No. _____

In the
Supreme Court of the United States

WILLIS FRANKLIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was petitioner denied his Sixth and Fourteenth Amendment rights to retained counsel of choice when the trial court failed to continue the trial during the absence of one of petitioner's co-counsel?

Was petitioner denied his Sixth Amendment right to "client autonomy" under *McCoy v. Louisiana*, 584 U.S. 414, 138 S. Ct. 1500, 200 L. Ed. 2d 82 (2018), in not being advised that he had the final say in whether or not to testify even if this was against the advice of his attorneys?

LIST OF ALL PARTIES

Petitioner

WILLIS FRANKLIN.

Respondent

PEOPLE OF THE STATE OF CALIFORNIA.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

Both the appellate court opinion and the order denying review were unpublished and are included in the Appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT.

1. Date of entry of order sought to be reviewed: March 13, 2024 (Court of Appeals opinion) May 29, 2024 (order denying review.)

2. Date of any order respecting rehearing: not applicable.

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 2101(d).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. United States Constitution.

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Fourteenth Amendment. ". . . No State shall . . . deprive any person of . . . liberty . . . without due process of law. . ."

2. Federal statutes and rules.

28 U.S.C. section 2101(d): "The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court."

Supreme Court Rule 13. Review on Certiorari: "1. Unless otherwise provided by law . . . . a petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."

3. State statutes.

California Penal Code section 261(a)(2): "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . . (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."

California Penal Code section 288(a): ". . . a person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . ."

California Penal Code section 288(c)(2)(A): "Any person who commits an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years."

California Penal Code section 288.5(a): "Any person who . . . resides in the same home with the minor child . . . , who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of . . . three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child."

California Penal Code section 29800(a)(1): "Any person who has been convicted of a felony . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony."

California Penal Code section 30305(a)(1): "No person prohibited from owning or possessing a firearm under Chapter 2 . . . shall own, possess, or have under custody or control, any ammunition or reloaded ammunition."

STATEMENT OF THE CASE.

1. Specification of Stage in the Proceedings in Which the Federal Questions Sought to Be Reviewed Were Raised, the Manner of Raising Them, and the Way in Which They Were Passed On.

On August 9, 2022, a California jury convicted petitioner of violating California Penal Code sections 288.5(a), 288(a), 288(c)(2)(A), 261(a)(2), 29800(a)(1), and 30305(a). A California superior court petitioner to 62 years to life . (Clerk's Transcript ("CT.") vol. 7, pp. 2085-2088).

On March 13, 2024, a California Court of Appeals affirmed petitioner's convictions. (A165893.)

On May 29, 2024 , the California Supreme Court summarily denied petitioner's petition for review. (S265914.)

2. Statement of Facts.

a. Denial of retained counsel of choice.

The trial began on September 3, 2021. (Reporter's Transcript ("RT.") vol 4, p. 559, 7CT. 1820.) Trial resumed on September 7, 2021. (4RT. 690, 7CT. 1821.)

On Wednesday, September 8, 2021, defense co-counsel Ford notified the court that he had COVID-19 symptoms and wasn't coming in. The court recessed trial and directed that Ford, defense co-counsel Belyi, and petitioner be tested for

Covid-19. (5RT. 834.)

As of Thursday, September 9, 2021, Belyi and petitioner had tested negative. Ford had a presumptive "negative" result and was waiting for full results. (5RT. 835.) Ford stayed home with symptoms. (5RT. 835.)

The court stated that trial had been in the middle of a prosecution witness cross-examination by Belyi on Tuesday, September 7. The witness had come to court on September 8 and "waited all day", and as of the morning of September 9, came to court. The court had sent the jurors home on September 8. The jurors returned to court on September 9, and were waiting. (5RT. 835.)

The court said trial had to proceed that day "with only Ms. Belyi present and Mr. Ford . . . listening and viewing by way of BlueJeans." The court saw no prejudice because Belyi had been cross-examining the witness ("Georgina") during the last session. (5RT. 836.)

Belyi complained that Bluejeans had malfunctioned so that "Ford had been stuck . . . frozen on BlueJeans . . . [and] is unable to participate in the trial." Belyi and Ford acted as "a team." (5RT. 837.) The court responded that Belyi was "capable" of handling the trial in Ford's absence, that it would be "nice" if both defense counsel could be in court, but that petitioner didn't have a right to be represented by both retained counsel in court. (5RT. 837.)

Belyi asked to suspend trial for a day, until Ford's Covid-19 test results were available. The court asked Belyi to

guarantee that Ford "won't have a positive result on his test by tomorrow." Belyi said that because Ford's home test and her own "rapid test" were negative, she believed Ford wouldn't test positive, but couldn't be sure. (5RT. 838.)

Belyi explained that Ford's in-court presence was necessary because:

> "Mr. Ford and I, yes, we obviously have split up different witnesses and we split up responsibility for different motions. Neither one of us is first or second chair. At the same time we do work together. So when I am examining a witness Mr. Ford has been assisting me with certain follow-up questions. He does assist me with communicating with Mr. Franklin and kind of going through Mr. Franklin's notes as he's writing them and filtering in the ones that he feels are important."

(5RT. 838.)

The court asked for legal authority that the right to retained counsel of choice included a right to more than one counsel. Ford, who was online, cited *People v. Crovedi,* 65 Cal.2d 199, 208 (1966) and *People v. Gzikowski* 32 Cal.3d 581, 586 (1982). Ford advised the court that *Crovedi* held that:

> ". . . the state should keep to a necessary minimum its interference with the individual's desire to defend itself in whatever manner he deems legitimate means within his resources, and that desire can constitutionally be forced to yield only when it will

> result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case."

(5RT. 840.)

Ford said *Gzikowski* found defendant's right to retained counsel of his choice was violated by denial of a continuance to find replacement of lead counsel, who withdrew leaving an inexperienced co-counsel. (5RT. 840.) Ford also stated:

> " . . . both those cases concern unavailability of counsel related to either death or months of a delay. Here I think we've gotten today and maybe one more if I'm not feeling better tomorrow. On that point, Judge, I would note for the record it's not that I'm just not feeling well but that my specific symptoms are listed as symptoms that the CDC and local rules would cause me from being prohibited to be in court. If I could be there I would be there."

(5RT. 841.)

The court denied the defense request to recess trial until the next day, when Ford's full test results would be available. The court said that Mr. Ford could listen in, that Ms. Belyi could "confer with Mr. Ford." (5RT. 843.)

The jury was brought in and the court informed them that Mr. Ford was "on video." Ms. Belyi continued with her cross-examination of "Georgina." (5RT. 844.)

During the afternoon session, Ms. Belyi requested a 5 minute recess to confer with Mr. Ford. (5RT. 900.) After the recess, Ms. Belyi ended her cross-examination and the prosecutor began Georgina's redirect examination, followed by Belyi's re-cross. (5RT. 900, 908.) Georgina's testimony concluded. (5RT. 910.)

The prosecutor then began his direct examination of complaining witness "S." (5RT. 910.) After 38 pages of transcript, the court then adjourned and excused the jury. (5RT. 948.)

The court then held a brief hearing, at which Mr. Ford, still online, stated that he had:

> " . . . extreme difficulty understanding what ["S"] is answering to basically any answer that's longer than two words . . . . I've got my volume turned up and I can hear her very clearly on the yeses and the nos but there's a lot of mumbling and pulling away from the mike on more detailed answers. I've got a lot of question marks in my notes I'm not sure what she's said to a lot of things. I'm writing down Mr. Homer's questions and where she says yes or no but as to the last question I don't have the foggiest idea what she said."

(5RT. 948.) Ford added:

> "I can't express how strongly I wish I could be there tomorrow or hope that I can be there tomorrow. My symptoms do seem to be alleviating a little bit, but

> without the negative test I don't know if I can."

(5RT. 949.) The court responded:

> "I don't want to see you until you get a negative test. I think for the jury's comfort I think at this stage that makes sense."

(5RT. 949.)

Ford returned on September 10, 2021. (5RT. 950.)

b. Facts concerning *McCoy* issue.

i. Motion for new trial.

