In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

ROBERT MAURICE BLOOM,

Appellant.

CAPITAL CASE

Case No. S095223

Los Angeles County Superior Court Case No. A801380
The Honorable Darlene E. Schempp, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Acting Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
State Bar No. 210740
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6090
Fax: (916) 731-2122
Email: DocketingLAAWT@doj.ca.gov
Michael.Johnsen@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

ARGUMENT

COUNSEL DID NOT VIOLATE APPELLANT'S AUTONOMY RIGHT TO MAINTAIN FACTUAL INNOCENCE BY PRESENTING A GUILT-PHASE MENTAL DEFENSE OVER HIS OBJECTION

Relying on *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, 1508, appellant claims that his Sixth Amendment autonomy right was violated when his trial lawyers presented a guilt-phase mental defense over his objection. (Supp. AOB 6-8.) *McCoy* does not support reversal on the facts of this case because appellant did not unequivocally insist that he was innocent of the killings, a prerequisite for relief under *McCoy*. While there is no question that appellant did not want his lawyers to present a mental defense, the record also makes clear that the dispute was one of trial tactics. It did not implicate any value judgment, as described in *McCoy*, about maintaining factual innocence. Mere disagreement over which defense to pursue at the guilt phase, which is all that this case involves, does not implicate the categorical Sixth Amendment rule established in *McCoy*.

A. *McCoy v. Louisiana*

In *McCoy*, a capital case, the defendant disagreed with his attorney's strategy to concede liability for death-qualifying murder at the guilt phase in order to preserve credibility and to focus on avoiding the death penalty at the sentencing phase. (*McCoy*, *supra*, 138 S.Ct. at pp. 1505-1507.) The defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." (*Id*. at p. 1505.) He opposed his counsel's strategy to concede guilt "at every opportunity, before and during trial, both in conference with his lawyer and in open court." (*Id*. at p. 1509.) The high court held that counsel's decision to go ahead with the concession despite his client's "intransigent and

unequivocal" objection violated the Sixth Amendment autonomy right to maintain innocence. (*Id*. at pp. 1507-1509.)

The Court reasoned that trial management is ordinarily within counsel's purview—"what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence"—and is subject to the usual *Strickland*[1] standard governing the effective assistance of counsel. (*McCoy*, *supra*, 138 S.Ct. at pp. 1508, 1510-1511.) But it observed that certain fundamental decisions nonetheless belong exclusively to the criminal defendant: "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*Id*. at p. 1508.) It concluded that "[a]utonomy to decide that the objective of the defense is to assert innocence belongs in this latter category." (*Ibid*.) That autonomy right supersedes any decision by counsel about which trial strategy would be the most effective because it concerns, at its root, a "value judgment." (*Ibid*.) Even if the assertion of innocence is unwise as a matter of trial strategy, a defendant "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 …." (*Ibid*.) When counsel violates this autonomous value judgment by conceding guilt, the error is structural. (*Id*. at p. 1511.)

Under *McCoy*, therefore, a lawyer violates the defendant's autonomy right to maintain innocence if he or she admits guilt of the charged offense or a lesser-included offense notwithstanding the client's position that he or she did not commit the crime. (See *People v. Flores* (2019) 34 Cal.App.5th 270, 281-282; *People v. Eddy* (2019) 33 Cal.App.5th 472, 481-483.)[2] The

---

[1] *Strickland v. Washington* (1984) 466 U.S. 668.

