such rules have yet to emerge." (*Whorton v. Bockting, supra,* 549 U.S. at pp. 417–418, *internal citations omitted.*) Since the *Teague* decision, the Supreme Court has rejected every claim that a new rule satisfied the requirements for watershed status. (*Ibid.*). "In order to qualify as

watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. [Citations.] Second, the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." (*Whorton v. Bockting, supra,* 549 U.S. at pp. 417–418, *internal citations omitted.*)

The Supreme Court has created a high threshold to meet that first element:

> "[i]t is ... not enough ... to say that [the] rule is aimed at improving the accuracy of trial," *Sawyer,* 497 U.S., at 242, 110 S.Ct. 2822, or that the rule "is directed toward the enhancement of reliability and accuracy in some sense," *id.,* at 243, 110 S.Ct. 2822. Instead, the question is whether the new rule remedied "an ' "impermissibly large risk" ' " of an inaccurate conviction. *Summerlin, supra,* at 356, 124 S.Ct. 2519.

(*Whorton, supra,* 549 U.S. at p. 418.)

The opinion in *Whorton* illustrates how difficult it is for the new rule constitutional rule to be deemed a "watershed" rule, even when that rule directly affects the admission of evidence of defendant's guilt. In *Whorton,* petitioner was convicted of sexual assault on a six-year old minor, and he sought a writ of habeas corpus based on the trial court's alleged violation of the Confrontation Clause in allowing a detective and the minor's mother to testify to the minor's incriminating out-of-court statements. The trial court's ruling was consistent with the controlling authority at the time of trial, *Ohio v. Roberts* (1980) 448 U.S. 56, which held "the Confrontation Clause permitted the admission of a hearsay statement made by a declarant who was unavailable to testify if the statement bore sufficient indicia of reliability, either because the statement fell within a firmly rooted hearsay exception or because there were 'particularized guarantees of trustworthiness' relating to the statement in question." (*Whorton, supra,* 549 U.S. at pp. 412-413, citing *Roberts, id.* at p. 66.) Long after the defendant's conviction was final, the Supreme Court issued its opinion in *Crawford v. Washington* (2004) 541 U.S. 36, which overruled *Roberts* and held that " '[t]estimonial statements of witnesses absent from trial' are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness].' 541 U.S., at 59. See also *Davis v. Washington,* 547 U.S. 813 (2006)." (*Whorton, supra,* 549 U.S. at pp. 413-414.)

The *Whorton* court denied defendant's request for collateral relief and refused to retroactively apply *Crawford* to his final conviction, concluding that the new rule of criminal procedure announced

in *Crawford* was not a "watershed" rule. (*Id.* at p. 418.) It held that the *Crawford* rule did not satisfy the first element since it did not lead "to an impermissibly large risk of an inaccurate conviction." (*Id.* at p. 418.)

> "[T]he question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is ' one without which the likelihood of an accurate conviction is *seriously* diminished.' " 399 F.3d, at 1028 (Wallace, J., concurring and dissenting) (quoting *Summerlin,* 542 U.S., at 352, 124 S.Ct. 2519; internal quotation marks omitted; emphasis in original). *Crawford* did not effect a change of this magnitude.

(*Whorton v. Bockting, supra,* 549 U.S. at p. 420.)

The present case does not involve a rule relating to the admission or exclusion of evidence, and otherwise has no bearing on Petitioner's guilt or innocence. As discussed above, the announced purpose of the *McCoy* rule is to validate the defendant's independent right to control the defense theory and to prevent trial counsel from conceding defendant's guilt to the jury. That rule has little impact on improving the accuracy of the fact-finding process, and certainly does not rise to the level of preventing "an impermissibly large risk of an inaccurate conviction." As such, McCoy did not establish a watershed rule of criminal procedure.

Accordingly, Petitioner fails to establish that *McCoy* applies to his conviction retroactively, under the federal standard. Since Petitioner has failed to show that *McCoy* applies retroactively, under either state or federal standards, his Petition resting on *McCoy* fails.

D. Even if McCoy Applied Retroactively, the Petition Fails on the Merits.

As discussed above, the United States Supreme Court in *McCoy v. Louisiana, supra*, established that a criminal defendant has a Sixth Amendment right to dictate the ultimate goals of his defense. The decision centered upon McCoy's counsel conceding his guilt over his steadfast objection. The Court stated that "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." (*McCoy v. Louisiana, supra,* 138 S.Ct. at 1509.)

Likewise, the decisions in *People v. Eddy, supra*, and *People v. Flores, supra*, centered upon clear concessions of guilt. The Sixth Amendment violations in the three cases cited by Petitioner

rested upon a clear and unequivocal concession of guilt by counsel, against the wishes of the client. The courts in the above-cited decisions did not prohibit defense counsel from arguing an alternative theory in the event the jury rejects the proffered alibi, or mistaken identity defense. In fact, the court in *McCoy* seemingly endorsed such a strategy. On this subject, the *McCoy* Court stated

> 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. See *Gonzalez,* 553 U.S., at 249, 128 S.Ct. 1765 ("[n]umerous choices affecting conduct of the trial" do not require client consent, including "the objections to make, the witnesses to call, and the arguments to advance"); cf. *post,* at 1515 – 1516. Counsel, in any case, must still develop a trial strategy and discuss it with her client, see *Nixon,* 543 U.S., at 178, 125 S.Ct. 551, explaining why, in her view, conceding guilt would be the best option. In this case, the court had determined that McCoy was competent to stand trial, *i.e.,* that McCoy had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Godinez v. Moran,* 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (quoting *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (*per curiam*)).[footnote omitted] If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection. English could not interfere with McCoy's telling the jury "I was not the murderer," *although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction*.

(*McCoy v. Louisiana* (2018) 138 S.Ct. 1500, 1509 [emphasis added].)

Defense counsel's recognition that the jury might reject a defendant's alibi, or mistaken identity defense does not amount to a concession of guilt. Similarly, counsel's decision to argue that the evidence would not support a conviction for first degree murder in the event the jury might reject the total innocence argument, does not amount to a concession of guilt. As pointed out by Respondent, the 9th Circuit Court of Appeals recognized this nuance in *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892. The court stated,

> Hovey contends that counsel conceded guilt of first degree murder when, referring to a chart that compared the requirements for first degree premeditated murder with those for second degree murder, he stated:
>
> > I submit to you that it's within the realm that there could be findings ... of willful, deliberate and premeditated ... yet ... there may be some reasonable doubt.
> >
> > I think under the law as it's presented by [the prosecutor] in this case, there are theories that could support a second degree murder. In fact, absent willful,

> deliberate[ ] premeditation, it is second degree murder. I do think also it could be first degree murder and I recognize it also could be special circumstance. I believe that that is within your province to find as you see because you're the judges to pass on the facts and you will.

> Counsel did not concede premeditation with these words. Although he stated that "there could be findings ... of willful, deliberate and premeditated," he made this point in the context of weighing the jury's options.

(*Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 905–906)

In the present case, Mr. Hanlon did not concede Mitchell's guilt. Rather, after arguing Mitchell's total innocence for the vast majority of his closing argument, he carefully presented an alternative argument, in the event the *jury* rejected the claim of mistaken identity. He prefaced his arguments in terms of proffering a sensible consideration that would flow in the event the jury rejected the mistaken identity defense. As can be seen in the excerpts from Mr. Hanlon's closing argument above, he routinely prefaced his alternative theory with reference to what *the jury* might find. ["If you decide that Mr. Mitchell did this act…;" "If you don't believe him, what occurred?" "If you don't believe what he testified to, if you believe he's a killer, what do you then do with the facts?" "What do you do if you were convinced beyond a reasonable doubt that Mr. Mitchell is not telling the truth and did take the hammer [sic] and did kill her?" "So, I want to talk to you – what can we infer from the evidence, if you conclude that Mr. Mitchell is the person who killed [D.K.]?" "If you decide that Mr. Mitchell did this act, the provocation, . . ."]

Mr. Hanlon, in closing, put his alternative argument in the context of Mitchell's claim of total innocence, and argued,

> So the question becomes, has the Government proved Mr. Mitchell is guilty beyond a reasonable doubt? Have they proved his testimony is not only inconsistent with the facts, but beyond a reasonable doubt – doubt is not true? I don't think they have. I don't think the evidence has shown that. If you think they have, then you go to the next stage.

(Ex. J; p. 64)

This court concludes that Mr. Hanlon did not concede guilt, but keenly provided defendant a hope for a lesser offense in the event the jury rejected his testimony.

Mr. Hanlon came closer to a concession of guilt by stating, "there certainly is evidence on which you could conclude, depending on how you understand the inferences for circumstantial evidence, that Mr. Mitchell is not being totally honest with you about what happened." (Ex. J, p. 57) However, such recognition is not a concession, as recognized by the Court in *Ayers, supra.*

A careful review of Mr. Hanlon's closing argument reveals to this court, as it did to Judge Chhabria sitting on the United States District Court for the Northern District of California hearing Petitioner's federal habeas petition, that Mr. Hanlon did not concede Mitchell's guilt. (See Ex. 1 to Respondent's Return, p. 6) Rather, he provided Mitchell a life-line, in the form of a back-up argument as a "next stage" in the event the jury rejects his primary defense.

Petitioner, seemingly recognizing that Mr. Hanlon did not actually concede Mitchell's guilt, argues that under the circumstances here, the mere presentation of the alternative argument is prohibited. Petitioner argues,

> Mitchell's case is very different. There was no room for Hanlon to argue Mitchell's innocence while also arguing that *whoever* committed this homicide lacked the required intent or only committed manslaughter. The only person whose intent we had circumstantial evidence of was Mitchell. The only person who could have committed manslaughter 'because of a sudden quarrel or in the heat of passion' and because he 'acted rashly and under the influence of intense emotion that obscured his reasoning or judgment' was Mitchell [citations] The only person about whom Hanlon could have argued, 'What happened...that led to a man beating in the brains of a woman he loved?' was Mitchell [citation]. Hanlon's argument committed Mitchell to having killed the mother of his child, an admission McCoy emphasized a defendant might not wish to make and which Mitchell adamantly and consistently opposed."

(Petitioner's MPA, p. 16: 13 to 17: 2)

Petitioner's argument is not persuasive, and seemingly misses the point of the alternative argument. The alternative argument, as presented by Mr. Hanlon, is only applicable if *the jury finds* that the defendant is in fact the perpetrator over counsel's argument to the contrary. Defense counsel does not concede guilt by asking the jury to consider mitigation circumstances or mental state, in the event *the jury* concludes the defendant is the perpetrator. By asking the jury to consider the evidence in the "next stage" (as Mr. Hanlon put it), the defense made clear the jury should do so only if it

rejected the mistaken identity claim. In raising the alternative or back-up argument, Mr. Hanlon did not concede guilt.

Petitioner's argument on this point, if accepted by the court, would lead to absurd results. That is, in cases like the present, where the evidence of a defendant's commission of the act is strong, and the claim of total innocence, alibi, or mistaken identity are doomed from the start (as the Court of Appeal put it), skilled trial counsel would be prohibited from arguing to the jury any mitigation upon *the jury's* rejection of the defendant's claim. The more inevitable it is that the jury would reject the total innocence claim, the less able is the attorney to seek a lesser offense. The stronger the evidence of a defendant's participation in the act of killing, the more restricted would be counsel. The court is not persuaded that the Sixth Amendment, or *McCoy* and its progeny, stand for such a principle.

Consequently, even if *McCoy* were to apply to the present case retroactively, Mr. Hanlon's conduct did not violate Petitioner's Sixth Amendment right pursuant to *McCoy v. Louisiana*. Accordingly, the Petition fails on its merits.

E. This Petition is Not Procedurally Barred

Respondent asserts that the Petition is procedurally barred. Based on the findings above, the court disagrees. Petitioner's current claim that the rule in *McCoy* requires a reversal of his convictions and the granting of a new trial, was not raised and rejected in his prior direct appeal. As such, Mitchell does not violate the rule in *In re Waltreus* (1965) 62 Cal.2d 218, 225 ["legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus."] (*In re Reno, supra,* 55 Cal.4th at pp. 476-477, citing *Waltreus, supra.*)

In Mitchell's underlying appeal, the First District Court of Appeal rejected Mitchell's contention based on his claim of ineffective assistance of counsel under *Strickland, supra*. This is not the same issue decided in *McCoy*, which fashioned a new Sixth Amendment right of defendant's autonomy, independent of the *Strickland* ineffective assistance of counsel claim. (*McCoy, supra,* at pp. 1510-1511.) As articulated above, Mitchell alleges violation of a new fundamental right. It was not before raised on appeal.

For the same reason, the court rejects Respondents' argument that petitioner failed to exhaust his appellate remedies. (Return pp. 41-42). " ' "[I]n the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Dixon,* 41 Cal.2d 756, 759.)'" (*In re Clark* (1993) 5 Cal.4th 750, 765-766.)

The above finding, however, is based on the court's conclusions in this decision, that *McCoy* announced a new rule and created a new application of the Sixth Amendment. It is worth noting that Petitioner's claim that *McCoy* did not announce a new rule conflicts with his argument that he could not have raised the issue on appeal, and thus is not barred from bringing this collateral attack. In this court's view, if Petitioner were correct that *McCoy* simply refined or explained previously existing law, and reached a conclusion that was anticipated and implied by *Faretta* or *Nixon*, the analysis as to whether the claim is procedurally barred would be different.

V. CONCLUSION

For the reasons stated above, the Petition for Writ of Habeas Corpus is denied.

Dated: May 20, 2020

PAUL M. HAAKENSON
Judge of the Superior Court

Cc: Steven S. Lubliner
Warden, Donovan Correctional Facility, San Diego, CA
California Attorney General
Marin County District Attorney

S265812

IN THE SUPREME COURT OF CALIFORNIA

In Re James R.W. Mitchell JAMES R.W. MITCHELL, Petitioner, vs. RALPH M. DIAZ, Secretary, California Department of Corrections and Rehabilitation, an individual; and MARCUS POLLARD, Warden of Richard J. Donovan Correctional Facility, an individual, Respondents, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	First District Court of Appeal No. A160759 Marin County Superior Court No. SC210551A (habeas case) First District Court of Appeal, No. A133094 (direct appeal) Marin County Superior Court No. SC165475A (case of conviction)

PETITION FOR REVIEW

Following the Judgment of the Superior Court
of the State of California for the County of Marin

HONORABLE PAUL M. HAAKENSON, JUDGE

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

ISSUES PRESENTED FOR REVIEW

Under *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, a defendant has a right of autonomy under the Sixth Amendment to insist that defense counsel present a defense of complete innocence. (*Id.* at pp. 1507-1509.) In *McCoy*, and as *McCoy* was applied by *People v. Flores* (2019) 34 Cal. App. 5th 270 and *People v. Eddy* (2019) 33 Cal. App. 5th 472, defense counsel violated that right when he conceded to the jury that the defendant committed the *actus reus* of a charged crime. The error is structural. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1511; *People v. Flores*, *supra*, 34 Cal. App. 5th at p. 283; *People v. Eddy*, *supra*, 33 Cal. App. 5th at p. 483.) *McCoy* applies retroactively on collateral review to cases like petitioner's that are otherwise final. (*In re Smith* (2020) 49 Cal. App. 5th 377, 391-392.) It is undisputed that, in this murder case, defense counsel knew of petitioner's insistence on a defense of complete innocence and his refusal of a defense based on mental state.

1. Regardless of whether defense counsel's remarks amounted to a concession of the *actus reus* of homicide, did defense counsel's alternative argument for voluntary manslaughter in defiance of petitioner's wishes violate petitioner's right of client autonomy as set out in *McCoy*?

2. If a concession is required, does defense counsel violate *McCoy* when he impliedly or tacitly concedes a defendant's guilt of the *actus reus* of a charged crime? As applied here, did defense counsel concede the *actus reus* of homicide when, after arguing for an acquittal grounded substantially in petitioner's testimony

of third party culpability, he began his alternative argument for a manslaughter conviction by saying petitioner would not approve of it and by twice invoking his duties as an officer of the court to tell the jury the evidence suggested petitioner lied on the stand?

STATEMENT OF THE CASE

In Marin County Superior Court case number SC165475A, a jury convicted petitioner of first-degree murder, kidnapping of a child, stalking, and related charges, with weapons use enhancements. He was acquitted of a special circumstance that the murder was committed for purposes of kidnapping. On August 16, 2011, petitioner was sentenced to 35 years to life in state prison. The sentence consisted of 25 to life on the murder count, plus one consecutive year for the deadly weapon enhancement, plus the upper term of eight consecutive years for kidnapping, and one consecutive year for stalking. Punishment on other counts was stayed pursuant to California Penal Code section 654. (Exh. M, vol. 2, 347.)

Petitioner's direct appeal was adjudicated in the First District Court of Appeal, case number A133094. Among his claims were several that revolved around his entitlement to dictate a defense of complete innocence. He argued that because defense counsel concealed their intention to argue for voluntary manslaughter, petitioner lost the chance to replace them with counsel who would follow his instructions, effectively denying him counsel of his choice, a structural error. (Exh. L, vol. 2, 273-287.) He argued that the trial court violated his Sixth Amendment rights by, at points in the trial when petitioner had

doubts that defense counsel would follow his instructions, denying his requests to replace them with the Public Defender, denying his request for self-representation, and denying counsel's requests to withdraw, errors which are also structural. (Exh. L, vol. 2, 248-272.) He also argued that his Sixth Amendment right to counsel was violated when the trial court let counsel refuse to participate at sentencing because he did not want to argue against petitioner's wishes again. (Exh. L, vol. 2, 292-306.)

On July 28, 2014, the Court of Appeal filed an unpublished opinion. Other than set aside a protective order as unauthorized, the Court rejected all of petitioner's claims and affirmed the judgment. As the issue arose, the Court rejected the view that he was entitled to dictate a defense of complete innocence. The decision to concede guilt as appropriate was a strategic decision left to defense counsel, to be reviewed for ineffective assistance, which it was not. (Exh. M, vol. 2, 366-367, 369-370, 372, 376.)

Petitioner filed a petition for review in this Court on August 27, 2014 on the claims from the Court of Appeal. (Exh. N, vol. 2, 392-393.) This Court denied review on October 15, 2014 in case number S220833. (Exh. O, vol. 2, 441.)

On March 13, 2017, petitioner filed a *pro se* habeas petition in the First District Court of Appeal. *In re James Mitchell*, A150765. The petition, which is unavailable to the undersigned, apparently challenged his sentence. According to the online docket, the Court denied the petition on March 22, 2017 as procedurally defaulted and on the merits. (Exh. P, vol. 2, 442.)

Petitioner did not file a habeas petition or petition for review in this Court after the above denial.

On October 26, 2015, petitioner filed a *pro se* petition for writ of habeas corpus in the Northern District of California. *Mitchell v. Davey*, 15-cv-04919-VC. Petitioner pled all the claims from his state appeal, including the claims concerning his attorneys' disregard of his wishes and the trial court's handling of issues concerning his representation. (Exh. Q, vol. 3, 444-450.) On November 2, 2015, the district court issued an Order to Show Cause to respondent. On February 19, 2016, respondent filed its answer, supporting memorandum, and exhibits. On May 5, 2016, petitioner filed a traverse. (Exh. S, vol. 3, 462-463.)

On October 18, 2016, the district court denied the petition and ruled that petitioner was not entitled to a certificate of appealability. It entered judgment for respondent that same day. (Exh. R, vol. 3, 451-460.)

On June 9, 2017, in case number 16-17057, the U.S. Court of Appeals for the Ninth Circuit granted a certificate of appealability on the issues of "whether the state trial court violated appellant's constitutional rights when it (1) denied his request for self-representation under *Faretta v. California*, 422 U.S. 806 (1975); and (2) denied his motion to dismiss retained counsel at sentencing, including whether counsel rendered ineffective assistance at sentencing." (Exh. T, vol. 3, 465-466.) The undersigned was appointed to represent petitioner in the Ninth Circuit under the Criminal Justice Act.

On July 23, 2018, the undersigned filed petitioner's opening brief in the Ninth Circuit. In addition to briefing the two certified issues, the undersigned briefed two uncertified issues, as the Rules of Court permit. The uncertified issues briefed were "Mitchell's Sixth Amendment Right to Counsel Was Violated by Defense Counsel's Overriding of His Decision Not to Concede Guilt of Any Form of Homicide" and "The State Court of Appeal's Conclusion That Mitchell's Request for New Counsel a Month Before His *Faretta* Request Was Properly Denied Was Unreasonable Because it Unreasonably Discounts Mitchell's Purpose of Seeking Counsel Who Would Limit His Defense to Complete Innocence." (Exh. U, vol. 3, 469-470.)

A central theme was petitioner's entitlement to insist on a defense of complete innocence. The brief argues, *inter alia*, that in rebuffing petitioner's attempts to replace Hanlon and Rief, the trial court unreasonably failed to consider this important interest. (Exh. U, vol. 3, 484-485, 504, 408-513, 525-526, 528-529.) The opinion in *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 and predecessor United States Supreme Court cases figure in the argument as they do in the discussion of the uncertified claim that petitioner's Sixth Amendment rights were violated by the concession of manslaughter. (Exh. U, vol. 3, 509, 525-526.)

Respondent filed the answering brief in the Ninth Circuit on February 19, 2019. (Exh. V, vol. 3, 530-599.) As the rules permit, respondent did not address the two uncertified claims. Addressing *McCoy*, respondent argued that it could not justify habeas relief because it post-dated petitioner's state court appeal

and that because it had not been presented to the state courts of appeal, any discussion was unexhausted. Respondent also argued that *McCoy* was distinguishable because Hanlon did not expressly concede guilt; he simply presented an alternative defense theory under which petitioner could be convicted of manslaughter. (Exh. V, vol. 3, 579-584.)

On July 17, 2019, prior to the filing of a reply brief, the Ninth Circuit granted petitioner's motion to stay his appeal so that he could seek state habeas relief premised on *McCoy*.

On October 3, 2019, petitioner, represented by the undersigned, filed a petition for writ of habeas corpus in Marin County Superior Court. (Exh. W, vol. 4, 601-628.) It was accompanied by a memorandum of points and authorities (Exh. X, vol. 4, 629-655.) and supporting documents. The petition was assigned case number SC210551A. Petitioner sought relief based on *McCoy*. The Superior Court issued an Order to Show Cause on November 21, 2019 and appointed the undersigned to represent petitioner. (Exh. Y, vol. 4, 657.) On May 20, 2020, after further briefing, the Superior Court denied the petition. It ruled that *McCoy* was not retroactive[1] and that even if it was, petitioner was not entitled to relief on the merits. The Court found no procedural bars. (Exh. Y, vol. 4, 656-691).

On August 21, 2020, petitioner, represented by the undersigned, filed a new habeas petition in the First District

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[1] The Superior Court so ruled prior to Division Two of the Fourth District holding that *McCoy* was retroactive. (*In re Smith* (2020) 49 Cal. App. 5th 377, 391-392.)

Court of Appeal in case A160759. At the Court's request, respondent filed an informal response and petitioner filed an informal reply. In addition to disputing petitioner's entitlement to relief on the facts, respondent argued that *McCoy* was not retroactive, the claim was procedurally defaulted because it could have been raised on direct appeal, and the claim was untimely when measured from the time of the direct appeal.

On November 18, 2020, the Court of Appeal issued an order denying relief on the merits. The Court did not interpret defense counsel's argument as conceding petitioner's guilt of the charged crime. It did not address petitioner's other argument that merely arguing for a manslaughter conviction against petitioner's wishes violated *McCoy*. (Order at 1.) The Court did not question retroactivity or impose any procedural bars in the alternative. (Order at 1-2.)

STATEMENT OF FACTS

I. Statement of Facts from Trial[2]

The murder victim was petitioner's girlfriend, D.K. The kidnapping victim was petitioner's daughter with her. Petitioner began his relationship with D.K. in August 2007. They moved in together two weeks later.

During the relationship, petitioner used drugs and committed acts of domestic violence against D.K. Petitioner was arrested several times, charges were filed, and restraining orders were imposed. The couple reunited from time to time, sometimes

[2] This Statement of Facts is derived from the state court of appeal's opinion. (Exh. M, vol. 2, 347-351.)

at D.K.'s initiation. Beginning in March 2009, petitioner's threatening behavior and drug use increased. He would threaten D.K., and he once threatened an officer who spoke to him on the phone from her house. A restraining order against petitioner was made permanent on July 7, 2009. Petitioner did not appear at that hearing, and he denied having received the order before the incident on July 12, 2009.

Phone records showed that petitioner made many, many calls to D.K.'s phone in the weeks preceding her death. He also called her best friend and said that he knew he had messed up but would do anything to get back with D.K. and his daughter. Between June 26 and July 12, he called D.K. 78 times, but she never answered until July 12. Petitioner made no calls to her after 6:42 p.m. that day.

Shortly before 7:00 p.m. on July 12, 2009, D.K.'s elderly neighbors, Bessie and Nick, heard her scream. Nick went outside to check and saw a man repeatedly hitting D.K. on the head with a baseball bat. Nick went back in the apartment and told Bessie to call the police "because he's here." Bessie called 911 and told the dispatcher that the child's father was beating D.K.

Bessie then saw a white man run past the window with a screaming child. The man had a shaved head and wore a black t-shirt and jeans. Other neighbors also saw the man and gave descriptions consistent with petitioner's—white, bald, heavy set. There were inconsistencies in the description of the clothing, with one neighbor saying the man wore a white t-shirt. The lineup process was inconclusive. Nick picked somebody else out of a

lineup. One neighbor could not pick anyone out of a photo lineup with petitioner's picture in it but did identify him with 95 percent certainty at a live lineup a week later. Everyone was consistent that only one person was involved in beating D.K. and carrying away the child.

D.K. was dead at the scene when police arrived. A baseball bat was found. The bat had petitioner's left index fingerprint on it near the grip. Petitioner is left-handed.

Both petitioner's cousin, John Morgan, and his brother, Justin Mitchell, got word that D.K. was dead. Both called petitioner separately that evening. Morgan said that petitioner was crying, and Justin said he was teary and distraught. They could hear the child in the background. Morgan asked petitioner if he knew D.K. was dead. Petitioner said he did. He never denied killing her. He neither admitted nor denied the killing to Justin. Morgan told petitioner to take the child somewhere safe. Petitioner told both men that he would take the child to Mexico rather than surrender her. Alternatively, petitioner told Justin that he might take her to his mother's house. Neither man knew petitioner to possess a bat or to play baseball or softball.

By tracking petitioner's cell phone, it was determined that he was heading east on Interstate 80. His car was found parked in Citrus Heights. When officers approached, they found the minor, alone and unharmed, sleeping in the front seat. A red substance on her cheek was later tested and determined to be D.K.'s blood.

Petitioner's passport was in the center console of the car. He was found walking around several blocks away and arrested without incident. He was wearing a red and navy-blue striped shirt and jeans.

Petitioner's jeans had blood spatter on the front. The blood was determined to be D.K.'s blood. Testimony suggested the spatter pattern was consistent with beating D.K. on the head from a few feet away while she was on the ground.

The bat was tested for trace DNA, i.e., DNA from a source other than blood. D.K. was the primary contributor. There were two other low-level contributors. Neither petitioner nor the child could be excluded as sources.

Petitioner testified in his own defense, raising a defense of mistaken identity. He testified that on July 12, 2009, D.K. invited him over. He left his home in Pittsburg around 5:00 p.m. and drove over. He was wearing a red and blue striped polo shirt and jeans. He parked his car and walked towards D.K.'s duplex.

Passing through the gate, petitioner heard D.K. scream for help. He encountered two men, one with a buzzed head wearing a white shirt, and the other in a black t-shirt. Petitioner fought with both men. The man in the black shirt hit him in the back with a baseball bat. Petitioner tried to take it away. After more fighting, petitioner chased the men. The man in the black t-shirt disappeared. The man in the white shirt had the child. Petitioner confronted him, punched and kicked him, and demanded the child. The man let him take her and ran away.

Petitioner went back up towards the duplex with the child. He heard someone say to call 911. Remembering he had a restraining order, he decided to leave before the police arrived.

Driving north on Highway 101, petitioner called his cousins. He planned to go to a cousin's house to wait to hear from D.K. He did not want to call her while the police were there. Petitioner's mother called him and told him that D.K. was dead and that it was being said that he killed her. Petitioner said he needed to talk to his lawyer. By chance, he ran into his attorney, Terence Hallinan, at a gas station.

Petitioner testified that he did not see anyone hit D.K. with a bat. He had not known she was dead when he left with the child. He could not explain how blood spatter got on his jeans. A urine test done after he was arrested showed he had no alcohol in his system and a small amount of methamphetamine, indicative of use within the past five to seven days.

A softball coach testified that the bat might be used by a high school player or small man or woman. D.K.'s mother said she had never seen the bat near her home. Her other children had played baseball and softball; their bats had all been given away. The county coroner testified that D.K.'s mother had told him that the bat may have been in the laundry room of the complex before the murder.

II. Relevant Procedural History at Trial

A. Defense Counsel's Closing Argument

The first part of Hanlon's closing argument alluded generally to petitioner's innocence. He discussed petitioner's

likely state of mind as he drove to see his daughter, the lack of proof that he brought the bat to the premises, the weakness of the eyewitness identification, and the inconclusiveness of the blood spatter evidence and the evidence that petitioner touched the bat on the question of what petitioner actually did. (Exh. J, vol. 1, 137-178.)

Hanlon argued that petitioner's testimony about fighting two men who really killed D.K. was consistent with the inconsistent eyewitness testimony about whether the killer wore a black or a white shirt. Hanlon did not otherwise advocate for the credibility of petitioner's testimony. He said that the coincidence of petitioner coming upon two other men doing violence to D.K. was one the jury would have to grapple with. (Exh. J, vol. 1, 178-180.)

Hanlon then argued for a guilty verdict on a lesser homicide, primarily manslaughter. (Exh. J, vol. 1, 180-190.) He argued, "What happened . . . that led to a man beating in the brains of a woman he loved?" (Exh. J, vol. 1, 183.) He prefaced this by saying that his job was to advocate for his client even if, impliedly, he disagreed with him. He said that petitioner would not agree with the argument he was about to make. (Exh. J, vol. 1, 180-181.) He said that the jury should not conclude that he did not believe his client. He believed, however, that the record contained evidence that petitioner was lying. (Exh. J, vol. 1, 181-182.) Hanlon told the jury, not once, but twice, that his duties as "an officer of the court" required him to argue against petitioner's

wishes and inform the jury about the possible falsity of his testimony. (Exh. J, vol. 1, 180-182.)

B. <u>Earlier Proceedings re Petitioner's Requested Defense</u>.

On September 1, 2010, the trial court granted a motion to relieve petitioner's counsel Douglas Horngrad. Attorneys Stuart Hanlon and Sara Rief were appointed. (Exh. A, vol. 1, 8-32.)

On January 20, 2011, the court held an *in camera*[3] hearing with petitioner, Hanlon, and Rief. Hanlon represented that rather than proceed on a heat-of-passion manslaughter theory, they would present the defense petitioner wanted, which was that he "did not commit this crime and that there were other people who did." Petitioner would so testify. (Exh. B, vol. 1, 34.) Hanlon said that to pursue this credibly would require DNA testing on the bat and petitioner's clothes. (Exh. B, vol. 1, 34-37.)

On May 10, 2011, petitioner asked the court to relieve Hanlon and Rief and appoint the Public Defender. Petitioner believed Hanlon was not being honest with him about the defense that he had been promised. Hanlon had made no public statements about it. The court opined that one would expect defense counsel to remain publicly non-committal about the

[3] On December 10, 2012, in direct appeal case A133094, the Court of Appeal granted respondent's motion to unseal all *in camera* proceedings. In December 2017, during the pendency of petitioner's Ninth Circuit habeas appeal, the Superior Court granted his motion, filed by the undersigned, to unseal the *in camera* documents for federal habeas purposes.

defense theory. (Exh. C, vol. 1, 40.) It denied the motion. (Exh. C, vol. 1, 44-45.)

On May 25, 2011, the court held an *in camera* hearing on Hanlon's request for additional defense funds. Hanlon said that petitioner would be testifying that he did not commit the crime. Whether Hanlon actually argued that would be up to him. (Exh. D, vol. 1, 47.)

Hanlon said there was substantial evidence that petitioner suffered from psychiatric problems. When he was getting involved with the case, he was told that petitioner had agreed to present a mitigating mental defense. That turned out not to be the case. "Mr. Mitchell has consistently told me he would not go forward with the [mental state] defense." (Exh. D, vol. 1, 47-48.)

Hanlon said that his duties to petitioner extended beyond just deferring to the defense he wanted to present. He was uncertain if he could put on a defense that contradicted petitioner's testimony. However, it was necessary to investigate. (Exh. D, vol. 1, 48-49.) He asked for $25,000 to $30,000. The court understood that petitioner was insisting on a defense of complete innocence, with which Hanlon disagreed. (Exh. D, vol. 1, 50-51.) It refused to approve so much money for "a conflicting defense that might not come into play in any event." (Exh. D, vol. 1, 52.)

On Friday, June 10, 2011, petitioner asked that he be granted his *Faretta* rights to represent himself at trial. He did not trust or like Hanlon. Hanlon had lied to him, so he expected him to lie to the jury. (Exh. E, vol. 1, 58.) If he received the files that day or Saturday, he would be prepared to proceed the

following Tuesday. He was already prepared to argue the motions that had been filed. (Exh. E, vol. 1, 59-60.)

When petitioner appeared in court the following Monday and asked for a continuance, the trial court denied his *Faretta* request, deeming it untimely. (Exh. E, vol. 1, 79-82.)

Hanlon then moved to withdraw. (Exh. F, vol. 1, 83-84.) The court held an *in camera* hearing with Hanlon, Rief, and petitioner. Hanlon said he had recently received two threatening letters from petitioner. (Exh. F, vol. 1, 87-90.)

Petitioner acknowledged he was angry because he was fighting his lawyers, who insisted on a heat-of-passion defense. After Hanlon and Rief embraced his desired defense, relations improved. That did not stop him from writing rambling, spur-of-the-moment letters that he sometimes regretted. (Exh. F, vol. 1, 92-98.) Hanlon said nothing. The court denied his motion to be relieved. (Exh. F, vol. 1, 98-99.)

C. Proceedings at Sentencing re Petitioner's Requested Defense.

At sentencing on August 16, 2011, the court held an *in camera* hearing on a mutual request that Hanlon and Rief not represent petitioner at sentencing or in connection with a possible motion for new trial. Petitioner was upset because Hanlon had argued in the alternative at trial for a heat-of-passion manslaughter verdict against his express instructions. (Exh. K, vol. 1, 194.) This strategy had been sprung on him at the last minute, leaving him no time to find new counsel. Petitioner thought Hanlon planned it that way. (Exh. K, vol. 1, 194-197.)

Although the issue at sentencing was concurrent vs. consecutive sentences, Hanlon doubted that he could perform competently the way he believed petitioner wanted. He believed that petitioner still wanted him to argue that he did not commit the murder. Although guilt was settled given the verdict, Hanlon was still unwilling to argue against petitioner's wishes. (Exh. K, vol. 1, 198-201.) "I made that decision once. I'm not going to do it again." (Exh. K, vol. 1, 200.) If forced to argue, he would simply submit the matter. (Exh. K, vol. 1, 200, 202.)

The court ordered Hanlon to explain why he argued for manslaughter. Hanlon said that he thought it was the only possible way to save petitioner from life in prison. He had told petitioner at some point that petitioner had the right to testify however he wished, but the decision of what to argue was his. (Exh. K, vol. 1, 200-201.)

> "Mr. Mitchell clearly expressed his desire that I not do it. I told him—I don't remember when that conversation first came up, whether it was before trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he was saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests." (Exh. K, vol. 1, 201.)[4]

[4] The trial court declined to relieve Hanlon. At sentencing, petitioner reasserted his innocence. Hanlon said nothing. Petitioner was sentenced.

ARGUMENT

I. Petitioner's Sixth Amendment Right of Client Autonomy, Which Allowed him to Insist on a Defense of Complete Innocence and not Have Defense Counsel Concede his Commission of the *Actus Reus* of the Charged Crime, was Violated When Defense Counsel, Knowing of Petitioner's Wishes and Knowingly Over his Objection, Argued in the Alternative that he was Guilty of Lesser Homicides, Primarily Voluntary Manslaughter.

A. Introduction

Under *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, a criminal defendant has a Sixth Amendment right to dictate the ultimate goals of his defense. When defense counsel concedes commission of a homicide knowing that the defendant wants a defense of complete innocence, the defendant's Sixth Amendment rights have been violated. (*Id.* at pp. 1507-1509.) The error is structural, requiring reversal without a showing of prejudice. (*Id.* at p. 1511.)

Focusing on the concession aspect of *McCoy* ignores a critical aspect of the case, the client's right to dictate the ultimate goals of his defense. If the goal of a defendant charged with murder is a defense of absolute innocence, the only way defense counsel can honor this is to argue for a complete acquittal. Defense counsel who argues for a verdict of mitigated homicide violates *McCoy*. This is so regardless of how he phrases his argument and whether or not he concedes the commission of a homicide. Review should be granted to settle this important question of law. (California Rules of Court, Rule 8.500, subd. (b)(1).)

If a concession is required, what must it look like? There are many ways in law—and life—to assert something directly without saying it explicitly. This case exemplifies that. Because an attorney has many rhetorical arrows in his quiver, a *McCoy* violation should not require the magic words, "Ladies and Gentlemen of the Jury, I concede to you that the defendant did X." Rather, the likely impact of his argument on a reasonable juror should be analyzed. The likely impact of Hanlon's argument was "Forget everything I just said about innocence. Focus on manslaughter." Review should be granted to settle this important question of law. (California Rules of Court, Rule 8.500, subd. (b)(1).)

B. Standard of Review

Facts entitling a petitioner to habeas relief must be proven by a preponderance of the evidence. (*In re Large* (2007) 41 Cal. 4th 538, 549.) This Court reviews the legal issues in petitioner's habeas petition *de novo*. (*Robinson v. Lewis* (2020) 9 Cal. 5th 883, 895-896; *In re Resendiz* (2001) 25 Cal. 4th 230, 249, *abrogated in part on other grounds*, *Padilla v. Kentucky* (2010) 559 U.S. 356, 370.)

C. The Merits

1. *McCoy* and California Cases Granting Relief Under it.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." A defendant also has a Sixth Amendment right to forgo the

assistance of counsel and represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 807.) This is because "[t]he right to defend is personal." (*Id.* at p. 834.) "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." (*Id.* at p. 819.)

A defendant who appears with counsel cedes most trial management decisions to the attorney. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1508.) "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,[5] and forego an appeal. See *Jones v. Barnes* (1983) 463 U.S. 745, 751.)" (*Ibid.*)

The question under review in *McCoy* was "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." (*Id.* at p. 1507.) In *McCoy*, the defendant was charged with capital murder for killing three family members of his estranged wife. (*Id.* at pp. 1505-1506.) McCoy was adamant about his innocence. "Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong." (*Id.* at p. 1506.)

Two weeks before trial, McCoy's retained counsel, English, told him that he intended to concede guilt. McCoy was furious and told him not to do so. He demanded a defense of innocence. It was undisputed that defense counsel was aware of McCoy's

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[5] See *Harris v. New York* (1971) 401 U.S. 222, 225.

wishes. Both McCoy and English sought to sever the relationship. The trial court refused to relieve English, telling him that he was the attorney and the choice of defense, if any, was his. (*Ibid.*)

During opening statement, English conceded that it was indisputable that McCoy had caused the victims' deaths. This prompted an outburst from McCoy about being sold out for having "murdered his family." (*Id.* at p. 1506-1507.) McCoy ultimately testified in his own defense, "maintaining his innocence and pressing an alibi difficult to fathom." (*Id.* at p. 1507.) During closing argument, English again conceded that McCoy was the killer. (*Id.* at p. 1507.) He argued against a verdict of first-degree murder on the theory that McCoy lacked the intent required for that crime. (*Id.* at p. 1512 [Alito, J., dissenting].) McCoy was convicted of first-degree murder and ultimately sentenced to death. (*Id.* at p. 1507.)

The U.S. Supreme Court did not apply its ineffective assistance jurisprudence because the issue was "client autonomy" under the Sixth Amendment. (*Id.* at pp. 1510-1511.) Citing *Faretta*, the Court emphasized that the right to make a defense under the Sixth Amendment was "personal." That is why the Sixth Amendment speaks of the "assistance" of counsel. (*Id.* at pp. 1507-1508.) While most trial management decisions are ceded to defense counsel, the client retains exclusive control over certain fundamental decisions. (*Id.* at p. 1508.)

These fundamental decisions included McCoy's goal of maintaining complete innocence.

> "Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." (*Id.* at p. 1508.)

These objectives may not necessarily be sound or realistic, but that risk is as accepted in this context as it is when defendant represents himself under *Faretta*. (*Ibid.*)

The defendant's objectives also may not be strictly tethered to the goal of avoiding a conviction.

> "Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. (*Ibid.*)

Such decisions must be honored. "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." (*Id.* at p. 1509 [emphasis in original]." Defense counsel's failure to abide by the client's objectives was structural error. (*Id.* at p. 1511.)

In *People v. Eddy* (2019) 33 Cal. App. 5th 472, the defendant was charged with first-degree murder. (*Id.* at p. 475.) Defense

counsel urged the defendant's innocence during opening statement, focusing on the possibility that a third party present at the scene stabbed the victim. There was no defense case. In his closing argument, however, defense counsel conceded that Eddy was guilty of voluntary manslaughter, but he urged his innocence of first or second-degree murder. Eddy was convicted of first-degree murder with a knife use enhancement. (*Id.* at p. 477.)

The trial court learned of the disagreement during a *Marsden* hearing in connection with sentencing and a possible motion for new trial. (*Id.* at pp. 477-478.) Defense counsel said he knew of Eddy's wishes prior to closing argument, though he said Eddy had "waffled" a bit in insisting on a defense of complete innocence. (*Id.* at p. 478.) Eddy was adamant that he had told defense counsel not to argue for voluntary manslaughter. He also said that defense counsel refused to let him testify. (*Id.* at p. 478-479.) Defense counsel ultimately admitted he had argued against his client's wishes because he thought it was the sounder strategy. (*Id.* at p. 479.) The trial court denied the *Marsden* motion. (*Id.* at p. 478.)

The Court of Appeal reversed.

> "Here, defendant argues his counsel's concession during closing arguments that he committed manslaughter violated his Sixth Amendment right to maintain his absolute innocence. We agree that McCoy protects defendant's right to determine that the objective of his defense is innocence and conclude, on this record, that the rule announced in McCoy applies here." (*Id.* at p. 481.)

It did not matter that defense counsel acted reasonably. Authorities suggesting otherwise "miss the mark." As *McCoy* had held, the issue was the defendant's Sixth Amendment right to autonomy, not effective assistance. (*Id.* at p. 483.)

McCoy and *Eddy* were followed in *People v. Flores* (2019) 34 Cal. App. 5th 270, which involved two trials. In one case, Flores was charged with attempted murder with a vehicle. Defense counsel conceded over objection that Flores was driving but argued there was no premeditation. (*Id.* at p. 272.) In the other case, he was charged with manufacturing an assault weapon and being a felon in possession of an assault weapon. Defense counsel conceded, again over objection, that Flores possessed the weapon; he argued that knowledge was not proven. (*Id.* at pp. 272-273.) Flores's wishes were apparent by the time of a pre-trial *Marsden* hearing. (*Id.* at p. 275.) Flores was convicted of the greater charges in both cases. (*Id.* at p. 276.)

In reversing under *McCoy*, *Flores* cited *Eddy* and an Oregon case to hold that *McCoy* was not limited to capital cases. (*Id.* at pp. 282-283.) It was also not limited to the Sixth Amendment right to insist on a defense of innocence to *the charged crime*. A defendant may insist on a defense that he did not commit the *actus reus* of the charged crime. (*Id.* at pp. 273, 277, 279-281, 283.) This is so even if doing otherwise is a reasonable strategy. (*Id.* at pp. 279-281, 283.) *Flores* noted that in *McCoy*, defense counsel had conceded the *actus reus*, that McCoy had killed his family, but had argued that McCoy lacked the mental state required for conviction of first-degree murder. (*Id.* at

p. 273.) In holding this impermissible, *Flores* emphasized the rationale about a defendant not wanting to commit he had killed his family, or, it necessarily follows, having committed other serious criminal acts. (*Id.* at p. 282.)

2. Defense Counsel Violated Petitioner's Right of Client Autonomy When, Knowingly and Against Petitioner's Wishes, He Argued for a Manslaughter Conviction.

McCoy holds that a defendant has a Sixth Amendment right to insist on a defense of complete innocence. *Eddy* and *Flores* emphasized this right as well. While the facts of *McCoy* involved a concession of homicide, nothing in *McCoy's* discussion of client autonomy says that the right to dictate the ultimate goals of the representation is limited to precluding explicit concessions of guilt.

If a defendant wants to take an all-or-nothing approach to acquittal and prevent defense counsel from arguing for a conviction of mitigated homicide or some lesser offense, under *McCoy*, he has that right. This is so regardless of whether counsel intends to ground his argument in an explicit concession of the *actus reus* or dance around the issue like respondent argued Hanlon did. Indeed, allowing the defendant to set these boundaries avoids such artful dodging situations where any reasonable jury would inevitably understand that defense counsel believes his client committed the *actus reus*.

Nothing in *McCoy* is to the contrary. The Court of Appeal cited *McCoy's* statement that defense counsel "could not interfere with McCoy's telling the jury 'I was not the murderer,' although

counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction." (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at 1509.) This language does not justify Hanlon's disobedience of petitioner's wishes.

First, as noted above, *McCoy* held that what might be sound strategy is irrelevant to the issue of client autonomy. Second, the reference to the defendant's telling the jury "I was not the murderer" cannot merely refer, as Hanlon assumed, to the client taking the stand to tell his story. That right may have informed *McCoy*, but it long predated it and has nothing to do with the question presented there. (*Id.* at pp. 1513, 1516.)

Rather, "I was not the murderer" must refer to defense counsel arguing that to the jury on the client's behalf. The language that follows about arguing mental state can only be harmonized with the core holding of *McCoy* if, unlike what happened in *McCoy*, such argument does not undermine the defendant's claim of innocence of the *actus reus*. It is hard to imagine how that tightrope might successfully be walked in most cases. It certainly was not in petitioner's.

This is not a case where, consistent with *McCoy*, defense counsel could argue that *whoever* committed the crime was not guilty of the charged crime because of a missing element, *e.g.*, the absence of force or fear in a petty theft charged as a robbery. Such an argument would not concede the defendant's guilt of any *actus reus*. It would not link him to a crime against his will and to his potential embarrassment.

Petitioner's case is very different. There was no room for Hanlon to argue petitioner's innocence while also arguing that *whoever* committed this homicide lacked the required intent or only committed manslaughter. The only person whose intent we have circumstantial evidence of was petitioner. The only person who could have committed manslaughter "because of a sudden quarrel or in the heat of passion" and because he "acted rashly and under the influence of intense emotion that obscured his reasoning or judgment" was petitioner. (Exh. I, vol. 1, 124.) The only person about whom Hanlon could have argued, "What happened . . . that led to a man beating in the brains of a woman he loved?" was petitioner. (Exh. J, vol. 1, 183.) Petitioner was entitled to preclude this type of argument.

3. Defense Counsel Conceded that Petitioner Committed a Homicide.

Hanlon never said, "Ladies and gentlemen of the jury, I concede that Mr. Mitchell killed the victim." Given what he did say, he might as well have. Under *McCoy*, that should be enough.

Hanlon did not defend petitioner's credibility. Rather, he said petitioner's testimony about third parties presented a coincidence that the jury would have to grapple with. Beginning his argument about manslaughter, he told the jury that petitioner would object to his making it, remarks that told the jury he did not know about the argument and had not authorized it. He said the record supported the conclusion that petitioner was lying. (Exh. J, vol. 1, 180-182.)

Hanlon's professed disavowal of not believing his client actually told the jurors the exact opposite; it told them that they should not belabor petitioner's innocence defense but, rather, focus on manslaughter.[6] Nothing in *McCoy* suggests that defense counsel may pay lip service to the defendant's claims of absolute innocence and then negate them in front of the jury because doing so seems like the sounder strategy. Hanlon's argument was clearly impermissible.

Most damningly, Hanlon referred to himself as an officer of the court. He did this not once, but twice.

> "I want to talk to you about an issue that's very difficult, not because it's difficult to talk about, but because my job as an attorney is to be an advocate for my client. I'm also an officer of the court. And I see my job in closing argument as arguing what I believe the evidence suggests and have you think about it. . . .
>
> I don't—you know, I try never to do that, and that's why this is difficult, but it's something, as an officer of the court and an advocate for my client, I have to do, because there certainly is evidence on which you could conclude, depending on how you understand the inferences for circumstantial evidence, that Mr. Mitchell is not being totally honest with you about what happened." (Exh. J, vol. 1, 180-182.)

Even if the jury misunderstood Hanlon's ultimate point amidst his faux equivocal evasions, invoking his duties as an officer of the court would have told the jury he knew petitioner

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[6] Hanlon's argument involves two rhetorical devices. "Apophasis" is the practice of bringing up a subject or asserting a point by claiming not to mention it. "Paralipsis" is the device of emphasizing a point by claiming it deserves little emphasis.

had lied and that the jury should also so conclude. If a prosecutor had invoked his duties and ethics to bolster the credibility of a witness, any defendant would complain about prosecutorial vouching. (*People v. Fierro* (1991) 1 Cal.4th 173, 211; *People v. Alvarado* (2006) 141 Cal. App. 4th 1577, 1585.) Hanlon also improperly vouched—for his own client's guilt.

To Hanlon's point that conceding petitioner's guilt of homicide was something "I have to do" as an officer of the court, the response is, "No, you don't." Although a defendant's constitutional right to testify does not include the right to testify falsely and his Sixth Amendment right to counsel does not include having the knowing assistance of counsel in suborning his perjury, (*Nix v. Whiteside* (1986) 475 U.S. 157, 173-176,) nothing in the record shows that petitioner told Hanlon his intended testimony was false.

McCoy distinguished the Louisiana Supreme Court's reliance on *Whiteside* on that basis. "But McCoy's case does not resemble Nix, where the defendant told his lawyer that he intended to commit perjury. There was no such avowed perjury here." (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1510.) Had Hanlon so known, his duty would have been not to put petitioner on the stand or to withdraw. (*Ibid.*) Hanlon had no business putting him on the stand and then telling the jury that he lied. (*Ibid.*)

Hanlon's argument committed petitioner to having killed the mother of his child, an admission *McCoy* emphasized a defendant might not wish to make and which petitioner

adamantly and consistently opposed. Hanlon may not have conceded this expressly, but his meaning was crystal clear. This Court should grant review and so hold.

4. <u>The Authority Cited by the Court of Appeal is Neither Binding nor Persuasive</u>.

In denying relief, the Court of Appeal primarily cited sister state and federal circuit cases that are either not on point or that contradict *McCoy* and/or California's interpretation of *McCoy*. The case of *United States v. Rosemond* (2d Cir. 2020) 958 F.3d 111 held that *McCoy* was not violated when defense counsel conceded that the defendant paid to have the victim shot but disputed the element of intent to kill. (*Id.* at pp. 119, 123; Order at 1-2.) The case is distinguishable.

Rosemond read *McCoy* as limited to cases where counsel concedes every element of a charged crime. (*Id.* at p. 122.) This contradicts both *Flores*, which expressly held that concession of the *actus reus* of a charged crime violates *McCoy*, and *Eddy*, in which that holding is necessarily implied. It is also inconsistent with *McCoy* where, after conceding that defense counsel killed the victims, defense counsel argued for a verdict of mitigated homicide based on mental state.

The cited case of *Truelove v. State* (N.D. 2020) 945 N.W. 2d 272 is similarly distinguishable. (Order at 2.) It held that counsel's strategy that the defendant testify and admit striking the victim did not violate *McCoy* because it was "not necessarily" a complete concession of the charge of aggravated assault. (*Id.* at pp. 275-276.) Again, this contradicts *McCoy*, *Flores*, and *Eddy*.

Truelove is further distinguishable because the defendant there never opposed counsel's strategy or insisted on a defense of complete innocence. (*Id.* at p. 276.)

The Court of Appeal cited *Merck v. State* (Fla. 2020) 298 So.3d 1120 for the proposition that arguing alternative defenses of identity and voluntary intoxication does not violate *McCoy*. *Merck* is a barebones dismissal in which the supposed alternative argument of identity is not mentioned. The Court simply held that arguing voluntary intoxication is not a concession of guilt. (*Id.* at p. 1121.) The case lacks sufficient discussion to support the denial of relief here. However, if the voluntary intoxication argument was logically bound up with a concession over the defendant's objection that the defendant had committed the *actus reus* of the charged murder, it would violate *McCoy*.

The cited case of *People v. Maynard* (N.Y. App. Div. 2019) 176 A.D. 3d 512 actually supports petitioner's position. There, the two issues were who robbed the victim and whether the victim was robbed in a dwelling to make the case second-degree burglary, a more serious charge. (*Id.* at p. 513.) *Maynard* held that counsel's emphasis on the stronger argument of where the robbery occurred did not violate *McCoy*. (*Id.* at pp. 513-514.) This is the kind of case alluded to above where defense counsel may argue that *whoever* committed the crime was not guilty of the charged crime because of a missing element. That is not the case here because the only person who could have been guilty of voluntary manslaughter was petitioner.

The Court of Appeal cited one California case, *People v. Franks* (2019) 35 Cal. App. 5th 883 for a general statement of *McCoy*. (*Id.* at p. 891; Order at 1.) The facts of *Franks*, where the defendant was convicted of voluntary manslaughter, do not support the denial of relief. There, counsel admitted that the defendant had been with the victim prior to her body being discovered. He urged the jury to consider a verdict of involuntary manslaughter. (*Id.* at p. 888.) On appeal, the defendant argued that this "implicit concession" that he had caused the victim's death violated *McCoy*. (*Id.* at p. 889.) Relief was denied solely because the defendant had not made his wishes for a defense of absolute innocence known to counsel. (*Id.* at p. 891.)

Franks did not hold that concession of the *actus reus* of a charged crime does not violate *McCoy*. More importantly, it did not hold that an "implicit concession," *i.e.*, something other than "Ladies and Gentlemen of the Jury, the defendant is guilty of X," but amounting to the same thing, can never violate *McCoy*. This Court should decide that question in petitioner's favor.

5. <u>This is an Appropriate Case in Which to Reach These Issues</u>.

Although the issue arose in habeas, *McCoy* is retroactive to cases on collateral review. (*In re Smith* (2020) 49 Cal. App. 5th 377, 391-392.) The Court of Appeal imposed no procedural defaults in the alternative. This Court should reach the merits and either grant petitioner relief or hold that an Order to Show Cause should issue.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Dated: November 30, 2020

s/Steven S. Lubliner
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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 8.504(d)(1) of the California Rules of Court, I hereby certify that the foregoing petition is produced in a proportional font (Century Schoolbook) of 13-point type and utilizes 1.5 line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 8,094 words (exclusive of the table of contents, the table of authorities, the signature block, the proof of service and this certificate).

Dated: November 30, 2020

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Petitioner
James R.W. Mitchell

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re JAMES R. W. MITCHELL, on Habeas Corpus.	A160759 (Marin County Super. Ct. No. SC165475A)

BY THE COURT:

The petition for writ of habeas corpus is denied on the merits. Petitioner's Sixth Amendment rights were not violated because his counsel did not concede petitioner's guilt in closing argument. (*McCoy v. Louisiana* (2018) 584 U.S. ___, ___, 138 S.Ct. 1500, 1509 ["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."]; *id.* at p. 1509 ["[Defense counsel] could not interfere with McCoy's telling the jury 'I was not the murderer,' *although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction.*"], italics added; *People v. Franks* (2019) 35 Cal.App.5th 883, 891 ["*McCoy* makes clear, however, that for a Sixth Amendment violation to lie, a defendant must make his intention to maintain innocence clear to his counsel, and counsel must override that objective by conceding guilt."]; see *United States v. Rosemond* (2d Cir. 2020) 958 F.3d 111, 119, 123 [no violation of *McCoy* where counsel for defendant in murder-for-hire case admitted that defendant had paid for the victim to be *shot* but argued that the government failed to prove beyond a reasonable doubt that the defendant intended for the

victim to be *killed*]; *Merck v. State* (Fla. 2020) 298 So.3d 1120, 1121 [counsel for murder defendant did not violate *McCoy* by arguing the alternative defenses of reasonable doubt as to the identity of the perpetrator and voluntary intoxication]; *Truelove v. State* (N.D. 2020) 945 N.W.2d 272, 276 [counsel's admission that defendant charged with aggravated assault had struck the victim was not "not necessarily a definitive statement of guilt as was present in *McCoy*."]; see also *People v. Maynard* (N.Y. App. Div. 2019) 176 A.D.3d 512, 513–514, 112 N.Y.S.3d 706, 707 ["Rather—in light of testimony by the defendant that was decisively contradicted by the evidence and therefore transparently false—counsel made the permissible alternative argument [citation] that, if the jury determined that defendant was the perpetrator, it should still acquit him of the top count of burglary in the second degree."].)

Date: 11/18/2020 **Humes, P. J.** P.J.

Before: Humes, P.J., Margulies, J., and Banke, J. PRESIDING JUSTICE

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D)

I, Steven S. Lubliner, declare I electronically served from my electronic service address of sslubliner@comcast.net the following documents:

PETITION FOR REVIEW

on November 30, 2020 at 8:00 a.m. to the following persons and entities:

Office of the Attorney General
sfagdocketing@doj.ca.gov

Marin County District Attorney
DA_MagRoom@marincounty.org

First District Appellate Project
eservice@fdap.org

DECLARATION OF SERVICE

I, the undersigned, declare that I am over 18 years of age, an attorney and a member in good standing of the State Bar of California. I am not a party to the within cause. My business address is P.O. Box 750639, Petaluma, CA 94975. My e-mail address is sslubliner@comcast.net. I served a true copy of the above-mentioned documents on the following, by placing same in an envelope(s) addressed as follows

Marin County Superior Ct.
P.O. Box 4988
San Rafael, CA 94913-4988

James R.W. Mitchell, #AI4523
D17-121
R.J. Donovan Correctional Facility
480 Alta Road
San Diego, CA 92179

Each said envelope was then sealed and deposited in the United States mail at Petaluma, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on November 30, 2020 at Petaluma, California.

s/Steven S. Lubliner

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In Re James R.W. Mitchell JAMES R.W. MITCHELL, Petitioner, vs. RALPH M. DIAZ, Secretary, California Department of Corrections and Rehabilitation, an individual; and MARCUS POLLARD, Warden of Richard J. Donovan Correctional Facility, an individual, Respondents, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	Marin County Superior Court No. SC210551A (habeas case) First District Court of Appeal, Division One, No. A133094 (direct appeal) Marin County Superior Court No. SC165475A (case of conviction)

PETITION FOR WRIT OF HABEAS CORPUS

Following the Judgment of the Superior Court
of the State of California for the County of Marin

HONORABLE PAUL M. HAAKENSON, JUDGE

Steven S. Lubliner (State Bar No. 164143)
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

1. This petition seeks habeas relief based on *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, both on its face and as interpreted by *People v. Flores* (2019) 34 Cal. App. 5th 270 and *People v. Eddy* (2019) 33 Cal. App. 5th 472. Under this authority, defense counsel violates a defendant's Sixth Amendment right to dictate the ultimate goals of his defense when, over the defendant's known objections, he concedes to the jury that the defendant committed the charged crime or the *actus reus* of a charged crime or overrides the defendant's wishes for a defense of complete innocence. The error is structural. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1511.)

2. Here, defense counsel Hanlon and Rief knew throughout this first-degree murder case that Mitchell wanted a defense of complete innocence and did not want any defense based on mental state that necessarily involved conceding that he had committed a homicide. They promised Mitchell that his defense would be so limited. Like the defendant in *McCoy*, Mitchell testified in support of his defense of complete innocence, implicating third parties.

3. Hanlon first argued for an acquittal. Then, without having told Mitchell he would do so, he argued at length for a guilty verdict on a lesser homicide, primarily manslaughter. He prefaced this by telling the jury that his job was to advocate for his client even if, impliedly, he disagreed with him. He said that Mitchell would not agree with the argument he was about to make, thus telling the jury Mitchell did not know about it. He

then said the record contained evidence that would allow the jury to conclude that Mitchell was lying. He said his duties as an officer of the court compelled this admission. Mitchell was convicted of first-degree murder and related crimes.

II. ALLEGATIONS OF CONFINEMENT

4. Petitioner/appellant James R.W. Mitchell ("Mitchell") is confined in a California state prison serving a sentence of 35 years to life that was imposed on August 16, 2011 by the Honorable Kelly V. Simmons following Mitchell's conviction in Marin County Superior Court case SC165475A of first-degree murder, kidnapping, corporal injury on a cohabitant, child abduction, child endangerment, and stalking with weapons use enhancements. The murder victim was Mitchell's estranged girlfriend, who was the mother of his daughter.

5. Petitioner's address is James R.W. Mitchell, AI4523, R.J. Donovan Correctional Facility, 480 Alta Road, San Diego, CA 92179. Petitioner is unlawfully confined and restrained of his liberty by Ralph M. Diaz, Secretary, California Department of Corrections and Rehabilitation, and Marcus Pollard, Warden of R.J. Donovan Correctional Facility.

6. According to Mitchell's record on the inmate locator page of the California Department of Corrections and Rehabilitations web site, Mitchell will be eligible for parole in March 2038.

III. PROCEDURAL HISTORY

A. Statement of Facts from Trial[1]

7. The murder victim was Mitchell's girlfriend, D.K. The kidnapping victim was Mitchell's daughter with her. Mitchell began his relationship with D.K. in August 2007. They moved in together two weeks later.

8. During the relationship, Mitchell used drugs and committed acts of domestic violence against D.K. Mitchell was arrested several times, charges were filed, and restraining orders were imposed. The couple reunited from time to time, sometimes at D.K.'s initiation. Beginning in March 2009, Mitchell's threatening behavior and drug use increased. He would threaten D.K., and he once threatened an officer who spoke to him on the phone from her house. A restraining order against Mitchell was made permanent on July 7, 2009. Mitchell did not appear at that hearing, and he denied having received the order before the incident on July 12, 2009.

9. Phone records showed that Mitchell made many, many calls to D.K.'s phone in the weeks preceding her death. He also called her best friend and said that he knew he had messed up but would do anything to get back with D.K. and his daughter. Between June 26 and July 12, he called D.K. 78 times, but she never answered until July 12. Mitchell made no calls to her after 6:42 p.m. that day.

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[1] This Statement of Facts is derived from the state court of appeal's opinion. (Exh. M, vol. 2, 347-351.)

10. Shortly before 7:00 p.m. on July 12, 2009, D.K.'s elderly neighbors, Bessie and Nick, heard her scream. Nick went outside to check and saw a man repeatedly hitting D.K. on the head with a baseball bat. Nick went back in the apartment and told Bessie to call the police "because he's here." Bessie called 911 and told the dispatcher that the child's father was beating D.K.

11. Bessie then saw a white man run past the window with a screaming child. The man had a shaved head and wore a black t-shirt and jeans. Other neighbors also saw the man and gave descriptions consistent with Mitchell's—white, bald, heavy set. There were inconsistencies in the description of the clothing, with one neighbor saying the man wore a white t-shirt. The lineup process was inconclusive. Nick picked somebody else out of a lineup. One neighbor could not pick anyone out of a photo lineup with Mitchell's picture in it but did identify Mitchell with 95 percent certainty at a live lineup a week later. Everyone was consistent that only one person was involved in beating D.K. and carrying away the child.

12. D.K. was dead at the scene when police arrived. A baseball bat was found. The bat had Mitchell's left index fingerprint on it near the grip. Mitchell is left-handed.

13. Both Mitchell's cousin, John Morgan, and his brother, Justin Mitchell, got word that D.K. was dead. Both called Mitchell separately that evening. Morgan said that Mitchell was crying, and Justin said he was teary and distraught. They could hear the child in the background. Morgan asked Mitchell if he knew D.K. was dead. Mitchell said he did. He never denied

killing her. He neither admitted nor denied the killing to Justin. Morgan told Mitchell to take the child somewhere safe. Mitchell told both men that he would take the child to Mexico rather than surrender her. Alternatively, Mitchell told Justin that he might take her to his mother's house. Neither man knew Mitchell to possess a bat or to play baseball or softball.

14. By tracking Mitchell's cell phone, it was determined that he was heading east on Interstate 80. His car was found parked in Citrus Heights. When officers approached, they found the minor, alone and unharmed, sleeping in the front seat. A red substance on her cheek was later tested and determined to be D.K.'s blood.

15. Mitchell's passport was in the center console of the car. He was found walking around several blocks away and arrested without incident. He was wearing a red and navy-blue striped shirt and jeans.

16. Mitchell's jeans had blood spatter on the front. The blood was determined to be D.K.'s blood. Testimony suggested the spatter pattern was consistent with beating D.K. on the head from a few feet away while she was on the ground.

17. The bat was tested for trace DNA, i.e., DNA from a source other than blood. D.K. was the primary contributor. There were two other low-level contributors. Neither Mitchell nor the child could be excluded as sources.

18. Mitchell testified in his own defense, raising a defense of mistaken identity. He testified that on July 12, 2009, D.K. invited him over. He left his home in Pittsburg around 5:00

p.m. and drove over. He was wearing a red and blue striped polo shirt and jeans. He parked his car and walked towards D.K.'s duplex.

19. Passing through the gate, Mitchell heard D.K. scream for help. He encountered two men, one with a buzzed head wearing a white shirt, and the other in a black t-shirt. Mitchell fought with both men. The man in the black shirt hit him in the back with a baseball bat. Mitchell tried to take it away. After more fighting, Mitchell chased the men. The man in the black t-shirt disappeared. The man in the white shirt had the child. Mitchell confronted him, punched and kicked him, and demanded the child. The man let him take her and ran away.

20. Mitchell went back up towards the duplex with the child. He heard someone say to call 911. Remembering he had a restraining order, he decided to leave before the police arrived.

21. Driving north on Highway 101, Mitchell called his cousins. He planned to go to a cousin's house to wait to hear from D.K. He did not want to call her while the police were there. Mitchell's mother called him and told him that D.K. was dead and that it was being said that he killed her. Mitchell said he needed to talk to his lawyer. By chance, he ran into his attorney, Terence Hallinan, at a gas station.

22. Mitchell testified that he did not see anyone hit D.K. with a bat. He had not known she was dead when he left with the child. He could not explain how blood spatter got on his jeans. A urine test done after he was arrested showed he had no alcohol in

his system and a small amount of methamphetamine, indicative of use within the past five to seven days.

23. A softball coach testified that the bat might be used by a high school player or small man or woman. D.K.'s mother said she had never seen the bat near her home. Her other children had played baseball and softball; their bats had all been given away. The county coroner testified that D.K.'s mother had told him that the bat may have been in the laundry room of the complex before the murder.

B. <u>Trial Level Proceedings</u>

24. Petitioner was represented by private counsel at trial. Petitioner's counsel were Stuart Hanlon and Sara Rief. Their address is Law Offices of Hanlon & Rief, 1663 Mission Street, suite 200, San Francisco, CA 94103.

25. In Marin County Superior Court case number SC165475A, Mitchell pled not guilty. He was convicted by a jury of first-degree murder, kidnapping of a child, stalking, and related charges, with weapons use enhancements. He was acquitted of the alleged special circumstance that the murder was committed for purposes of kidnapping.

26. On August 16, 2011, Mitchell was sentenced to 35 years to life in state prison. The sentence consisted of 25 to life on the murder count, plus one consecutive year for the deadly weapon enhancement, plus the upper term of eight consecutive years for kidnapping, and one consecutive year for stalking. Punishment on other counts was imposed but stayed pursuant to California Penal Code section 654. (Exh. M, vol. 2, 347.)

C. State Appellate Proceedings

27. Mitchell timely appealed from the judgment and sentence. The appeal was adjudicated in the First District Court of Appeal, case number A133094. Through the First District Appellate Project, Mitchell was represented by court-appointed counsel, Peter Gold, 5758 Geary Blvd., suite 160, San Francisco, CA 94107.

28. Pertinent here, Mitchell raised several claims that revolved around his entitlement to dictate a defense of complete innocence. He argued that because Hanlon and Rief concealed their intention to argue for voluntary manslaughter, Mitchell lost the chance to replace them with counsel who would follow his instructions, effectively denying him counsel of his choice, a structural error. (Exh. L, vol. 2, 273-287.) He argued that the trial court violated his Sixth Amendment rights by, at points in the trial when Mitchell had doubts that Hanlon and Rief would follow his instructions, denying his requests to replace them with the Public Defender, denying his request for self-representation, and denying Hanlon and Rief's requests to withdraw, errors which are also structural. (Exh. L, vol. 2, 248-272.) He also argued that his Sixth Amendment right to counsel was violated when the trial court allowed Hanlon to refuse to participate at sentencing because he did not want to once again argue against Mitchell's wishes. (Exh. L, vol. 2, 292-306.)

29. Claims not relevant to this petition concern 1) the trial court's failure to order a competency investigation; 2) the trial court's failure to provide requested investigative funds; 3)

insufficient evidence to sustain the conviction for child endangerment; and 4) an unauthorized protective order. (Exh. M, vol. 2, 347.)

30. On July 28, 2014, the Court of Appeal filed an unpublished opinion. The Court held that the protective order issued in favor of Mitchell's daughter and the victim's mother was unauthorized. (Exh. M, vol. 2, 388-389.) It rejected all of Mitchell's other claims and affirmed the judgment. As the issue arose in Mitchell's various claims, the Court rejected the view that Mitchell was entitled to dictate a defense of complete innocence. The decision to concede guilt as appropriate was a strategic decision left to defense counsel, to be reviewed for ineffective assistance, which it was not. (Exh. M, vol. 2, 366-367, 369-370, 372, 376.)

31. Mitchell filed a petition for review in the California Supreme Court on August 27, 2014. The petition revisited the claims from the Court of Appeal. (Exh. N, vol. 2, 392-393.) The Court denied the petition on October 15, 2014 in case number S220833. (Exh. O, vol. 2, 441.)

D. State Court of Appeal Habeas Proceedings

32. On March 13, 2017, Mitchell filed a *pro se* habeas petition in the First District Court of Appeal. *In re James Mitchell*, A150765. The petition, which is unavailable to the undersigned, apparently challenged his sentence. According to the online docket, the Court denied the petition on March 22, 2017:

> "The petition for writ of habeas corpus is denied. Petitioner fails to meet his burden of demonstrating the timeliness of the petition. (*In re Robbins* (1998) 18 Cal.4th 770, 780.) In addition, the claim raised herein appears to be one that could have been raised on direct appeal, and it is therefore not cognizable on habeas. (*In re Dixon* (1953) 41 Cal.2d 756, 759.) Even if the petition is not procedurally barred, it fails to state a prima facie case for relief. Petitioner received an eight-year sentence on the kidnapping charge, which sentence was authorized by statute. (Pen. Code, § 208, subd. (a); see § 208, subd. (b) [enhanced penalties of subdivision (b) not applicable to taking of children by biological parents].)" (Exh. P, vol. 2, 442.)

Mitchell did not file a habeas petition or petition for review in the California Supreme Court from the above denial.

E. <u>Federal Habeas Proceedings</u>

33. On October 26, 2015, Mitchell filed a *pro se* petition for writ of habeas corpus in the Northern District of California. *Mitchell v. Davey*, 15-cv-04919-VC. Mitchell pled all the claims from his state appeal, including the claims concerning his attorneys' disregard of his wishes and the trial court's handling of issues concerning his representation. (Exh. Q, vol. 3, 444-450.) On November 2, 2015, the district court issued an Order to Show Cause to respondent. On February 19, 2016, respondent filed its answer, supporting memorandum, and exhibits. On May 5, 2016, Mitchell filed a traverse. (Exh. S, vol. 3, 462-463.)

34. On October 18, 2016, the district court denied the petition and ruled that Mitchell was not entitled to a certificate of appealability. It entered judgment for respondent that same day. (Exh. R, vol. 3, 451-460.)

35. On June 9, 2017, in case number 16-17057, a motions panel of the U.S. Court of Appeals for the Ninth Circuit granted a certificate of appealability on the issues of "whether the state trial court violated appellant's constitutional rights when it (1) denied his request for self-representation under *Faretta v. California*, 422 U.S. 806 (1975); and (2) denied his motion to dismiss retained counsel at sentencing, including whether counsel rendered ineffective assistance at sentencing." (Exh. T, vol. 3, 465-466.) The undersigned was appointed to represent Mitchell in the Ninth Circuit under the Criminal Justice Act.

36. On July 23, 2018, the undersigned filed Mitchell's 64-page opening brief in the Ninth Circuit. In addition to briefing the two certified issues, the undersigned briefed two uncertified issues, as the applicable rules of court permit. The uncertified issues briefed were "Mitchell's Sixth Amendment Right to Counsel Was Violated by Defense Counsel's Overriding of His Decision Not to Concede Guilt of Any Form of Homicide" and "The State Court of Appeal's Conclusion That Mitchell's Request for New Counsel a Month Before His *Faretta* Request Was Properly Denied Was Unreasonable Because it Unreasonably Discounts Mitchell's Purpose of Seeking Counsel Who Would Limit His Defense to Complete Innocence." (Exh. U, vol. 3, 469-470.)

37. A central theme of the brief was Mitchell's entitlement to insist on a defense of complete innocence. The brief argues, *inter alia*, that in rebuffing Mitchell's attempts to replace Hanlon and Rief, the trial court unreasonably failed to

consider this important interest. (Exh. U, vol. 3, 484-485, 504, 408-513, 525-526, 528-529.) The May 14, 2018 opinion in *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 and predecessor United States Supreme Court cases, discussed *infra*, figure in the argument as they do in the discussion of the uncertified claim that Mitchell's Sixth Amendment rights were violated by the concession that he committed manslaughter. (Exh. U, vol. 3, 509, 525-526.)

38. Respondent filed a 70-page answering brief in the Ninth Circuit on February 19, 2019. (Exh. V, vol. 3, 530-599.) As the rules permit, respondent did not address the two uncertified claims that were briefed. Addressing *McCoy*, respondent raised procedural arguments that the case could not be the basis of habeas relief because it post-dated Mitchell's state court appeal and that because it had not been presented to the state courts of appeal, any discussion of it was unexhausted. Respondent further argued that *McCoy* was distinguishable because Hanlon did not expressly concede guilt; he simply presented an alternative defense theory under which Mitchell could be convicted of manslaughter. (Exh. V, vol. 3, 579-584.)

39. The reply brief in the Ninth Circuit was not filed. On July 17, 2019, the Ninth Circuit granted Mitchell's motion to stay the Ninth Circuit appeal so that he could seek state habeas relief premised on *McCoy v. Louisiana*.

F. Habeas Proceedings in Superior Court Underlying this Petition.

On October 3, 2019, Mitchell, represented by the undersigned, filed a petition for writ of habeas corpus in Marin

County Superior Court. (Exh. W, vol. 4, 601-628.) It was accompanied by a memorandum of points and authorities (Exh. X, vol. 4, 629-655.) and supporting documents. The petition was assigned case number SC210551A. Mitchell sought relief based on *McCoy*. The Superior Court issued an Order to Show Cause on November 21, 2019. (Exh. Y, vol. 4, 657.) On May 20, 2020, after further briefing, the Superior Court denied the petition. The Court ruled that *McCoy* was not retroactive and that even if it was, Mitchell was not entitled to relief on the merits. The court found no procedural bars. (Exh. Y, vol. 4, 656-691).

G. <u>Allegations of Timeliness</u>.

40. This petition is being filed within a reasonable time, three months after the denial in the Superior Court. (See *Robinson v. Lewis* (2020) 9 Cal. 5th 883, 901-902 [holding that California will never consider a habeas petition filed 120 days or less after the denial by a lower court to be substantially delayed].)

41. To the extent further allegations that this petition is timely are required, the following is alleged. At the time the petition was denied, the undersigned was occupied with preparing the opening brief in *United States v. Young*, et al., 9th Cir. No. 18-10228, a large-record, multi-defendant RICO homicide case. The undersigned submitted a 132-page, 27,000-word opening brief on June 26, 2020. The Ninth Circuit ordered the undersigned to cut the brief to 24,000 words. The edited brief was filed on July 10, 2020. The undersigned had to prepare and file his taxes by the extended deadline of July 15, 2020 and had

other time-sensitive obligations in state courts of appeal. (See Declaration of Steven S. Lubliner.)

42. The petition in the superior court was timely. The United States Supreme Court decided *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 on May 14, 2018. The undersigned became aware of *McCoy* at some point thereafter while preparing the substantial opening brief that was filed in the Ninth Circuit on July 23, 2018. He argued that *McCoy* was the latest in a line of U.S. Supreme Court cases recognizing a client's right to insist on a defense of complete innocence and that the state courts acted unreasonably in failing to factor this concern in analyzing the trial court's denial of Mitchell's motion for, variously, self-representation and new counsel. He also cited *McCoy* in briefing the uncertified issue that counsel violated *McCoy*'s Sixth Amendment rights by conceding his commission of a homicide in arguing for a conviction of voluntary manslaughter. As noted above, respondent filed the respondent's brief on February 19, 2019, dismissing *McCoy's* relevance and raising procedural objections.

43. The undersigned believed that Mitchell's claims for federal habeas relief and a new trial are strong. The decision of whether to stay the course in the Ninth Circuit or return to state court to seek relief and face both arguments on the merits and possible procedural objections was not easy. It could only be made over time in conjunction with counsel's other professional and personal obligations permitted. (See *In re Soderstein* (2007) 146 Cal. App. 4th 1163, 1221-1222 [counsel have professional

obligations to other clients].) In addition to his professional obligations, the undersigned had devoted substantial time last year to dealing with recurring personal and family illness as well as the ongoing need to advocate for his elderly mother. (See Declaration of Steven S. Lubliner.) In light of all of the above, the petition in the superior court was filed within a reasonable time.

44. As set out in the Lubliner declaration, a number of favorable developments in California state courts shaped the decision to return to state court. In his memorandum of points and authorities below, as here, Mitchell relied on *People v. Amezcua and Flores* (2019) 6 Cal. 5th 886, *People v. Eddy* (2019) 33 Cal. App. 5th 472, and *People v. Flores* (2019) 34 Cal. 5th 270. *Amezcua and Flores* was decided on February 28, 2019, *Eddy* was decided on March 26, 2019, and *Flores* was decided on April 12, 2019. Of these, *Eddy* is arguably the most important decision. On July 17, 2019, in case S255600, the California Supreme Court denied respondent's petition for review and accompanying request that the Court of Appeal's opinion in *Eddy* be depublished.[2] The petition was filed in superior court within a reasonable time of these state court developments.

H. <u>Other Procedural Requisites</u>

45. Apart from the habeas appeal pending in the Ninth Circuit, which has been stayed pending the outcome of these proceedings, Mitchell has no other actions, motions, appeals, applications, or petitions pending in any other court regarding the judgment under attack.

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[2] Respondent did not file a petition for review in *Flores*.

46. The claim for relief premised squarely on *McCoy v. Louisiana* (2018) 138 S.C. 1500 is raised in this petition for the first time. Because *McCoy* was decided while Mitchell's federal habeas petition was pending in the Ninth Circuit, this claim could not have been raised on direct appeal or in any other state proceeding.

47. To the extent it may be thought otherwise, the failure to pursue such a claim was the product of ineffective assistance of trial or appellate counsel and/or Mitchell's lack of access to competent counsel to advise regarding postconviction habeas and discovery.

48. This petition is necessary because Mitchell has no other plain, speedy, or adequate remedy at law for the substantial violations of his federal constitutional rights as set out in *McCoy* and subsequent cases construing it.

49. Mitchell hereby incorporates by reference each and every paragraph of this petition into each and every claim presented in this petition as though fully set forth therein.

50. Each claim is based on a violation of Mitchell's rights under the United States Constitution. The arguments in the memorandum of points and authorities are incorporated herein.

51. Mitchell is currently represented in this matter by his Ninth Circuit appellate counsel, Steven S. Lubliner, Law Offices of Steven S. Lubliner, P.O. Box 750639, Petaluma, CA 94975, who was appointed pursuant to the Criminal Justice Act due to Mitchell's indigence. This petition contains a prayer requesting this court to appoint counsel.

CLAIM FOR RELIEF

Claim 1: Defense Counsel's Refusal to Respect Mitchell's Request that his Defense be Limited to Complete Innocence and his Concession During Closing Argument that Mitchell Committed a Homicide, Considered Separately or Together, Violated Mitchell's Right of Client Autonomy Under the Sixth Amendment to Dictate the Ultimate Objectives of His Defense. The Error is Structural.

52. Mitchell's conviction, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, analogous provisions of the California Constitution, and state statutory and decisional law because trial counsel Stuart Hanlon, without authorization and over Mitchell's repeated and longstanding objections, 1) refused to confine Mitchell's defense to the first-degree murder charge to one of complete innocence; 2) argued in the alternative for a conviction of lesser degrees of homicide, primarily voluntary manslaughter; and 3) conceded that Mitchell had committed a homicide, the *actus reus* of the first-degree murder charge.

53. Mitchell realleges the facts set out elsewhere in this petition and incorporates them by reference as though fully set forth herein.

54. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to the following:

55. On September 1, 2010, the trial court granted a motion to relieve Mitchell's counsel Douglas Horngrad. Attorneys Stuart Hanlon and Sara Rief were appointed. (Exh. A, vol. 1, 8-32.)

56. On January 20, 2011, the court held an *in camera*[3] hearing with Mitchell, Hanlon, and Rief. Hanlon represented that rather than proceed on a heat-of-passion manslaughter theory, they would present the defense Mitchell wanted, which was that he "did not commit this crime and that there were other people who did." Mitchell would so testify. (Exh. B, vol. 1, 34.) Hanlon said that to pursue this credibly would require DNA testing on the bat and Mitchell's clothes. (Exh. B, vol. 1, 34-37.)

57. On May 10, 2011, Mitchell asked the court to relieve Hanlon and Rief. He was considering suing them, so he did not believe they should be his lawyers. He had no money and wanted the Public Defender. He hoped to go to trial in three weeks to a month. He was not interested in delay. (Exh. C, vol. 1, 39-43.) At this point, some prospective jurors had been summoned, but juror hardships had not yet begun. (Exh. C, vol. 1, 39, 45.)

58. Mitchell was concerned that Hanlon was not being honest with him about the defense that he had been promised. Hanlon had made no public statements about it. The court opined

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[3] On December 10, 2012, in direct appeal case A133094, the Court of Appeal granted respondent's motion to unseal all *in camera* proceedings. In December 2017, during the pendency of Mitchell's Ninth Circuit habeas appeal, this Court granted Mitchell's motion, filed by the undersigned, to unseal the *in camera* documents for federal habeas purposes.

that one would expect defense counsel to remain publicly non-committal about the defense theory. (Exh. C, vol. 1, 40.)

59. Mitchell said Hanlon misled him by saying that things would be done for him and then not doing them. The court asked Mitchell what he had done to retain new counsel; Mitchell said he was indigent. (Exh. C, vol. 1, 41-42.) After balancing a number of factors, the court denied the motion. (Exh. C, vol. 1, 44-45.)

60. On May 25, 2011, the court held an *in camera* hearing on Hanlon's request for additional defense funds. Hanlon said that Mitchell would be testifying that he did not commit the crime. Whether Hanlon actually argued that would be up to him. (Exh. D, vol. 1, 47.)

61. Hanlon said there was substantial evidence that Mitchell suffered from psychiatric problems. When he was getting involved with the case, he was told that Mitchell had agreed to present a mitigating mental defense. That turned out not to be the case. "Mr. Mitchell has consistently told me he would not go forward with the [mental state] defense." (Exh. D, vol. 1, 47-48.)

62. Hanlon said that his duties to Mitchell extended beyond just deferring to the defense he wanted to present. He was uncertain if he could put on a defense that contradicted Mitchell's testimony. However, it was necessary to investigate. (Exh. D, vol. 1, 48-49.) He asked for $25,000 to $30,000. The court understood that Mitchell was insisting on a defense of complete innocence, with which Hanlon disagreed. (Exh. D, vol. 1, 50-51.)

It refused to approve so much money for "a conflicting defense that might not come into play in any event." (Exh. D, vol. 1, 52.)

63. On Friday, June 10, 2011, Mitchell asked that he be granted his *Faretta* rights to represent himself at trial. He did not trust or like Hanlon. Hanlon had lied to him, so he expected him to lie to the jury. (Exh. E, vol. 1, 58.) If he received the files that day or Saturday, he would be prepared to proceed the following Tuesday. He was already prepared to argue the motions that had been filed. (Exh. E, vol. 1, 59-60.)

64. When Mitchell appeared in court the following Monday and asked for a continuance, the trial court denied his *Faretta* request, deeming it untimely. (Exh. E, vol. 1, 79-82.)

65. Hanlon then moved to withdraw. (Exh. F, vol. 1, 83-84.) The court held an *in camera* hearing with Hanlon, Rief, and Mitchell. Hanlon said he had recently received two threatening letters from Mitchell. (Exh. F, vol. 1, 87-90.)

66. Mitchell acknowledged he was angry because he was fighting his lawyers, who insisted on a heat-of-passion defense. After Hanlon and Rief embraced his desired defense, relations improved. That did not stop him from writing rambling, spur-of-the-moment letters that he sometimes regretted. (Exh. F, vol. 1, 92-98.) Hanlon said nothing. (Exh. F, vol. 1, 98.)

67. The court ruled that relieving Hanlon "would cause a horrible injustice in the handling of the case" and "would require an undue delay." It denied the motion on that basis. (Exh. F, vol. 1, 98-99.) Hanlon then said that he would be announcing doubts about Mitchell's competency. (Exh. F, vol. 1, 100.)

68. Back in open court, Hanlon announced his doubts. (Exh. G, vol. 1, 101-103.) Doubting Hanlon's credibility, the court declined to suspend proceedings. (Exh. G, vol. 1, 102, 104, 108-109.)

69. In opening statement, Hanlon said Mitchell would testify that he was at the homicide scene. He did not say Mitchell would testify about the two other men. (Exh. H, vol. 1, 110-115.)

70. Hanlon asked for the manslaughter instructions at the instructions conference. (Exh. I, vol. 1, 116-122.) The trial court instructed on two theories of manslaughter as well as on second-degree murder. (Exh. I, vol. 1, 123-125.)

71. Hanlon's closing argument alluded generally to Mitchell's innocence. He discussed Mitchell's likely state of mind as he drove to see his daughter, the lack of proof that he brought the bat to the premises, the weakness of the eyewitness identification, and the inconclusiveness of the blood spatter evidence and the evidence that Mitchell touched the bat on the question of what Mitchell actually did. (Exh. J, vol. 1, 137-178.)

72. Hanlon argued that Mitchell's testimony about fighting the two men who really killed D.K. was consistent with the inconsistent eyewitness testimony about whether the killer wore a black or a white shirt. Hanlon did not otherwise advocate for the credibility of Mitchell's testimony. He said that the coincidence of Mitchell coming upon two other men doing violence to D.K. was one the jury would have to grapple with. (Exh. J, vol. 1, 178-180.)

73. Hanlon then argued for a verdict of guilty on a lesser homicide, primarily manslaughter. (Exh. J, vol. 1, 180-190.) He prefaced this by saying that his job was to advocate for his client even if, impliedly, he disagreed with him. He said that Mitchell would not agree with the argument he was about to make. (Exh. J, vol. 1, 180-181.) He said that the jury should not conclude that he did not believe his client. He believed, however, that the record contained evidence that Mitchell was lying. (Exh. J, vol. 1, 181-182.)

74. Hanlon twice told the jury that his duties as "an officer of the court" required him to argue against Mitchell's wishes and undermine Mitchell's case for innocence. (Exh. J, vol. 1, 180-182.)

75. The jury convicted Mitchell of first-degree murder, kidnapping, and related crimes, with weapons-use enhancements.

76. At sentencing on August 16, 2011, the court held an *in camera* hearing on a mutual request that Hanlon and Rief not represent Mitchell at sentencing or in connection with a possible motion for new trial. Mitchell was upset because Hanlon had argued in the alternative at trial for a heat-of-passion manslaughter verdict against his express instructions. (Exh. K, vol. 1, 194.) This strategy had been sprung on him at the last minute, leaving him no time to find new counsel. Mitchell thought Hanlon planned it that way. (Exh. K, vol. 1, 194-197.)

77. Although the issue at sentencing was concurrent vs. consecutive sentences, Hanlon doubted that he could perform

competently the way he believed Mitchell wanted. He believed that Mitchell still wanted him to argue that he did not commit the murder. Although guilt was settled given the verdict, Hanlon was still unwilling to argue against Mitchell's wishes. (Exh. K, vol. 1, 198-201.) "I made that decision once. I'm not going to do it again." (Exh. K, vol. 1, 200.) If forced to argue, he would simply submit the matter. (Exh. K, vol. 1, 200, 202.)

78. The court ordered Hanlon to explain why he argued for manslaughter. Hanlon said that he thought it was the only possible way to save Mitchell from life in prison. He had told Mitchell at some point that Mitchell had the right to testify however he wished, but the decision of what to argue was his. (Exh. K, vol. 1, 200-201.)[4]

> "Mr. Mitchell clearly expressed his desire that I not do it. I told him—I don't remember when that conversation first came up, whether it was before trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he was saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests." (Exh. K, vol. 1, 201.)

79. The foregoing establishes that at least as early as January 2011, and more likely soon after accepting their appointment in September 2010, Hanlon and Rief knew of

[4] The trial court declined to relieve Hanlon. At sentencing, Mitchell made a statement reasserting his innocence. Hanlon said nothing. Mitchell was sentenced.

Mitchell's demand that his defense be confined to complete innocence, a position from which Mitchell never wavered.

80. Despite their knowledge of Mitchell's ultimate defense objective of complete innocence, Hanlon and Rief went back on their initial agreement to adhere to this objective. Instead, as he believed himself entitled to do, Hanlon argued in the alternative and against Mitchell's wishes for a guilty verdict on a lesser homicide, primarily voluntary manslaughter. This violated Mitchell's client autonomy rights under the Sixth Amendment and related authority to dictate the ultimate objectives of his defense and not have defense counsel concede guilt over the defendant's objection.

81. The error pled in the preceding paragraph is a structural error requiring reversal without evaluation of the reasonableness of Hanlon's actions or a showing of prejudice.

82. Hanlon so argued after failing to advocate for the credibility of Mitchell's testimony about third-party culpability, emphasizing the coincidence at the heart of Mitchell's testimony, telling the jurors that Mitchell would not agree with the alternative argument—which told the jurors Mitchell did not know about it and had no say in it—and, finally, telling the jurors, with the candor required of him as an officer of the court, that while he did not want them to think he believed Mitchell was lying, the record supported them drawing that conclusion themselves.

83. Hanlon's thorough undermining of Mitchell's defense testimony in service of his unauthorized argument, including his

transparent preface to the argument that told the jury Mitchell had lied, negated the defense case of complete innocence and conceded Mitchell's guilt of homicide, the *actus reus* of the charge of first-degree murder. This also violated Mitchell's client autonomy rights under the Sixth Amendment and related authority to dictate the ultimate objectives of his defense and not have defense counsel concede guilt at trial over his objection.

84. The error pled in the preceding paragraph is a structural error requiring reversal without evaluation of the reasonableness of Hanlon's actions or a showing of prejudice.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the file in *People v. James R. W. Mitchell*, First District Court of Appeal No. A133094;

2. Order respondent to show cause why petitioner is not entitled to the relief sought;

3. Appoint counsel Steven S. Lubliner to represent petitioner in this matter, *nunc pro tunc* to July 23, 2020, the date preparation of this petition began;[5]

4. Grant petitioner funds to secure investigation and expert assistance as necessary;

5. Permit petitioner to amend his petition to allege any other basis for his unconstitutional confinement as it is discovered, further developed, or becomes ripe for habeas review;

[5] The undersigned is a panel attorney on the First District Appellate Project.

6. Grant petitioner the authority to obtain subpoenas for witness and documents;

7. Grant petitioner the right to conduct discovery;

8. Order an evidentiary hearing at which petitioner will offer further proof in support of the allegations herein;

9. After full consideration of the issues raised in this petition, vacate the judgment and sentence imposed upon petitioner in Marin County Superior Court Case No. SC165475A on the charges of first-degree murder, kidnapping, corporal injury on a cohabitant, and all weapons use enhancements; and

10. Grant petitioner such further relief as is appropriate and in the interest of justice.

Respectfully submitted,

Dated: August 21, 2020

s/Steven S. Lubliner
LAW OFFICES OF STEVEN S. LUBLINER
P.O. Box 750639
Petaluma, CA 94975
Phone: (707) 789-0516
e-mail: sslubliner@comcast.net
Counsel for Petitioner James R.W. Mitchell

VERIFICATION

I, Steven S. Lubliner, declare as follows:

1. I am an attorney admitted to practice law before all courts in the State of California. I represent petitioner herein, who is confined and restrained of his liberty in the California Department of Corrections facility at San Diego, California.

2. I am authorized to file this petition for writ of habeas corpus on petitioner's behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much or more than petitioner's.

3. I have read the petition and am personally familiar with the files and records of this case. I know the allegations in this petition to be true. The allegations contained in the petition are based on the record of trial court proceedings that are subject to judicial notice. They are also based on facts personally known to me. If called as a witness, I could and would testify thereto.

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

Executed in Petaluma, California on August 21, 2020.

s/Steven S. Lubliner

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D)

I, Steven S. Lubliner, declare I electronically served from my electronic service address of sslubliner@comcast.net the following documents:

PETITION FOR WRIT OF HABEAS CORPUS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JAMES R.W. MITCHELL'S PETITION FOR WRIT OF HABEAS CORPUS

DECLARATION OF STEVEN S. LUBLINER IN SUPPORT OF JAMES R.W. MITCHELL'S PETITION FOR WRIT OF HABEAS CORPUS

EXHIBITS IN SUPPORT OF JAMES R.W. MITCHELL'S PETITION FOR WRIT OF HABEAS CORPUS (4 VOLUMES)

on August 21, 2020 at 4:00 p.m. to the following persons and entities:

Office of the Attorney General
sfagdocketing@doj.ca.gov

DECLARATION OF SERVICE

I, the undersigned, declare that I am over 18 years of age, an attorney and a member in good standing of the State Bar of California. I am not a party to the within cause. My business address is P.O. Box 750639, Petaluma, CA 94975. My e-mail address is sslubliner@comcast.net. I served a true copy of the above-referenced documents on the following, by placing same in an envelope(s) addressed as follows:

James R.W. Mitchell, #AI4523
D17-121
R.J. Donovan Correctional Facility
480 Alta Road
San Diego, CA 92179

Each said envelope was then sealed and deposited in the United States mail at Petaluma, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on August 21, 2020 at Petaluma, California.

s/Steven S. Lubliner

IN THE COURT OF APPEAL OF THE S
FIRST APPELLATE DISTRICT
DIVISION ONE

In Re James R.W. Mitchell JAMES R.W. MITCHELL, Petitioner, vs. RALPH M. DIAZ, Secretary, California Department of Corrections and Rehabilitation, an individual; and MARCUS POLLARD, Warden of Richard J. Donovan Correctional Facility, an individual, Respondents, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	Marin County Superior Court No. SC210551A (habeas case) First District Court of Appeal, Division One, No. A133094 (direct appeal) Marin County Superior Court No. SC165475A (case of conviction)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Following the Judgment of the Superior Court
of the State of California for the County of Marin

HONORABLE PAUL M. HAAKENSON, JUDGE

Steven S. Lubliner (State Bar No. 164143)
LAW OFFICES OF STEVEN S. LUBLINER
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TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

This petition seeks habeas relief based on the United States Supreme Court case *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, both on its face and as interpreted by *People v. Flores* (2019) 34 Cal. App. 5th 270 and *People v. Eddy* (2019) 33 Cal. App. 5th 472. *McCoy* applies retroactively on collateral review to cases that are otherwise final. (*In re Smith* (2020) 49 Cal. App. 5th 377, 391-392.)

Under *McCoy*, defense counsel violates a defendant's Sixth Amendment right to dictate the ultimate goals of his defense when, over the defendant's known objections, he concedes to the jury that the defendant committed the charged crime or the *actus reus* of a charged crime or overrides the defendant's wishes for a defense of complete innocence. The error is structural. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1511; *People v. Flores*, *supra*, 34 Cal. App. 5th at p. 283; *People v. Eddy*, *supra*, 33 Cal. App. 5th at p. 483.)

Here, defense counsel Stuart Hanlon and Sarah Rief knew throughout their representation of Mitchell in this first-degree murder case that he wanted a defense of complete innocence and did not want any defense based on mental state that involved conceding that he had committed a homicide. They promised Mitchell that his defense would be so limited. Respondent disputed none of these facts, and the Superior Court did not find to the contrary.

Like the defendant in *McCoy*, Mitchell testified in support of his defense of complete innocence. Hanlon first argued for an

acquittal. Then, without having told Mitchell he would do so, he argued at length for a guilty verdict on a lesser degree of homicide, primarily voluntary manslaughter.

Transitioning into this alternative argument, Hanlon told the jury that his job was to advocate for his client even if he disagreed with him. He said Mitchell would not agree with his alternative argument, which told the jury Mitchell did not know about it and had not authorized it. He said the evidence would allow the jury to conclude that Mitchell was lying. He told the jury his duty as an officer of the court compelled him to admit this. Mitchell was convicted of first-degree murder. That conviction and the related convictions and findings must be reversed.

ARGUMENT

I. Mitchell's Sixth Amendment Right of Client Autonomy, Which Allowed him to Insist on a Defense of Complete Innocence and not Have Defense Counsel Concede his Commission of the *Actus Reus* of the Charged Crime, was Violated When Defense Counsel, Knowing of Mitchell's Wishes and Knowingly Over his Objection, Argued in the Alternative that Mitchell Was Guilty of Lesser Homicides, Primarily Voluntary Manslaughter.

A. Standard of Review

Facts entitling a petitioner to relief must be proven by a preponderance of the evidence. (*In re Large* (2007) 41 Cal. 4th 538, 549.) A habeas petition filed in a court of appeal after denial in the superior court invokes the court of appeal's original jurisdiction. This Court does not review the superior court's decision but independently reviews the record to make its own

findings and legal conclusions. (*Robinson v. Lewis* (2020) 9 Cal. 5th 883, 895-896; *In re Resendiz* (2001) 25 Cal. 4th 230, 249, *abrogated in part on other grounds*, *Padilla v. Kentucky* (2010) 559 U.S. 356, 370.)

Factual findings made after an evidentiary hearing are not binding but may be given great weight. (*Robinson v. Lewis*, *supra*, 9 Cal. 5th at p. 896; *In re Resendiz*, *supra*, 25 Cal. 4th at p. 249.) Where the superior court's findings are not grounded in credibility determinations made after an evidentiary hearing, such deference is inappropriate. (*In re Resendiz*, *supra*, 25 Cal. 4th at 249; *In re Arias* (1986) 42 Cal. 3d 667, 695.) Here, no evidentiary hearing was necessary. The superior court denied the petition based on its interpretation of the trial court record. This Court owes no deference to that decision.

Whether a judicial opinion should be given retroactive effect is reviewed *de novo*. (*In re Moore* (2007) 133 Cal. App. 4th 68, 74.)

B. <u>The Merits</u>

The holding of *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 is simple. A criminal defendant has a Sixth Amendment right to dictate the ultimate goals of his defense. When defense counsel overrides the defendant's known wishes by, for example, conceding commission of a homicide when the defendant wants a defense of complete innocence, the defendant's Sixth Amendment rights have been violated. (*Id.* at pp. 1508-1509.) The error is structural, requiring reversal without a showing of prejudice. (*Id.* at p. 1511.) The

underpinnings of *McCoy* are set out below. *McCoy* will then be discussed at greater length along with California cases that have granted relief under *McCoy* in cases similar, if not identical, to Mitchell's.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." A defendant also has a Sixth Amendment right to forgo the assistance of counsel and represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 807.) This is because "[t]he right to defend is personal." (*Id.* at p. 834.) "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." (*Id.* at p. 819.)

A defendant who appears with counsel cedes most trial management decisions to the attorney. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1508.) "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,[1] and forego an appeal. See *Jones v. Barnes* (1983) 463 U.S. 745, 751.)" (*Ibid*.) In *Brookhart v. Janis* (1966) 384 U.S. 1, the Supreme Court held that defense counsel may not force the defendant, against his wishes, to plead guilty or submit the case on the state's *prima facie* case without contest. The court reversed without a discussion of prejudice. (*Id.* at pp. 7-8.)

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[1] See *Harris v. New York* (1971) 401 U.S. 222, 225.

The defendant's known wishes and ultimate goals are critical. In *Florida v. Nixon* (2004) 543 U.S. 175, a capital case, defense counsel believed that it would be beneficial to concede guilt in hopes of avoiding a death sentence at the penalty phase. Defense counsel explained this strategy to the defendant who was unresponsive during the discussions. He neither consented to the strategy nor affirmatively opposed it. (*Id.* at p. 181.) Defense counsel conceded Nixon's guilt in both opening statement and closing argument, urging the jury to focus on the penalty phase. (*Id.* at pp. 182-183.) Nixon was convicted and then sentenced to death. (*Id.* at p. 184.)

On appeal, the issue was whether defense counsel's concessions amounted to a failure to subject the prosecution's case to meaningful adversarial testing under *United States v. Cronic* (1984) 466 U.S. 648, meaning that prejudice was presumed, or whether they should be analyzed under *Strickland v. Washington* (1984) 466 U.S. 668, which would require a finding of deficient performance and prejudice before relief could be granted. (*Florida v. Nixon*, *supra*, 543 U.S. at p. 185.) The Florida Supreme Court held that while defense counsel may have acted reasonably, he overstepped because he never obtained Nixon's explicit consent to his strategy. Therefore, Nixon was entitled to a new trial. (*Id.* at pp. 186-187.) The U.S. Supreme Court reversed that decision. (*Id.* at p. 187.)

In so doing, the Court maintained the distinction between decisions that the Sixth Amendment leaves to counsel after consultation and decisions that are the client's alone.

> "But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." (*Id.* at p. 187.)

In the face of the defendant's stubborn silence, defense counsel was not ineffective for conceding guilt at the guilt phase in hopes of demonstrating a sympathetic case for the penalty phase. (*Id.* at p. 189.)

> "To summarize, in a capital case, counsel must consider in conjunction both the guilt and penalty-phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." (*Id.* at p. 192.)

This implies that a contrary conclusion would have been reached if Nixon had explicitly opposed counsel's strategy. Indeed, *Nixon* has been distinguished on that basis.

> "This case is not like *Nixon*, where the defendant did not respond to counsel's proposed strategy, and

> neither consented nor objected when his counsel pursued that strategy at trial. In stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty. The Court's holding in *Nixon* that counsel was not required to acquire the defendant's 'affirmative, explicit acceptance' to a tactical decision to concede guilt, was expressly qualified as applying only to the factual scenario in which the defendant is unresponsive to counsel's proposed strategy. However, where, as here, the defendant *adamantly objects* to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury. The right to make these decisions is nullified if counsel can override them against the defendant's wishes. In this case, the trial court's failure to address the breakdown in the attorney-client relationship allowed defense counsel to proceed with a trial objective that Cooke expressly opposed. This deprived Cooke of his Sixth Amendment right to make fundamental decisions concerning his case." (*Cooke v. State* (Del. 2009) 977 A.2d 880 847 [emphasis in original, footnotes omitted].)

McCoy cited *Cooke* as persuasive authority. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at pp. 1509, 1510, 1511.)

The question under review in *McCoy* was "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." (*Id.* at p. 1507.) In *McCoy*, the defendant was charged with capital murder for killing three family members of his estranged wife.

(*Id.* at pp. 1505-1506.) McCoy was adamant about his innocence. "Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong." (*Id.* at p. 1506.)

Two weeks before trial, McCoy's retained counsel, English, told him that he intended to concede guilt. McCoy was furious and told him not to do so. He demanded a defense of innocence. It was undisputed that defense counsel was aware of McCoy's wishes. Both McCoy and English sought to sever the relationship. The trial court refused to relieve English, telling him that he was the attorney and the choice of defense, if any, was his. (*Ibid.*)

During opening statement, English conceded that it was indisputable that McCoy had caused the victims' deaths. This prompted an outburst from McCoy about being sold out for having "murdered his family." (*Id.* at p. 1506-1507.) McCoy ultimately testified in his own defense, "maintaining his innocence and pressing an alibi difficult to fathom." (*Id.* at p. 1507.) During closing argument, English again conceded that McCoy was the killer. (*Id.* at p. 1507.) He argued against a verdict of first-degree murder on the theory that McCoy lacked the intent required for that crime. (*Id.* at p. 1512 [Alito, J., dissenting].) McCoy was convicted of first-degree murder and ultimately sentenced to death. (*Id.* at p. 1507.)

The U.S. Supreme Court did not apply its ineffective assistance jurisprudence under either *Strickland* or *Cronic* because the issue was "client autonomy" under the Sixth Amendment. (*Id.* at pp. 1510-1511.) Citing *Faretta*, the Court

emphasized that the right to make a defense under the Sixth Amendment was "personal." That is why the Sixth Amendment speaks of the "assistance" of counsel. (*Id.* at pp. 1507-1508.) While most trial management decisions are ceded to defense counsel, the client retains exclusive control over certain fundamental decisions. (*Id.* at p. 1508.)

These fundamental decisions included McCoy's defense objective of maintaining complete innocence.

> "Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." (*Id.* at p. 1508.)

These objectives may not necessarily be sound or realistic, but that risk is as accepted in this context as it is when defendant represents himself under *Faretta*. (*Ibid.*)

The defendant's objectives also may not be strictly tethered to the goal of avoiding a conviction.

> "Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. (*Ibid.*)

Such decisions must be honored. "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." (*Id.* at p. 1509 [emphasis in original]." Citing *Cooke*, *McCoy* held that *Nixon* did not dictate a contrary conclusion because McCoy's express and adamant objections clearly communicated his defense objectives. (*Id.* at p. 1509.) Defense counsel's failure to abide by the client's defense objectives was structural error, requiring reversal without a showing of prejudice. (*Id.* at p. 1511.)

Two California cases have applied *McCoy* in a manner that should govern this case. In *People v. Eddy* (2019) 33 Cal. App. 5th 472, the defendant was charged with first-degree murder. (*Id.* at p. 475.) Defense counsel urged the defendant's innocence during opening statement, focusing on the possibility that a third party present at the scene stabbed the victim. There was no defense case. In his closing argument, however, defense counsel conceded that Eddy was guilty of voluntary manslaughter, but he urged his innocence of first or second-degree murder. Eddy was convicted of first-degree murder with a knife use enhancement. (*Id.* at p. 477.)

The trial court learned of the disagreement during a *Marsden* hearing in connection with sentencing and whether or not a motion for new trial should be filed by new counsel. (*Id.* at pp. 477-478.) At the hearing, defense counsel said he knew of Eddy's wishes prior to closing argument, though he said Eddy had "waffled" a bit in insisting on a defense of complete innocence. (*Id.* at p. 478.) Eddy was adamant that he had told

defense counsel not to argue for voluntary manslaughter. He also said that defense counsel refused to let him testify. (*Id.* at p. 478-479.) Defense counsel ultimately admitted he had argued against his client's wishes because he thought it was the sounder strategy. (*Id.* at p. 479.) The trial court denied the *Marsden* motion. (*Id.* at p. 478.)

The Court of Appeal reversed Eddy's conviction.

> "Here, defendant argues his counsel's concession during closing arguments that he committed manslaughter violated his Sixth Amendment right to maintain his absolute innocence. We agree that McCoy protects defendant's right to determine that the objective of his defense is innocence and conclude, on this record, that the rule announced in McCoy applies here." (*Id.* at p. 481.)

The fact that the defendant had initially waffled a bit was irrelevant because defense counsel had been instructed not to argue manslaughter and had not followed the instruction. It did not matter that Eddy had not brought the issue to the trial court's attention before he was convicted. (*Id.* at pp. 481-482.) While the trial court's acquiescence had been part of the procedural history in *McCoy*, it was not necessary to establish a Sixth Amendment violation. (*Id.* at p. 480, fn. 6.) It also was unnecessary for Eddy to testify to preserve the claim. (*Id.* at p. 483.) It also did not matter that Eddy wanted to argue that a third party at the scene was guilty rather than present an alibi defense as McCoy had done; both defenses are consistent with factual innocence. (*Id.* at p. 483.)

It did not matter that defense counsel acted reasonably. Authorities suggesting otherwise "miss the mark." As *McCoy* had held, the issue was the defendant's Sixth Amendment right to autonomy, not effective assistance. (*Id.* at p. 483.)

McCoy and *Eddy* were followed in *People v. Flores* (2019) 34 Cal. App. 5th 270, which involved two trials. In one case, Flores was charged with attempted murder with a vehicle. Defense counsel conceded over objection that Flores was driving but argued there was no premeditation. (*Id.* at p. 272.) In the other case, he was charged with manufacturing an assault weapon and being a felon in possession of an assault weapon. Defense counsel conceded, again over Flores's objection, that Flores possessed the weapon; he argued that knowledge was not proven. (*Id.* at pp. 272-273.) Flores's wishes were apparent by the time of a pre-trial *Marsden* hearing. (*Id.* at p. 275.) Flores was convicted of the greater charges in both cases. (*Id.* at p. 276.)

In reversing on *McCoy* grounds for structural error, (*id.* at p. 283,) *Flores* cited *Eddy* and an Oregon case to hold that *McCoy* was not limited to capital cases. (*Id.* at pp. 282-283.) It was also not limited to the Sixth Amendment right to insist on a defense of innocence to *the charged crime*. A defendant may insist on a defense that he did not commit the *actus reus* of the charged crime. (*Id.* at pp. 273, 277, 279-281, 283.) This is the rule even if doing so is a reasonable path to acquittal of the charged crime or conviction of a lesser offense. (*Id.* at pp. 279-281, 283.) *Flores* noted that in *McCoy*, defense counsel had conceded the *actus reus*, that McCoy had killed his family, but had argued that

McCoy lacked the mental state required for conviction of first-degree murder. (*Id.* at p. 273.) In holding this impermissible, *Flores* emphasized the rationale about a defendant not wanting to commit he had killed his family, or, it necessarily follows, having committed other serious criminal acts. (*Id.* at p. 282.)[2]

McCoy, *Eddy*, and *Flores* establish Mitchell's right to relief. *McCoy* holds that a defendant has a Sixth Amendment right to insist on a defense of complete innocence. *Eddy* and *Flores* confirm this reading and that *McCoy* is not limited to capital cases. *Eddy* holds that a defendant convicted of first-degree murder is entitled to a new trial when defense counsel, as Hanlon did, argues for voluntary manslaughter or other lesser degrees of homicide against the client's wishes. The fact that this problem may not have been clear to the trial court until after the defendant has been convicted does not defeat relief. *Flores* clarifies that this right extends to precluding admissions of the *actus reus* of the charged crime in service of an acquittal or

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[2] Both the U.S. Supreme Court and California Supreme Court have read *McCoy* expansively, declining to limit the case and its rationale to concessions at the guilt phase of capital trials. In *Garza v. Idaho* (2019) 139 S.Ct. 738, the U.S. Supreme Court cited *McCoy* to hold that defense counsel must file a notice of appeal at the defendant's request even in the face of a plea agreement providing for an appeal waiver. (*Id.* at p. 746.) The failure to do so is presumptively prejudicial. (*Id.* at pp. 749-750.) The California Supreme Court cited *McCoy* to reaffirm that a capital defendant's decision not to put on a penalty phase case in mitigation with family members as witnesses must be honored by counsel and that counsel's obedience is not ineffective assistance. (*People v. Amezcua and Flores* (2019) 6 Cal. 5th 886, 925-926.)

conviction of a lesser offense. This, too, precluded Hanlon from arguing for a verdict of guilty on a lesser degree of homicide such as voluntary manslaughter.

In addition to disobeying Mitchell's instructions, Hanlon conceded Mitchell committed a homicide. He did not defend Mitchell's credibility. Rather, he said Mitchell's testimony about third parties presented a coincidence that the jury would have to grapple with. Beginning his argument about manslaughter, he told the jury that Mitchell would object to his making it, remarks that told the jury Mitchell did not know about the argument and had not authorized it. He said the record supported the conclusion that Mitchell was lying. (Exh. J, vol. 1, 180-182.)

Hanlon's professed disavowal of not believing his client actually told the jurors the exact opposite; it told them that they should not belabor Mitchell's innocence defense but, rather, focus on manslaughter.[3] Nothing in *McCoy* suggests that defense counsel may pay lip service to the defendant's claims of absolute innocence and then undermine them in front of the jury because doing so seems like the sounder strategy. Hanlon's argument was clearly impermissible.

Most damningly, Hanlon referred to himself as an officer of the court. He did this not once, but twice.

> "I want to talk to you about an issue that's very difficult, not because it's difficult to talk about, but

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[3] Hanlon's argument involves two rhetorical devices. "Apophasis" is the practice of bringing up a subject or asserting a point by claiming not to mention it. "Paralipsis" is the device of emphasizing a point by claiming it deserves little emphasis.

> because my job as an attorney is to be an advocate for my client. I'm also an officer of the court. And I see my job in closing argument as arguing what I believe the evidence suggests and have you think about it. . . .
>
> I don't—you know, I try never to do that, and that's why this is difficult, but it's something, as an officer of the court and an advocate for my client, I have to do, because there certainly is evidence on which you could conclude, depending on how you understand the inferences for circumstantial evidence, that Mr. Mitchell is not being totally honest with you about what happened." (Exh. J, vol. 1, 180-182.)

If the jury had misunderstood Hanlon's ultimate point amidst his faux equivocal evasions, his invoking his duties as an officer of the court would have told the jury he knew Mitchell had lied and that the jury should also so conclude. If a prosecutor had invoked his duties and ethics to bolster the credibility of a witness, any defendant would complain about prosecutorial vouching. (*People v. Fierro* (1991) 1 Cal.4th 173, 211; *People v. Alvarado* (2006) 141 Cal. App. 4th 1577, 1585.) Hanlon also improperly vouched—for his own client's guilt.

To Hanlon's point that conceding Mitchell's guilt of homicide was something "I have to do" as an officer of the court, the response is, "No, you don't." Although a defendant's constitutional right to testify does not include the right to testify falsely and his Sixth Amendment right to counsel does not include having the knowing assistance of counsel in suborning his perjury, (*Nix v. Whiteside* (1986) 475 U.S. 157, 173-176,) nothing in the record here shows that Mitchell had told Hanlon that his intended testimony was false.

McCoy distinguished the Louisiana Supreme Court's reliance on *Whiteside* on that basis. "But McCoy's case does not resemble Nix, where the defendant told his lawyer that he intended to commit perjury. There was no such avowed perjury here." (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1510.) Had Hanlon so known, his duty would have been not to put Mitchell on the stand or to withdraw. (*Ibid*.) Hanlon had no business putting Mitchell on the stand and then telling the jury that he lied and thus was guilty of homicide. (*Ibid*.)

Respondent will undoubtedly rely on *McCoy's* statement that defense counsel "could not interfere with McCoy's telling the jury 'I was not the murderer,' although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction." (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at 1509.) This language does not justify Hanlon's actions.

First, as noted above, *McCoy* held that what might be sound strategy is irrelevant to the issue of client autonomy. Second, the reference to the defendant's telling the jury "I was not the murderer" cannot merely refer, as Hanlon assumed, to the client taking the stand to tell his story. That right may have informed *McCoy*, but it long predated it and has nothing to do with the question presented there. (*Id.* at pp. 1513, 1516.)

Rather, "I was not the murderer" must refer to defense counsel arguing that to the jury on the client's behalf. The language that follows about arguing mental state can only be harmonized with the core holding of *McCoy* if, unlike what

happened in *McCoy*, such argument does not undermine the defendant's claim of innocence of the *actus reus*. It is hard to imagine how that tightrope might successfully be walked in most cases. It certainly was not in Mitchell's.

This is not a case where, consistent with *McCoy*, defense counsel could argue that *whoever* committed the crime was not guilty of the charged crime because of a missing element, *e.g.*, the absence of force or fear in a petty theft charged as a robbery. Such an argument would not concede the defendant's guilt of any *actus reus*. It would not link him to a crime against his will and to his potential embarrassment.

Mitchell's case is very different. There was no room for Hanlon to argue Mitchell's innocence while also arguing that *whoever* committed this homicide lacked the required intent or only committed manslaughter. The only person whose intent we have circumstantial evidence of was Mitchell. The only person who could have committed manslaughter "because of a sudden quarrel or in the heat of passion" and because he "acted rashly and under the influence of intense emotion that obscured his reasoning or judgment" was Mitchell. (Exh. I, vol. 1, 124.) The only person about whom Hanlon could have argued, "What happened . . . that led to a man beating in the brains of a woman he loved?" was Mitchell. (Exh. J, vol. 1, 183.)

Hanlon's argument committed Mitchell to having killed the mother of his child, an admission *McCoy* emphasized a defendant might not wish to make and which Mitchell adamantly and

consistently opposed. Hanlon's usurpation was structural error. Mitchell is entitled to a new trial.

C. *McCoy* Applies Retroactively to this Case.

In determining whether a procedural rule applies retroactively to cases on collateral review, California courts have applied the federal test of *Teague v. Lane* (1989) 489 U.S. 288, the state tests of *In re Johnson* (1970) 3 Cal. 3d 404 and *People v. Guerra* (1984) 37 Cal. 3d 385, or both. (Cf. *In re Ruedas* (2018) 23 Cal. App. 5th 777, 793-803 [applying both] & *In re Thomas* (2018) 30 Cal. App. 5th 744, 759-761 [declining to apply *Teague* because it was decided with federal habeas petitions in mind].)

Shortly after the superior court denied relief, Division Two of the Fourth District held that *McCoy* was retroactive under both *Teague* and California law because, as an extension of *Florida v. Nixon*, it did not create a new rule.

> "The holding of *McCoy* extended the precedent under *Nixon*, *supra*, 543 U.S. 175, drawing a conclusion clearly implied in or anticipated by that opinion. *Nixon* established the parameters of a claim of ineffective assistance of counsel where counsel makes a strategic decision to concede guilt in order to avoid harsher consequences where the defendant never asserted a defense objective of maintaining innocence and never verbally approved or protested counsel's proposed approach. *McCoy*, on the other hand, held that *Nixon* and *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674, 104 S.Ct. 2052] do not apply where counsel's decision overruled the defendant's unambiguous and intransigent objection to that admission, usurping the defendant's prerogative to choose the object of his defense and to decide whether to maintain his innocence. *McCoy* interpreted and extended the rule of *Nixon* to provide

> guidance in situations where the defendant expressly objects to counsel's strategy of conceding guilt. Defendant argued on direct appeal that his trial attorney deprived him of his Sixth Amendment right to effective assistance of counsel by conceding his guilt of second-degree murder. In this respect, we conclude that *McCoy* did not announce a new rule. Instead it was foreshadowed by *Nixon* and is entitled to retroactive application." (*In re Smith* (2020) 49 Cal. App. 5th 377, 391-392.)[4]

A finding of retroactivity is required, both on the theory that *McCoy* did not announce a new rule and when other aspects of retroactivity analysis are considered.

1. State Habeas Law Requires the Application of *McCoy* to Mitchell's Petition.

Under *People v. Guerra* (1984) 37 Cal.3d 385 and *In re Johnson* (1970) 3 Cal.3d 404, retroactivity analysis proceeds in three stages. The first question is whether the new decision announced a new rule. If it did, the next question is whether the new rule displaced a previous, contrary rule. If *either* of these did *not* occur, then the decision applies to all cases, including those already final. "It is only in this 'narrow class of decisions' that there can have been justifiable reliance on an old rule to the contrary, and hence that the courts may choose to make, on grounds of policy, an exception to the ordinary assumption of retrospective operation." (*People v. Guerra*, *supra*, 37 Cal.3d at p. 401.)

[4] The Court denied relief on the merits. (*Id.* at p. 392.)

Thomas elaborated on what constitutes a new rule in a case concerning the constitutionality of admitting certain types of hearsay evidence.

> "Decisions establish 'new rules' when they depart from clear contrary rules established in prior judicial decisions. In practice, that means decisions establish new rules when they (1) explicitly overrule a precedent of the California Supreme Court, or (2) disapprove a practice implicitly sanctioned by prior decisions of the Supreme Court, or (3) disapprove a long-standing and widespread practice expressly approved by a near-unanimous body of lower court authorities. (*In re Lucero*, *supra*, 200 Cal. App. 4th at p. 45, citing *Guerra*, *supra*, 37 Cal. 3d at p. 401.) By contrast, decisions do not establish new rules if they merely "explain or refine the holding of a prior case, … apply an existing precedent to a different fact situation, … draw a conclusion that was clearly implied in or anticipated by previous opinions," or give effect to a statutory rule or existing binding decision of the United States Supreme Court. (*Guerra*, *supra*, 37 Cal. 3d at p. 399 & fn. 13.)) In such cases, the rule in question already exists, and the case law merely applies it or fills out its boundaries." (*In re Thomas*, *supra*, 30 Cal. App. 5th at pp. 761-762.)

As *Smith* held, *McCoy* did not announce a new rule within the meaning of the above standards. The outcome was "clearly implied in or anticipated by previous opinions[.]" *McCoy* made clear that its decision flowed from the recognition in *Faretta v. California* (1975) 422 U.S. 806 that "the right to defend is personal" and that the Sixth Amendment's "grant 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." (*McCoy*, 138 S.Ct. at 1507-08 (brackets and internal quotations omitted), quoting *Faretta*, 422 U.S. at 819-20, 834.) The Court also drew from *Brookhart v. Janis*, *supra*, (*McCoy*, 138 S.Ct. at p. 1516,) and from Justice Scalia's concurrence in *Gonzalez v. United States* (2008) 553 U.S. 242, in observing that "action taken by counsel over his client's objection has the effect of revoking counsel's agency." (*McCoy*, 138 S.Ct. at 1509-10 (brackets, ellipses, and internal quotations omitted), quoting *Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring).) Further, as *Smith* held, *McCoy* flows logically and inevitably from *Florida v. Nixon*. If Nixon, rather than remaining silent, had explicitly refused to concede guilt, his conviction would have been reversed under the Sixth Amendment on client autonomy principles without regard to whether counsel had rendered ineffective assistance.

Even if *McCoy* announced a new rule, it would apply retroactively if it did not supplant "a prior rule to the contrary." The announcement of a new rule does not involve the displacement of an earlier, contrary rule "when we resolve a conflict between lower court decisions, or address an issue not previously presented to the courts." (*People v. Guerra*, *supra*, 37 Cal.3d at pp. 399-400; *In re Thomas*, *supra*, 30 Cal. 5th at p. 762.)

McCoy did not overrule any precedent or either the U.S. Supreme Court or the California Supreme Court. Prior to the Louisiana Supreme Court's decision in *McCoy*, neither U.S. Supreme Court nor California Supreme Court case law authorized counsel to violate a defendant's right to autonomy

under the Sixth Amendment by conceding the defendant's guilt or his commission of the *actus reus over the defendant's objection*. As in *McCoy* itself, decisions holding to the contrary under ineffective assistance law address a different issue.

Even if *McCoy's* holding about client autonomy under the Sixth Amendment is a new rule that displaced an old rule, it would still govern this case. In considering whether a new procedural rule should be given retroactive effect, California considers three factors: "a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." (*In re Thomas*, *supra*, 30 Cal. App. 5th at p. 756.) The latter two factors only become relevant if retroactivity is a close question after consideration of the purpose of the rule. (*Ibid.*) A rule related to minimizing the risk of convicting the innocent will apply retroactively in state habeas cases regardless of reliance and the effect on the administration of justice. (*Id.* at p. 757.)

The defendant-client's right under the Sixth Amendment to demand a defense of complete innocence and prevent concessions of guilt is a "pro-defendant" rule. It has nothing to do with mutual fairness or easing the prosecution's burden. It prevents conviction of the innocent by holding the prosecution to its highest burden. There may be cases where, because of the weight of the evidence, the defendant whose autonomy is respected loses, but that does not change the fact that the rule protects the

innocent. Further, when the California Supreme Court referred to innocence in *Johnson*, it did not just mean factual innocence.

Johnson had suffered a prior conviction for violating a federal statute that required anyone who acquired marijuana to pay a marijuana transfer tax. This conviction was used to enhance his sentence in a subsequent drug prosecution. (*In re Johnson*, *supra*, 3 Cal. 3d at p. 407.) Under the tax scheme, whenever the marijuana transfer tax was paid by one not lawfully registered to possess it or exempt from such registration, the payor's information was forwarded to federal and the applicable state prosecutors' offices because trafficking in marijuana was a federal crime and illegal in every state, subject to limited exceptions. (*Id.* at p. 409.)

The question was whether Johnson, as a habeas petitioner, could invalidate the prior conviction finding by relying on *Leary v. United States* (1969) 395 U.S. 6. *Leary* had held that a timely invocation of the Fifth Amendment's privilege against self-incrimination was a complete defense to prosecution under the transfer tax statute. Thus, after *Leary*, a defendant, practically speaking, could no longer be convicted of a transfer tax violation if he claimed the Fifth Amendment. (*Id.* at pp. 409-410; *Leary v. United States*, *supra*, 395 U.S. at p. 27.)[5]

[5] *Leary* did not strike down the transfer tax statute. Although *Johnson* suggested that the outcome in *Leary* was comparable, (*In re Johnson*, *supra*, 3 Cal. 3d at p. 416,) it still analyzed *Leary* as a procedural rule.

Neither *Johnson* nor *Leary* were cases about factually innocent people. Anyone convicted of violating the transfer tax statute was guilty two times over, first of not paying the required tax and second of the true target offense of illegally trafficking in marijuana. Nonetheless, because compelled self-incrimination was an unacceptable way of declaring obvious guilt, *Leary* was a rule that minimized *legally* wrongful convictions. *Johnson* declared this as important as any hypothetical procedural rule that might allow some semblance of omniscience about the defendant's *factual* guilt or innocence.

> "The overwhelming concern of recent retroactivity decisions with the relation of the rule in question to the reliability of the truth-determining process at trial is but a corollary to the ultimate test of the integrity of the judicial process: its capacity to ensure the acquittal of the innocent. Since, under our system of justice, the significance of innocence does not vary with its legal cause, the present petitioner is as entitled to a retroactive application of *Leary* as others are entitled to a retrospective right to trial counsel -- counsel whose job it is to search for legal as well as factual defenses for those accused of crime." (*Id.* at p. 416.)

The recent case of *In re Brown* (2020) 45 Cal. App. 5th 699 (rev. granted June 10, 2020) is consistent with this "legal innocence" aspect of *Johnson*. At issue was whether *People v. Gallardo* (2017) 4 Cal. 5th 120 applied retroactively to cases on collateral review. (*In re Brown*, *supra*, 45 Cal. App. 5th at p. 705.) *Gallardo* addressed how to prove prior convictions consistent with the Sixth Amendment's right to jury trial. It held that "when the sentencing court must rely on a finding regarding the

defendant's conduct, but the jury did not necessarily make that finding (or the defendant did not admit to that fact), the defendant's Sixth Amendment rights are violated." (*People v. Gallardo*, *supra*, 4 Cal. 5th at p. 135.)

Brown had been sentenced under the Three Strikes law based on a juvenile conviction for carjacking that would only count as a strike if he had been armed with a deadly weapon. (*In re Brown*, *supra*, 45 Cal. App. 5th at p. 713.) Arming had not been charged, proven, or admitted in juvenile court. (*Id.* at pp. 707, 709.) The trial court had granted Brown's habeas petition, holding *Gallardo* retroactive and rejecting the prosecution's request to rely on the probation report to find that Brown's juvenile carjacking involved a deadly weapon. (*Id.* at p. 713.) The Court of Appeal affirmed, with one justice dissenting. (*Id.* at pp. 705, 727.)

Addressing retroactivity, the Court agreed that *Gallardo* set out a new procedural rule. (*Id.* at pp. 716-717.) This rule satisfied the "innocence" prong of the *Johnson* test.

> "The *Gallardo* rule thus goes to the integrity of the factfinding process when the court determines whether a prior conviction qualifies as a strike. The primary purpose of the *Gallardo* rule is to promote reliable determinations of a defendant's guilt or innocence in committing underlying acts, apart from the elements of a conviction, required to impose a strike. Because the purpose of *Gallardo* 'relates to characteristics of the judicial system which are essential to minimizing convictions of the innocent' used to increase a defendant's sentence (*In re Johnson*, *supra*, 3 Cal. 3d. at p. 413), the purpose of the *Gallardo* rule weighs heavily in favor of

> retroactive application. (*In re Johnson*, *supra*, at p. 413; accord, *In re Lucero*, *supra*, 200 Cal. App. 4th at p. 45.) (*Id.* at p. 718.)"[6]

Especially pertinent here are the references to "integrity of the factfinding process," "characteristics of the judicial system," and "adherence to constitutional factfinding procedures."

The *Brown* majority disagreed with the opinion of the dissenting justice and with *In re Milton* (2019) 42 Cal. App. 5th 977 (rev. granted March 11, 2020), which held that *Gallardo* was not retroactive because there was nothing offensive to the truth-seeking function about having a judge make findings of fact about prior conduct from a probation report.

> "We recognize that the factfinding process might not be any less reliable if conducted by the sentencing judge, *and might even be better*. We recognize that applying Gallardo retroactively will be disruptive and burdensome to the courts. Nevertheless, we conclude these factors do not outweigh a defendant's constitutional right to a jury determination of facts upon which a strike is based when the strike is founded on a crime statute that does not categorically match the predicate prior crime." (*In re Brown*, *supra*, 45 Cal. App. 5th at p. 721-722 [emphasis added].)

Like *Johnson*, *Brown* stands for the proposition that for a new procedural rule to serve "the integrity of the factfinding process," it does not have to have some omniscient quality to it. It suffices if it deems certain methods of pronouncing the defendant guilty to be unacceptable. *Leary* was retroactive in *Johnson*

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[6] The Court then held that considerations under the second and third prongs of *Johnson* did not militate against *Gallardo's* retroactivity. (*Id*. at pp. 718-719.)

because a defendant may not be compelled to pronounce himself guilty. *Gallardo* was retroactive in *Brown* even though the challenged fact-finding process "might even be better" because having a judge read a probation report to pronounce a defendant guilty of prior unadjudicated conduct was unacceptable. Under *McCoy*, every defendant gets to say, "My attorney may not pronounce me guilty against my wishes. Only the jury may do that." This favors retroactivity under the first prong of *Johnson*.

The second and third prongs of the *Johnson* analysis do not outweigh this. The prosecution can have no reliance interest in a conviction where the defendant's insistence on innocence was ignored as it was, for example, in *Brookhart v. Janis*. Concern about the administration of justice and finality of convictions does not defeat retroactivity. The appellate process does not give the defendant a chance to obtain a reversal by establishing reasonable doubt on some or all elements. His only chance to do that is at trial, and if his attorney has, over objection, refused to do that, or has, as Hanlon did here, told the jury to disregard the case for complete innocence, *McCoy* entitles him to relief.

2. Under *Teague v. Lane*, *McCoy* Applies Retroactively to this Case.

Although *Thomas* deemed it inappropriate to do so, some California courts of appeal have applied the federal standard for retroactivity set out in *Teague v. Lane* (1989) 489 U.S. 288. (See, e.g., *In re Ruedas* (2018) 23 Cal. App. 5th 777, 793-798.)

"Under Teague, judicial decisions that create a new rule of law are generally not given retroactive effect to cases on

collateral review that were already final when the rule was announced." (*In re Ruedas*, *supra*, 23 Cal. App. 5th at p. 793.)[7] A case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. (*Teague v. Lane*, *supra*, 489 U.S. at 301.) Put another way, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (*Ibid*.) "[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." (*Williams v. Taylor* (2000) 529 U.S. 362, 382 (plurality).)

McCoy broke no new ground and imposed no new obligations under the Sixth Amendment on state or federal governments. The precedents from which *McCoy* flowed—*Faretta*, *Brookhart*, and *Nixon*—were all well-established by the time of Mitchell's trial. Because *McCoy* applied existing rules to a related situation not previously adjudicated by the U.S. Supreme Court, it did not announce a new rule. Therefore, it is retroactive under *Teague* and cases that apply *Teague*.

D. Mitchell's Claim is Properly Before this Court.

1. Neither *Waltreus* nor *Dixon* Bars Mitchell's Claim.

Generally, claims previously raised and rejected on direct appeal may not subsequently be pled anew in a state habeas

[7] *Teague* recognized two exceptions that are not applicable here. (*Ibid*.)

petition. (*In re Waltreus* (1965) 65 Cal. 2d 218, 225.) Relatedly, claims that could have been raised on direct appeal but were not may not be pled in a state habeas petition. (*In re Dixon* (1953) 41 Cal. 2d 756, 759.) Neither procedural bar applies in this case.

Though Mitchell advanced a closely related claim, this claim was not previously raised and rejected on direct appeal. On direct appeal, Mitchell argued that Hanlon rendered ineffective assistance in violation of the Sixth Amendment. His malfeasance lay in concealing his intent to argue for lesser homicides such as voluntary manslaughter. This prevented Mitchell from obtaining counsel who would confine the defense to complete innocence, effectively denying him counsel of his choice, a structural error. (Exh. L, vol. 2, 273-287.)

Strictly construed, this is a different claim. *McCoy* held that client autonomy and the right to dictate a defense of actual innocence is a separate right under the Sixth Amendment. It is not part of the Sixth Amendment's ineffective assistance jurisprudence. The Court of Appeal held that Mitchell did not receive ineffective assistance as alleged. (Exh. M, vol. 2, 366-367, 369-370, 372, 376.) Therefore, there can be no *Waltreus* bar.

Construed more broadly, this claim is also not subject to a *Dixon* bar. Although Mitchell spoke of ineffective assistance and did not expressly invoke the Sixth Amendment right to client autonomy, his claim arguably amounts to the same thing. Mitchell argued that Hanlon's deception deprived him of counsel of his choice, a structural error. In this context, counsel of choice does not refer to a particular individual but to anyone who would

have restricted Mitchell's defense to complete innocence. Thus, there should be no *Dixon* bar.

2. Even if a *Waltreus* or *Dixon* Bar Applies, Mitchell's Claim Comes Under the Exceptions Set out in *In re Harris*.[8]

Four exceptions overcome a *Waltreus* default: 1) when the issue constitutes a fundamental constitutional error; 2) when there has been a change in law affecting the petitioner; 3) when the trial court lacked fundamental jurisdiction; and 4) when the trial court acted in excess of its jurisdiction. (*In re Harris* (1993) 5 Cal. 4th 813, 834-841; accord, *In re Reno* (2012) 55 Cal. 4th 428, 478.) These exceptions also overcome a *Dixon* default. (*In re Harris*, *supra*, 5 Cal. 4th at p. 825, fn. 3; *In re Reno*, *supra*, 55 Cal. 4th at pp. 490-491; *In re Robbins* (1998) 18 Cal. 4th 770, 814 fn. 34.) The first and second *Harris* exceptions apply here.

Harris narrowed the *Waltreus/Dixon* exception for fundamental constitutional error because of the increasing prevalence of litigating the overlooked or mishandled claim of error via a claim of ineffective assistance of trial or appellate counsel. (*Id.* at pp. 831-834.) "Only where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process, is an opportunity for a third chance at judicial review (trial, appeal, post-appeal habeas corpus)

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[8] The Superior Court imposed no *Dixon*, *Waltreus*, or timeliness defaults. It suggested, however, that if *McCoy* was retroactive it might reach a different conclusion. (Exh. Y, vol. 4, 691.) Because the court did not consider how *In re Harris* might excuse any default, this suggestion is not persuasive.

justified." (*Id.* at p. 834.) An example of this was cases involving structural error. (*Ibid*.) *Reno* confirmed that structural errors overcame the state's interest in finality of judgments under this exception. (*In re Reno*, *supra*, 55 Cal. 4th at p. 487.)

McCoy error is structural error. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at p. 1511.) The right of client autonomy relates to other rights, the denial of which are all structural error. Denial of the "personal" *Faretta* right of self-representation is structural error as is denial of the right to counsel of one's choice. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 fn. 8; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.) In *Brookhart v. Janis* (1966) 384 U.S. 1, defense counsel, over the defendant's strenuous objection, agreed to submit the case upon presentation of a *prima facie* case without confrontation and cross-examination. (*Id.* at pp. 6-7.) The Court reversed without a showing of prejudice. (*Id.* at pp. 7-8.) In *Florida v. Nixon*, if the defendant had objected to defense counsel's strategy of conceding guilt, the case would have been a client autonomy case, and defense counsel's concessions would have been structural error. (*Florida v. Nixon*, *supra*, 543 U.S. at pp. 187, 192.) These precedents establish the *Harris* exception for fundamental constitutional rights.

The *Harris* exception for "change in the law" also defeats any *Waltreus* or *Dixon* default. The exception applies where the later decision settles or clarifies a legal point rather than simply adding to a division of authority. (*In re Harris*, *supra*, 5 Cal. 4th at p. 841.) The later decision must apply retroactively to the

petitioner's case. (*In re Martinez* (2017) 3 Cal. 5th 1216, 1222.) To the extent the question required settling, *McCoy* established Mitchell's entitlement to relief on these facts. The decision applies retroactively for the reasons set out above.[9] For this reason as well, no *Waltreus* or *Dixon* default applies.

3. <u>This Petition is Timely</u>.

This petition is being filed within a reasonable time, three months after the May 20, 2020 denial in the Superior Court. (See *Robinson v. Lewis* (2020) 9 Cal. 5th 883, 901-902 [holding that California will never consider a habeas petition filed 120 days or less after the denial by a lower court to be substantially delayed].) The original petition was timely as well.

To avoid an untimeliness bar, the petitioner must establish, alternatively, (1) the absence of substantial delay, (2) good cause for any substantial delay, or (3) that the claim falls with an exception to the timeliness bar. (*In re Robbins* (1998) 18 Cal. 4th 770, 780-781.) Substantial delay is measured from the time the petitioner knew or reasonably should have known of the factual or legal basis of the claim. (*Id.* at p. 780.) Exceptions that excuse the absence of good cause for substantial delay are:

> "(i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he

[9] There is no inconsistency between saying that 1) a decision is retroactive because it was anticipated by precedent and, therefore, is not a new rule and 2) applying the *Harris* "change in law" exception to a retroactive decision that clarified the law.

> or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute." (*Id.* at p. 780-781.)

Although *Robbins* was a capital case, its timeliness guidelines also apply to noncapital cases. (*In re Reno* (2012) 55 Cal. 4th 428, 459-460; *In re Sanders* (1999) 21 Cal. 4th 697, 703.)

Reno endorsed U.S. Supreme Court cases characterizing the timeliness standards of *Robbins* as a general reasonableness test. (*Id.* at p. 460.) The petition "should be filed as promptly as the circumstances allow[.]" (*Ibid*.) One aspect of good cause for substantial delay is the investigation of other claims. (*In re Robbins*, *supra*, 18 Cal. 4th at p. 780.) It is also understood that counsel has professional obligations to other clients. (*In re Soderstein* (2007) 146 Cal. App. 4th 1163, 1221-1222.)

Any suggestion that Mitchell should have raised this claim in 2012 should be rejected as an attempt to backdoor a procedural default in through a timeliness bar. The petition is also timely when measured from the date of the *McCoy* decision.

The petition and supporting declaration of the undersigned set out how Mitchell became aware of *McCoy* while litigating related claims in the Ninth Circuit and the decision process that led to *McCoy* relief being pursued in state court in the wake of favorable California cases interpreting *McCoy*. This culminated in the California Supreme Court's denial of review in *Eddy* in

July 2019. The superior court petition was filed two months after that. Thus, the superior court petition was not substantially delayed, or, alternatively, is excused by good cause.

The case of *In re Brown* (2020) 45 Cal. App. 5th 699 is instructive. There, pursuant to a guilty plea that included an admission to an invalid juvenile strike, the defendant was sentenced in 2006. (*Id.* at p.707.) In December 2016, a records analyst of the Department of Corrections and Rehabilitation wrote the superior court about possible sentencing errors in Brown's judgment. In January 2017, the court declined to amend the judgment. (*Id.* at pp. 707-708.) Brown had received the CDCR letter as well and contacted the Public Defender. (*Id.* at p. 709.) In February 2017, the Public Defender's office reviewed Brown's file, concluded that the strike was invalid, and informed Brown of this. (*Id.* at pp. 708-709.) At some point thereafter, Brown, with counsel, moved to modify the sentence. It turned out that the transcript of his 2006 plea hearing was no longer available. In July 2017, after numerous continuances, the court and the parties agreed that Brown should file a writ petition. That petition was filed in January 2018. This was one month after *Gallardo* was decided.[10] (*Id.* at p. 708.)

[10] The petition alleged ineffective assistance of counsel as well as invalidity of the prior strike. (*Id.* at p. 708.) Nothing in the record suggests that the six months between the July 2017 hearing where it was agreed Brown had to file a writ petition and January 2018 when he eventually filed it was spent waiting for the decision in *Gallardo*.

The trial court granted the petition. It rejected the prosecution's untimeliness argument, finding no prejudice. (*Id.* at p. 711.) The prosecution renewed that argument on appeal, arguing that they were prejudiced because the plea transcript was missing and because defense counsel could not remember the proceedings. (*Id.* at p. 724.)[11] Applying *Robbins*, the Court of Appeal held that the 13-month interval between Brown's learning that his sentence was unauthorized because of the invalid strike and his filing of a proper habeas petition was justified. The Court noted Brown's efforts via other means and held, "Under these circumstances, defendant moved reasonably expeditiously in challenging the juvenile carjacking strike. The record shows that the significant delay in seeking such collateral relief was justified." (*Id.* at p. 725.)

Here, too, Mitchell was litigating the impact of Hanlon's indifference to his wishes on another front, in his Ninth Circuit habeas appeal. The period of delay is comparable to that in *Brown*. Further, although it is not clear in *Brown* that part of the delay was spent waiting for *Gallardo* to be decided, that is a relevant factor here, where the development and interpretation of *McCoy* in California courts ultimately dictated the decision to stay proceedings in the Ninth Circuit and file this petition.

Finally, if this Court believes the petition was unjustifiably delayed, it should excuse the delay. Of the four *Robbins* factors, the one that most closely applies to this situation is "(i) that error

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[11] Here, of course, the trial record is complete.

of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner[.]" Although the first part about fundamental unfairness clearly applies, this factor as a whole is not well suited to a claim involving structural error where prejudice need not be assessed because the defendant did not have anything that a reviewing court should dignify as a trial. Discussing structural error for a violation of client autonomy rights, the Supreme Court said, "[T]he effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." (*McCoy v. Louisiana*, 138 S.Ct. at p. 1511.) Thus, the error here is of comparable magnitude to those set out in *Robbins*. Since a claim involving structural error excuses *Waltreus* and *Dixon* defaults under *Harris*, it should excuse any timeliness default as well.

CONCLUSION

For the foregoing reasons, Mitchell's petition for writ of habeas corpus should be granted.

Dated: August 21, 2020

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CERTIFICATION

Pursuant to Rules 8.384(a)(2) and 8.204(c) of the California Rules of Court, I hereby certify that the foregoing brief is produced in a proportional font (Century Schoolbook) of 13-point type and utilizes 1.5 line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 9,618 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate).

Dated: August 21, 2020

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Petitioner
James R.W. Mitchell

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D)

I, Steven S. Lubliner, declare I electronically served from my electronic service address of sslubliner@comcast.net the following documents:

PETITION FOR WRIT OF HABEAS CORPUS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JAMES R.W. MITCHELL'S PETITION FOR WRIT OF HABEAS CORPUS

DECLARATION OF STEVEN S. LUBLINER IN SUPPORT OF JAMES R.W. MITCHELL'S PETITION FOR WRIT OF HABEAS CORPUS

EXHIBITS IN SUPPORT OF JAMES R.W. MITCHELL'S PETITION FOR WRIT OF HABEAS CORPUS (4 VOLUMES)

on August 21, 2020 at 4:00 p.m. to the following persons and entities:

Office of the Attorney General
sfagdocketing@doj.ca.gov

DECLARATION OF SERVICE

I, the undersigned, declare that I am over 18 years of age, an attorney and a member in good standing of the State Bar of California. I am not a party to the within cause. My business address is P.O. Box 750639, Petaluma, CA 94975. My e-mail address is sslubliner@comcast.net. I served a true copy of the above-mentioned documents on the following, by placing same in an envelope(s) addressed as follows

James R.W. Mitchell, #AI4523
D17-121
R.J. Donovan Correctional Facility
480 Alta Road
San Diego, CA 92179

Each said envelope was then sealed and deposited in the United States mail at Petaluma, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on August 21, 2020 at Petaluma, California.

s/Steven S. Lubliner

People v. Mitchell

Court of Appeal of California, First Appellate District, Division One

July 28, 2014, Opinion Filed

A133094

Reporter
2014 Cal. App. Unpub. LEXIS 5375 *; 2014 WL 3707995

THE PEOPLE, Plaintiff and Respondent, v. ***JAMES RAPHAEL WHITTY MITCHELL***, Defendant and Appellant.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Subsequent History: Related proceeding at *Mitchell v. Hanlon, 2014 Cal. App. Unpub. LEXIS 5491 (Cal. App. 1st Dist., July 31, 2014)*

Review denied by *People v. Mitchell, 2014 Cal. LEXIS 9693 (Cal., Oct. 15, 2014)*

Prior History: [*1] Superior Court of Marin County, No. SC165475A.