On July 12, 2022, petitioner filed a motion for new trial based on his Sixth Amendment right to "client autonomy" (7CT. 1943), as described in *McCoy v. Louisiana,* 584 U.S. 414, 138 S. Ct. 1500, 200 L. Ed. 2d 82 (2018). (7CT. 1948-1949.)

At an earlier hearing, petitioner's counsel requested a transcript of the court's advisement of petitioner's right to testify or not. (7CT. 1963-1964.) The court responded: "I don't know that happened. But you don't need to accept my representation." (7CT. 1964.) As no transcript of the court session was available, petitioner accepted the court's representation that it didn't advise Mr. Franklin of his personal right to testify. (7CT. 1945.)

Petitioner declared:

> "2. At trial, I unequivocally wanted to testify in my own defense.
>
> 3. I told my attorneys that I wanted to testify in my own defense.
>
> 4. After listening to the prosecution witnesses, I told my attorneys that the witnesses had given false and inaccurate testimony and that I needed to testify to set the record straight.
>
> 5. My attorneys never told me that it was my right to decide whether or not to testify. They simply told me that they had decided that they were not going to put me on the stand and have me testify. I did not know at the time that I had the right to decide for myself whether or not to testify."

(7CT. 1946, 1955.)

Ford's declaration stated:

> "I recall having numerous conversations with Mr. Thompson regarding the prospect of him testifying at his trial. Some of these conversations happened before trial. Some of these conversations took place during trial.
>
> I do not have a specific memory of my advisement to Mr. Thompson regarding his right to testify, however I do recall advising him consistently that it was ultimately his right to decide whether he would testify

or not."

(7CT. 1946, 1959.)

Belyi's declaration stated:

> "3. During the course of my representation of Mr. Franklin, he and I had numerous conversations about his testimony at trial.
>
> 4. While I cannot recall the exact words of my advisements to Mr. Franklin during those conversations, I informed him that he had the right to testify, and it was his choice whether he testified. In these conversations, I advised Mr. Franklin not to testify.
>
> 5. In some of these conversations, both Mr. Ford and I spoke with Mr. Franklin together. In others, I spoke to him alone."

(7CT. 1946-1947, 1961.)

The prosecutor's opposition attached a transcript of petitioner's jail call that described the following in-court exchange about whether petitioner was going to testify:

> "[The] judge asked them if they had any other witnesses, and they told him, and then, he, you know, he argued about that. He said, 'well, what about your client? Is your client goin' testify?' And I looked at him, and he was like, 'don't you say nothin' to me.

> Don't say nothin'. I can't ask you, and you can't talk to me.' And they looked at each other, and they said, 'no, we don't think he's gonna' testify. We don't think' -- and then, Maria [Belyi] came over 'cuz she know what I said about that. Same thing Tina said, and she said, 'Look, I know – she's compassionate. She wants to do this, and your compassionate, and we know you want to, but you know, we really just want you to listen to us right now. Just listen to us. Let us do this.' I was like, 'okay, handle your business. Handle your business.'"

(7CT. 1970, 1992.)

The prosecutor offered petitioner's statement to his mother as a version of what actually happened in court, and argued that it showed that petitioner understood that he had the right to decide for himself whether or not to testify.

Petitioner replied that the excerpt showed that the court treated the decision as a tactical decision for defense counsel to make by telling him "don't you say nothin' to me. Don't say nothin'. I can't ask you, and you can't talk to me." Petitioner's response "handle your business" showed that he believed that it was his attorneys' "business" to decide whether or not he would testify, not his. (7CT. 2000.)

The judge had submitted excerpts of jury voir dire on the issue of whether the petitioner's decision to testify is "reserved for the defendant" and isn't a matter of "trial management." (7CT. 2000-2002.)

"1st Day" excerpts. (7CT. 2001-2002.)

The court advised a juror that:

> "If Mr. Franklin wants to testify, he'll come up and we'll treat him just like any other witness and we'll consider his information. If he doesn't, we don't care, we'll focus on what we do hear." (p. 48.)

Two pages later, the court advised a potential juror that:

> "Whether an individual chooses to testify or not is between him and his counsel." (p. 50.)

Shortly afterwards, the court then advised a juror:

> "[if] the defendant has chosen ***not to testify***, you cannot in any way consider that against him." (p. 50, emphasis added.)

The prospective juror asked the court what would happen if:

> "the prosecution put on a compelling case and ***the defense made the decision*** not to have the defendant testify . . ." (p. 50, emphasis added.)

In response, the court didn't advise the prospective juror about whose decision it would be that defendant not testify. (pp. 50- 51.)

"2nd day" excerpts (7CT. 2002-2003.)

On pages 31 and 33, the court's advisements to prospective

jurors suggested that it was up to petitioner to decide ***not to testify***:

> "should he choose ***not to testify***, the jury cannot consider that in any way . . ." (p. 31, emphasis added.)
>
> "should he choose ***not to testify***, we can't hold that against him . . ." (p. 33, emphasis added.)
>
> But a defendant's decision ***not to***, if that's what happens, I don't know, but if Mr. Franklin chooses ***not to testify***, I won't ask him why.
>
> He has a right to testify ***if he'd like to.***" (p. 33, emphasis added.)

However, on the very next page, the court advisement to a prospective juror suggested that whether petitioner testifies is for defense counsel to make:

> "You can imagine there might be lots of reasons and it's a conversation that Mr. Franklin will have with his lawyers and they may say, you know what, the jury is never going to believe those witnesses that Mr. Homer calls. Did you hear them testify? There's no reason for you to get up there. ***That may be a determination they make a couple of days from now, there's no reason to testify***, not after all that evidence." (p. 34, emphasis added.)

The reply memorandum argued that "defendant would not have understood the court's (juror) advisements . . . to be

advisements to defendant", but also argued that "some of the excerpts suggest that the defendant can choose whether or not to testify, but others suggest that the decision to put the defendant on the stand is one that defense counsel make as part of trial strategy." (7CT. 2001.)

The actual excerpts were apparently submitted as a "Court's Exhibit 1."

ii. Hearing.

(1) Petitioner.

Petitioner was never advised that he could "override or veto" his attorneys' decision that he not testify. (13RT. 2413):

> "The decision for me not to testify was made here in this courtroom when the Court asked my two lawyers whether or not their client would be testifying . . . .
>
> And Judge Reardon pointed to me and said, You don't answer; you don't say anything. And he looked back at the two lawyers.
>
> Ms. Belyi and Brian and they looked back and forth at each other until ultimately they decided that I would not testify. That was the first time that the decision was made. Up until then Mr. Ford was for my testifying and Ms. Belyi was not. But that was the first time the decision was actually made. They made it and no one asked me anything else."

(13RT.. 2413-2414.)

Petitioner thought the colloquy with the court occurred:

> ". . . after the court session was over and the Judge said he wanted to ask them, he wasn't rushing them but he needed to clarify for scheduling purposes whether or not I was going to testify or not. When the question came up I sat up in the seat, I was anxious to hear that answer."

(13RT. 2414.)

The judge noticed him sitting up and "pointed to me sitting down and he said you don't answer and then turned back to the lawyers." (13RT. 2415.) Then:

> " . . . there was a pause. They looked back and forth at one another. I believe Ms. Belyi saw that I wanted to answer and that I wanted to get involved in that . . . .
>
> I believe Ms. Belyi walked over — I'm not sure. I believe that's when she walked over and said to me, I know this is what you want to do but just listen to us; we don't want you to testify."

(13RT. 2415.)

Petitioner agreed that he had replied "handle your business" as he had said during the jail call with his mother. Asked what he meant by that, petitioner said:

> " . . . throughout the trial different things had come up. I wanted to put in evidence. We had a text message, a screenshot. We had a screenshot of a text message from [S] stating I've never been molested by anyone and I wanted to present that. And they ultimately decided that we weren't going to use that evidence. I wanted to call witnesses and they decided that we were ultimately not going to call them. All along I would say to them, okay, fine, I understand it."

(13RT. 2415-2416.) Petitioner agreed that by "the lawyers doing their business — they're making decisions on whether or not something is admissible, whether a witness is called" and that "at the time when the Court was inquiring whether you're going to testify, you were deferring to their judgment that they don't think you should testify." (13RT. 2416.) Asked if, at that point, either of petitioner's attorneys advised him that "although we strongly recommend that you don't testify, you have an absolute right to testify," petitioner replied:

> "No, neither one of them said that. The Judge accepted their decision when they ultimately said he is not going to testify."

(13RT. 2416-2417.) Neither of petitioner's attorneys asked him "if you understood that you had this individual right to testify" or whether he waived this right. (13RT. 2417.) The court didn't ask such questions either, or ask petitioner's lawyers to voir dire petitioner on "on whether he understands of this right to testify and he expressly waives

it." (13RT. 2417.)

On cross-examination, petitioner agreed that he had talked with his attorneys more than once about testifying. (13RT. 2418.) Ford had mentioned putting petitioner on the stand. (13RT. 2418.) Both attorneys told petitioner that he "had a right to testify." (13RT. 2418.) Asked if whether, like decisions to present evidence or call witnesses, petitioner "went along with what their advice to you was", petitioner replied:

> "I didn't think I had a choice in it. I thought that was – they're the lawyers and I'm not a lawyer. I really don't know what's going on. But once I received the papers from Mr. Beles, that clearly explained the difference between the strategy, the things that they had control over or what I have control over which they didn't explain to me and I didn't know."

(13RT. 2418-2419.)

Asked if petitioner ever told his attorneys that he disagreed with their tactics, petitioner replied: "There were several things that I disagreed with but they did it their way." (13RT. 2419.)

The prosecutor asked petitioner: "And when your lawyers advised you that they didn't think you should testify you chose to go along with that advice, right?" Petitioner replied:

> "I was told by the Court not to answer anything. He had the answer from them. They accepted the answer

— the Court accepted their answer. They didn't come to me and say this is what we're doing, do you agree. I wasn't given a chance to agree or disagree."

(13RT. 2419.)

Petitioner's attorneys felt it was "dangerous" to testify because "they would have to cover too much ground . . . . the prosecution has not proven its case." (13RT. 2420-2421.) Ford had told him:

" . . . that sitting on the witness stand a witness can say one thing and blow the whole case. Right now they haven't proven their case so we don't need to do this. We don't need to do this at all."

(13RT. 2421.)

Asked if Belyi had "informed him that he had a right to testify and it was his choice whether he testified", petitioner replied "I do not recall her ever saying that it was my choice. Just as when she came over to the table she didn't say this is what we want to do but it's your choice." (13RT. 2422.) Belyi told him "she didn't want you to testify" and that "you were to listen to them." (13RT. 2422.) The court asked if this was "very different than 'I'm making the decision and you have no say in this'." Petitioner replied:

" . . . there was no decision made for me not to testify, so there would not have been a conversation where she would have told me this is your choice. We didn't — there was no — until then Brian Ford had said I

was going on the stand. Until the decision was made in this courtroom I believed I was going to testify . . . .

When you asked them and then told me not to say anything I didn't. I didn't say a word. I listened to what they said. They ultimately told you that I was not going to testify and you accepted that from them."

(13RT. 2423.)

(2) Belyi.

Belyi told petitioner that he had the right to decide whether or not to testify, but she didn't think he should testify. (13RT.. 2426-2427.) Belyi said that "there was evidence that we believed would be coming in were Mr. Franklin to testify" and that testifying "would open the door to certain questions that we believed would be damaging to his case." (13RT. 2427-2428.) Petitioner agreed to follow her advice. (13RT. 2428.)

Asked whether there was a "time in the

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Belyi didn’t obtain a waiver of the right to testify from petitioner. (13RT. 2430-2431.)

(3) Ford.

Ford advised petitioner that it was his decision whether or not to testify, but that he shouldn’t testify. (13RT. 2433.) Ford thought he had given petitioner reasons for not

testifying, but didn't ever tell petitioner he couldn't testify. (13RT. 2434.) Ford believed that petitioner had agreed not to testify.

Ford didn't recall any "time when the Judge asked directly to you and your co-counsel whether or not you were going to put your client on the stand." (13RT. 2434, 2435.)

Ford had no notes in his file that he had told petitioner "he has an absolute constitutional right to testify in spite of your advice against it." (13RT. 2435-2436.) Ford didn't tell petitioner "that you're waiving the right and if the Judge asks me directly in open court about it I'm going to tell him that I asked you these questions." (13RT. 2436.)

In response to questioning by the court, Ford thought that he

> " . . . would have said that I still do not think that you should testify . . . . I would have said that it was ultimately his right, but . . . I don't really remember specifics."

(13RT. 2437.)

Ford would have "heavily weighted" the portion of the conversation where he advised petitioner "not to testify" and would have "lightly weighted" the portion where he told petitioner "but you know it is your right." (13RT. 2437.)

ARGUMENT

1. Petitioner was denied his Sixth and Fourteenth Amendment rights to retained counsel of choice.

a. Law.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." "The Sixth Amendment's right to counsel encompasses two distinct rights: a right to adequate representation and a right to choose one's own counsel." *United States v. Cronic,* 466 U.S. 648, 657 n.21, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Under the Sixth Amendment, a defendant has a right to counsel at any "critical stage" of trial. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (per curiam). A "critical stage" is one that "held significant consequences for the accused." *Woods v. Donald*, 575 U.S. 312, 315, 135 S. Ct. 1372, 1376, 191 L. Ed. 2d 464 (2015), citing *Bell v. Cone*, 535 U.S. 685, 696, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic,* 466 U.S. at 659, fn. 25.

Improper denial of the right to retained counsel of choice is "structural error." A defendant who establishes that his right to retained counsel of choice was violated need not demonstrate prejudice." *United States v. Gonzalez-Lopez,* 548 U.S. 140, 146, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006.) Such denial "unquestionably qualifies as 'structural

error.'" *Gonzalez-Lopez, id.*

The right to retained counsel of choice isn't limited to only one attorney for trial. *Wheat v. United States,* 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) implicitly held that this right includes the right to retain more than one attorney. In *Wheat*, a represented defendant requested that a second retained attorney, Iredale, be added to petitioner's defense team. The trial court denied the motion, not because the defendant had the right to only one retained counsel at trial, but because it believed that Iredale had previously represented a government witness, Bravo. The trial court reasoned that if Bravo testified, " . . . ethical proscriptions would forbid [Iredale] to cross-examine Bravo in any meaningful way." *Wheat v. United States* (1988) 486 U.S. at 156.

The Supreme Court upheld the denial of the motion to retain Iredale as additional counsel based on conflict of interest. *Wheat,* 486 U.S. at 162-163. The dissent disagreed with disqualifying Iredale because the court could have "ordered that [Iredale] take no part in the cross-examination of Bravo." *Wheat, id.* at p. 171. Both the majority and dissent assumed that the right to retained counsel of choice included retaining additional counsel unless such counsel had a conflict of interests.

Gonzalez-Lopez similarly involved the right to additional retained counsel of choice. Defendant had originally retained a local attorney to represent him and later sought to retain additional out of state counsel. *Gonzalez-Lopez*, 548 U.S. at 142. A magistrate erroneously disqualified the out of state

counsel for violating a local rule. *Gonzalez-Lopez, id.* On appeal, however, the court held that erroneous disqualification of additional counsel violated defendant's Sixth Amendment right to retained counsel of choice. *Gonzalez-Lopez*, *id* at 143. The right to retained counsel of choice doesn't depend on whether the desired counsel would provide a better "quality of representation" than the existing counsel. *Gonzalez-Lopez, id.* at 145, fn. 1.

After *Gonzalez-Lopez* was decided, the California Supreme Court explicitly recognized the right to retained co-counsel of choice. *People v. Ramirez*, 39 Cal.4th 398 at 424-425 (2006), citing *Gonzalez-Lopez*, 553 U.S. at 248. See also *United States v. Laura* 607 F.2d 52, 58, 61 (3rd Cir. 1979) ("By the time of her hearing, she had a defense team composed of two attorneys who may have served distinct and important functions on her behalf. As she wished to retain both attorneys we can only presume that she felt that she needed both attorneys. That choice is hers to make and not the court's, unless some appropriate justification for the dismissal is provided.")

California cases had previously found a due process right to retained counsel of choice. *People v. Crovedi*, 65 Cal.2d at 208. *Gonzalez-Lopez,* however, rejected any analysis based solely on due process balancing that would "read the Sixth Amendment as a more detailed version of the Due Process Clause." *Gonzalez-Lopez*, 548 U.S. at 145. "[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, id. at 145,

citing *Crawford v. Washington,* 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Accord, *Bullcoming v. New Mexico,* 564 U.S. 647, 649, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), citing *Gonzalez-Lopez* at 145 ("Although the purpose of Sixth Amendment rights is to ensure a fair trial, it does not follow that such rights can be disregarded because, on the whole, the trial is fair.")

In addition, under *Gonzalez-Lopez*, the right to counsel of choice is violated "***whenever*** the defendant's choice is wrongfully denied" because any denial "pervades the entire trial." *Gonzalez-Lopez*, 548 U.S. at 150, emphasis added.

b. The trial court denied petitioner his right to retained counsel of choice.

There had been only two days of trial testimony. (4RT. 559-834, (7CT. 1820-1821.) There was no danger of losing jurors. (5RT. 836.) The September 8 recess was done to protect other people in the courtroom from possibly contracting Covid-19 in case any of the defense tested positive. (5RT. 834.) Ford was first barred from coming to court by "CDC and local rules" until he had a negative test results (5RT. 841), and later, by court order. (5RT. 949.)

The court deprived petitioner's right to retained counsel of choice, simply because Ford reported Covid-19 symptoms and followed rules by staying away from court until his negative test result was available the following day. This came at a critical stage of the trial without justification. The defense had only requested a recess until Ford's test result was available the next morning. Such a minor delay of a day

would have been far less than the delays involved in previous cases.

Moreover, in not recessing trial while Ford's Covid status was uncertain, the court acted contrary to the "orderly processes of justice" described in *Crovedi.* If Ford had been positive for Covid-19, he would have had Covid-19 on September 7, the day before he reported symptoms on September 8. September 7 involved a full day of testimony. (4RT. 690-830.) Since an infected person is contagious for a few days before symptoms develop,[1] Ford could have spread Covid-19 to others in the courtroom on September 8 if he had it. The court should have recessed until Ford's test results were known to protect those in court from possible further transmission of Covid-19. This would have both promoted the processes of justice and avoided depriving petitioner of his Fourteenth Amendment right to due process and Sixth Amendment right to retained counsel of choice.

2. Petitioner had a right to personally decide whether he would testify. This wasn't a trial tactics decision that could be made by counsel.

a. Law.

McCoy v. Louisiana, 138 S. Ct. at 1508, held that under the

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[1] The infectious period is "2 days before the confirmed case had any symptoms . . . through Days 5-10 after symptoms first appeared."

https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx

Sixth Amendment, in "'grant[ing] to the accused personally the right to make his defense,' 'speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.'" *McCoy v. Louisiana*, *id*, quoting *Faretta v. California*, 422 U.S. 806, 819-820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). *McCoy* went on to hold as follows:

> "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.' . . . . Some decisions, however, are ***reserved for the client*** — notably, whether to plead guilty, waive the right to a jury trial, ***testify in one's own behalf***, and forgo an appeal."

McCoy v. Louisiana, 138 S. Ct. at 1508, emphasis added, citing
Gonzalez v. *United States,* 553 U. S. 242, 248, 128 S. Ct. 1765, 170 L. Ed. 2d 61 (2008) and *Jones* v. *Barnes*, 463 U. S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

McCoy concerned a defendant's right "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***."

McCoy v. Louisiana, 138 S. Ct. at 1508, emphasis in original.

In *McCoy,* defense counsel wanted to admit McCoy's guilt of three murders but argue that he should only be convicted of second degree murder because of his mental incapacity. McCoy had repeatedly insisted on a defense of innocence, saying that "he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong." *McCoy*, 138 S. Ct. at 1506 and fn. 1.

Despite the unlikely nature of McCoy's claim of innocence, the Supreme Court held that the decision to admit guilt or assert innocence was McCoy's personally and not defense counsel's:

> "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 . . . . 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 . . . ."

McCoy, 138 S. Ct. at 1508-1509.

McCoy's result wasn't controlled by principles of ineffective assistance of counsel "because a client's autonomy, not

counsel's competence, is in issue." *McCoy*, 138 S. Ct. at 1510-1511. Unlike ineffective assistance, which is only shown when prejudice results, "the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative." *McCoy*, 138 S. Ct. at 1504, 1511. Violation of McCoy's "client autonomy" was structural and McCoy was entitled to a new trial without a showing of prejudice. *McCoy*, 138 S. Ct. at 1511, citing *McKaskle v. Wiggins*, 465 U. S. 168, 177, n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (self-representation), *United States v. Gonzalez-Lopez*, 548 U. S. at 150 (right to retained counsel of choice), and *Waller* v. *Georgia*, 467 U. S. 39, 49-50, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (public trial).

> "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."

McCoy v. Louisiana, 138 S. Ct. at 1511.

Under *McCoy*, the reasonableness of defense counsel's tactics didn't matter:

> "But McCoy insistently maintained: "I did not murder my family." App. 506. Once he communicated that to court and counsel, strenuously objecting to English's proposed strategy, a concession of guilt

should have been off the table."

McCoy, 138 S. Ct. at 1512.

b. Petitioner was deprived of his Sixth Amendment right to "client autonomy" under *McCoy*.

The discussion about whether petitioner would be testifying on his own behalf wasn't reported. The prosecutor introduced a transcript of the jail call as a substitute record. Petitioner told his mother:

> "[The] judge asked them if they had any other witnesses, and they told him, and then, he, you know, he argued about that. He said, 'well, what about your client? Is your client goin' testify?' And I looked at him, and he was like, 'don't you say nothin' to me. Don't say nothin'. I can't ask you, and you can't talk to me.' And they looked at each other, and they said, 'no, we don't think he's gonna' testify. We don't think' – and then, Maria [Belyi] came over 'cuz she know what I said about that. Same thing Tina said, and she said, 'Look, I know – she's compassionate. She wants to do this, and your compassionate, and we know you want to, but you know, we really just want you to listen to us right now. Just listen to us. Let us do this.' I was like, 'okay, handle your business. Handle your business.'"

(7CT. 1970, 1992.)

The jail call supports petitioner's claim that at the time, he

believed that the decision of his testifying was the "business" of his attorneys and not his choice. It also contradicts trial counsel's claims that they and petitioner had decided earlier that petitioner wouldn't be testifying, since, according to the jail call, the attorneys told the court "we ***don't think*** he's gonna' testify" and then Belyi came over to petitioner and asked him to "***listen to us right now***." (7CT. 1970, 1992.)
Neither the judge nor counsel had any different version of the discussion, since they couldn't recall it. (7CT. 1964, 13RT. 2429, 2434, 2435.)

The trial court found that Belyi's statement "listen to us right now" told petitioner that the decision to testify was his personal decision to make. However, petitioner's testifying involves more than him simply giving a speech on his version of the events. To testify effectively, his attorneys would have prepare questions and plan for probable cross-examination. Saying "listen to us" at the last minute suggested to petitioner that the attorneys hadn't prepared for his testifying and that he had little choice but to "listen to them."

c. The court should have either advised petitioner on the record that the right to testify was his personal decision to make and not a matter of trial tactics, or ensured that trial counsel had advised petitioner that it was his right to testify over trial counsels' objection and that petitioner understood that right.

McCoy identified three decisions involving "client

autonomy" that couldn't be made for the defendant by a trial attorney — whether to:

1. plead guilty / insist on trial,

2. waive the right to a jury trial (or not),and

3. testify in one's own behalf (or not.)

McCoy at 1508. *McCoy* also identified a fourth closely related to the decision whether to plead guilty — whether to defend based on a claim of innocence or an admission of partial guilt.

Under California and federal law, before accepting a plea of guilty, the trial court record must show on its face that the defendant was advised of and expressly waived the trial rights set forth in *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S. Ct. 1709, ** 23 L. Ed. 2d 274 (1969). These include the right to counsel, privilege against self incrimination, right to jury trial, and right to confront accusers or cross-examine.

Similarly, defendant's waiver of the right to jury trial must be expressed "in open court by the defendant . . . 'in words . . . and will not be implied from a defendant's conduct.'" *People v. Sivongxxay,* 3 Cal. 5th 151, 166 (2017), *Patton v. United States,* 281 U.S. 276, 308-312, 50 S. Ct. 253, 74 L. Ed. 854 (1930).

Under *McCoy*, a defendant should similarly be advised of his personal right to testify. The idea that a defendant's right to testify was merely a matter of "trial management" that is

exercised under the direction of competent trial counsel was explicitly rejected in *McCoy. McCoy* put a defendant's right to jury trial and right to testify on the same level, and found both to be "reserved for the client." *McCoy v. Louisiana*, 138 S. Ct. at 1508. But even before *McCoy*, *Rock v. Arkansas,* 483 U.S. 44, 107 S. Ct. 2704; 97 L. Ed. 2d 37 (1987) held that a defendant's right to testify was independently based on the Sixth Amendment and not merely an aspect of due process. Years ago, the California Supreme Court applied *Rock* in *People v. Johnson,* 62 Cal. App. 4th 608, 618 (1998), holding:

> "The criminal defendant's constitutional right to testify is ***unlike other matters of trial strategy which are in the control of defense counsel.*** A criminal defendant has the right to take the stand even over the objections of his trial counsel."

An attorney's conversation on this topic is fraught with coercion, duress and confusion. Trial counsel declared that they had told petitioner that it would be bad for him to testify, while also being assured that of course, it was his decision. Such advice inherently eroded petitioner's freedom of choice. The advice would also naturally lead to confusion and misunderstanding by petitioner because of the nature of his right to decide for himself whether or not to testify. As *McCoy* and *Johnson* points out, the defendant has other constitutional rights, such as the right to call witnesses and cross-examine, that aren't a matter of "client autonomy" but up to his counsel as part of defense strategy. *People v. Johnson,* 62 Cal. App. 4th at 618.

Trial counsel said that they'd advised petitioner that he had the right to testify in his own behalf. However, neither had specifically advised petitioner that he had "an absolute constitutional right to testify in spite of [the attorney's] advice against it." Ford's testimony (13RT. 2435-2436), see Belyi's testimony that she didn't advise petitioner "that his right to testify was totally . . . distinct . . . from the lawyers' right to manage the case and put in evidence and not put in evidence and call witnesses . . . and that this was his personal constitutional right." (13RT. 2429-2430.) Ford also admitted that he would have "heavily weighted" the portion of the conversation where he advised petitioner "not to testify" and would have "lightly weighted" the portion where he told petitioner "but you know it is your right." (13RT. 2437.)

It wouldn't be enough simply to resolve the factual dispute by merely accepting the assurances of trial counsel. This wouldn't be an adequate substitute for the on the record advisements required for the other two basic trial decisions that *McCoy* identified as reserved for the defendant – pleading guilty or waiving the right to a jury trial. If it was, there would be no requirement for on the record advisements by the court in these other two situations.

Thus, the court should have advised petitioner that his right to testify is his own decision that was reserved for him to make, and wasn't a matter of trial tactics to be decided by his attorneys and made sure that he understood and waived the right, just as in the other two basic trial decisions identified in *McCoy.* Alternatively, the trial court should have made a record that trial counsel had explained this right to petitioner and obtained a knowing and intelligent waiver of the right.

CONCLUSION.

The trial court denied petitioner his right to retained counsel of choice by forcing him to proceed with only one counsel, on the theory that a defendant has the right to only one retained trial counsel. The court of appeal upheld trial court's decision on the notion that the right to a second retained counsel of choice doesn't apply if the denial is only for a day. There is no California or federal precedent for such a decision. Indeed, the leading Supreme Court case, *Gonzalez-Lopez*, was decided in the context of more than one retained defense counsel. Not granting certiorari would open the door to state trial courts arbitrarily limiting a defendant's right to counsel of choice to a single trial counsel, no matter how complex the case.

McCoy held that both the decision to waive or insist on jury trial and the decision to testify or not are defendant's personal rights that can't be overridden by counsel as a matter of trial strategy. Unlike the decision to waive or insist on jury trial, which requires a defendant's personal on the record agreement, the law is unsettled about whether a trial court must advise a defendant that his right to testify or not is his personal decision and not one for his counsel to make, and whether it must obtain a waiver of this right from the defendant. The court should grant certiorari to address this issue. The California Court of Appeal's ruling that it was up to petitioner to insist on his right to testify at the end of the prosecution's case without advisement contradicts the principle of "client autonomy" identified in *McCoy*. It would render this right meaningless for a defendant, like petitioner, who didn't know he had the right to overrule his counsel's decision that he not testify.

Dated: Oakland, California, Monday, August 19, 2024.

Robert Joseph. Beles

Paul Gilruth McCarthy
Attorneys for *Petitioner WILLIS FRANKLIN*

APPENDIX

1. Opinions, Orders, Findings of Fact, and Conclusions of Law, Whether Written or Orally Given and Transcribed, Entered in Conjunction with the Judgment Sought to Be Reviewed.

a. California Supreme Court order denying review.

SUPREME COURT
FILED MAY 29 2024
Jorge Navarrete Clerk. Deputy

Court of Appeal, First Appellate District, Division One - No. A165893

S284673

IN THE SUPREME COURT OF CALIFORNIA, En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

WILLIS PETER FRANKLIN, Defendant and Appellant.

The petition for review is denied.

GUERRERO
Chief Justice

b. Court of Appeals opinion.

People v. Franklin
Court of Appeal of California,
First Appellate District, Division One
March 13, 2024, Opinion Filed
A165893

Reporter

2024 Cal. App. Unpub. LEXIS 1608 *; 2024 WL 1087796

THE PEOPLE, Plaintiff and Respondent, v. WILLIS PETER FRANKLIN, 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.

Prior History:

[*1]

Alameda County Super. Ct. No. 18CR013820.

Counsel: Office of the Attorney General, Julia Je, for The People, Plaintiff and Respondent.

Beles & Beles Law Offices, Robert Joseph Beles, Law Offices of Robert J. Beles, Paul Gilruth McCarthy, Katherine N Hallinan, for Willis Peter Franklin, Defendant and Appellant.

Judges: LANGHORNE WILSON, J.; HUMES, P. J., BANKE, J. concurred.

Opinion by: LANGHORNE WILSON, J.

Opinion

Defendant Willis Peter Franklin appeals from a sentence of 62 years to life, imposed after a jury found him guilty of multiple sexual offenses against three victims, along with several weapons charges. Franklin asserts that his constitutional right to counsel of his choice was denied when the trial court refused to continue his trial for one day, instead requiring one of his two attorneys to appear remotely pending Polymerase chain reaction (PCR) test results for COVID 19. Defendant also contends that his Sixth Amendment rights were violated because he was not allowed to decide for himself whether to testify in his own defense at trial and was not properly advised by the court of that right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On August 30, 2021, the Alameda County District Attorney filed the operative second amended information

[*2]

in this case, charging Franklin with 10 felonies: continuous

sexual abuse of a child under the age of 14 with respect to Jane Doe One (Pen. Code,[2] § 288.5, subd. (a), count one); lewd and lascivious acts on Jane Doe Two, a child under 14 years of age (§ 288, subd. (a), counts two and three); rape of an unconscious person, Jane Doe Three (§ 261, subd. (a)(4), count four); forcible oral copulation of Jane Doe Three (former § 288a, subd. (c)(2)(A); see now § 287, subd. (c)(2)(A), count five); forcible rape of Jane Doe Three (§ 261, subd. (a)(2), count six); sexual battery by restraint on Jane Doe Three (§ 243.4, subd. (a), count seven); two counts of possession of a firearm by a felon on August 24, 2018 (§ 29800, subd. (a)(1), counts eight and nine); and possession of a firearm by a prohibited person (§ 30305, subd. (a)(1), count ten). As to counts one through six, enhancements were alleged pursuant to section 667.61 (the One Strike law) that Franklin was convicted in the present case of qualifying offenses against more than one victim. The operative information additionally alleged that Franklin had been convicted of bank robbery (18 U.S.C. § 2113) in 1989 and received a prison term for that offense. Count seven was later dismissed for insufficient evidence.

A. Trial

The jury trial was held over 17 days in September and October 2021. Franklin was represented at trial by two attorneys, Brian Ford and

[*3]

[2] All statutory references are to the Penal Code unless otherwise specified.

Maria Belyi. Brian Ford gave the opening statement for the defense on September 2 and 3, 2021 and argued against a prosecution motion during the direct examination of the first witness on September 3. That same day, Belyi objected to testimony, argued regarding the admission of certain evidence, and later conducted the cross examination of the first witness. Belyi also questioned Jane Doe Three during a section 402 hearing. On the next court day, September 7, Belyi objected throughout the direct testimony of Jane Doe Three and then conducted her cross-examination. On September 8, 2021, Ford notified the court early in the morning that he was experiencing symptoms consistent with COVID 19. The court informed the jury that Ford was ill, and the matter was continued to the next day.

By September 9, 2021, both Franklin and Belyi (the two who sat at the same table with Ford) had both tested negative. Ford, who was still feeling unwell, tested negative with a home test kit but appeared remotely via a video platform as he was still awaiting the results of his PCR test. The trial court expressed a general concern about moving the matter along expeditiously and additionally opined that, "under the circumstances

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we find ourselves in with the concerns about the pandemic and COVID infections . . . the longer this case goes on it's only going to get more complicated in that regard." The court further noted that it had asked the jury members to send it a message if any of them "had concerns about their ability to carry forward" given the "developments over the last 24

hours," and none of them had. The court concluded that it felt like "a necessity" to proceed for the remainder of that court day (it was already 11:33 a.m.) with Beyli present in court and Ford participating in the proceedings on the court's video platform. It did not see any prejudice to Franklin in Belyi continuing her cross-examination of Jane Doe Three in an effort to complete the witness examination that day.

Belyi objected to going forward without Ford physically present, arguing that they worked as a team and assisted each other in a way that was not possible over video. She noted that Ford's face had been frozen during a previous hearing and was concerned technical malfunctions might prejudice how the defense was viewed by the jury. She also emphasized the seriousness of the case and Franklin's right to have both of his retained

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attorneys present. The trial court responded that it had observed the two attorneys working together equally and believed Belyi to be "quite capable" of handling matters. While the defense was only asking for a one-day continuance, Belyi acknowledged that it was not a certainty Ford would be well by the next day or test negative. Belyi also clarified that, when she examined a witness, Ford helped her with follow-up questions and by filtering notes from Franklin to provide her with those he deemed important. Ford contributed by citing several cases to the court regarding a defendant's right to retained counsel of choice and argued that the situation could lead the jury to view him as disposable.

While it recognized that the situation was not "ideal," the court could not imagine the jury thinking that Ford was dispensable or that Franklin could be prejudiced by the situation, given Ford's prior conduct in court and his understandable need to isolate. Indeed, the court believed Ford's willingness to dress in his suit and appear remotely even while ill would show the jury how important the case was to Franklin and Ford. The court emphasized that Ford would be visible to the jury on the

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court screen unless it was being used to show exhibits and that he would be listening in and able to contribute to the proceedings. It stated its willingness to allow Belyi and Ford to communicate by phone, text, or in a breakout room at "appropriate points." Ultimately, the trial court denied defense counsel's request to continue the matter to the next day so that Ford could be physically present.

The trial day moved forward with Belyi finishing her cross-examination of Jane Doe Three, the prosecutor completing his redirect examination, and Belyi conducting a re-cross examination. The prosecutor then began his direct examination of Jane Doe One. Ford tested negative and returned to court the next day.

On October 6, 2021, the jury found Franklin not guilty on count four and guilty on all other counts. It found true all special allegations.

B. Motion for New Trial

In July 2022, Franklin—represented by new counsel—filed a motion for new trial on grounds that he had not been advised by prior counsel that it was his personal decision whether or not to testify at trial. The motion additionally argued that the trial court had a duty to advise Franklin on the record that the decision whether

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or not to testify was his to make, and the court had not done so. According to Franklin, since the identified errors were structural, a new trial was required. Attached to the motion were several declarations. Franklin's declaration stated that he repeatedly told his attorneys (Ford and Belyi) that he wanted to testify and that "[his] attorneys never told [him] that it was [his] right to decide whether or not to testify." In contrast, both Ford and Belyi declared that they had advised Franklin that it was ultimately his choice whether or not to take the stand at trial.

In its opposition to the new trial motion, the prosecution argued that California courts have explicitly rejected for decades the notion that defendants should or must be advised of their right to testify by the trial court. In support of its argument that Franklin agreed with his trial counsel not to take the stand, the prosecution submitted a transcript from a jail house call between Franklin and his mother discussing a colloquy in court regarding whether Franklin would testify. In relevant part, it reflects Franklin's understanding of the decision as follows: "[The] judge asked them if they had any other witnesses,

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and they told him, and then, he, you know, he argued about that. He said, 'well, what about your client? Is your client goin' testify?' And I looked at him, and he was like, 'don't you say nothin' to me. Don't say nothin'. I can't ask you, and you can't talk to me.' And they looked at each other, and they said, 'no, we don't think he's gonna' testify. We don't think'—and then, Maria came over 'cuz she know what I said about that. Same thing Tina said, and she said, 'Look, I know—she's compassionate. She wants to do this, and your compassionate, and we know you want to, but you know, we really just want you to listen to us right now. Just listen to us. Let us do this.' I was like, 'okay, handle your business. Handle your business.'" After an unclear response from his mother, Franklin opined: "I think they did good—" Defense counsel argued in reply that the excerpt actually proved the opposite from what the prosecutor maintained—that Franklin thought it was his attorneys' decision whether or not he testified.[1]

The court held a hearing on the new trial motion on July 25, 2022. Franklin testified that he was not advised by his attorneys that he could "override or veto" the decision made

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by them regarding whether he would take the stand. With

[1] A number of excerpts from jury voir dire were also before the court and were equally equivocal. Some comments suggested it was Franklin's personal decision whether to testify—e.g., "[']But a defendant's decision not to, if that's what happens, I don't know, but if Mr. Franklin chooses not to testify, I won't ask him why.[']" (Italics omitted.) Others implied it was a defense decision—e.g., his lawyers may say "'[t]here's no reason for you to get up there. That may be a determination they make a couple of days from now, there's no reason to testify, not after all that evidence.'" (Italics omitted.)

respect to the discussion in court regarding whether he would testify, Franklin stated: "[The judge] looked back at the two lawyers, Ms. Belyi and [Ford] and they looked back and forth at each other until ultimately they decided that I would not testify. That was the first time that the decision was made. Up until then Mr. Ford was for my testifying and Ms. Belyi was not. But that was the first time the decision was actually made. They made it and no one asked me anything else."

Franklin acknowledged that Belyi walked over and said to him: "I know this is what you want to do but just listen to us; we don't want you to testify." He also recalled Ford telling him at some point: "[S]itting on the witness stand a witness can say one thing and blow the whole case. Right now they haven't proven their case so we don't need to do this." When Franklin told his attorneys to handle their business, he meant for them to make the decision like they had other decisions with respect to trial tactics. He did not "think [he] had a choice in it." He did not recall Belyi ever saying that it was his choice.

The court then asked Franklin: "[Belyi] didn't

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say anything to the effect of we don't care what you think, this decision has been made by Mr. Ford and I. We don't want to hear what you have to say. It's none of your business. She didn't say anything like that. She said 'listen to us.' Listen to our advice on this topic." Franklin agreed that was what Belyi said. When defense counsel objected to the court's questions, the court replied: "The point I'm making is your client's own

testimony is that his lawyer said to him 'listen to us.' That suggests to me his agency in the decision. Not that this was pressed upon him, a decision taken from him. His own testimony is consistent with their declaration."Belyi testified that she recalled talking with Franklin around five times during her representation of him regarding whether or not he would testify at trial. She advised Franklin more than once that it was his right to decide whether or not he would take the stand. Specifically, Belyi believed she said "that it's ultimately up to [him] and that he [could] testify even if we disagree[d] with that path." Belyi also advised Franklin that she did not think he should testify, explaining that his testimony would open the door for the admission

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of evidence that would be damaging to his case. From her recollection, Franklin ultimately agreed to go along with her advice. Belyi did not secure an actual waiver from Franklin of his right to testify. Had Franklin insisted on testifying, she would have allowed it.

Ford testified that he spoke with Franklin more than five times about testifying in his case and advised him more than once that it was his decision whether or not he testified at trial. He consistently gave Franklin his "very strong" opinion that he should not take the stand in his own defense. However, if Franklin had insisted on testifying, he would have allowed him to do so. Ford admitted that he never formally voir dired Franklin about his decision whether to testify.

After argument, the trial court denied the motion for new

trial. It noted there was no dispute that Franklin was not questioned on the record by either counsel or the court regarding his personal right to choose whether to testify. But it rejected Franklin's argument that such a failure, in itself, required reversal. The court went on to find both Belyi and Ford credible, accepting their testimony "that they did on a number of occasions adequately advise

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Mr. Franklin of his right to testify and that the choice in that matter was his." The court continued: "So in regard to any credibility calls I just want to say that that was the Court's finding and I in essence believe that Mr. Franklin's position really is one of regret that he did not testify as opposed to a position where he did not understand that he had the right to override his lawyers' advice on that point."

Thereafter, at the sentencing hearing on August 8, 2022, the court imposed a total term of 62 years to life under the One Strike Law—four consecutive terms of 15 years to life (counts one, two, five, and six) to run consecutively to a two-year determinate term for count eight. Concurrent terms were imposed with respect to counts three (15 years), nine (two years), and 10 (two years). This appeal followed.

II. DISCUSSION

A. Constitutional Right to Counsel of Choice

Franklin asserts on appeal that the judgment must be reversed because the trial court denied him his Sixth

Amendment right to counsel of his choice. He claims that the error was structural, requiring reversal without consideration of prejudice or any countervailing factors. Franklin misapprehends the scope of the constitutional

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right he invokes.

1. Legal Framework and Standard of Review

"The Sixth Amendment right to counsel guarantees a criminal defendant the right to choose his or her own counsel when the defendant does not need appointed counsel." (*People v. Woodruff* (2018) 5 Cal.5th 697, 728, 235 Cal. Rptr. 3d 513, 421 P.3d 588, citing *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (*Gonzalez-Lopez*).) In *Gonzalez-Lopez*, the United States Supreme Court rejected the argument that this Sixth Amendment right to counsel of choice is not violated unless a defendant has been prejudiced. (*Gonzalez-Lopez*, at pp. 144-146.) Thus, "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer [he or she] wants." (*Id.* at p. 148.) The Supreme Court also concluded that violation of the right is not subject to review for harmless error. Rather, "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."'" (*Id.* at p. 150.)

The *Gonzalez-Lopez* Court, however, was careful to point out that the Sixth Amendment right to counsel of choice "'is

circumscribed in several important respects.'" (*Gonzalez-Lopez, supra*, 548 U.S. at p. 144.) As is relevant here, the Court "'recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness [citation], and against the demands of its calendar.'" (*People v. Lynch* (2010) 50 Cal.4th 693, 725, 114 Cal. Rptr. 3d 63, 237 P.3d 416, quoting *Gonzalez-Lopez*, at p. 152; see also *Morris v. Slappy* (1983) 461 U.S. 1, 11, 103 S. Ct. 1610, 75 L. Ed. 2d 610 ["'Trial

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judges necessarily require a great deal of latitude in scheduling trials.'"].) Thus, a trial court may "'make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.'" (*Gonzalez-Lopez*, at p. 152.)

A continuance of a criminal proceeding "shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) Granting or denying a motion for continuance is left to the discretion of the trial court and will be affirmed on appeal absent a showing of an abuse of discretion. (*People v. Mickey* (1991) 54 Cal.3d 612, 660, 286 Cal. Rptr. 801, 818 P.2d 84.) Reviewing courts look to the "circumstances of each case, '"particularly in the reasons presented to the trial judge at the time the request [was] denied."'" (*People v. Courts* (1985) 37 Cal.3d 784, 791, 210 Cal. Rptr. 193, 693 P.2d 778.)***2. No Constitutional Violation is Established***

Franklin argues that once he was denied his attorney's physical presence for a single court day when Ford was

required to appear remotely, the violation of his Sixth Amendment right to counsel of his choice was complete. Thus, he claims, the judgment must be reversed for structural error and without any balancing of competing interests. As we have just stated, however, a trial court may "make scheduling and other decisions that effectively exclude a defendant's first choice of counsel," without running afoul of the Sixth Amendment. (*Gonzalez-Lopez, supra*, 548 U.S. at p. 152.)

Here, Franklin's

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first choice was understandably to have Ford physically present for every day of trial. But we do not believe the trial court's decision to proceed with trial for one day with only one of Franklin's two attorneys physically present and the other present and available remotely implicates Sixth Amendment concerns. Indeed, the *Gonzalez-Lopez* court justified its conclusion that the erroneous deprivation of the right to counsel of choice is structural error as follows: "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,' . . . [h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an

alternate universe." (*Id.* at p. 150.) Such is obviously not the case here.

Rather, we conclude that the

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trial court's decision to proceed with the trial under the circumstances presented is more properly analyzed for abuse of discretion as a denial of Franklin's request for a continuance. It is clear from the factual recitation set forth above that no abuse occurred here. In denying the continuance, the trial court heard the concerns of defense counsel; considered the comfort level of the jury and Jane Doe Three; weighed the unique concerns presented by the COVID 19 pandemic; received negative tests from Belyi and Franklin; considered Belyi's clear competence and the stage of the proceedings; saw no material prejudice to Franklin; and stated its willingness to allow Belyi and Ford to communicate during the proceedings. We see no error, and certainly no abuse of discretion.

B. Constitutional Right to Decide to Testify in Own Defense

Franklin next contends that his Sixth Amendment right to decide for himself whether or not to testify was violated in this case because his attorneys never explained to him that it was his choice to make. In a related argument, Franklin asserts that the trial court erred by failing to give him an express advisement on the record that the decision whether or not to testify

was personal and to obtain a valid waiver. On this second point, he argues existing precedent to the contrary is no longer good law in light of the United States Supreme Court's decision in *McCoy v. Louisiana* (2018) 584 U.S. 414, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (*McCoy*). We are not persuaded by either claim.

1. Legal Framework and Standard of Review

Both the Fifth Amendment of the United States Constitution and Article 1, section 15 of the California Constitution provide that criminal defendants cannot be compelled to testify as witnesses against themselves in criminal proceedings. In a related vein, the United States Supreme Court explicitly held in 1987 that criminal defendants also have "a constitutional right to testify on [their] own behalf." (*People v. Johnson* (1998) 62 Cal.App.4th 608, 617, 72 Cal. Rptr. 2d 805 (*Johnson*), citing *Rock v. Arkansas* (1987) 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (*Rock*); accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1332, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (*Bradford*).) "The Supreme Court stated the right to testify 'is one of the rights that "are essential to due process of law in a fair adversary process"' [citation] and was protected by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." (*Johnson*, at p. 617, quoting *Rock*, at pp. 51-53.)

Specifically, the Supreme Court explained: "'The opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony' since the privilege

against self-incrimination '"is fulfilled only when the accused [are] guaranteed the right 'to remain silent unless [they] choose to speak in the unfettered exercise of [their] own will.' . . . The choice of whether to testify in

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one's own defense . . . is an exercise of the constitutional privilege."'" (*Johnson*, 62 Cal.App.4th at p. 617, quoting *Rock, supra*, at pp. 52-53; accord, *People v. Duong* (2020) 10 Cal.5th 36, 55, 267 Cal. Rptr. 3d 231, 471 P.3d 352 ["A criminal defendant has the right to testify at trial, 'a right that is the mirror image of the privilege against compelled self-incrimination and accordingly is of equal dignity.'"].) The *Rock* Court further found "the right to testify 'in the Compulsory Process Clause of the Sixth Amendment, which grants defendant[s] the right to call "witnesses in [their] favor"' since "'[l]ogically included in the accused's right to call witnesses whose testimony is "material and favorable to [their] defense," [citation] is a right to testify [themselves], should [they] decide it is in [their] favor to do so.'" (*Johnson*, at pp. 617-618, quoting *Rock*, at p. 52.) Finally, "'the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law [which includes the] right to be heard and to offer testimony,' necessarily includes the criminal defendant's right to testify in [his or her] own behalf." (*Johnson*, at p. 618, quoting *Rock*, at p. 51.)

The *Rock* Court further opined that "the Sixth Amendment '"grants to the accused *personally* the right to make [his or her] defense"' which includes the 'right to present [their] own version of events in [their] own words.'" (*Johnson, supra*, 62

Cal.App.4th at p. 618, italics in *Rock*.) Thus, a defendant "may exercise the right to testify

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over the objection of, and contrary to the advice of, defense counsel." (*Bradford, supra*, 15 Cal.4th at p. 1332.) However, the right to testify "must be exercised with caution and good judgment, and with the advice and under the direction of competent trial counsel. It necessarily follows that a trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising [his or her] Fifth Amendment privilege against self-incrimination and is abiding by [defense] counsel's trial strategy." (*People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545, 85 Cal. Rptr. 346 (*Mosqueda*); accord, *People v. Enraca* (2012) 53 Cal.4th 735, 762-763, 137 Cal. Rptr. 3d 117, 269 P.3d 543 (*Enraca*) [quoting *Mosqueda*].)

Thus, our high court has repeatedly held that a trial court is not required to "obtain an affirmative waiver on the record whenever a defendant fails to testify at trial." (*People v. Alcala*, 4 Cal.4th 742, 805, 15 Cal. Rptr. 2d 432, 842 P.2d 1192; accord, *People v. Bradford* (1997) 14 Cal.4th 1005, 1052-1053, 60 Cal. Rptr. 2d 225, 929 P.2d 544 [same and distinguishing the right to a jury trial because Cal. Const., art. I, § 16 expressly requires a personal waiver of the jury trial right from the defendant]; *Bradford, supra*, 15 Cal.4th at p. 1332 [trial court has no sua sponte duty to inform a defendant of his or her "right to testify, or to obtain his personal waiver of that right"]; see also *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1232, 280 Cal. Rptr. 578 ["[t]he waiver of the right to

testify may be made by counsel, and the courts have wisely refused to impose a sua sponte obligation on the trial court to extract a personal waiver from the defendant"].)

In 2012, the

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Supreme Court reaffirmed these previous decisions, again opining that a trial court has no duty to give advice or seek an explicit waiver regarding a defendant's right to testify, unless a conflict with counsel comes to the court's attention. (*Enraca, supra*, 53 Cal.4th at p. 762.) Specifically, our high court rejected the argument "that requiring an advisement and explicit waiver, even in the absence of a conflict, 'would not only protect [a] defendant's fundamental constitutional right to testify, but also ease the burden on the judicial system' by obviating the need for posttrial evidentiary hearings on the question of waiver." (*Ibid.*) In doing so, the Court noted: "When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on [a] claim that despite expressing to counsel [a] desire to testify, [the defendant] was deprived of that opportunity.'" (*Id.* at pp. 762-763.)

"On appeal, a trial court's ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard. [Citation.] Its ruling will not be disturbed unless defendant establishes 'a "manifest and unmistakable abuse of discretion."'" (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27, 63 Cal. Rptr. 3d 1, 162 P.3d 528 (*Hoyos*), overruled in part on another

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ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920, 169 Cal. Rptr. 3d 363, 320 P.3d 800.) "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler* (1997) 16 Cal.4th 561, 582, 66 Cal. Rptr. 2d 454, 941 P.2d 87; accord *People v. Albarran* (2007) 149 Cal.App.4th 214, 224, fn. 7, 57 Cal. Rptr. 3d 92.) However, with respect to constitutional questions, such as that at issue here, "the asserted abuse of discretion is the asserted failure of the trial court to recognize violations of defendant's constitutional rights." (*Hoyos*, at p. 917, fn. 27.) In other words, our review of the constitutional claim is de novo.

2. No Sixth Amendment Violation is Established

i. Defendant Was Adequately Advised By Counsel

Franklin's first argument—that he was not adequately advised of his right to decide for himself whether or not to testify—is easily dismissed. As stated above, the court found Belyi and Ford credible, and we must accept the trial court's credibility determinations. The testimony of Ford and Belyi supplies substantial evidence that they advised Franklin on multiple occasions that it was ultimately his choice whether or not to testify in his own defense. Franklin does nothing to refute these core facts. He asserts that the jail house call supports his testimony that he believed the decision regarding whether he would testify was the "'business'

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of his attorneys" rather than his own choice. But the call is, at best, ambiguous. And he claims that he only went along with Belyi's "last minute" plea to "'listen to us right now'" because he assumed his attorneys had not prepared to put him on the stand. Even if this were true, it does not overcome the credible statements of Ford and Belyi that they each advised him of his right to testify *more than once*. In short, the record does not show that Franklin's attorneys failed to advise him properly regarding his right to take the stand, and thus the trial court did not abuse its discretion in denying Franklin's new trial motion on that basis.[1]

ii. Trial Court Had No Duty to Seek an Explicit Waiver

The second part of Franklin's argument in this context is that we should ignore decades of precedent concluding that a trial court has no duty to give advice or seek an explicit waiver regarding a defendant's right to testify based on the United States Supreme Court's decision in *McCoy, supra*, 584 U.S. 414. We decline to do so. Even while presenting this argument, Franklin concedes that the *McCoy* case does not specifically deal with a defendant's decision to testify. It is just listed as a right reserved "'for the client.'"

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In brief, the Court explained that the Sixth Amendment guarantees a defendant the right to make a defense; it

[1] By failing to demand on the record the right to testify in his own defense, Franklin has arguably forfeited the issue. (See *Enraca, supra*, 53 Cal.4th at pp. 762-763.) However, since the trial court held a hearing and considered the merits of the claim in denying the new trial motion—and because we must address the constitutional issue regardless—we address and reject the argument on the merits.

"'speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.'" (*McCoy, supra*, 584 U.S. at p. 421.) While some decisions, such as trial management, are best left to counsel, "[s]ome decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*Id.* at p. 422.)

Although *McCoy* listed the right to testify in one's own defense among those trial decisions that are reserved for the client, it did so only to add another right to that list—the right of a defendant to maintain his or her innocence at trial. *McCoy* did not consider whether a trial court must advise and/or seek an explicit waiver on the record to preserve said rights. Further, nothing in *McCoy* suggests that all of the listed decisions reserved for a defendant in a criminal case—whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, forgo an appeal, and maintain innocence—must be treated identically in all respects. For example, as is relevant here, a number of courts have rejected the procedural rule Franklin argues is required here

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because the right to testify is so inextricably tied to the Fifth Amendment right against self-incrimination. "To require the trial court to follow a special procedure, explicitly telling defendant about, and securing an explicit waiver of, a privilege *to* testify (whether administered within or outside the jury's hearing), could inappropriately influence the defendant to waive [his or her] constitutional right *not* to testify, thus threatening the exercise of this other, converse,

constitutionally explicit, and more fragile right." (*Siciliano v. Vose* (1st Cir. 1987) 834 F.2d 29, 30 (opn. of Bryer, J.); accord, *United States v. Rodriguez-Arpacio* (5th Cir. 2018) 888 F.3d 189, 193-194; *Brown v. Graham* (W.D.N.Y. 2011) 2011 U.S. Dist. LEXIS 87879 at pp. 14-16; see generally *State v. Morel-Vargas* (Conn. 2022) 343 Conn. 247, 273 A.3d 661, 672-675.) In sum, nothing in *McCoy* mandates we reject existing precedent in this context, and we are therefore bound to follow it. (*People v. Landry* (1996) 49 Cal.App.4th 785, 791, 56 Cal. Rptr. 2d 824.)

III. DISPOSITION

The judgment is affirmed.
Langhorne Wilson, J.

WE CONCUR:

Humes, P. J.
Banke, J.

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