[2] The *McCoy* Court repeatedly described the violation there as counsel's concession of "guilt." (See *McCoy*, *supra*, 138 S.Ct. at pp. 1505,

interest the Constitution protects is the defendant's autonomy to declare that he or she did not actually commit the act underlying the charged crime (*McCoy*, *supra*, 138 S.Ct. at pp. 1505-1506, 1508)—in other words, that he or she is "factually innocent" (*Eddy*, *supra*, 33 Cal.App.5th at p. 481). Nevertheless, the defendant's insistence on maintaining innocence must be clear and unambiguous. (*McCoy*, *supra*, 138 S.Ct. at p. 1509 [describing defendant's opposition as "intransigent and unambiguous"].) As *McCoy* reaffirms, in the absence of an unambiguous assertion of factual innocence, counsel's decisions about trial strategy are reviewed under the normal *Strickland* standard. (*Id*. at pp. 1508, 1509-1510 [discussing *Florida v. Nixon* (2004) 543 U.S. 175].)

B. No autonomy violation of the sort identified in *McCoy* occurred in this case

Though the retrial record shows that appellant strenuously objected to the strategy of presenting a mental defense, it does not show that he unambiguously sought to maintain his innocence within the meaning of *McCoy*. The defense strategy—supported by the testimony of several family members and three psychiatric experts—was to show that appellant had acted under the heat of passion in committing the killings and that he suffered from mental impairments that prevented him from forming malice. (See RB 10-24.) Appellant reiterated several times leading up to trial that

---

1509-1511.) Whether the defendant's autonomy right would be violated by something short of the admission of legal guilt—for example, counsel's admission, over the client's objection, of the actus reus of the charged crime while still pursuing a complete defense such as accident or necessity—is unclear. (See *id*. at p. 1512 & fn. 1 (dis. opn. of Alito, J.) ["A rule that a defense attorney may not admit the actus reus of an offense (or perhaps even any element of the actus reus) would be very different from the rule that the Court expressly adopts."].) The People take no position on that question here, since the facts of this case do not implicate it.

he disagreed with his attorneys' decision to pursue this defense. (See Sealed RT 92, 499, 666, 823; see also Sealed RT 3033, 3615.)[3] Among appellant's various complaints was that counsel would "concede guilt" as part of the mental defense. (Sealed RT 1930.) And at one point in making that objection appellant appeared to assert that he was factually innocent of killing Josephine and Sandra. (Sealed RT 1931 ["I did not kill Josephine and I am not the person who shot my little sister Sandy in the face."].) But those statements must be taken in context.

In objecting to the mental defense, appellant explained that the disagreement concerned control over trial strategy: that he thought he should "have final say-so on strategy and tactics" since it was his life at stake (Sealed RT 32; see also Sealed RT 503); that he preferred to put the prosecution to its burden of proof "without putting on a defense" at all (Sealed RT 145); and that the mental defense would open the door to damaging evidence (Sealed RT 499). At certain points, appellant acknowledged that he did not even dispute liability for killing Bloom and that the killings of Josephine and Sandra, which had "haunted" him in the years since, were simply not premeditated. (Sealed RT 96-98; see also Sealed RT 104-105.) That position was consistent with appellant's eventual testimony at the penalty phase, where he admitted that he killed all three victims and contended only that he was not "totally responsible" for killing Josephine and Sandra. (See RB 38-42.)[4]

---

[3] Respondent will refer to the sealed portions of the reporter's transcript provided to respondent under the terms of the Court's order of August 11, 2010, as "Sealed RT."

[4] At the first trial, appellant did not dispute that he had committed two of the killings. He testified there that "he killed his father while in a heat of passion after witnessing his father kill his stepmother, and he was in a 'transitory state' when he killed his stepsister." (See *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1270.)

When appellant complained that the mental defense would require counsel to "concede guilt," he again stated that he preferred to put the prosecution to its burden of proof rather than "hand them their case on a silver platter without so much as a fight." (Sealed RT 1930; see also Sealed RT 3035, 3616.) He believed the prosecution could not prove its case because he had disposed of the rifle and wiped his fingerprints off the scissors, and therefore "they don't have any physical evidence connecting me to any of these killings." (Sealed RT 1932 ["the prosecution's evidence against me is flimsy, inconsequential, and weak"].) And he explained that he had discussed several alternative defenses with his lawyers, which they disapproved, that he believed he had a constitutional right to reject the mental defense, and that the fundamental conflict was "between defense counsel's mental defense and my defense of the truth and putting [the prosecution] to their burden of proof." (Sealed RT 1933-1934.) Read as a whole, this record does not show that appellant unequivocally adhered to any "value judgment" about maintaining factual innocence. It instead reveals a dispute over ordinary trial strategy.