Core Terms

sentencing, withdraw, disruption, bat, heat, passion, ineffective, appointed, murder, breakdown, irreconcilable, incompetent, probation, psychological, restraining, jurors, kidnapping, attorney-client, baseball, blood, phone, innocence, shirt, mitigation, killed, psychiatrist, psychiatric, violence, talking, consecutive

Judges: Opinion by Becton, J.*, with Margulies, Acting P. J., and Dondero, J., concurring.

Opinion by: Becton, J.

Opinion

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BECTON, J.[*]—Defendant James Raphael Whitty Mitchell was convicted in a jury trial of first degree murder (*Pen. Code, § 187*), corporal injury on a cohabitant (*§ 273.5*),[1] kidnapping (*§ 207*), child abduction (*§ 278*), child endangerment (*§ 273a*), and stalking (*§ 646.9*). The jury found defendant personally used a deadly weapon in counts one and two (*§ 12022, subd. (b)(1)*), and personally inflicted great bodily injury with respect to count two (*§ 12022.7*). Additionally, there was an allegation that the homicide occurred with the special circumstance of kidnapping (*§ 190.2, subd. (a)(17)(B)*), which the jury found to be not true. Defendant was sentenced to imprisonment for 35 years to life.

The following issues are raised on appeal: (1) whether the trial court erred by refusing to allow defendant to discharge his retained attorneys on the eve of trial or permit them to withdraw; **[*2]** (2) whether defendant's retained attorneys provided ineffective assistance of counsel before trial or at sentencing; (3) whether the trial court erred by denying defendant's motion to appoint new counsel for purposes of a new trial motion and sentencing; (4) whether the trial court erred by refusing to order a competency hearing under *section 1368*; (5) whether the trial court properly handled defendant's request for funds to retain a psychiatric expert; (6) whether the evidence was sufficient to sustain the conviction for child endangerment; and (7) whether the restraining order issued to protect members of D.K.'s family was authorized under *section 646.9*.

We conclude that defendant was not deprived of his *Sixth Amendment* right to counsel of his choice by any of the court's rulings; defendant's claims of an irreconcilable conflict amounted to a difference of opinion about defense strategies, which was a matter exclusively within counsel's control. The denial of all of the motions was within the trial court's discretion due to the lateness of the requests and the disruption of the proceedings that was sure to ensue. We also find no evidence of ineffective assistance of counsel before trial or at sentencing and, in any event, **[*3]** could not find any prejudice from counsel's handling of this difficult case. The trial court acted within its discretion in refusing to suspend criminal proceedings under *section 1368* and responded reasonably to counsel's request for funds for a psychiatric expert. There was more than sufficient evidence of child endangerment. Based on recent authority, however, the restraining order was not properly issued in favor of D.K.'s mother and child. We, therefore, reverse the restraining order, but otherwise affirm the judgment.

FACTUAL BACKGROUND

The Crimes

Defendant testified at trial, and much of the following background comes from his testimony. Defendant and D.K. met at a San Francisco club in August 2007. They moved in together about two weeks later. They had a child together (the minor).

Defendant admitted at trial that he and D.K. got into fights when one or both was drinking or taking drugs, with defendant's preferred drugs being marijuana and methamphetamine.

[*] Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[1] Undesignated statutory references are to the Penal Code.

Although he used methamphetamine a lot when he was younger, he claimed he had used it only two or three times since 2007.

Defendant admitted he committed several acts of domestic violence against D.K. before the crimes alleged in this case. **[*4]** First, in 2008, when D.K. was pregnant, defendant slapped her during an argument in her apartment in San Francisco because she would not give him the car keys. Defendant was arrested, pled guilty to a domestic violence charge, and was placed on probation. Second, as they argued in the car while moving possessions from his place to hers, defendant backhanded D.K. Third, when defendant wanted to leave the apartment during an argument, he pushed D.K. out of the way. D.K.'s friend Erica was present on that occasion. Fourth, defendant took D.K. and her sister out to dinner in San Francisco. As he was driving them home afterwards, he and D.K. had a fight about trying to find drugs for the evening. Defendant slapped D.K. Finally, he hit D.K. in the face and gave her a bloody nose while she was on the phone with his cousin, starting to tell him that defendant was using drugs. She was holding the minor when he hit her.

Defendant and D.K. reunited after the incidents of violence, sometimes at the initiative of D.K., despite stay-away orders. In March 2009, however, defendant was arrested for a probation violation based on D.K.'s allegation that he had violated the San Francisco restraining order. **[*5]** D.K.'s testimony from that proceeding was read into the record. She claimed defendant owned a gun in November 2007 and had pointed it at her before, and now he told her he could easily get a gun within two hours. Defendant was arrested, but released after spending three or four days in jail, and his probation was modified.

After that probation violation, defendant went to Canada and stayed there in May and June. During that time, he spoke with D.K. on the phone at least once a day.

In June 2009, after he returned from Canada, defendant began taking methamphetamine again. D.K. caught him taking methamphetamine and packed her bags and left. D.K. and the minor moved in with D.K.'s mother in Novato.

On June 26, 2009, defendant went to D.K.'s apartment (he testified it was at her invitation) to see her and the minor. When he arrived, D.K. and her mother did not seem to want him there. Her mother called 911. Defendant was confused, but left when asked. After a police officer responded, a call came in to D.K.'s phone from defendant. The officer took the call and asked defendant to turn himself in. Defendant said he would "rather go home in a body bag" and threatened to kill the officer.

D.K. **[*6]** had also obtained a temporary restraining order against defendant from the Family Court in Marin County, in late March 2009. The temporary order was scheduled to be made permanent at a hearing on July 7, 2009. Neither defendant nor his attorney appeared for the hearing, and a copy of the order was mailed to him on July 10, 2009. Defendant denied having received that order.

Phone records showed the many phone calls defendant had made to D.K.'s phone in the weeks preceding her death, including 92 calls between June 16, 2009 and June 25, 2009, and 40 calls on June 26 alone. He twice called D.K.'s best friend, Erica, once on July 5 (when he left a message asking her to intercede on his behalf with D.K.) and again on July 11 (the day before the murder), when she accepted his call directly. He admitted he had "fucked up," but

would do anything necessary to get back together with D.K. and the minor. Defendant said he missed the minor, but was not going to "do anything stupid or crazy." He said, "I don't know what to do anymore," and if D.K. just told him she was in love with someone else, "that'd be like a lot easier than just messin' around with my emotions all the time." Defendant called **[*7]** D.K. 78 times between June 26 and July 12, 2009, but D.K. never answered until July 12.

Vasiliki (Bessie) and Nicholas Tzafopoulos (Nick), who was 80 at the time of trial, lived in the downstairs unit of a duplex in Novato, while D.K. and the minor lived with D.K.'s mother in the upstairs unit. Shortly before 7:00 p.m. on July 12, 2009, Bessie heard a scream and thought D.K. may have fallen down the stairs with her child. Bessie looked out of her living room window, but did not see anything.

About the same time, Nick heard a thumping sound and went outside to investigate. In the side yard, from a distance of about 15 feet, he saw a man repeatedly hitting D.K. on the head with a baseball bat. Afraid for his personal safety, Nick stepped back into the apartment and told Bessie to call the police "because he's here." Bessie called 911 and told the dispatcher it was the child's father who was beating D.K. Nick continued to hear the thumping noise as he stood in the house. Nick was screaming at the top of his lungs and said the man was using a bat.

Bessie then saw a white man run past the window with a screaming child under his left arm. The man had a shaved head and wore a black T-shirt and **[*8]** jeans. Nick also saw a man wearing dark clothes run away with a child, down the dead-end court into a car. Two other neighbors also saw a man running away carrying a screaming child. The witnesses who were able to describe the man said he was white, bald or having a shaved head, about six feet tall, and "built up" or "heavyset," which matched defendant's description.

The descriptions of the clothing worn by the man were not consistent, however, and there were weaknesses in the identification. One neighbor thought the man carrying the child was wearing a big, white T-shirt. Nick picked the wrong man at a live lineup. The neighbor who said the assailant was wearing a white T-shirt could not identify anyone in a photo lineup that night, but he did identify defendant with "95 percent" certainty at a live lineup a week later. The neighbors testified to seeing only one man involved in the altercation and kidnapping. Nick testified the man he saw hitting D.K. was the same man who ran off with the child.

When police arrived they found D.K. on the side of the residence, lying on her side with multiple fractures to the back of her head and a large amount of blood pooling around her head. The officer **[*9]** checked for a pulse and breathing, but found nothing. D.K. died on the spot from blunt force trauma. D.K.'s keys were found in her left hand. A black baseball bat lay about two feet from her leg. Later examination would show the bat had defendant's left index fingerprint on it near the grip. Defendant is left handed.

John Morgan (Morgan), a close cousin of defendant, testified that he got a message from D.K.'s mother that evening saying defendant had killed D.K. and taken the minor. Morgan called defendant and could hear the minor in the background screaming. Morgan asked defendant if he knew D.K. was dead, and defendant said he did. Both men were crying. Morgan tried to get defendant to take the minor someplace safe. Defendant said he was going to

Mexico, and authorities "would have to pry [the minor] out of his dead, dying arms." Defendant did not deny or admit killing D.K. Morgan testified on cross-examination that he had never seen defendant with a baseball bat and had never seen a baseball bat at defendant's house, even though he sometimes stayed in a room there and had helped defendant move several times. He did not recognize the bat that killed D.K.

Defendant's brother, Justin **[*10]** Mitchell (Justin), also received word that D.K. was dead that evening and called defendant's cell phone. It sounded like defendant was driving, and Justin heard the minor in the background. Defendant was teary and distraught. He said he was taking the minor to Mexico. Defendant talked about how much he loved the minor and said he wanted to see her grow up and did not want to be apart from her. Defendant also mentioned he might take the minor to his own mother. Defendant then said he had to go and hung up. He neither admitted nor denied killing D.K. Justin, too, had never seen defendant with a baseball bat and had not known him to play baseball or softball as an adult.

Novato police called AT&T to track defendant's cell phone and found he was heading east on Interstate 80. They tracked him as far as Auburn, east of Sacramento. The car stopped in a residential location in Citrus Heights. Citrus Heights Police were notified, and a perimeter was set up. When officers approached the car they found the minor alone, sleeping in the front seat. The minor was unharmed, but she had a dried red substance on her cheek and shoe that proved to be D.K.'s blood.

Defendant's passport was found in the **[*11]** center console of the car, and a temporary restraining order dated March 20, 2009 was found in the trunk. Defendant was located walking on a street several blocks from the car. He did not resist arrest. He was wearing a red and navy blue striped shirt and jeans.

Aside from the above testimony, there was physical evidence that the front of defendant's jeans had D.K.'s blood spatter on them, and the pattern was consistent with the victim having received blows to the head with the bat while she was on the ground. The fine blood spatter suggested defendant was only a few feet from the source of the blood, probably less than five feet away when D.K. was being bludgeoned with the bat. The blood was all on the front of his pants; no blood spatter appeared on the back of them or on the shirt defendant was wearing when he was arrested.

The prosecution had the bat tested for trace DNA (i.e., not from blood). The primary contributor was D.K., but defendant could not be excluded as a low-level trace DNA contributor, nor could the minor. If defendant was a low-level contributor, then there was another low-level contributor of trace DNA on the bat, since the DNA sample included an allele foreign to **[*12]** both D.K. and defendant.

Phone records showed that defendant called D.K. 19 times on July 12, but made no calls to her after 6:42 p.m.

The Defense

Defendant testified on his own behalf, raising a defense of mistaken identity. He claimed he did not kill D.K., but tried to raise a suspicion that two other unidentified men may have. He testified that on July 12, 2009, D.K. invited him over to her house. He left his home in Pittsburg sometime after 5:00 p.m. and drove to D.K.'s

apartment. He was wearing a red and blue striped polo shirt and jeans. Defendant parked at the base of the court and walked toward the duplex.

As he walked through the front gate, he heard D.K. yell, "help." He jogged around the corner of the duplex and immediately became "engaged" with a man in a white shirt. The man had a "buzzed head" and "very light sky blue" eyes and bad breath. The two began pushing each other. As the two fought, out of the corner of his eye defendant saw a man in a black T-shirt running past him. As he struggled with the man in the white shirt, he was hit in the back with a baseball bat. He turned around and saw the guy in the black T-shirt and struggled with him. The man was a little taller **[*13]** than defendant, well built, with hairy arms and gray or brown eyes. Defendant tried to take the bat away from the man, and then re-engaged with the man in the white shirt. The man in the white shirt then knocked defendant down. He immediately hopped back up and then ran down the cul-de-sac because he heard the minor screaming.

Defendant chased the man in the black T-shirt, who had the minor. Defendant caught up to the man and faced him. He told the man to give him the minor, and then batted him on the cheek and kicked him in the shin. The man let defendant grab the minor and then ran away.

As defendant started to head back to D.K.'s apartment, he heard someone say, "call 9-1-1." Defendant then remembered he had a restraining order and decided to leave before the police arrived.

Defendant drove north on Highway 101. He called his cousins. He planned to go to his cousin's house to wait for D.K. to call him. He did not call D.K. because he did not want to call her while the police were there. Then his mother called and told him D.K. was dead, and D.K.'s mother was saying that defendant had killed her. Defendant told his mother he could not talk any longer because he had to talk to his lawyer **[*14]** right away.

By chance, he ran into his attorney, Terrence Hallinan, at a gas station in Auburn that night. He had run out of gas, and he left the minor in the car in order to separate himself from her because he was afraid of what the police might do if they caught up to his car.

Defendant testified he did not see anyone hit D.K. with a baseball bat, did not know she was dead when he left with the minor, and did not even see D.K. at all that day. He could not explain how the blood spatter got on his jeans.

The defense presented testimony of the head coach of women's softball at San Francisco State College that the softball bat used in the assault was the kind that would be used by a high school or small college man or woman. D.K.'s mother, called by the defense, denied having seen the bat around her home. She testified that her other children played baseball or softball as children, but D.K. did not. She claimed the children's bats had been given away to Goodwill. D.K.'s mother was impeached by the county coroner, who testified that on the day after the murder, she told him the bat may have been in the laundry room of her apartment prior to the murder.

The defense also presented testimony **[*15]** that a urine test done after defendant's arrest showed he had no alcohol in his system and a small amount of methamphetamine tending to indicate defendant had used methamphetamine within the past five days, or if he was a chronic user, it may have been detectable for up to seven days.

Defense Counsel's Closing Argument

In closing argument to the jury, Stuart Hanlon, who represented defendant at trial, first suggested it was not unbelievable that D.K. had invited defendant over to her house since she had previously initiated contact with him despite restraining orders. This, he argued, was also consistent with the testimony of a domestic violence expert who acknowledged couples have trouble separating, even in abusive relationships. Having adduced evidence tending to show the baseball bat belonged to D.K., not defendant, Hanlon argued that defendant did not bring the bat with him and, thus, there was insufficient evidence of premeditation and deliberation. He also noted that defendant did not bring with him the things he would have wanted if he had been planning to kidnap the minor, such as diapers and bottles. Using this evidence, he argued against a first degree murder conviction based **[*16]** on either premeditation and deliberation or felony murder, as well as arguing against the kidnapping special circumstance.

Hanlon then argued the believability of defendant's testimony as best he could. He pointed out weaknesses in the witness identifications, and reminded the jury that other witnesses had testified about both a man in a black T-shirt and a man in a white T-shirt, which was consistent with defendant's testimony about the two other men with whom he claimed he had a confrontation. Defendant, on the other hand, wore a blue and red striped shirt, and the prosecution never presented evidence that he changed his shirt after the crime.

Hanlon admitted defendant must have been near D.K. when she was beaten to death because of the blood spatter on his jeans. But he argued that defendant must have been "locked in" on the man in the white shirt, with whom he was fighting, so that he did not notice D.K. being murdered. He argued that defendant's fingerprint could have got on the bat when he struggled with the man in the black T-shirt over the bat.

Finally, near the end of his argument, Hanlon explained—if the jury did not believe defendant's version of the events—still, the crime **[*17]** most likely occurred in an "explosion of anger," and in the "heat of passion." He pointed out the coincidence of the date with defendant's father's death, which tended to suggest that some kind of psychological factors may have been at work. He argued that defendant's phone calls to D.K. had not been threatening, but rather sad and "pathetic" pleas to get back together with her. And he recited that Erica testified defendant did not sound angry and she believed he was sincere in wanting to change his ways when she talked to him on July 11. None of this pointed to a premeditated murder. Hanlon theorized that D.K. must have said something, such as telling defendant he could not see the minor, that made him snap, and the killing occurred in a fit of rage.

PROCEDURAL HISTORY

Continuances to Change Counsel

We now turn to the lengthy procedural history in this case. On December 4, 2009, the information was filed, and defendant appeared for arraignment with attorney Hallinan. The court tentatively set jury selection for May 27, 2010. On February 24, 2010, the parties appeared and Hallinan informed the court that

he had been fired by defendant.

On March 11, 2010, Hallinan appeared along with Douglas **[*18]** Horngrad, who announced his intention to substitute in as defendant's retained attorney. Horngrad said he had just been retained that week, and he would need a 60-day continuance because it was a "huge case." The trial court expressed concern about a substantial continuance.

The prosecution indicated it had no objection to a continuance for trial until September of 2010. The prosecutor stressed the People's right to a speedy trial, and pointed out that two of the witnesses were very elderly. The court allowed a substitution on Horngrad's assurance he could begin the trial on October 21, 2010.

On August 8, 2010, Horngrad requested another continuance of about four months based on problems with the processing of the DNA evidence. The court continued the trial to January 20, 2011 for jury selection.

On September 1, 2010, Horngrad appeared and moved to withdraw as counsel, telling the court that Hanlon and his associate, Sara Rief, would be substituting in. At a closed hearing, counsel explained that he and defendant had a disagreement about defense strategy, and "it was communicated to me both directly and indirectly that there are concerns regarding my physical safety that should compel **[*19]** me to adhere to [defendant's] strategies . . . rather than the strategies that I believe were legally sound."

The court expressed concern whether such problems might occur with "any defense attorney," making clear it did not want to have the next counsel come in and say there was a similar problem. Horngrad assured the court that Hanlon "is a terrific attorney" and "an extremely gifted lawyer . . . whose word is his bond." Horngrad said he had been very clear with Hanlon that the trial dates could not be moved, and Hanlon had agreed to them.

The judge reconvened in open court where Rief stated they "were ready and available for the dates that this Court has previously set." The court said it would allow defendant to change counsel, but only if new counsel were prepared to "take on the trial date." The judge stressed that the trial date had already been continued from October to January, and the court was "not inclined to start shifting lawyers again just to continue the trial date." Horngrad said his trial preparation in the case was very complete and he would give his files to Hanlon.

On December 16, 2010, both sides agreed to a two-week continuance because of issues with transportation **[*20]** of the bat to a defense laboratory. The trial was reset for February 3, 2011.

On January 20, 2011, defense counsel raised more issues with regard to DNA testing and sought a continuance of trial to mid-March. The court affirmed its belief that both sides were working diligently, but stressed that the case was nearing two years old and "I can't just ignore that." The court continued the trial date to June 17. Jurors would be summoned on May 9, juror questionnaires would be provided, and hardship requests would be discussed. A jury would be selected beginning June 14. Opening statements were to commence on June 17, with presentation of evidence to begin on June 21.

Defendant's Request to Remove Retained Attorneys and Substitute the Public Defender

On May 10, 2011, at the commencement of jury selection, defendant moved to relieve his attorneys and to have the case turned over to

the public defender due to his indigence. He complained that "trust issues" had arisen between him, Hanlon and Rief. He said his defense attorneys were just telling him what he wanted to hear, but were not being forthright with him. Defendant informed the court he was going to sue his attorneys and asked, "So, why **[*21]** am I going to . . . sit with counsel who I'm possibly going to sue?" Defendant did not question counsel's competence—especially after the court told him there were "no more competent lawyers than the ones you've had," and that "the reputation of . . . the lawyers you have now is just extraordinary." But he did question their honesty.

The court denied the motion due to the imminence of trial, the fact that jurors had already appeared for hardship excusals, witnesses had been subpoenaed, and granting the motion would cause an inevitable delay in and disruption of the trial. It then proceeded to convene groups of jurors and required them to fill out juror questionnaires. Over the course of the next month, the court and counsel adjudicated the numerous hardship and cause challenges.

Defense Counsel's Request for Funds for a Psychiatric Examination

At an ex parte hearing on May 25, 2011, which defendant did not attend, Hanlon requested $20,000 to $30,000 from the court for a forensic psychiatric examination of defendant. Hanlon told the court there was much evidence that defendant possibly had psychological problems. Hanlon confirmed defendant would testify he did not commit the murder, and **[*22]** said there was some evidence supporting that theory. But, he added, "[w]hether I argue that or not will be up to me." Hanlon suggested that, based on interviews with family members, defendant had "a history of . . . mental issues." And despite defendant's strong wishes to the contrary, "I have an obligation to explore as best I can all avenues of defense." We shall discuss the record of this colloquy in more detail in section V, below.

Defendant's Request to Represent Himself

On Friday, June 10, 2011, in open court while discussing juror issues, defendant said he wanted to represent himself, and there would be no disturbances or delays. Defendant explained: "It's really a personal problem, and I don't trust him. I don't like him. I don't want anything to do with them. They've been way too disruptive. Like if they're going to lie to me, I can only imagine that they're going to lie to a jury. This man wants to do that to a jury, I can only imagine the blowback and the effect that it's going to have on me as a defendant in this case. And like I said if we want to discuss it further, we could discuss it under seal. But other than that, it's my right. [¶] I've done the research. I can go [pro. per.] **[*23]** any time I wish or any time that I see. I have to say I'm very competent in the case. I know the information. The only thing I'd ask the Court to do is order present counsel I do have right now to turn over all documents, all—like all investigations, like, you know, all experts, like everything, all the trial books, everything that they have done thus far and then turn it over to me here in the jail. And our next court date is June 14th, right? [¶] . . . [¶] We're dark on Mondays. I'll be ready to go on Tuesday. If they turn everything over to me today or Saturday, I'll be ready to go on Tuesday." Defendant assured the court he was ready to proceed on the pending motions "right now." The court stated, "Well, it sounds as though you know what you're doing and that you want to make this decision."

In response to an inquiry from the court, Hanlon said: "My understanding of the law is Mr. Mitchell, if he's prepared to go on Tuesday, he has an absolute right to represent himself. For what it's worth, he's intelligent. He understands the facts of the case, which I've discussed at length with him. He understands the issues. He's been able to communicate with me about these matters. [¶] On **[*24]** that basis—I'm not commenting on what he said or why he wants to do this, but if I had any doubts about his competency, I would say. In terms of being able to understand the issues and the law, my discussion with him for the last period of time however long it's been since I've been his lawyer, he does have that ability, and he understands. He certainly understands the issues in the case, discussed the legal concepts with me at length. That—that's my only real comment."

The court continued the trial until Monday, and ordered Hanlon to produce the entire file to defendant over the weekend. The court concluded by assuring defendant that he had the right to represent himself.

On Monday, June 13, 2011, defendant acknowledged receipt of the files and still wanted to represent himself. Defendant then produced a list of requests to the court, including the need to procure counsel's "case law studies . . . from Westlaw," to confer with Hanlon's investigator, to have the court order the jail to allow him out of his cell for four or five hours a day, to receive a copy of the Evidence Code, and finally, he said he needed time to interview witnesses. Defendant said under current conditions, with **[*25]** only one to two hours a day out of his cell, he could be ready to proceed to trial "in four weeks, and this is like after we do voir dire . . . ." He indicated that if he could get out of the cell more, for four or five hours a day, he could be ready by June 28. The prosecution objected to the continuance.

The court reminded defendant he had earlier stated he would be able to go to trial without a continuance. In light of defendant's need for another continuance, the court noted its decision was "discretionary." It made a detailed ruling denying defendant's request, including that jury selection had already been underway for a month, in limine motions had been adjudicated, prior continuances had been granted to accommodate defendant's changes of counsel, and "most importantly," defendant would need "at least four weeks" to get ready to go to trial.

Retained Counsel's Request to Withdraw

Immediately after that ruling, Hanlon moved to withdraw as counsel. The court convened a closed hearing with Hanlon, Rief and defendant. Hanlon told the court defendant had threatened him and Rief, and they had concerns for their safety. Hanlon said he was afraid to sit at the counsel table with defendant **[*26]** because he might "get a pencil in [his] face." He also said he could no longer communicate with defendant and could not act competently as counsel because he no longer felt a sufficient commitment to his client. He said he had two letters he considered threatening, but he would not show them to the court based on attorney-client privilege.

The court noted this was a "discretionary" ruling and was "similar analysis" to the "[pro. per.] request." The judge looked at whether the withdrawal would "work an injustice in the handling of the case" or would "cause a delay," concluding that if counsel were to be relieved "it would cause a horrible injustice in the

handling of the case" and would "require an undue delay." The judge complimented Hanlon and Rief, saying they were "two of the most competent lawyers" to appear in her court, were always "thorough, . . . competent, . . . [and] ready to go," and had provided defendant with "excellent representation" so far.

Defendant denied any such threats were "imminent" or "dangerous." He said his letters to counsel were a product of his frustration and anger with being locked up "23 hours a day." He said he "like[d]" Hanlon and Rief and would not harm "people **[*27]** who he care[d] about."

Based on the timing and other factors it considered in denying the pro. per. request, the court also denied counsel's request to withdraw.

Counsel Expresses a Doubt as to Defendant's Competency

When the matter was reconvened in open court, Hanlon expressed doubt as to defendant's competence. The court declined to suspend criminal proceedings to hold a *section 1368* hearing based in part on the court's own discussions with defendant in the course of his *Faretta* motion and Hanlon's motion to withdraw, in part on Hanlon's contradictory statements about defendant's competency to represent himself, and based on the fact that Hanlon had represented defendant for nine months without expressing a doubt about his competency. The court noted that the expression of doubt came on the heels of the denial of Hanlon's motion to withdraw, and the "timing is suspicious." The next day Hanlon filed a declaration supplementing the factual basis for his doubt about defendant's competency, but the court again declined to initiate a competency hearing.

Opening statements were made on June 21, 2011. Evidence was taken from June 21 through July 6. The jury began deliberating on July 8 and returned its verdicts **[*28]** on the next court date, July 12.

Posttrial Proceedings

The court scheduled the sentencing hearing for August 16, 2011, taking into account Hanlon's scheduling conflicts that would prevent his availability from early September to October. On August 8, Hanlon filed "Defendant's Request to Relieve Present Counsel and Request for Appointment of New Counsel for Purposes of Sentencing and Motion for New Trial." In the motion, Hanlon stated that defendant wished to have new counsel appointed to pursue a new trial motion based on Hanlon's purported ineffective assistance at trial. Hanlon expressed his disagreement that he had rendered ineffective assistance. Hanlon also requested to withdraw for purposes of sentencing because of defendant's "lack of faith." The prosecution filed a written opposition.

At the commencement of the August 16 hearing, the trial court brought up the motion, and the parties agreed that a hearing out of the presence of the prosecutor was appropriate. At that hearing, the trial court asked defendant to explain why he believed Hanlon had been ineffective at trial. The reasons included most prominently Hanlon's raising a heat of passion defense in closing argument, which **[*29]** defendant believed was inconsistent with his testimony.

After hearing defendant's complaints, the trial court denied the motions, finding no evidence of ineffective assistance by Hanlon. In fact, the court believed Hanlon's representation had been

"excellent," and his handling of the inconsistent defenses was "sort of a brilliant argument."

Sentencing went forward on August 16, with defendant receiving a 35 to life prison sentence, consisting of a 25 to life sentence for the murder of D.K. with one consecutive year for the deadly weapon enhancement, the aggravated term of eight consecutive years for kidnapping, and one consecutive year for stalking. Sentences for the remaining crimes and enhancements were imposed, but stayed under *section 654*.

DISCUSSION

I. Issues Relating to Legal Representation at Trial

A. Motion to Discharge Retained Attorneys and Substitute in the Public Defender

When defendant made his first motion to discharge Hanlon and Rief and substitute in the public defender, jury selection was about to begin. Defendant explained his "trust issues" with counsel as follows: "I have letters written from them, like, you know, from their office saying like we're going to help you with this, **[*30]** and we're going to do whatever. And then I learn[ed] like two weeks before jury hardships that's not the case, that it's completely like, you know, it's like, you know, they're not going to do it whatsoever." Defendant said he wished he had learned "this" four months ago, instead of "now." Defendant concluded it "kind of raises an alarm in me—it alarms me what else are they not telling me and what else are they misleading me on."

In denying the substitution, the judge said, "Of course, I have to consider the defendant's request, which is that he have counsel of his choosing." Nevertheless, she noted that Hanlon and Rief were defendant's third set of attorneys, and they were "very competent, experienced, excellent lawyers." The court reminded defendant that the trial had been continued several times at his request, mostly to get new counsel ready. Further, the court again remarked that the case was two years old, motions in limine had been completed, the current date was the day set to hear juror hardships, and the court was only informed of defendant's request the previous day.

"We have 65 witnesses approximately under subpoena, 800 jurors have been summoned, a hundred of them for today, and **[*31]** they're upstairs. And I think that any further delay would result in a complete disruption of an orderly and just process. There's not another counsel here ready to go. The only way that Mr. Mitchell could have what he wants was if I discharged counsel, reset the case again, re-subpoenaed witnesses, re-summoned jurors, and then gave counsel additional time to prepare. And then if there's a discontent between that attorney and this defendant, I'm not sure where we would be. Seems that perhaps that's a common thread. In any event, it's the 11th hour. We've already proceeded with in limines, jurors are upstairs. I'm denying the request on balance pursuant to" *People v. Keshishian (2008) 162 Cal.App.4th 425, 75 Cal. Rptr. 3d 539* (*Keshishian*).

Both an indigent and a nonindigent criminal defendant have the right to discharge a retained attorney with or without cause. "A nonindigent defendant's right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion

if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]. . . . [T]he 'fair opportunity' to secure counsel of choice **[*32]** provided by the *Sixth Amendment* 'is necessarily [limited by] . . . the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."' The trial court, however, must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.]" (*People v. Ortiz (1990) 51 Cal.3d 975, 983-984, 275 Cal. Rptr. 191, 800 P.2d 547* (*Ortiz*).)

In the case of an untimely motion to discharge retained counsel, we apply the abuse of discretion standard on appeal. (See, e.g., *People v. Lara (2001) 86 Cal.App.4th 139, 153-155, 165-166, 103 Cal. Rptr. 2d 201*.) "A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Stewart (1985) 171 Cal.App.3d 59, 65, 215 Cal. Rptr. 716*.)

There is no question in the present case that denial of the May 10, 2011 motion was justified. In balancing defendant's request against the disruption of the trial process, the trial court was expressly guided by *Keshishian, supra, 162 Cal.App.4th 425*, which held: "Because the right **[*33]** to discharge retained counsel is broader than the right to discharge appointed counsel, a *Marsden*-type hearing[2] at which the court determines whether counsel is providing adequate representation or is tangled in irreconcilable differences with the defendant is '"[an] inappropriate vehicle in which to consider [the defendant's] complaints against his retained counsel."' [Citations.] Instead, under the applicable test for retained counsel, the court should 'balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution.' [Citation.]" (*Keshishian, supra, at p. 429*.) Indeed it has been recognized that a motion to substitute counsel may be denied as untimely, especially when made during jury selection. (*People v. Williamson (1985) 172 Cal.App.3d 737, 745, 218 Cal. Rptr. 550* [motion to substitute appointed counsel]; *People v. Molina (1977) 74 Cal.App.3d 544, 547-548, 141 Cal. Rptr. 533* [request for continuance to retain counsel in lieu of appointed counsel]; see also *People v. Turner (1992) 7 Cal.App.4th 913, 918-919, 9 Cal. Rptr. 2d 388* [denial of substitution on day of hearing on probation revocation where defendant represented by staff attorney at legal services clinic].)

More recently, in *People v. Maciel (2013) 57 Cal.4th 482, 160 Cal. Rptr. 3d 305, 304 P.3d 983* (*Maciel*), the Supreme Court encountered a multiple-defendant death penalty case in which the defendant, whose trial had been severed, sought to discharge retained counsel approximately six **[*34]** weeks before the case was called for trial. (*Id. at pp. 510-513*.) The trial court denied the motion and the Supreme Court affirmed: "We conclude that the trial court acted within its discretion in denying defendant's motion to discharge counsel. At the time the motion was made, the case had been

[2] *People v. Marsden (1970) 2 Cal.3d 118, 84 Cal. Rptr. 156, 465 P.2d 44*.

pending for two years. Trial was imminent and, in fact, began about six weeks later. Defendant had no substitute counsel in mind; rather, he requested that the court appoint counsel. New counsel would have had to study the records in each former codefendant's trial as well as in this case, resulting in significant delays. In evaluating timeliness, the trial court properly considered the long delay that would have resulted from changing counsel in this case." (*Id. at pp. 512-513*.)

Here, as in *Maciel*, the predictable disruption was great, as articulated by the trial court and quoted above. The case had already been pending for nearly two years. Jurors had been summoned and witnesses subpoenaed. Two important witnesses were elderly, the only eyewitness to the beating being 80 years old. It is undeniable that substituting in the public defender at that late date would have required a substantial delay. Denial of defendant's motion **[*35]** was directly tied to the delay and disruption that inevitably would have flowed from granting it. The court did not abuse its discretion. (See *People v. Turner, supra, 7 Cal.App.4th at pp. 915-916, 918-919* [court's denial of belated request to discharge counsel proper because the request was unduly disruptive to "witnesses and other participants"]; *People v. Lau (1986) 177 Cal.App.3d 473, 477-479, 223 Cal. Rptr. 48* [denial of substitution based on disagreement between counsel and client regarding defendant's guilt or innocence, though resulting in a loss of trust on the part of the client and anger on the part of the attorney, was justified by the lateness of the request].)

Defendant attempts to distinguish *Keshishian* because in that case the client had simply "lost confidence" in his attorneys. (*Keshishian, supra, 162 Cal.App.4th at p. 428*.) But we find defendant's complaint of "trust" issues to be very close on its facts. In *Keshishian*, as here, the defendant was charged with murder. As here, the defendant appeared with retained counsel on "the day the matter was called for trial." (*Id. at p. 427*.) Both cases had been pending for a long time: nearly two years in our case and two and a half years in *Keshishian*. (*Id. at p. 428*.) Previous continuances had been granted in both cases at the defense's request. (*Ibid*.) The Court of Appeal noted in *Keshishian* that "[a]n indefinite continuance **[*36]** would have been necessary, as [defendant] had neither identified nor retained new counsel." (*Id. at p. 429*.) True here also. And in both cases the courts held retained defense counsel in high regard, and both counsel appeared ready for trial. (Compare *Keshishian, supra, at p. 428* ["some of the best attorneys in all of Southern California"] with our case ["two of the most competent lawyers" to appear in her court].) "Witnesses whose appearances had already been scheduled would have been further inconvenienced by an indefinite delay." (*Id. at p. 429*.) So, too, here.

On these very similar facts *Keshishian* held: """The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel,'" and the court is within its discretion to deny a last-minute motion for continuance to secure new counsel." (*Keshishian, supra, 162 Cal.App.4th at p. 429*.) Under *Maciel* and *Keshishian*, we find there was no abuse of discretion in denying the substitution motion.

Defendant insists, however, he had an actual conflict of interest with Hanlon because he had a potential lawsuit against him, which he claims *required* the court to allow him to replace Hanlon with new counsel, citing *U.S. v. Moore (9th Cir. 1998) 159 F.3d 1154, 1158-1160*

(*Moore*). *Moore* involved a federal prosecution for conspiracy to distribute cocaine **[*37]** and possession for distribution. (*Id. at p. 1155*.) Moore wanted to put on a defense of withdrawal from the conspiracy, but his counsel disagreed. (*Id. at p. 1156*.) However, *Moore* differed from our case in that Moore's attorney failed to communicate to Moore a plea bargain offer until it was too late to respond. (*Id. at p. 1158*.) Moore, in response, threatened to sue him and reacted so badly that his attorney felt physically threatened. (*Id. at p. 1159*.) Moore's counsel moved to withdraw at Moore's request. (*Ibid*.) The Ninth Circuit concluded that defendant and his attorney had "no actual conflict because Moore's threat to sue [his attorney] for ineffective assistance was not inconsistent with [the attorney's] goal of rendering effective assistance." (*Id. at p. 1158*.)

Thus, *Moore* is not favorable to defendant's position on conflict of interest: "Although a lawsuit between defendant and counsel can potentially create an actual conflict of interest, we do not find that Moore's threat actually resulted in a conflict in this case. . . . Moore's threat of a malpractice suit never went beyond the threat to file a claim against [his attorney]. Despite Moore's assurances that he had a valid claim for malpractice, finding an actual conflict from a mere threat would **[*38]** allow defendants to manufacture a conflict in any case. We decline to adopt such an unbounded rule. While Moore's threat is evidence of the breakdown of the attorney-client relationship, we agree with the district court that it was insufficient to create an actual conflict of interest." (*Moore, supra, 159 F.3d at p. 1158*.)

The *Moore* court went on to find an irreconcilable breakdown between Moore and counsel, noting it is only "if the relationship between lawyer and client completely collapses" that the courts must be concerned about violation of the *Sixth Amendment* right to counsel. Having found a complete breakdown in the relationship, the court did not require a showing of prejudice. "A defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences results in the *complete denial* of counsel." (*Moore, supra, 159 F.3d at p. 1158*, italics added.) The factors considered by the court in assessing whether there was an irreconcilable conflict were: "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." (*Id. at pp. 1158-1159*.)

The extent of the conflict was more serious in *Moore*, where the court found the defendant had valid grievances against counsel, including failure to **[*39]** timely inform him of plea negotiations and failure to prepare for trial. (*Moore, supra, 159 F.3d at p. 1159*.) Here, by contrast, we see no likelihood that the difficulties in the relationship resulted from Hanlon's negligence or lack of preparation. The underlying dispute was essentially one of tactics. Defense counsel were not refusing to put on a defense that defendant wanted to assert, but rather were considering putting on an additional and alternative "defense" of mitigated culpability. There was never any claim that Hanlon was unprepared for trial or had blown his client's chance to get a favorable plea bargain.

Moore's attempts to substitute counsel were also more timely than defendant's. Moore brought the problems to the court's attention four times before trial, nearly a month before the trial was scheduled to begin and six weeks before it actually began. He raised the issue at the first opportunity following his explosive meeting with counsel in which he learned that

the plea bargain was no longer available. (*Moore, supra, 159 F.3d at pp. 1158-1159*.) Even Moore's final attempt to obtain substitute counsel was made two weeks before trial and was deemed timely. (*Id. at p. 1161*.) We also note that Moore's case had been pending for a far shorter time than the present **[*40]** case, there was no mention in *Moore* of any previous attempts by the defendant to change counsel (and the timing of events suggests there had been none), and the opinion does not disclose whether as lengthy a trial was required.

Moore was also backed up by his counsel throughout the substitution motions in affirming there had been a breakdown (*Moore, supra, 159 F.3d at pp. 1156, 1158, 1161)*, whereas Hanlon did not move to withdraw or bring the purported threats to the court's attention until more than a month after defendant's May 10 motion, when jury selection had been underway for more than a month. The Ninth Circuit in *Moore* found no continuance would have been necessary had the motion been granted when the attorney-client discord first was brought to its attention. (*Id. at p. 1161*.) The same is not true here.

In *Moore*, as here, the court learned more as time progressed, and by two weeks or more before trial actually commenced, the court in *Moore* was aware the attorney felt physically threatened by the defendant. (*Id. at pp. 1159-1160*.) In *Moore*, the Ninth Circuit held the district court largely to blame for the way the facts trickled in, finding the district court's initial inquiries to have been "minimal." (*Id. at p. 1160*.) We do not find the same defect in the proceedings **[*41]** below.

In our case, defendant mentioned primarily "trust issues" in his May 10, 2011 motion. Defendant seems to argue on appeal that there had been a complete and irreconcilable breakdown of the attorney-client relationship even as of May 10, claiming that view is supported by Hanlon's request to withdraw on June 13. But at the time of defendant's May 10 motion, defense counsel did *not* represent to the judge there was any desire by the attorneys to withdraw. Rief, who appeared with defendant that day, was invited to speak, but did not voice any comment at all. She did not, as defendant seems to contend, inform the court there had been an irreconcilable breakdown in the attorney-client relationship, nor did she inform the court of any threats. (*People v. Sanchez (1995) 12 Cal.4th 1, 37, 47 Cal. Rptr. 2d 843, 906 P.2d 1129* ["In reviewing denial of motion to substitute attorneys, the court 'focuses on the ruling itself and the record on which it is made. It does not look to subsequent matters . . . .'"].)

Defendant also cites cases involving counsel with conflicting loyalties due to representation of other clients involved in some manner in the defendant's case. *Leversen v. Superior Court (1983) 34 Cal.3d 530, 533-535, 538-540, 194 Cal. Rptr. 448, 668 P.2d 755*, in which defense counsel discovered at trial that his firm had formerly represented a trial witness **[*42]** and cosuspect in different proceedings, held counsel's motion to withdraw was improperly denied. In *Uhl v. Municipal Court (1974) 37 Cal.App.3d 526, 112 Cal. Rptr. 478*, the superior court ordered the municipal court to allow a public defender to withdraw as counsel based on an asserted conflict of interest with another of the office's clients in a different proceeding, without requiring the attorney to provide further details. Because the claim of a potential conflict was within the realm of "informed speculation," and because it would have violated the public defender's ethical duties to represent conflicting interests, the order was upheld on appeal. (*Id. at pp. 529,*

532, 535-536.) We cannot equate defendant's dispute with Hanlon over strategy with an actual conflict resulting from dual representation of clients with adverse interests. (Cf. Glasser v. United States (1942) 315 U.S. 60, 69-70, 62 S. Ct. 457, 86 L. Ed. 680 [attorney hired by one defendant in conspiracy trial appointed to simultaneously represent codefendant who had inconsistent interests].)

In U.S. v. Adelzo-Gonzalez (9th Cir. 2001) 268 F.3d 772, an irreparable breakdown had occurred where appointed counsel argued vigorously against a defendant's substitution motion, called defendant a "liar," and according to the defendant, threatened to testify against him at trial and to "sink him for 105 years." (Id. at pp. 778-779.) The Ninth Circuit found the extent of **[*43]** the conflict "prevented the attorney from providing adequate representation." (Id. at p. 781.) No such open antagonism was displayed in the present case. The case is both nonbinding and distinguishable.

Only in the most extreme circumstances have the courts found a breakdown in communication sufficient to establish a Sixth Amendment violation. (See, e.g., Frazer v. U.S. (9th Cir. 1994) 18 F.3d 778, 780 [appointed attorney called his client a "'stupid nigger son of a bitch,'" and said he hoped defendant would "'get life,'" and said if defendant continued "'to insist on going to trial,'" counsel would prove to be "'very ineffective'"]; United States v. Williams (9th Cir. 1979) 594 F.2d 1258, 1260 [where attorney-client relationship had for some time been "stormy," with "quarrels, bad language, threats, and counter-threats," court erred in summarily denying substitution motion made a month before trial].) In U.S. v. Nguyen (9th Cir. 2001) 262 F.3d 998, 1004-1005, it was primarily the district court's failure to conduct an adequate inquiry that led to the reversal of the defendant's conviction on grounds that a substitution motion had been improperly denied.

Additional cases cited by defendant are not helpful to his position. People v. Abilez (2007) 41 Cal.4th 472, 488, 61 Cal. Rptr. 3d 526, 161 P.3d 58, involved a *Marsden* motion by a defendant charged with sodomizing and murdering his mother. He claimed his attorney (1) was "overly concerned with convincing **[*44]** defendant to accept a plea bargain"; (2) "discussed the case with his (counsel's) teenage son"; (3) "was disrespectful and sarcastic"; and (4) "had not discussed the defense witnesses with him." (Id. at pp. 485-486.) The Supreme Court found no error in the court's denial of the motion because the defendant did not claim any lack of preparation by defense counsel, and counsel explained the other accusations. (Id. at pp. 486-490.) Likewise, Manfredi & Levine v. Superior Court (1998) 66 Cal.App.4th 1128, 78 Cal. Rptr. 2d 494 (*Manfredi*), involved an attorney's motion to withdraw due to an ethical conflict, while he refused to divulge any details about the conflict. The Court of Appeal upheld the trial court's denial of the motion. (Id. at pp. 1135-1136; see also People v. Horton (1995) 11 Cal.4th 1068, 1105-1107, 47 Cal. Rptr. 2d 516, 906 P.2d 478 [denial of counsel's motion to withdraw upheld on appeal where client had filed malpractice action against counsel, but dismissed it during jury selection and court concluded the lawsuit had no merit].) These cases do not advance defendant's cause.

Based on the foregoing authorities, we conclude the trial court's ruling on the first motion to substitute counsel was not an abuse of discretion.

B. Defendant's June 10, 2011 Request to Dismiss Counsel and Represent Himself

Next, on June 10, 2011, after the court and counsel had gone through a month of hardship challenges, **[*45]** defense counsel announced that defendant wished to dismiss counsel and proceed in pro. per. (*Faretta v. California (1975) 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562* (*Faretta*).) As detailed above, defendant said he did not like or trust defense counsel and insisted he would be ready to begin trial on the next court date (Tuesday, June 14). Hanlon supported defendant's motion, stressing that he had thoroughly discussed the law and facts with defendant and had no doubt as to his competence.

The trial court agreed that, despite the timing of the request, defendant had the near-absolute right to represent himself, absent a request for a continuance. However, when defendant returned to court the next Monday, he told the court he would need a month to prepare. The court considered the continuance request, among other factors, and denied the motion.

A *Faretta* motion may be denied if it is untimely. (*People v. Lynch (2010) 50 Cal.4th 693, 721-722, 114 Cal. Rptr. 3d 63, 237 P.3d 416* (*Lynch*); *People v. Windham (1977) 19 Cal.3d 121, 127-128, 137 Cal. Rptr. 8, 560 P.2d 1187* (*Windham*).) A *Faretta* motion brought on the "eve of trial" is untimely. (*Lynch, supra, at pp. 722-723*.) In assessing an untimely motion for self-representation, the trial court considers factors such as "'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, **[*46]** and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (*Id. at p. 722, fn. 10*, quoting *Windham, supra, at p. 128*.)

All of those grounds argued in favor of denying the motion. Defense counsel were prepared to go to trial and were known to the court to be excellent attorneys. With regard to the length and stage of the proceedings, the trial court recited that defendant had delayed his request to go pro. per. until opening statements were about to begin, the parties had sorted out hardship and cause challenges for "approximately 1000" potential jurors, "90 percent" of the in limine motions had been ruled on "several weeks ago," the case was two years old, and several continuances had already been granted at defense request, in part to allow defendant to change lawyers. But clearly, the court's biggest concern was the four-week continuance that defendant would have needed to prepare. The court did not abuse its discretion in denying defendant's belated *Faretta* motion.

C. Defense Counsel's Request to Withdraw on June 13, 2011

Immediately after the denial of defendant's *Faretta* motion, defense counsel moved to withdraw. The trial court convened a hearing out of the presence of the prosecutor **[*47]** to discuss the issues. After Hanlon explained his fears to the court, defendant addressed the court at some length and denied that any threats to Hanlon and Rief were "imminent" or "dangerous," claiming he "really liked" Hanlon and Rief, and did not want to hurt them. He said, "I do get angry sometimes. But it's not to the level or to the gravity or to the effect of like me actually carrying anything out or following anything through because I would never do anything to Mr. Hanlon. I would never do anything to Mrs. Rief because I care about

them." He said the letters should be seen as coming from "an upset client who is locked up in jail for 23 hours a day and has . . . no intention of . . . ever really hurting the people who he cares about."

The trial court denied Hanlon's motion. It noted that defendant's last counsel, Horngrad, "was removed for the same reason [Mr. Hanlon and Ms. Rief] are commenting upon. And it makes me wonder, . . . a defendant cannot excuse lawyers forever by issuing a threat, otherwise those people will never have a lawyer. And it happened once before. It appears to be happening again. I don't know if it's—I certainly don't know if it's something that is purposefully **[*48]** occurring in an attempt to have new counsel." The court applied the same factors that entered into its decision to deny the *Faretta* request.

Defendant argues that—at any stage of the proceedings—if "the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result," the defendant must be given new counsel. (*People v. Smith (1993) 6 Cal.4th 684, 696, 25 Cal. Rptr. 2d 122, 863 P.2d 192* (*Smith*).) We do not disagree, but the trial court is not required to "'rubber stamp' counsel's request to withdraw." (*Aceves v. Superior Court (1996) 51 Cal.App.4th 584, 592, 59 Cal. Rptr. 2d 280* (*Aceves*).) Defendant insists that we must find there was an irreconcilable conflict between him and Hanlon and Rief by June 13, 2011, based on the attorneys' fear of defendant's threats. But the trial court impliedly found otherwise and we see no basis for overturning that finding. (Cf. *People v. Verdugo (2010) 50 Cal.4th 263, 310, 113 Cal. Rptr. 3d 803, 236 P.3d 1035* [threats allegedly made against counsel by defendant's father were found not to be "serious and credible" by trial court, and refusal to discharge retained counsel and appoint counsel upheld on appeal]; *In re Z.N. (2009) 181 Cal. App. 4th 282, 289, 294, 104 Cal. Rptr. 3d 247* [threatening phone calls from client did not require granting a belated *Marsden* motion].)

Defendant cites *Aceves, supra, 51 Cal.App.4th 584*, an opinion issued over a strong dissent. The appellate court in *Aceves* issued a writ of mandate requiring **[*49]** the superior court to vacate its denial of counsel's motion to withdraw where a deputy public defender told the court, the conflict "(1) was confined to [the defendant] and the office of the public defender, (2) did not involve threats to witnesses or third parties, (3) did not relate to other cases, and (4) had resulted in a complete breakdown in the attorney-client relationship: it was as such a classic conflict where duty of loyalty to the client is compromised by the attorney's own interests." (*Id. at p. 592*.) The attorney further represented as an officer of the court he could say no more about the conflict "without violating the [attorney-client] privilege or breaching ethical duties," and the trial court did not doubt the attorney's representations. (*Ibid*.) But *Aceves* relied in part on the fact that the deputy himself did not make the final call as to whether a conflict existed; rather, the issue was reviewed through superiors in the public defender's office. (*Id. at pp. 594-595*.) Moreover, the trial court in *Aceves* expressly stated it did not doubt counsel's representations. (*Id. at p. 592*.) And counsel's representations included the opinion that it was unlikely there would be a conflict should new counsel appear on **[*50]** the defendant's behalf. (*Id. at p. 589*.)

Our case is different. The court here never stated that it believed Hanlon's description of

the seriousness of the threats, and it did express its concern that the same type of conflict had arisen before and might arise again if withdrawal were allowed. The risk of a "perpetual cycle of eleventh hour motions to withdraw" was one ground upon which *Manfredi, supra, 66 Cal.App.4th at page 1136*, distinguished and refused to follow *Aceves, supra, 51 Cal.App.4th 584*.

By the conclusion of the in camera hearing, the court had acquired enough information from Hanlon and from defendant to assess for itself whether an irremediable breakdown had occurred. In fact, it was evidently defendant's own statements reassuring the court that he meant Hanlon and Rief no harm that swayed the court to believe no grounds for withdrawal existed. In light of the conflicting reports of the nature of the threats, the trial court was free to resolve the credibility question, and we defer to such findings. (See *Smith, supra, 6 Cal.4th at p. 696* [in *Marsden* hearing, trial court may resolve credibility issues].) The court implicitly concluded, as proved to be true, the threats were the product of a heated disagreement about defense strategy, but did not amount to a risk of actual danger to Hanlon **[*51]** or Rief and did not truly threaten to result in ineffective assistance of counsel. The exchange of heated words does not necessarily reflect an irreconcilable conflict. (*Ibid.*; see also *Miller v. Blacketter (9th Cir. 2008) 525 F.3d 890, 897*.)

We refuse to find, as defendant urges us to do, that the court actually believed Hanlon was in true danger and yet sent him back into the courtroom with defendant without any protection, such that it affected counsel's ability to perform effectively at trial. Defendant acknowledges in his reply brief that shackling defendant would have been an alternative satisfactory resolution to the problem. Yet, Hanlon did not ask to have defendant shackled—and specifically rejected any such remedy—which casts doubt on how seriously he took the threats.[3]

Defendant points to nothing in the record suggesting Hanlon's performance as an advocate at trial actually was affected by the purported threats. From our review of the record, it appears he performed as a conscientious advocate for his client, cross-examining the prosecution's witnesses, **[*52]** putting on defense witnesses, making appropriate objections, and taking care that his client not be prejudiced before the jury (e.g., making sure D.K.'s mother was not allowed to make faces or otherwise react inappropriately while in the courtroom). Hanlon also mentioned talking to his client in jail, so it appears his fear did not prevent him from consulting with defendant during trial. In open court, outside the presence of the jury, Hanlon said he wanted to be in court with defendant at the end of each day when the jury was excused for the evening. These do not appear to be the reactions of a frightened man, nor have we detected anything in counsel's performance that shows he was less than a zealous advocate both before and at trial. Counsel ultimately did present the heat of passion mitigation argument he thought appropriate, despite defendant's opposition and despite the purported threats, both by requesting jury instructions and by arguing to the jury.

It is evident from the record that the court had great confidence in Hanlon's professionalism and his ability to conduct the best defense possible in these difficult circumstances, despite defendant's purported threats. The

[3] Before defendant testified, the court instructed Hanlon that defendant was not to be given any sticks or bats during the examination. Hanlon initially objected to that restriction.

record **[*53]** of the trial seems to bear out the judge's faith in this experienced attorney, who appears to have avoided any departure from prevailing norms of effective representation.

The court cited *Lempert v. Superior Court (2003) 112 Cal.App.4th 1161, 5 Cal. Rptr. 3d 700* (*Lempert) and Mandell v. Superior Court (1977) 67 Cal.App.3d 1, 136 Cal. Rptr. 354* (*Mandell*). While both of those cases reversed the trial court's denial of a motion to withdraw,[4] both held the decision lay in the sound discretion of the trial court, "having in mind whether such withdrawal might work an injustice in the handling of the case," and also whether the withdrawal would "cause undue delay in the proceeding." (*Lempert, supra, at p. 1173*; *Mandell, supra, at p. 4*.) These are precisely the considerations the trial court relied upon, finding that counsel's withdrawal "would cause a horrible injustice in the handling of the case," and would "require an undue delay."

The gist of defendant's complaint about Hanlon and Rief, as it ultimately emerged, was that he did not want them to present a defense or an argument based on any theory other than pure innocence. Although this was only spelled out for the court clearly after trial, we think the judge would have had a strong inkling that this was behind all of the representation issues based on what she could glean from conversations with defendant, Hanlon and Horngrad. But sharp disagreements as to strategy do not create an actual conflict, nor do they necessarily signify a complete breakdown in the attorney-client relationship. Similar complaints with counsel have frequently been rejected as a justification for a last minute substitution of counsel. (See *People v. Lau, supra, 177 Cal.App.3d at pp. 478-479* [retained counsel not substituted where defense counsel believed defendant was guilty and should enter a plea]; *Plumlee v. Masto (9th Cir. 2008) 512 F.3d 1204, 1211* ["Plumlee has cited no Supreme Court case—and we are not aware of any—that stands for the proposition that the *Sixth Amendment* is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust. **[*55]** Indeed, *Morris v. Slappy [(1983) 461 U.S. 1, 103 S. Ct. 1610, 75 L. Ed. 2d 610]* is to the contrary"].) The fact that defendant carried his disagreement with counsel to the point of making colorable, but nonserious threats does not change the outcome.

Fundamentally, "[i]t is well established that an attorney representing a criminal defendant has the power to control the court proceedings." (*People v. Floyd (1970) 1 Cal.3d 694, 704, 83 Cal. Rptr. 608, 464 P.2d 64*; accord, *People v. Moore (1983) 140 Cal.App.3d 508, 513-514, 189 Cal. Rptr. 487* [whether to request a mistrial in counsel's control]; *People v. Williams (1987) 194 Cal.App.3d 124, 130, 239 Cal. Rptr. 375*.) We reject defendant's claim that the foregoing rule applies only to appointed attorneys. Rather, the cases are unconditional in their statement that "[a] criminal accused has only two constitutional rights with respect to his legal representation, and they are mutually exclusive. He may choose to be represented by professional

[4] Specifically, those cases dealt with attorneys who sought to withdraw as counsel because their fees were not being paid. (*Lempert, supra, at pp. 1165-1166*; *Mandell, supra, 67 Cal.App.3d at p. 4*.) The attorney in *Lempert* told the court "it bordered on involuntary servitude . . . to mandate continued representation," and that he "could not afford to represent defendant through trial without compensation." (*Lempert, supra, at p. 1167*.) Because the attorney's livelihood was threatened in those cases, an actual financial conflict of interest existed that likely **[*54]** would have affected counsel's performance at trial.

counsel, or he may knowingly and intelligently elect to assume his own representation. [¶] . . . [¶] [¶] [W]hen the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics."[5] (*People v. Hamilton (1989) 48 Cal.3d 1142, 1162-1163, 259 Cal. Rptr. 701, 774 P.2d 730* (*Hamilton*); see also *People v. Jones (1991) 53 Cal.3d 1115, 1139, 282 Cal. Rptr. 465, 811 P.2d 757* [retained attorney].) Where, **[*56]** as here, the untimeliness of the request removed the absolute right to proceed in pro. per., defendant had no right to insist on his choice of legal strategy. (*Hamilton, supra, at p. 1163*.)

This case is similar to *People v. Welch (1999) 20 Cal.4th 701, 85 Cal. Rptr. 2d 203, 976 P.2d 754* (*Welch*), in which "defendant wanted a defense of actual innocence and mistaken identity, whereas counsel pursued the defense that defendant . . . lacked premeditation and deliberation." (*Id. at p. 728*.) "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. (See [*Hamilton, supra, 48 Cal.3d at p. 1162*].) Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.'" (*Id. at pp. 728-729*.) "A defendant who does not qualify under *Faretta* for self-representation does not have the right to dictate strategy **[*57]** to his counsel. (See *People v. Hamilton, supra, 48 Cal.3d at p. 1162*.)" (*Welch, supra, at p. 736*.)

Likewise, a "defendant may not force the substitution of counsel by his own conduct that manufactures a conflict." (*Smith, supra, 6 Cal.4th at p. 696*; see also *Miller v. Blacketter, supra, 525 F.3d at p. 897*.) A "trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel." (*People v. Myles (2012) 53 Cal.4th 1181, 1207, 139 Cal. Rptr. 3d 786, 274 P.3d 413*.) A defendant's "frequent repetitive attempts to replace" his attorney may reasonably suggest he has "made insufficient efforts to resolve his disagreements" with counsel, making "any breakdown in his relationship with counsel . . . attributable to his own attitude and refusal to cooperate."[6] (*Clark, supra, 52 Cal.4th at p. 913*.) The same was true here, as evidenced by defendant's replacement of two previous attorneys, seemingly on similar grounds.[7]

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[5] A criminal defendant does have limited specific rights to override counsel's decisions. For instance, a defendant undoubtedly has the right to insist on testifying, even if counsel disagrees. (*People v. Robles (1970) 2 Cal.3d 205, 215, 85 Cal. Rptr. 166, 466 P.2d 710*; see *Hamilton, supra, 48 Cal.3d at pp. 1162-1163* [listing a defendant's limited rights to overrule counsel].)

[6] Defendant attempts to distinguish *People v. Clark (2011) 52 Cal.4th 856, 131 Cal. Rptr. 3d 225, 261 P.3d 243* (*Clark*) on the basis that counsel in that case assured the court that she would "fight hard" for the defendant, whereas no such express assurance was given in this case. We find the distinction unpersuasive, as the court repeatedly recognized the excellent representation Hanlon had so far provided. The court impliedly found Hanlon would "fight" for defendant, despite their differences.

[7] Horngrad told **[*58]** the court that he and defendant disagreed about "strategies" and that defendant had threatened him if he failed to carry out defendant's preferred strategy. Defendant told the court he parted ways with Horngrad because Horngrad wanted him to take a 12-year plea bargain. He also complained about a lawyer, inferably Hallinan, who "told the papers that it's a crime of passion, when in reality I [told] him something completely different."

Defendant stresses Hanlon's statement on June 13, 2011 that "he and I no longer communicate. I feel sometimes we're talking at opposite universes or different universes." This statement conflicted with Hanlon's earlier statements that he and defendant had communicated thoroughly, including that Hanlon had read 500 to 1,000 pages of letters from defendant. We trust defendant could have communicated his thoughts about the defense in such abundant correspondence during the nine months Hanlon had represented him. Even if the lines of communication had recently broken down, Hanlon never claimed that his client had been so uncommunicative that Hanlon could not prepare a defense.

This record contains substantial evidence to support the court's implied finding **[*59]** that counsel had no reason to fear physical harm such that his performance at trial would be affected, and that defendant had no legally cognizable reason to disapprove of counsel's performance. Accordingly, no breakdown in the attorney-client relationship had occurred. The court acted within its discretion in denying counsel's motion to withdraw.

II. Ineffective Assistance of Counsel Before Trial and at Sentencing

Defendant next raises claims of ineffective assistance of trial counsel before trial, at trial, and at sentencing. First, he claims counsel failed to keep him promptly informed of the legal defenses to be raised at trial and this prevented him from hiring new counsel to take over the defense who would pursue only the identification defense. Second, he claims he was denied effective assistance of counsel based on Hanlon's "abandonment" of him at sentencing. We also perceive a third claim of ineffective assistance of counsel based on counsel's having argued a heat of passion defense without having presented medical evidence to support it.

A. The Law

A defendant claiming ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. (*Strickland v. Washington (1984) 466 U.S. 668, 687, 691-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (*Strickland* ***[*60]***).) The burden is on defendant to show, first, that trial counsel failed to act in a manner to be expected of reasonably competent attorneys. (*People v. Lewis (1990) 50 Cal.3d 262, 288, 266 Cal. Rptr. 834, 786 P.2d 892* (*Lewis*); *Strickland, supra, at p. 687*.) Where a defendant cannot make such a showing, including cases where the record is not clear, we will affirm. (*Lewis, supra, at p. 288*.) On the first prong, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland, supra, at p. 688*.) Under the second prong, he must show that in the absence of the error it is reasonably probable that a result more favorable to him would have been obtained. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id. at p. 694*.)

We further note that claims of ineffective assistance most often must be raised on a petition for writ of habeas corpus. Raising the issue on appeal is appropriate only if there was no conceivable legitimate basis for counsel's challenged conduct, or if he was asked for an explanation and failed to provide one. (*People v. Mai (2013) 57 Cal.4th 986, 1009, 161 Cal. Rptr. 3d 1, 305 P.3d 1175*; *Lewis, supra, 50 Cal.3d at p. 288*; *People v. Mendoza Tello*

(1997) 15 Cal.4th 264, 266-267, 62 Cal. Rptr. 2d 437, 933 P.2d 1134.) Here, defendant has chosen to rely on the appellate record which, as we shall discuss, is insufficient to entitle him to relief.

Finally, as discussed above, it is well settled that counsel **[*61]** retains decision-making power with respect to trial strategy. (E.g., *Hamilton, supra, 48 Cal.3d at p. 1163*.) We also must avoid second-guessing trial counsel in hindsight and must apply a "highly deferential" review to counsel's performance. (*Strickland, supra, 466 U.S. at p. 689*.)

B. Timing of Defense Counsel's Decision to Argue Heat of Passion

The record here does not clearly disclose when counsel made his decision to argue the lesser included offenses of second degree murder and voluntary manslaughter to the jury, nor does it establish what communication occurred about raising such issues. Defendant claims that Hanlon and Rief "agreed" when they were retained that they would *only* present a defense based on mistaken identity, and would forgo any argument based on heat of passion. We find it unlikely that competent counsel would ever agree to such an inflexible strategy and, in any case, find insufficient support in the record to justify relief on appeal. At the very least, such an argument would have to be raised by a petition for writ of habeas corpus to have even a colorable chance of success.

It is true, as defendant points out, that on January 20, 2011, Hanlon stated to the court that he intended to pursue the theory that "Mr. Mitchell did not commit **[*62]** this crime and that there were other people who did. [¶] That as a defense I will work with him on [it] and I believe him and we will go forward on that. [¶] . . . [¶] [¶] But the issue of heat of passion. So we're not going forward on that, we're going on the defense that Mr. Mitchell did not do this and he will testify." These statements were made in the context of a request for a continuance for further DNA testing on the baseball bat, in hopes that "we will find DNA of unknown persons on it," or perhaps some other individuals' fingerprints. Hanlon also said, "we believe further testing will support his defense that other people did this act," immediately adding that if the court would not allow such testing, "it would be very difficult to go forward, if we will become barred it becomes a more complex defense. [¶] So given the defense we're going to use these tests are mandatory."

These statements do not manifest a final decision—much less a binding commitment—to adhere to a particular trial strategy, and rather reflect that the investigation was ongoing. They also do not show what Hanlon and defendant had discussed about a heat of passion theory. Ultimately, the defense lab's DNA **[*63]** test results apparently provided no support for defendant's third party culpability defense. Understanding the strength of the evidence against defendant, naturally counsel would consider an alternative defense strategy.

Likewise, at the hearing on May 10, 2011, defendant's statement that "trust issues" had developed was too general to clarify what Hanlon had told defendant about using or not using a heat of passion defense or when that information was conveyed. From defendant's statement the most we can glean is that some significant discussion occurred "two weeks" earlier, presumably after the DNA test results came back from the lab.

Next, defendant points out that on May 25, 2011, counsel requested funds for a psychiatric

examination of defendant. The record of that hearing tends to show that counsel was still investigating and deliberating about which defenses to raise at trial. It provides no factual basis for defendant's claim that defense counsel withheld a final decision from him.

On June 21, 2011, defense counsel filed a request for jury instructions, including an instruction on heat of passion voluntary manslaughter (*CALCRIM No. 570*). The court ultimately did instruct the jury on that theory, **[*64]** as well as on provocation reducing a murder to second degree. This, we conclude, is the first objective sign in the record that Hanlon had decided to argue a heat of passion defense.

What emerges from the foregoing excerpts is the undeniable impression that Hanlon was wrestling through much of the pretrial period with the question of how to best present a defense for this difficult client. On this record, we cannot conclude that Hanlon willfully withheld important information or strategy decisions from defendant. Defendant has not carried his burden of showing that counsel made a decision earlier and withheld it from him until the very last minute, even assuming such conduct would be considered incompetent. Nor has he convinced us that counsel "agreed" in advance not to use a heat of passion argument.

As noted above, the choice of a defense was always Hanlon's. In *Jones, supra, 53 Cal.3d 1115*, the defendant was represented by retained counsel who "argued that because of defendant's mental state the jury should find him guilty only of the lesser included offense of voluntary manslaughter. . . . [Counsel made this argument] over the objection of defendant, who insisted on proclaiming his innocence . . . ." (*Id. at p. 1139*.) *Jones* ***[*65]*** rejected the defendant's assertion that presenting conflicting defenses is categorically incompetent. (*Id. at pp. 1138-1139*; see also *People v. McPeters (1992) 2 Cal.4th 1148, 1186-1187, 9 Cal. Rptr. 2d 834, 832 P.2d 146* [where counsel conceded facts contrary to defendant's testimony, the court ruled: "we cannot say counsel was constitutionally ineffective in his attempt to make the best of a bad situation"].)

Defendant tries to distinguish these authorities on the basis that the defendants in those cases claimed counsel was ineffective for presenting a particular defense at trial, whereas, he claims counsel's ineffectiveness occurred before trial when he failed to communicate his defense strategy to defendant in a timely way. Had he been informed earlier of counsel's intentions, defendant claims he could have simply hired another lawyer who would present his misidentification defense without a heat of passion argument.

Besides taking us outside the record, defendant's argument also rests on the implicit assumption that he could have found another competent attorney who would have actually allowed him to dictate which defense theories would be raised and which would not. Given that Horngrad and Hanlon both refused to be dominated in such a way by this client, it is unlikely he could have **[*66]** found another competent attorney willing to cede to defendant the role of "captain of the ship."

And even assuming Hanlon's conduct fell below professional standards, defendant has not satisfied the prejudice prong of *Strickland*. There is no reason whatsoever to think that a misidentification defense alone would have been more successful.

The evidence showing the falsity of defendant's testimony was overwhelming. The physical

evidence showed that defendant was present at the scene and touched the bat, leaving his fingerprint. Defense counsel's argument that the fingerprint could have been the result of a struggle over the bat was probably the best explanation available from a defense standpoint. But two prosecution experts agreed that the blood spatter on defendant's pant legs meant he was within five feet of D.K. when the blows were struck. This not only tended to incriminate defendant, but also belied his claim that he did not see anyone hitting the victim, and in fact did not see the victim at all when he came into her yard. Hanlon's suggestion that he was so "locked in" on his own fight that he did not realize D.K. was being bludgeoned to death less than five feet away—while perhaps **[*67]** the best available argument consistent with defendant's testimony—was a long stretch at best.

Moreover, the jury knew about defendant's previous domestic attacks on D.K., about D.K.'s having cut defendant off from her and the minor because of his drug use, and about the flurry of phone calls made by defendant to D.K. in the days before the attack. From the evidence it may be inferred that defendant began beating the victim on sight, while she still held her car keys in one hand and the minor in the other. Thus, a trial strategy based solely on defendant's testimony was doomed.

While Hanlon's heat of passion argument was also unsuccessful, he did manage to convince the jury that the prosecution had not proved defendant had formed the intent to kidnap the minor before he killed D.K., thus avoiding a life sentence without parole. And although a theory of heat of passion was unlikely to succeed due to lack of proof of provocation, we cannot fault Hanlon for attempting to argue a theory that could potentially have saved defendant years in prison. Defendant has not shown that Hanlon was ineffective before trial either in deciding to argue heat of passion or in failing to communicate his choice **[*68]** of defense strategy to defendant in a timely way.

C. Presentation of Heat of Passion Argument at Trial

Defendant also argues counsel was ineffective when he presented the lesser included offense theory only in closing argument, without calling experts or other witnesses to support it. Once again, defendant fails to carry his burden on the first prong of *Strickland*. To begin with, defendant fails to enlighten us as to what those experts would have established by their testimony or what other witnesses should have been called.

Hanlon's heat of passion theory was not altogether unsupported by the evidence. The jury had heard testimony about the coincidence of the anniversary of the death of defendant's father and the minor's birth, both falling on the day of the murder. There was evidence to show how distraught he was over his estrangement from D.K. and his inability to see the minor. Thus, there was some evidentiary basis for the subjective element of a crime of passion argument, which requires no medical testimony. (*People v. Steele (2002) 27 Cal.4th 1230, 1253, 120 Cal. Rptr. 2d 432, 47 P.3d 225* (*Steele*); *People v. Mercado (2013) 216 Cal.App.4th 67, 81-82, 156 Cal. Rptr. 3d 804* (*Mercado*).) A doctor's evaluation of defendant's mental state or psychological makeup would not have been necessary in presenting this aspect of the theory to the **[*69]** jury.

What was, in fact, missing was evidence on the objective prong of heat of passion analysis—

evidence of provocation. The heat of passion theory is ultimately judged by an objective standard of provocation such as would incite a reasonable person. (*Steele, supra, 27 Cal.4th at p. 1253*; *Mercado, supra, 216 Cal.App.4th at pp. 81-82*.) But defendant was the only person who could have provided such evidence (if it existed), and he insisted on sticking to his story about his confrontation with two other men.

When the court, while hearing defendant's motion for new counsel to present a motion for new trial, ordered Hanlon to explain why he decided to argue mitigation at trial, the following colloquy ensued: "MR. HANLON: Because I felt the jury—the evidence was overwhelming, and the only way to save him from life in prison was to make that argument, even though for reasons that I don't think I have to answer . . . your question, I didn't have witnesses to support that. But I felt that I had to. I felt Mr. Mitchell's view and the jury's read of his testimony would be correct. He thought they were behind him and thought he was innocent. I did not see it that way. I thought the evidence was overwhelming, as it was from the beginning, and I felt I had to do that to try **[*70]** to save him from life in prison without a chance of parole. That was my choice. [¶] Mr. Mitchell clearly expressed his desire that I not do it. I told him—I don't know when that conversation first came up, whether it was before the trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he's saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests. And I tried to make it, you know, it—it was a difficult situation, but, yes, there was a reason why I did it, and that's what it was."

Being appropriately deferential to counsel's tactical decisions, we cannot say Hanlon's reasoning was beyond the realm of competent lawyering. We conceive of counsel's argument on heat of passion not as a contradictory theory, but rather a backup argument, in recognition by counsel that the jurors would likely reject defendant's far-fetched testimony.

Nor can we say Hanlon's strategic decision proved to be prejudicial under the second prong of the *Strickland* test. Hanlon did not altogether abandon defendant's **[*71]** favored theory of defense. In fact, he spent most of his closing argument attempting to support the theory to which defendant had testified. The problem that defendant fails to come to grips with is that his testimony was wholly unbelievable in light of the other evidence, and the evidence of guilt was, in fact, overwhelming. Based on this record, counsel's argument on heat of passion clearly was aimed at making the best of a bad situation and cannot fairly be deemed either incompetent or prejudicial.

D. Sentencing Hearing

Defendant also argues defense counsel was incompetent at the sentencing hearing because he "abandoned" defendant and basically stood by as a "body," without making any argument on defendant's behalf. At the outset of the August 16, 2011 hearing set for sentencing, the court noted defendant had filed a written request to relieve Hanlon as his attorney for purposes of sentencing and filing a new trial motion.

At a closed hearing, counsel explained there were only two arguments he could make at sentencing. First, he could argue in line with defendant's testimony that defendant was innocent. Counsel rejected that course, saying

"[t]o argue to the court at sentencing he didn't **[*72]** do it, given the jury verdict, is meaningless." Counsel argued that the other possibility, to argue that defendant was guilty, but that his crime was mitigated "flies in the face of what he wants, and I—I made that decision once. I'm not going to do it again." "THE COURT: If we were to proceed to sentencing and thinking in that same vein, couldn't you then make the argument that you're talking to me about as far as concurrent versus consecutive sentences? [¶] MR. HANLON: I'm not prepared to do it again. I'm not prepared to fly in the face of what my client wants. It's his life. I've done my best for him, and I've done my best as an officer of the court. I'm not going to continue in that vein. It's contradictory to what I believe my job is. So, Mr. Mitchell makes this call. He clearly doesn't want me to—he doesn't want me to be his lawyer at sentencing. But if I am, I'm not going to argue against what he believes are the facts. I'm just not prepared to do it again regardless I—with all due respect regarding the order, you can't order me to argue. [¶] THE COURT: Sure. [¶] MR. HANLON: You know, so I would probably submit it and just let the prosecution put on their evidence, and Mr. Mitchell **[*73]** wants to make a statement, he can argue his own view of the evidence. I'm not going to argue at sentencing under these circumstances." Defendant, in fact, wished to replace Hanlon precisely for the reason that he wished his attorney *not* to state any facts contradicting his own profession of complete innocence.

Defendant's preferred argument did not go unexpressed at sentencing. Defendant spoke at length on his own behalf. The court appears to have listened attentively and allowed him to continue speaking even when the prosecutor objected to his calling D.K.'s mother "a drunk." He maintained his absolute innocence, but was also allowed to argue his complaints about counsel, his opinion of D.K.'s mother, and his view of the criminal justice system and the press.

And despite his arguments to the contrary, defendant was not deprived of counsel entirely at the hearing. We do not view Hanlon's presence at sentencing as being nothing more than a "body." Although Hanlon did not make a statement on defendant's behalf at sentencing, he was a legally-trained representative, fully familiar with the facts of the case, who had reviewed the probation report. We are confident, given counsel's otherwise **[*74]** vigorous representation, if the probation report had recommended an unauthorized sentence or had failed to take account of relevant sentencing factors, counsel would have pointed that out. Appellate counsel has specified no sentencing error. Defendant fails to show that Hanlon's assessment of the pros and cons of arguing at sentencing constituted ineffective assistance.

Hanlon could reasonably have believed arguing for a lesser sentence based on heat of passion or lack of planning would be pointless, or maybe even an affront to the court, given the jury's rejection of the lesser included offenses. Moreover, defendant perceived such arguments as tantamount to calling him a liar and arguing along those lines could have triggered an outburst from defendant that would have only made things worse for him. Counsel may also have perceived that the trial court would have been unreceptive to arguments based on psychological factors, as it had been when counsel made the *section 1368* request. Nor has defendant pointed to any helpful medical evidence that could have been presented.

We apply the usual *Strickland* standard of prejudice and see no reasonable likelihood that counsel's failure to argue at sentencing **[*75]** had a negative impact on the sentence imposed. Indeed, the court had limited sentencing discretion. The sentence for first degree murder is statutorily set at a minimum of 25 years to life. (*§ 190*.) To that extent, as the court noted, the sentence was "mandatory." Thus, the chief issues for decision by the court were whether to impose the aggravated term of eight years on the kidnapping count, as recommended by probation, and whether to impose the sentences concurrently or consecutively. Given the narrow issues at stake, there was little counsel could have done to influence the court's decision.

The probation report recommended an upper term on the kidnapping count. The identified factors in aggravation overwhelmingly outweighed the circumstances in mitigation, including the violence, viciousness, cruelty and callousness of the beating of D.K. with the minor in close proximity, the use of a deadly weapon, the vulnerability of the victim the minor, the planning and almost "military precision" with which the crime was carried out, and defendant's violation of the trust and confidence of his estranged girlfriend and the minor. With respect to defendant himself, the probation report noted defendant's **[*76]** violence and danger to society with reference not only to the current crimes, but to the fact that his siblings had previously obtained a restraining order against him, not to mention the history of domestic violence against D.K. (*Cal. Rules of Court, rule 4.421*.) His prior convictions were "just entering the level considered numerous," defendant was on probation when the crime was committed, and his performance on probation was, of course, unsatisfactory.

Only one factor in mitigation was identified and that was defendant's history of methamphetamine abuse, which the probation officer noted could have "permanently affected his mental health." (*Cal. Rules of Court, rule 4.423*.) However, the report concluded "little weight" should be given to this factor, as defendant was not under the influence of drugs at the time of the offense, and claimed that he had not used any controlled substances for a week prior to the instant offense. The court reviewed and considered the probation officer's analysis of this mitigating factor, but concluded that it did not significantly mitigate defendant's crimes.

Although Hanlon had at one point suggested that defendant did have a diagnosed mental health issue (which Hanlon believed was posttraumatic stress disorder, **[*77]** with possible bipolar features), the record sheds no light on whether such a diagnosis would have constituted helpful mitigation evidence. Significantly, defendant does not contend that counsel was ineffective for failing to develop medical evidence for presentation at sentencing or failing to argue existing medical evidence. (See section V, *post*.) In fact, he makes no suggestion about what Hanlon actually should have done at sentencing that he did not do.

The probation report also recommended the sentence on the kidnapping count be imposed consecutively to the 25 to life sentence for the murder because it involved a different victim from the murder. (*Cal. Rules of Court, rule 4.425*.) The report further recommended that the sentence on the stalking count also be imposed consecutively because it had occurred over a long period of time and had kept D.K. perpetually in fear. It did correctly recommend, however, that the sentences on counts two, four and five be stayed under *section 654*. The

report recommended an aggregate term of 35 years to life.

We see little that counsel could have done to advocate for a more favorable outcome. The reasons for imposing the aggravated terms and consecutive sentences were well articulated in the **[*78]** probation report and would have been difficult to refute. Given defendant's insistence that he was innocent of D.K.'s murder and had actually rescued the minor from being kidnapped by the men in the black and white shirts, remorse certainly could not have been argued to soften the court's view of the offenses. In sum, defendant has failed to meet his burden of showing any ineffectiveness in Hanlon's representation of him at the sentencing hearing, much less resulting prejudice.

III. Posttrial Motions Relating to New Counsel for Motion for New Trial and for Sentencing

A. New Counsel for a New Trial Motion and Sentencing

Defendant claims the court erred in denying his motion for new counsel to make a new trial motion, first, by applying the *Marsden* standard, requiring a showing of cause. He contends that because Hanlon was retained, not appointed, that standard was inappropriate. Second, he claims any delay in the proceedings that would have occurred by granting the motion would have been minimally disruptive and would have been outweighed by defendant's right to counsel of his choice, given the irreconcilable breakdown in the relationship between Hanlon and defendant.

In arguing the first **[*79]** point, defendant seizes on the trial court's brief reference to *Marsden* in deciding how to approach defendant's motion. At the outset of the proceedings on August 16, 2011, the trial court asked counsel whether they thought it appropriate to hold a hearing outside of the prosecutor's presence, "sort of in accordance with the *Marsden* case . . . ." The prosecutor agreed he should not be present at the hearing, "[j]ust like a *Marsden*." It is not clear from the remarks whether the court believed the substantive standards of *Marsden* would apply in such a hearing, or whether it simply intended to hold the hearing without the prosecutor. These remarks alone do not clearly establish whether counsel and the court understood this was not strictly a *Marsden* motion, given that Hanlon was retained counsel.

We do note that in opposition to the substitution request the prosecution had filed a written response arguing that a *Marsden*-type hearing was required and that substitution should be allowed only if defendant could show "failure to replace counsel would substantially impair the defendant's right to assistance of counsel based on either inadequate representation or an irreconcilable conflict between **[*80]** counsel and the defendant," citing *Marsden*. Defendant argues this standard was incorrect, citing cases such as *People v. Munoz (2006) 138 Cal.App.4th 860, 866-867, 41 Cal. Rptr. 3d 842* (*Munoz*) [requesting substitution for a new trial motion] and *People v. Lara, supra, 86 Cal.App.4th at page 155* [motion as trial commenced]. As we have discussed, a request to discharge retained counsel is not governed by the same standard as a motion to substitute appointed counsel. We agree with defendant that holding him to a *Marsden* substantive standard would not have been appropriate in the context of relieving

retained counsel, and we believe the prosecutor's response to defendant's posttrial substitution motion was misleading in that respect.

The question is whether the court actually followed the prosecutor's advice on this point, or whether it correctly judged the substitution motion by the standard set forth in *Keshishian, supra, 162 Cal.App.4th 425*, denying the motion because it would result in undue delay and disruption of the proceedings. We think the latter is more likely, or at least it cannot be ruled out.

The court held a closed hearing, allowing defendant to state at length the reasons why he believed Hanlon had been ineffective at trial and why new counsel should be appointed to pursue a new trial motion, which would have necessitated putting **[*81]** over the sentencing hearing. Defendant outlined his complaints, including Hanlon's arguing of the heat of passion defense in closing argument, Hanlon's failure to produce doctors or witnesses to support that defense, and Hanlon's purportedly waiting until the last minute to inform defendant he intended to argue the lesser included offenses (thereby preventing defendant from getting another attorney). Defendant also disputed Hanlon's interpretation of the evidence in statements to the jury.[8]

After hearing defendant's complaints, the trial court invited Hanlon to respond and he declined. The court asked him whether he could provide "good service" to defendant if sentencing went forward as scheduled that day. We have reviewed in section II.C., the colloquy that followed, with Hanlon telling **[*82]** the court he refused to argue that defendant did not commit the murder, given the jury's verdict, and also refused to argue mitigation because that argument "flies in the face of what [defendant] wants . . . ." Indeed, defendant made it clear he wanted to continue to assert his innocence at sentencing and would not accept Hanlon's advice that the jury's guilty verdicts had foreclosed those arguments. The court, too, tried to explain, "He can't argue to me right now that you didn't do it because the jurors found that you did. [¶] So, it's like we're past that point."

The court denied the motion, expressing its belief that Hanlon's handling of the inconsistent defenses was "the best argument . . . someone could make" on defendant's behalf, "sort of a brilliant argument because it gave jurors two reasons not to find you guilty of first degree murder." The court concluded, "I thought all of the attorneys in the case were excellent . . . your attorney included." The court denied the motion for new counsel and counsel's request to withdraw.

The judge offered to give defendant time to consult with Hanlon before the sentencing continued. Defendant responded, "I'm already suing him for malpractice, **[*83]** Your Honor. I have nothing to discuss with my lawyer." The court then asked whether defendant wanted to make his own statement at sentencing, and defendant responded that he would if the court was "going to take away [his] counsel." The court pointed out, "there's a very good attorney sitting right next to you," to which defendant responded by calling Hanlon "pathetic." The court then said it would deny the motion and would give defendant an opportunity to speak

[8] Specifically, defendant complained that although he testified he was hit in the back with a baseball bat during his confrontation with the men in the black and white shirts, Hanlon contradicted that testimony in his argument to the jury, saying, "Mr. Mitchell never said he got hit in the back with a bat." Defendant said he could "continue to count the ways" in which Hanlon had contradicted his testimony.

at sentencing, including giving him "a few minutes to think about if you want to say anything or if you want to talk to Mr. Hanlon . . . ."

The Attorney General insists that the trial court did not apply the wrong standard, noting that "the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties." (*People v. Mack (1986) 178 Cal.App.3d 1026, 1032, 224 Cal. Rptr. 208*; *Evid. Code § 664*.) The record certainly shows the court knew that attempts to replace retained counsel stood on a different footing from attempts to replace appointed counsel when the issue arose at the start of trial, having expressly cited *Keshishian, supra, 162 Cal.App.4th 425* at an earlier hearing. As discussed in section I.A. above, *Keshishian* held the discharge of retained counsel may be executed at any time, **[*84]** for any reason or no reason, provided the discharge does not result in "'disruption of the orderly processes of justice.'" (*Keshishian, supra, at p. 428*.) The question is whether, as defendant posits, the court failed to recognize the *Keshishian* standard was also correct in the posttrial context.

Given the trial court's demonstrated knowledge of *Keshishian, supra, 162 Cal.App.4th 425*, it may be that the court denied the posttrial motion to substitute because it believed, on balance, that the denial was necessary to avoid disruption of an orderly judicial process. The court did not expressly cite delay and disruption as the reasons for denying the motion, but if the denial was premised on such factors, we could not disturb that ruling as an abuse of discretion.

Here, the motion to substitute counsel was filed just eight days before the sentencing hearing was scheduled and was heard at the beginning of the sentencing hearing. Several witnesses had planned to and did attend the August 16, 2011 sentencing. Appointment of new counsel undoubtedly would have disrupted the proceedings, inconvenienced witnesses, and caused a substantial delay while transcripts were prepared and new counsel familiarized himself or herself with the case. We cannot believe, as **[*85]** defendant tries to convince us, that these factors were not taken into account by the court in ruling on the motion.

Of the cases cited by defendant, *Munoz, supra, 138 Cal.App.4th 860* is the closest to our facts. There, the defendant filed a posttrial motion to relieve retained counsel and have new counsel appointed for a motion for a new trial. The substitution motion was filed 40 days after he was convicted and nine days before the scheduled sentencing. (*Id. at p. 864*.) The court, as here, initially addressed the issue on the date set for sentencing. (*Ibid*.) It made it very clear, however, that it was applying a *Marsden* standard to the request, stating, "We're in a unique situation in that there is one set of rules when you are seeking substitution of counsel prior to a verdict and there is a different set of rules when you are seeking substitution of counsel after a verdict." (*Ibid*.) The trial court informed the defendant that he was not automatically entitled to a new attorney, and that he would have to show a conflict of interest or incompetent representation. (*Ibid*.) The court did not, however, rule on the motion on the date set for sentencing. Instead, it trailed the sentencing hearing for a week to give the defendant a **[*86]** further chance to express his complaints about counsel, which he did in a six-page letter. (*Id. at pp. 864-865*.)

When the hearing resumed a week later, retained counsel expressed the opinion that, because he was retained, the defendant could

discharge him "at any time on any quantum of proof . . . ." (*Munoz, supra, 138 Cal.App.4th at p. 865*.) The court responded: "'I believe that what you are suggesting is true prior to trial, or prior to a retrial. . . . [¶] I truly believe that this is a different setting. . . . [W]ere the rule to be that he could discharge you at this point, it would be an automatic situation where there would be a substantial delay in the administration of justice because any new lawyer who came in would only be competent if transcripts were prepared, the entire trial was reviewed, and then a decision was made about that. [¶] I do not believe that that is the state of the law that exists now, so if he had wished to discharge your services prior to trial, I agree with you. But just as if he wanted to discharge your services mid trial, I think it would be a discretionary call on my part and there would have to be a showing. The court believes that the same would occur now.'" (*Ibid*.) It then considered the defendant's request **[*87]** for new counsel under a *Marsden* standard and denied the request.[9]

Relying on *People v. Ortiz, supra, 51 Cal.3d at pages 982-987*, the Court of Appeal reversed the order denying appointment of new counsel and remanded the cause to allow defendant to discharge his retained attorney. (*Munoz, supra, 138 Cal.App.4th at pp. 866, 871*.) The court held that an automatic **[*88]** retrial was not required. Instead, "[o]nce new counsel is appointed, the case shall proceed anew from the point defendant originally sought to discharge his attorney." (*Id. at p. 871*.)

Defendant argues that the court in this case, as in *Munoz*, incorrectly applied a *Marsden* standard in ruling on defendant's motion. Defendant asks for the same remedy here, with new counsel being appointed to consider filing a new trial motion and, if no such motion were to be filed, to appear at resentencing on his behalf.

We find two significant points of distinction that persuade us such a remedy is unnecessary in this case. First, the prospect of delay and disruption in the proceedings in *Munoz* was much less obvious and less severe than in the present case. The crime there was a stabbing during an attempted carjacking that had required only a two-day trial, in which the key witness's testimony had been previously transcribed on a conditional examination. (*Munoz, supra, 138 Cal.App.4th at p. 868*.) Thus, very little time would have been required to allow newly appointed counsel to determine whether to file a motion for a new trial. (*Ibid*.) There was also no mention in *Munoz* that witnesses had appeared to speak at sentencing who would be inconvenienced by the **[*89]** delay. Delay and disruption of the orderly process of justice, therefore, constitutes a much stronger reason for denying the motion in this case than it did in *Munoz*.

Munoz itself observed: "Most trials will not be as easily reviewed as this one, so delay and public expense will often be the primary reasons for denying motions to replace counsel [posttrial]. The defendant must always be

[9] Similar to *Munoz, supra*, *138 Cal.App.4th 860, 41 Cal. Rptr. 3d 842*, *U.S. v. Rivera-Corona (9th Cir. 2010) 618 F.3d 976* (*Rivera-Corona*), vacated the trial court's denial of a motion to replace retained counsel with appointed counsel after defendant's guilty plea and before sentencing because the district court used the wrong standard—requiring "'a complete and utter breakdown' in the attorney-client relationship"—when it denied the defendant's motion. (*Rivera-Corona, supra, at p. 978*.) The defendant told the court he had entered his plea because counsel had demanded $5,000 more to take the case to trial and had threatened to "prosecute [his] family" if he could not pay, which "scared" him into entering a guilty plea. (*Ibid*.) The Ninth Circuit vacated the sentence and remanded the case to the district court, requiring it to "appoint counsel if Rivera-Corona is financially eligible, and make appropriate factual inquiries into Rivera-Corona's allegations concerning the circumstances underlying his guilty plea if there is a formal motion to set aside the plea." (*Id. at p. 983*.)

required to justify this additional expense to the satisfaction of the trial court, and such calls will always be within its broad discretion. Delay and public expense will militate for denial and we do not envision either a spate of such motions or a plethora of successful ones." (*Munoz, supra, 138 Cal.App.4th at p. 868*.)

The trial in the present case and its record were unusually lengthy and complex. It likely would have taken months to secure the transcripts and bring new counsel up to speed so that he or she could draft a new trial motion. If *Munoz* was at the low end of the spectrum of disruption, this case was certainly near the high end. "[D]elay and public expense" justified the court's ruling in this case. (*Munoz, supra, 138 Cal.App.4th at p. 869*.) Several witnesses had appeared to speak at defendant's sentencing. The Court of Appeal implicitly found that delay, disruption and **[*90]** public expense did *not* justify a denial of the defendant's motion in *Munoz*, whereas we find the opposite is true here.

The crime victim's family also had rights to a speedy resolution of the case that weighed heavily against a substitution of counsel on the day set for sentencing. *Article 1, section 28 of the California Constitution* provides in part: "(a) The People of the State of California find and declare all of the following: [¶] . . . [¶] [¶] (6) Victims of crime are entitled to finality in their criminal cases. [¶] . . . [¶] [¶] (b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: [¶] . . . [¶] [¶] (8) To be heard, upon request, at any proceeding, including any . . . sentencing. . . . [¶] (9) To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings."

A second distinction between this case and *Munoz* is that it was very clear that the court applied the wrong standard in *Munoz*, whereas the record in our case is more ambiguous. Arguably, the trial court understood and applied the proper standard, but inquired into defendant's dissatisfaction with Hanlon to determine whether an irreconcilable conflict existed **[*91]** that would justify relieving counsel *regardless* of the delay and disruption it would obviously entail. Read in that light, the court may have simply been assuring itself that it could safely deny the motion on grounds of delay and disruption without violating defendant's *Sixth Amendment* rights.

Once again, *Maciel, supra, 57 Cal.4th 482* is instructive, and we think dispositive. There, as here, the defendant argued that the court improperly applied a *Marsden* standard to a motion to discharge retained counsel and appoint counsel in his stead. (*Maciel, supra, at p. 513*.) There, as here, the defendant rested his argument on the fact that the court inquired into the defendant's dissatisfaction with counsel and also used the word "*Marsden*" in referring to the motion. (*Id. at pp. 513-514*.) The Supreme Court rejected his argument that the court had improperly held him to the *Marsden* standard of good cause, a more difficult standard to meet than should have been required under *Ortiz, supra, 51 Cal.3d 975*.

In upholding the trial court's ruling, *Maciel* said: "Contrary to defendant's assertion, the trial court did not deny the motion merely because defendant had failed to demonstrate that counsel was incompetent or had abandoned him or that there was an irreconcilable conflict between defendant and counsel. **[*92]** In evaluating whether a motion to discharge retained counsel is 'timely, i.e., if it will result in "disruption of the orderly processes of justice"' (*Ortiz, supra, 51 Cal.3d at p. 983*), the

trial court considers the totality of the circumstances (see *United States v. Gonzalez-Lopez [(2006)] 548 U.S. [140,] 152, 126 S. Ct. 2557, 165 L. Ed. 2d 409*; *Verdugo, supra, 50 Cal.4th at p. 311*). Although a defendant seeking to discharge his retained attorney is not *required* to demonstrate inadequate representation or an irreconcilable conflict, this does not mean that the trial court cannot properly consider the absence of such circumstances in deciding whether discharging counsel would result in disruption of the orderly processes of justice. Here, defendant raised numerous concerns about retained counsel in his declaration filed in support of the motion to discharge counsel, and the trial court did nothing improper in discussing those concerns with defendant at the hearing." (*Maciel, supra, 57 Cal.4th at pp. 513-514*.)

Defendant does not dispute that the court could properly have denied the motion based on delay and disruption alone, but contends the court did not expressly mention those factors in denying the motion and, therefore, must be found to have held him to the higher *Marsden* standard. We cannot accept defendant's argument. Although the judge never said expressly that granting the motion **[*93]** would disrupt the administration of justice, such a consideration was implicit in the circumstances. The motion was being heard on the date set for sentencing, with the probation officer in court, as well as family and friends of D.K. who had appeared to speak at sentencing. We will not entertain the unrealistic supposition that delay and disruption played no role in the judge's ruling. It is defendant's burden to show error on appeal (e.g., *People v. Green (1979) 95 Cal.App.3d 991, 1001, 157 Cal. Rptr. 520)*, and we are not convinced that the court improperly applied the *Marsden* standard.

B. Hanlon's Motion to Withdraw for Sentencing

With respect to the court's refusal to allow Hanlon to withdraw for purposes of sentencing, defendant's argument fares no better. We conclude the court was within its discretion in denying the motion, in part because defendant would have been prejudiced at sentencing if he had been forced to appear with no counsel at all. The court was faced with either allowing counsel to withdraw with no substitution, which would have violated his right to counsel at sentencing (*Gardner v. Florida (1977) 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393*; *Mempa v. Rhay (1967) 389 U.S. 128, 134, 137, 88 S. Ct. 254, 19 L. Ed. 2d 336)*, or else allowing the withdrawal, but continuing the sentencing hearing, resulting in the disruption of the proceedings that we have already concluded constituted **[*94]** reason enough for denying defendant's substitution motion. The court did not abuse its discretion in denying counsel's request to withdraw. (*People v. Sanchez, supra, 12 Cal.4th at p. 37*; *Manfredi, supra, 66 Cal.App.4th 1128, 1133*.)

IV. The Court's Refusal to Order a *Section 1368* Evaluation

A. Factual Background

As discussed above, Hanlon unsuccessfully moved to withdraw as counsel on June 13, 2011. Only upon the denial of the motion to withdraw did he for the first time raise a doubt as to defendant's competence under *section 1368*. And only the next day did Hanlon produce his declaration claiming he had harbored longstanding doubts as to defendant's

competence. That declaration of course flatly contradicted Hanlon's statement to the court just a few days earlier that he had no doubts about defendant's competence in the context of defendant's *Faretta* motion.

Hanlon argued that his declaration of a doubt as to the defendant's competency was based on his inability to communicate with defendant "in any meaningful way," as well as defendant's "inability to communicate" with him. Hanlon told the court, "there are things that are approaching delusional comments . . . ." The court noted it had spoken at length to defendant that day at the closed hearing, as well as the preceding Friday, and found him **[*95]** fully able to communicate. The court found defendant "to be competent," and to have "the ability to communicate with counsel if he chooses to do so." Hanlon said, based on his greater familiarity with defendant, he believed "things are going on in [defendant's] head that are not real." He felt he had watched a "breakdown occur" with "delusional things" becoming more and more common.

The court noted that in nine months Hanlon had been representing defendant he had never previously stated a doubt about defendant's competence. In fact, the previous week, when defendant requested to represent himself, Hanlon "made a record indicating [he] felt he was competent to do so." The court noted Hanlon expressed a doubt about defendant's competency only after his motion to withdraw had been denied, and "the timing is suspicious." The court concluded, "[t]here's not a doubt in my mind as it relates to the competency of the defendant. So I'm not going to suspend criminal proceedings."

The following day Hanlon filed a declaration under seal providing more details to support his doubt about defendant's competency, in which he stated that he had sought the advice of two forensic psychiatrists, but neither would **[*96]** express an opinion without interviewing defendant, who refused to be interviewed. Hanlon claimed he had not pushed the issue earlier so as to avoid causing a "total and irreversible breakdown of the attorney-client relationship." When he told the court on Friday, June 10, 2011, that defendant was competent, he did so despite "grave doubts as to his competency to communicate in a meaningful way with me." Hanlon conceded he had made a "mistake" in vouching for defendant's competency, and that "my judgment may have been effected [*sic*] by the recent threats of violence he had made against me, the breakdown of our attorney-client relationship, and my knowledge that I felt I could no longer continue in my representation of him." In recent weeks, defendant had become resistant to talking about the facts of the case, becoming agitated and angry when Hanlon pressed him on facts of his defense.

Hanlon declared that prosecution and defense interviews with family members and others showed defendant had a long history of psychological problems, learning disabilities, and bizarre behavior, and that his delusional thinking had existed since childhood. Hanlon said a psychiatrist retained by Hallinan **[*97]** had diagnosed defendant with "a recognizable mental illness that included delusional ideation."

The declaration listed several statements made by defendant that Hanlon believed were delusional because, after investigation, he concluded they were untrue. These included defendant's claim he had been visited in jail by famous people, had been part of a secret military force, had had sexual relations with well-known women, had been a bodyguard for

a famous musician and had been shot while protecting him. It is difficult to tell from Hanlon's declaration whether all of these statements had been investigated and found to be untrue. We note that because defendant was a member of a well-known family in the world of adult entertainment, his claims of consorting with well-known people cannot be rejected as delusional quite as readily as they might be in some other cases.[10]

After reviewing Hanlon's declaration, the court noted in particular that after defendant made his *Faretta* motion and had been given his attorneys' files over the weekend, he came into court and made a "very rational," "very reasonable," "very intelligent" and "very coherent" presentation to the court about the materials he had reviewed and his reasons for and estimate of needing more time to prepare. He was also able to explain at the in camera hearing on Hanlon's motion to withdraw both his own emotional state and his communications with his attorneys, as well as describing his stresses in jail and his defense strategy in a manner the court described as "coherent and reasonable." The court stressed that it found defendant's discussion during the hearing to be "[v]ery reasonable, very intelligent, and very thoughtful." The court acknowledged that defendant and his attorneys "have some disagreements," "[b]ut I . . . don't think that that makes Mr. Mitchell incompetent." The court again noted that it considered the timing of the motion "a little suspect," and felt "very strongly" there was "not substantial evidence . . . that would suggest that Mr. Mitchell is incompetent." It, **[*99]** therefore, denied the renewed motion. Under settled law, that ruling was within the court's discretion.

B. The Law

"A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence. . . . [¶] If a defendant presents substantial evidence of his lack of competence and is unable to assist counsel in the conduct of a defense in a rational manner during the legal proceedings, the court must stop the proceedings and order a hearing on the competence issue. [(*Pate* [*v. Robinson* (1966) 383] U.S. [375,] 384-386.)] [Citation.] In this context, substantial evidence means evidence that raises a reasonable doubt about the defendant's ability to stand trial. [Citation.] The substantiality of the evidence is determined when the competence issue arises at any point in the proceedings. [Citation.] The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard." (*People v. Ramos (2004) 34 Cal.4th 494, 507, 21 Cal. Rptr. 3d 575, 101 P.3d 478* (*Ramos*).)

"Substantial evidence of incompetence may arise from separate sources, including the defendant's own behavior. For example, if a psychiatrist or psychologist 'who has had sufficient opportunity to examine the accused, states under oath with particularity **[*100]** that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied.' [Citation.] If a

[10] Defendant is the son of one of the Mitchell Brothers, rather well-known producers of pornography. Defendant himself had worked at the O'Farrell Theater in San Francisco, a family-owned business, which he described as a "strip club." It is, therefore, not inconceivable that defendant would have known "famous" people or slept with **[*98]** "well-known" women.

defendant presents merely 'a litany of facts, none of which actually related to his competence at the time of sentencing to understand the nature of that proceeding or to rationally assist his counsel at that proceeding,' the evidence will be inadequate to support holding a competency hearing. [Citation.] In other words, a defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*Ramos, supra, 34 Cal.4th at pp. 507-508*.)

"When the evidence casting doubt on an accused's present competence is less than substantial, the following rules govern the application of *section 1368*. It is within the discretion of the trial judge whether to order a competence hearing. When the trial court's declaration of a doubt is discretionary, it is clear that 'more is required to raise a doubt than **[*101]** mere bizarre actions . . . or bizarre statements . . . or statements of defense counsel that defendant is incapable of cooperating in his defense . . . or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense . . . ." (*Welch, supra, 20 Cal.4th at p. 742*.)

C. Analysis

The reliability of Hanlon's assertion of a doubt as to defendant's competency was severely undercut by words from Hanlon's own mouth just days earlier. In order to credibly assert a doubt about his client's competence, Hanlon had to account for the fact that on the preceding Friday, he told the court he had no doubt whatsoever as to defendant's competency, and by June 14, 2011, he claimed to have had a doubt of long standing.

Despite Hanlon's efforts to distance himself from his earlier comments, the court was not obligated to accept his explanations and could, based on its own observation of defendant, place more credence in counsel's initial expression of confidence in defendant's competence. Accordingly, the court, in its reasoned discretion, was justified in finding Hanlon's declaration was not substantial evidence of defendant's **[*102]** incompetence. *Ramos* made clear that a defendant's demeanor during court appearances could be used in determining competency. "Although a court may not rely *solely* on its observations of a defendant in the courtroom *if there is substantial evidence of incompetence*, the court's observations and objective opinion do become important when no substantial evidence exists that the defendant is less than competent to plead guilty or stand trial. [Citation.] When a defendant has not presented substantial evidence to indicate he was incompetent, and the court's declaration of a doubt is therefore discretionary, its brief reference to the defendant's demeanor is not error." (*Ramos, supra, 34 Cal.4th at p. 509*, italics added; see also *People v. Rogers (2006) 39 Cal.4th 826, 849-850, 48 Cal. Rptr. 3d 1, 141 P.3d 135* ["psychiatric testimony . . . with little reference to defendant's ability to assist in his own defense" not sufficient]; *People v. Blair (2005) 36 Cal.4th 686, 714, 31 Cal. Rptr. 3d 485, 115 P.3d 1145* [preexisting mental condition not sufficient].)

Thus, Hanlon's assertion that defendant had a "long history . . . of psychological problems . . . and bizarre behavior" did not amount to substantial evidence that he was incompetent to go to trial. Defendant's purported past mental

problems were remote in time, did not come in the form of expert opinions, and were insufficiently **[*103]** connected to defendant's current health status and ability to assist in his defense at trial.

Likewise, Hanlon's litany of facts purportedly leading to a conclusion of incompetency (such as delusional statements) did not relate those facts to an inability to aid in his own defense. Although defendant might have been uncooperative in executing Hanlon's strategy, there is no reason to believe his behavior was due to mental problems rather than sheer stubborn insistence on his innocence. The court was within its discretion in declining to convene competency proceedings, bolstered by its lengthy and detailed colloquies with defendant before trial.

"[A]n uncooperative attitude is not, in and of itself, substantial evidence of incompetence." (*People v. Mai, supra, 57 Cal.4th at p. 1034*.) And "although a defense counsel's opinion that his client is incompetent is entitled to some weight, such an opinion alone does not compel the trial court to hold a competency hearing unless the court itself has expressed a doubt as to the defendant's competence. [Citation.] Here, the trial court entertained no such doubt. [¶] . . . [¶] [¶] Defendant further faults the trial court for concluding defendant's unwillingness to cooperate with his counsel did **[*104]** not equate with an inability to assist counsel. But we have recognized a similar distinction. [Citation.] If there is testimony from a qualified expert that, because of a mental disorder, a defendant truly lacks the ability to cooperate with counsel, a competency hearing is required. [Citation.] Here, however, there was no substantial evidence that defendant's lack of cooperation stemmed from *inability* rather than *unwillingness*, and the trial court's comments suggest that it found defendant's problem to be of the latter type rather than the former. In these circumstances, no competency hearing was required." (*People v. Lewis (2008) 43 Cal.4th 415, 525-526, 75 Cal. Rptr. 3d 588, 181 P.3d 947*, italics added; see also *Welch, supra, 20 Cal.4th at p. 742* [defendant's disagreement with counsel about "which defense to employ," even when accompanied by "paranoid distrust" of the legal system and his lawyer, did not require competency hearing].) The court in our case came expressly to the same conclusion. The trial court acted within its discretion in determining Hanlon's evidence of defendant's incompetence was insubstantial and declining to order a hearing under *section 1368*.

V. Refusal to Grant Counsel's Request for Funds for Psychological Expert

A. Factual Background

On May 25, 2011, during jury selection, defense **[*105]** counsel requested an ex parte hearing with the judge without his client's presence, during which he reviewed with the court the history of his representation of defendant. Counsel reported that defendant flatly refused counsel's repeated advice that they should pursue a psychological defense. Counsel said there were past psychological reports, and reports from family and friends, that defendant may have had some past psychological issues. He pointed out the bizarre coincidence that defendant's father had killed his brother (defendant's uncle) on July 12, 1991. Defendant's father had died on July 12, 2007. Defendant's minor child was born on July 12, and the murder of D.K. occurred on July 12, 2009. Hanlon thought this pointed to a

"perfect storm" of psychological stressors that could have triggered the crime.

Hanlon believed he needed to investigate such a defense, but because defendant would not cooperate with an examination, the psychological expert could only review defendant's medical records and watch him testify. If "that doctor came to the conclusion that he did suffer from a disease that affected either his ability to testify, or in fact, what happened," the defense "would call **[*106]** that person." Counsel estimated that such an expert would charge $300 to $500 per hour, and would cost $20,000 to $30,000.

The court carefully considered counsel's request, noting "the Court has already provided funds for Mr. Mitchell's defense, and for the defense he wants." Counsel conceded that the trial court had been "generous" in funding the defense investigation. As for a psychiatrist who would merely watch defendant testify, the court said: "I don't even know if that would necessarily be admissible evidence, which is something I think I need to consider, especially since it's a large amount of money that is being requested." Of course, the court pointed out that the request was on the eve of trial, which would cause a problem of notice to the prosecution. But the court said, "the most important thing" was that defendant's due process rights be guarded. The court concluded it would not be prudent to give counsel "such an exorbitant amount of money for a conflicting defense that might not come into play in any event."

However, the court did not entirely deny counsel's request. Instead, if counsel thought "a psychiatrist or psychologist could review any prior medical records and **[*107]** enter an opinion that you're wanting, with a dollar figure of [$2,000]"; Hanlon was encouraged to "look into that" and to "ask me again" if the expert's initial work seemed to call for further investigation. "If you don't think that's going to be enough money for you to look into this alternative defense, then I decline to provide additional funds." Defendant points to no further discussion of the topic, nor are we aware of any.

B. The Law

"An indigent defendant has a statutory and constitutional right to ancillary services reasonably necessary to prepare a defense. (*§ 987.9, subd. (a)*; [*Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319-320, 204 Cal. Rptr. 165, 682 P.2d 360]*.) The defendant has the burden of demonstrating the need for the requested services. [Citation.] The trial court should view a motion for assistance with considerable liberality, but it should also order the requested services only upon a showing they are reasonably necessary. . . . On appeal, a trial court's order on a motion for ancillary services is reviewed for abuse of discretion." (*People v. Guerra (2006) 37 Cal.4th 1067, 1085, 40 Cal. Rptr. 3d 118, 129 P.3d 321*; see also *People v. Gonzales and Soliz (2011) 52 Cal.4th 254, 286, 128 Cal. Rptr. 3d 417, 256 P.3d 543* [where "defendant failed to carry his burden to show that additional funding was reasonably necessary, . . . the trial court properly exercised its discretion to deny the motion"]; *People v. Beardslee (1991) 53 Cal.3d 68, 100, 279 Cal. Rptr. 276, 806 P.2d 1311* [defendant "had the burden of showing that **[*108]** the investigative services were reasonably necessary by reference to the general lines of inquiry he wished to pursue, being as specific as possible. [Citation.] Although a motion for assistance should be viewed with considerable liberality . . . , on appeal the trial court's order is presumed

correct. Error must be affirmatively shown"].)

C. Analysis

We think it is significant that the trial court did not deny defendant's request outright, but rather conditionally granted counsel a disbursement of $2,000 to look into the psychological defense. The trial court acted reasonably and within its discretion in authorizing a smaller amount for a preliminary investigation. Counsel's preferred psychiatrist would have charged $300 to $500 per hour, and he said he needed $20,000 to $30,000 in total. Mathematically, this suggests he was estimating 40 to 100 hours of expert psychiatric work, which inferably included the time the psychiatrist would have spent in court observing defendant's testimony and demeanor. Hanlon made no record below why, perhaps at a more modest hourly rate, he could not have secured the services of a competent psychologist or psychiatrist to conduct a preliminary review **[*109]** of defendant's medical records in far less time and for far less money.[11]

In fact, there is no indication in the record that defense counsel actually requested the $2,000 offered by the court. Defendant, therefore, arguably forfeited the claim he now raises. (Cf. *People v. Ervin (2000) 22 Cal.4th 48, 68, 91 Cal. Rptr. 2d 623, 990 P.2d 506* [where circumstances changed, failure to renew severance motion forfeited issue on appeal]; *People v. Davenport (1995) 11 Cal.4th 1171, 1195, 47 Cal. Rptr. 2d 800, 906 P.2d 1068* [same, motion challenging jury composition].)

Finally, as to prejudice, defendant makes no reasonable argument that his trial was rendered unfair or that he otherwise suffered prejudice because of the failure of the trial court to offer more than the preliminary $2,000. (See *People v. Guerra, supra, 37 Cal.4th at p. 1086*.) Defendant has failed to identify any mental defect or disease that he was suffering from, to explain the effect any such psychological problem had on his mental state at the time of the murder, or to make any showing or even any argument as to what a psychologist or psychiatrist would have reported if funds had been granted. Given defendant's resistance, it was not reasonably likely that counsel **[*110]** would have put on any actual evidence of a psychological defense. And though defendant seems to believe medical testimony was necessary to support a heat of passion defense, that clearly is not the case. As discussed above, psychological evidence could have contributed to the subjective element of heat of passion (for which there was already evidence), but would have been irrelevant to the objective element. (*Steele, supra, 27 Cal.4th at p. 1253*; *Mercado, supra, 216 Cal.App.4th at pp. 81-82*.) Moreover, as discussed above, the evidence of guilt was overwhelming. Consequently, defendant has not shown that the trial court's ruling on his request for $20,000 to $30,000 had any negative effect on his defense.

VI. Sufficiency of Evidence of Child Endangerment

Defendant next challenges the sufficiency of the evidence for the jury's verdict on count five, felony child endangerment under *section 273a, subdivision (a)*. The standard of review is the familiar substantial evidence standard. "Substantial evidence is 'evidence which is reasonable, credible, and of solid value.'"

[11] An indigent defendant does not have a constitutional right to choose a psychiatrist "of his personal liking," but rather, only has a right to a "competent psychiatrist." (*Ake v. Oklahoma (1985) 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53*.)

(*People v. Morales (2008) 168 Cal.App.4th 1075, 1083-1084, 85 Cal. Rptr. 3d 873* (*Morales*).) The question is whether any reasonable trier of fact could have found defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia (1979) 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560*.)

Defendant argues that the evidence was insufficient to prove the child endangerment charge because **[*111]** he took good care of the minor, and that he did not expose her to conditions likely to cause her great bodily harm. Defendant argues that he first assumed custody of the minor when he grabbed her from the man in the black T-shirt. He then carried her to his car. He cites Nick's testimony that he took "good care of the [minor]" when he placed the minor in his car. He claims from that point forward there was no evidence that he placed the minor in danger.

But in making this argument, defendant analogizes to kidnapping cases and other cases in which the defendant had no clear legal duty to care for the child. "*Section 273a* does not require that a defendant be related to a child. . . . '[T]he relevant question in a situation involving an individual *who does not otherwise have a duty imposed by law* or formalized agreement to care for a child (*as in the case of parents* or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all.'" (*Morales, supra, 168 Cal.App.4th at pp. 1083-1084*, italics added, fn. omitted [defendant kidnapper assumed caregiving responsibilities when he kidnapped victim and endangered her by taking her as a passenger in his speeding car]; see also *People v. Perez (2008) 164 Cal.App.4th 1462, 1471, 80 Cal. Rptr. 3d 500* [defendant properly convicted **[*112]** under *§ 273a* for having heroin and heroin-filled syringe in home he shared with his sister, whose granddaughter sometimes stayed there while defendant was the only awake adult in the home]; *People v. Malfavon (2002) 102 Cal.App.4th 727, 731, 734, 737, 125 Cal. Rptr. 2d 618* [defendant shook to death his girlfriend's seven-month-old baby while left to watch her briefly]; *People v. Culuko (2000) 78 Cal.App.4th 307, 313, 335, 92 Cal. Rptr. 2d 789* [man who had lived with baby's mother for two months properly convicted, along with mother, under *§ 273a*, where baby died from being punched in the stomach and showed signs of past abuse]; *People v. Cochran (1998) 62 Cal.App.4th 826, 833, 73 Cal. Rptr. 2d 257* [defendant's conviction sustained where he allowed child to live in his house and acted as "surrogate father"].) Before he ever took the minor from her mother, defendant had a preexisting fundamental legal duty of care as the minor's father.[12] Hence, we find his cases inapposite.

As the prosecutor argued, it could be inferred from the evidence that D.K. held the minor in her arms when the attack began. Thus, the minor was endangered in various ways: the minor could have been dropped by D.K., D.K. could have fallen on top of the minor, and of course, the minor could have been hit by the

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[12] "[P]arents have a duty 'to exercise reasonable care, supervision, protection, and control over their minor child[ren].' (*§ 272, subd. (a)(2)*.)" (*People v. Swanson-Birabent (2003) 114 Cal.App.4th 733, 746, 7 Cal. Rptr. 3d 744*.) "'It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation.'" (*Lipscomb By And Through DeFehr v. Simmons (9th Cir. 1992) 962 F.2d 1374, 1386, fn. 2*; *Williams v. Garcetti (1993) 5 Cal.4th 561, 570, 20 Cal. Rptr. 2d 341, 853 P.2d 507* [parents' legal responsibilities for care and protection of their **[*113]** children are well established and defined]; *People v. Burden (1977) 72 Cal.App.3d 603, 606, 615-616, 618-621, 140 Cal. Rptr. 282* [death of baby by starvation was murder because defendant father had common law duty to care for him].)

baseball bat. That the minor was spattered with D.K.'s blood gave rise to a legitimate inference that the minor had been close to D.K. during the attack and, therefore, in danger. In fact, the prosecutor's theory was that the minor was actually trapped under D.K.'s body as defendant beat D.K. to death.[13]

Moreover, there can be no doubt that once defendant took the minor away in his car he had assumed care and custody of her. Rather **[*114]** than taking appropriate precaution, defendant put her in the front seat of his car and drove at highway speeds with the minor protected, at most, with an adult seat belt. A patrol officer from the Citrus Heights Police Department testified that a front seat belt is not a safe method to restrain a child of the minor's size and would not "provide [the minor] any safety if there was a collision." By leaving the minor alone in the car at night defendant added another layer of danger. Based on all of these facts, the jury had ample evidence on which to base its verdict.

VII. Restraining Order Under *Section 646.9*

Finally, defendant argues the trial court exceeded its authority at sentencing when it issued an order under the stalking statute (*§ 646.9*) restraining defendant from having contact with the minor or D.K.'s mother for 10 years because they were not the named victims of the stalking offense. The operative language of *section 646.9, subdivision (k)(1)*, is as follows: "The sentencing court also shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon **[*115]** the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

We are faced with two conflicting opinions construing this language and the very similar language of *section 136.2, subdivision (i)(1)*.[14] *People v. Clayburg (2012) 211 Cal.App.4th 86, 88, 149 Cal. Rptr. 3d 414* (*Clayburg*) expressly authorized a restraining order to protect immediate family members who "suffer[] emotional harm" under *section 646.9*, while *People v. Delarosarauda (2014) 227 Cal.App.4th 205, 211-213, 173 Cal. Rptr. 3d 512* (*Delarosarauda*) disagreed with the *Clayburg* majority and held that family members are not "victims" under the similarly worded *section 136.2*.

The majority opinion in *Clayburg, supra, 211 Cal.App.4th 86*, held the reference to "immediate family" in the second sentence of the statute expands the class of "victims" on whose behalf a protective order **[*116]** may be issued. (*Id. at pp. 90-92*.) A dissenting opinion by Justice Perren interpreted *section 646.9, subdivision (k)(1)* as authorizing a protective order only for the named victim of the stalking offense, and expressed the view that the reference to "immediate family" in the second sentence above was intended only to make the

[13] D.K. had been face down during the beating, but she was on her side when the police arrived. Nick did not see or hear the minor during the beating. The prosecutor theorized that the minor was lying under D.K. when she was murdered and that defendant turned her on her side as he snatched the minor from her arms.

[14] *Section 136.2, subdivision (i)(1)* provides in relevant part: "[T]he court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. . . . It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

safety of such individuals a factor to be considered in setting the duration of the protective order. (*Clayburg, supra, at p. 95*.) *Delarosarauda* agreed with the construction advocated by Justice Perren and interpreted *section 136.2, subdivision (i)(1)* as authorizing protective orders only on behalf of named victims of domestic violence.

As a matter of statutory interpretation, we agree with the reasoning of *Delarosarauda* and the *Clayburg* dissent. We do not believe the second sentence of *section 646.9, subdivision (k)(1)* modifies the definition of "victim" in the first sentence. We therefore reverse the protective order issued under *section 646.9*.

DISPOSITION

The order restraining defendant from having contact with the minor and D.K.'s mother is reversed. In all other respects the judgment is affirmed.

Margulies, Acting P. J., and Dondero, J., concurred.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES R.W. MITCHELL,

Petitioner,

v.

CSP-CORCORAN, et al.,

Respondents.

Case No. 15-cv-04919-VC (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

James R.W. Mitchell has filed a *pro se* petition for a writ of habeas corpus challenging the validity of his state criminal conviction. Mitchell seeks habeas relief based on the following claims: (i) the trial court erred by denying Mitchell's motion to replace his third set of retained attorneys with the public defender, his motion to dismiss his attorneys and proceed in pro per, and his attorneys' motion to withdraw; (ii) ineffective assistance of counsel when counsel did not promptly inform Mitchell of the defenses he would argue at trial and when counsel abandoned Mitchell at sentencing; (iii) the trial court erred by denying Mitchell's motion to appoint new counsel to submit a motion for a new trial and to represent him at sentencing; (iv) the trial court erred by failing to order a pretrial competency evaluation; and (v) the trial court erred in its handling of counsel's request for funds to hire a psychological expert. Because the claims lack merit, the petition is denied.

PROCEDURAL BACKGROUND

On July 12, 2011, Mitchell was convicted by a jury of first degree murder, corporal injury on a cohabitant, kidnapping, child abduction, child endangerment and stalking. 8 Clerk's

Transcript ("CT") 1583-84; ECF No. 14-18 at 147-48. The jury found that Mitchell personally used a deadly weapon in counts one and two and personally inflicted great bodily injury with respect to count two. *Id.* The jury found the allegation that the homicide occurred with the special circumstances of kidnapping to be false. *Id.* On August 16, 2011, the trial court sentenced Mitchell to thirty-five years to life in prison. 8 CT 1655-58; ECF No. 14-19 at 35-43.

On July 28, 2014, the California Court of Appeal affirmed the judgment. *See People v. Mitchell*, 2014 WL 3707995 (Cal. Ct. App. Jul 28, 2014) (unpublished). On October 15, 2014, the California Supreme Court denied Mitchell's petition for review.

STANDARD OF REVIEW

A federal court may entertain a habeas petition from a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may not grant habeas relief unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).[1] This is a highly deferential standard for evaluating state court rulings: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Additionally, habeas relief is warranted only if the constitutional error at issue "'had substantial and injurious effect or influence in determining the jury's verdict.'"

[1]Mitchell argues AEDPA does not apply to him because he is not a terrorist and has not been sentenced to death. Although AEDPA's name suggests it only applies to terrorism and death penalty cases, the above authority substantiates that it applies to all federal petitions for a writ of habeas corpus.

Penry v. Johnson, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion of the highest court to analyze whether the state judgment was erroneous under the standard of § 2254(d). *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). In this case, the California Court of Appeal is the highest court to issue a reasoned decision on Mitchell's claims.

DISCUSSION

The trial proceedings and the evidence presented against Mitchell are described thoroughly by the California Court of Appeal in its opinion upholding the conviction. *See Mitchell*, 2014 WL 3707995 at *1-6. This Court now rules as follows on the claims presented by the habeas petition:

- Mitchell claims the trial court erred by denying his motion to substitute his third set of retained attorneys with a public defender. Although the Sixth Amendment grants criminal defendants who can afford counsel a right to hire counsel of their choice, *see Wheat v. United States*, 486 U.S. 153, 159, 164 (1988), the right is qualified when the proposed choice will interfere with the integrity of the proceeding, *see United States v. Stites*, 56 F.3d 1020, 2014, 1026 (9th Cir. 1995); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (trial court has wide latitude in balancing right to counsel of choice with needs of fairness and demands of its calendar).

  As articulated by both the trial court and the Court of Appeal, at the time Mitchell made his motion to substitute counsel, the case was nearly two years old, hundreds of potential jurors had been summoned, sixty-five witnesses had been subpoenaed, and two important witnesses were elderly. *See Mitchell*, 2014 WL 3707995 at *12. Because granting the motion would require substantial delay and disruption, the Court of Appeal's rejection of this claim was not an unreasonable application of Supreme Court authority or an unreasonable determination of the facts in light of the state record.

Mitchell's argument that there was an irreconcilable conflict with his counsel was also reasonably rejected by the Court of Appeal. *See Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007) (irreconcilable conflict occurs only where there is a complete breakdown in communication between attorney and client). As the court found, the only evidence Mitchell presented of a conflict was his own threat to sue his attorney which was based on an underlying dispute involving a disagreement about trial tactics. Furthermore, counsel were not refusing to put on Mitchell's preferred mistaken identity defense, as he claimed, but rather were considering putting on an additional and alternative defense of mitigated culpability. *Mitchell*, 2014 WL 3707995 at *12-13; *see Stenson*, 504 F.3d at 886 (disagreements over trial strategy or tactical decisions do not rise to level of complete breakdown in communication). Therefore, Mitchell did not receive ineffective assistance of counsel based on an irreconcilable conflict.

- Mitchell claims the trial court's denial of his motion to represent himself violated his Sixth Amendment rights. Although a criminal defendant has a Sixth Amendment right to self-representation, *Faretta v. California*, 422 U.S. 806, 832 (1975), such a motion may be denied if it is untimely, s*ee Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005) (denial of *Faretta* motion made on first day of trial before jury selection as untimely not contrary to clearly established federal law). The trial court noted that Mitchell had delayed his *Faretta* request until opening statements were about to begin, the parties had sorted out hardship and cause challenges for approximately 1000 potential jurors, most of the in limine motions had been ruled on, the case was two years old, and several continuances had been granted at defense request, in part to allow Mitchell to change attorneys. *Mitchell*, 2014 WL 3707995, at *14-15. The trial court denied the motion only after Mitchell stated that he would need a month to prepare. Given the delay and disruption that would result if the motion were granted, the denial of this claim was not contrary to or an unreasonable application of Supreme Court authority.
- After the denial of Mitchell's *Faretta* motion, defense counsel filed a motion to withdraw

on the ground that Mitchell had threatened him, which the trial court denied. Mitchell argues that an irreconcilable conflict existed between himself and counsel at that time based on counsel's fear of Mitchell's threats which resulted in ineffective assistance. However, at the hearing before the trial court, Mitchell denied that any threats to his counsel were "imminent" or "dangerous," that he liked his two attorneys and would not harm them. *Id.* at *15. As reasonably found by the Court of Appeal, after an in camera hearing on the motion, the trial court "implicitly concluded . . . the threats were the product of a heated disagreement about defense strategy, but did not amount to a risk of actual danger to the attorneys and did not threaten to result in ineffective assistance of counsel." *Id.* at 16. Furthermore, the Court of Appeal's review of the record showed that, after the denial of this motion, defense counsel provided effective assistance by conscientiously advocating for his client, "cross-examining prosecution's witnesses, putting on defense witnesses, making appropriate objections, and taking care that his client not be prejudiced before the jury." *Id.* at 17. The Court of Appeal's denial of this claim was not contrary to or an unreasonable application of federal authority or an unreasonable determination of the facts. *See Stenson*, 504 F. 3d at 886 (irreconcilable conflict only occurs where there is a complete breakdown in attorney-client communication and the breakdown prevents effective assistance; disagreements over trial strategy do not rise to level of complete breakdown in communications).

- The Court of Appeal reasonably denied Mitchell's claims of ineffective assistance of counsel. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) (doubly deferential standard used on federal habeas review of ineffective assistance of counsel claims). Counsel's decision to pursue a heat of passion defense in addition to Mitchell's mistaken identity defense did not constitute ineffective assistance because defense strategies are controlled by counsel, not by the client. *See Brookhart v. Janis*, 384 U.S. 1, 9 (1966) (attorney may properly make strategy decision about how to run a trial even if client disapproves*);* *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981) (difference of opinion as to trial

tactics does not constitute denial of effective assistance). The Court of Appeal's review of the record showed that counsel "was wrestling through much of the pretrial period with the question of how to best present a defense for this difficult client" and, on this basis, reasonably concluded that counsel did not willfully withhold important information or strategic decisions from Mitchell. *Mitchell*, 2014 WL 3707995, at *20. Furthermore, contrary to Mitchell's assertions, counsel did not abandon Mitchell's mistaken identity defense but presented the heat of passion defense as a backup argument, recognizing that the jury would likely reject Mitchell's "far-fetched" testimony that he was not the person who hit the victim with a baseball bat. *Id.* at *22-23. Counsel cannot be faulted for presenting both defenses, satisfying Mitchell by arguing mistaken identity and presenting a backup mitigating defense because he believed the evidence would not support a defense of mistaken identity. *See Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (counsel's performance was not deficient where "he did what he could with what he had to work with, which was not much."). Furthermore, because counsel presented Mitchell's desired mistaken identity defense, Mitchell cannot show prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (petitioner bears burden not only of showing counsel's performance was deficient but that it also caused him prejudice); *see also DePasquale v. McDaniel*, 2011 WL 841419, *10 (D. Nev. Mar. 7, 2011) (presentation of two defenses not unreasonable and did not prejudice petitioner).

- Mitchell fails to show that counsel's performance was deficient at the sentencing hearing or that it caused prejudice. At an in–camera hearing, counsel thoroughly explained his reasons for remaining silent at Mitchell's sentencing hearing. *Mitchell*, 2014 WL 3707995, at *23. He stated that he could argue, in line with Mitchell's testimony, that Mitchell was innocent, but rejected this in light of the jury's verdict; his only other alternative was to argue that Mitchell was guilty, with mitigating factors, but because Mitchell disapproved of this counsel would not argue it. *Id.* At the sentencing hearing, counsel was silent and Mitchell spoke at length about his innocence. *Id.*

Given counsel's strategic decision for his silence at Mitchell's sentencing hearing, Mitchell has failed to show deficient performance. Furthermore, the Court of Appeal reasonably found that, even though counsel was silent, he provided effective assistance because, given counsel's otherwise vigorous representation of Mitchell, had the probation report recommended an unauthorized sentence or failed to take account of relevant sentencing factors, counsel would have pointed it out to the court. *Id.* In light of the fact that Mitchell's argument for his innocence was heard by the court and that the trial court had limited sentencing discretion based upon Mitchell's convictions, *see id.* at *24, Mitchell has also failed to show prejudice.

- Mitchell claims the trial court erred in denying his motion to substitute an attorney to file a motion for a new trial and for sentencing. The Court of Appeal reasonably determined that the trial court understood the applicable law and properly based its decision on the disruption and delay that would result from granting Mitchell's motion given that the motion was heard on the date set for sentencing and that friends and family of the victim were in court to speak at the sentencing hearing. *Id.* at *29. This Court must defer to this ruling. *See Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (on habeas review, a federal court must presume that state courts know and follow the law and must follow § 2254(d)'s "highly deferential standard for evaluating state-court rulings").
- The Court of Appeal's decision to reject Mitchell's claim that the trial court erred in denying his counsel's motion to withdraw for sentencing was reasonably based on its determination that the trial court was faced with either allowing counsel to withdraw with no substitution, which would have violated Mitchell's right to counsel at sentencing, or to allow the withdrawal, but continuing the sentencing hearing, which would have resulted in delay and disruption of the proceedings. *Mitchell*, 2014 WL 3707995, at *30. This Court defers to this ruling. *Visciotti*, 537 U.S. at 24.
- Mitchell claims the trial court erred by refusing to order a competency hearing. The conviction of a defendant while legally incompetent violates due process. *Pate v.*

Robinson, 383 U.S. 375, 378 (1966). The test for competence to stand trial is whether the defendant demonstrates the ability "to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396 (1993). The question "is not whether mental illness substantially affects a *decision*, but whether a mental disease, disorder or defect substantially affects the prisoner's *capacity* to appreciate his options and make a rational choice." *Dennis v. Budge*, 378 F.3d 880, 890 (9th Cir. 2004) (emphasis in original). Due process requires a trial court to order a psychiatric evaluation or conduct a competency hearing sua sponte if the court has a good faith doubt concerning the defendant's competence. *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (only when evidence raises a bona fide doubt about competency must trial court conduct a hearing). On habeas review, the state court's determination that the evidence did not require a competency hearing is a factual determination requiring deference unless it is unreasonable. *Torres v. Prunty*, 223 F.3d 1103, 1105 (9th Cir. 2000).

The issue of Mitchell's competency was raised by his defense counsel. However, counsel made contradictory statements: he first asserted he had no doubts about Mitchell's competency and then, four days later, after it became apparent that Mitchell's *Faretta* motion and counsel's motion to withdraw would be denied, he asserted he had longstanding doubts about Mitchell's competency. *Mitchell*, 2014 WL 3707995, at *32. Under these circumstances, counsel's credibility was put in question and the trial court was entitled to discount counsel's second statement. *Id.* Furthermore, the trial court had several lengthy discussions with Mitchell about his motions to substitute counsel and concluded that Mitchell made rational, reasonable, intelligent and coherent arguments in support of his motions. *Id.* at *31. Finally, the Court of Appeal found no evidence supported Mitchell's argument that his lack of cooperation with his attorneys stemmed from inability; instead, the Court of Appeal reasonably found that the evidence showed that his lack of cooperation stemmed from unwillingness. *Id.* at *33. Given these factual

findings, to which this Court must defer, it was objectively reasonable for the Court of Appeal to conclude that the denial of a competency hearing did not violate Mitchell's due process rights.

- Mitchell argues the trial court improperly denied counsel's pretrial request for $20,000 to hire a psychological expert to pursue a mental defect defense. However, at the time counsel made this request, Mitchell refused to be examined by a psychologist, therefore, counsel could only request an expert to review Mitchell's records and watch him testify. *Id.* at *33. The trial court did not deny the request but granted an amount of $2,000 for counsel to "look into" such a defense and to ask the court again if the expert's initial work called for further investigation. *Id.* at *34. Nothing in the record indicates that counsel requested the $2,000. *Id.* at *35. The Court of Appeal reasonably found the trial court's authorization of a smaller amount than counsel requested for a preliminary investigation was proper. *Id.* at *34 (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (when defendant demonstrates to trial court that his sanity will be a significant factor at trial, state must assure access to a competent psychiatrist; however, defendant does not have a constitutional right to a psychiatrist of his own choosing or to receive funds to hire his own)). Furthermore, the denial of the $20,000 did not have a substantial or injurious effect or influence on the verdict because Mitchell failed to identify any mental defect he was suffering from or to explain how such a defect affected his mental state at the time of the murder or to show what the expert might have reported had the funds been granted. *Id.* at *35; *see Brecht*, 507 U.S. at 637.

CONCLUSION

Based on the foregoing, the Court orders as follows:

1. Mitchell's petition for a writ of habeas corpus is denied. A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

2. The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: October 18, 2016

VINCE CHHABRIA
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES R.W. MITCHELL Petitioner/Appellant v. CSP CORCORAN; DAVEY, Warden Respondent-Appellee.	)	No. 16-17057 DC # 3:15-cv-04919-VC

MOTION TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME IN WHICH TO FILE THE REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE VINCE CHHABRIA
United States District Judge

Steven S. Lubliner (CA SBN 164143)
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Telephone (707) 789-0516
Attorney for Petitioner-Appellant
JAMES R.W. MITCHELL

Petitioner/appellant James R.W. Mitchell ("Mitchell") respectfully moves this Court to stay this appeal pending the outcome of anticipated habeas proceedings in California state court that may render this appeal moot. Mitchell requests to return to state court to seek habeas relief predicated squarely on the U.S. Supreme Court's opinion in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), which was decided after his direct appeal became final and while his habeas appeal was pending in this Court. Counsel for respondent has expressed no objection to this request. (Lubliner Decl., ¶ 8.) This Court has granted similar stays in *Hanafi v. Katavich*, No. 16-55256 and *Maldonado v. Fox*, No. 17-56933. (Lubliner Decl., ¶ 6-7, exhs. A-D.)

Should this Court deny a stay, Mitchell requests that the due date for the reply brief, which is currently July 16, 2019, be extended to August 6, 2019. Counsel for respondent has expressed no objection to this request. (Lubliner Decl., ¶ 8.)

Mitchell is presently confined in a California state prison serving a sentence of 35 years to life that was imposed following his conviction in 2011 of the murder of his estranged girlfriend, kidnapping of his child, and related offenses. This appeal is from the district court's denial of appellant's petition for writ of habeas corpus on October 18, 2016.

This Court granted a certificate of appealability on two issues: "whether the state trial court violated appellant's constitutional rights when it (1) denied his request for self-representation under *Faretta v. California*, 422 U.S. 806 (1975); and (2) denied his motion to dismiss retained counsel at sentencing, including whether counsel rendered ineffective assistance at sentencing." On July 23, 2018, Mitchell filed a 64-page opening brief. Mitchell briefed the certified issues and two uncertified issues: "(1) Mitchell's Sixth Amendment Right to Counsel Was Violated by Defense Counsel's Overriding of His Decision Not to Concede Guilt of Any Form of Homicide; and (2) The State Court of Appeal's Conclusion That Mitchell's Request for New Counsel a Month Before His *Faretta* Request Was Properly Denied Was Unreasonable Because it Unreasonably Discounts Mitchell's Purpose of Seeking Counsel Who Would Limit His Defense to Complete Innocence." On February 19, 2019, respondent filed a 70-page answering brief. Respondent did not address the uncertified issues.

Central to the substitution claims is the argument that Mitchell had a Sixth Amendment right to insist on a defense of complete innocence and that the trial court acted unreasonably in not giving that preeminent consideration when he asked to represent himself and/or substitute counsel. Mitchell argued that this right flowed from *Florida v. Nixon*, 543 U.S. 175 (2004) and

predecessor U.S. Supreme Court cases that predated his trial. Mitchell further argued that the 2018 U.S. Supreme Court opinion in *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 confirmed this. *McCoy* held that defense counsel may not, in the face of the client's known objections, concede guilt or override the client's desire to maintain a defense of complete innocence. The error is structural. *Id.* at p. 1511.

The respondent's brief argues that *McCoy* is irrelevant because it was decided after Mitchell's direct appeal was final, any argument grounded in *McCoy* is unexhausted, and the case is distinguishable because Mitchell's defense counsel argued alternative theories of innocence and guilt of the lesser crime of voluntary manslaughter. Mitchell believes that recent opinions in the California courts of appeal favor his position. *People v. Flores*, 34 Cal. App. 5th 270 (2019); *People v. Eddy*, 33 Cal. App. 5th 472. Further, both the United States Supreme Court and the California Supreme Court have read *McCoy* expansively to inform other contexts.

The undersigned believes that *McCoy* is simply an inevitable extension of *Nixon*, *Faretta*, and other U.S. Supreme Court cases so as to govern this Ninth Circuit appeal and entitle Mitchell to habeas relief under AEDPA. However, while it initially seemed in Mitchell's interest to see the case through in this Court, the undersigned has concluded that prudence

dictates that Mitchell return to state court and litigate his *McCoy* claim squarely there. This is particularly true given the recent favorable case law. (Lubliner Decl., ¶ 4.)

A state habeas petition is in progress. It should be filed in two to three weeks. (Lubliner Decl., ¶ 5.) This Court granted the stay in *Maldonado v. Fox*, 17-56933, based on counsel's representation that a habeas petition was being prepared. (Lubliner Decl., ¶ 7, exh. C, pp. 4-5.)

Proceeding in this manner will conserve the judicial resources of this Court. If the state court grants relief, then the habeas appeal pending in this Court would be moot and could be dismissed. There would be no need for further briefing, oral argument, or the petitions for rehearing and *en banc* review that the losing party would inevitably file on the *Faretta* and *Nixon/McCoy* issues at the heart of the case.

For the foregoing reasons, Mitchell's request to stay this appeal should be granted. Alternatively, the due date for the reply brief should be extended to August 6, 2019.

Dated: July 12, 2019

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Appellant
James Mitchell

PROOF OF SERVICE

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California and the Bar of this Court; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I caused to be served a true and correct copy of the following document(s) in the manner indicated below:

MOTION TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME IN WHICH TO FILE THE REPLY BRIEF

DECLARATION OF STEVEN S. LUBLINER IN SUPPORT OF MOTION TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME IN WHICH TO FILE THE REPLY BRIEF

(X) by today e-filing, at Petaluma, California, the said document(s) in the Ninth Circuit e-filing system to parties registered to receive e-filings in this case.

David Rose, Esq.
Office of the Attorney General
11th Floor
455 Golden Gate Avenue
San Francisco, CA 94102

Executed in Petaluma, California on July 12, 2019

/s/Steven S. Lubliner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES R.W. MITCHELL Petitioner/Appellant v. CSP CORPORAN; DAVEY, Warden Respondent-Appellee.	)	No. 16-17057 DC # 3:15-cv-04919-VC

DECLARATION OF STEVEN S. LUBLINER IN SUPPORT OF MOTION TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME IN WHICH TO FILE THE REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE VINCE CHHABRIA
United States District Judge

Steven S. Lubliner (SBN 164143)
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, California 94975
Telephone (707) 789-0516
Attorney for Petitioner-Appellant
JAMES R.W. MITCHELL

I, Steven S. Lubliner, declare as follows:

1. I am counsel of record for appellant James R. W. Mitchell ("Mitchell") in this appeal. I have personal knowledge of all matters stated herein and, if called as a witness, could and would testify competently thereto.

2. I received my order of appointment on August 14, 2017. I filed the 64-page opening brief on July 23, 2018. Respondent's 70-page answering brief was filed on February 19, 2019.

3. The certified issues in this case are "whether the state trial court violated appellant's constitutional rights when it (1) denied his request for self-representation under *Faretta v. California*, 422 U.S. 806 (1975) and (1) denied his motion to dismiss retained counsel at sentencing, including whether counsel rendered ineffective assistance at sentencing." I briefed these issues and two uncertified issues. A common theme to the arguments was Mitchell's Sixth Amendment right to dictate the goals of his defense and not have defense counsel knowingly override his wishes for a defense of complete innocence. I have cited *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) and predecessor cases decided prior to Mitchell's trial in support of this position.

4. Although I disagree with respondent's arguments in the answering brief on the irrelevance of *McCoy* and predecessor cases, after considering the matter and consulting with other attorneys I have now concluded that it is in Mitchell's best interest to have this appeal stayed to seek habeas relief in California state court on a claim premised squarely on *McCoy*. My decision has been informed by holdings of the California courts of appeal in March and April of this year that appear to strongly favor Mitchell's position.

5. I have made substantial progress on drafting a state habeas petition. I estimate the petition will be filed in two to three weeks.

6. Attached respectively as exhibits A and B to this declaration are true and correct copies of the stay motion and order in *Hanafi v. Katavich*, No. 16-55256.

7. Attached respectively as exhibits C and D to this declaration are true and correct copies of the stay motion and order in *Maldonado v. Fox*, No. 17-56933.

8. Yesterday, July 11, 2019, in an exchange of e-mails, I informed David Rose, counsel for respondent/appellee that I would be filing this motion. He expressed no objection.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Petaluma, California on July 12, 2019

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Appellant

PROOF OF SERVICE

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California and the Bar of this Court; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I caused to be served a true and correct copy of the following document(s) in the manner indicated below:

MOTION TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME IN WHICH TO FILE THE REPLY BRIEF

DECLARATION OF STEVEN S. LUBLINER IN SUPPORT OF MOTION TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME IN WHICH TO FILE THE REPLY BRIEF

(X) by today e-filing, at Petaluma, California, the said document(s) in the Ninth Circuit e-filing system to parties registered to receive e-filings in this case.

David Rose, Esq.
Office of the Attorney General
11th Floor
455 Golden Gate Avenue
San Francisco, CA 94102

Executed in Petaluma, California on July 12, 2019

/s/Steven S. Lubliner

FILED

JUL 17 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES R. W. MITCHELL, Petitioner-Appellant, v. CSP CORCORAN; DAVE DAVEY, Warden, Respondents-Appellees.	No. 16-17057 D.C. No. 3:15-cv-04919-VC Northern District of California, San Francisco ORDER

The appellant's motion (Docket Entry No. 62) to stay appellate proceedings is granted. The previously established briefing schedule is vacated.

Appellate proceedings are stayed pending resolution of state court proceedings or until further order of the court.

Appellant shall file a status report on October 14, 2019, and every 90 days thereafter while the state habeas petition is pending. Status reports should include any change in the status of the state court case and the estimated date of resolution of appellant's state habeas petition, if known.

Appellant shall notify the court by filing a status report within 7 days of the resolution of appellant's state habeas petition proceedings.

Failure to file a status report will terminate the stay of appellate proceedings.

The briefing schedule will be reset in a future order.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Wendy Lam
Deputy Clerk
Ninth Circuit Rule 27-7

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES R.W. MITCHELL **Petitioner,** **vs** **CSP CORCORAN and DAVEY,** **Respondent.**	**U.S.C.A. No.: 16-17057** **U.S.D.C. No.: CV-15-04919-VC** **ORDER RE: CJA APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL ON APPEAL**

The individual named above as appellant, having testified under oath or having otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and, because the interests of justice so require, the Court finds that the appellant is indigent, therefore;

IT IS ORDERED that the attorney whose name and contact information are listed below is appointed to represent the above appellant.

Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
707-789-0516
sslubliner@comcast.net

Appointing Judge: Hon . Judge Chhabria

August 15, 2017
Date of Order

August 14, 2017
Nunc Pro Tunc Date