Nor is appellant's objection to the mental defense itself enough to support a *McCoy* claim. (Supp. AOB 7-8.) *McCoy* expressly protects only a defendant's autonomous value judgment about maintaining innocence. (See *McCoy*, *supra*, 138 S.Ct. at pp. 1505-1506, 1508; *Eddy*, *supra*, 33 Cal.App.5th at p. 481) It does not grant criminal defendants veto power in instances of strategic disagreements falling outside that narrow context. (See *McCoy*, *supra*, 138 S.Ct. at pp. 1508, 1510-1511; see also *People v. Gurule* (2002) 28 Cal.4th 557, 611 [ineffectiveness under *Strickland* shown only if counsel conceded guilt while "lacking any reasonable tactical reason to do so"].) Because the constitutional violation identified in *McCoy* is a structural one, its scope must necessarily be limited. (See *People v. Mil* (2012) 53 Cal.4th 400, 410 [structural error exists "only in a 'very limited

class of cases'"].) To extend *McCoy* in the manner suggested by appellant, however, would substantially encroach on the well-established *Strickland* inquiry that has always governed disagreements like the one that arose in this case. Inevitably, the promise of automatic reversal would promote ever more litigation about a defendant's autonomy right to select from myriad potential "objectives," swallowing much of counsel's long-recognized authority to manage the defense. (See *United States v. Rosemond* (S.D.N.Y. 2018) 322 F.Supp.3d 482, 487.) Such an extension is unsupported by the reasoning or holding of *McCoy*.[5]

Appellant does not rely on the Ninth Circuit's decision in *United States v. Read* (2019) 918 F.3d 712, and respondent agrees that the decision is inapposite. There, counsel presented an insanity defense over the defendant's objection and the Ninth Circuit reversed, holding that *McCoy*'s

---

[5] In this case, moreover, appellant's attempt to secure relief based on his objection to the mental defense raises serious questions apart from whether *McCoy* supports the claim. Appellant successfully argued for reversal of his first death judgment on the basis that his trial attorney was ineffective in failing to adequately present a mental defense. (See RB 1 & fn. 1; *Bloom v. Calderon, supra,* 132 F.3d at pp. 1277-1278.) During discussion of appellant's objections below, the court and defense counsel recognized that the very reason the case had to be retried was that a federal court had concluded that "the mental defenses were never developed in the first trial," in violation of the Sixth Amendment. (RT 669.) Appellant's argument now—that his second death judgment should be reversed because those mental defenses were developed and presented—strongly resembles the type of argument made by parties this Court has criticized for attempting to trifle with the courts. (Cf. *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, 165-166 [to permit party to challenge judgment determining parentage after stipulating to that judgment would "trifle with the courts"]; *People v. Hester* (2000) 22 Cal.4th 290, 295 ["defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process"]; *In re Griffin* (1967) 67 Cal.2d 343, 348 ["a litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when 'To hold otherwise would permit the parties to trifle with the courts'"].)

reasoning "strongly suggests" this violated the defendant's Sixth Amendment autonomy right. (*Id*. at pp. 719-721.) The defense at issue in *Read* was comparable to California's plea of not guilty by reason of insanity (see Pen. Code, § 1026), which would entail indeterminate hospitalization if successful. (See 28 U.S.C. §§ 4242-4243; *Read*, *supra*, 918 F.3d at p. 716.) The Ninth Circuit observed that a defendant objecting to such a defense, much like one who wishes to maintain factual innocence, might prefer the greater risk of penal consequences to the potential opprobrium associated with an insanity finding, as well as the prospect of indefinite confinement. (*Read*, *supra*, 918 F.3d at pp. 720-721.)

Irrespective of the Ninth Circuit's questionable extension of *McCoy* to circumstances beyond a defendant's assertion of factual innocence, *Read*'s reasoning does not apply here even on its own terms. This case is fundamentally different from *Read*. The mental defense advanced by counsel was not the type that could have resulted in an insanity finding or commitment to a mental institution. Rather, counsel sought to mitigate appellant's criminal culpability by showing that he had acted under the heat of passion and suffered from mental impairments that prevented him from forming malice. (RB 10-24.) In fact, California has long adhered to the rule recognized by the *Read* court (see *People v. Gauze* (1975) 15 Cal.3d 709, 717-718 [presently sane defendant cannot be compelled to present an insanity defense]), and appellant was permitted to withdraw his insanity plea below (see 24CT 6263-6264). *Read* is irrelevant to appellant's strategic dispute with his attorneys over the mental defense presented at the guilt phase of his trial.

The distinction between the Sixth Amendment rights discussed in *McCoy* and *Strickland* is a matter "not of degree but of kind." (*Bell v. Cone* (2002) 535 U.S. 685, 696 [characterizing distinction between *Strickland* and *United States v. Cronic* (1984) 466 U.S. 648].) An unambiguous

objection to any defense strategy does not suffice to support a *McCoy* claim. Rather, the autonomy right recognized in *McCoy* is violated only when counsel overrides a defendant's unambiguous assertion of factual innocence. That did not happen here. There was therefore no categorical Sixth Amendment violation as described in *McCoy*.

CONCLUSION

The judgment should be affirmed.

Dated: January 15, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Acting Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General

S/

MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
Attorneys for Respondent

LA2001XS0002
54044066.docx

CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 1,861 words.

Dated: January 15, 2020

XAVIER BECERRA
Attorney General of California

S/

MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE AND E-MAIL

Case Name: **People v. Robert Maurice Bloom – Capital Case**
Case No.: **S095223**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On **January 17, 2020**, I electronically served the attached **Supplemental Respondent's Brief** by transmitting a true copy via this Court's TrueFiling system..Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on **January 17, 2020**, I placed a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Hon. Darlene E. Schempp, Judge
Los Angeles County Superior Court
Northwest District
6230 Sylmar Avenue, Dept. S
Van Nuys, CA 91401

On **January 17, 2020**, I served the attached **Supplemental Respondent's Brief** by transmitting a true copy via electronic mail to:

John Morris
Head Deputy District Attorney
[Courtesy Copy by Email}

CAP - SF
filing@capsf.org
[Courtesy Copy by Email]

DECLARATION OF SERVICE AND E-MAIL

Case Name: **People v. Robert Maurice Bloom – Capital Case**
Case No.: **S095223**

On **January 17, 2020**, I caused one (1) **unbound** copy of the **Supplemental Respondent's Brief** in this case to be delivered to the California Supreme Court at 350 McAllister Street, Room 1295, San Francisco, CA 94102-4797 by **Federal Express Tracking # 8133 7986 6087**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 17, 2020**, at Los Angeles, California.

K. Amioka	s/
Declarant	Signature

LA2001XS0002
54052297.docx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BLOOM (ROBERT MAURICE)**
Case Number: **S095223**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **michael.johnsen@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
STIPULATION	S095223_SRB_Bloom

Service Recipients:

Person Served	Email Address	Type	Date / Time
William Lowe Attorney at Law	wtlowe@gmail.com	e-Serve	1/17/2020 2:12:59 PM
William Lowe Attorney at Law 83668	wtlowelaw@gmail.com	e-Serve	1/17/2020 2:12:59 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

1/17/2020
Date

/s/Karen Amioka
Signature

Johnsen, Michael (210740)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm