IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. HUNG THANH MAI, Defendant and Appellant.	No. S089478 (Orange County Sup. Ct. No. 96NF1961)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Orange

HONORABLE RICHARD WEATHERSPOON

MICHAEL J. HERSEK
State Public Defender

C. DELAINE RENARD
State Bar No. 1699893
Deputy State Public Defender

221 Main Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 904-5600
Renard@ospd.ca.gov

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

FEDERAL CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES

Pages

FEDERAL RULES

FEDERAL REGULATIONS

STATE CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

Pages

OTHER RULES

TEXTS AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

Pages

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. HUNG THANH MAI, Defendant and Appellant.	No. S089478 (Orange County Sup. Ct. No. 96NF1961)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of death following a trial and is authorized by Penal Code section 1239, subdivision (b).[1]

STATEMENT OF THE CASE

On April 14, 1997, the Orange County District Attorney filed an information against appellant, Hung Thanh Mai, charging him with a July

[1] All statutory references are to the Penal Code unless otherwise noted.

13, 1996 violation of Penal Code section 187, subdivision (a) (murder of Don Joseph Burt). (1 CT 16.)[2] The information added a single special circumstance allegation under Penal Code section 190.2, subdivision (a) (7) (murder of peace officer in lawful performance of his or her duties). (1 CT 16.) On August 28, 1997, Mr. Mai pleaded not guilty and denied the special circumstance allegation. (1 CT 87.)

On July 23, 1999, Mr. Mai waived his right to jury trial on the first degree murder charge and special circumstance allegation and the parties stipulated to a court trial based upon the evidence presented at the preliminary hearing, without presenting any additional evidence or argument – a so-called "slow plea." (2 CT 491.) On July 30, 1999, the trial court found Mr. Mai guilty of first degree murder and found true the special circumstance allegation. (2 CT 503.)

On April 3, 2000, the penalty trial commenced with jury selection. (2 CT 654.) On April 19, 2000, the jury returned a death verdict. (3 CT 853, 867-868.)

On June 23, 2000, the trial court denied the automatic motion to modify the death verdict pursuant to Penal Code section 190.4. (4 CT

---

[2] "CT" refers to the Clerk's Transcript, preceded by volume number. "SCT" refers to the supplemental Clerk's Transcript, preceded by the date the supplement was filed (e.g., 3/16/07 SCT). "Muni CT" refers to the separately bound and paginated municipal court Clerk's Transcript. "987.9 CT", "987.3 CT" and "987.2 CT" refers to the Clerk's Transcripts of materials filed pursuant to Penal Code sections 987.9. 987.3, and 987.2.

"RT" refers to the superior court Reporter's Transcript as originally filed, preceded by the volume number. "ART" refers to the Augmented Reporter's Transcript. "Muni RT" refers to the separately bound and paginated volumes of municipal court Reporter's Transcripts, preceded by the volume number.

1127.) On the same date, the court imposed the judgment of death and ordered that Mr. Mai be confined in the federal Bureau of Prisons until the death judgment is executed. (4 CT 1119-1123, 1127.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

//

//

STATEMENT OF FACTS

The Guilt Phase[3]

On July 13, 1996, at around 8:30 p.m., Bernice Sarthou was purchasing food at a drive-through restaurant in Fullerton when she observed California Highway Patrol ("C.H.P.") Officer Don Burt, in his marked patrol car, effect a traffic stop of a white BMW. (1 Muni RT 151-153.)[4] Although she was some distance from the BMW and still wearing her sunglasses because it was still daylight and the sun had not yet set, Sarthou testified that she could tell that the driver was a young Vietnamese male. (1 Muni RT 152-154, 190-191.)

Ms. Sarthou lost sight of the cars for several minutes as she drove through the drive-though and waited for her food. (1 Muni RT 156, 175.) When she saw them again, the driver of the BMW was outside of the car, struggling with Officer Burt. (1 Muni RT 157-160, 180-183, 205-206.) During the struggle, shots were fired. (Muni RT 161, 206.) When Officer Burt fell, the driver shot him in the head, after which he drove away in Burt's patrol car. (1 Muni RT 162.) Officer Burt died of multiple gunshot wounds. (1 Muni RT 88-92.)

The investigating officer, Doug Kennedy interviewed some

---

[3] Because Mr. Mai waived jury trial and entered a "slow plea" by submitting the issue of his guilt on the murder charge and special circumstance to the court based on the evidence presented at the preliminary hearing, the Statement of Facts regarding the guilt phase is based on the transcript of the preliminary hearing. (1 RT 180, 199-200.)

[4] Ms. Sarthou's first name was spelled "Berneice" by the preliminary hearing court reporter and as "Bernice" by the penalty phase court reporter. For ease of reference, Mr. Mai shall refer to her as "Bernice."

percipient witnesses after the shooting. (1 Muni RT 97-103.) Approximately 40 people had witnessed the shooting, many of whom provided conflicting descriptions of the suspect. (1 Muni RT 98-103.) Several witnesses at the scene identified a man named Yong Ho Choi, a Korean male, as the shooter. (1 Muni RT 119-120.) Mr. Choi was arrested shortly thereafter. (1 Muni RT 119-120.)

According to Detective Kennedy, Officer Burt had contacted dispatch during the traffic stop and requested a driver's license check for a person by the name of Phu Dug Nguyen, including his date of birth and license number, which is typically requested to determine if a license has been suspended. (1 Muni RT 93-94, 134.) Burt's citation book was recovered at the scene; the most recent citation was issued to Phu Duc Nguyen for driving with a suspended license. (1 Muni RT 93-94.)

A wallet was found in the BMW containing several pieces of identification, one of which was in appellant's name and bore his photograph. (1 Muni RT 69.) A bloody shoe print was found on Officer Burt's citation book. (1 Muni RT 69-70.)

Officer Burt's patrol car was later found by the police abandoned at a car dealership on West Lincoln Boulevard in Fullerton. (1 Muni RT 73-74.) A security officer at a nearby business informed the police that he had seen an Asian male run from the dealership and jump over a car that evening, but was unable to identify the man. (1 Muni RT 76-79.) The police recovered a shoe print from the bumper of the car. (1 Muni RT 79-80.)

Within days of the shooting and arrest of Mr. Choi, federal informant Chang "Alex" Nguyen notified his federal law enforcement contacts, through his attorney, that Mr. Mai had confessed the shooting to him and was hiding at Mr. Nguyen's apartment in Houston, Texas. (2 Muni RT

434-435, 454-456, 459-464.) At the time of the shooting, Mr. Nguyen was facing criminal charges for aggravated robbery, "organized crime," and residential burglary. (2 Muni RT 267, 308-309, 315-316.) Indeed, Mr. Nguyen had been actively involved in a wide variety of criminal enterprises for several years. (2 Muni RT 288-292, 304-305, 357-358, 386; 3 Muni RT 502-503-506, 520.)

According to Mr. Nguyen, in July 1996, he and Mr. Mai had been in business together for about six months. (2 Muni RT 270, 282, 288; 3 Muni RT 541-542.) Mr. Nguyen purchased large quantities of forged payroll checks and other instruments from Mr. Mai, making anywhere from $10,000 to $30,000 a week. (2 Muni RT 288-293.) After his arrest on other charges, and around the second week of July 1996, Mr. Nguyen and his lawyer contacted the FBI and offered them information regarding Mr. Mai's criminal enterprise. (2 Muni RT 294-295, 308, 340-342, 414-415.) Mr. Nguyen was actively looking for immunity from prosecution for his own crimes and knew that he would have to offer something of value in order to do so. (2 Muni RT 415-417.)

Also according to Mr. Nguyen, on July 13 – only a few days after he had offered up Mr. Mai to the FBI – Mr. Mai telephoned him in Houston and confessed that he "just took down a California Highway Patrolman." (2 Muni RT 265-266, 272, 340-343.) Mr. Nguyen offered to fly Mr. Mai to Houston and hide him at his home and eventually booked him a flight to Dallas. (2 Muni RT 272, 276, 393-397, 418-419.) Immediately thereafter, Mr. Nguyen attempted to contact his lawyer. (2 Muni RT 277-278, 417-418.)

Mr. Nguyen picked Mr. Mai up at the Dallas airport; on the drive back to Houston, Mr. Mai described the details of the shooting. According

to Mr. Nguyen, Mr. Mai told him that he had been pulled over by a C.H.P. officer. (2 Muni RT 278.) Believing that he had an outstanding arrest warrant, Mr. Mai identified himself by someone else's name and provided the officer that person's information. (2 Muni RT 278.) The officer ran a license check, which showed that the license had been suspended. (2 Muni RT 278.) The officer told Mr. Mai that he would have to tow the car after doing an inventory search and directed him to wait on the curb. (2 Muni RT 278-279.) Mr. Mai told the officer to just give him a ticket and tell him where to collect the car, but the officer told him that he had to wait until the inventory search was concluded. (2 Muni RT 280-281.) Mr. Mai had some "stuff" in the car, which Nguyen understood to mean forged traveler's checks. (2 Muni RT 282-283.)

Mr. Mai told Nguyen that the officer searched the trunk, found a bag, opened it, and told Mr. Mai he was under arrest. (2 Muni RT 281, 283.) Mr. Mai panicked because he believed that he had two prior "strikes" and, if arrested, this would be his third "strike" and he would be imprisoned for life. (2 Muni RT 284.) He pulled his own gun and fired at the officer three times; when the officer fell, he shot him four more times. (2 Muni RT 282-283, 438.) Unable to find his own keys, he grabbed the officer's gun and keys and fled in the patrol car. (2 Muni RT 284.) He left the car somewhere and gave a "Mexican guy" $100 to drive him to a friend's house. (2 Muni RT 285.)

According to Mr. Nguyen, while in Houston, Mr. Mai made a phone call to someone and asked if they took care of "that package I left for you." (2 Muni RT 286.) After a pause, Mr. Mai said, "well, you better because it's very important." (2 Muni RT 286.) Mr. Nguyen asked him what the call was about. Mr. Mai responded that he had something important he

needed a friend to get rid of. (2 Muni RT 286.) Later that day, Mr. Mai told Mr. Nguyen that he needed new shoes because he had blood all over the ones he was wearing. Mr. Nguyen could see a dark spot on one of Mr. Mai's shoes. (2 Muni RT 286.)

Mr. Nguyen attempted to contact his lawyer several times after collecting Mr. Mai from the airport. (2 Muni RT 431-432.) When he finally reached his attorney, two to three days later, they immediately contacted the FBI and met with an agent. (2 Muni RT 432-434.) Mr. Nguyen informed the agent of Mr. Mai's confession and location. (2 Muni RT 434-435, 454-456, 459-464.)

Mr. Mai was arrested by local law enforcement officers and FBI agents in Mr. Nguyen's apartment. (1 Muni RT 80-81; 2 Muni RT 314; 3 Muni RT 532-536.) Mr. Nguyen later identified some shoes in his apartment – a very common, K-Mart brand – as belonging to Mr. Mai. (1 Muni RT 141; 2 Muni RT 430-431.) One of the arresting officers told Detective Kennedy that those shoes appeared to have dried blood on them and were seized. (1 Muni RT 83-84.)[5]

Apparently unaware that Mr. Nguyen had turned him in, Mr. Mai telephoned him several times from jail. (2 Muni RT 464, 471-472.) The FBI directed Mr. Nguyen to record those calls for the specific purpose of recording a threat to Mr. Nguyen's life. (2 Muni RT 465-480.) Mr. Nguyen did as instructed and turned the tapes over to the FBI. However, those recorded calls simply consisted of "chitchat"; not threats. (2 Muni RT

---

[5] The state presented no evidence at the preliminary hearing to prove that the substance on the shoes was blood.

474, 480.)[6]

Shortly after Mr. Mai's arrest, Mr. Nguyen's pending criminal charges were dismissed and he began working as a paid FBI informant, providing information about a number of ongoing criminal enterprises, while confessing his involvement in still other crimes. (2 Muni RT 301, 304-309, 315-316, 322-325, 330, 338-339, 344, 350-355, 359-360, 363-366, 483-484.) Mr. Nguyen received his first cash payment for his informant services a month after Mr. Mai's arrest. (2 Muni RT 355-356, 363-365.) Mr. Nguyen was never arrested or prosecuted for any of his own crimes. (2 Muni RT 295, 297-299, 301, 305, 520-521.) To the contrary, he was in the federal witness protection program at the time of his March 1997 preliminary hearing testimony against Mr. Mai. (2 Muni RT 268, 324, 330.) Despite his witness protection status, the fact that his pending, serious criminal charges were dismissed after turning Mr. Mai in, and the fact the he was never arrested for the many crimes to which he had confessed, Mr. Nguyen repeatedly denied that he had made any "deals" with federal authorities. (2 Muni RT 298-301, 307, 315-323, 330.)[7]

Detective Kennedy interviewed Phu Duc Nguyen (the name by

---

[6] As will be discussed in detail in Argument I, *post*, the FBI eventually got what it wanted by sending an undercover officer into the Orange County jail to approach Mr. Mai, which resulted in federal charges of conspiring to kill their informant, Mr. Nguyen.

[7] When Mr. O'Connell, who represented Mr. Mai at the preliminary hearing, attempted to cross-examine Alex Nguyen more fully regarding his denial that he had any deals with federal authorities by questioning him about the other cases in which he had acted as an informant, the court sustained the prosecutor's assertion of privilege under Evidence Code section 1040. (2 Muni RT 322-328, 330-331, 360-362, 366-370, 373-378, 388-391.)

which the driver of the BMW had identified himself to Officer Burt) and his brother, Phong, several hours after the shooting. (1 Muni RT 110-112, 114, 140.) According to Alex Nguyen, Phong Nguyen was Mr. Mai's crime boss. (2 Muni RT 425; 3 Muni RT 530.)

According to both Phu and Phong Nguyen and their girlfriends, the brothers were together, at home, with their girlfriends, at the time of Officer Burt's shooting. (1 Muni RT 116, 131-132, 137-139.) Their alibis. however, were not corroborated by any other evidence. (1 Muni RT 137-139.)

Detective Kennedy submitted the shoes seized from Alex Nguyen's Houston apartment to the crime lab for blood analysis and comparison to the shoe prints recovered from the shooting scene and the location where the patrol car had been abandoned. (1 Muni RT 84-85.) According to Detective Kennedy, analysts compared the shoes and prints and concluded that the print recovered from the location where the patrol car had been abandoned was a positive match to the shoes and that the print recovered from the crime scene was consistent with those shoes. (1 Muni RT 86-88.)

Mr. Mai's arrest and return to Orange County was widely publicized in the local media and his photograph was printed and broadcast by several media agencies. (1 Muni RT 201-205; 3 Muni RT 538, 554; see also, e.g., 1 Muni RT 3-4; Muni CT 6-16, 25-29, 31-35, 40.) According to Detective Kennedy, some of the witnesses who had earlier identified Mr. Choi as the shooter later identified a photograph of Mr. Mai as the shooter from a photographic lineup. (1 Muni RT 122.)

Ms. Sarthou told officers at the scene that she did not see the shooter and could not identify him. (1 Muni RT 169-170, 245, 248-249.) Nevertheless, two to three weeks after the shooting and after seeing the

media coverage of his arrest, Ms. Sarthou identified Mr. Mai as the shooter from a photograph. (1 Muni RT 201-205, 236.)[8]

Mr. Mai's girlfriend, Victoria Pham, testified that she "assisted" Mr. Mai in leasing a white BMW and saw him driving it on the evening of July 13, 1996. (3 Muni RT 572.)[9] Mr. Mai called her the following day, told her that something had happened to the car, and that she could have it. (3 Muni RT 572-573.)

Mr. Mai lived on West Lincoln Boulevard. West Lincoln was the same street on which the patrol car had been abandoned. (1 Muni RT 76-78.)

The Penalty Phase

A. Circumstances of the Crime

Between 8:00 and 8:20 p.m. on July 13, 1996, Reserve Fullerton Police Officer Michael Lyman was driving through the intersection of Nutwood and Placentia in his patrol car and noticed a C.H.P. car, with its lights flashing, parked behind a white BMW. (6 RT 1156-1157.) The C.H.P. officer was standing outside, speaking to the driver of the BMW and writing a ticket. (6 RT 1157-1158.) The C.H.P. officer signaled a "Code 4" to Lyman, meaning that everything was all right and no assistance was needed. (6 RT 1158-1159.)

Around the same time, Benjamin Baldauf was in a parking lot on

---

[8]Ms. Sarthou further testified that when she saw Mr. Choi's photograph in the newspaper, which identified him as the shooting suspect, she was "absolutely" sure he was the wrong man, although she never contacted authorities to tell them. (1 Muni RT 194-201, 249-253.)

[9] Ms. Pham was not asked to identify the white BMW at the scene of the shooting as the car leased by Mr. Mai.

Nutwood Avenue in Fullerton, preparing to register at a nearby hotel. (6 RT 1099-1101.) Bernice Sarthou was in her car in the drive-through lane of a fast food restaurant. (6 RT 1189.) They also noticed the patrol car and white BMW. (6 RT 1100-1102, 1191.)

At about 8:30 p.m., Officer Burt contacted his dispatcher for a check of the BMW's license plate and the status and validity of a driver's license in the name of Phu Duc Nguyen. (6 RT 1177-1180; see also 4 CT 1129-1133 [People's Exhibit 36].) Officer Burt issued the driver, identified as Phu Duc Nguyen, a citation for driving with a suspended license. (6 RT 1134; 3/16/07 3 SCT 421 [People's Exhibit 20].) The parties stipulated that there was an active warrant for Mr. Mai's arrest at the time of the shooting, which would have been discovered in a standard warrant or record check under his name. (6 RT 1183.)

After checking into his hotel room, Mr. Baldauf left the hotel and noticed that the C.H.P cruiser and the BMW were still outside, and the CHP officer was searching the trunk of the BMW. (6 RT 1103-1104.) The driver of the BMW, whom Baldauf identified as Mr. Mai, seemed scared and "his eyes were just darting all over the place wildly." (6 RT 1107, 1114.) A few moments later, the officer approached the driver's door and "the driver came out shooting." (6 RT 1109.) The driver and the officer were "spinning" together before both men fell to the ground. (6 RT 1110-1111.) The driver took something from the officer, bent over and fired a gun once at the officer's head. (6 RT 1112-1113.) Mr. Baldauf ran to a nearby phone and called 911. (6 RT 1113.)

After Bernice Sarthouh picked up her food at the drive-through window, she stopped in the parking lot to eat, at which point she also regained sight of the cruiser and BMW. (6 RT 1191.) The driver, whom

she identified as Mr. Mai, and the officer were both outside of their vehicles and the two men were struggling. (6 RT 1191-1192.) She heard four shots and saw the officer fall, at which point the driver shot the officer once in the head, then ran to the cruiser and drove away. (6 RT 1192-1195.)

About 15 to 20 minutes after seeing Officer Burt writing the BMW driver a ticket, Officer Lyman heard a dispatch that an officer was down at that location. (6 RT 1159.) When he returned to the intersection, the BMW was still there, but the cruiser was gone, and Officer Burt was lying, shot, on the ground. (6 RT 1160.)

At about 8:15 p.m., Robert Excell was in his car at the intersection of Nutwood and Placentia when he heard the shots. (6 RT 1147-1148.) Shortly thereafter, a C.H.P car with its lights on pulled up next to him and stopped at a light. (6 RT 1149-1151.) Mr. Excell identified Mr. Mai as the driver. (6 RT 1151.) Both cars entered Highway 57, but Mr. Excell lost sight of the C.H.P. car near the Lincoln exit. (6 RT 1153-1154.)

Officer Lyman made a "90 percent" positive identification of another man, Yong Ho Choi, as the driver of the white BMW during an in-field show up on the night of the shooting. (6 RT 1163-1166.) However, two and a half weeks later, and after Mr. Mai's arrest was widely reported in the media, he made a "100 percent" positive identification of Mr. Mai as the driver from a photographic lineup. (6 RT 1167-1169.)

Police collected evidence from the scene of the shooting, including about seven nine millimeter shell casings, Officer Burt's citation book with a bloody shoe print on it, and a vehicle property form. (6 RT 1121-1125.) Inside of the BMW, they collected several other pieces of evidence, including a paper bag filled with traveler's checks, a printer, cartridges, a soda can, a wallet containing identification in Mr. Mai's name, and

miscellaneous pieces of paper. (6 RT 1125-1127.) One fingerprint lifted from the traveler's checks and two lifted from one of the pieces of paper were identified as Mr. Mai's. (7 RT 1228-1230, 1234-1238.)[10]

On the night of the shooting, Officer Burt's cruiser was discovered at an automobile dealership on Lincoln Boulevard in Anaheim, next to a Royal Furniture store. (6 RT 1184-1185.) At the time of the shooting, Mr. Mai resided at an apartment complex on Lincoln Boulevard. (6 RT 1185.) The parties stipulated that, if called as a witness, Mung Thanh Huynh would testify that on July 13, 1996, he was working as a security guard outside of the Royal Furniture Store. (6 RT 1183.) At about 10:00 p.m., he saw an Asian male, about 20 to 30 years old, climb up and run over the front of his Toyota pickup truck. (6 RT 1183-1184.) Officers checked the area near the truck and discovered a partial shoe print on the bumper of a Honda parked directly in front of it. (6 RT 1187-1188; 7 RT 1211-1213.)

On July 17, 1996, Mr. Mai was arrested in Houston, Texas. (7 RT 1286.) According to one of the arresting officers, Mr. Mai identified a pair of shoes as his at the time of his arrest. (6 RT 1127-1129.) Police discovered blood on one of the shoes, which "matched" Officer Burt's DNA profile. (7 RT 1250-1255, 1261-1262.)[11] The shoes were also

---

[10] Prints recovered from a Sprite can were also identified as Mr. Mai's. (RT 1225.) However, the prosecution did not present evidence to connect that particular can or the prints on it to this shooting, such as testimony identifying that can as having been seized in connection with this case or testimony from a crime scene technician that he or she lifted fingerprints from that can.

[11] According to one calculation, that profile occurs in one in thirty million Caucasians; according to another, it occurs in one in six billion. (RT 1255, 1263.)

compared to the shoe prints recovered from Officer Burt's citation book and from the Honda parked in front of the Royal Furniture store. (7 RT 1215-1216, 1223-1224.) Analysts were unable to positively match the print from the citation book to those shoes, but were able to match the print left on the Honda to those shoes. (7 RT 1215-1216, 1223-1224.)

A secret service agent with the U.S. Treasury examined checks, papers, and print cartridges recovered from the BMW. (7 RT 1271, 1274.) He concluded that the bag of traveler's checks were counterfeit and worth about $10,0000. (7 RT 1281-1282.) All of the evidence otherwise bore indicia of a mass production, nation-wide counterfeit check operation. (7 RT 1274-1284.)

Officer Burt died of multiple gunshot wounds. (7 RT 1301.) He was shot seven times, causing eleven gunshot wounds. (7 RT 1293-1294.)

Officer Burt's family testified to the impact of his death on their lives. His wife, Christine Burt, testified that they had been married for three years, and that she was seven months pregnant at the time of his death. (7 RT 1350-1351.) When he died, he was 25 years old and had been on active duty for 14 months. (7 RT 1356.) His death was emotionally and financially devastating to her. (7 RT 1356.) She went into a "deep depression" and was diagnosed with post traumatic stress disorder, for which she was still being treated at the time of trial. (7 RT 1357.) Her husband's death also deeply affected her parents and brother, all of whom were close to him. (7 RT 1357-1358.)

Officer Burt's father, Don Burt, was an active-duty C.H.P. officer at the time of his son's death. (7 RT 1363-1364.) Mr. Burt and his wife testified that their son was a loving, athletic, intelligent young man whom they loved deeply and whose death had profoundly impacted them and the

rest of their family. (7 RT 1359-1361, 1365-1370.) After his son's death, Mr. Burt had to retire from the C.H.P after 30 years due to depression, which required treatment with counseling and medication. (7 RT 1368.)

B. Other Evidence in Aggravation

On July 13, 1996, at about 7:30 a.m., Aryan Neghat was driving on Highway 91 when a white BMW came up behind him "very fast" in the fast lane. (7 RT 1341.) Mr. Neghat changed lanes, but there was another car in front of the BMW that would not get out of the way. (7 RT 1343-1344.) The BMW got so close to the other car that they touched bumpers. (7 RT 1344.) The driver of the BMW pointed a gun out of the driver's side window, at which point the car in front of him changed lanes. (7 RT 1345.)

Later that night, Mr. Neghat was watching the news and saw a white BMW that looked similar to the one he had seen that morning. (7 RT 1346.) Later that month, he identified a photograph of Mr. Mai as the driver of the white BMW. (7 RT 1347.) Although he was 100 percent sure of his identification at the time, he was no longer certain of his identification at trial. (7 RT 1344, 1347.)

On the night of September 11, 1995, Mark Baker – a neighbor of Mr. Mai's and Mr. Mai's girlfriend, Victoria Pham – was awakened by the sounds of Mr. Mai and Ms. Pham arguing outside of their apartment. (7 RT 1315-1317.) Mr. Baker opened his apartment door and saw Mr. Mai pushing Ms. Pham against the outside railing and the two of them struggling. (7 RT 1318.) He yelled at them to "knock it off," at which point Mr. Mai hit Ms. Pham on the back. (7 RT 1319.) Mr. Mai ran into his apartment, prompting Mr. Baker to call him a "wuss." (7 RT 1320.) Mr. Mai came back with a "machine gun," loaded it, and pointed it at Mr. Baker. (7 RT 1320-1321.) When Mr. Baker turned and started walking

back to his apartment, Mr. Mai said, "What was that you called me, I think you called me a motherfucker. Let me hear you say it again." (7 RT 1321.) Mr. Baker asked him if the gun was real and Mr. Mai replied, "you want to find out." (7 RT 1322.) At that point, the apartment manager came out, told them all to go back inside, and called the police. (7 RT 1322.) Although Mr. Baker spoke to police that night, Mr. Mai apparently was never convicted of any felony associated with the incident. (7 RT 1322.)

On June 17, 1996, Robert Bachand was working as a salesman at a Honda dealership in Anaheim. (7 RT 1323-1324.) At about 7:30 that night, two Asian men came in and asked to test drive one of the cars. (7 RT 1324-1325.) The three men drove a car off the lot, with Mr. Bachand in the backseat, and onto the freeway. (7 RT 1325-1236.) The passenger pulled a nine millimeter handgun out, pointed it at Mr. Bachand, told him that they were "Vietnamese Mafia," and demanded his wallet. (7 RT 1328, 1330-1331.) The men told him that they were going to take the car and wanted to know if it had "LOJACK," which could be tracked by the police. (7 RT 1328.) When Mr. Bachand told them he did not know, they called someone on a cell phone and put it to his ear. (7 RT 1329.) A male voice told Mr. Bachand not to "fuck" with his "guys or they will kill you." (7 RT 1329.) The man on the phone demanded the personal identification number for Mr. Bachand's ATM card and he gave it to him. (7 RT 1329.) They stopped the car in a residential area, where several other young Asian men met them. (7 RT 1330-1331, 1336.) The passenger got out of the car and another young Asian male, also armed, got in and they drove away. (7 RT 1336.) Eventually, the men dropped Mr. Bachand off on the freeway. (7 RT 1337.)

The parties stipulated that, later that night, a C.H.P. officer observed

the stolen Honda driving 80 miles per hour on the freeway. (7 RT 1373.) When he attempted to effect a traffic stop, the vehicle gave chase before crashing. (7 RT 1373.) The two occupants, Asian males, were arrested when they attempted to flee on foot. (7 RT 1373.) One of the men possessed a magazine containing 10 .89 millimeter rounds. (7 RT 1373.) A taser gun, as well as a loaded nine millimeter semiautomatic pistol, were also found in the area of the crash site. (7 RT 1373.)

Mr. Bachand was taken to the crash site and identified the car as the stolen Honda and the two Asian males as the men who had dropped him off on the freeway. (7 RT 1337-1339.) About a month later, he saw Mr. Mai in the extensive media coverage of his arrest for Officer Burt's murder and identified him as the passenger who had pointed a gun at him. (7 RT 1340-1341.)

The prosecution presented documentary evidence that Mr. Mai had suffered four prior felony convictions for: (1) escape while misdemeanor charges were pending (Pen. Code, § 4532) in 1992; (2) possession of an assault weapon (Pen. Code, § 120880) in 1992; (3) assault (Pen. Code, § 245) in 1993; and (4) burglary (Pen. Code, § 459) in 1993. (People's Exhibits 50-53; 7 RT 1237; 8 RT 1417.)

Mr. Mai declined to present any penalty phase defense, including any meaningful challenge to the state's aggravating evidence, mitigating evidence, or closing argument. (8 RT 1409-1410.) Instead, he took the stand and testified that the jurors should return a death verdict. (8 RT 1409-1410.)

//

//

ARGUMENT

I

THE JUDGMENT MUST BE REVERSED BECAUSE MR. MAI DID NOT MAKE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF HIS RIGHT TO THE ASSISTANCE OF CONFLICT-FREE COUNSEL AND WAS ULTIMATELY DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF CONFLICT-FREE COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATE CONSTITUTION AND ARTICLE 1 SECTION 15 OF THE CALIFORNIA CONSTITUTION

A. Introduction

On July 27, 1998, while awaiting trial in this case, Mr. Mai was arrested, and ultimately indicted, for: (1) conspiracy to commit murder for hire in violation of 18 USC § 1958; (2) use of interstate commerce facility with intent to commit murder for hire in violation of 18 USC § 1958; and (3) aiding and abetting the possession of a machine gun in violation of 18 USC § 922(o), subd. (2), in *United States v. Mai,* United States District Court for the Central District of California, No. 98-82-1. (2 CT 381, 476-477, 488-490, 498; 1 RT 99.)[12] On the same date, California transferred temporary custody of Mr. Mai to the federal government pursuant to a petition for writ of habeas corpus ad prosequendum. (8/29/07 SCT 164-170; 8/29/07 ART 5.)

The federal charges arose from an alleged conspiracy to have an undercover officer – who approached Mr. Mai while in the Orange County

---

[12] While the federal charges were described in the record, the record does not include a copy of the actual indictment. A motion for judicial notice of the indictment accompanies this brief. (Evid. Code §§ 452, subd. (d) [records of any court of record of the United States are proper subjects of judicial notice] and 459, subd. (a) [reviewing court may take judicial notice of any matter specified in section 452].)

jail – murder Alex Nguyen, the informant-witness who testified against Mr. Mai at the preliminary hearing in this case. (2 CT 386-388, 394-399, 498; 1 RT 63, 99, 155-156.) The federal government also indicted three co-defendants as co-conspirators: (1) Victoria ("Vickie") Pham, Mr. Mai's girlfriend; (2) Huy Ngoc Ha; and (3) Daniel Watkins, defense counsel Dennis O'Connell and George Peters's investigator, appointed to assist them with Mr. Mai's defense in this case. (2 CT 391, 497-499; 1 RT 63.)[13]

Documents presented to the trial court in August 1998 demonstrated that it was in Daniel Watkins's role as Mr. Peters and Mr. O'Connell's investigator in Mr. Mai's state capital murder trial that Mr. Watkins allegedly participated in the conspiracy to kill state prosecution witness Alex Nguyen. (1 RT 83; 1 CT 128, 137, 140-143, 145-147, 148, 150-151.)[14] In addition, according to a memo dated July 13, 1998, which Mr. Watkins's federal defense counsel, James Waltz, wrote to the Assistant United States Attorney ("AUSA") assigned to the federal prosecution, Marc Greenberg, and which was submitted to both the state trial court and the federal court (1 RT 183; 1 CT 155-156):

---

[13] Mr. Peters was Mr. Mai's appointed lead trial counsel. Mr. O'Connell was Mr. Mai's sole retained counsel at the preliminary hearing. Mr. Watkins worked for Mr. O'Connell and was part of Mr. Mai's defense team during the pre-trial proceedings. (1 RT 98-99; 2 CT 498.) According to Mr. Peters, he arranged to have both Mr. O'Connell and Mr. Watkins appointed to assist him, as second counsel and investigator, in representing Mr. Mai at trial given their knowledge of the case and Mr. Mai's requests that they continue to represent him. (1 RT 98-99; 2 CT 498.)

[14] The bills Mr. Watkins submitted, which were signed by defense counsel, further demonstrated that Watkins was acting as their investigator and at their direction when he engaged in many of the alleged overt acts in furtherance of the charged conspiracy. (987.9 CT 54-83.)

> I intend to present a full court press and challenge the accuracy [of the charges] by calling Rob, George Peters, and Dennis O'Connel [*sic*] in a challenge under FCRP4. For your info, Defendant [Watkins] was the investigator for George Peters who is representing Mai in State court. *At Peters's behalf*, Defendant interacted with Mai. *Mai told Defendant about Mai's plan to kill Alex in Texas, and Defendant reported all that to George Peters, Dennis and Rob Harley, and took their directions*. As a side to Marc Greenberg, George Peters and O'Connel [*sic*] should be disqualified from further representing Mai in state court, as their testimony in Federal Court will be adverse to Mai (in federal court) as they will exculpate Defendant from any wrongdoing.
>
> If not disqualified, the state will otherwise easily convict Mai in both cases and give the defense a great appellate issue which now can be so easily avoided. Peters and O'Connell are a cornerstone of Defendant [*sic*] defense. Meanwhile, Defendant denies any and all allegations in the complaint concerning any wrong doing and *all his activities were blessed by Peters, Harley, and O'Connell. Just ask them.* Defendant did nothing to aid *Mai's plan which was well known among his defense team. Yes, that is true.* Thus, I am asking you to interview Peters, O'Connell and Harley ASAP. Peters at 835-0540 and O'Connel [*sic*] at 635-5631; pager 691-8876.

(1 CT 156, italics added.)[15]

Thus, according to his own counsel, while Mr. Watkins knew of Mr. Mai's plan to kill Nguyen, both Messers. Peters and O'Connell also knew of the plan *and* "all [Watkins's] activities" were "direct[ed]" and "blessed

---

[15] The appellate record does not indicate what role Jesse Flores or Rob Harley played in either case.

While these documents were submitted to the trial court and considered at a conflict hearing (1 RT 75-88), the trial court summarily granted the prosecutor's request, "could I ask the court to seal those, I have not been privy to those documents, and I do not intend to." (1 RT 84.)

by" them. In other words, according to the admission of defense counsel's investigator and Mr. Mai's indicted co-conspirator, defense counsel were unindicted co-conspirators.[16]

As will be demonstrated in Part C, *post*, Daniel Watkins's conduct, admission and allegations against Messrs. Peters and O'Connell, and his attorney's demand for an investigation into their roles in the crimes related to Mr. Mai's crimes, created potential conflicts of interest of the most serious kind. As will be demonstrated in Part D, *post*, the trial court, Mr. Mai's defense counsel, and "independent" counsel chosen by Mr. Mai's defense counsel, characterized the only potential conflict of interest arising from the above-described facts as the possibility that Messrs. Peters and O'Connell might be called as witnesses in Messrs. Mai and Watkins's federal trial and their testimony might call for privileged material. (1 RT 66-69, 74-78.) However, all of the attorneys concluded that there was only the "appearance of a conflict, or the potential of a conflict"; in fact, there was no, and would be no, conflict of interest and certainly no possibility that any conflict would affect defense counsel's representation in this case. (1 RT 75-79, 80-82.) This is what they advised the trial court, and this is what they advised Mr. Mai. (1 RT 75-80, 83.)

The trial court made no inquiry into, nor did anyone advise Mr. Mai on the record of, defense counsel's potentially conflicting interests in their

---

[16] Nearly a year later, in June 1999, Watkins entered a guilty plea to the lesser charge of accessory after the fact to murder for hire pursuant to a plea bargain. A motion for judicial notice of the records of the United States District Court for the Central District of California reflecting these facts accompanies this brief. (Evid. Code §§ 452, subds. (c) [official acts of judicial departments of United States are proper subjects of judicial notice] and (d) [records of any court of record of the United States], 459.)

own liberty, livelihood, and reputation that Watkins's conduct, admission and allegations against defense counsel created. To the contrary, defense counsel misrepresented the depth and the breadth of the potential conflicts they faced. Thus, as will be demonstrated in Part D, *post*, both the trial court and Messrs. Peters and O'Connell violated their constitutionally mandated obligations to Mr. Mai to fully apprise him of the conflicts of interest and their potential impact on counsel's representation. In so doing, they failed to obtain a knowing and intelligent waiver of Mr. Mai's right to the effective assistance of conflict-free counsel.

As will be demonstrated in Parts E through G, *post*, the potential conflict ripened into an actual one because it adversely affected defense counsel's performance at every stage of these capital proceedings. Lead defense counsel, Mr. Peters, brokered a promise to the federal government – over the objection of Mr. Mai's appointed, *unconflicted* federal counsel – in which Mr. Mai agreed not only to plead guilty to all of the federal charges, for which he would receive the maximum sentence, and be housed in federal custody under solitary confinement conditions that can only be described as draconian, but also *agreed to plead guilty to the state capital murder charge*, all in exchange for AUSA Greenberg's promise to recommend a sentence reduction for Mr. Mai's girlfriend and indicted co-conspirator, Victoria Pham – a recommendation that was ultimately rejected. (Part E-2, *post.*) Defense counsel made no attempt to bargain for any personal benefit to Mr. Mai in his state capital murder proceedings and consented to the plea without any promise or expectation that it would avoid a death verdict. (Parts E-3 and E-4, *post.*) Finally, defense counsel consented to Mr. Mai's unconditional slow plea to capital murder without arguing against the sufficiency of the evidence to prove the sole special

circumstance allegation, despite the dearth of evidence to prove – indeed, despite the existence of affirmative evidence to *disprove* – one of its essential elements. (Part E-5, *post.*)

Furthermore, throughout the proceedings, Messrs. Peters and O'Connell repeatedly represented that Mr. Mai's mental state had deteriorated under the draconian federal confinement conditions to the point that he was no longer able rationally to assist in his defense or make rational life and death decisions. Yet they also insisted that competency proceedings under Penal Code section 1368 were unnecessary. (Part F, *post.*)

Despite their grave and reasonable doubts that Mr. Mai was capable of making rational life and death decisions, when Mr. Mai expressed a desire to effectively stipulate to a death sentence, Messrs. Peters and O'Connell failed to take steps to ensure that his decision was competent (Part G-2-a, *post*) or fully informed (Part G-2-b, *post*); instead, circumstantial record evidence demonstrates that they overstated the hopelessness of his case and even encouraged his decision (Part G-2-c, *post*). Indeed, defense counsel acceded in Mr. Mai's purported death wish and effectively stipulated to a death sentence by declining to present available, compelling mitigating evidence (Part G-3-a, *post*); declining to challenge the prosecution's aggravating evidence (Part G-3-b, *post*); affirmatively presenting Mr. Mai's statement to the penalty phase jurors that death was the appropriate penalty and declining to present any closing argument (Part G-3-c, *post*)

As will further be demonstrated in Part G, *post*, the record demonstrates that the conflict of interest influenced defense counsel's "strategy" of effectively stipulating to a death sentence and, hence,

establishes that the conflict adversely affected their performance from beginning to end. Finally, as demonstrated in Part H, *post*, having established that defense counsel labored under an actual conflict of interest that adversely affected their performance throughout the proceedings, this Court must presume prejudice and hold that Mr. Mai was deprived of his right to the effective assistance of conflict-free counsel as guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. The judgment must be reversed.

B. The General Framework for Assessing Conflicts of Interest Under The Sixth Amendment to the United States Constitution and Article I, Section 15 of the California Constitution

Under the Sixth and Fourteenth Amendments to the United States Constitution (*Holloway v. Arkansas* (1978) 435 U.S. 475, 481-487; *Powell v. Alabama* (1932) 287 U.S. 45, 68-71), as well as article I, section 15 of the California Constitution (*People v. Bonin* (1989) 47 Cal.3d 808, 833-834), a defendant in a criminal case has a right to the assistance of counsel. The state and federal constitutional guarantees to assistance of counsel comprise two related rights: the right to counsel of reasonable competence (*McMann v. Richardson* (1970) 397 U.S. 759, 770-771; *People v. Pope* (1979) 23 Cal.3d 412, 424-425), and the right to counsel's undivided loyalty (*Wood v. Georgia* (1981) 450 U.S. 261, 271-272; *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612; *Mannhalt v. Reed* (9th Cir. 1988) 847 F.2d 576, 579-580; *United States v. Allen* (9th Cir. 1987) 831 F.2d 1487, 1494-1495). The state and federal constitutional guarantees to counsel's undivided loyalty to his client have "a correlative right to representation that is free from conflicts of interest." (*Wood v. Georgia, supra*, 450 U.S. 261, 271-272; accord *Cuyler v. Sullivan* (1980) 446 U.S. 335, 345-350; *Mickens v. Taylor*

(2002) 535 U.S. 162, 171; *People v. Bonin*, *supra*, 47 Cal.3d at p. 833; see also *Strickland v. Washington* (1984) 466 U.S. 668, 692 [duty of loyalty is "perhaps the most basic of counsel's duties"].) Conflicts of interest under both the state and federal Constitutions are governed by the same legal standards. (*People v. Doolin* (2009) 45 Cal.4th 390, 421, 428 [abrogating California law governing conflicts of interest under the state Constitution and adopting federal constitutional standard].)

As will be more fully discussed in Part D, *post*, when the trial court and trial counsel are aware of facts creating the possibility that a conflict of interest might adversely affect counsel's representation of his or her client, or a "potential conflict," the state and federal Constitutions impose certain duties upon the court and counsel. (See, e.g., *Wood v. Georgia*, *supra*, 450 U.S. at p. 272; *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 485; *Glasser v. United States* (1942) 315 U.S. 60, 76.) Furthermore, any waiver of the right to conflict free counsel must be knowing, voluntary, and intelligent and must appear on the face of the record. (See, e.g., *Glasser v. United States, supra,* 315 U.S. at p. 71; *Johnson v. Zerbst* (1938) 304 U.S.458, 464.) If the court or counsel fail in these duties or the validity of the defendant's waiver does not appear on the face of the record, the constitutional question becomes whether the possibility was realized – i.e., whether counsel's representation of his client was *actually* adversely affected by the conflict. (See, e.g., *Mickens v. Taylor*, *supra*, 535 U.S. at pp. 173-174.) If so, and as fully discussed in Part E-1, *post*, the potential conflict ripened into an "actual conflict" in violation of the client's state and federal constitutional rights. (*Cuyler v. Sullivan*, 446 U.S. at pp. 348-49; accord, e.g., *Strickland v. Washington*, *supra*, 466 U.S. at p. 692; *Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272; *Wheat v. United States* (1988) 486 U.S. 153, 160; *People v.*

Rundle (2008) 43 Cal.4th 76, 169-173, and authorities cited therein.)

C. The Actions, Admission and Allegations Against Defense Counsel, By Daniel Watkins – Mr. Mai's Indicted Co-Conspirator and Defense Counsel's Agent and Investigator – Created the Potential That Severe Conflicts of Interest Could Adversely Affect Counsel's Representation of Mr. Mai

1. A Plausible Allegation that Defense Counsel Was Involved in Criminal Activity or Other Wrongdoing Related to His Client's Crimes Creates a Unique and Severe Potential Conflict of Interest

As this Court has explained, while "most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of co-defendants, the [federal and state] constitutional principle is not narrowly confined to instances of that type.'" (*People v. Hardy* (1992) 2 Cal.4th 86, 135-136, and authorities cited therein.) Under both state and federal constitutional standards, "conflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his [or her] responsibilities to another client or a third person or *by his* [or her] *own interests*.'" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 135, italics in original, and authorities cited therein.) In other words, a conflict may exist "whenever counsel is so situated that the caliber of his services may be substantially diluted'" (*ibid*) and thus "[a] claim that counsel's loyalty was divided by virtue of his *own* conflicting interests is a claim of such a conflict." (*People v. Mayfield* (1993) 5 Cal.4th 142, 206; accord, e.g., *People v. Rundle* (2008) 43 Cal.4th 76, 171, and authorities cited therein; *Rubin v. Gee* (4th Cir. 2002) 292 F.3d 396, 402-403; *United States v. Cook* (10th Cir. 1995) 45 F.3d 388, 393; *United States v. Merlino* (3rd Cir. 2003) 349 F.3d 144, 151-152; *United States v. Levy* (2nd Cir. 1994) 25 F.3d 146,

153, fn. 5; *Mannhalt v. Reed* (9th Cir. 1988) 847 F.2d 576, 579-580; American Bar Association [hereafter "ABA"] Model Rules of Prof. Resp., Rule 1.7, subd. (a)(2) and Comment.)

It is well settled in this regard that (at least) a potential conflict of interest exists when a "plausible" allegation has been made – whether by the prosecution or a third party – that an attorney has engaged in criminal activity or other wrongdoing related to the crimes for which his client is charged. (*United States v. Fulton* (2nd Cir. 1993) 5 F.3d 605, 610, 613 [co-defendant and government witness's allegation that defendant's counsel "engaged in criminal conduct related to the charges for which the defendant is on trial" amounted to severe conflict of interest]; accord, *United States v. Merlino*, *supra*, 349 F.3d at pp. 151-152 ["suggestion of (attorney's) potential criminal liability" related to client's crimes created potential conflict sufficient to permit disqualification of counsel over client's objections and constitutional right to counsel of choice]; *United States v. Cancilla* (2nd Cir. 1984) 725 F.2d 867, 870-871; *United States v. Register* (11th Cir. 1999) 182 F.3d 820, 823-834; *Taylor v. United States* (6th Cir. 1993) 985 F.2d 844, 846; *United States v. Greig* (5th Cir. 1992) 967 F.2d 1018, 1022; *Mannhalt v. Reed*, *supra*, 847 F.2d at pp. 580-581; *Government of Virgin Islands v. Zepp* (3rd Cir. 1984) 748 F.2d 125, 136; *Rugiero v. United States* (E.D. Mich. 2004) 330 F.Supp.2d 900, 903-906.)

It is not necessary that the allegation be proven true at the time it is made in order to create the potential for fatally conflicting interests. (See, e.g., *United States v. Merlino*, *supra*, 349 F.3d at pp. 151-152; *United States v. Fulton*, *supra*, 5 F.3d at p. 613; *United States v. Greig*, *supra*, 967 F.2d at pp. 1020-1023; *Government of Virgin Islands v. Zepp*, *supra*, 748 F.2d at pp. 129-130, 136.) The potential for conflicted loyalties not only exists, but

is particularly acute, because "counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded, but ostensibly plausible accusation, [may] affect virtually every aspect of his or her representation of the defendant." (*United States v. Fulton*, *supra*, 5 F.3d at p. 613.)

For instance, during the pre-trial stage, defense counsel may avoid negotiating a plea bargain whereby his client would cooperate with the authorities, because it could risk implicating counsel in the crime; indeed, prosecutors "could not possibly approach [a defendant] with a deal to give information about" an attorney's wrongdoing when the defendant is represented by that attorney. (*Mannhalt v. Reed*, *supra*, 847 F.2d at p. 582; accord, e.g., *United States v. Williams* (2nd Cir. 2004) 372 F.3d 96, 106; *United States v. Fulton*, *supra*, 5 F.3d at p. 613.) At trial, defense counsel may fear that "a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney." (*United States v. Fulton*, *supra*, 5 F.3d at p. 610; accord, e.g., *United States v. Levy, supra*, 25 F.3d at p. 156 [counsel may seek to "curry favor" with the government by failing to pursue a vigorous defense]; *Mannhalt v. Reed, supra*, 847 F.2d at p. 581.) Similarly, given his possible independent personal knowledge of facts relating to the crimes, defense counsel may avoid strategies that could result in being called as a witness. (See, e.g., *United States v. Levy*, *supra*, 25 F.3d at pp. 156-158; see also Ca. Rules of Prof. Conduct, Rule 5-210 [attorney must withdraw if called as a witness in client's trial].)

Furthermore, as this and many other courts have recognized, when plausible allegations that counsel was involved in crimes or other wrongdoing related to his client's crimes are *made to the same entity*

prosecuting the client, and counsel may thereby become the target of investigation by the same entity prosecuting his client, the potential for fatally divided loyalties becomes even greater. (*In re Gay* (1998) 19 Cal.4th 771, 828; *Armienti v. United States* (2d Cir. 2000) 234 F.3d 820, 824-825; *United States v. Levy, supra*, 25 F.3d at p. 156; *United States v. Greig* (5th Cir. 1992) 967 F.2d 1018, 1020-1022; *Thompkins v. Cohen* (7th Cir. 1992) 965 F.2d 330, 332; *United States v. McLain* (11th Cir. 1987) 823 F.2d 1457, 1463-1464 *United States v. Cancilla* (2nd Cir. 1984) 725 F.2d 867, 868-871.) As one court has explained, such allegations "may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer." (*Thompkins v. Cohen, supra*, 965 F.2d at p. 332.) Put another way, when counsel may be subject to investigation by the same office that is prosecuting his client, he or she "may, consciously or otherwise, seek the goodwill of the office for his [or her] own benefit," which "may not always be in the best interest of his client." (*Armienti v. United States*, *supra*, at p. 825; accord *United States v. Levy, supra*, 25 F.3d at p. 156.)[17]

Finally, even if the plausible allegations do not suggest potential criminal liability, "many courts have found an actual conflict of interest when a defendant's lawyer faces possible criminal charges *or significant disciplinary consequences* as a result of questionable behavior related to his

---

[17] Compare *United States v. Baker* (9th Cir. 2001) 256 F.3d 855, 860-861 (finding no conflict where attorney was investigated and prosecuted by different jurisdiction than that prosecuting client, there was no indication either jurisdiction was even aware of the proceedings in the other, there was no "connection between any of the parties involved in the two matters," and thus attorney was not in "position of choosing whether to help himself or his client").

representation of defendant." (*United States v. Levy*, *supra*, 25 F.3d at p. 156, and authorities cited therein; accord, e.g., *United States v. Merlino* (3rd Cir. 2003) 349 F.3d 144, 151 ["an attorney who faces criminal or disciplinary charges as a result of his or her actions in a case will not be able to pursue the client's interests free from concern for his or her own"]; *Government of Virgin Islands v. Zepp*, *supra*, 748 F.2d at p. 136.)

2. Daniel Watkins's Conduct, Admission and Plausible Allegations Against Defense Counsel Regarding Their Roles In the Conspiracy, And His Attorney's Demand That Their Roles Be Investigated by the Same Agency Prosecuting Mr. Mai, Created the Potential That Counsel's Representation of Mr. Mai Would be Adversely Affected by their Conflicting Personal Interests

As previously discussed, Daniel Watkins was defense counsel's investigator in Mr. Mai's state capital murder trial. (1 CT 79; 1 RT 50, 63, 111-115.) He was indicted as a co-conspirator in the federal case based upon actions he undertook in his role as defense counsel's investigator in this case. (2 CT 391, 396-400, 397, 486-490;[18] 1 CT 128, 134-135, 137-142, 145-147, 150-151; 987.9 CT 54-83.) Watkins admitted that he knew of Mr. Mai's plan to kill Nguyen, and that both Messers. Peters and O'Connell also knew of the plan *and* "directed" and "bless[ed]" "all [Watkins's] activities." (1 CT 156.)

If Watkins's allegations were true, Messrs. Peters and O'Connell were unindicted co-conspirators in the plot to kill Nguyen. However, pursuant to the authorities discussed in Part C-1, *ante*, even if the allegations *ultimately* proved to be untrue (which is in no way demonstrated

---

[18] Watkins is referred to as "codefendant #4" in the factual basis accompanying the federal plea agreement. (See 2 CT 394.)

by the record), at the time they were made and throughout Mr. Mai's state capital murder trial, they were sufficiently "plausible" to create the potential that counsel's representation of Mr. Mai would be adversely affected by their conflicting personal interests in their liberty, livelihood, and reputation. (*United States v. Fulton*, *supra*, 5 F.3d at p. 613.)

Watkins's allegations against defense counsel were made in the context of his own admission. Although Watkins's counsel curiously described his client's statement as laying the groundwork for a "defense," it was, in fact, an admission. (1 CT 155-156.) Even if his "activities" were "direct[ed]" by counsel with knowledge of the plot to kill Nguyen, as Watkins alleged, that did not excuse, justify, or even mitigate his conduct. Because a reasonable person ordinarily would not admit to criminal conduct unless it were true (see, e.g., Evid. Code § 1230), Watkins's statement implicating *both* himself and defense counsel as co-conspirators was at least "plausible."

Certainly, the federal government's evidence and Watkins's admission and allegations constituted evidence that Watkins and defense counsel were accomplices in the plot to kill or influence Nguyen. The uncorroborated testimony of an accomplice is sufficient to establish probable cause to hold a defendant to answer to criminal charges. (*People v. McRae* (1947) 31 Cal.2d 184, 187.) Indeed, even the out-of-court statement of an accomplice may be sufficient to establish probable cause to believe that the defendant committed the crime. (*People v. Miranda* (2000) 23 Cal.4th 340, 349-350.) The testimony of an accomplice alone may even be sufficient to prove guilt beyond a reasonable doubt, so long as there is some corroboration for that testimony. (Pen. Code, § 1111). Importantly, the corroborating evidence need not corroborate every element of the crime

charged; it is sufficient if it "tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Fauber* (1992) 2 Cal.4th 792, 834-835.) The corroborating evidence "'may be slight and entitled to little consideration when standing alone' [citation]" (*People v. Tewksbury* (1976) 15 Cal.3d 953, 969) and may consist of circumstantial evidence (*People v. Garrison* (1989) 47 Cal.3d 746, 773).

To be clear, it is not necessary for Mr. Mai to prove the truth of Watkins's allegations and thus does not cite the foregoing principles in an attempt to do so. Rather, he relies on the foregoing principles as analogous authority to demonstrate that if the uncorroborated statement or testimony of an accomplice is sufficient to prove probable cause to believe that a defendant committed a crime, and if accomplice testimony corroborated by slight evidence tending to connect the defendant to the crimes is sufficient to prove a defendant's guilt beyond a reasonable doubt, *a fortiori* Watkins's allegations against defense counsel were "plausible" enough to create the severe potential that counsel's conflicting personal interests in protecting their liberty, livelihood, and reputation could adversely affect their representation of Mr. Mai.

Generally, an attorney is ethically responsible for the conduct of his non-lawyer employees and agents, such as investigators. (ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-396; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 35; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122-123; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 [attorney has duty to closely supervise non-lawyer employees or agents and is ethically responsible for their mistakes or negligence resulting from failure to aedquately supervise]; *In the Matter of Jones* (Review Dept. 1993) 2 Cal.

St. Bar Ct. Rptr. 411 [attorney held ethically responsible for misconduct and illegal activities of non-lawyer employees]; *Hu v.Fang* (2002) 104 Cal.App.4th 61, 64, and authorities cited therein [attorney responsible for negligence of non-lawyer employees and agents] cf. *Stokes v. California Horse Racing Bd.* (2002) 98 Cal.App.4th 477, 482 [even "an innocent principal or employer is liable for the torts committed by an agent or employee while acting within the scope of the agency and employment even if the agent of employee acts in excess of the authority or contrary to instructions"].) As previously mentioned, according to a federal arrest and search warrant affidavit (which was submitted to the trial court when the issue of a possible conflict arose), Mr. Watkins committed a number of overt acts in furtherance of the conspiracy in his role as counsel's investigator and agent.

Those acts included providing to Mr. Mai – either directly or through their co-conspirators – "personal information" about Nguyen (such as his address) that had been "listed in the discovery materials provided to the attorneys defending Mai on the pending murder case," traveling to Houston (Nguyen's home town) and obtaining other relevant addresses and personal information regarding Nguyen's family members and girlfriend, obtaining Nguyen's date of birth and social security and driver's license numbers, and obtaining other discovery in this case that included a photograph of Nguyen, all of which Mr. Watkins provided to Mr. Mai (directly or through their co-conspirators), and all of which was ultimately provided to the undercover agent posing as a hit man. (1 CT 138-144; see also 2 CT 396-397 [federal change of plea proceedings]; 2 CT 512, 532 [affidavit for wiretap, exhibit in support of prosecution's motion to shackle Mr. Mai].) Indeed, defense counsel swore that many of these acts were "performed

under my direction and at my request in a satisfactory manner." (987.9 CT 67, 71-75.)

According to other record evidence, Messrs. Peters and Mr. O'Connell delegated to Mr. Watkins the responsibility of personally obtaining all discovery directly from the District Attorney's office. (1 RT 111-112; 987.9 CT 30-31, 54, 56, 58.) Indeed, Mr. Peters acknowledged that he "never saw" the discovery himself until long after Mr. Watkins's arrest. (1 RT 111-112.) Messrs. Peters and O'Connell directed Mr. Watkins to provide discovery and other "legal materials" to Mr. Mai, which was in unredacted form. (987.9 CT 54-63, 67-75.)[19] Again, according to the federal search and arrest warrant affidavit, that unredacted discovery contained "personal information" regarding Nguyen, including his address. (1 CT 141-143.) In permitting their agent and investigator, Daniel Watkins, to provide that information to Mr. Mai, defense counsel committed a crime

---

[19] Following Mr. Watkins's arrest and the appointment of a new investigator, Mr. Rasch, to assist Messrs. Peters and O'Connell, Mr. Peters submitted a declaration regarding the tasks he had assigned Mr. Rasch. (987.9 CT 146-152.) In a declaration, Mr. Peters explained that given "the Daniel Watkins's [sic] precedent," he had instructed Mr. Rasch to redact witness information from the discovery before providing it to Mr. Mai, which required a substantial amount of time. (987.9 CT 150-142.) Consistent with this representation, Mr. Raush's itemized bills included a substantial amount of time spent redacting the discovery. (987.9 CT 226.) In contrast, while Mr. Watkins's itemized bills – submitted to and approved by Mr. Peters – included time spent "indexing" and "review[ing] discovery," they bore no indication that he had spent any time redacting it. (987.9 CT 21-28, 43-63, 67-83.) From all of this evidence, the only reasonable inference is that Mr. Peters never directed Mr. Watkins to redact the discovery before providing it to Mr. Mai and never had any reason to believe that Mr. Watkins had done so.

Penal Code section 1054.2 explicitly states in relevant part that "no attorney may disclose *or permit to be disclosed* to a defendant, members of the defendant's family, or anyone else the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of section 1054.2, unless specifically permitted to do so by the court after a hearing and a showing of good cause." (Italics added.) While an attorney may disclose such information to employees or "persons appointed by the court to assist in the preparation of a defendant's case," those persons "shall be informed by the attorney that further dissemination of the information . . . is prohibited." Violation of section 1054.2 is a misdemeanor.

Moreover, following the death verdict and in a letter to the judge presiding over the section 987.9 requests in which Mr. Peters sought additional compensation, he represented that: "Within several days of the arrest of investigator Dan Watkins on the federal case his federal attorney faxed the federal prosecutor and inferred on this fax that Dennis O'Connell and I knew about Mr. Mai's plot to kill a witness. As a result, I initially refused to be Mr. Mai's federal counsel because of the possibility of a legal conflict where I might be a witness. This difficult accusation dissolved some days later when it became obvious there was a difference in knowing that Mr. Mai hated the turncoat witness and knowing of a specific plot to murder this witness." (987.3 CT 30.)

Thus, Mr. Peters did not deny that he had directed the activities for which Mr. Watkins had been indicted – just as Watkins had alleged. The only allegation that Mr. Peters *ever* disputed on the (confidential) record was that he had done so with knowledge that Mr. Mai would use the information that their agent provided to him in an attempt to kill Nguyen.

Despite Mr. Peters's denial of such knowledge in that confidential letter, Watkins's allegation that he had such knowledge was certainly "plausible" given defense counsel's violation of Penal Code section 1054.2 and knowledge that Mr. Mai was allegedly a high-ranking member of a powerful Vietnamese gang, that Alex Nguyen claimed to be a protected witness with a "contract" out on his life, and that Mr. Mai "hated" the "turncoat witness," whose whereabouts and other vital information his agent had provided to Mr. Mai. (2 Muni RT 268, 320-321; 987.3 CT 30; cf. *People v. McRae*, *supra*, 31 Cal.2d at p. 187; *People v. Fauber*, *supra*, 2 Cal.4th at pp. 834-835.)

Thus, Watkins's allegations were plausible enough to suggest defense counsel's potential criminal liability for crimes related to those of their client. At the very least, defense counsel faced potential, severe disciplinary consequences for Watkins's criminal conduct based on their failure to supervise him more closely. Hence, Watkins's conduct and plausible allegations were such that counsel had reason to fear that they could lead to criminal charges at worst, or severe disciplinary consequences at best, thus creating the risk that counsel's representation of Mr. Mai would adversely be affected thereby. (See, e.g.,*United States v. Levy*, *supra*, 25 F.3d at p. 156, and authorities cited therein ["many courts have found an actual conflict of interest when a defendant's lawyer faces possible criminal charges or significant disciplinary consequences as a result of questionable behavior related to his representation of defendant"]; Part C-1, *ante*, and authorities cited therein.)

Certainly, the allegations constituted a sufficiently plausible basis on which to launch an investigation into Messrs. Peters and O'Connell's roles in the plot to kill Nguyen. Indeed, Mr. Watkins's attorney demanded such

an investigation – a demand made not only to the same federal prosecutor's *office* that was prosecuting Mr. Mai, but to the very *same* prosecutor, AUSA Marc Greenberg. (1 CT 155-156.) As discussed in Part C-1, *ante*, when plausible allegations that counsel was involved in crimes or other wrongdoing related to his client's crimes are made to the same entity prosecuting the client, there is a danger that counsel will become the target of a criminal investigation by that entity, which creates an incentive to curry favor with it and a disincentive to provoke its ire and, thus a serious potential that counsel's representation will be adversely affected by the conflict of interest. (See, e.g., *Armienti v. United States* (2d Cir. 2000) 234 F.3d 820, 824-825; *United States v. Levy, supra*, 25 F.3d at p. 156; *Thompkins v. Cohen* (7th Cir. 1992) 965 F.2d 330, 332.)[20]

Importantly in this regard, it was not only the federal government that had the power to investigate and potentially prosecute Messrs. Peters and O'Connell for any role they played in the conspiracy to kill Nguyen. Many of the activities for which Watkins was indicted took place in Orange County. (2 CT 391, 396-400, 397, 486-490; 1 CT 128, 134-135, 137-143, 145-147, 150-151; see also 987.9 CT 54-83.) And, according to Watkins, Messrs. Peters and O'Connell directed those activities with full knowledge of the plot to kill Nguyen. (1 CT 156.) Thus, Orange County had jurisdiction to investigate and prosecute Messrs. Peters and O'Connell for

---

[20] Compare *United States v. Baker* (9th Cir. 2001) 256 F.3d 855, 860-861 (finding no conflict where attorney was investigated and prosecuted by different jurisdiction than that prosecuting client, there was no indication either jurisdiction was even aware of the proceedings in the other, there was no "connection between any of the parties involved in the two matters," and thus attorney was not in "position of choosing whether to help himself or his client").

aiding and abetting the plot to kill Nguyen, taking part in the conspiracy, or for any other wrongdoing relating to the plan. (See, e.g., Pen. Code, § 27, subd. (a)(1) [persons who commit in whole, *or in part*, a crime within California are punishable under California law]; Pen. Code, §§ 182, subd. (a), 184 [conspiracy trial may be held in any county in which an overt act in furtherance of conspiracy is done]; 4 Witkin, Cal. Crim. Law 3d (2000), Ch. XI, Juris. & Venue, § 51, collecting cases [where crime is committed in part in one county and in part in another, either county has jurisdiction to prosecute] and § 61, collecting cases [conspiracy may be prosecuted and tried in any county in which any overt act tending to effect the conspiracy is done]; see also Pen. Code, § 31 [aiding and abetting liability]; *People v. Beeman* (1984) 35 Cal.3d 547, 561 [elements of aiding and abetting liability].) Certainly, there was reason to fear that the Orange County District Attorney's Office would have had a keen interest in the prosecution of participants in a conspiracy to kill one of its own witnesses in a capital murder trial, thus giving counsel incentive to curry personal favor with that office.

In sum, based on Watkins's actions and serious and plausible allegations against defense counsel, Messrs. Peters and O'Connell had much to fear from the state *and* federal law enforcement agencies prosecuting their client. As potential criminal defendants, they had compelling self-interest in maintaining a positive relationship with the state and federal authorities prosecuting their client, and in concealing any wrongdoing on their part, with a view to arriving at a favorable outcome regarding the allegations against them. As criminal defense attorneys, they had a duty to maintain an adversarial relationship with those agencies in order to vigorously represent their client and his best interests. This is the

essence of conflicting interests.

D. The Record Fails to Demonstrate that Mr. Mai Knowingly and Intelligently Waived His Right to Representation by Counsel Unencumbered by their Potentially Conflicting Personal Interests in their Liberty, Livelihood, and Reputations that Watkins's Conduct and Allegations Created

1. The Governing Legal Principles

According to the American Bar Association, an attorney should avoid, or move to withdraw from, employment if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own . . . personal interests" and the attorney cannot reasonably conclude that he or she will be able to provide competent and diligent representation. (ABA Model Rules of Prof. Resp. [hereafter "ABA Model Rules"], Model Rule 1.7 and Comment; see also ABA Model Code of Prof. Resp. [hereafter "ABA Model Code"], Canon 5 and Ethical Consideration 5-2 [attorney should avoid, or withdraw from, employment "if his personal interests or desires will, or there is a reasonable probability that they will, adversely affect the advice to be given or services to be rendered the . . . client"].) At the very least and for state and federal constitutional purposes, defense attorneys "have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem." (*Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 485-486.) "When an attorney addresses the court regarding a potential or actual conflict, he is obligated to do so forthrightly and honestly." (*People v. Mroczko* (1983) 35 Cal.3d 86, 112.)

When a trial court knows, or reasonably should know, of facts giving rise to a potential conflict, it has an affirmative duty to protect a defendant's rights (*Glasser v. United States*, *supra*, 315 U.S. at p. 72), which includes

an "independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment" (*Wheat v. United States, supra*, 486 U.S. at p. 161). Therefore, when the possibility of a conflict is "sufficiently apparent" to a trial court, there arises "a duty to inquire further." (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272; *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 485; *Glasser v. United States*, *supra*, 315 U.S. at p. 76.)

The trial court's duty to investigate potential conflicts cannot be discharged by a perfunctory inquiry. The court's inquiry must be both "searching" (*Garcia v. Bunnell* (9th Cir. 1994) 33 F.3d 1193, 1197), and "targeted" at the *specific* conflict at issue (*Selsor v. Kaiser* (10th Cir. 1996) 81 F.3d 1492, 1501; accord, e.g., *People v. Easley* (1988) 46 Cal.3d 712, 730-732). This duty is even greater in a capital case. As this Court has explained, in discharging this duty, the trial court must act "'with a caution increasing in degree as the offenses dealt with increase in gravity.'" (*People v. Bonin*, *supra*, 47 Cal.3d at pp. 836-883, quoting *Glasser v. United States*, *supra*, 315 U.S. at p. 71.)

The court's obligation is "not merely to inquire but also to act in response to what its inquiry discovers" (*People v. Bonin*, *supra*, 47 Cal.3d at p. 836) or take "appropriate action" (*People v. McDermott* (2002) 28 Cal.4th 946, 990; accord, e.g., *Holloway v. Arkansas*, *supra*, 435 U..S. at p. 484). Some courts have held that if the trial court conducts a full inquiry and determines that allegations of attorney wrongdoing are wholly frivolous or demonstrably untrue, it may appropriately determine that there is no potential conflict of interest and no further action need be taken. (See, e.g., *United States v. Jones* (2nd Cir. 1990) 900 F.2d 512, 518-520 [rejecting argument that prosecutor's "tirade" alluding to violation ethical rules if

certain actions were taken by counsel created potential conflict because those actions were not taken, trial judge properly found that "the prosecutor's hysterics were without foundation in fact or law," and therefore at that time there was no conflict of interest and counsel "was free to pursue a vigorous defense"].)

Absent such a determination following a full inquiry, there are two "appropriate actions" available to a trial court in the face of plausible allegations of attorney wrongdoing related to his client's crimes: disqualify counsel or obtain the defendant's knowing, voluntary and intelligent waiver of his right to counsel unencumbered by the conflict. Some courts have held that the potential for fatally divided loyalties arising from plausible allegations of attorney wrongdoing related to his client's crimes is so great that the potential conflict cannot be waived by the defendant and counsel *must* be disqualified, even over the defendant's constitutionally protected right to retained counsel of choice. (See, e.g., *United States v. Fulton, supra*, 5 F.3d at pp. 611-613 ["given the breadth and depth of this type of conflict, we are unable to see how a meaningful waiver can be obtained"]; *United States v. Arrington* (2nd Cir. 1989) 867 F.2d 122, 129; *United States v. Hobson* (11th Cir. 1982) 672 F.2d 825, 827-829; see also *United States v. Salinas* (5th Cir. 1980) 618 F.2d 1092, 1093 [trial court was within discretion in disqualifying counsel over defendant's objection where counsel was under investigation concerning events for which his client was indicted].)

The majority of courts – following the general principle that the right to conflict-free counsel may be waived under certain circumstances (see, e.g., *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 346-347) – have held that such conflicts may be waived. As with all fundamental constitutional

rights, however, any such waiver must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 110; accord *Glasser v. United States, supra,* 315 U.S. at pp. 70-71; *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464; *People v. Easley*, *supra*, 46 Cal.3d at p. 730 [the defendant must be advised of the "full range of dangers" presented by the conflict]; *Lewis v. Mayle* (9th Cir. 2004) 391 F.3d 989, 996; *United States v. Allen* (9th Cir. 1987) 831 F.2d 1487, 1500, and authorities cited therein ["defendant (must) know about all of the risks that are likely to develop"].) The reviewing court must "'ascertain with certainty' that a defendant knowingly and intelligently waived that right by 'focusing on what the defendant understood.' [Citation.]" (*Lewis v. Mayle*, *supra*, 391 F.3d at p. 996; accord, e.g., *People v. Mroczko*, *supra*, 35 Cal.3d at pp. 110-113; *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732.)

Significantly, the validity of the waiver *must appear on the face of the record.* (See, e.g., *Carnley v. Cochran* (1962) 369 U.S. 506, 515-516; *Glasser v. United States, supra,* 315 U.S. at p. 71; *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464.) Courts "'indulge every reasonable presumption against the waiver of unimpaired assistance of counsel.'" (*People v. Bonin*, *supra*, 47 Cal.3d at p. 840, quoting from *People v. Mroczko*, *supra*, 35 Cal.3d at p. 110; accord, *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464.)

2. The Hearing and Colloquy

Despite the severe conflicts of interest presented by Watkins's status as both an indicted co-conspirator and defense counsel's investigator, his allegations against both Messrs. Peters and O'Connell, and his own attorney's demand that Messrs. Peters and O'Connell's roles in the conspiracy be investigated by at least one of the agencies prosecuting Mr.

Mai, those conflicts were never explored on the record at all.

Instead, on August 7, 1998, Mr. Peters briefly described the background of the federal prosecution and "its mix" with the state case and informed the trial court that it was possible that he and Mr. O'Connell would be called as witnesses in the federal trial by Mr. Mai's alleged co-conspirator, Daniel Watkins, who was their investigator in this case. According to Mr. Peters, this "[n]aturally . . . raises the spectre of some conflict of interest here." (1 RT 63-67.)

Nevertheless, Mr. Peters further explained that he and Mr. O'Connell had discussed the matter and "we do not see any actual conflicts at this point." (1 RT 67.) However, according to Mr. Peters, the state prosecutor was concerned regarding the potential conflict and wanted to be "confident that later down the road some armchair quarterback doesn't decide that there was some conflict, and undo the work that was done many years before, that is a professional thing for the prosecutor to do." (1 RT 67.)

Therefore, with the prosecutor joining the request, Mr. Peters asked the trial court to appoint a specific attorney as "independent" counsel to review both the state and federal cases and advise both Mr. Mai and Mr. Mai's counsel as to whether there was a conflict of interest. (1 RT 67-68.) The court granted their request and appointed Gary M. Pohlson, the attorney Messrs. Peters and O'Connell had requested, to "render an opinion for us." (1 RT 68-69, 74.)[21]

---

[21] Initially, defense counsel asked that an attorney named Jack Earley be appointed. (1 RT 67-68.) However, because Mr. Earley was unavailable, the court ultimately granted defense counsel's request to

(continued...)

On August 21, 1998, Mr. Pohlson appeared in state court with all counsel and Mr. Mai. (1 RT 74-75.) He represented to the court that he had discussed both cases with Messrs. Peters and O'Connell, the state prosecutor, and the federal prosecutor, AUSA Greenberg. (1 RT 75.) Mr. Pohlson also reviewed the search and arrest warrants and supporting affidavit in the federal case and the memorandum Mr. Watkins's federal counsel had presented to AUSA Greenberg and the district court, which were submitted to the trial court and made part of the trial record. (1 RT 83-84; 1 CT 125-156.)[22]

Mr. Pohlson explained that he had had a "relatively brief" meeting with Mr. Mai "outlining for him what my conclusions were, what the law said with regard to, at least in my opinion what the law says with regard to where the conflict situation is." (1 RT 75-76.) In Mr. Pohlson's opinion, there was "the appearance of a conflict, or the potential of a conflict," based on the likelihood that Messrs. Peters and O'Connell would be called as witnesses in the federal trial. He explained that he was "pretty sure that one side or the other is going to call Mr. Peters and Mr. O'Connell" regarding the charges against their investigator, Daniel Watkins. (1 RT 76.)

However, AUSA Greenberg had informed Mr. Pohlson that the

---

[21](...continued)
appoint another colleague, Gary Pohlson. (1 CT 124; 1 RT 74-75.) It appears that Mr. Peters and Mr. Pohlson had previously acted as co-counsel in at least one other case. (See *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1014 [listing Gary M. Pohlson and George Peters as counsel for petitioner].)

[22] As previously noted, these documents were sealed at the prosecutor's request, "could I ask the court to seal those, I have not been privy to those documents, and I do not intend to." (1 RT 84.)

federal government intended to request two juries in Mr. Mai and Mr. Watkins's federal trial. (1 RT 76.) Since the federal government "is going to make sure that the Mai jury doesn't know anything about Peters and O'Connell[,] . . . no way will they be impacted, will Mr. Mai be impacted by at least the appearance of his lawyers testifying against him. So I don't think that's going to be a problem as far as conflict goes." (1 RT 76.)

Even if the federal court refused the request for two juries, Mr. Pohlson had discussed with Messrs. Peters and O'Connell the subject matter of their potential testimony, which Mr. Pohlson opined would be "in no way harmful to Mr. Mai." (1 RT 76-77.) Furthermore, the AUSA informed Mr. Pohlson that he did not intend to examine Messrs. Peters and O'Connell regarding any privileged matter. (1 RT 77.) "So I don't think there is a conflict on that level." (1 RT 77.) Mr. Pohlson did not describe the potential testimony, explaining that he did "not think it is necessary for me to go into that now," nor did the trial court inquire into the nature of the expected testimony. (1 RT 77; compare *United States v. Miskinis* (9th Cir. 1992) 966 F.2d 1263, 1269 [if attorney's potential testimony "would have been adverse to the defense that [defendant] might have offered, a conflict of interest existed"].)

At bottom, Mr. Pohlson informed the trial court and Mr. Mai that he saw only two possible conflicts presented by the facts: (1) the possibility that Mr. Mai's attorneys would be testifying as prosecution or defense witnesses in a case the government was prosecuting against Mr. Mai; and (2) the possibility that their testimony would harm Mr. Mai with regard to the federal case or involve privileged matter. (1 RT 76-78.) However, Mr. Pohlson concluded – and advised Mr. Mai – that there was no, and would be no, actual conflict and certainly not one that would "affect this case"

because the federal case was "outside the parameters" of the state case. (1 RT 78-79.)

In any event, Mr. Pohlson explained, "whether there is a conflict or not, it is waivable." (1 RT 77.) To that end, Mr. Pohlson "brief[ly]" met with Mr. Mai and informed him "of almost exactly what I just told the court, that assuming that there is a conflict, that he can waive that if he wants . . . ." (1 RT 75-76, 78; see also 1 RT 83.) In other words, he advised Mr. Mai that although there was the *"appearance"* of a conflict based on the possibility that his attorneys would be witnesses in the federal trial, in actuality there was no conflict. (1 RT 75-78.) He further advised Mr. Mai that even if there were a conflict, "in no way will that affect the representation, in no way will that render their representation by Mr. O'Connell and Mr. Peters ineffective in itself." (1 RT 79.) Based on this advice, according to Mr. Poholson, "Mr. Mai does not believe there is a conflict, he stated that to me a couple of times" (1 RT 83) and he wished to have both defense attorneys continue to represent him (1 RT 79).

The court inquired of Mr. Peters, "Mr. Peters, in your mind, do you have a conflict in this matter?" (1 RT 80.) Mr. Peters replied that he did not; there was no "actual conflict[,] [a]nd I am having even a hard time imagining any potential conflict, based on what I know, which includes talking with the U.S. Attorney and talking to Mr. Evans [the state prosecutor]." (1 RT 80-81.)

Mr. Peters further represented, and the state prosecutor confirmed, that the state prosecutor did not intend to introduce any criminal activity relating to the federal charges in the state prosecution, which "reduces the conflict to about zero." (1 RT 80-81.) Further, "even if the attorney-client privilege was waived and I did testify, I believe I would have nothing to say

that would harm Mr. Mai." (1 RT 81.) Mr. Peters concluded that "on every level, emotionally and intellectually, I do not believe I have a conflict . . . ." (1 RT 81.)

The court next inquired of Mr. O'Connell whether he believed that he had a conflict in the case. (1 RT 82.) Mr. O'Connell also responded that he did not. (1 RT 82.)

Thereafter, the court engaged Mr. Mai in the following colloquy:

> The court: The court is going to make a determination, based upon the information furnished to the court by attorney Pohlson and all counsel, that there is an appearance of a potential conflict. The court cannot determine any more than Mr. Pohlson can at this time that an actual conflict exists. It appears that one does not exist, but there is an appearance.
>
> But it also appears, based upon what the court has been advised, that if a conflict exists it would not render the representation of defense counsel ineffective in and of itself.
>
> Because of that appearance of conflict, or potential conflict, or conflict, Mr. Mai, the lawyers may not be able to furnish you effective representation, and you might not have a fair trial if represented by these counsel, do you understand that?
>
> The defendant: Yes.
>
> The court: We have appointed independent counsel to confer with you, and you have confirmed you spoke with Mr. Pohlson yesterday; is that correct?
>
> The defendant: Yes.
>
> The court: And he advised you of the same possibilities of harm that I am advising you of at this time; is that correct?
>
> The defendant: Yes. . . .
>
> The court: Should you have ineffective counsel, your chances

of being convicted are greater, and when you waive your right to conflict free counsel, you are also waiving an appeal based upon that conflict; do you understand that?

The defendant: Yes.

The court: That means you can't raise that issue, should you be convicted, it means later on you cannot raise this as an issue on appeal?

The defendant: Yes, I understand.

The court: Having been advised of your right to be represented by attorneys free of conflict, and having understood the disadvantage and dangers of being represented by attorneys with conflicts, do you specifically give up your right to be represented by attorneys who have no conflict of interest?

The defendant: Yes.

The court: Have any threats or promises been made to you to obtain this waiver?

The defendant: No, sir.

The court: And Mr. Peters, Mr. O'Connell, you concur in defendant's decision?

Mr. Peters: Yes, your honor.

Mr. O'Connell: Yes.

(1 RT 85-87.) Based upon the foregoing, the trial court found that Mr. Mai had made a knowing, voluntary, and intelligent waiver of his right to counsel unencumbered by the described conflict. (1 RT 88.)

3. The Record Fails to Demonstrate that Mr. Mai was Advised of the Most Virulent Potential Conflicts of Interest Created by Watkins's Conduct and Allegations or Warned of the Dangers of Being Represented by Counsel Laboring Under Such Conflicts and, Hence, Fails to Demonstrate that Mr. Mai Made A Knowing and Intelligent Waiver of his Right to be Represented by Counsel Unencumbered by Such Conflicts

As discussed in Part D-1, *ante*, when the trial court and defense counsel know or reasonably should know of a potential conflict, the state and federal Constitutions demand that the trial court conduct a "searching" and "targeted" inquiry into the conflict and its potential consequences (*Selsor v. Kaiser*, *supra*, 81 F.3d at p. 1501) and that trial counsel address the potential conflict "forthrightly and honestly" (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 112). (Accord *Wheat v. United States*, *supra*, 486 U.S. at p. 160; *Wood v. Georgia*, *supra*, 450 U.S. at p. 272; *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 485-486; *Glasser v. United States*, *supra*, 315 U.S. at p. 76; *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732.) These duties serve two critical functions.

First, the fulfillment of these duties is necessary to protect the defendant's Sixth Amendment rights by either determining that there is no potential conflict or, if there is a potential conflict, taking appropriate action through counsel's voluntary withdrawal, the court's disqualification of counsel, or obtaining the defendant's waiver of his right to counsel unencumbered by the conflict. (See, e.g., *Wheat v. United States*, *supra*, 486 U.S. at p. 161; *Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 485-486; *Glasser v. United States*, *supra*, 315 U.S. at p. 71.) Second, fulfillment of these duties is vital to ensure that any purported waiver is a "knowing,

intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences," which must appear from the face of the record. (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 110; accord, e.g., *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 346-347; *Glasser v. United States, supra,* 315 U.S. at pp. 70-71; *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464; *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732.)

Here, as the record of the conflict hearing and colloquy with Mr. Mai demonstrates, the only potential conflict discussed and addressed was the possibility that Messrs. Peters and O'Connell might be called as witnesses in Mr. Mai and Watkins's federal conspiracy trial. (1 RT 66-67, 75-88.) Indeed, Mr. Pohlson was quite explicit that this was the only potential conflict that he had discussed with Mr. Mai. (1 RT 75-78.) Furthermore, as to the consequences of that particular potential conflict, Messrs. Pohlson, Peters, and O'Connell assured the court and Mr. Mai that it was only theoretical because counsel would not, in fact, be called as witnesses in *Mr. Mai*'s federal trial, which would be before a separate jury, or provide testimony that would be harmful to him. (1 RT 76-78.) And in any event, they assured the court and Mr. Mai, even any theoretical conflict could not possibly have any adverse impact on counsel's representation of Mr. Mai in these proceedings because they were "outside the parameters" of the federal case. (1 RT 78-79.) In fact, according to defense counsel, the state prosecutor had promised not to present any of the conspiracy evidence in the state capital murder trial, which "reduces the conflict to about zero." (1 RT 80-81.) Based upon this advice, according to Mr. Pohlson, Mr. Mai himself was convinced that there was no possibility of a conflict. (1 RT 75-76, 78, 83.) It was based on *this* record and advice that Mr. Mai waived his right to counsel unencumbered by the potential "appearance" of a conflict

based on the possibility his counsel could be called as witnesses in his federal trial. (1 RT 85-87.)

But for all of the reasons discussed in Part C, *ante*, the possibility that defense counsel might be called as witnesses in Mr. Mai's federal conspiracy trial was the least virulent of the conflicts presented by the indictment of their investigator for conspiring with Mr. Mai to kill the state's witness, by Watkins's own activities allegedly committed in furtherance of that conspiracy while acting as counsel's agent and investigator, by his allegations that counsel directed those activities with knowledge of the plot to kill the witness, and by his attorney's demand to the AUSA prosecuting Mr. Mai that defense counsel's roles in the plot be investigated. No one – including Mr. Pohlson, who described in detail the advice he had given Mr. Mai – addressed or advised Mr. Mai of the potential conflicts created by those facts or their possible impact on counsel's representation of Mr. Mai in this case. (See Part C, *ante*, and authorities cited therein.)

The trial court made no inquiry into the potential effect that the allegations of defense counsel's potential criminal liability and ethical violations might have on counsel's representation of Mr. Mai in these proceedings. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272; *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 485; *Glasser v. United States*, *supra*, 315 U.S. at p. 76.) The trial court made no inquiry into what independent personal knowledge defense counsel had regarding the conspiracy. The trial court never even inquired into the credibility or plausibility of Watkins's allegations. (See, e.g., *United States v. Jones*, *supra*, 900 F.2d at pp. 518-520.) Indeed, *defense counsel did not even deny the allegations*. Instead, the court simply accepted Messrs. Pohlson, Peters, and O'Connell's

representations that there was only the appearance of a possible conflict based on the theoretical possibility that counsel could be called as witnesses in Mr. Mai's federal trial, that this theoretical possibility would not be realized and therefore there was no potential conflict, and their indefensible representation that there was no possibility at all that counsel would have any conflict of interest in their representation of Mr. Mai in these proceedings. In so doing, "the trial court was too eager to accept [counsel's] representation that no conflict existed, or that problems posed by any conflict could be evaded." (*People v. Easley*, *supra*, 46 Cal.3d at p. 731.)

Indeed, defense counsel failed to address or acknowledge the most virulent of the potential conflicts presented by the facts of which the trial court was aware. They also failed to bring to the court's attention additional facts lending credibility to Watkins's allegations against them and suggesting their own potential criminal liability and ethical violations for conduct relating to the conspiracy to kill the state's witness. (See Part C-2, *ante*.) Even worse, they misled the court with regard to the depth and breadth of the conflicts presented by the facts and their potential impact on counsel's representation of Mr. Mai in this case.

On March 2, 2000, roughly a year and a half after the August 21, 1998 conflict hearing in state court, Mr. Peters and state prosecutor Jacobs appeared in federal district court before Judge David O. Carter and discussed the possibility that the evidence relating to the plot to kill Nguyen would be introduced in Mr. Mai's state capital murder trial. According to AUSA Greenberg, "it was decided early on that it couldn't be done. And the D.A.'s office doesn't intend to do it." (3/16/07 2 SCT 132.) The federal court responded with skepticism, "I don't know how it could be"

that the evidence would not be admitted in the state case and specifically inquired of state prosecutor Jacobs, "[s]o those death threats concerning Mr. Nguyen, you're representing to me you're not going to put this on, Mr. Jacobs?" (3/16/07 2 SCT 133.)

In response, state prosecutor Jacobs clarified that Assistant District Attorney Evans, who had been assigned to prosecute the case before Mr. Jacobs, had simply "made a promise to the defense that he would not *in the case-in-chief*, in the aggravating evidence, present anything having to do with the federal case," a promise by which the state was bound. (3/16/07 2 SCT 133, italics added.) Mr. Peters agreed that this was the arrangement and pointed out, "I think the Court can see by [Mr. Jacob's reference to] the case-in-chief, if we were to put on some penalty evidence[,] it could go into that field – especially with respect to Alex Nguyen." (3/16/07 2 SCT 133.) Mr. Jacobs confirmed that Mr. Peters was correct: the state was free to present evidence relating to the conspiracy as impeachment or on rebuttal. (3/16/07 2 SCT 134.)

Thus, it was misleading for defense counsel to represent to the state trial court that the state prosecutor had promised that he would not introduce any evidence relating to the conspiracy in Mr. Mai's capital murder trial and certainly grossly misleading to represent that this non-existent promise "reduce[d] the conflict to about zero." (1 RT 80-81.) To the contrary, and as will be demonstrated in Part G-1, *post*, the potential for fatally divided loyalties was even more acute given the true nature of the agreement: as Messrs. Peters and O'Connell made life and death decisions over Mr. Mai's fate, the threat loomed that if they did attempt to save his life by presenting a penalty phase defense with mitigating evidence (which, as discussed in Part G-3, *post*, they had the power to do even over Mr.

Mai's objections), evidence regarding the alleged plot to kill Nguyen and their own roles in it could be aired in a public forum in the county in which they practiced and before their colleagues, the judges who presided over their cases, the prosecutors who were their frequent adversaries, and the state and federal agencies who had the power to investigate and indict or charge them. If, on the other hand, they acceded in Mr. Mai's instructions to effectively stipulate to a death sentence (see Part G-1, *post*), the lid would remain securely on the Pandora's Box the federal conspiracy evidence could otherwise open.[23] At bottom, both Messrs. Peters and O'Connell violated their duties, and indeed their oaths as officers of the court, by failing to acknowledge and even misleading the state trial court regarding the true nature of the conflict and its potential effect on counsel's representation of Mr. Mai. (See, e.g., *People v. Mroczko*, *supra*, 35 Cal.3d at p. 112; *Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 485-486; see also Business & Professions Code section 6068 [attorney shall not mislead the judge by false statement of fact or law]; Rules of Prof. Conduct, Rule 5-200(B) [same]; *Williams v. Superior Court* (1996) 46 Cal.App.4th 320, 330, and authorities cited therein.)[24]

---

[23] As will be demonstrated in Parts G, *post*, defense counsel rejected the first alternative, which conflicted with their personal interests, in favor of the second alternative of presenting no penalty phase defense, which served their personal interests.

[24] It is uncertain whether the trial judge was *actually* aware of the true nature of the agreement with the state prosecutor. On April 11, 2000, during the penalty phase voir dire, the trial judge stated that he had received and reviewed certain pleadings relating to the federal proceedings. (5 RT 1075; 3/16/07 2 SCT 28-156.) Attached as an exhibit to one of those pleadings was the federal court transcript reflecting the true nature of the

(continued...)

This record simply does not rebut the "presumption against the waiver of unimpaired assistance of counsel" (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 110; accord, *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464) or affirmatively demonstrate that Mr. Mai knowingly and voluntarily waived his right to counsel unencumbered by counsel's conflicting personal interests in their liberty, livelihood, and reputation created by their own conduct, that of their investigator, and their investigator's allegations that they were equally culpable in the conspiracy to kill the state's witness. (See, e.g., *Glasser v. United States, supra,* 315 U.S. at p. 71; *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464.)

This Court's decision in *People v. Mroczko*, *supra*, 35 Cal.3d 86 is particularly instructive in this regard. In that case, this Court found a conflict of interest where one attorney represented two co-defendants charged with the same murder and his office represented two potential witnesses to, and alternative suspects in, the charged crime. (*Id.* at pp. 98-99, 105.) One of those client/witnesses had made a sworn statement to the authorities in which he implicated the other client/witness in the charged crime and exculpated the defendant, Mroczko. (*Id.* at p. 100.)

On three different occasions, the prosecution raised the conflicts of interest inherent in the attorney's joint representation of the co-defendants and his office's representation of the two witnesses and ultimately moved to

---

[24](...continued)
agreement. (5 RT 1075; 3/16/07 2 SCT 89-156.) If the trial court reviewed the exhibits attached to those pleadings and discovered the true nature of the agreement, then it failed in its duty to inquire into the potential conflict it created and its impact on counsel's performance. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272; *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 485; *Glasser v. United States*, *supra*, 315 U.S. at p. 76.)

disqualify counsel. (*People v. Mroczko*, *supra*, 35 Cal.3d at pp. 98-99, 101-103.) Defense counsel repeatedly represented that although there was the *appearance* of a conflict, there was, in fact, no conflict. (*Id.* at pp. 100-102.) Furthermore, defense counsel insisted that the defendants had been adequately advised of the potential conflicts and thus were free to waive them. (*Id.* at pp. 101-102.)

On three occasions, both defendants informed the court that they were aware of the potential conflicts, they believed that there would, in fact, be no conflicts at trial, and requested that they continue to be represented by the same counsel. (*People v. Mroczko*, *supra*, 35 Cal.3d at pp. 98-99.) Both defendants were asked if they were willing to waive their right to conflict-free counsel. (*Id.* at p. 100.) They were informed generally of the risks and dangers of one attorney representing co-defendants, as well his office's representation of the two witnesses, which could prevent counsel from attacking their credibility. Both defendants stated that they were willing to accept those risks and waive "any conflicts that may have existed." (*Id.* at pp. 101-102.) The court specifically inquired of Mroczko if he had been made aware of the "real or apparent conflict of interest." (*Id.* at p. 103.) Mroczko replied that he had been made aware of it, but "I don't believe it." (*Ibid.*)

After Mroczko was convicted of first degree murder, he appealed on the ground that he had been deprived of his state and federal constitutional rights to conflict-free counsel and that his waiver was invalid because it was not knowing and intelligent. (*People v. Mroczko*, *supra*, 35 Cal.3d at pp. 92, 97.) This Court agreed. (*Id.* at p. 105.)

This Court concluded, among other things, that counsel's representation of Mroczko suffered from his representation of his co-

defendant as well as the witness implicated in the charged crime because he had to choose a strategy that would vindicate all of his clients as opposed to strategies that would be potentially beneficial to Mroczko but detrimental to his other clients. (*Id.* at pp. 106-108.) As to Mroczo's purported waiver, this Court held:

> The attempted waivers here were fatally flawed in several respects. First, the courts' comments did not fully convey a number of actual and severe conflicts that were apparent even pretrial. Instead, each judge who addressed the defendants concerning the conflicts did so in language implying that they were merely potential conflicts. Most importantly, however, defense counsel reinforced this language repeatedly – and erroneously – asserting that no conflict existed. The product of the court's and counsel's approaches was apparent in Mroczko's responses: he was not convinced that a conflict would arise. Mroczko's final comment, that he was aware of the possibility of a conflict but did not "believe" it, should have alerted the trial court to the fact that he may not have understood the severity of the problem.

(*People v. Mroczko*, *supra*, at pp. 110-111.)

As to defense counsel, this Court emphasized that "[w]hen an attorney addresses the court regarding a potential or actual conflict, he is obligated to do so forthrightly and honestly." (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 112.) Yet, "in the face of serious conflicts, [defense counsel] made no attempt to inform the court. On the contrary, he took the indefensible position that no conflicts existed." (*Id.* at p. 113.) Defense counsel's "behavior strongly suggests that he was unwilling or unable to assess accurately whether his representation of [the co-defendants and implicated client/witness] was in the best interest of each. The very fact that he was willing to represent such clearly conflicting interests despite the legal and ethical ramifications of his position, raises questions about his

judgment, or at least his impartiality.'" (*Ibid.*) On this record, the Court found that Mroczko's waivers were not knowing and intelligent and, therefore, were ineffective. (*Ibid.*)

This Court's decision in *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732 is in accord. There, facts were presented to the trial court that created a potential conflict carrying the substantial danger of adversely affecting defense counsel's representation of the defendant. While the trial court made some inquiry into the potential conflict:

> the consequences addressed by the court and other parties were of an entirely different and less virulent sort [from the true potential consequences]. In discussing the conflict, the parties focused primarily on the possibility that [defense counsel] might have to testify. . . . This facet of the conflict, moreover, was presented by the court and [defense counsel] as a surmountable obstacle, and was conveyed to the defendant as posing no serious conflict. . . . [T]he trial court was too eager to accept [counsel's] representation that no conflict existed, or that problems posed by any conflict could be evaded.

(*People v. Easley*, *supra*, 46 Cal.3d at pp. 730-731.) Furthermore, the defendant's "'final comment, that he was aware of the possibility of a conflict, but did not 'believe it,' should have alerted the trial court to the fact that the defendant may not have understood the severity of the problem.'" (*Id.* at p. 731, fn. 18, quoting from *People v. Mroczko*, *supra*, 35 Cal.3d at p. 111.) This Court concluded, "[b]ecause the [trial] court identified only a minor portion of the potential consequences arising from [defense counsel's] representation . . . we cannot conclude that defendant fully understood the full scope of the conflict and intelligently waived it." (*Id.* at p. 731.)

Here, as in *Mroczko* and *Easley*, the trial court and Messrs. Peters,

O'Connell, and Pohlson's "comments did not fully convey a number of actual and severe conflicts that were apparent even pretrial." (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 110; accord, *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-731.) The only possible conflict which was discussed on the record and with Mr. Mai was the possibility that Messrs. Peters and O'Connell would be called as *witnesses* in the federal trial, which was far "less virulent" than the other potential conflicts presented by the facts. (*People v. Easley*, *supra*, 46 Cal.3d at p. 731; see 1 RT 66-67, 75-82.) Even with respect to this possible conflict, and just as in *Mroczko* and *Easley,* the court and Messrs. Pohlson, Peters and O'Connell described it as "merely [a] potential conflict[]," the insignificance of which was "reinforced" when Mr. Pohlson, Mr. Peters, and Mr. O'Connell "repeatedly – and erroneously – assert[ed] that no conflict existed." (*People v. Mroczko*, *supra*, at pp. 110-111; accord, *People v. Easley*, *supra*, 46 Cal.3d see 1 RT 66-67, 75-82; see 1 RT 66-67, 75-82.)

And just as in *Mroczko* and *Easley*, *supra*, "[t]he product of the court's and counsel[s'] approaches was apparent in [Mr. Mai's] responses: he was not convinced that a conflict would arise." (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 111; accord, *People v. Easley*, *supra*, 46 Cal.3d at p. 731 & fn. 18; see 1 RT 80, 83.) As in *Mroczko* and *Easley*, this record fails to demonstrate that Mr. Mai made knowing and intelligent waiver of his right to counsel unencumbered by the conflicts raised on this appeal. (*People v. Mroczco, supra*, 35 Cal.3d at p. 113; *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732.)[25]

---

[25] Accord, e.g., *Mannhalt v. Reed, supra*, 847 F.2d at p. 581 [although defendant was aware before trial of witness's allegation that (continued...)

Under both the state and federal Constitutions (see *People v. Doolin*, *supra*, 45 Cal.4th at p. 421), the question then becomes whether the potential conflict ripened into an actual one, whereby Messrs. Peters and O'Connell actively represented conflicting interests, which adversely affected their performance throughout the trial proceedings. (See, e.g., *Mickens v. Taylor*, *supra*, 535 U.S. at pp. 166, 175; *Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 348.) In resolving this question, this Court should be mindful that Messrs. Peters and O'Connell's efforts to mislead the trial court and their failure even to *acknowledge* the extremely serious conflicts that arose from their investigator's conduct and allegations "'strongly suggests that [they were] unwilling or unable to assess accurately whether [their] representation of [Mr. Mai] was in the client's best interest . . . The very fact that [they were] willing to represent [Mr. Mai in the face of] such clearly conflicting interests despite the legal and ethical ramifications of [their] position, raises questions about [their] judgment, or at least [their] impartiality.'" (*People v. Mroczco, supra*, 35 Cal.3d at p. 113; accord

---

[25](...continued)
counsel was involved in crimes related to his own and counsel discussed it with him, the defendant was never told "that it created a potential conflict of interest and never warned . . . of the dangers of continued representation" by an attorney laboring under such a conflict and hence there was no knowing and intelligent waiver of right to counsel unencumbered by that conflict]; *United States v. Allen, supra,* 831 F.2d at p. 1500 [waiver not knowing or intelligent because defendant was not "adequately informed of the significance of the conflict" of interest and the specific impact it could have on counsel's representation]; *Lewis v. Mayle, supra*, 391 F.3d at pp. 996-997 [same]; *United States v. Levy*, *supra*, 25 F.3d at pp. 158-159, and authorities cited therein ["this Court has repeatedly concluded that even a defendant's explicit, in-court waiver of his right to a non-conflicted lawyer was not valid and effective when the trial court failed to explain adequately the ramifications of the attorney's conflicts"].)

People v. Easley, supra, 46 Cal.3d at p. 732 [same].) Indeed, counsel had compelling personal interests to insist on the absence of any conflict and thereby retain their positions as Mr. Mai's counsel.

First, their fee agreement provided for an initial lump sum payment up front, which they could keep *only* if the case was disposed of while they were counsel of record. (Pen. Code, § 987.2 CT 1-13.) Therefore, if they were removed, they would not merely have lost their future fees, but would have to *return* most of the lump sum fee they had already been paid. Even more importantly, and as will be demonstrated below, if they were discharged and other counsel appointed, there was a substantial risk that evidence and allegations of their potential criminal liability and/or ethical violations would come to light; on the other hand, maintaining their position as counsel would allow them to keep that evidence in darkness. It is reasonable to infer that counsel's failure to disclose the depth and breadth of the conflict of interest created by Watkins's conduct and allegations against them was a direct product of their conflicted state of mind and "raises questions about [their] judgment, or at least [their] impartiality.'" (*People v. Mroczco, supra*, 35 Cal.3d at p. 113.)

Certainly, and as will be demonstrated below, the conflict profoundly impacted Messrs. Peters and O'Connell's performance and colored virtually every stage of this capital proceeding, which amounted to an empty charade that inevitably led to the jury's decision to put Mr. Mai to death.

E. The Potential Conflict of Interest Ripened into an Actual One, Which Adversely Affected Defense Counsel's Performance In the Pre-Trial and Plea Proceedings

1. A Potential Conflict Becomes An "Actual Conflict" within the Meaning of the State and Federal Constitutions When it Influences, and thus Adversely Affects, Counsel's Performance

Typically, in order to establish a violation of his or her state and federal constitutional rights to the effective assistance of counsel, a defendant must show both that: (1) counsel's representation fell below an objective standard of reasonable competence; and (2) but for counsel's errors there is a "reasonable probability" that the result of the proceeding would have been different. (*Strickland v. Washington, supra*, 466 U.S. at pp. 693-694; accord, e.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 217-219.) However, there are exceptions to this general rule. (See, e.g., *Strickland v. Washington*, *supra*, at p. 692; *United States v. Cronic* (1984) 466 U.S. 648, 656-662.)

For instance, when a defendant has actually or constructively been denied the assistance of counsel at a critical stage of the proceedings, prejudice is presumed. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692; *United States v. Cronic*, *supra*, 446 U.S. at pp. 656-662.) Such circumstances warrant a presumption of prejudice because prejudice is "so likely that case-by-case inquiry into prejudice is not worth the cost." (*Ibid.*; see also, e.g., *Ellis v. United States* (1st Cir. 2002) 313 F.3d 636, 643 [Sixth Amendment right to counsel violations that fall within narrow category of cases to which presumption of prejudice is applied are those that are "pervasive in nature, permeating the entire proceeding" while harmless

error analysis applies to "short-term" or "localized" violations].)

Another exception applies to "actual conflicts of interest." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692.) An actual conflict of interest is a conflict of interest that *actually* and "adversely affected counsel's performance," as opposed to a mere "theoretical division of loyalties." (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 171; accord *Cuyler v. Sullivan*, *supra,* 446 U.S. at pp. 348-349; *Alberni v. McDaniel* (9th Cir. 2006) 458 F.3d 860, 870 [under *Mickens* "an 'actual conflict' is defined by the effect a potential conflict had on counsel's performance"]; *People v. Rundle*, *supra*, 43 Cal.4th at p. 169, and authorities cited therein.)

As will be more fully discussed in Part H, *post*, once an "actual conflict" of interest is shown, prejudice is presumed and a Sixth Amendment violation is established. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692; *Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272; *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 348-49; *Glasser v. United States* (1942) 315 U.S. 60, 76; *People v. Roldan* (2005) 35 Cal.4th 646, 673, and authorities cited therein; see also *Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 489-490.) This presumption – often referred to as the "*Sullivan* limited presumption" – "is not quite the per se rule of prejudice that exists" for actual or constructive denials of counsel altogether. (*Strickland*, *supra*, 466 U.S. at p. 692.) Rather, "prejudice is presumed only if the defendant demonstrates that 'counsel actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" (*Ibid.*)[26]

---

[26] Whether the so-called *Sullivan* limited presumption of prejudice applies to all actual conflicts or only to specific kinds of actual conflicts (continued...)

The United States Supreme Court has held that an adverse effect (and thus an "actual conflict") is established if it appears that counsel was "influenced in his basic strategic decisions by" the conflict. (*Wheat v. United States*, *supra*, 486 U.S. at p. 160; accord *Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273; *United States v. Wells* (9th Cir. 2005) 394 F.3d 725, 733, and authorities cited therein; *Lewis v. Mayle* (9th Cir. 2004) 391 F.3d 989, 998, and authorities cited therein; *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1452; *People v. Mroczko*, *supra*, 35 Cal.3d at p. 107.) Whether counsel was "influenced in his basic strategic decisions" by the conflict is governed by the reviewing court's own examination of the record and not counsel's perceptions. This is so because "[h]uman self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it." (*United States v. Shwayder* (9th Cir. 2002) 312 F.3d 1109, 1119, as amended by (9th Cir. 2003) 320 F.3d 889; accord, e.g., *Lewis v. Mayle*, *supra*, 391 F.3d at p. 998.) This is particularly true when the conflict arises from the attorney's possible liability for crimes or other wrongdoing related to his client's crimes because the attorney's "inherent emotional and psychological barriers" make it nearly impossible to "reliably determine to what extent the [trial] decisions were based on legitimate tactical considerations and to what extent they were the result of impermissible considerations." (*United States v. DeFalco* (3d Cir. 1979) 644 F.2d 132, 137.)

Hence, the reviewing "court itself must examine the record to

---

[26](...continued)
shall be addressed at length in part F, *post*.

discern whether the attorney's behavior seems to have been influenced by the suggested conflict." (*Sanders v. Ratelle*, *supra*, 21 F.3d at p. 1452.) In order to satisfy this standard, it is not necessary to prove that the conflict was the *sole* "cause of any" actions or inactions by defense counsel. (*Lockhart v. Terhune* (9th Cir. 2001) 250 F.3d 1223, 1231). The defendant need only show "that some effect on counsel's handling of particular aspects of the trial was 'likely' [Citation]." (*Ibid.*; accord, e.g., *United States v. Shwayder*, *supra*, 312 F.3d at pp. 1118-1119; *United States v. Christakis* (9th Cir. 2001) 238 F.3d 1164, 1170; *Mannhalt v. Reed*, 847 F.2d at p. 583.)

This Court has held that adverse effect is established when "'the record shows that counsel "'pulled his punches'" – i.e., failed to represent defendant as vigorously as he might have had there been no conflict.' (*People v. Easley* (1988) 46 Cal.3d 712, 725.)" (*People v. Rundle*, *supra*, 43 Cal.4th at p. 169, and authorities cited therein; accord, e.g., *People v. Cox* (2003) 30 Cal.4th 913, 948-949.)

Similarly, an adverse effect is established if there was "'some plausible alternative defense strategy or tactic that might have been pursued but was not and that the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' [Citation.]" (*United States v. Wells*, *supra*, 394 F.3d at p. 733, and authorities cited therein; accord, e.g., *Winfield v. Roper* (8th Cir. 2006) 460 F.3d 1026, 1039; *Reyes-Vejarano v. United States* (1st Cir. 2002) 276 F.3d 94, 97; *Freund v. Butterworth* (11th Cir. 1999) 165 F.3d 839, 860; *Winkler v. Keane* (2d Cir. 1993) 7 F.3d 304, 309; *United States v. Bowie* (10th Cir. 1990) 892 F.2d 1494, 1500; *United States v. Gambino* (3rd Cir. 1988) 864 F.2d 1064, 1070; *United States v. Fahey* (1st Cir. 1985) 769 F.2d 829, 836;

People v. Mroczko, *supra*, 35 Cal.3d at pp. 107-108 [adverse effect under federal constitution shown where, "[b]y discarding" viable alternative strategy, counsel "papered over the conflict that would have arisen" had he pursued it and thus his "very choice of strategies was colored by the conflict he faced"].)

The defendant need not show that the plausible alternative would necessarily have been successful if it had been used, but only "that it possessed sufficient substance to be a viable alternative." (*United States v. Fahey*, *supra*, 769 F.2d at p. 836; accord, e.g., *Winkler v. Keane*, *supra*, 7 F.3d at p. 309; *United States v. Rodrigues* (9th Cir. 2003) 347 F.3d 818, 823; *United States v. Shwayder*, *supra*, 312 F.3d at pp. 1118-1119; *United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1011, and authorities cited therein; *United States v. Gambino*, *supra*, 864 F.2d at p. 1070.) Demonstrating that the plausible alternative was "inherently in conflict" with the attorney's competing interests is sufficient to establish a causal "link" between the conflict and counsel's decision to discard that alternative and, thus, that the conflict influenced and adversely affected counsel's performance. (See, e.g., *United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1011, and authorities cited therein; *Lewis v. Mayle*, *supra*, 391 F.3d at pp. 998-999.)

As one court has explained:

> This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that "was inherently in conflict with" a plausible line of defense or attack on the prosecution's case. [Citation.] Once

> such a showing is made, *Strickland*'s [and *Sullivan*'s] "fairly rigid" presumption of prejudice applies.

(*United States v. Malpiedi* (2nd Cir. 1995) 62 F.3d 465, 469.) "The test is a strict one" for two reasons. (*Ibid.*)

First, "a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest." (*United States v. Malpiedi*, *supra*, 62 F.3d at p. 469.) An attorney whose ethical obligations or own compelling self-interests may prevent him or her from pursuing a strategy or tactic "is hardly an objective judge of whether that strategy or tactic is sound trial practice." (*Ibid.*) Second, when the state or trial court knows or reasonably knows of the potential conflict, they can avoid the problem entirely by either disqualifying or (in the case of the state, moving to disqualify) counsel or taking the defendant's knowing, voluntary, and intelligent waiver. (*United States v. Malpiedi*, *supra*, 62 F.3d at p. 470; accord, *Strickland v. Washington*, *supra*, 466 U.S. at p. 692 [the "fairly rigid rule[s]" applied to actual conflicts are reasonable given the duties of counsel to avoid, and the trial court to prevent, conflicts of interest that adversely affect counsel's performance].)

This test is satisfied in this case. As will be demonstrated below, and as all of the parties recognized, the state proceedings were inextricably linked to the federal proceedings. Certainly, it was not only the Orange County District Attorney's Office that had a keen interest in Mr. Mai's state capital murder conviction and death sentence; the outcome of the state proceedings were clearly of critical importance to the U.S. Attorney's Office, to whom the allegations against, and demand to investigate, Messrs. Peters and O'Connell were directly made. Both prosecuting agencies'

power to investigate and charge or indict them loomed over counsel throughout the proceedings.

2. The Conflict Influenced, and Thus Adversely Affected, Defense Counsel's Promise to the Federal Government – Made over the Objection of Mr. Mai's Unconflicted Federal Counsel – That, in Addition to Pleading Guilty to All of the Federal Charges and Submitting to Federal Confinement, Mr. Mai Would Plead Guilty to the State Capital Murder Charge

Federal public defender Neison Marks was appointed to represent Mr. Mai against the federal charges. (2 CT 377-379.) However, on March 5, 1999, Mr. Peters appeared with Mr. Mai and Mr. Marks in the federal district court. Mr. Peters explained to Judge Carter that he had been appointed to represent Mr. Mai in state court, but not in federal court, "because up until this time it was a direct conflict I could be a witness. I ask at this time the court give me coequal powers of representation for sentencing purposes." (2 CT 409.)[27] There was no further discussion regarding any potential conflicts.

Judge Carter granted Mr. Peters's request, giving him "coequal powers with Mr. Marks for the plea and sentencing purposes." (2 CT 409.) In that capacity, Mr. Peters explained that he had orchestrated an agreement with the U.S. Attorney's Office – the federal agency that had the power to investigate and indict him and Mr. O'Connell for their alleged roles in the plot to kill Nguyen – whereby Mr. Mai promised to: (1) plead guilty to all

---

[27] Judge Carter was the Orange County Superior Court judge initially assigned to preside over Mr. Mai's state capital murder trial. (See 1 RT 3.) Judge Carter was appointed to the federal bench during the pendency of the state trial, after which the state trial was assigned to Judge Weatherspoon. (1 RT 32.)

of the federal charges (2 CT 381, 476-477), for which he would receive the maximum sentence (1 RT 191-192); (2) remain in federal custody, even if sentenced to death in his state murder trial, under extraordinarily harsh special administrative restrictions[28] (2 CT 405-406, 482); (3) waive his right to appeal his sentence in federal court or to challenge his federal convictions by collateral attack other than via a claim of ineffective assistance of counsel (2 CT 403-404, 482); and (4) *plead guilty in state court to the state murder charge and admit the special circumstance allegation* (2 CT 382, 385, 401-402, 477-478). With respect to the promised plea to the state capital murder charge, Mr. Peters explained, he would be giving his statutory consent to it in state court (Pen. Code, § 1018) "because I believe Mr. Mai is doing this plea for the right reasons, and I will be – at the time he enters that plea, I'll be waiving any objections I have to his plea." (2 CT 410.) Finally, according to Mr. Peters, the only bargained for benefit received in exchange for these sacrifices was the AUSA's promise to recommend a sentence reduction for Mr. Mai's girlfriend and indicted co-conspirator, Victoria Pham. (CT 402, 407; see also 1 RT 104-105, 125, 156-159, 169-170, 190-195.)[29]

---

[28] These harsh conditions are described in detail in part E-2-b, *post*.

[29] Although the federal plea agreement also indicated that the federal government would recommend a two-level reduction to the applicable sentencing guideline offense under U.S. Sentencing Guideline 3E1.1 (2 CT 400-402U.S. Sentencing Guideline 3E1.1 (2 CT 400-402), both AUSA Greenberg and defense counsel explained that anyone pleading guilty at the stage at which Mr. Mai pleaded guilty would receive those reductions, without any formal agreement, under the federal sentencing guidelines. (1 RT 190-195.) As AUSA Greenberg explained, "So there is no particular benefit granted there that wouldn't be granted in every case, and it is simply

(continued...)

Mr. Marks – Mr. Mai's appointed federal counsel who did *not* have a conflict – *refused* to concur in the agreement. (2 CT 409-413.) In fact, he explicitly objected to the "deal" for "several reasons," including Mr. Mai's waiver of appeal and collateral review, the harshness of the special administrative restrictions, and the agreement to plead guilty to the state capital murder charge, which was "beyond the scope of my representation" and therefore he could not advise Mr. Mai regarding the evidence, possible defenses, and the like. (2 CT 411.)

Nevertheless, the federal court approved the agreement and accepted Mr. Mai's guilty pleas to the federal charges, for which it imposed the maximum sentence. (2 CT 400-413; 1 RT 191-192.)[30] The federal agreement, whereby Mr. Mai sacrificed virtually everything in his power – including the possibility of his very life – for virtually nothing in return was highly unusual, to say the least. (Cf. *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 364, fn. 8 [questioning propriety of plea bargain in exchange for promise of leniency for someone other than the accused]; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300-1301 [Orange County Superior Court judge "expressed doubt that any attorney in Orange County 'would consent to somebody pleading guilty to a capital offense'"].) The state trial court was fully informed of the situation and the federal change of plea transcript and

---

[29](...continued)
a matter of application of the law, it is not something the government can give or take away." (1 RT 193-194.)

[30] The federal change of plea colloquy was interrupted several times by Mr. Mai's requests to confer with Mr. Peters, resulting in the clarification that Mr. Mai was not stipulating to the factual bases for the pleas, but rather stipulating that the government could prove the offenses beyond a reasonable doubt. (2 CT 386-3942 CT 386-394.)

a copy of the federal plea agreement were submitted to the state trial court and made part of the record. (1 RT 124-125, 162-165, 187; 2 CT 476-490.)

Certainly, there is no question that the federal government reaped tremendous benefit from the agreement while Mr. Mai received virtually nothing in return. Furthermore, Messrs. Peters and O'Connell had reason to believe that they could reap a substantial personal benefit from the agreement by currying favor with the U.S. Attorney, which held such tremendous power over their future, while their client, Mr. Mai, received essentially no benefit for substantial sacrifices. (See Part C, *ante*, and authorities cited therein.) This Court has held that an adverse effect is shown when it is likely that an unconflicted attorney would have handled aspects of the case differently. (See, e.g., *People v. Rundle*, *supra*, 43 Cal.4th at p. 170, and authorities cited therein; *People v. Roldan, supra*, 35 Cal.4th at p. 674; *People v. Easley*, *supra*, 46 Cal.3d at pp. 726-727.) This Court need look no further than the face of the federal change of plea transcript for proof that an unconflicted attorney would not have brokered or consented to the federal plea agreement. Mr. Mai's appointed federal counsel, Neison Marks, who was not burdened by a conflict, explicitly objected and refused to concur in the agreement given all that Mr. Mai was sacrificing without receiving anything of substance in return. (2 CT 411.)

Indeed, Mr. Mai received no real benefit at all for the considerable sacrifices he did make. While the AUSA did make good on the only promised benefit he made in exchange for Mr. Mai's federal pleas and promised state plea by recommending a sentence reduction in federal court for Ms. Pham, Judge Carter denied the recommendation. (1 RT 158-159, 193-195; 2 CT 502.)

3. The Conflict Influenced, and Thus Adversely Affected, Defense Counsels' Decision to Consent to Mr. Mai's Unconditional Plea to the State Murder Charge and Special Circumstance Allegation Without Seeking a Return Benefit to their Client

On July 23, 1999, and after Judge Carter refused the recommended sentence reduction for Ms. Pham, Messrs. Peters and O'Connell, AUSA Greenberg, the state prosecutor, and Mr. Mai appeared in state court and informed the trial court that the parties had stipulated to waive jury trial and submit to a court trial based upon the transcript of, and evidence presented at, the preliminary hearing. (1 RT 180-183.) At the preliminary hearing, defense counsel had presented no evidence or argument against the sufficiency of the evidence to hold Mr. Mai to answer on the first degree murder charge and special circumstance allegation. (3 Muni RT 577-578; see also 1 RT 14 [felony complaint].) By entering a stipulated submission based on the preliminary hearing transcript, defense counsel waived the right to present argument or additional evidence. (1 RT 184.) Hence, the submission was a "slow plea," which all agreed was "tantamount, that is the same as" a guilty plea to the first degree murder charge and special circumstance allegation (1 RT 180-184), thus essentially making the guilty verdict a "foregone conclusion." (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602 [slow plea is "tantamount to a guilty plea" which effectively makes guilty verdict a "foregone conclusion"]; see also *People v. Wright* (1987) 43 Cal.3d 487, 495-499.) Furthermore, the plea was unconditional, made without any promised benefit in return. (1 RT 187-189.)

Both the trial court and the prosecutor recognized, and assured Mr. Mai and his defense counsel, that Mr. Mai's promise to the federal

government to plead guilty to the state capital murder charge was not binding in state court. (1 RT 188-189, 197; see also 1 RT 125-126.) While AUSA Greenberg emphasized that a plea to the state capital murder charge was a term of the federal agreement which Mr. Mai would violate if he insisted on going to trial, he also conceded that the federal government would not move to invalidate the agreement and federal pleas or move for resentencing if Mr. Mai did violate the agreement. (1 RT 194-197.)

AUSA Greenberg's position was hardly surprising. The federal government had reaped an enormous benefit by obtaining Mr. Mai's guilty pleas to *all of the federal charges* and having him sentenced to the federal *maximum* in exchange for an ephemera. In other words, if Mr. Mai's federal agreement and pleas were invalidated, Mr. Mai had everything to gain and the federal government had everything to lose.

At the same time, Messrs. Peters and O'Connell had reason to fear that if they reneged on their promise to the federal government to deliver Mr. Mai's state capital murder plea, it would displease the U.S. Attorney's Office, which had the power to charge them based on Daniel Watkins's actions and allegations. (See Part C, *ante*, and authorities cited therein.) Similarly, the unconditional plea to the state capital murder charge was beneficial to the Orange County District Attorney's Office, with whom counsel had incentive to curry personal favor, which also had jurisdiction to investigate and charge them for any wrongdoing relating to the conspiracy (See Part C, *ante*, and authorities cited therein.) In other words, while Mr. Mai was free to insist on a full-blown trial notwithstanding the federal plea agreement – and indeed had nothing to gain by entering the plea, as more fully discussed in the following sections – delivering Mr. Mai's unconditional plea served defense counsel's personal interests. (Part C,

ante, and authorities cited therein.)

Furthermore, by his own admission, Mr. Peters did not even *attempt* to negotiate with the state for anything in exchange for Mr. Mai's plea. (1 RT 104-105.) The state prosecutor was not a party to, and indeed played no role in, the federal plea agreement promising Mr. Mai's plea to the state capital murder charge. (1 RT 100, 104-106, 125-126, 148, 168.) And as Mr. Peters emphasized to the state trial court with respect to the plea, "I am not looking, and Mr. Mai is not looking to Mr. Evans [the state prosecutor], we are not looking for any deal from him. . . . [H]e is giving us absolutely nothing, and we are quite frankly not asking for anything at this point, because he has told us, and for good reasons, he is not going to give us anything." (RT 105-106.) Thus, it is clear from the record that defense counsel made no attempt to offer Mr. Mai's cooperation in the investigation and prosecution of crimes relating to the plot to kill Nguyen to the Orange County District Attorney in exchange for any benefit to Mr. Mai. Based on Watkins's actions and allegations, counsel had reason to fear that Mr. Mai's cooperation could have unearthed evidence regarding their roles or other wrongdoing related to the plot to kill or influence the state's witness. (See Part C-2, *ante*.)

Where, as here, a plausible allegation has been made which implicates defense counsel in crimes related to those charged against his or her client:

> at the pre-trial stage, counsel's ability to advise the defendant as to whether he or she should seek to cooperate with the government is impaired. Cooperation almost always entails a promise to answer truthfully all questions put by the government. Because the government knows of the accusations against defense counsel, questions concerning those allegations seem inevitable, and counsel may have good

> reason to be apprehensive about what the client knows or has heard from co-conspirators. In such circumstances, counsel is hardly an appropriate negotiator of a plea and cooperation agreement.

(*United States v. Fulton*, *supra*, 5 F.3d at p. 613; accord *Mannhalt v. Reed*, *supra*, 847 F.2d at pp. 582-583; *United States v. Cancilla*, *supra*, 725 F.2d at p. 870; cf. *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 490 [attorney who has conflicting interests as between jointly charged clients may be precluded from exploring plea negotiations whereby one client agrees to cooperate with authorities and implicate the other].)

Therefore, when such allegations have been made against counsel, counsel's failure to "make any significant effort to negotiate a . . . cooperation agreement on his [client's] behalf" in exchange for some kind of benefit to the client demonstrates that the conflict likely influenced, and thus adversely affected, counsel's performance. (*United States v. Williams* (2nd Cir. 2004) 372 F.3d 96, 106; accord, e.g., *Mannhalt v. Reed*, *supra*, at p. 583.) In other words, offering the client's cooperation in investigating and prosecuting others involved in his crimes in exchange for a benefit to the client is a "plausible alternative" to entering an unconditional guilty plea to capital murder, but an alternative that is "inherently in conflict" with the attorneys' conflicting interests in their own liberty, livelihood, and reputation. (*United States v. Williams*, *supra*, *supra*, 372 F.3d at pp. 106-107, and authorities cited therein; Part E-1, *ante*, and authorities cited therein.)

To be sure, according to Mr. Peters, the state prosecutor indicated that he would not "give us anything." (1 RT 105-106.) Nevertheless, Mr. Peters also made it clear that he did not even *attempt* to broker a deal with the state prosecutor. (1 RT 105-106; see also 1 RT 100, 125-126, 148-168.)

As discussed in Part E-1, *ante*, the question in assessing a conflict's adverse effect does not focus its impact on the outcome of the case, but focuses on its impact on counsel's *performance* itself. Thus, the defendant "need not demonstrate that the government would have reduced his sentence" or agreed to other consideration "if he had provided information implicating" others with conflicting interests. (*United States v. Christakis* (9th Cir. 2001) 238 F.3d 1164, 1170; accord, *United States v. Williams*, *supra*, *supra*, 372 F.3d at pp. 106-107; *Winkler v. Keane*, *supra*, 7 F.3d at pp. 307-309.) Indeed, "assess[ing] the impact of a conflict of interest on the attorney's . . . decisions in plea negotiations would be virtually impossible." (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 491.) In order to demonstrate adverse effect, the defendant need only show that his attorney did not pursue the plausible alternative of *attempting* to negotiate a cooperation agreement and that the alternative was inherently in conflict with counsel's other interests and, thus, likely influenced his decision. (*United States v. Williams*, *supra*, *supra*, 372 F.3d at pp. 106-107; *United States v. Christakis*, *supra*, 238 F.3d at p. 1170; *Winkler v. Keane*, *supra*, 7 F.3d at pp. 307-309; cf. *Lopez v. Scully* (2nd Cir. 1995) 58 F.3d 38, 42 [although sentence was included in plea agreement and judge had previously indicated that he would not impose lower sentence, defense counsel's failure to pursue the plausible alternative of *arguing* for mitigation constituted "adverse impact" from conflict].) The record here so demonstrates. (See also ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989) [hereafter "ABA Guidelines (1989)"], Guideline 11.6.1 and Commentary ["if the possibility of a negotiated disposition is rejected by either the prosecution or the client, when a settlement appears to counsel to be in the client's best interests, counsel should continue efforts to negotiate

a plea agreement"].)

4. The Conflict Influenced Defense Counsel's Decision to Consent to the Unconditional Plea to Capital Murder Without The Promise or Expectation that it Would Avoid a Death Sentence

Defense counsel not only failed to attempt to negotiate for a return benefit in exchange for Mr. Mai's plea, such as a promise that it would avoid a death sentence, but they consented to the unconditional plea without even any *expectation* that it would be of any benefit to Mr. Mai.

To be sure, when Mr. Mai entered the plea, Mr. Peters explained that he consented to it because, "based on the quality of evidence against [Mr. Mai] and the nature of some of that evidence . . . I have always realized if we had anything to say and wanted credibility, we have to do it in the penalty phase." (1 RT 189.) "I can have that credibility by pointing out that Mr. Mai has done the right thing." (1 RT 190.) In other words, Mr. Peters explained that the strategic basis underlying his decision to consent to the unconditional plea was that there was no defense to the state capital murder charge and he hoped to gain a tactical advantage at the penalty phase by arguing Mr. Mai's admission of wrongdoing as a reason to spare his life. But the other record evidence makes plain that this was *not* the reason for which Mr. Mai entered his plea.

Immediately following Mr. Peters's representation to the trial court, Mr. Mai conferred with Mr. Peters, after which Mr. Peters stated on the record that Mr. Mai "may not even want to go down that road in terms of presenting evidence in the penalty phase, he hasn't made that decision yet, and that's up to him." (1 RT 189-190.) The trial court specifically inquired of Mr. Mai whether he was entering his plea for "tactical" reasons at the penalty phase, as his counsel had suggested. (1 RT 197.) Mr. Mai refused

to respond, even after the court directed counsel to obtain a response. (1 RT 197-198.) Mr. Peters finally explained to the court that the matter was "complicated" but Mr. Mai "is not disagreeing with my strategy if we come to a penalty phase. Is that correct, Mr. Mai?" (1 RT 198.) Mr. Mai replied, "I am disagreeing, yes." (1 RT 198.) After yet another off-record discussion, Mr. Mai agreed that defense counsel had *explained counsel's* "tactical and strategic reasons for doing this submission" and that he is "not disagreeing with [counsel's] advice." (1 RT 198.)

However, during the next court session on July 30, 1999, Mr. Peters explained that Mr. Mai was concerned about reports he had read in the newspaper that he had entered the plea in order to "beg for his life." (2 RT 208.) He wished to clarify that his "primary purpose" in entering the plea was to help and protect Ms. Pham, not to "beg for his life" in the penalty phase. (2 RT 207-208.) The court expressed its concern, then, that Mr. Mai was entering the plea in the hope for some benefit for Ms. Pham that had not been disclosed. (2 RT 209-210.) Mr. Peters assured the court that Mr. Mai was not; "it is all done." (2 RT 210.) Nevertheless, Mr. Mai insisted that he was *not* entering his plea in order to gain any advantage at the penalty phase or for himself. (2 RT 209-210; see also 3 RT 489-490.)[31]

---

[31] In fact, although Mr. Peters represented that no other promises had been made, other record evidence reveals that before Mr. Mai originally entered his slow plea, Mr. Peters had negotiated a stipulated modification to the conditions of Mr. Mai's federal confinement which permitted him to have supervised written communications with Ms. Pham while they were incarcerated in separate federal facilities. (1 RT 160-162, 188-189; 2 RT 373; 3 RT 434-435; 2 CT 611-613.) However, it was never honored because the wardens of both federal facilities refused to allow the communications and, ultimately, Judge Carter formally struck the stipulated

(continued...)

To the contrary, and as more fully discussed in Part G, *post*, Mr. Mai expressed a desire to effectively stipulate to the death penalty by presenting no challenge to the prosecution's aggravating evidence, no mitigation, and no closing argument, and by affirmatively presenting his own statement to the jurors that the death penalty was appropriate in this case. Messrs. Peters and O'Connel acquiesced and did not make any attempt to utilize the plea in order to save Mr. Mai life's at the penalty phase.

Even before defense counsel acquiesced in Mr. Mai's death wish at the penalty phase, and as more fully discussed in Part G-2-c, *post*, defense counsel made numerous remarks expressing their view that, no matter what mitigating evidence they might unearth and present, "nobody would be fooled in thinking the odds of Mr. Mai getting the death penalty aren't extremely high, because of the nature of the case." (2 RT 323; see also 1 RT 263; RT 473, 5 RT 862; 6 RT 1081-1082.) Hence, on the face of the record, counsel not only consented to an unconditional plea to capital murder without the promise that it would avoid a death sentence, but they did so believing that it would likely result in a death sentence.

Of course, as the parties recognized below, defense counsel had the power to prevent Mr. Mai from entering the plea under Penal Code section 1018 by refusing to consent to consent to it. (Pen. Code, § 1018; 1 RT 189;

---

[31](...continued)
modification. (2 RT 373; 3 RT 434; see also 3 RT 418-420, 434.)

Even after Judge Carter formally struck the stipulated modification, Mr. Mai was given the opportunity to withdraw his slow plea, but he declined to do so. (3 RT 489-490.) Hence, the record still demonstrates that Mr. Mai did not expect to receive any benefit when he reaffirmed his decision to plead and certainly did not enter the plea in order to "beg for his life" at the penalty phase.

see also 1 RT 100.) Section 1018 was enacted to serve the state's independent interest in "safeguard[ing] against erroneous imposition of a death sentence . . . . [and] serves inter alia as a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant . . . simply wants the state to help him commit suicide." (*People v. Chadd* (1981) 28 Cal.3d 739, 750-751, 753.)

Under section 1018, this Court has consistently held that defense counsel has a duty to exercise his or her "independent, professional judgment" with respect to the decision to plead guilty in a capital case and *cannot* cede control of that decision to his client. (*People v. Massie* (1985) 40 Cal.3d 620, 625 [setting aside guilty plea made with counsel's consent due to pressure from client but against counsel's own judgment]; *People v. Chadd* (1981) 28 Cal.3d 739, 744, 747-850; see also ABA Model Rules of Prof. Resp., Model Rule 1.7 and Comment; ABA Code of Prof. Responsibility, Canon 5 ["A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"].) "Independent professional judgment" also entails judgment uninfluenced by the attorney's own personal interests. (ABA Model Rule 1.7 and Comment; ABA Code, Canon 5.)

At the time of trial, the American Bar Association acknowledged and considered Penal Code section 1018 in providing guidelines to counsel contemplating guilty pleas in capital cases. (ABA Guidelines (1989), *supra*; see also, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 524 [Supreme Court has "long referred to '[the ABA Guidelines] as 'guides to determining what is reasonable'" attorney performance].) Guideline 11.6.3, subdivision (B) provided that "the decision to enter or to not enter a guilty

plea should be based solely on the client's best interest." The Commentary to that Guideline stated:

> In non-capital cases, the decision to enter a plea of guilty rests solely with the client [footnote]. When the decision to plead guilty is likely to result in the client's death, however, counsel's position is unique. If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights. In California, at least, a defendant cannot plead guilty over the objection of the attorney [footnote], giving counsel tremendous responsibility for the client's life. . . . [C]ounsel must strive to prevent a (perhaps depressed or suicidal) client from pleading guilty when there is a likelihood that such a plea will result in a death sentence.

The Commentary to Guideline 11.6.2 was even more explicit. It counseled: "counsel should insist that no plea to an offense for which the death penalty can be imposed will be considered without a written guarantee, binding on the court or other final sentencer, that death will not be imposed." (ABA Guidelines (1989), *supra*, Guideline 11.6.2, Commentary, & fn. 2 ["'it is suggested that this [entering a guilty plea to a capital offense] is an effective strategy only when the attorney knows without any doubt that no death sentence will result. Any other 'strategy' for entering a guilty plea is ill-advised and should be abandoned.' (Citation)"].)[67]

---

[67] In 2003 – after the trial in this case concluded – the ABA revised its Guidelines to clarify that "the decision whether to enter a plea of guilty must be informed and counseled, but ultimately lies with the client." (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003), reprinted in 31 Hofstra L.Rev. 913, 1044-

(continued...)

Consistent with these guidelines, the cases demonstrate that when a defendant seeks to plead guilty to a capital offense without condition, or when it is likely to result in a death sentence, disinterested counsel consistently refuse to consent to the plea. (See, e.g., *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1300-1301 [trial court correctly refused to accept unconditional guilty plea to capital offense to which defense counsel refused to consent on the ground that "I can't turn around and say I consent to allow my client to plead guilty when I know she's pleading guilty for all intents and purposes to a death sentence," and where the trial court itself "expressed doubt that any attorney in Orange County 'would consent to somebody pleading guilty to a capital offense'"]; *People v. Chadd*, *supra*, 28 Cal.3d at pp. 744, 747-850 [trial court erred in accepting guilty plea to capital offense to which defense counsel refused to consent on the ground that the "defendant's basic desire is to commit suicide, and he's asking for

---

[67](...continued)
1045 [hereafter "ABA Guidelines (2003)"] Guideline 10.9.2, History of Guideline.) Of course, California law is to the contrary with regard to guilty pleas to capital offenses. (Pen. Code, § 1018.) Even when the decision to plead guilty does lie solely with the client, however, the revised Guidelines still state that "if no written guarantee can be obtained that death will not be imposed, counsel should be extremely reluctant to participate in a waiver of the client's trial rights." (ABA Guidelines (2003), *supra*, 31 Hofstra L. Rev. at p. 1045, Commentary.) Furthermore, counsel's duty "to ensure that the choice is as well considered as possible . . . . may require counsel to do *everything possible to prevent a* depressed or *suicidal client from pleading guilty when such a plea could result in an avoidable death sentence*." (*Ibid.*, italics added.) Since refusing to consent to the plea is within counsel's power in California, it necessarily follows that even under the 2003 Guidelines, counsel should refuse to consent to a plea when the defendant wishes to enter it in order to receive the death penalty and a death sentence may be avoidable.

the cooperation of the State in that endeavor"].)

Thus, consistent with the ABA Guidelines in existence at the time of trial, the purpose behind Penal Code section 1018, and prevailing professional norms, refusing to consent to the unconditional plea without a promise, or even a belief in the likelihood, that it would thereby avoid a death verdict, was a "plausible alternative" to the course defense counsel chose in this case. (See, e.g. *United States v. Wells*, *supra*, 384 F.3d at p. 733; Part E-1, *ante*, and authorities cited therein.) For all of the reasons discussed in the previous sections, this plausible alternative was "inherently in conflict" (*ibid*) with Messrs. Peters and O'Connell's personal interest in honoring their promise to the federal government and not provoking its ire by breaking it (see, e.g., *United States v. Fulton*, *supra*, at p. 610) and in currying favor with the state government (*United States v. Levy, supra*, 25 F.3d at p. 156) – the two entities with the power to investigate and charge them for any wrongdoing on their part relating to the plot to kill or influence the state's witness, Nguyen. (See Part C, *ante*, and authorities cited therein)

Furthermore, it is reasonable to infer that Messr. O'Connell and Peters had reason to fear their own client if they did not do as he instructed and consent to the plea. If Watkins's allegations were true, Mr. Mai could corroborate them to the state and federal prosecutors. Even if Watkins's allegations were untrue, it would be reasonable for counsel to fear that if they disregarded his instructions and refused to consent to his plea, Mr. Mai might retaliate by falsely corroborating Watkins's allegations. In some other case involving a conflict arising from allegations that defense counsel is involved in his client's crimes, but where the client seeks acquittal or to avoid a death sentence, such fear might inure to the client's benefit since

counsel would have an incentive to curry favor with the client by vigorously defending him. But this is not such a case. As will be demonstrated in the following arguments, while the record casts compelling doubts on whether Mr. Mai's decision to effectively stipulate to the death penalty was knowing, voluntary, intelligent, and competent, he did instruct his counsel to assist him in effectively stipulating to a death sentence and they complied. (See, e.g., 8 RT 1399-1402, 1409-1410.) Thus, the "plausible alternative" of disregarding their client's wishes and refusing to consent to the unconditional plea when they believed that it was likely to lead – and which their later performance *guaranteed* would lead – to a death verdict was "inherently in conflict" with counsel's personal interests. (See Parts C and E-1, *ante*, and authorities cited therein.)

For all of these reasons, and pursuant to the authorities discussed in Parts C-1 and E-1, *ante*, the record supports the inference that the conflict of interest influenced counsel's decision to consent to Mr. Mai's unconditional plea to capital murder, made without promise or expectation that it would avoid a death sentence. Thus, the conflict adversely affected counsel's performance. (Part E-1, *ante*, and authorities cited therein.)

5. The Conflict Influenced Counsel's Decision to Consent to the Unconditional Slow Plea to the Sole Special Circumstance Allegation Without Arguing a Compelling Reasonable Doubt Defense

Finally, Mr. Peters's representation to the trial court that there was no defense – or nothing "to say" – to the capital murder charge was simply incorrect. (1 RT 189.) There was, in fact, a compelling reasonable doubt defense to the sole special circumstance alleged under Penal Code section 190.2, subdivision (a)(7) (murder of peace officer while "engaged in the course of the performance of his or her duties").

Mr. Mai's waiver of his right to jury trial and stipulation to submit the issue of guilt, or the truth of a special circumstance allegation, to the trial court on the basis of the preliminary hearing transcript did not affect the prosecution's burden of proof or the presumption of Mr. Mai's innocence. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 603; *People v. Martin* (1973) 9 Cal.3d 687, 695.) As will be discussed in greater detail in Arguments II and III, *post*, which are incorporated by reference herein, an essential element of the section 190.2, subdivision (a)(7) allegation, on which the prosecution bore the burden of proof beyond a reasonable doubt (Pen. Code, §190.4, subd. (a); see, e.g., *Ring v.* Arizona (2002) 536 U.S. 584, 608-609, and authorities cited therein), is that the peace officer must be engaged in the *lawful* performance of his or her duties when he or she is killed. (See *In re Manuel G.* (1997) 16 Cal.4th 805, 815; *People v. Mayfield* (1997) 14 Cal.4th 668, 791; *People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1217; *People v. Curtis* (1969) 70 Cal.2d 347, 354; see also *People v. Simmons* (1996) 42 Cal.App.4th 1100, 1109.) In order to prove this element, the prosecution's preliminary hearing evidence had to be sufficient to prove beyond a reasonable doubt that the detention of Mr. Mai, during which the killing occurred, was lawful. (See, e.g., *People v. Curtis*, *supra*, 70 Cal.2d at p. 354; *People v. Castain* (1981) 122 Cal.App.3d 138, 145; *People v. White* (1980) 101 Cal.App.3d 161, 166-167; *People v. Roberts* (1967) 256 Cal.App.2d 488, 492-493.) "Lawfulness" in this context is assessed under Fourth Amendment standards. (See, e.g., *In re Manuel G.*, *supra*, 16 Cal.4th at p. 821; *People v. Curtis*, *supra*, 70 Cal.2d at p. 354; *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 791-792.)

A traffic stop constitutes a seizure of the driver within the meaning of the Fourth Amendment. (See, e.g., *Delaware v. Prouse* (1979) 440 U.S.

648, 653.) A seizure or detention made without a warrant is only reasonable or *lawful* "'when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provides some objective manifestation that the person detained may be involved in criminal activity' (*People v. Souza* (1994) 9 Cal.4th 224, 231)" (*People v. Mayfield, supra*, 14 Cal.4th at p. 791), which includes a traffic violation (*Whren v. United States* (1996) 517 U.S. 806, 809-810; see also, e.g., *People v. Hernandez* (2008) 45 Cal.4th 295, 299-300; *Delaware v. Prouse, supra,* 440 U.S. at p. 663).

The prosecution's preliminary hearing evidence focused on the evidence of criminal activity that Officer Burt discovered *after* the initial traffic stop seizure of Mr. Mai – that the driver of the BMW was driving with a suspended license and that there were possibly forged traveler's checks in the trunk. (1 Muni RT 93-94, 134; 2 Muni RT 278-279.) Indeed, according to Detective Kennedy, the citation Officer Burt filled out and signed (which was completed but for the driver's signature) *only* cited the BMW driver for driving with a suspended license. (1 Muni RT 65-66, 93-94.) Officer Burt did not cite the driver for any vehicle code or other violation to justify or explain the initial stop and seizure. Facts discovered *after* a seizure (or traffic stop) do not transform it into a lawful one. (See, e.g., *Florida v. J.L.* (2000) 529 U.S. 266, 271; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188; *Florida v. Royer* (1983) 460 U.S. 491, 507-508; *People v. Hernandez, supra*, 45 Cal.4th at pp. 299-301, and authorities cited therein; *People v. Sanders* (2003) 31 Cal.4th 318, 334, and authorities cited therein.)

The only preliminary hearing evidence going to the reason for the traffic stop came from a statement attributed to Mr. Mai by Alex Nguyen.

As discussed in the Statement of Facts, above, Nguyen testified to a number of admissions Mr. Mai allegedly made to him about shooting the officer. (2 Muni RT 265-266, 272, 278-285, 340-343.) In the course of that testimony, Nguyen purported to recount not only Mr. Mai's statements to him (Nguyen) but also the conversation Mr. Mai described between the officer and himself, including the officer's statements to Mr. Mai. (2 Muni RT 278-281.) Defense counsel objected to the "multiple hearsay" presented by the recounted conversation. (2 Muni RT 280.) The prosecutor responded that Mr. Mai's statements fell within a hearsay exception because they constituted "an admission. I understand that the layer from the officer to the defendant is not for the truth of the matter." (2 Muni RT 280.) The trial court overruled defense counsel's objection, agreeing that Officer Burt's statements were admissible for the non-hearsay purpose of explaining and putting in context Mr. Mai's admissions. (2 Muni RT 280.)

Thus, Nguyen testified, inter alia, that Mr. Mai had told him that "he was driving and he thought he had his light on, but he got pulled over by California Highway Patrolman for not having his light [*sic*]." (2 Muni RT 278.) Nguyen later clarified that Mr. Mai told him that he "thought he have his light on" but "[t]he officer told him that he pull him over because he was driving without his headlights." (2 Muni RT 422.)

Therefore, while the prosecutor offered, and the court admitted, Officer Burt's statements during the conversation preceding the shooting in order to explain Mr. Mai's admissions – including Officer Burt's statement to Mr. Mai that he had stopped him because his headlights were not on – the prosecutor did not offer, and the court did not receive, those statements for their truth. The only evidence offered for its truth was Mr. Mai's own statement that although Burt *told him* that he had stopped him because his

headlights were not on, Mr. Mai "thought" that his headlights *were* on. This evidence simply did not prove that Officer Burt in fact stopped Mr. Mai because his headlights were not illuminated.

But even if Officer Burt had stopped Mr. Mai because his headlights were off, the prosecution presented no evidence to prove that this amounted to a *traffic violation* and, thus, no evidence to prove that the stop/seizure was lawful. Police officers are "reasonably expected to know" the Vehicle Code. (See, e.g., *People v. Cox* (2008) 168 Cal.App.4th 702, 710, and authorities cited therein.) At the time of the 1996 traffic stop, the Vehicle Code only required that headlights be illuminated "from one-half hour after sunset to one-half hour before sunrise" (Veh. Code, § 38335) or "during darkness" (Veh. Code, § 24400), which was defined as "any time from one-half hour after sunset to one-half hour before sunrise or at any other time when visibility is not sufficient to render clearly discernable any person or vehicle on the highway at a distance of 1,000 feet" (Veh. Code, § 280). The prosecution presented no evidence to prove when the sun set on July 13, 1996 or that the stop occurred after "one-half hour after sunset" or "during darkness" as defined by the Vehicle Code. In fact, the only evidence the prosecution presented at the preliminary hearing regarding the time and conditions of the initial stop proved the contrary.

According to Bernice Sarthou, while she estimated that it was about 8:30 p.m. when she witnessed the traffic stop (1 Muni RT 152, 191), she also explicitly testified that "it was still daylight[,] [i]t wasn't sunset yet" (1 Muni RT 190), and indeed that she was still wearing her sunglasses "because the sun was still bright enough to need them" (1 Muni RT 152; see also 1 Muni RT 190-192). Thus, even if Officer Burt's hearsay statement to Mr. Mai had been offered, accepted, and were admissible for its truth – i.e.,

to prove that he had, in fact, stopped Mr. Mai because he was driving with his headlights off – and even rejecting Mr. Mai's own statement that he believed that his headlights were on, the prosecution presented no evidence to prove that at the time of the stop Officer Burt had an objectively reasonable suspicion that Mr. Mai had committed a *traffic violation* or was otherwise engaged in criminal activity. (See *Whren v. United States, supra*, 517 U.S. at pp. 809-810; *Delaware v. Prouse*, *supra*, 440 U.S. at p. 663.)

Therefore, there was ample room for reasonable doubt that the detention of Mr. Mai was lawful and, thus, that Officer Burt was lawfully engaged in the performance of his duties when he was killed. (See *In re Manuel G.*, *supra*, 16 Cal.4th at p. 815.) Nevertheless, Messrs. Peters and O'Connell consented to the "slow plea," and made no argument against the sufficiency of the evidence to prove the sole special circumstance allegation rendering Mr. Mai eligible for the death penalty. As previously discussed, and as defense counsel acknowledged, they had the power to refuse to consent to the slow plea. (Pen. Code, § 1018.) And even by agreeing to stipulate to submit the issue of guilt based solely on the transcript of, and evidence presented in, the preliminary hearing, they still had the power to *argue* against the sufficiency of that evidence to prove the sole special circumstance allegation. (*Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 604 [defendant who submits issue of guilt to trial court on basis of preliminary hearing transcript retains right to challenge the sufficiency of the evidence both at trial and on appeal]; see also 1 RT 184 [Mr. Peters waived right to "argue" any "point of law"].)

In sum, arguing against the sufficiency of the preliminary hearing evidence to prove the sole special circumstance allegation was a "plausible alternative" (Part E-1, *ante*, and authorities cited therein) to counsel's

decision to consent to the "slow plea" and effectively stipulate to Mr. Mai's death eligibility when they believed that it would likely result in a death verdict. (See Part E-4, *ante*). However, that "plausible alternative" was "inherently in conflict" with their competing personal interests in currying favor with the both the federal government by making good on their promise to deliver Mr. Mai's plea to the state capital murder charge and with the Orange County District's Attorney's office, the two agencies that held such awesome power over their futures. (See Parts C and E-1, *ante.*)

6. Conclusion

In sum, there were at least four "plausible alternatives" to Messrs. Peters and O'Connell's "strategy" of promising the federal government Mr. Mai's plea to the state capital murder charge and consenting to Mr. Mai's slow plea to that charge without attempting to negotiate any return benefit to Mr. Mai in these proceedings, without the promise or expectation that it would avoid a death verdict, and without arguing against the sufficiency of the preliminary hearing evidence to prove the sole special circumstance rendering Mr. Mai death eligible. First, counsel could have chosen not to inject themselves into the federal prosecution, in which Mr. Mai was already represented by unconflicted federal counsel, and certainly not promised the federal government, over the objection of federal counsel, that Mr. Mai would plead to the state capital murder charge. Second, counsel could have acted on the state court and prosecutor's assurances that the promised plea was not binding in state court and attempted to negotiate a cooperation agreement with the state prosecutor whereby Mr. Mai would provide information regarding the conspiracy to kill the state's witness, over which Orange County had jurisdiction, in exchange for a reduced charge or other benefit or leniency in these proceedings. Third, counsel could have

refused to consent to the slow plea and demanded an adversarial trial on the murder charge and special circumstance allegation. Fourth, counsel could even have stipulated to submit the issue of Mr. Mai's guilt based solely on the preliminary hearing transcript, but argued a compelling reasonable doubt defense to the sole special circumstance allegation to the trial court. However, all of these "plausible alternatives" were "inherently in conflict" with defense counsel's competing personal interests in preventing evidence (including Watkins's actions and allegations) of their wrongdoing relating to the conspiracy from coming to light, in currying favor with the law enforcement agencies that held the power to investigate and charge them, and in their liberty, livelihood, and reputation. (See Parts C and E-1, *ante*, and authorities cited therein.) The record therefore demonstrates that the conflict of interest influenced, and thus adversely affected, counsel's performance in the pre-plea, plea and guilt phase stages of these capital proceedings. (Part E-1, *ante*, and authorities cited therein).

F. The Conflict of Interest Influenced, and Thus Adversely Affected, Defense Counsel's Performance In Failing to Ensure that Mr. Mai was Not Tried, and Did Not Effectively Stipulate to the Death Penalty, While Incompetent

1. State Law and the Due Process Clause Prohibit Trying or Sentencing an Incompetent Defendant

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Penal Code section 1367 prohibit the state from trying or sentencing a criminal defendant while incompetent. (*Drope v. Missouri* (1975) 420 U.S. 162, 171; *Pate v. Robinson* (1966) 383 U.S. 375, 384-386; *Dusky v. United States* (1960) 362 U.S. 402, 403.) Under section 1367, a defendant is mentally incompetent to stand trial or plead guilty "if, as a result of mental disorder or developmental disability, the defendant is

unable to understand the nature of the criminal proceedings *or* to assist counsel in the conduct of a defense in a rational manner." (See also *Drope v. Missouri*, *supra*, at p. 171 [a defendant is incompetent if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in the preparation of his defense"]; accord *Godinez v. Moran* (1993) 509 U.S. 389, 399 [competency requirement also applies to guilty pleas and waivers of constitutional rights].)

Penal Code section 1368, subdivisions (a) and (b), respectively, require the trial court to initiate proceedings to determine a defendant's competence "if a doubt arises in the mind of the judge as to the mental competence of the defendant" or "[i]f counsel informs the court that he or she believes the defendant is or may be incompetent."

2. Defense Counsel's Repeatedly Expressed Belief, And Supporting Evidence, that Mr. Mai's Mental State Had So Deteriorated in Solitary Federal Confinement that He Was No Longer Able to Rationally Participate in His Penalty Phase Defense

Mr. Mai was in state custody when the federal government indicted him. The federal government took temporary custody of Mr. Mai by way of the issuance of a writ of habeas corpus ad prosequendum for the purpose of prosecuting him. (8/29/07 SCT 164-170; 8/29/07 RT 5.) One of the terms of Mr. Mai's agreement with the federal government was that he would be housed in federal custody under special administrative restrictions under Code of Federal Regulations § 501.3. (2 CT 405-406, 482.) The State of California was not a party to that agreement. (1 RT 100, 104-106, 125, 148, 168.) In addition to the special administrative restrictions, the federal Bureau of Prisons ["BOP"] imposed further, severe restrictions on the

conditions of Mr. Mai's confinement. (See, e.g., 3 RT 446-448, 453-457.)

As will be discussed in greater detail in Argument IV, *post*, which is incorporated by reference herein, from the date that Mr. Mai entered his slow plea on July 23, 1999, and repeatedly throughout the proceedings, Mr. Peters described those conditions to the state court and expressed his belief that Mr. Mai's mental state had so deteriorated under them that he was no longer able to rationally participate in his penalty phase defense or indeed to decide to present no defense. (2 CT 497, 500-501; 2 RT 372-374, 383, 396, 403-405, 419; 3 RT 489; 4 RT 589; 3/16/07 2 SCT 42-44, 161, 175, 178, 180-181, 187-190.)

As Mr. Peters first described them, the "administrative conditions on [Mr. Mai's] custody . . . are extremely onerous, virtually keeping him isolated something like Hannibal Lechter in *Silence of the Lambs*." (1 RT 192-193; see also 3/16/07 3 SCT 308-320 [copy of section 501.3 restrictions as modified on July 23, 1999].) Those restrictions became even more onerous in the following months. At least since early January 2000, Mr. Mai was housed in a one-man cell in which the lights and a camera were on 24 hours a day. (2 RT 372, 374, 383.) He was allowed "[n]o reading material or pens or papers or nothing." (2 RT 372.) His cell was "totally sealed off, so nothing can be slipped in and out" and he was not able to "flush his own toilet for fear sometimes communications can take place through toilets." (2 RT 372.) Apart from limited, sporadic visits with an aunt with whom Mr. Mai had a very difficult relationship, "he can have no contact with anybody." (2 RT 374; see also 3 RT 419.) He was only permitted to talk to a lieutenant; he was not allowed even verbal contact with other detention facility personnel or inmates; indeed, inmates could not even work near his cell. (2 RT 374, 383.) Mr. Peters, the federal district

court judge, and other witnesses had seen for themselves during a surprise midnight visit to the detention facility that Mr. Mai "had to lay there with his t-shirt over his eyes because he had the lights on 24 hours a day, and literally had nothing to read, nothing to write, nothing to do, 24, seven." (2 RT 372, 374, 383; see also 3/16/07 2 SCT 178, 180; 2 CT 497, 500-501.)[68]

Furthermore, Mr. Peters *repeatedly* represented to the state trial court judge, as well as in pleadings filed in the Ninth Circuit Court of Appeals and the Court of Appeal for the Fourth Appellate District – which were served on and reviewed by the trial court – that Mr. Mai's mental health was steadily deteriorating under the extreme isolation and "lack of sensory stimuli" to the point that he was no longer able to rationally participate in his defense. (2 CT 497, 500-501; 3/16/07 2 SCT 171, 175, 178, 180-181, 187-190; 3 SCT 304-369; 2 RT 372, 374, 383, 396; 3 RT 403-405, 489; 4 RT 589; 5 RT 1075-1076; 6 RT 1079-1082.) For instance, Mr. Peters represented in one pleading filed on April 3, 2000, and which the state trial judge reviewed (RT 1075), that:

> Petitioner's confinement has been so severe that it has caused substantial changes in Petitioner's mental health. Petitioner's counsel told both the Federal and State Court that he was unable to effectively communicate with the Petitioner. The Petitioner was not incompetent to stand trial, but e [*sic*] was a breakdown in the attorney client relationship that is

---

[68] In addition to the severe restrictions placed on his federal confinement, the state court granted the prosecutor's request to have heightened, "maximum security" measures during the state capital murder trial. These extra measures included additional metal detectors just outside of the courtroom, handheld metal detector "wanding" inside of the courtroom of everyone who entered, including potential jurors, and additional bailiffs. (2 RT 305-309; 3 RT 460-474.) In addition, Mr. Mai was accompanied from the federal detention facility to the state courthouse and back by a "kind of S.W.A.T. team." (2 RT 343, 384.)

> jeopardizing Petitioner's fundamental right to counsel guaranteed by the Sixth Amendment of the United States Constitution. [¶] The changes have become so dramatic that Dr. Veronica Thomas can no longer finish her evaluation ofthe Petitioner. Obviously a complete psychological evaluation of the Petitioner is a necessary component of the Petitioner's defense at his penalty phase trial. . . . . [¶] The conditions surrounding the Petitioner's custody status in the Metropolitan Detention Center are so inhuman and oppressive that Petitioner's counsel cannot complete and present to the Orange County Superior Court evidence of Petitioner's mental state in mitigation of the death penalty. (3/16/07 2 SCT 42-44.)

Mr. Peters further represented, inter alia, that they "can not [*sic*] longer present evidence as to [Mr. Mai's] mental condition to the trier of fact at his penalty phase trial because the conditions of this [*sic*] confinement have caused him to become mentally unstable to a point where his Counsel and psychologist cannot prepared [*sic*] the Petitioner for trial." (3/16/07 2 SCT 161.)

Mr. Peters also informed the state court that "we have for some time talked about putting no penalty evidence on." (3 RT 449.) However, he explained, "Mr. Mai needs to be in a situation where he can make rational decisions about this" and his current mental state, which Mr. Peters believed was caused by the confinement conditions, precluded rational decision making. (3 RT 449.)

In addition, Mr. Peters presented to the state trial court the testimony of Dr. Veronica Thomas, a clinical and forensic psychiatrist appointed as an expert in this case to explore and develop possible mitigating evidence. (2 RT 403-407.) Her testimony was to the same effect: Mr. Mai's mental state had so deteriorated under the extreme isolation and sensory deprivation

under which he was confined that she could not complete the work necessary to prepare or develop evidence for the penalty phase defense. (3 RT 406-411, 421, 427-428.)[69]

Mr. Peters did not present this evidence in order to declare a doubt regarding Mr. Mai's competency to stand trial. Instead, he presented this evidence to both the state court and the federal courts in an unsuccessful attempt to have the additional restrictions the BOP imposed on the conditions of Mr. Mai's federal confinement removed or modified. (3 RT 403-405, 429, 446-449, 489; 2 CT 652; 3/16/07 2 SCT 28-170, 189; 3/16/07 3 SCT 353-354.)

The toll of his isolation on Mr. Mai's mental health eventually became apparent to everyone. In early proceedings, before he was taken into federal custody, Mr. Mai conducted himself appropriately. However, Mr. Mai's behavior changed dramatically after 15 months under the federal confinement conditions.

In one court session, Mr. Mai was obviously disoriented and confused, which Mr. Peters attributed to the impact of the confinement conditions on his mental health. (2 RT 395-398, 400.) In others throughout the pre-penalty phase and penalty phase proceedings, Mr. Mai had numerous, enraged and irrational "outbursts" both inside and outside the courtroom, prompting the court to warn him several times he would be removed for the rest of the trial if he continued to disrupt the proceedings. (2 RT 305-309, 345, 349; 6 RT 1079-1083, 1089-1091, 1098; 7 RT 1319,

---

[69] Indeed, the debilitating effects of solitary confinement and "supermax" confinement conditions on prisoners have long been well documented and recognized by many other courts and mental health professionals. (See Argument IV-C-3, *post*, and authorities cited therein.)

1325-1331.)

Mr. Mai himself was concerned about his inability to control his behavior and therefore requested that he be placed in visible shackles throughout the trial. (6 RT 1086-1087; see also 2 RT 348, 365.) Mr. Peters joined in Mr. Mai's request "for his [Mr. Mai's] safety and my safety and Dennis [O'Connell]'s safety" and the trial court granted the request. (RT 1086.) The shackles likely compounded Mr. Mai's already deteriorating mental state (see, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 846, and authorities cited therein [recognizing the "pain 'and consequential burden on the mind and body of the defendant'" caused by physical restraints, which can "'impair[] his mental faculties'" and his "ability to cooperate or communicate with counsel"]; accord *Illinois v. Allen* (1970) 397 U.S. 337, 344) and "create[d] the impression in the minds of the jurors that the court believe[d] the defendant [was] a particularly dangerous and violent person" – a critical issue in the penalty phase (*Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748). Indeed, while shackled, Mr. Mai had such a violent outburst during the testimony of one penalty phase witness that he upended his counsel's table – to which he was chained – and had to be removed by a bailiff. (RT 1331.)[70]

As fully discussed in Part G, *post*, it was in this condition that Mr. Mai directed defense counsel to present no defense to the state's case for death and instead present his own statement to the jurors that they should return a death verdict – directions his attorneys followed.

---

[70] Aggression and poor impulse control are symptoms of a mental disorder caused in whole or in part by solitary, or segregated housing, confinement. (See, e.g., *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1265-1266, and authorities cited therein.)

3. Defense Counsel's Insistence that No Competency Proceedings be Initiated

Defense counsel's *repeated* representations that, as a result of the sensory deprivation created by the onerous conditions of his federal confinement, Mr. Mai's mental state had deteriorated to the point that he was no longer able to assist the defense team in the preparation of his penalty phase defense in a rational manner mirrored the standard for incompetence under Penal Code section 1367. That statute provides that a defendant is mentally incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings *or to assist counsel in the conduct of a defense in a rational manner*." (Pen. Code, § 1367, italics added; see also *Drope v. Missouri, supra*, 420 U.S. at p. 171)

Nevertheless, Mr. Peters repeatedly represented to the state trial court that, "if he were 1368, I'd say that, I am not doing that because that would be a game, and I am not here to play games." (5 RT 1077; see also 2 RT 396, 3 RT 452; 5 RT 1077; 6 RT 1081.) Mr. Peters's representations were obviously irreconcilable.

4. The Conflict of Interest Influenced, and thus Adversely Affected, Counsel's Failure to Move for the Initiation of Competency Proceedings

It is abundantly clear that Messrs. Peters and O'Connell genuinely (and reasonably) believed that Mr. Mai was unable to assist in the preparation of his defense in a rational manner based upon their own interactions with Mr. Mai, their observations of Mr. Mai, and the opinion of a psychologist who was well acquainted with Mr. Mai and personally observed the deterioration of his mental health while in federal custody. It is equally clear that whenever defense counsel has a genuine belief that his

or her client is not competent to assist in the client's defense, counsel is legally and ethically obligated to act in the client's best interest by requesting a competency evaluation and hearing, even over the client's objections. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 804-805, and authorities cited therein [in the face of substantial evidence of incompetence, due process demands competency hearing and "attorney representing the defendant is required to 'advocate the position counsel perceives to be in the client's best interests even when that interest conflicts with the client's stated position"]; *United States v. Boigegrain* (10th Cir. 1998) 155 F.3d 1181, 1188, and authorities cited therein ["the defendant's lawyer is not only allowed to raise the competency issue, because of the importance of the prohibition against trying [the incompetent], she has a professional duty to do so when appropriate"]; *Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 566-569; ABA Criminal Justice Mental Health Standards (1989) Standard 7-4.2, subd. (c) [defense counsel should move for evaluation of client's competence to stand trial whenever counsel has good faith doubt regarding the matter].) Since even a minimally competent attorney who harbors doubts regarding his or her client's competence would take steps to ensure that the client is not tried while incompetent, moving for the initiation of competency proceedings in this case was certainly a "plausible alternative" to defense counsel's failure to do so in this case. (See Part E-1, *ante*, and authorities cited therein.)

Mr. Peters's irreconcilable representations that Mr. Mai was no longer able to assist in his penalty defense in a rational manner, but that he was "not 1368," can only be attributable to two explanations: 1) he was not aware of the statutory definition of incompetency, which would fall below objective standards of reasonable trial assistance (see, e.g., *Kimmelman v.*

Morrison (1986) 477 U.S. 365, 385 [counsel's decision based upon ignorance or misunderstanding of law is unreasonable]); and/or 2) his insistence that no competency proceedings be initiated served his and Mr. O'Connell's own conflicting interests. Given Mr. Peters's representation that he had practiced law for 28 years at the time of trial (8 RT 1491) and the state prosecutor's own description of Messr. Peters and O'Connell as "extremely experienced homicide investigators and capital case defenders" (1 RT 82), it is doubtful that Mr. Peters was unaware of the statutory definition of incompetence. In any event, even if counsel's performance was partly due to incompetence and ignorance, the record supports the inference that it was *also* influenced by the conflict. (See, e.g., *Lockhart v. Terhune*, *supra*, 250 F.3d at p. 1231, and authorities cited therein [defendant need not show that the conflict was the *sole* "cause" of counsel's trial decisions, but only that "that some effect on counsel's handling of particular aspects of the trial was 'likely'" in order to demonstrate adverse effect]; Part E-1, *ante*, and authorities cited therein.)

It would certainly be reasonable to assume that the state and federal prosecutors would have been displeased if Mr. Mai were declared incompetent, and Messrs. Peters and O'Connell had reason to fear displeasing those prosecutors. (See Part C, *ante*.) If Mr. Mai were declared incompetent, he would be unable to stand trial at the penalty phase; his incompetency might necessitate the withdrawal of his slow plea at the guilt phase – a plea in which not only the state, but also the federal government had a strong interest, as evidenced by the federal plea agreement; his incompetency might provide grounds on which to collaterally attack his guilty pleas in federal court (see, e.g., *Burt v. Uchtman*, *supra*, 422 F.3d 557, 566-569); and a finding of incompetence would obviously affect the

place and conditions of Mr. Mai's confinement, in which the federal government also had a strong and compelling interest, as demonstrated by the plea agreement itself (see, e.g., Pen. Code, § 1370). Furthermore, Messrs. Peters and O'Connell had reason to believe that advocating in favor of Mr. Mai's incompetence would displease Mr. Mai, as well. As will be discussed in Part G, *post*, Mr. Mai expressed the desire to be executed and instructed his attorneys to effectively stipulate to a death verdict. He even threatened to disrupt the proceedings if his attorneys made a plea for the jurors' mercy. (8 RT 1399-1403.) Thus, advocating for their client's incompetence would go against Mr. Mai's wishes and instructions to obtain a death sentence. And, as discussed in Part E-4, *ante*, it is reasonable to infer that counsel had reason to fear that if they displeased Mr. Mai, he could – truthfully or otherwise – retaliate by corroborating Watkins's allegations against them to the state and federal prosecutors.

Hence, believing that their client was unable to make rational life and death decisions or rationally participate in his defense, counsel found themselves caught between the rock of their ethical and constitutional duties to advocate in their "client's best interests even [if] that interest conflict[ed] with [their] client's stated position'" (*People v. Stanley*, *supra*, 10 Cal.4th at pp. 804-805) and the hard place of fearing that if they disregarded their client *and* the state prosecutor's desires to obtain a death sentence, as well as their promise to the federal government that Mr. Mai would remain in its custody under special administrative conditions, by moving for the initiation of competency proceedings their own freedom, livelihood, and reputation would be at risk. Thus, moving for the initiation of competency proceedings was a "plausible alternative" that was "inherently in conflict" with defense counsel's competing personal interests. (Part E-1, *ante*, and

authorities cited therein.) Pursuant to the authorities cited in Part E-1, *ante*, this showing establishes that the conflict of interest influenced, and adversely affected, defense counsel's performance in this regard.

G. The Conflict of Interest Influenced, And Thus Adversely Affected, Counsel's Penalty Phase Performance

Mr. Mai informed defense counsel (and, ultimately, the court) that he wished to forgo the presentation of any penalty phase defense, including the presentation of mitigating evidence or closing argument. (7 RT 1375-1377, 8 RT 1399-1403.) Furthermore, Mr. Mai informed counsel and the court that he wished to testify that the jurors should return a death verdict. (8 RT 1399-1401.)

Defense counsel acquiesced. (8 RT 1399-1402.) They presented no meaningful challenge to the state's aggravating evidence. They presented no mitigating evidence or closing argument. Apart from a single, overruled objection to CALJIC No. 17.41.1 – on the ground that "I have never liked this instruction, just because it makes snitches out of the other jurors" (7 RT 1394) – they neither objected to, nor requested, any jury instructions. Finally, they presented to the jurors as "the only defense evidence" (8 RT 1409) Mr. Mai's narrative "testimony" that death was the appropriate penalty in this case (8 RT 1409-1410) – testimony that the prosecutor argued as a basis for a death verdict (8 RT 1424).

As will be demonstrated below, there were "plausible alternative tactics" available to defense counsel, both in regard to counseling Mr. Mai on his desire to seek execution and in regard to their own decision to acquiesce in that desire. (See Part E-1, *ante*, and authorities cited therein) However, the discarded plausible alternative of fighting for their client's life through an adversarial penalty phase trial was "inherently in conflict"

with their conflicting personal interests to avoid the significant risks to their liberty, livelihood, and reputation, as well as insurmountable ethical dilemmas, that such a trial would have posed. (*Ibid.*) On this record, this Court cannot be confident that counsel's effective stipulation to a death verdict was solely the result of their disinterested, independent professional judgment, and not influenced by their eagerness to seize onto a troubled young man's purported death wish as an answer to their own prayers.

1. Counsel Had Compelling Personal Interests that Would be Served By Acquiescing In Mr. Mai's Purported Death Wish and Foregoing An Adversarial Penalty Phase Trial

As previously discussed, counsel had reason to believe that disregarding Mr. Mai's wishes posed the risk that he would retaliate by corroborating Watkins's allegations against them to the state and federal prosecutors. Similarly, defense counsel certainly had reason to believe that stipulating to a death sentence would please the state prosecutor, with whom they had interest to curry personal favor. (See Part C, *ante*, and authorities cited therein.)

But counsel's conflicting interests ran even deeper with respect to their decisions over the penalty phase trial and certainly deeper than they represented to the state trial court and Mr. Mai. As discussed in Parts D-2 and 3, *ante*, during the state court proceedings regarding the perceived conflict of interest arising from the possibility that they would be "called as witness[es]" in Watkins's federal trial, the state prosecutor and defense counsel Mr. Peters represented that the prosecutor had agreed not to present any evidence regarding the conspiracy to kill Alex Nguyen in Mr. Mai's trial. (1 RT 80-81.) This, Mr. Peters emphasized to the trial court, "reduces the conflict to about zero." (1 RT 80-81.) However, as discussed in Part D-

3, *ante*, these representations were grossly misleading.

In truth, the agreement was that the prosecutor would not introduce the evidence in his penalty phase *case-in-chief*; he explicitly reserved the right to present the evidence on rebuttal or as impeachment if Mr. Mai presented a penalty phase defense with mitigating evidence. (3/16/07 2 SCT 132-134.) Far from "reduc[ing] the conflict to about zero," the true agreement made the conflict far more acute.

If Mr. Mai presented a penalty phase defense with mitigating evidence, the state would be free to present evidence regarding the conspiracy to kill Nguyen. Presenting such evidence would necessarily entail the state's own investigation into the conspiracy. And that investigation could have unearthed evidence of defense counsel's roles in it, including their directions to Watkins to engage in acts that the federal government alleged were overt acts in furtherance of the conspiracy and Watkins's own allegations that defense counsel were, in effect, unindicted co-conspirators.

Certainly, Watkins would be a logical witness to prove the conspiracy in Mr. Mai's penalty phase trial. In June 1999 – well before Mr. Mai's penalty phase commenced with jury selection on April 3, 2000 – Watkins entered a guilty plea in federal to the lesser charge of accessory after the fact to (attempted) murder for hire pursuant to a plea bargain and waived his right to appeal.[71] Therefore, Watkins could not avoid testifying at Mr. Mai's penalty phase trial by invoking his Fifth Amendment privilege

---

[71] A motion to take judicial notice of federal court records reflecting these facts pursuant to Evidence Code section 452, subdivisions (c) [official acts of judicial departments of United States is proper subject of judicial notice] and (d) [records of any court of record of the United States]) and Evidence Code section 459 accompanies this brief.

against self-incrimination. (See, e.g., *Reina v. United States* (1960) 364 U.S. 507, 513 [once a person has been convicted, he or she can no longer be "incriminated" and thus privilege no longer applies].)[72] Indeed, Watkins may have *wanted* to testify given his allegations against defense counsel. (1 CT 155-156.)

As a witness regarding the plot to kill Nguyen, there was certainly a significant risk that Watkins's allegations against Mr. Mai's defense counsel would have been laid bare during the very public (and widely publicized) penalty phase trial. Obviously, Mr. Mai's counsel would have a powerful personal interest in preventing the public airing of those allegations. Furthermore, counsel would have a had a strong disincentive from subjecting Watkins to any vigorous and searching examination, which could uncover evidence of their own wrongdoing. (See, e.g., *Mannhalt v. Reed*, *supra*, 847 F.2d at pp. 582-583 [when it is government witness who makes accusation that defense counsel engaged in criminal conduct relating to client's crimes, counsel's "personal interest in his own reputation and avoiding criminal prosecution" may make effective cross-examination impossible]; accord *United States v. Fulton*, *supra*, 5 F.3d at pp. 610, 613; *United States v. Hobson*, *supra*, 672 F.2d at pp. 828-829; see also Part C, *ante*, and authorities cited therein.)

Furthermore, given Watkins's allegations and the evidence that many of the alleged overt acts in furtherance of the conspiracy were undertaken at

---

[72] While the privilege continues during the pendency of appeal (see, e.g., *In re Courtney S.* (1982) 130 Cal.App.3d 567, 573), Watkins waived, and thereby extinguished, his right to appeal. (See, e.g., *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554, and authorities cited therein [when defendant pleads guilty to charge from which he can no longer appeal, privilege no longer exists with respect to facts underlying conviction].)

counsel's direction and in his role as counsel's investigator (see Part C-2, *ante*), Messrs. Peters and O'Connell independent personal knowledge regarding relevant evidence relating to the plot would have made them logical witnesses regarding the conspiracy. Under the crime/fraud exception to the attorney-client privilege, defense counsel would not be able to avoid testifying by invoking that privilege. (Evid. Code, § 956 [exception to attorney-client privilege where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud"]; see *United States v. Levy*, *supra*, 25 F.3d at pp. 156-158.)

Counsel would have obvious personal interests in avoiding being called as witnesses in Mr. Mai's penalty phase trial. It could put them in the unseemly position of having to testify against their own client, invoking their own rights against self-incrimination or, at the very least, having to withdraw as counsel and lose a substantial portion of their fees. (See Pen. Code, § 987.2 CT 1-13; Rules Prof. Conduct, Rule 5-210 [attorney must withdraw if called as a witness in client's trial]; see, e.g., *United States v. Levy*, *supra*, 25 F.3d at pp. 156-158 [where counsel, who had been accused of wrongdoing connected to client's crimes, pursued strategy that avoided possibility of his being called as a witness, court concluded that the conflict influenced strategy and demonstrated adverse effect]; *United States v. Livinston* (D. Del. 2006) 425 F.Supp.2d 554, 560-561, & fn. 4 [strategy that would call for attorney's own testimony and thus necessitate his withdrawal is one that inherently conflicts with attorney's own interests]; see also *United States v. Fulton*, *supra*, 5 F.3d at p. 613 ["when a government witness implicates defense counsel in a related crime, the resultant conflict . . . permeates the defense"].)

In addition, had defense counsel presented a penalty phase defense with mitigating evidence, thus prompting the state to present evidence relating to the conspiracy, there was a significant risk that yet another conflict of interest would reveal itself and adversely affect defense counsel's counsel's representation of Mr. Mai. Another logical witness to prove the conspiracy would be Mr. Mai's other indicted co-conspirator and girlfriend, Vicky Pham. On April 29, 1999, Ms. Pham pled guilty to aiding and abetting (attempted) murder for hire in violation of 18 U.S.C § 1958 and waived her appeal rights.[73] Hence, like Watkins, Ms. Pham could not avoid testifying at Mr. Mai's 2000 penalty phase trial by invoking her Fifth Amendment privilege against self-incrimination. In July 1999, Mr. Peters informed the state court that he had assumed the role of Ms. Pham's co-counsel at her own sentencing hearing. (2 CT 497, 501; see also 1 RT 158, 170, 202-203; 2 RT 223.) Indeed, according to Mr. Peters, he and Ms. Pham's federal counsel "organized a strategy for a presentation at Ms. Pham's sentencing. I arranged for Dr. Veronica Thomas, Ph.D. to present testimony at the sentencing to the affect [*sic*] that Ms. Pham had acted under Mr. Mai's duress caused by physical and mental abuse," from which she also suffered "battered women's syndrome." (2 CT 501.) As mentioned in Part F-2, *ante*, Dr. Thomas was appointed by the state court to assist *Mr. Mai* with his defense in *this* case. (1 RT 170, 202-203; 3 RT 403-407.)

---

[73] A motion for this Court to take judicial notice of the records of the United States District Court for the Central District of California reflecting these facts accompanies this brief. (Evid. Code, §§ sections 452, subdivisions (c) [official acts of judicial departments of United States is proper subject of judicial notice] and (d) [records of any court of record of the United States], 459.)

Had defense counsel presented a penalty phase defense with mitigating evidence, and thereby prompted the state to present evidence – including Ms. Pham's testimony – relating to the conspiracy at the penalty phase, defense counsel would have faced an insurmountable ethical dilemma. First, they had actively produced aggravating evidence adverse to Mr. Mai that he had forced Ms. Pham to assist him in conspiring to kill the state's witness through the infliction of "duress" and "physical and mental abuse." (See, e.g., *People v. Easley*, *supra*, 46 Cal.3d at pp. 722-725 [conflict of interest existed where, inter alia, in course of representing another client in a civil case arising from arson of building, defense counsel elicited the defendant's confession to the arson and the prosecution intended to introduce the arson evidence in penalty phase of defendant's own trial].) Moreover, defense counsel would have been precluded from subjecting Ms. Pham to effective cross-examination, given that she was a former client in a case substantially related to this one to whom defense counsel owed a duty of loyalty. (See, e.g, *United States v. Shwayder*, *supra*, 312 F.3d at pp. 118-119; *United States v. Malpiedi*, *supra*, 62 F.3d at p. 469; *Mannhalt v. Reed*, *supra*, 847 F.2d at p. 580; *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732.)

The conflict of interest inherent in defense counsel's representation of Ms. Pham, and the potential it had to adversely affect defense counsel's representation of Mr. Mai in the penalty phase of this case, were never even addressed, much less explored, on the record. To the extent that the trial court ultimately became aware that, contrary to counsel's representation at the conflict hearing, the state prosecutor was free to present evidence relating to the conspiracy on rebuttal (see footnote 24, *ante*), the trial court erred in failing to inquire into the potential conflicts of interest that inhered

in defense counsel's representation of Ms. Pham. (See Part D, *ante*, and authorities cited therein.) To the extent that there was no such inquiry because defense counsel misled the court to believe that the state prosecutor had promised not to present evidence relating to the conspiracy in Mr. Mai's state capital murder trial, counsel violated their constitutional and ethical duties. (See Part D, *ante*, and authorities cited therein.) In either event, Mr. Mai never made a knowing, voluntary, and intelligent waiver of his right to counsel unencumbered by this particular conflict on the record. (See Part D, *ante*, and authorities cited therein.)

At bottom, presenting a penalty phase defense with mitigating evidence meant that the state prosecutor would be free to present evidence regarding the plot to kill Nguyen, which would have opened a Pandora's Box of insurmountable legal and ethical dilemmas for counsel – ranging from their own indictment as co-conspirators at worst to their having to withdraw as counsel at best. Messr. Peters and O'Connell neatly avoided these dilemmas by acquiescing in Mr. Mai's purported desire to present no penalty phase defense.

As will be demonstrated below, there were several "plausible alternative" strategies to save Mr. Mai's life that counsel rejected in favor of foregoing a penalty phase defense. "By discarding" the plausible alternative of attempting to save Mr. Mai's life by presenting a penalty phase defense with mitigating evidence, counsel "papered over the conflict[s] that would have arisen" had they pursued it and, thus, their "very choice of strategies was colored by the conflict[s] [they] faced." (*People v. Mroczko*, *supra*, 35 Cal.3d at pp. 107-108.)

2. There Were Several Plausible Alternatives to Defense Counsel's Response And Counsel to Mr. Mai With Regard to his Expressed Desire to Forgo a Penalty Phase Defense and Seek a Death Verdict

It is not unusual for clients to initially insist that they want to be executed. (ABA Guidelines (2003), *supra*, 31 Hofstra L.Rev. at p. 1009, Guideline 10.5 and Commentary.) Indeed, defendants who initially "volunteer" for execution frequently change their minds. (See, e.g., R. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures* (2004-2005) 54 Catholic U. L. Rev. 1169, 1189-1192; R. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers* (2002) 77 Notre Dame L. Rev. 795, 801; W. White, *Defendants Who Elect Execution* (1986-1987) 48 U. Pitt. L. Rev. 853, 854-855.)

In light of these realities, "it is ineffective assistance for counsel to simply acquiesce in those wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide." (ABA Guidelines (2003), *supra*, 31 Hofstra L.Rev. at pp. 1009-1010 and fn. 186, Guideline 10.5 and Commentary; accord, e.g., ABA Guidelines (1989) Guidelines 11.4.1, 11.4.2, 11.6.3 and Commentary; *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1089-1090; *Comer v. Stewart* (9th Cir. 2000) 215 F.3d 910, 914, fn. 2; *Hardwick v. Crosby* (11th Cir. 2003) 320 F.3d 1127, 1190, and authorities cited therein.) At a minimum, an attorney confronted with such a client must assure himself or herself that the client's instructions are: (1) rational, by ensuring that the client is competent; and (2) informed, by conducting necessary investigation and fully and accurately advising the client of his or her options based upon the results of such investigation. (See, e.g., ABA Guidelines (2003), *supra*, Guidelines 10.5 and 10.7 and

Commentary; ABA Guidelines (1989), Guidelines 11.4.1, 11.4.2, 11.6.2 and Commentary; ABA Criminal Justice Mental Health Standards (1989) Standard 7-4.2, subd. (c).)

a. Defense Counsel Did Not Take Plausible Steps to Ensure that Mr. Mai's Decision was a Competent and Rational One

As fully discussed in Part F, *ante*, despite their reasonable and genuine belief – repeatedly and emphatically expressed – that the federal confinement conditions had had such a debilitating effect on Mr. Mai's mental state that he was no longer able to assist in the preparation of his defense in a rational manner, counsel also insisted that competency proceedings under section 1368 were unnecessary.

Of course, a defendant's competency to stand trial is always a critical matter. But it becomes even more so when defense counsel cedes control of a capital murder trial to his or her client and that client waives virtually all of his or her rights and effectively stipulates to the death penalty. (Cf. *Rees v. Peyton* (1966) 384 U.S. 312, 314 [where condemned defendant wished to abandon further litigation, and in light of his counsel's expressed doubts regarding client's competency to make that decision, hearing required in order to determine whether defendant was competent to make a rational choice to abandon litigation]; *Summerlin v. Schriro* (9th Cir. 2005) 427 F.3d 623, 639 [defendant's decision to waive presentation of mitigation must be competent one, under *Rees v. Peyton, supra*].)

As the American Bar Association, this Court, and other courts have explicitly or implicitly recognized, an attorney who harbors doubts about his or her client's competency or the rationality of the client's expressed wishes, yet simply accedes in that client's wishes to take actions (or to decline to take actions) to the client's detriment, violates his or her

constitutional and ethical duties. (See, e.g., *Comer v. Stewart* (9th Cir. 2000) 215 F.3d 910, 914, fn. 2, and authorities cited therein [attorneys were not obligated to accede in client's death wish when they had doubt regarding his competency due to impact of confinement in "sensory deprivation unit"; "[i]f his attorneys followed [the defendant's] current expressed desire, despite their apparently reasonable belief that he suffers from a mental disability, they would clearly violate the ethical rules governing their conduct"]; *People v. Stanley*, *supra*, 10 Cal.4th at pp. 804-805, and authorities cited therein [in the face of substantial evidence of incompetence, an "attorney representing the defendant is required to advocate the position counsel perceives to be in the client's best interests even when that interest conflicts with the client's stated position"]; ABA Model Rules, Rule 1.14 [attorney should take protective action contrary to client's wishes when "the lawyer reasonably believes that the client cannot adequately act in the client's own interests"]; ABA Guidelines (2003), *supra*, 31 Hoftra L.Rev. at pp. 1009-1010, Commentary to Guideline 10.5; ABA Guidelines (1989), Guidelines 11.4.1, 11.4.2, 11.6.2 and Commentary; ABA Criminal Justice Mental Health Standards (1989) Standard 7-4.2, subd. (c); ABA Criminal Justice Mental Health Standards (1989) Standard 7-4.2, subd. (c).)[74]

---

[74] See also *United States v. Boigegrain* (10th Cir. 1998) 155 F.3d 1181, 1188 ["if there were doubt of the defendant's competence, counsel should not necessarily respect the client's expressed desires"]; *Thompson v. Wainwright* (11th Cir. 1986) 787 F.2d 1447, 1451 [defense counsel's decision to accede in his client's wishes not to investigate or present mitigating evidence "is especially disturbing in this case because [attorney] himself believed that [defendant] had mental difficulties"]; *Brennan v. Blankenship* (W.D. Va. 1979) 472 F.Supp. 149, 156 ["under any

(continued...)

This is particularly true in death penalty cases in which the client insists that he wants to be executed. "Due to the extraordinary and irrevocable nature of the [death] penalty, at every stage of the proceedings, counsel must make 'extraordinary efforts on behalf of the accused.'" (ABA Guidelines (2003), *supra*, 31 Hofstra L. Rev. at p. 923, Commentary to Guideline 1.1, quoting from ABA Standards for Criminal Justice: Prosecution and Defense Function (3d ed. 1993) [hereafter "ABA Standards for Criminal Justice"], Standard 4-1.2, subd. (c); accord, ABA Guidelines (1989), Guideline 1.1 and Commentary.)

Hence, even a minimally competent attorney who doubts his or her client's ability to make rational life and death decisions would not accede in the client's death wish without at least demanding the initiation of competency proceedings. Certainly, when an attorney doubts his client's ability to make rational life and death decisions, moving for the initiation of competency proceedings is a "plausible" tactic to pursue, but which counsel in this case discarded. (See Part E-1, *ante*, and authorities cited therein.)

b. Defense Counsel Did Not Take Plausible Steps to Ensure that Mr. Mai's Decision was a Fully Informed One

The record also provides compelling circumstantial evidence that Messrs. Peters and O'Connell failed to ensure that Mr. Mai's decision not

---

[74](...continued)
professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect"]; *Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1501-1502 [counsel provided constitutionally inadequate representation where "morose and irrational" defendant whose mental state was in question instructed counsel not to present mitigating evidence, and counsel simply acquiesced in that request; defense counsel's *independent* duties to investigate and analyze are "even greater" where defendant is "noticeably morose and irrational"].

to present mitigation was a fully informed one. Criminal defense attorneys have "the duty to make reasonable investigations or to make a *reasonable* decision that makes particular investigations unnecessary." (*Strickland v. Washington, supra,* 466 U.S. at p. 691.) This includes the duty to investigate potentially relevant mitigating evidence. (See, e.g., *Rompilla v. Beard* (2005) 545 U.S. 374, 390-391 [counsel ineffective for failing to adequately investigate mitigating evidence]; *Wiggins v. Smith* (2003) 539 U.S. 510, 523-525 [same]; *Williams v. Taylor* (2000) 529 U.S. 362, 394.) Consistent with these principles, the ABA Guidelines in existence at the time of trial unequivocally provided that "counsel's duty to investigate is not negated by the expressed desires of a client." (ABA Guidelines (1989), Guideline 11.4.1, Commentary; accord, ABA Guidelines (2003), *supra*, 31 Hofstra L.Rev. at p. 1015, Guideline 10.7, subd. (a)(2).)

Hence, as numerous courts recognize, before acceding to even a *competent* client's wishes to forgo the presentation of mitigation, his or her attorney must investigate potential mitigating evidence and present it to the client. (See, e.g., *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1089-1090; *Summerlin v. Schriro, supra*, 427 F.3d at p. 638; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 838; *Battenfield v. Gibson* (10th Cir. 2001) 236 F.3d 1215, 1227-1235; *Blanco v. Singletary, supra*, 943 F.2d at pp. 1500-1503; *Hamblin v. Mitchell* (6th Cir. 2003) 354 F.3d 482, 487, 492; *Coleman v. Mitchell* (6th Cir. 2001) 268 F.3d 419, 449-450; *Matthew v. Evatt* (4th Cir. 1997) 105 F.3d 907, 920; *Weekly v. Jones* (8th Cir. 1996) 76 F.3d 1459, 1466; see also, e.g., *People v. Roldan, supra*, 35 Cal.4th at p. 682 ["counsel's decision to contact defendant's family over his express wishes was a tactical decision counsel was entitled to make" as "'captain of the ship'"].) Where – as here – defense counsel has reason to doubt his or

her client's competency or the rationality of the client's expressed desire not to present mitigating evidence, counsel has an even "*greater* obligation to investigate and analyze available mitigation evidence,' rather than 'latch[ing] onto [his client's] statements that he [does] not want any witnesses called." (*Hardwick v. Crosby* (11th Cir. 2003) 320 F.3d 1127, 1190; accord *Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1501-1502.) Without conducting such investigation, the defendant cannot make a fully informed decision not to present mitigating evidence nor can counsel make an objectively reasonable decision to accede in the defendant's wishes. (See, e.g., *Douglas v. Woodford*, *supra*, at p. 1090, and authorities cited therein; *Hamblin v. Mitchell* (6th Cir. 2003) 354 F.3d 482, 487, 492; *Battenfield v. Gibson*, *supra*, 236 F.3d at pp. 1227-1235.)

Here, according to Mr. Peters and Dr. Thomas, Mr. Mai's girlfriend of many years, Victoria Pham, told Dr. Thomas that Mr. Mai had been in a terrible, near fatal car accident, after which his behavior changed dramatically to become quite violent. (2 CT 501; 1 RT 170-171; 2 RT 231-232.) In Dr. Thomas's opinion, this evidence suggested the possibility of brain damage, potentially critical mitigating evidence that demanded investigation. (1 RT 170-171; 2 RT 231-232.)

Dr. Thomas was quite correct; brain injury is compelling, "classic mitigation evidence." (*Correll v. Ryan* (9th Cir. 2006) 465 F.3d 1006, 1017; accord, *Porter v. McCollum* (2009) ___ U.S. ___, 130 S.Ct. 447, 454-455.) Indeed, evidence of brain damage and mental impairment "'not only can act in mitigation, it could also significantly weaken the aggravating factors.' [Citation.]" (*Middleton v. Dugger* (11th Cir. 1988) 849 F.2d 491, 495; accord, e.g., *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1257; *Simmons v. Luebbers* (8th Cir. 2002) 299 F.3d 929, 939.)

According to Dr. Thomas, preliminary neuropsychological testing was necessary in order to investigate this possible mitigation and, based on the results of that testing, an MRI or CAT scan might also be necessary. (2 CT 501; 1 RT 170-171; 2 RT 231-233.) The record demonstrates that Dr. Thomas was the only expert that Messrs. Peters and O'Connell retained in this case; however her itemized billing does not include neuropsychological testing or (obviously, due to her lack of qualification) an MRI or CAT scan. (987.9 CT 117-118, 129-133, 153-188.) It is reasonable to infer from the absence of any evidence in the Penal Code section 987.9 materials that Dr. Thomas performed neuropsychological testing or that counsel retained any other expert to conduct such testing or perform an MRI or CAT scan that there simply is no such evidence – i.e., that defense counsel did not investigate the evidence suggestive of brain damage. (See, e.g., *Burkle v. Burkle* (2006) 141 Cal.App.4th 1029, 1036 [from absence of evidence of loan agreement, it was reasonable to infer that there was no such agreement].) Since objective standards of competence demand that an attorney investigate such evidence in order to ensure that his client's decision not to present mitigation is an informed and intelligent one, *a fortiori* such investigation was a "plausible alternative" to defense counsel's failure to conduct such investigation in this case. (See Part E-1, *ante*, and authorities cited therein).

Furthermore, and as will be discussed in Argument IV, *post*, evidence of brain trauma followed by a change in behavior, particularly when coupled with irrational conduct before or during trial, is a classic warning sign that the defendant may be incompetent to stand trial. (See, e.g., *Pate v. Robinson*, *supra*, 383 U.S. at p. 378; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1087-1089.) Hence, given its potential impact on

Mr. Mai's cognitive functioning, investigation into the possibility of brain damage to ensure that Mr. Mai's decision to effectively stipulate to the death penalty was a *rational and competent* one was a "plausible alternative" for defense counsel to take. (See Part E-1, and authorities cited therein)

c. The Record Reveals Circumstantial Evidence that Defense Counsel Did Not Pursue the Plausible Alternative of Attempting to Persuade Mr. Mai to Change His Mind and Fight For his Life, but Rather Overstated the Hopelessness of His Case and Even Encouraged His Decision

When a defendant expresses a desire to withhold the presentation of a penalty defense so as to receive a death verdict, among the "extraordinary efforts" counsel must make in a capital case is an effort to attempt to persuade the defendant to change his or her mind. (See ABA Guidelines (1989), Guidelines 11.4.1, 11.4.2, 11.6.2 11.6.3, and Commentary; ABA Guidelines (2003), *supra*, 31 Hofstra L. Rev. at p. 1009, Guidelines 10.9.2 and Commentary; *Silva v. Woodford*, *supra*, 279 F.3d at p. 847; *Summerlin v. Schriro*, *supra*, 427 F.3d at p. 631; *Stankewitz v. Woodford* (9th Cir. 2004) 365 F.3d 706, 721.) In so doing, counsel must be careful not to understate or overstate the risks, hazards, or prospects of the case. (ABA Standards for Criminal Justice (1993), Standard 4-5.1, subd. (b); accord, e.g., *Harris ex rel. Ramseyer v. Blodgett* (W.D. Wash. 1994) 853 F.Supp. 1239, 1262, affirmed by *Harris ex rel. Ramseyer v. Wood* (9th Cir. 1994) 64 F.3d 1432.)

Here, while the appellate record does not reveal the full extent of the private communications between Messrs. Peters and O'Connell and Mr. Mai, the remarks defense counsel made on the record shed considerable

light on the advice they gave Mr. Mai and the efforts they made to convince him to fight for his life. (8 RT 1401.) First, as discussed in Part E-4, *ante* (and more fully in Arguments II and III, *post*), defense counsel represented to the state court that there was not "anything to say" to defend against the capital murder charge at the guilt phase. (1 RT 189-190.) Presumably, they gave the same counsel to Mr. Mai.

Defense counsel expressed equally pessimistic views regarding the outcome of the penalty phase. In an early proceeding, Mr. Peters stated that "nobody would be fooled in thinking the odds of Mr. Mai getting the death penalty aren't extremely high, because of the nature of the case." (2 RT 323.) This was so even if they discovered and presented evidence of brain injury and its impact on Mr. Mai's mental state. In discussing the need to investigate Mr. Mai's head trauma for the presence of brain injury, Mr. Peters stated, "I have never seen a case work with psychiatric testimony unless the client was a blithering idiot, and was so mentally ill that the prosecutor was going for it. I testified in my own habeas corpus hearing in my first death penalty, *Douglas*, and they asked me the question, the issue about psychological, and I said, well, I have never seen a jury buy a psychological issue, they would only buy a psychological defense in a death case if the client was so mentally ill he couldn't have committed the crime in the first place." (2 RT 263.)

On still another date before the commencement of the penalty phase, Mr. Peters emphasized that Mr. Mai "has no illusions about what the outcome" of the penalty phase would be. (3 RT 473.) At another, Mr. Peters referred to this as a "death case with a high probability of a death verdict." (5 RT 862.) At still another, immediately after the penalty phase jurors were sworn, Mr. Peters explained that Mr. Mai "is quite fatalistic,

[because] *we* know what the highest percentage is in this case, nobody is fooling anybody . . . ." (6 RT 1081.) Indeed, Mr. Mai "knows what the outcome is, he does and you do, we can't be certain, but this kind of case, and the fact that we may put on no defense, is the evidence is overwhelming and awfully brutal, you know, if we just – if we can get through this." (6 RT 1082.)

Furthermore, defense counsel made a number of statements indicating that they believed that Mr. Mai's decision to die was the right, moral and just course to take, which provides circumstantial evidence that they provided such counsel to Mr. Mai. Very early on in the proceedings, Mr. Peters informed the state court that he was aiding in Mr. Mai's decision to sacrifice himself in order to help Ms. Pham because "I believe it is the right thing to do." (1 RT 99.) Mr. Peters informed the state court that he had offered Mr. Mai's plea to the state capital murder charge in exchange for the federal government's recommendation to reduce Ms. Pham's sentence: "Now I have control over that under [Penal Code section] 1018. I can stop that from happening as his counsel. I have not attempted to stop that, because I consider all I know about this case, and the hours I spent with Mr. Mai, I think he is doing the right thing under the circumstances . . . ." (1 RT 100.) Similarly, he told the federal court: "I can affirm that also I have a statutory power in capital cases to keep [Mr. Mai] from pleading guilty and I have willingly waived that because I believe Mr. Mai is doing this plea for the right reasons, and I will be – at the time he enters that plea, I'll be waiving any objections I have to his plea." (2 CT 410.)

Mr. Peters's later remarks strongly suggested that the "right thing" did not refer to some tactical or strategic benefit, but rather referred to his own (purported) moral judgment. When judgment and sentence were

imposed, Mr. Peters presented a rather bizarre narrative in which he stated, among other things, that the death penalty was just and right in this case and that Mr. Mai's decision to die was an admirable one. Referring to Mr. Mai's penalty phase testimony that death was the appropriate penalty in this case (see Part 3-c, *post*), Mr. Peters declared in open court: "I just want to say this on behalf of Mr. Mai, *certainly his crime and background merit where he is at, there is no question about that, and Mr. Mai looked into the eyes of the jurors and told them that.*" (8 RT 1491, italics added.)[75] Mr. Peters went on to emphasize that Mr. Mai's decision to waive all rights and volunteer for execution was "not rash," but rather was a "rational, *mature* decision on his part." (8 RT 1493, italics added.) Mr. Peters closed by expressing his admiration for Mr. Mai, who "stood up, unlike any defendant in Orange County that I can think of, he stood up and said, I am good for this, and this is the appropriate penalty, and I just wanted to memorialize that to kind of balance the picture, the mythological Henry Mai that sometimes is out there." (8 RT 1493.)

Thus, defense counsel's remarks throughout the proceedings provide compelling circumstantial evidence of the advice and counsel they gave to Mr. Mai: there was no guilt phase defense and a death verdict was virtually a foregone conclusion no matter what mitigating evidence they might unearth and offer, while volunteering for death was "the right thing" and "certainly . . . merit[ed]" based on "his crime and his background." As will be demonstrated, even a minimally competent attorney would not have provided such counsel; certainly, withholding such counsel and attempting

---

[75] As discussed in Part 3-c, *post*, this statement referred to Mr. Mai's penalty phase "testimony" that the jurors should return a death verdict.

to persuade Mr. Mai to fight for his life was a "plausible alternative" to defense counsel's course in this case. (See Part E-1, *ante*, and authorities cited therein.)

Preliminarily, defense counsel's remarks that their judgment was driven by their own moral considerations and that Mr. Mai's decision to surrender to execution was a "right" and *just* one were completely at odds with their roles and duties as advocates. (*Osborn v. Shillinger* (10th Cir. 1988) 861 F.2d 612, 626 [counsel ineffective where, inter alia, he wrote letter after sentencing in which he stated "in essence, that his client deserved the death penalty"]; *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, 1074 ["an attorney who adopts and acts upon a belief that his client should be convicted fails to function in any meaningful sense as the Government's adversary"]; accord *Frazer v. United States* (9th Cir. 1994) 18 F.3d 778, 782-783].) Indeed, as the supreme court of one state has emphatically stated, "we cannot countenance or condone representation of a defendant by an attorney who has stated in a public document [or forum] that his client is a 'prime candidate for the death penalty.' . . . An attorney is not justified in asserting that his client deserves the death penalty, *even if his client desires to have that penalty imposed.*" (*State v. Holland* (Utah 1994) 876 P.2d 357, 358-361 & fn. 3, italics added.)

Furthermore, much of the advice Messrs. Peters and O'Connell offered Mr. Mai was simply incorrect or misleading. As discussed in Part E-4, *ante* (and more fully in Arguments II and III, *post*), and contrary to defense counsel's representation, there certainly was something "to say" in response to the sole special circumstance allegation rendering Mr. Mai eligible for a death verdict: the evidence was insufficient to prove it beyond a reasonable doubt.

Similarly, the nature of the special circumstance alone did not, contrary to counsel's remarks, make a death verdict virtually a foregone conclusion. (See, e.g., *People v. Gonzalez* (2005) 34 Cal.4th 1111 [jury rejected death penalty in favor of life for defendant convicted of first degree murder of one peace officer with peace-officer murder special circumstance, as well as attempted premeditated murder of second peace officer]; *People v. Johnson* (1993) 114 Cal.App.4th 778, 785 [of three defendants convicted of murder of peace officer, jury rejected death penalty in favor of life for one and trial court modified jury's death verdict and reduced to a life sentence for another]; *People v. Noble* (1981) 126 Cal.App.3d 1011, 1012-1013, 1015 [jury rejected death in favor of life for defendant convicted of murder of peace officer with special circumstance]; *Al-Amin v. State* (Ga. 2004) 597 S.E.2d 332, 330 [jury rejected death in favor of life for defendant convicted of killing police officer]; see also *People v. Vasquez* (Cal.App. 1st Dist., Jan. I, 2006, No. A102559) 2006 WL 226759 [jury hung at penalty and court imposed life]; *People v. Ferris* (Cal. App. 4th Dist., Nov. 14, 2002, No. E030349) 2002 WL 31520553 [two juries deadlocked at penalty phase for defendant convicted of murdering peace officer, who had previously been convicted of another first-degree murder, prompting prosecution to abandon pursuit of death penalty].)[76]

---

[76] Mr. Mai is aware that unpublished decisions may not be relied upon as legal authority. (Cal. Rules of Court, rule 8.1115.) He cites the above unpublished decisions not as legal authority, or as proof of the underlying facts discussed therein. Rather he cites those cases simply to reflect the evidence presented and verdicts rendered in them. Judicial notice of those decisions for these purposes under Evidence Code sections 452 and 459 is appropriate and a motion for judicial notice accompanies this brief.

(continued...)

Nor was Mr. Mai's criminal history or the circumstances of the crime so aggravating that they made a death verdict a forgone conclusion. (See, e.g., *Williams v. Taylor*, *supra*, 529 U.S. at p. 418, dis. opn. of Rehnquist, J. [emphasizing that majority reversed for counsel's failure to investigate and present mitigating evidence under *Strickland* standard despite extensive aggravating evidence that appellant had "savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a prisoner's jaw"]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [penalty phase errors required reversal despite fact defendant murdered three friends, after he bound them and even as they "cried or begged for mercy," in order to rob store in which they worked; "although the crime committed was undeniably heinous, a death sentence in this case was by no means a foregone conclusion"]; *In re Lucas* (2004) 33 Cal.4th 682, 735 [death not forgone conclusion despite aggravating evidence based on crimes in which defendant "brutal[ly]" killed two elderly and "vulnerable" neighbors in their home, and on defendant's violent criminal history]; *Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1082-1084, 1091 [death penalty not unavoidable for defendant who committed sexual offenses against two teenage girls before eventually murdering them and attempted to solicit additional similar crimes, and who had violent criminal history that included other sex offenses and solicitation to kill]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 918-919, 929-932 [death not forgone conclusion despite "strong"

---

[76](...continued)
(See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at pp. 847 848 & fn. 9 [it is entirely appropriate to take judicial notice of unpublished opinions in unrelated cases, without violating prohibition against citing unpublished opinions as precedent or legal authority].)

aggravating evidence based on current crimes in which defendant carefully planned and committed murders of three people in two separate incidents, and on defendant's prior violent assaults]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 619-622 [same – despite defendant having been convicted of thirteen counts of aggravated first-degree murder].)

To the contrary, while there is no question that the murder was a tragedy for the victim and his family, the circumstances of the crime itself were not particularly aggravating above and beyond the nature of the special circumstance. According to the prosecution's own evidence, the crime was not pre-planned, but rather the spontaneous result of a moment of panic born of Mr. Mai's (mistaken) belief that if he were arrested, he would be convicted as a third strike offender and imprisoned for the rest of his life. (2 Muni RT 278-284; see, e.g., *Belmontes v. Woodford* (9th Cir. 2003) 350 F.3d 861, 906-907 [fact that murder was not pre-planned was part of "substantial mitigating evidence" that could have persuaded jury to reject death penalty]; *Jackson v. Herring* (11th Cir. 1995) 42 F.3d 1350, 1369 [circumstances of crime were not especially aggravating as compared to "many death penalty cases (which) involve murders that are carefully planned or accompanied by torture, rape, or kidnapping"].) Thus, contrary to defense counsel's remarks – and presumably his advice to Mr. Mai – the state's case for death was not "so overwhelming" (2 RT 224) or so "awfully brutal" (6 RT 1082) that "nobody would be fooled in thinking the odds of Mr. Mai getting the death penalty aren't extremely high" (2 RT 323), or that Mr. Mai should have been left with "no illusions" that the "outcome" of the trial (3 RT 473) would be anything other than a death verdict.

Nor was it true that penalty phase juries are not responsive to evidence of mental impairment caused by brain injury "unless the client [is]

a blithering idiot," as Mr. Peters represented, or – as he had "testified in my own habeas corpus hearing in my first death penalty, *Douglas*" – that juries don't "buy a psychological issue, they would only buy a psychological defense in a death case if the client was so mentally ill he couldn't have committed the crime in the first place." (2 RT 263.) More than a little ironically, in the "*Douglas*" case to which Mr. Peters referred, Mr. Peters was found to have provided ineffective assistance of counsel for failing to investigate and present mitigating evidence, including a serious head injury from an automobile accident, brain damage and a social history. (*Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1088-1091.)

In truth, evidence of brain damage and mental impairment "is exactly the kind of evidence that garners the most sympathy from jurors." (*Smith v. Mullin* (10th Cir. 2004) 379 F.3d 919, 942-943, and authorities cited therein.) Indeed, it "not only can act in mitigation, it could also significantly weaken the aggravating factors.' [Citation.]" (*Middleton v. Dugger*, *supra*, 849 F.2d at p. 495; accord, e.g., *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1257; *Simmons v. Luebbers* (8th Cir. 2002) 299 F.3d 929, 939.)

In sum, the record provides substantial circumstantial evidence that defense counsel overstated the hopelessness of Mr. Mai's case and even encouraged his decision to die on moral grounds, rather than pursuing the "plausible alternative tactic" of attempting to change his mind and convince him to fight for his life. (See Part E-1, *ante*.)

3. There Were Plausible Alternatives to Defense Counsel's Own Decision to Forgo Any Penalty Phase Defense and Effectively Stipulate to the Death Penalty

"When a defendant exercises his or her constitutional right to representation by professional counsel, it is counsel who 'is in charge of the case' and the defendant 'surrenders all but a handful of "fundamental" personal rights to counsel's *complete control* of defense strategies and tactics.'" (*In re Barnett* (2000) 31 Cal.4th 466, 472, italics added, quoting from *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163, and authorities cited therein; accord *People v. Cook* (2007) 40 Cal.4th 1334, 1343 ["counsel, as 'captain of the ship,' maintains complete control over defense tactics and strategies, except that the defendant retains a few "fundamental personal rights"]; *New York v. Hill* (2000) 528 U.S. 110, 114-115 [an attorney has full authority to manage the conduct of the trial without obtaining client's approval]; *Taylor v. Illinois* (1988) 484 U.S. 400, 417-418 [same]; *Jones v. Barnes* (1983) 463 U.S. 745, 751-752 [while client controls certain limited fundamental personal rights, counsel otherwise controls the case, even when contrary to client's wishes]; ABA Standards for Criminal Justice, *supra*, Standard 4-5.2.)

Absent those limited, personal rights that the client controls, counsel has *no* duty "to abide by the wishes of his client . . . . Indeed, in some instances, listening to the client rather than to the dictates of professional judgment may itself constitute incompetence." (*United States v. McGill* (1st Cir. 1992) 11 F.3d 223, 226-227, cited with approval in *New York v. Hill*, *supra*, 528 U.S. at p. 115.) Thus, as "captain of the ship" (*People v. Roldan, supra*, 35 Cal.4th at p. 682), counsel has the power to pursue strategies that are inconsistent with the client's wishes or even with the

client's testimony. (See, e.g., *Jones v. Barnes*, *supra*, 463 U.S. at pp. 751-752; *People v. Welch* (1999) 20 Cal.4th 701, 725-729; *People v. McPeters* (1992) 2 Cal.4th 1148, 1186-1187; *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 781; *People v. Williams* (1970) 2 Cal.3d 894, 905; *Silva v. Woodford*, *supra*, 279 F.3d at p. 847; *United States v. McGill*, *supra*, 11 F.3d at pp. 226-227.)

Consistent with these principles, while this Court has held that defense counsel may not be *required* to present mitigation over his or her competent client's objections (see, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1031), it has also held that counsel has the *power* to do so (*People v. Deere* (1985) 41 Cal.3d 353, 364-365; accord *People v. Roldan*, *supra*, 35 Cal.4th at pp. 678, 682, 722-723; *People v. Welch*, *supra*, 20 Cal.4th at pp. 727-728). Other courts are in accord. (See, e.g., *Duvall v. Reynolds* (10th Cir. 1998) 139 F.3d 768, 780 ["the ultimate decision to introduce mitigating evidence (other than the defendant's own testimony) is vested in the defendant's trial counsel"]; accord *Douglas v. Woodford*, *supra*, 316 F.3d at p. 1089; *Brecheen v. Reynolds* (10th Cir. 1994) 41 F.3d 1343, 1368-1369.) Indeed, this principle is consistent with the very text of the Sixth Amendment, which "requires not merely the provision of counsel to the accused, but 'Assistance' which is to be 'for his *defence*.'" (*United States v. Cronic*, *supra*, 466 U.S. at p. 654, quoting text of Sixth Amendment, italics added.)

Pursuant to these principles, even if defense counsel *had* attempted to persuade Mr. Mai to change his mind about foregoing a penalty phase defense and were unsuccessful, they still had the power to override his wishes and present a penalty phase defense, particularly given their repeatedly expressed doubts over his ability to make rational life and death

decisions. Importantly, defense counsel recognized that they had this power. (2 RT 241; 8 RT 1399-1400.) Indeed, Mr. Peters has exercised that power in at least one other case in which he had no competing personal interests impelling him to do otherwise. (*Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1087-1089 [finding Mr. Peters had rendered ineffective assistance of counsel in failing to investigate and present certain mitigating evidence, which could not be excused based on his client's instructions not to present mitigation since Mr. Peters had already "disregarded his client's wishes and did put on what mitigating evidence he had unearthed" and further disregarded his client's instructions not to present closing argument].)

Thus, while lead defense counsel, Mr. Peters, has pursued the "plausible alternative" of disregarding a client's wishes and presenting a penalty phase defense with mitigating evidence in at least one other case, defense counsel discarded that "plausible alternative" in *this* case. (See Part E-1, *ante*, and authorities cited therein.) Of course, in *this* case, that "plausible alternative" was "inherently in conflict" with their own compelling interests to avoid the risks to their liberty, livelihood, and reputation, as well as the the ethical dilemmas, that presenting a defense with mitigating evidence would have posed. (See Parts C , E-1, and G-1, *ante*, and authorities cited therein)

a. Defense Counsel Discarded the Plausible Alternative of Presenting Available Mitigating Evidence

The face of the record reveals mitigating evidence that Mr. Mai's defense counsel had the power to present, but chose not to present. As the trial court recognized, Mr. Mai had family and friends, including his father and uncle who had flown in from Vietnam, present in the courtroom and

available to testify on his behalf. (8 RT 1488; see also 5 RT 861-862.) Indeed, defense counsel characterized them as "essential, material and relevant witnesses" (2 RT 327) who "played a significant role in [Mr. Mai's childhood] escape from Vietnam . . . ." (5 RT 861.)

According to Mr. Peters's, Mr. Mai's childhood was quite traumatic. (2 RT 221, 224; see also 3 CT 1049 [probation report].) His father was a soldier with the South Vietnamese Army and his mother was a "bar girl" who abandoned him as a young child. (3 CT 1049, 1065-1066; 2 RT 219-222, 227.) Mr. Mai's illegitimate birth was a "big shame" to his father's family. (3 CT 1049, 1065-1066.) His early years were thus spent in a war-torn country, abandoned by both parents, and a shame to his family.

Saigon fell when Mr. Mai was only four years old, forcing him to flee Vietnam by boat in the company of his 72-year-old paternal grandmother, who did not speak English. (2 RT 219-222, 225; 3 CT 1049.) After fleeing Vietnam, Mr. Mai did not see or communicate with his father again until the time of his capital murder trial; he never saw or communicated with his mother again. (2 RT 221; 5 RT 858.)

In the United States, Mr. Mai lived with his paternal aunt and her husband, who – according to Mr. Peters – "brutally beat[]" Mr. Mai. (3 CT 1049, 1065-1066.) In 1986, a child abuse report was filed with Orange County Social Services after Mr. Mai reported that his uncle had beaten him. (CT 1065-1066.) Unfortunately, the agency determined that there was "insufficient information to warrant child abuse investigation." (3 CT 1065-1066.) However, according to the juvenile history detailed in the probation report, an officer noted in 1990 that Mr. Mai had dark circles under his eyes, burn marks on his hands, and was "extremely thin." (3 CT 1054.) In 1991, another officer noted that he "continue[d] to have the

appearance of a malnourished cadaver." (3 CT 1054.)[77]

Certainly, all of this evidence regarding the cultural implications of Mr. Mai's illegitimate birth to a "bar girl" in Vietnam, his flight from Vietnam without his parents and under extreme circumstances as a young child, and his abusive and traumatic childhood would have been highly relevant evidence in mitigation. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 ["there can be no doubt that a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant" mitigation]; accord, *Wiggins v. Smith* (2003) 539 U.S. 510, 534; *Williams v. Taylor* (2000) 529 U.S. 363, 397-398; *In re Lucas* (2004) 33 Cal.4th 682, 734 ["childhood abandonment" and abuse is "forceful" mitigation]; *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1163; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 619 [cultural expert testimony regarding difficulty of children immigrants assimilating to life in United States is constitutionally relevant mitigating evidence]; *Tran v. Borg* (9th Cir. 1990) 917 F.2d 566 [California jurors who heard evidence regarding violence of war-time life in Vietnam, defendant's escape from Vietnam, "and psychological trauma and adjustment problems facing the Vietnamese," rejected death penalty in favor of life without parole for defendant convicted of first degree murder with special circumstances despite aggravating evidence that included prior manslaughter conviction, prior homicide, and prior robbery];[78] cf. *United States v. Vue* (D. Neb. 1994)

---

[77] While the officers "suspect[ed]" that Mr. Mai's appearance was due to drug use (3 CT 1054), it was equally consistent with signs of abuse and neglect.

[78] *Tran v. Borg*, *supra*, is an unpublished decision. However, Mr. (continued...)

865 F.Supp. 1353, 1359-1360 [in non-capital case, sentencing court found as significantly mitigating the defendants' status as war refugees, who were "driven from their homeland" because they had engaged in military service to our country and its "democratic ideals"].)

Furthermore, there was mitigating evidence of Mr. Mai's remorse. (Pen. Code, § 190.3, subd. (k).) According to Mr. Peters, Mr. Mai apologized to the Burt family during the federal sentencing proceeding – when he had nothing at all to gain from such an expression of remorse. (2 RT 230.) Certainly, Mr. Mai accepted responsibility for his crime. Indeed, as defense counsel characterized it to the trial court, Mr. Mai's plea to the capital murder charge laid the foundation for a "my client doing the right thing defense" at the penalty phase. (2 RT 257; see also 1 RT 190.)[79] And the trial court recognized in this regard that Mr. Mai "surely spared the victim's family some delay in the process and some of the ordeal of trial, and to that extent are mitigating factors." (8 RT 1488.) Yet the jurors

---

[78](...continued)
Mai does not cite it as precedent or legal authority. (See Cal. Rules of Court, rule 8.1115.) Nor does he cite it for purposes of proving the truth of the facts therein. Rather, it is relevant only insofar as to *reflect* the evidence presented in that case and the verdict reached; accordingly, a motion for judicial notice of that decision for this purpose under Evidence Code sections 452 and 459 accompanies this brief. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 847 848 & fn. 9 [it is entirely appropriate to take judicial notice of unpublished opinions in unrelated cases, without violating prohibition against citing unpublished opinions as precedent or legal authority].)

[79] In addition, as discussed in the preceding section, there was potentially vital mitigating evidence – the strong possibility of brain trauma which profoundly affected his impulse control and aggression – that defense counsel did not investigate.

never learned, through evidence, instructions, or argument, that Mr. Mai's guilt had been established by plea.

Messrs. Peters and O'Connell could have presented all of this evidence to the penalty jurors even over Mr. Mai's objections, but chose not to do so. Particularly given the serious questions regarding the rationality and informed nature of Mr. Mai's instructions to effectively stipulate to a death verdict, presentation of the available mitigating evidence – even over Mr. Mai's objections – was a "plausible alternative" to the course they chose. (See, e.g., *Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1087-1089 *People v. Roldan*, *supra*, 35 Cal.4th at pp. 678, 682, 722-723; *Comer v. Stewart*, *supra*, 215 F.3d at p. 914, fn. 2, and authorities cited therein; *Thompson v. Wainwright*, *supra*, 787 F.2d at p. 1451.)

b. Defense Counsel Discarded the Plausible Alternative of Challenging the Prosecution's Aggravating Evidence

As previously discussed, defense failed to make any meaningful challenge to the prosecution's aggravating evidence. They conducted virtually no cross-examination of the penalty phase witnesses, made only two minor evidentiary objections, and otherwise left the prosecution's aggravating evidence unchallenged.[80] Indeed, they "agreed to a number of

---

[80] Defense counsel only subjected four of the prosecution's twenty-two penalty phase witnesses to very minimal cross-examination: (1) from Benjamin Baldauf, defense counsel elicited only that Mr. Mai seemed scared during the shooting of Officer Burt (6 RT 1114-1115); (2) from Michael Lyman, defense counsel elicited that he had initially identified someone else as the driver of the BMW (6 RT 1163-1167); (3) from Robert Bachand – the witness whose testimony so agitated Mr. Mai that he upended the counsel table to which he was shackled – defense counsel elicited that he had seen Mr. Mai on the news before identifying him as one

(continued...)

stipulations," which included "all the foundation for the D.N.A. . . . also for fingerprints, D.N.A., chain of evidence for D.N.A.," and Mr. Mai's prior felony convictions. (2 RT 247, 252-253).[81]

The face of the record reveals that Messrs. Peters and O'Connell had evidence with which to dispute at least one of the prosecution's prior acts of violence offered in aggravation – the alleged carjacking and kidnapping of the Honda salesman, Robert Bachand. (7 RT 1323-1337.) As his outbursts during that witness's testimony clearly demonstrated, Mr. Mai vehemently denied that he had committed those prior criminal acts. (7 RT 1325-1331.) Mr. Peters later represented to the trial court, "I knew from my own investigation that Mr. Mai was not good for that . . . ." (8 RT 1489.) Yet,

---

[80](...continued)
of the men who had carjacked him in a prior incident (7 RT 1340-1341); and (4) from Aryan Neghat, defense counsel elicited that he had *not* seen Mr. Mai in any news coverage before identifying him (7 RT 1349). Otherwise, defense counsel did not cross-examine any of the prosecution's other 18 penalty phase witnesses. (See 6 RT 1139, 1155, 1180, 1188, 1196; 7 RT 1213, 1224, 1230, 1241, 1255, 1263, 1284, 1289, 1307, 1323, 1358, 1361, 1370.)

Similarly, defense counsel made only two minor objections at trial: (1) to two autopsy photographs, on the ground that they were cumulative of other such photographs, which the court overruled (7 RT 1267-1268; see also 2 RT 297); and (2) a motion for mistrial (having made no objection before or during the testimony) based on the testimony of a Secret Service agent connecting Mr. Mai to a national fraud scam, on the ground that it was not included in the prosecution's notice of aggravation, which the court denied (7 RT 1309).

[81] While counsel and the prosecutor referred to these as "stipulations," no formal stipulations were made or read to the jurors. Instead, defense counsel simply declined to challenge any of the prosecution's evidence.

Mr. Peters never presented the exculpatory evidence his "own investigation" had unearthed. Once again, presenting this evidence and subjecting the prosecution's aggravating evidence to meaningful adversarial testing was a "plausible alternative," particularly given defense counsel's doubts over the rationality of Mr. Mai's decision to effectively stipulate to the death penalty. (See, e.g., *Stankewitz v. Woodford*, *supra*, 365 F.3d at pp. 720-723 [counsel's failure to present available evidence to dispute or rebut prosecution's aggravating evidence regarding prior criminal act fell below objective standard of reasonably competent assistance]; cf. *United States v. Cronic*, *supra*, 466 U.S. at p. 659 [when trial is held, counsel must subject state's case to meaningful adversarial testing].)

c. Defense Counsel Discarded the Plausible Alternatives of Objecting to Mr. Mai's Request to Testify that Death Was the Appropriate Penalty in this Case and Pleading for His Life in Closing Argument

As previously mentioned, defense counsel and Mr. Mai informed the trial court that Mr. Mai wished to testify that death was the appropriate penalty and requested that he be permitted to do so. (8 RT 1399, 1401.) Furthermore, Mr. Mai instructed counsel not to present closing argument and threatened to "act out" in front of the jury verbally or "turn tables over or do something to indicate his displeasure with my taking a position contrary to him, he being my client." (RT 1399, 1402-1403.) Mr. Peters acknowledged that he had the power to present closing argument even over Mr. Mai's objections. (8 RT 1399-1400; see, e.g., *Bell v. Cone* (2002) 535 U.S. 685, 701-702 [presentation of closing argument is tactical matter controlled by counsel]; *People v. Roldan*, *supra*, 35 Cal.4th at pp. 679-682, 685; *People v. Welch*, *supra*, 20 Cal.4th at pp. 725, 754; *People v.*

McPeters, *supra*, 2 Cal.4th at pp. 1186-1187.) Indeed, Mr. Peters has exercised that power under similar circumstances. (*Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1087-1088 [Mr. Peters presented penalty phase closing argument over client's objections despite his stated fear that client would "'leap up and grab me around the throat' for disregarding his wishes"].)

Nevertheless, Mr. Peters "exercis[ed his] judgment" to withhold any argument or plea for mercy on his client's behalf and instead joined in Mr. Mai's request to the court to allow him to "say his peace [*sic*], and have the rest of the trial end on a respectable basis like that, than for me to spend a few minutes arguing, which would only cause an outbreak by Mr. Mai. So that's the decision I made at this point." (8 RT 1399-1400.) Although the court acknowledged that Mr. Mai's proposed testimony would be "almost tantamount to suicide and the state of California doesn't assist or participate in suicides," it granted the request, reasoning that Mr. Mai had "the right to take the stand and talk to the jurors." (8 RT 1401.)

Hence, defense counsel's only remarks to the penalty phase jurors were: "[A]s you can see, Mr. Mai is going to tell you what he wants to tell you, and this will be the only defense evidence, this is Mr. Mai's request. And he will be addressing you directly and speaking, with the agreement of the prosecutor, in narrative, he will just tell you what he wants to tell you." (8 RT 1409.)

Mr. Mai then took the stand and made the following sworn statement to the jurors:

> Before I start, I would like to say that I did request for my lawyers not to say anything on my behalf, and I appreciate that. Jurors, I am not here to ask or beg for your sympathy or pity. Nor am I here to ask or beg of you, the jurors, to spare

> my life. Personally, I believe in an eye for an eye. I believe in two eyes for every eye. If you were to take down one of my fellows, I would do everything that is necessary to take down at least two of yours, just to be even. In this penalty phase trial, the prosecutor, Mr. Jacobs, is seeking the maximum penalty, which we all know is death. I personally feel that the maximum penalty is properly suited for this occasion. I also feel that it is the right thing, for you, the jurors, to do so. Being in my situation now I feel it is only fair, there's a price to pay for everything in life, now that I am here it's time I pay that price. Because, after all of this entire ordeal, it is just part of the game. That's all I have to say, your honor.

(8 RT 1409-1410.)

Following Mr. Mai's statement to the jurors, the prosecutor presented his summation. His closing words pounded the final nail in Mr. Mai's coffin: "Mr. Mai testified and told you what he expects from you and what he believes he deserves. I don't see a reason to disappoint him on this point. . . . the death penalty is the only appropriate verdict." (8 RT 1424.) Counsel made no objection to the prosecutor's argument. The jurors agreed with the prosecutor; they returned the death verdict a mere 50 minutes after retiring to commence their "deliberations." (3 CT 867-868.)

There were "plausible alternatives" to defense counsel's presentation of Mr. Mai's statement that death was the appropriate penalty in this case. As more fully discussed in Argument V, *post*, which is incorporated by reference herein, while the court and counsel were certainly correct that Mr. Mai had the right to testify (8 RT1301; see also 7 RT 1376), they were absolutely incorrect that he had the "right" to "testify" that death was the appropriate penalty in this case. (8 RT 1401; see also 7 RT 1376.)

The right to testify is *not* absolute but rather encompasses only "the right to present *relevant* testimony." (*Rock v. Arkansas* (1987) 483 U.S. 44,

51-53, 55, italics added; see also, e.g., *People v. Lancaster* (2007) 41 Cal.4th 50, 101-102 [trial court properly precluded defendant from testifying to irrelevant matter at penalty phase without violating his constitutional right to testify]; *People v. Alcala* (1992) 4 Cal.4th 742, 806-807 [same].) This Court and the United States Supreme Court have consistently condemned witness opinion testimony that death is the appropriate punishment, as well as most testimony that life is the appropriate punishment, as constitutionally *irrelevant* and inadmissible at the penalty phase of a capital trial. (*Booth v. Maryland* (1987) 482 U.S. 496, 502-503; *People v. Smith* (2005) 30 Cal.4th 581, 622-62, and authorities cited therein; *People v. Danielson* (1992) 3 Cal.4th 691, 715 ["a defendant's opinion regarding the appropriate penalty the jury should impose usually would be irrelevant to the jury's penalty decision"].)

Thus, objecting to Mr. Mai's testimony as irrelevant and inadmissible (see, e.g., *United States v. Pierce* (5th Cir. 1992) 959 F.2d 1297, 1304 & fn. 13 [rejecting argument that defense counsel's refusal to allow client to testify to irrelevant matter amounted to ineffective assistance]) or, at the very least, refusing to *join* in his request (see, e.g., *People v. Klvana* (1993) 11 Cal.App.4th 1679, 1713-1718 [it was entirely appropriate for defense counsel to refuse to join in defendant's request to testify to certain matters on the ground that it was against counsel's advice to testify because it would not be in client's best interest and his testimony could contradict defense witnesses, which resulted in trial court's refusal to allow testimony]) were "plausible alternatives" to the course defense counsel chose.

Similarly, there were "plausible" alternatives to counsel's decision to withhold any argument in favor of sparing Mr. Mai's life. While it is true

that defense counsel's own choices left them little to argue, they could have made a simple plea of mercy for their client's life "grounded primarily on notions of humanity, moral conscience, mercy and forgiveness," and pointed to his acceptance of responsibility for the crime. (*Campbell v. Kincheloe* (9th Cir. 1987) 829 F.3d 1453, 1460; see, e.g., *Darden v. Wainwright* (1986) 477 U.S. 168, 186-187 [where no mitigation was presented, counsel reasonably made simple plea for mercy].)

It is also true that Mr. Mai threatened to "act out" if his counsel presented closing argument pleading for his life. (RT 1399-1400.) It is not true, however, that the court and counsel had to be held hostage to that threat. Indeed, the court had removed Mr. Mai from the courtroom on prior occasions for his disturbances and had repeatedly threatened to do so if he disrupted further proceedings. (See, e.g., 2 RT 345, 349; 6 RT 1082-1083; 7 RT 1331.) No doubt if Mr. Mai had threatened to disrupt the prosecutor's plea for his *death,* the court would have made good on its promise to remove him from the courtroom. (See, e.g., *Illinois v. Allen* (1970) 397 U.S. 337, 343 [defendant's disruptive behavior can waive his constitutional right to be personally present during trial]; accord *People v. Majors* (1998) 18 Cal.4th 385, 413-415, and authorities cited therein [trial court may order removal of capital defendant from penalty phase based on his threats to disrupt the proceedings].) It is profoundly troubling that the court declined to do so when Mr. Mai threatened to disrupt a plea for his very *life*. In any event, the issue here is whether *defense counsel* had plausible alternatives to withholding a plea for their client's life in the face of Mr. Mai's threat to "act out" and the answer is clearly yes. (*Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1087-1088; see also *State v. Morton* (N.J. 1998) 715 A.2d 228, 255, 258-259 [where capital defendant opposed presentation of mitigating

evidence and "threatened to react in a disorderly and violent fashion to the presentation of mitigating evidence," it was within counsel's authority to request client's absence from courtroom during presentation of mitigation]; *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 961 [court removed capital murder defendant after defense counsel notified the court that defendant had threatened to disrupt reading of guilt phase verdict with a statement that "will absolutely kill him, literally and figuratively"].)

4. Conclusion

In sum, in expressing a desire for execution, Mr. Mai was not necessarily an unusual capital client. It is not uncommon for capital murder defendants insist that they want to be executed and therefore the law and ethical cannons provide guidelines for attorneys in how to respond to such clients. What was unusual was defense counsel's response to Mr. Mai's expressed desire to be executed.

Despite their profound misgivings regarding Mr. Mai's competence to make such a decision, both direct and circumstantial evidence demonstrate that defense counsel discarded the "plausible alternatives" of: (1) moving for the initiation of competency proceedings; (2) investigating evidence that was potentially vital not only as mitigation, but also as bearing upon Mr. Mai's ability to make a competent, rational and fully informed decision to effectively stipulate to a death verdict; (3) making any meaningful attempt to persuade Mr. Mai to fight for his life in favor of giving him misleading and inappropriate advice that there was no defense to the sole special circumstance rendering him eligible for the death penalty, that a death verdict was virtually a foregone conclusion no matter what evidence they might unearth and offer, and that his decision to submit to execution was the "right" and admirable "thing to do;" and, ultimately, (4)

overriding their questionably competent client's death wish by presenting a penalty phase defense with mitigating evidence in favor of effectively stipulating to a death verdict.

Furthermore, while Mr. Mai's defense counsel may not have been *required* to override his instructions to effectively stipulate to the death penalty, they certainly had the *power* to pursue the "plausible alternative" of fighting for his life by presenting a penalty phase defense with mitigating evidence. For all of the reasons discussed in Parts C and G-1, that "plausible alternative" was "inherently in conflict" with defense counsel's personal interests to avoid an adversarial penalty phase trial that would pose severe risks to their own liberty, livelihood, and reputation and could create insurmountable ethical dilemmas. Given the serious conflicts under which Mr. Mai's defense counsel labored, combined with their consistently expressed doubts over Mr. Mai's ability to make rational life and death decisions, this Court cannot be confident that Messrs. Peters and O'Connell's highly unusual decision to accede in their client's death wish was the *sole* result of their disinterested, independent professional judgment, and not influenced by their instinctive desire for self-preservation. (See W. White, *Defendants Who Elect Execution* (1987) 48 Univ. Pitt. L. Rev. 853, 861 [among interviewed capital defense attorneys, some acknowledged the ethical dilemma posed when client wants death penalty, but "not one indicated that he could imagine a case in which he would voluntarily allow a capital defendant to submit to execution."].) The record provides ample basis from which to conclude that counsel's conflicting interests influenced, and thus adversely affected, their performance and they thereby labored under "actual conflicts" of interest in violation of the state and federal constitutions. (Part E-1, *ante*, and

authorities cited therein).

H. The Judgment Must Be Reversed

For over 20 years, it was fairly well accepted under both state and federal law that when *any* conflict of interest adversely affected defense counsel's performance, it amounted to an actual conflict in violation of the state and federal constitutions, prejudice was presumed (the so-called "*Sullivan* limited presumption"), and the judgment could not stand. (See, e.g., *Mickens v. Taylor*, *supra*, 535 U.S. at p. 174, and authorities cited therein [noting federal appellate courts had largely accepted that the *Sullivan* limited presumption applied to "all kinds of alleged attorney ethical conflicts"]; *People v. Hardy*, *supra*, 2 Cal.4th at pp. 135-136; *People v. Bonin*, *supra,* 47 Cal.3d at p. 843.) As the United States Supreme Court explained in *Sullivan*, presuming prejudice when a conflict adversely affects counsel's performance reflects the Court's "refus[al] 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.'" (*Cuyler v. Sullivan*, 446 U.S. at p. 349, quoting *Glasser v. United States*, *supra*, at p. 76.) Moreover, this "fairly rigid rule of presumed prejudice for [actual] conflicts of interest" is reasonable given the duties of counsel to avoid, and the trial court to prevent, conflicts of interest that adversely affect counsel's performance. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692; see also Part H, *post*, and authorities cited therein.)

A series of recent decisions, however, has raised a question as to whether all "actual conflicts" triggers the *Sullivan* limited presumption of prejudice, whether that presumption is limited to certain types of actual conflicts and, if so, what types. As will be demonstrated below, where, as

here, a plausible allegation has been made that an attorney is complicit in his client's crimes, or may be subject to investigation by the same agency that is prosecuting the client, and the conflict adversely affects counsel's performance throughout the proceedings – from the pre-trial and plea through the sentencing stages – the *Sullivan* limited presumption of prejudice is warranted.

1. *Mickens v. Taylor* and this Court's Interpretation and Application of the Federal Constitutional Standard in *People v. Rundle*

In *Mickens v. Taylor*, *supra*, 535 U.S. 162, the question before the high court was whether a trial court's failure to inquire into a potential conflict of interest, of which the trial court was or should have been aware but to which defense counsel made no objection, requires automatic reversal without the need to demonstrate that the conflict adversely affected counsel's performance. (*Id.* at pp. 165-166, 172-175.) In answering this question, a five-justice majority of the Court observed that generally a defendant must prove that his attorney's deficient performance prejudiced the outcome of the defendant's case under the *Strickland* standard in order to make out a Sixth Amendment violation warranting relief. (*Id.* at p. 166.)

However, there is an exception to that rule, and prejudice is presumed, where "assistance of counsel has been denied entirely or during a critical stage of the proceeding" or in "circumstances of that magnitude. . . . We have held in several cases that 'circumstances of that magnitude' may . . . arise when the defendant's attorney actively represented conflicting interests." (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 166.) In order to demonstrate that an actual conflict of interest violated the defendant's Sixth Amendment right, the defendant must "'show[] that a conflict of interest *actually affected the adequacy of his representation*,'" in which case "'he

need not demonstrate prejudice in order to obtain relief.'" (*Id.* at p. 171, quoting from *Cuyler v. Sullivan*, *supra*, 466 U.S. at pp. 349-350, emphasis in original.) In other words, for a conflict of interest to rise to a Sixth Amendment violation, it "requir[es] a showing of defective performance, but not . . . in addition (as *Strickland* does in other ineffectiveness-of-counsel cases), a showing of probable effect upon the outcome of trial." (*Id.* at p. 174.) Hence, based on the majority's interpretation of the high court's precedent, it rejected a rule of automatic reversal that does not require a showing of adverse effect for the failure to inquire into a potential conflict of interest. (*Id.* at pp. 173-174.)

As the *Mickens* majority itself emphasized, the legal issue before the court did not present the additional question of whether an actual conflict that adversely affects counsel's performance always triggers the *Sullivan* limited presumption of prejudice, whether that presumption is confined to certain kinds of actual conflicts and, if so, what kinds.[82] (*Mickens v. Taylor*, *supra*, 535 U.S. at pp. 174-175.) Nevertheless, the bare five-justice majority embarked on a "foray into an issue that [wa]s not implicated by the question presented." (*Id.* at p. 185 & fn. 8, dis. opn. of Stevens, J.)

In dicta, the majority observed that the potential conflict at issue in that case arose in the successive representation context and had been presented and argued on the assumption that if the trial court's failure to inquire into the potential conflict did not require automatic reversal, then the *Sullivan* limited presumption – mandating reversal upon a showing of adverse effect – would apply. (*Mickens v. Taylor*, *supra*, 535 U.S. at p.

---

[82] Throughout this argument, Mr. Mai's use of the term "actual conflict" refers to the United States Supreme Court's definition of that term – i.e., a conflict that adversely affects counsel's performance.

174.) However, the majority further observed:

> the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application. "[U]ntil," it said, "a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." [*Sullivan, supra,*] 446 U.S., at 350, 100 S.Ct. 1708). Both *Sullivan* itself, see *id.*, at 348-349, 100 S.Ct. 1708, and *Holloway*, see 435 U.S., at 490-491, 98 S.Ct. 1173, stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. [Citation]. Not all attorney conflicts present comparable difficulties.

(*Mickens v. Taylor*, *supra*, at p. 175.)

At bottom, the majority explained, "[t]he purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. [Citation.]" (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 176.) As to the kind of actual conflicts for which the prophylaxis is needed, the majority's dicta concluded that it is "an open question" under the precedent of that Court. (*Ibid.*)

In *People v. Rundle*, *supra*, 43 Cal.4th 76, this Court considered the effect of *Mickens* on the federal constitutional standard applicable to conflicts of interest. It focused on the *Mickens* dicta that the *Sullivan* limited presumption is a prophylactic measure that should apply to "'situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right.' (*Mickens*, *supra*, at p. 176.)" (*People v. Rundle*, *supra*, 43 Cal.4th at p. 173.) Construing the *Mickens* dicta, along with the *holdings* of other United States Supreme Court decisions on the subject, this Court reasoned that the presumption

applies to the complete denial of counsel and "to circumstances of that magnitude" when an attorney "actively represented conflicting interests" (*People v. Rundle, supra,* 43 Cal.4th at p. 169, quoting from *Mickens, supra*, at p. 166) and "the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel, . . . [that] the presumption [must] be applied in order to safeguard the defendant's fundamental right to the effective assistance of counsel under the Sixth Amendment." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 173, citing *Mickens v. Taylor*, *supra*, 535 U.S. at p. 175; see also *Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272 [*Sullivan* limited presumption applies to actual conflict that adversely affects counsel's performance in representing defendants while being paid by third party whose interests conflict with those of defendants]; *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 490 [it is appropriate to presume prejudice from conflict due to difficulty in assessing harm, which consists not only of what counsel does, but of "what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to pretrial plea negotiations and in the sentencing process"].)

Applying that standard to the conflict of interest at issue in that case, this Court emphasized that defense counsel only labored under a conflict with respect to a discrete jury misconduct issue, as opposed to his representation as a whole, and the conflict's adverse effect was similarly limited to that discrete issue. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 173.) Hence, it did not present the "high probability of prejudice" or corresponding "difficulty of proving that prejudice" (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 175) that inheres in conflicts for which the *Sullivan*

limited presumption is necessary to safeguard the defendant's Sixth Amendment rights. (*People v. Rundle*, *supra*, at p. 173; cf. *Ellis v. United States* (1st Cir. 2002) 313 F.3d 636, 643 [Sixth Amendment right to counsel violations that fall within narrow category of cases to which presumption of prejudice is applied are those that are "pervasive in nature" while harmless error analysis generally applies to "short-term" or "localized" violations].)

Thus, this Court in *Rundle* did *not* hold that the *Mickens* dicta changed the federal constitutional standard to confine the *Sullivan* limited presumption to actual conflicts involving multiple concurrent representation nor that it would be appropriate to limit the presumption to such conflicts under *Mickens*. Instead, the *Rundle* decision focused its interpretation of United States Supreme Court precedent not on a particular category of conflict but rather on where it rightfully belonged: whether an actual conflict is sufficiently pervasive or severe that its high probability of prejudice and the corresponding difficulty in proving prejudice warrants the *Sullivan* limited presumption in order to safeguard the defendant's Sixth Amendment rights. (See, e.g., *Mickens v. Taylor*, *supra*, 535 U.S. at pp. 174-176; *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 348-349; *Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 490-491; *Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272.) This interpretation of the federal constitutional standard is consistent with United States Supreme Court precedent, as well as other courts' interpretation of the standard post-*Mickens*. (See, e.g., *Rubin v. Gee* (4th Cir. 2002) 292 F.3d 396, 401-402 & fn. 2; *United States v. Mota-Santana* (1st Cir. 2004) 391 F.3d 42, 46; *Alberni v. McDaniel* (9th Cir. 2006) 458 F.3d 860, 873-874; *Acosta v. State* (Tex.Crim.App. 2007) 233 S.W.3d 349, 353-355; *People v. Hernandez* (Ill. 2008) 238 Ill.2d 134, 305; *People v. Miera* (Colo. App. 2008) 183 P.3d 672, 676-677; see also

Tueros v. Greiner (2nd Cir. 2003) 343 F.3d 587 [under AEDPA, "for 'clearly established Federal law' . . . we must look to *Sullivan*, not to the *Mickens* postscript" which was "dicta"; neither *Sullivan* nor *Wood v. Georgia* expressly limits presumption to multiple concurrent representation].)

2. *People v. Doolin* And Its Adoption, Interpretation, and Application of the Federal Constitutional Standard

Only eight months after issuing its decision in *People v. Rundle*, *supra*, this Court issued its decision in *People v. Doolin*, *supra*, 45 Cal.4th 390. In *Doolin*, this Court held that conflict of interest claims under the state Constitution are to be assessed under the same standard as conflict of interest claims under the federal Constitution and disapproved its prior decisions to the extent that they held otherwise. (*Id.* at p. 421.) However, its interpretation of the federal constitutional standard differed dramatically from its interpretation of that standard in *Rundle*, *supra*.

In *Doolin*, the defendant's attorney was appointed under a fee contract whereby he was permitted to save for himself any unspent funds allocated for experts and other defense services. The defendant appealed his murder conviction and death sentence on the ground that the fee contract created a conflict of interest that adversely affected his counsel's performance and thus violated his state and federal constitutional rights to the effective assistance of conflict-free counsel. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 411-416.)

In assessing that claim, a majority of this Court "harmonize[d] California conflict of interest jurisprudence with that of the United States Supreme Court[,] adopt[ed] the standard set out in *Mickens,*" and disapproved of this Court's "earlier decisions to the extent that they can be

read to hold that attorney conflict claims under the California constitution are to be analyzed under a standard different from that articulated by the United States Supreme Court." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 421.) Thus, in order to establish a violation of the state and federal constitutional guarantees to the effective assistance of conflict-free counsel, the defendant must establish that his or her counsel labored under an "actual conflict" – i.e., a conflict of interest that adversely affected his or her performance. (*Id.* at pp. 417-418.)

Applying that standard in *Doolin*, this Court held that the defendant had failed even to demonstrate that the conflict of interest adversely affected, or rendered deficient, counsel's performance in any respect. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 422-429.) Nevertheless, "in an abundance of caution," the Court "assume[d] without deciding" that the conflict adversely affected counsel's penalty phase performance in two ways: (1) failing to obtain a social study report; and (2) failing to adequately investigate potential character witnesses. (*Id.* at pp. 427-428.) The question then became whether the *Sullivan* limited presumption or the *Strickland* standard applied.

With respect to application of the *Sullivan* limited presumption, this Court's interpretation of the federal constitutional standard under United States Supreme Court precedent was identical to its interpretation in *Rundle*: while the limited "presumption of prejudice need not attach to every conflict" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 428), it is appropriate when "'defense counsel actively represented conflicting interests.' (*Mickens*, *supra*, 535 U.S. at p. 166)" (*id.* at p. 418), and "the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary

assessments of the detrimental effects of deficient performance by defense counsel." (*Id.* at p. 428; see also *id.* at p. 418, citing *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348-349, *Holloway v. Arkansas* (1978) 435 U.S. 475, 490-491, and *People v. Rundle*, *supra*, 43 Cal.4th at p. 173.) Thus, as in *Rundle*, in *Doolin*, this Court recognized that the United States Supreme Court has not limited application of the *Sullivan* limited presumption to actual conflicts involving multiple concurrent representation. (See also *Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272 [*Sullivan* limited presumption applies to actual conflict that adversely affects counsel's performance in representing defendants while being paid by third party whose interests conflict with those of defendants].)

Nevertheless, in an abrupt departure from this Court's interpretation of the federal constitutional standard in *Rundle* only months earlier, the *Doolin* decision followed the bright-line rule of the Fifth Circuit Court of Appeals' closely divided decision in *Beets v. Scott* (5th Cir. 1995) 65 F.3d 1258, confining the *Sullivan* limited presumption of prejudice to actual conflicts in "multiple concurrent representation" situations. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 428-429.) As to all other actual conflicts, the defendant must prove prejudice under traditional *Strickland* analysis. (*Ibid.*)

Applying that bright-line rule in *Doolin*, the majority held that the *Strickland* standard applied to the assumed actual conflict arising from the fee arrangement, requiring the defendant to prove prejudice from his counsel's failures to obtain a social study report and adequately investigate potential character witnesses. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 429-430.) Because the record did not reveal what evidence a social study or adequate investigation would have yielded, the defendant could not prove

on direct appeal that absent the conflict the result of the proceeding would have been different under the *Strickland* standard. (*Ibid.*)

As a preliminary matter, while this Court in *Doolin* cited the majority's decision in *Beets v. Scott*, *supra*, 65 F.3d 1258, in support of such a rule, it read the *Beets* decision too narrowly. The majority in *Beets* did not hold that the *Sullivan* limited presumption is confined to actual conflicts involving "multiple *concurrent* representation" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 428), but rather explicitly stated that the presumption applies to actual conflicts in *both* the multiple concurrent representation *and* multiple serial or successive representation contexts (*Beets v. Scott*, *supra*, 65 F.3d at p. 1265 & fn. 8; accord *United States v. Infante* (5th Cir. 2005) 404 F.3d 376, 392 & fn. 12).

Indeed, only seven months after issuing its decision in *Doolin*, this Court implicitly recognized that the *Sullivan* limited presumption is *not* strictly confined to actual conflicts in the multiple concurrent representation context, but may also be applied to actual conflicts in the multiple serial representation context. (*People v. Friend* (2009) 47 Cal.4th 1, 46-47.) In *Friend,* the Court concluded that counsel labored under an actual conflict arising from his prior representation of a prosecution witness, which adversely affected his performance in failing to impeach that witness with evidence relating to the prior representation, although counsel did cross-examine the witness and impeach him with other evidence. (*Id.* at pp. 46-47.) While this Court declined to apply the *Sullivan* limited presumption, it did not do so based on any bright-line rule that the presumption only applies to multiple concurrent representation conflicts, as this Court had suggested in *Doolin*. Instead, this Court declined to apply the presumption under the same analysis it had employed in *People v. Rundle*, *supra*:

because the conflict adversely affected counsel's performance only with respect to a discrete and limited issue, it did not present the high "'probability of prejudice and corresponding difficulty in demonstrating such prejudice'" for which the *Sullivan* limited presumption is necessary to safeguard the defendant's Sixth Amendment rights. (*People v. Friend*, *supra*, at pp. 46-47, quoting *People v. Rundle*, *supra*, 43 Cal.4th at p. 173; accord, *Mickens v. Taylor*, *supra*, 535 U.S. at p. 175.)

Thus, while *Friend* signals this Court's implicit recognition that the *Sullivan* limited presumption may be applied to actual conflicts in both the multiple concurrent *and* multiple serial representation contexts, it should decline to follow or adopt *Beets*' rigid, bright-line rule *confining* the *Sullivan* limited presumption to such conflicts for several reasons. First, approving or disapproving such a bright-line rule was unnecessary in *Doolin*. Since this Court held that Mr. Doolin had not even established an actual conflict (i.e., that the conflict of interest adversely affected counsel's performance), it was not necessary to reach the question of what standard of prejudice applied. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 422-429.) And even accepting the Court's "assum[ption] without deciding" that the conflict did adversely affect two discrete parts of defense counsel's penalty phase performance "in an abundance of caution" (*Id.* at pp. 427-428), the question of what standard of prejudice applied was arguably resolved under its interpretation of the United States Supreme Court's jurisprudence on federal constitutional standard in *Rundle*, *Doolin* itself, and later in *Friend*. That is, the *Sullivan* limited presumption applies when "'defense counsel actively represented conflicting interests' (*Mickens*, *supra*, 535 U.S. at p. 166)" (*People v. Doolin*, *supra*, 45 Cal.4th p. 418), and "the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice

are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel." (*Id.* p. 428; accord *People v. Rundle*, *supra*, 43 Cal.4th at p. 173; *People v. Friend*, *supra*, 47 Cal.4th at pp. 46-47.) Consistent with its application of that standard in *Rundle* and *Friend*, because a conflict arising from a fee contract is not typically the kind of conflict that threatens defense counsel's representation as a whole and because the conflict in *Doolin* in fact arguably affected only two discrete parts of defense counsel's performance, the conflict in *Doolin* did not warrant the *Sullivan* prophylaxis under that standard.

Furthermore, as demonstrated below, while the bright-line rule of *Beets* may be enticing for its ease of application, it is artificial, flawed, and inconsistent with United States Supreme Court precedent and with the very purpose of the *Sullivan* prophylaxis. Hence, this Court should decline to adopt or follow the *Beets* majority's interpretation of the federal constitutional standard and instead continue to adhere to its interpretation of the federal constitutional standard based on the *jurisprudence of the United States Supreme Court*, as stated in *Rundle*, *Friend*, and *Doolin* itself.

3. *Beets v. Scott's* Bright-Line Rule Limiting the *Sullivan* Prophylaxis to Actual Conflicts Arising from Multiple Representation is Flawed and Inconsistent with United States Supreme Court Jurisprudence on the Subject and Indeed with the Very Purpose the Prophylaxis is Intended to Serve

In *Beets v. Scott*, a closely divided Fifth Circuit Court of Appeals concluded that the *Sullivan* limited presumption of prejudice should be confined to actual conflicts in multiple representation cases because it is only in such cases that an attorney has conflicting *ethical* obligations. "In

no other category of conflicts is the risk of prejudice so certain as to justify an automatic presumption." (*Beets v. Scott*, *supra*, 65 F.3d at p. 1271.) No doubt because of the uniquely conflicting ethical obligations involved in multiple representation situations, the *Beets* majority reasoned, the United States Supreme Court had only applied the *Sullivan* limited presumption to such conflicts and therefore it is to such conflicts that the high court's "actively represented conflicting interests" language necessarily refers. (*Id.* at pp. 1266-1267, citing *Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 350.)

However, the *Beets* majority's reading of United States Supreme Court precedent is simply incorrect. As this Court implicitly recognized in *Rundle*, *Doolin*, and *Friend*, the United States Supreme Court has neither explicitly limited the *Sullivan* presumption to actual conflicts in the multiple representation context nor has it only applied the *Sullivan* presumption in that context. To the contrary, and as the *Beets* dissent emphasized, in *Wood v. Georgia*, *supra*, 450 U.S. at pp. 171-172, the United States Supreme Court held that the *Sullivan* limited presumption would apply to an actual conflict arising from an arrangement in which one attorney is paid by a third party with interests that conflict with the defendant/client's. (*Beets v. Scott*, *supra*, 65 F.3d at pp. 1294-1296, dis. opn. of King, J. joined by Politz, Garwood, Smith, and Wiener, JJ.)

The *Beets* majority curiously acknowledged as much, but fleetingly dispatched *Wood* on the ground that it "simply recognized that some third-party fee arrangements can develop into the *functional equivalent* of multiple representation," to which the *Sullivan* limited presumption will apply. (*Beets v. Scott*, *supra*, 65 F.3d at p. 1268, italics added.) But in this context, the "functional equivalent" of multiple representation is just another way of saying that counsel "actively represented conflicting

interests," which might *usually* arise in the multiple representation context, but is not *limited* to that context. In other words, even the *Beets* majority's characterization of *Wood* – i.e., that the *Sullivan* limited presumption applies to actual conflicts arising from multiple representation *and* its "functional equivalent" – is inconsistent with a rigid, bright-line rule confining the *Sullivan* presumption to strict multiple representation situations.

For similar reasons, the *Beets* majority's focus on the conflicting *ethical* obligations counsel faces in multiple representation contexts was flawed. Once again, even when counsel's fees are paid by a third party, his or her ethical obligations are to the client alone, not the third party. (See, e.g., Rules of Prof. Conduct, Rule 3-310, subd. (e)(1); Model Rules of Prof. Conduct (ABA), Rules 1.8, subd. (f) and 1.7, Comment.) Nevertheless, the high court has held that the *Sullivan* limited presumption applies to actual conflicts that arise in that context. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272.)

Moreover, as the *Mickens* majority itself observed, the *Sullivan* limited presumption does not hinge on the violation of one ethical cannon over another. (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 176.) Indeed, it does not even hinge on one category of conflict over another. (See *Burger v. Kemp* (1987) 483 U.S. 776, 783 ["we have never held that the possibility of prejudice that 'inheres in almost every instance of multiple representation' justifies adoption of an inflexible rule that would presume prejudice in all such cases. [Citation.] Rather, we presume prejudice . . . [when] counsel 'represented conflicting interests' and . . . 'an actual conflict of interest adversely affected his . . . performance'"].) Rather, application of the *Sullivan* limited presumption turns on its purpose, which is "to apply

needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." (*Mickens v. Taylor*, *supra*, at p. 176.) While the "needed prophylaxis" might *usually* arise in the multiple representation context, it is not *necessarily* limited to that context.

To be sure, and as this Court emphasized in *Doolin*, even the dissenting opinion in *Beets* acknowledged that not every conflict warrants a presumption of prejudice. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 429.) As the *Beets* dissent observed, *Strickland* is often adequate to assess conflicts of interest that are "frequently or normally encountered in the practice of law." (*Beets v. Scott*, *supra*, 65 F.3d at pp. 1294, 1298, dis. opn. of King, J., joined by Politz, Garwood, Smith, and Wiener, JJ.) For instance, virtually all attorney fee arrangements (such as that at issue in *Doolin*) involve conflicts of interest, the adverse effects of which often go to limited discrete issues under which prejudice *may* be analyzed under *Strickland*, and *should* be analyzed under *Strickland* in order to avoid having the *Sullivan* "exception" swallow the *Strickland* rule. (*Id.* at p. 1297.)

However, the *Beets* dissent also recognized that "there are exceptional conflicts between an attorney's self-interest and his client's interest, stemming from highly particularized and powerfully focused sources, of the sort not normally encountered in law practice, that demand the application of [*Sullivan*]." (*Beets v. Scott*, *supra*, 65 F.3d at pp. 1297-1298, dis. opn. of King, J. joined by Politz, Garwood, Smith, and Wiener, JJ.) One such "exceptional conflict" exists when the attorney is alleged to have been involved "in the allegedly criminal conduct of his client. These circumstances present situations so fraught with the temptation for the

lawyer to sacrifice his client's best interest for his own benefit that they constitute particularly serious threats to the duty of loyalty." (*Id.* at p. 1298, and authorities cited therein.)

Other courts agree. In *Rugiero v. United States* (E.D. Mich. 2004) 330 F.Supp.2d 900, the defendant's attorney was under federal investigation while representing the defendant throughout his federal pre-trial and trial proceedings. (*Id.* at pp. 903-904.) This conflict of interest adversely affected counsel's performance in at least two ways: 1) counsel failed to pursue plea negotiations on behalf of his client because his client's cooperation could expose his own wrongdoing; and 2) counsel pulled his punches in examining a key government witness, from which it could be inferred that he sought to serve his own interests by currying favor with the government. (*Id.* at p. 908.) Thus, the conflict was an actual one and the question was whether the *Strickland* standard or the *Sullivan* limited presumption applied. (*Id.* at pp. 905-906.)

The *Rugiero* court acknowledged the *Mickens* dicta cautioning courts from "unblinkingly" applying the *Sullivan* limited presumption to all actual conflicts of interest because the prophylaxis is not necessary in all contexts. However, the court concluded that the *Sullivan* presumption was necessary in that case:

> The rationale behind [*Sullivan*'s] presumption-of-prejudice rule is (1) the high probability of prejudice arising from the conflict and (2) the difficulty of proving that prejudice. See *Mickens*, 535 U.S. at 175, 122 S.Ct. 1237. These two elements are present here. First, when an attorney is the subject of a criminal investigation by the same prosecutor who is prosecuting the attorney's client, there is a high probability of prejudice to the client as the result of the attorney's obvious self-serving bias in protecting his own liberty interests and financial interests. The liberty concern at

> issue is avoiding or minimizing imprisonment. The financial interests include avoiding disbarment and avoiding termination of the attorney's current representation of the client in question. [footnote omitted] The high probability of prejudice in this situation distinguishes this personal interest conflict from the weaker personal interest conflicts listed in the dicta in *Mickens*, e.g., book deals. See *Mickens*, 535 U.S. at 174-75, 122 S.Ct. 1237. Second, such prejudice is difficult to prove because the client could be harmed by the attorney's actions or inactions that are known only to the attorney. In short, the personal interest conflict at issue presents comparable difficulties to situations involving concurrent representation conflicts. See *Mickens*, 535 U.S. at 175, 122 S.Ct. 1237.

(*Rugiero v. United States*, *supra*, 330 F.Supp.2d at pp. 905-906; accord *State v. Cottle* (N.J. 2008) 946 A.2d 550, 558-562 ["the same concerns about divided loyalties" that exist in actual conflicts arising from multiple representation "are present here" where counsel was under indictment by same prosecutor's office that was prosecuting his client, a conflict that adversely affected counsel's performance in providing, inter alia, a "perfunctory opening statement" along with other "pre-trial and trial lapses," to which the presumption of prejudice was warranted even under *Mickens*]; see also *Stenson v. Lambert* (9th Cir. 2007) 504 F.3d 873, 886 [characterizing actual conflict where defense counsel is alleged to have committed crimes related to defendant's crimes as active representation of conflicting interests under *Mickens* and *Sullivan*].)

While there is a dearth of case law post-*Mickens* regarding the appropriate standard to apply to an actual conflict arising from allegations that defense counsel was involved in his client's crimes due to the exceptional and extraordinary nature of such conflicts – as the *Beets* dissent recognized – some pre-*Mickens* decisions are nevertheless instructive. In

United States v. Fulton (2nd Cir. 1993) 5 F.3d 605, for instance, the Second Circuit Court of Appeals considered whether such a conflict is even waivable. The court acknowledged that while potential conflicts from multiple concurrent representation may be waived:

> The danger arising from representation by a counsel who has been implicated in related criminal activity by a government witness is of a different order of magnitude, however. Advice as well as advocacy is permeated by counsel's self-interest, and no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation.

(*Fulton, supra*, 5 F.3d at p. 613.) "Given the breadth and depth of this type of conflict, we are unable to see how a meaningful waiver can be obtained." (*Ibid.*; accord, e.g., *United States v. Perez* (2nd Cir. 2003) 325 F.3d 115, 126-127 [citing *Fulton* and characterizing joint representation of co-defendants as "lesser conflict" as compared to one arising from an accusation by defendant's co-conspirator that defendant's counsel was also involved in the conspiracy].)

Indeed, pre-*Mickens*, the Second Circuit held that the potential for, and difficulty in demonstrating, prejudice arising from a conflict based on allegations that counsel was involved in his client's crimes (or is under investigation by the same entity prosecuting his client), is even *greater* than in the multiple representation context and thus warranted a rule of *per se* reversal, even without inquiry into adverse effect. (See, e.g.,*United States v. Fulton, supra*, 5 F.3d at p. 611; *United Sates v. Cancilla, supra*, 725 F.2d at p. 867; 3 Lafave, *Criminal Procedure*, § 11.9(d) at pp. 939-940 (3d ed. 2007) [given high possibility of, but difficulty in proving, prejudice from such conflicts, "much can be said for adopting in such cases, as the Second Circuit has done, a standard of per se ineffectiveness"].) While such a per

se rule may be inconsistent with *Mickens*, the rationale underlying it nevertheless demonstrates that it is not *only* in the multiple representation context that "the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel, . . . [that] the presumption [must] be applied in order to safeguard the defendant's fundamental right to the effective assistance of counsel under the Sixth Amendment." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 173, citing *Mickens v. Taylor*, *supra*, 535 U.S. at p. 175; accord *People v. Doolin*, *supra*, 45 Cal.4th at pp. 418, 428.)

As the majority in *Mickens* emphasized, "[b]oth *Sullivan* itself [citation] and *Holloway* [citation] stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 175.) As the *Holloway* Court explained, the high probability of, and difficulty in demonstrating, prejudice from multiple concurrent representation conflicts stems from the danger that the conflict could impact every aspect of counsel's representation:

> . . . . the evil-it bears repeating-is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error [under such circumstances] would require, unlike most cases, unguided

speculation.

(*Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 490-491, cited in *Mickens v. Taylor*, *supra*, 535 U.S. at p. 176.)

It is equally true that "counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded, but ostensibly plausible accusation" that he or she was involved in his or her client's crimes, can "affect virtually every aspect of his or her representation of the defendant." (*United States v. Fulton*, *supra*, 5 F.3d at p. 613; accord, e.g., *Mannhalt v. Reed*, *supra*, 847 F.2d at p. 583 ["when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great" at virtually every stage of the proceedings].) Indeed, in this case, the conflict *did* influence "virtually every aspect" of defense counsel's representation of Mr. Mai. Hence, just as in the multiple representation context, "the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel, . . . [that] the presumption [must] be applied in order to safeguard [Mr. Mai's] fundamental right to the effective assistance of counsel under the Sixth Amendment." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 173, citing *Mickens v. Taylor*, *supra*, 535 U.S. at p. 175; accord *People* . *Doolin*, *supra*, 45 Cal.4th at pp. 418, 428.)

4. The Possibility of Prejudice and the Corresponding Difficulty in Demonstrating Such Prejudice Are Sufficiently Great Compared to Other More Customary Assessments of the Detrimental Effects of Deficient Performance by Defense Counsel, That the *Sullivan* Limited Presumption Must Be Applied in Order to Safeguard Mr. Mai's Fundamental Right to the Effective Assistance of Counsel under the Sixth Amendment and Article I, section 15 of the California Constitution

As demonstrated in Parts D through G, *ante*, the conflict of interest arising from Daniel Watkins's conduct and allegations against Messrs. Peters and O'Connell adversely affected their representation of Mr. Mai at virtually every stage of the proceedings, from the conflict hearing itself, to the advice they gave Mr. Mai regarding the relative strengths and weaknesses of the case, plea negotiations, entry of the slow plea, the question of Mr. Mai's competency to stand trial, and through the penalty phase in which they effectively stipulated to a death verdict. In such a case, the risk of prejudice and the corresponding difficulty in proving it are just as great – if not more so – as they are in the multiple concurrent representation context. (See, e.g., *Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 490-491, cited in *Mickens v. Taylor*, *supra*, 535 U.S. at p. 175; accord *Strickland v. Washington*, *supra*, 466 U.S. at p. 692; *Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 349.) In other words, while it may be true that "[n]ot all attorney conflicts present comparable difficulties" to those presented in the multiple representation context (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 175), when, as here, the nature of the conflict is such as to pose a "high possibility of prejudice" and the conflict actually *does* adversely affect virtually every aspect of counsel's performance, it does present "comparable difficulties" and thus warrants application of the *Sullivan*

prophylaxis.

Finally, application of the *Sullivan* limited presumption to an actual conflict that adversely influences counsel's performance from the beginning of trial through the end, and results in guilty pleas and an effective stipulation to a death sentence, is entirely consistent with United States Supreme Court jurisprudence in which prejudice is *completely* presumed when defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing" and the trial process "loses its character as a confrontation between adversaries." (*United States v. Cronic*, *supra*, 466 U.S. at pp. 656-659 [prejudice is presumed under these circumstances because "there has been a denial of Sixth Amendment rights that makes the adversarial process itself unreliable"]; see also *Bell v. Cone*, *supra*, 535 U.S. at pp. 695-697 [where counsel's performance is deficient with respect to discrete issues or points, *Strickland* standard is appropriate, but where counsel completely fails to submit prosecution's case to any meaningful adversarial testing, prejudice is presumed and a Sixth Amendment violation is established]; accord *Turrentine v. Mullen* (2004) 390 F.3d 1181, 1207-1208 [complete or entire failure to test state's case resulting in constructive denial of counsel under *Bell* and *Cronic* exists when "'the evidence overwhelmingly established that (the) attorney abandoned the required duty of loyalty to his client,' and where counsel 'acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case"].)[83]

---

[83] Of course, the *Sullivan* limited presumption is "is not quite the per se rule of prejudice that exists" under the *Bell* and *Cronic* exceptions to the *Strickland* standard since "prejudice is presumed only if the defendant demonstrates that 'counsel actively represented conflicting interests' and

(continued...)

For all of these reasons, this Court should resist the seduction of adopting a rigid, bright-line rule that may be easy to apply, but which only provides false comfort. Confining the *Sullivan* limited presumption to actual conflicts arising from multiple representation is inconsistent with the purpose of *Sullivan*, with United States Supreme Court jurisprudence, and with this Court's own expressed concerns about the need to "closely guard" a defendant's right to the effective assistance of counsel when counsel labors under an actual conflict (*People v. Rundle*, *supra*, 43 Cal.4th at p. 175, and authorities cited therein). Instead, the Court should continue to adhere to its interpretation of the federal constitutional standard under the United States Supreme Court's jurisprudence: the *Sullivan* limited presumption applies when defense counsel "'actively represented conflicting interests' (*Mickens*, *supra*, 535 U.S. at p.166)" (*People v. Doolin*, *supra*, 45 Cal.4th p. 418) and "the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel." (*Id.* at p. 428; accord *People v. Rundle*, *supra*, 43 Cal.4th at p. 173; *People v. Friend*, *supra*, 47 Cal.4th at pp. 46-47.) Under that standard, the *Sullivan* limited presumption is warranted here and the violations of Mr. Mai's state and federal

---

[83](...continued)
that 'an actual conflict of interest adversely affected his lawyer's performance.'" (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692.) Nevertheless, the cases are analogous in that they stand for the general proposition that where, as here, counsel fails to subject the state's case to meaningful adversarial testing – as opposed to garden variety ineffective assistance of counsel claims going to discrete parts of counsel's performance – the *Strickland* standard is inadequate to safeguard a defendant's Sixth Amendment rights.

constitutional rights to the effective assistance of conflict-free counsel demand reversal.

5. Alternatively, Should this Court Adopt *Beets v. Scott*'s Interpretation of the Federal Constitutional Standard, it Should Do So in its Entirety and Hold That the *Sullivan* Limited Presumption Applies to Actual Conflicts Arising from Multiple Concurrent and Serial Representation and its "Functional Equivalent" And Therefore Applies Here

In the alternative, should this Court continue to "share the view" of the *Beets* majority (*People v. Doolin*, *supra*, 45 Cal.4th at p. 428), then it should adopt that "view" in its entirety. That is, the *Sullivan* limited presumption applies to actual conflicts arising in the multiple concurrent and serial representation contexts *and* – as in *Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272 – their "functional equivalent[s]." (*Beets v. Scott*, *supra*, 65 F.3d at p. 1268; see also, e.g., *Tueros v. Greiner*, *supra*, 343 F.3d at pp. 593-594 & fn. 4 [even if *Sullivan* presumption were limited to "multiple representation," when counsel labors under an actual conflict in which he or she actively represents conflicting interests, counsel "*effectively* engage[s] in multiple representation" and presumption applies].) This is just such a case.

As they represented Mr. Mai throughout the pre-trial and guilt and penalty phase proceedings, Messrs. Peters and O'Connell simultaneously and actively represented *themselves* as unindicted co-conspirators and their own interests in avoiding criminal investigation, charges, indictment, and/or serious ethical consequences arising from the conspiracy involving their client, Mr. Mai, and their agent and investigator, Mr. Watkins and Watkins's allegations that they were equally culpable. (Cf. *Lockhart v. Terhune* (9th Cir. 2001) 250 F.3d 1223, 1231-1232 [counsel labored under

an actual conflict of interest when he represented defendant and another client who was implicated in, but not indicted for, crime alleged against defendant; having established adverse effect, prejudice presumed under *Sullivan*]; *United States v. Allen* (9th Cir. 1987) 831 F.2d 1487, 1497-1498 [same, where attorney had ongoing attorney-client relationship with unindicted persons implicated in defendant's crimes].) This was the "functional equivalent" of multiple representation. Hence, even under *Beets*, and consistent with the principles discussed above, the *Sullivan* limited presumption applies to the actual conflict established here and demands reversal of the judgment.

Finally, should this Court adopt a rigid, bright-line rule limiting the *Sullivan* presumption to actual conflicts arising from multiple representation and therefore apply the *Strickland* standard here, reversal is nevertheless required. This is so for the reasons discussed in Argument III, *post*, which are incorporated by reference herein.

I. Conclusion

The question of whether to acquiesce in a client's purported death wish by consenting to an unconditional plea to a capital offense when the defendant is not – or may not be – even eligible for the death penalty, presenting no penalty phase defense at all, and indeed taking affirmative steps to effectively join in the state's case for death presents a host of complex legal, moral, and ethical dilemmas for any attorney. (See, e.g., M. Treuthart, A. Branstad, and M. Kite, *Mitigation Evidence and Capital Cases in Washington: Proposals for Change* (2002) 26 Seattle Univ. L. Rev. 241, 278-281; C. Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering* (2000) 25 Law & Soc. Inquiry 849; C. Chandler, *Voluntary Executions* (1998) 50 Stan. L. Rev.

1897, 1913.) Resolving these dilemmas is an exquisitely delicate matter.

Whether an attorney should *ever* accede and assist in a competent defendant's death wish may be open to debate. But whether an attorney may do so when, as here, the attorney has both compelling personal interests that can be served by acceding in his or her client's wish *and* clearly expressed doubts regarding the client's competency to make such a decision, is not. A death verdict that is the product of an attorney's resolution of the dilemma in favor of acceding in his or her questionably competent client's death wish and against attempting to save the client's life, when that resolution may in any way have been influenced by the attorney's instinctive desire for self-preservation, is constitutionally, morally, and ethically intolerable. The judgment cannot stand.

//

//

II

THE TRIAL COURT'S TRUE FINDING ON THE SOLE SPECIAL CIRCUMSTANCE UNDER PENAL CODE SECTION 190.2, SUBDIVISION (a)(7), MUST BE SET ASIDE, AND THE DEATH JUDGMENT REVERSED, BECAUSE IT WAS UNSUPPORTED BY SUFFICIENT EVIDENCE IN VIOLATION OF STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

The prosecution alleged a single special circumstance under Penal Code section 190.2, subdivision (a)(7) (murder of peace officer while lawfully engaged in performance of his or her duties). (1 CT 16.) As discussed in the preceding argument, Mr. Mai waived jury trial on the issue of his guilt of the charged murder and the truth of the special circumstance allegation. (2 CT 491; 1 RT 180-201.) The defense and the prosecution agreed to submit both issues to the trial court based solely upon transcript of, and evidence presented at, the preliminary hearing. (1 RT 180-181.) Defense counsel further waived their right to present argument or additional evidence, thus rendering the submission a "slow plea." (1 RT 183-184; see, e.g., *People v. Wright* (1987) 43 Cal.3d 487, 495-499.) Based upon the preliminary hearing evidence, the trial court found Mr. Mai guilty of the charged murder and found the special circumstance to be true. (2 CT 503; 2 RT 214-216.)

As will be demonstrated below, the preliminary hearing evidence was insufficient to prove beyond a reasonable doubt that Officer Burt was lawfully engaged in the performance of his duties when he was killed – an essential element of the peace-officer murder special circumstance. Thus, the trial court's true finding on the only special circumstance allegation, which rendered Mr. Mai death eligible, violated state law, as well as Mr. Mai's rights under the Eighth and Fourteenth Amendments to the United

States Constitution. The special circumstance must be set aside and the death judgment reversed.

B. In Order To Prove the Section 190.2, Subdivision (a)(7), Special Circumstance Allegation in this Case, State Law And The Due Process Clause Required the Prosecution to Prove Beyond a Reasonable Doubt that Officer Burt was Lawfully Engaged in the Performance of his Duties When He was Killed

Both state law and the Due Process Clause of the federal Constitution demand the prosecution prove every element of a special circumstance beyond a reasonable doubt. (Pen. Code, §190.4, subd. (a); *Ring v. Arizona* (2002) 536 U.S. 584, 609.) As discussed in Argument I-E-5, *ante*, when a defendant waives his right to a jury trial and agrees to a court trial based upon the transcript of (and evidence presented in) the preliminary hearing without presenting argument, the procedure is known as a "slow plea." (See *People v. Wright* (1987) 43 Cal.3d 487, 495-499; *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602-604.) While a slow plea is "tantamount to a guilty plea" and waives most important trial rights, such as the rights to trial by jury, confrontation, and to present evidence, it is different from a guilty plea in one important respect.

When a defendant has entered a not guilty plea but stipulates to submit the issue of his guilt on a transcript, the submission does not supercede the not guilty plea or waive the defendant's right to a trial altogether. (*Bunnell v. Superior Court, supra*, 13 Cal.3d at pp. 602-604.) Instead, the submission is a court trial in which the People still bear the burden of proving the defendant's guilt beyond a reasonable doubt. (*Id.* at p. 603.) Furthermore, "the trial court must weigh the evidence contained in the transcript and convict only if, in view of all matters properly contained therein, it is persuaded beyond a reasonable doubt of the defendant's guilt."

(*People v. Martin* (1973) 9 Cal.3d 687, 694-695.) A defendant who enters a slow plea thus reserves his right to challenge the sufficiency of the evidence to support the conviction or true finding on appeal "irrespective of any foregone conclusion or understanding that he will be found guilty." (*Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 604; *People v. Martin*, *supra*, 9 Cal.3d at pp. 693-694.)

As further discussed in Argument I-E-5, *ante*, an essential element of the special circumstance codified in Penal Code section 190.2, subdivision (a)(7), is that the peace officer victim must be "engaged in the course of the performance of his or her duties" when he or she is killed. (Pen. Code, § 190.2, subd. (a)(7).) With regard to this element:

> The long standing rule in California and other jurisdictions is that a defendant cannot be convicted of an offense against a peace officer "'engaged in . . . the performance of . . . [his or her] duties'" unless the officer was acting *lawfully* at the time the offense against the officer was committed. (*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1217; see also *People v. Simmons* (1996) 42 Cal.App.4th 1100, 1109.) "The rule flows from the premise that because an officer has no duty to take an illegal action, he or she is not engaged in 'duties' for purposes of an offense defined in such terms, if the officer's conduct is unlawful. . . (¶) . . . (T)he lawfulness of the victim's conduct forms part of the corpus delecti of the offense." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1217.)

(*In re Manuel G.* (1997) 16 Cal4th 805, 815, italics added; accord, e.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 791; *People v. Curtis* (1969) 70 Cal.2d 347, 352.) "Lawfulness" in this context is assessed under Fourth Amendment standards. (See, e.g., *In re Manuel G.*, *supra*, 16 Cal.4th at p. 821; *People v. Curtis*, *supra*, 70 Cal.2d at p. 354; *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 791-792.)

A traffic stop constitutes a seizure of the driver within the meaning

of the Fourth Amendment. (See, e.g., *Brendlin v. California* (2007) 551 U.S. 249, 255-256, 2406; *Whren v. United States* (1996) 517 U.S. 806, 809-810; *Delaware v. Prouse* (1979) 440 U.S. 648, 653; *People v. Hernandez* (2008) 45 Cal.4th 295, 299, and authorities cited therein.) As the United States Supreme Court has explained:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. . . . [P]ersons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

(*Delaware v. Prouse, supra*, 440 U.S. at p. 663.)

Thus, a detention or seizure made without a warrant is only reasonable or *lawful* "'when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provides some objective manifestation that the person detained may be involved in criminal activity' (*People v. Souza* (1994) 9 Cal.4th 224, 231)" (*People v. Mayfield, supra*, 14 Cal.4th at p. 791), which includes a traffic violation (*Whren v. United States, supra*, 517 U.S. at pp. 809-810). (See also *People v. Hernandez*, *supra*, 45 Cal.4th at pp. 299-300.) Reasonable suspicion in this regard is measured by an objective standard (see, e.g., *Whren v. United States*, *supra*, at pp. 812-813), and assessed by the information known to the officer at the time of the seizure; facts learned *after* a seizure cannot be used to justify it. (See, e.g., *Florida v. J.L.*, *supra*, 529 U.S. at p. 271; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188; *Florida*

v. Royer (1983) 460 U.S. 491, 507-508; *People v. Hernandez*, *supra*, 45 Cal.4th at pp. 299-301, and authorities cited therein; *People v. Sanders* (2003) 31 Cal.4th 318, 334, and authorities cited therein.) Absent such reasonable suspicion, the detention violates the Fourth Amendment and thus is not "lawful." (See, e.g., *Delaware v. Prouse*, *supra*, 440 U.S. at p. 663.)

Hence, when a defendant murders a peace officer while he or she is being detained by the officer and a special circumstance is alleged under section 190.2, subdivision (a)(7), the prosecution must prove beyond a reasonable doubt that the detention (or arrest) was lawful under the foregoing standards. (See, e.g., *People v. Curtis* (1969) 70 Cal.2d 347, 354; *People v. Castain* (1981) 122 Cal.App.3d 138, 145; *People v. White* (1980) 101 Cal.App.3d 161, 166-167; *People v. Roberts* (1967) 256 Cal.App.2d 488, 492-493.) Absent such proof, the defendant is still guilty of murder; but he is *not* "guilty" of the special circumstance. (See *People v. Curtis*, *supra*, at pp. 354-356.)

C. Because the Evidence Was Insufficient to Prove That Officer Burt Was Lawfully Engaged in the Performance of His Duties When He Was Killed, the Trial Court's True Finding on the Section 190.2, Subdivision (A)(7) Special Circumstance Allegation Violated State Law and the Eighth and Fourteenth Amendments, Requiring That it Be Set Aside and the Death Judgment Reversed

The same standard of appellate review applies to challenges to the sufficiency of the evidence to support convictions and special circumstance findings. (See, e.g., *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 790-791, and authorities cited therein; *Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) The test on appeal is whether the record "'discloses substantial evidence – that is evidence which is reasonable, credible and of solid value – such that a reasonable trier of fact could find defendant guilty beyond a reasonable

doubt.' [Citations.]" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 791; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In making this determination, an appellate court "looks to the whole record, not just the evidence favorable to the respondent, to determine if the evidence supporting the verdict is substantial in light of other facts." (*Jackson v. Virginia*, *supra*, at p. 319.) Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture is not substantial evidence. (See, e.g., *People v. Marshall* (1999) 15 Cal.4th 1, 35; *People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.) A state court special circumstance creating death eligibility that is unsupported by sufficient evidence violates the defendant's state and federal rights to due process of law, a fair trial and reliable determinations that he is guilty of a capital offense and that the death penalty is warranted. (U.S. Const., Amends. V, VIII, XIV; Calif. Const. art. I, §§ 1, 7, 12, 15,16, 17; *Ring v. Arizona*, *supra*, 536 U.S. at p. 609; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *People v. Thomas* (1992) 2 Cal.4th 489, 545, conc. & dis. opn. of Mosk, J.)

In this case, the preliminary hearing evidence was insufficient to prove that the detention of Mr. Mai, during which the killing occurred, was lawful; hence, it was insufficient to prove that Officer Burt was lawfully engaged in the performance of his duties when he was killed. (See, e.g., *People v. Curtis*, *supra*, 70 Cal.2d at p. 354.) As discussed in Argument I-E-5, *ante*, the prosecution's preliminary hearing evidence focused on the evidence of criminal activity that Officer Burt discovered *after* the initial traffic stop and seizure of Mr. Mai.

That is, according to Officer Kennedy, the citation Officer Burt wrote, and Alex Nguyen's testimony regarding Mr. Mai's admissions, after

Burt effected the stop and detained Mr. Mai, Mr. Mai identified himself as Phu Duc Nguyen. (1 Muni RT 70, 92, 95, 97.) The prosecution's evidence established that Officer Burt did not reasonably suspect that Mr. Mai had provided a false name and certainly that he did not know, or reasonably could have known, that the person who had falsely identified himself as Phu Duc Nguyen was in fact Mr. Mai. Officer Burt radioed dispatch for a license check for Phu Nguyen, which is typically run to determine if a license is suspended. The check did report a suspended license for Phu Nguyen, and Officer Burt wrote and signed a citation for driving on a suspended licence issued in Phu Nguyen's name. (1 Muni RT 23, 52-53, 70, 92, 95, 97.)

After determining that he was driving on a suspended license, Officer Burt told Mr. Mai that he would have to tow the car after doing an inventory search. (2 Muni RT 278-279.) Mr. Mai told Officer Burt to just give him a ticket and tell him where to collect the car, but Burt told him that he had to wait until the inventory search was concluded. (2 Muni RT 280-281.) According to Alex Nguyen, Mr. Mai told him that he had some "stuff" in the trunk, which Alex Nguyen speculated meant forged traveler's checks. (2 Muni RT 280-281.) After searching the trunk, Officer Burt told Mr. Mai that he was under arrest. (2 Muni RT 280-281.) Mr. Mai then shot and killed him. (2 Muni RT 282-283, 438.)

Thus, the prosecution's preliminary hearing evidence demonstrated that, after the traffic stop and his conversations with Mr. Mai and the police dispatcher, Officer Burt had reasonable suspicion that Mr. Mai was driving on a suspended license and, after searching the trunk, *possibly* suspected

Mr. Mai of being involved in the forgery of traveler's checks.[84] But Officer Burt only learned of these facts *after* – and as a direct result of – the initial traffic stop and seizure of Mr. Mai. As discussed in part B, *ante*, a detention must be based on facts known to the officer at the time of the detention; facts learned *after* a detention do not justify it or transform it into a lawful one. (See, e.g., *Florida v. J.L.*, *supra*, 529 U.S. at p. 271; *Illinois v. Rodriguez*, *supra*, 497 U.S. at p. 188; *People v. Hernandez*, *supra*, 45 Cal.4th at pp. 299-301, and authorities cited therein; *People v. Sanders*, *supra*, 31 Cal.4th at pp. 331-334, and authorities cited therein.)

As discussed in Argument I-E-5, *ante*, the prosecution's *only* preliminary hearing evidence regarding the reason for the initial seizure came from a statement attributed to Mr. Mai by Alex Nguyen. That is, Alex Nguyen testified that Mr. Mai told him that he "thought he have his light on [*sic*]" but "[t]he officer *told* [Mr. Mai] that he pull him over because he was driving without his headlights [*sic*]." (2 Muni RT 422, italics added; see also 2 Muni RT 278.) As further discussed in Argument I-E-5, *ante*, the prosecutor did not offer, and the trial court did not receive, Officer Burt's statements to Mr. Mai for their truth, but rather only for the non-hearsay

---

[84] The prosecution's preliminary hearing evidence was also paper thin with regard to what criminal activity a police officer might reasonably have suspected following a search of the BMW's trunk. While Officer Burt did tell Mr. Mai that he was under arrest immediately after, and thus apparently as a result of, his search of the trunk, the only preliminary hearing evidence regarding trunk's contents was Alex Nguyen's testimony that Mr. Mai told him that he had some "stuff" in the trunk, which *Nguyen* speculated meant forged traveler's checks (2 Muni RT 281-282). In addition, Officer Kennedy testified that some traveler's checks were found on the ground near the cars after the shooting. (1 Muni RT 118). There was no evidence that the checks were obvious forgeries or otherwise suggested the existence of criminal activity, however.

purpose of explaining and putting into context Mr. Mai's alleged admissions. (2 Muni RT 280; see also Evid. Code, § 1200.)

Thus, Officer Burt's statement to Mr. Mai that he had effected the traffic stop because the BMW's headlights were not on was neither offered nor admitted for its truth. The only evidence offered for its truth was Mr. Mai's own statement that although Officer Burt had *told him* that he had stopped him because his headlights were not on, Mr. Mai "thought" that his headlights *were* on. This evidence was plainly insufficient to prove that Officer Burt in fact stopped Mr. Mai because his headlights were not on.

In any event, even if Officer Burt did stop Mr. Mai because his headlights were not illuminated, the prosecution presented no evidence to prove that Officer Burt reasonably believed that Mr. Mai had thereby committed a *traffic violation* and, hence, no evidence to prove that Mr. Mai was lawfully detained for a traffic violation. As discussed in Argument I-E-5, *ante*, police officers are "reasonably expected to know" the Vehicle Code. (See, e.g., *People v. Cox* (2008) 168 Cal.App.4th 702, 710, and authorities cited therein.) At the time of the 1996 traffic stop, the Vehicle Code only required that headlights be illuminated "from one-half hour after sunset to one-half hour before sunrise" (Veh. Code, § 38335) or "during darkness" (Veh. Code, § 24400), which was defined as "any time from one-half hour after sunset to one-half hour before sunrise or at any other time when visibility is not sufficient to render clearly discernable any person or vehicle on the highway at a distance of 1,000 feet" (Veh. Code, § 280).

The prosecution presented no evidence to prove the time of sunset on July 13, 1996, or that the stop occurred after "one-half hour after sunset" or "during darkness" as defined by the Vehicle Code. In fact, the only evidence the prosecution presented at the preliminary hearing regarding the

time and conditions of the initial stop proved the contrary. According to Bernice Sarthou, while she estimated that it was about 8:30 p.m. when she witnessed the traffic stop and shooting (1 Muni RT 152, 191), she also explicitly testified that when she first observed the vehicles, "*it was still daylight. It wasn't sunset yet.*" (1 Muni RT 190, italics added.) Indeed, she was still wearing sunglasses "because the sun was still bright enough to need them" (1 Muni RT 152) and she was "facing toward the sun" (1 Muni RT 190; see also 1 Muni RT 191-194).

Therefore, even if Officer Burt's statement to Mr. Mai had been offered and accepted for its truth – i.e., to prove that Officer Burt had, in fact, stopped him for driving with his headlights off – and even rejecting Mr. Mai's own statement that believed that his headlights were on, the prosecution presented no evidence to prove that at the time of the stop Officer Burt had reasonable suspicion that Mr. Mai had committed a *traffic violation* or was otherwise engaged in criminal activity. (See *Whren v. United States, supra*, 517 U.S. at pp. 809-810; *Delaware v. Prouse*, *supra*, 440 U.S. at p. 663.) Hence, the preliminary hearing evidence was still insufficient to prove that Officer Burt's traffic stop and seizure of Mr. Mai was lawful.

In sum, the prosecution failed to prove the reason for Officer Burt's seizure of Mr. Mai, much less that the reason rendered the seizure a lawful one. The evidence was therefore insufficient to prove that Officer Burt was *lawfully* engaged in the performance of his duties when he was killed and, thus, insufficient to support the trial court's true finding on the sole special circumstance allegation. (*People v. Mayfield, supra*, 14 Cal.4th at pp. 791-792; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1217; *People v. Curtis*, *supra*, 70 Cal.2d at p. 354; *People v. Castain*, *supra*, 122 Cal.App.3d at p.

145; *People v. White*, *supra*, 101 Cal.App.3d at pp. 166-167; *People v. Roberts*, *supra*, 256 Cal.App.2d at pp. 492-493.) The court's true finding on the allegation therefore violated state law, Mr. Mai's state and federal constitutional rights to due process of law, a fair trial and reliable determinations that he was eligible for the death penalty and that the death penalty was warranted. (U.S. Const., Amends. V, VIII, XIV; Calif. Const. art. I, §§ 1, 7, 12, 15,16, 17; *Ring v. Arizona*, *supra*, 536 U.S. at p. 609; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *Beck v. Alabama*, *supra*, 447 U.S. 625, 637; *People v. Thomas*, *supra*, 2 Cal.4th 489, 545, conc. & dis. opn. of Mosk, J.) The true finding must be set aside and the death judgment reversed.

//

//

III

DEFENSE COUNSEL'S CONSENT TO MR. MAI'S SLOW PLEA TO THE SOLE SPECIAL CIRCUMSTANCE ALLEGATION AND THEIR FAILURE TO ARGUE OR PRESENT EVIDENCE IN SUPPORT OF A COMPELLING REASONABLE DOUBT DEFENSE TO IT VIOLATED MR. MAI'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DEMANDS REVERSAL

A. Introduction

As set forth in the previous argument, the prosecution's preliminary hearing evidence was legally insufficient to prove the "lawful performance of duties" element of the sole special circumstance allegation. (Pen. Code, § 1`90.2, subd. (a)(7).) Even assuming arguendo that the evidence was legally sufficient to prove the special circumstance allegation under the highly deferential standard of appellate review that applies to such claims (see, e.g., *People v. Smith* (2005) 37 Cal.4th 733, 744), there certainly existed a compelling defense to the allegation centered on reasonable doubt. However, rather than argue or otherwise pursue that defense, defense counsel, by consenting to Mr. Mai's slow plea to the allegation, effectively stipulated to the allegation, making a true finding a "foregone conclusion." (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602 [slow plea is "tantamount to a guilty plea" which effectively makes guilty verdict a "foregone conclusion"]; Pen. Code, § 1018 [counsel must consent to guilty pleas in capital cases]; 1 RT 180-181, 184.) Furthermore, defense counsel's consent to Mr. Mai's slow plea to the special circumstance allegation cannot be justified on the ground that it secured a benefit in return for that plea; it did not.

In Argument I-E-5, *ante*, Mr. Mai argues that defense counsel's performance in this regard was influenced by their conflicting personal

interests and, hence, created an actual conflict of interest in violation of Mr. Mai's rights under the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. However, even if counsel's conflicting personal interests played no role in their decision to consent to the slow plea, their performance nevertheless deprived Mr. Mai of his state and federal constitutional rights to the effective assistance of counsel under the traditional *Strickland v. Washington* (1984) 466 U.S. 668 analysis.

As discussed in Argument I, *ante*, article I, section 15 of the California Constitution and the Sixth Amendment to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. (See, e.g., *Powell v. Alabama* (1932) 287 U.S. 45; *People v. Nation* (1980) 26 Cal.3d 169, 178.) Ineffective assistance of counsel under both the state and federal Constitutions is established when: (1) counsel's representation fell below an "objective standard of reasonableness"; and (2) but for counsel's errors, there is a "reasonable probability" that the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-219 [California employs same analysis as *Strickland*].)

Importantly, in order to prove the second prong of the *Strickland* analysis, the defendant is *not* required to prove that the evidence was legally insufficient to support the verdict. Indeed, the defendant is not even required to prove that his or her counsel's deficient performance "more likely than not altered the outcome of the case." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 693; accord, e.g., *Nix v. Whiteside* (1986) 475 U.S. 157, 175.) Rather, in order to demonstrate a "reasonable probability" that

the result would have been different, a defendant need only demonstrate a "probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694; accord, e.g., *Nix v. Whiteside*, *supra*, at p. 175.)

As will be demonstrated below, defense counsel's consent to Mr. Mai's slow plea to the special circumstance allegation and their failure to argue or pursue a compelling reasonable doubt defense to the sole special circumstance creating death eligibility fell below an objective standard of reasonable competence that undermines confidence in the trial court's true finding on that allegation. Thus, Mr. Mai was deprived of his state and federal constitutional rights to the effective assistance of counsel, which demands that the special circumstance be set aside and the death judgment reversed.

B. The Governing Legal Principles

With respect to the first prong of the *Strickland* analysis, the United States Supreme Court has "long referred to '[the ABA Guidelines] as 'guides to determining what is reasonable'" performance. (*Wiggins v. Smith* (2003) 539 U.S. 510, 524, citing *Strickland v. Washington*, *supra*, 466 U.S. at pp. 688-689; accord *Rompilla v. Beard* (2005) 545 U.S. 374, 387 & fn. 7; *Williams v. Taylor* (2000) 529 U.S. 362, 396.) As this Court, other courts, and the ABA Guidelines all recognize, since "'representation of an accused murderer is a mammoth responsibility' (*In re Hall* [1981] 30 Cal.3d [408], 434), the 'seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance.' (*Profitt v. Wainwright* (11th Cir. 1882) 685 F.2d 1227, 1247.)" (*In re Jones* (1996) 13 Cal.4th 552, 566.) As one court has observed, "we are particularly vigilant in guarding this right [to the effective assistance of counsel] when a

defendant faces a sentence of death. Our heightened attention parallels the heightened demands on counsel in a capital case. (See ABA Standards for Criminal Justice 4-1.2(c) (3d ed. 1993) ('Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.')" (*Smith v. Mullen* (10th Cir. 2004) 379 F.3d 919, 938-939.)

While ineffective assistance of counsel claims are often reviewed by way of habeas corpus, "when counsel's ineffectiveness is so apparent from the [appellate] record" that a Sixth Amendment violation may be demonstrated, it is appropriate to raise and consider the merits of the claim on direct appeal. (*Massaro v. United States* (2003) 538 U.S. 500, 508; accord, e.g., *People v. Pope* (1979) 23 Cal.3d 412, 426.) For instance, if no *conceivable*, *reasonable* trial tactic or strategy could justify counsel's acts or omissions, his or her deficient performance in established. (See, e.g., *People v. Pope*, *supra*, at p. 426; see also, e.g., *People v. Nation*, *supra*, 26 Cal.3d at p. 179 [no conceivable, reasonable trial strategy could justify failure to move to exclude suggestive pre-trial identification]; *People v. Donaldson* (2001) 93 Cal.App.4th 916, 927-932 [no conceivable, reasonable strategy could justify failure to object to prosecutor testifying and arguing personal belief in witness's credibility]; *United States v. Villalpando* (8th Cir. 2001) 259 F.3d 934, 939 [no conceivable "strategic value" could have been gained by counsel's elicitation of highly damaging testimony against client]; *People v. Torres* (1995) 33 Cal.App.4th 37, 49 [improper opinion as to definitions of charged crimes and implication defendant guilty]; *People v. Stratton* (1988) 205 Cal.App.3d 87, 93 [prejudicial, minimally relevant evidence]; *People v. Moreno* (1987) 188

Cal.App.3d 1179, 1191 [damaging hearsay evidence]; *People v. Jackson* (1986) 187 Cal.App.3d 499, 505-506 [prior convictions]; *People v. Guizar* (1986) 180 Cal.App.3d 487, 491-492, and fn. 3 [other crimes]; *People v. Ellers* (1980) 108 Cal.App.3d 943, 951 [suppression of "seriously damaging evidence"]; *People v. Zimmerman* (1980) 102 Cal.App.3d 647, 658; *People v. Farley* (1979) 90 Cal.App.3d 851, 858-868; *People v. Sundlee* (1977) 70 Cal.App.3d 477, 482-485.) An attorney's deficient performance may also be established on direct appeal if he or she explained on the record the strategical basis for a particular act or omission and that strategy is unreasonable. (See, e.g., *People v. Pope*, *supra*, 23 Cal.3d at pp. 425-426.) Mr. Mai's case is such a case.

C. Even if Defense Counsel Reasonably Decided to Stipulate to Submitting the Issue of Mr. Mai's Guilt on the Transcript of the Preliminary Hearing, Their Consent to the Slow Plea, Without Arguing the Reasonable Doubt Regarding the Truth of the Sole Special Circumstance Allegation, Nevertheless Deprived Mr. Mai of His State and Federal Constitutional Rights to the Effective Assistance of Counsel and Demands That the Special Circumstance be Set Aside and the Death Judgment Reversed

As discussed in Arguments I-E-5 and II, *ante*, defense counsel consented to a "slow plea" by waiving jury trial and stipulating to a court trial in which the issue of guilt would be submitted on the transcript of, and evidence presented at, the preliminary hearing, and waived their right to present argument or additional evidence. (1 RT 180-184; *People v. Wright* (1987) 43 Cal.3d 487, 495-499 ["slow plea" is submission without presentation of argument or additional evidence]; *Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 602 [slow plea is "tantamount to a guilty plea" which makes guilty verdict a "foregone conclusion"]; Pen. Code, § 1018

[counsel must consent to guilty pleas in capital cases].) As further discussed in Argument I-E, *ante*, there was no promised or actual benefit for the plea in these proceedings.

As discussed in Argument I-E-4 & I-E-5, *ante*, this Court has repeatedly held that Penal Code section 1018's requirement of consent by defense counsel to any guilty plea to a capital offense is not an empty formalism. It imposes on counsel a duty to exercise his or her "independent, professional judgment" with respect to the decision to plead and may *not* cede control of that decision to his or her client. (*People v. Massie* (1985) 40 Cal.3d 620, 625 [setting aside guilty plea to which counsel consented due to pressure from his client, but which was against counsel's own professional judgment]; see also *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299-1301, and authorities cited therein [defense counsel properly withheld consent to, and trial court properly refused to accept, defendant's plea to capital offense without counsel consent].)

As discussed in Argument I-E-4, *ante*, the 1989 ABA Guidelines, which reflected the prevailing professional norms at the time of trial, acknowledged and considered Penal Code section 1018 in providing guidelines to counsel contemplating a guilty plea in a capital case. (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 524 [Supreme Court has "long referred to '[the ABA Guidelines] as 'guides to determining what is reasonable'" attorney performance].) Guideline 11.6.3, subdivision (B), provided that "the decision to enter or to not enter a guilty plea should be based solely on the client's best interest." The Commentary to that Guideline stated:

> In non-capital cases, the decision to enter a plea of guilty rests solely with the client [footnote]. When the decision to plead guilty is likely to result in the client's death, however,

> counsel's position is unique. If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights. In California, at least, a defendant cannot plead guilty over the objection of the attorney [footnote], giving counsel tremendous responsibility for the client's life. . . . [C]ounsel must strive to prevent a (perhaps depressed or suicidal) client from pleading guilty when there is a likelihood that such a plea will result in a death sentence.[85]

Consistent with these guidelines, the cases demonstrate that when a defendant seeks to plead guilty to a capital offense without any benefit, or when it is likely to result in a death sentence, defense attorneys consistently refuse to consent to the plea. (See, e.g., *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1300-1301; *People v. Chadd* (1981) 28 Cal.3d 739, 744, 747-850; see also W. White, *Defendants Who Elect Execution* (1987) 48 Univ. Pitt. L. Rev. 853, 861 [among interviewed capital defense attorneys, some acknowledged the ethical dilemma posed when client wants death penalty, but "not one indicated that he could imagine a case in which he would voluntarily allow a capital defendant to submit to execution."].) Indeed, as this Court has recognized, the Legislature's enactment of section 1018 contemplated that defense attorneys *would* refuse to consent to such pleas

---

[85] The Commentary to Guideline 11.6.2 was even more explicit. It unequivocally stated that "counsel should insist that no plea to an offense for which the death penalty can be imposed will be considered without a written guarantee, binding on the court or other final sentencer, that death will not be imposed." (ABA Guidelines (1989), *supra*, Guideline 11.6.2, Commentary, & fn. 2 ["'it is suggested that this [entering a guilty plea to a capital offense] is an effective strategy only when the attorney knows without any doubt that no death sentence will result. Any other 'strategy' for entering a guilty plea is ill-advised and should be abandoned.' (Citation)"].)

and thereby act "as a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant . . . simply wants the state to help him commit suicide." (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 750-751, 753.)[86]

Here, as discussed in Argument I-E-4, defense counsel consented to an unconditional slow plea without a promise of *any* return benefit in these proceedings, much less a promise or expectation that it would avoid a death sentence. As further discussed in Argument I-E-4, *ante*, although Mr. Peters represented that he and Mr. O'Connell were consenting to the plea in order to gain an advantage at the penalty phase by arguing that Mr. Mai's acceptance of wrongdoing should be weighed in favor of sparing his life (RT 189-190), Mr. Mai himself made it abundantly clear that he was *not*

---

[86] In 2003 – after the trial in this case concluded – the ABA revised its Guidelines to clarify that "the decision whether to enter a plea of guilty must be informed and counseled, but ultimately lies with the client." (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003), reprinted in 31 Hofstra L.Rev. 913, 1044-1045 [hereafter "ABA Guidelines (2003)"] Guideline 10.9.2, History of Guideline.) Of course, California law is to the contrary with regard to guilty pleas to capital offenses. (Pen. Code, § 1018.) Even when the decision to plead guilty does lie solely with the client, however, the revised Guidelines still state that "if no written guarantee can be obtained that death will not be imposed, counsel should be *extremely reluctant* to participate in a waiver of the client's trial rights." (ABA Guidelines (2003), *supra*, 31 Hofstra L. Rev. at p. 1045, Commentary, italics added.) Furthermore, counsel's duty "to ensure that the choice is as well considered as possible . . . . may require counsel to do *everything possible to prevent a* depressed or *suicidal client from pleading guilty when such a plea could result in an avoidable death sentence*." (*Ibid.*, italics added.) Since refusing to consent to the plea is within counsel's power in California, it necessarily follows that even under the 2003 Guidelines, counsel should refuse to consent to a plea when the defendant wishes to enter it in order to receive the death penalty and a death sentence may be avoidable.

entering the plea in an effort to save his life. (1 RT 189-190, 197-198, 2 RT 207-210.) To the contrary, the record as a whole amply demonstrates that Mr. Mai entered the plea with the intention of obtaining a death sentence. (See Argument I, *ante*.) Finally, and as further discussed in Argument I-E-4 & I-G-2-c, *ante*, defense counsel made remarks throughout the proceedings – and even before they acquiesced in Mr. Mai's death wish and effectively stipulated to a death sentence – that they had no expectation that the plea would actually avoid a death verdict. To the contrary, and as discussed in Argument I-G-2-c, defense counsel made it clear that they believed that a death verdict was virtually a foregone conclusion no matter what mitigating evidence they might offer. (2 RT 323; see also 1 RT 263; RT 473, 5 RT 862; 6 RT 1081-1082.)

On the face of this record, defense counsel's consent to the unconditional slow plea, knowing that it would almost inevitably result in a death sentence, was plainly inconsistent with the 1989 ABA Guidelines for counsel in capital cases, with prevailing professional norms, and indeed with the very purpose of section 1018. With this background in mind, there is no doubt that, given the dearth of the prosecution's preliminary hearing evidence to prove the only special circumstance rendering Mr. Mai eligible for what defense counsel believed would be – and what their subsequent performance *guaranteed* would be – an inevitable death verdict, their consent to the unconditional slow plea was grossly unreasonable. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.) Assuming arguendo that defense counsel reasonably stipulated to a court trial in which Mr. Mai's guilt would be determined based solely on the evidence in, and transcript of, the preliminary hearing (but see Part C, *ante*), they still retained the right to refuse to consent to the unconditional "slow plea" *and*

the right to *argue* the enormous room for reasonable doubt the preliminary hearing evidence left regarding the truth of the special circumstance allegation, as described in detail in Argument II, *ante,* which is incorporated by reference herein. (*Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 604 [defendant who submits issue of guilt to trial court based upon preliminary hearing transcript retains rights to have prosecution prove guilt beyond a reasonable doubt and to challenge the sufficiency of the evidence both at trial and on appeal]; *People v. Martin* (1973) 9 Cal.3d 687, 695 [submission still requires trial court, sitting as trier of fact, to weigh the evidence and be persuaded of guilt beyond a reasonable doubt].) Given the state of the preliminary hearing evidence, objective standards of reasonable competence demanded that defendant counsel exercise those rights. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694; see also, e.g.,*Young v. Zant* (11th Cir. 1982) 677 F.2d 792, 798-799 [defense counsel's concession to guilt and failure to "adopt obvious defenses" based on weaknesses in prosecution's evidence fell below objective standard of reasonably competent assistance].)

Defense counsel's consent to the unconditional slow plea and their failure to argue a compelling reasonable doubt defense to the sole special allegation cannot be justified by any conceivable, reasonable strategic decision. Indeed, as previously discussed, while acknowledging that he had the power to prevent the slow plea, Mr. Peters but explained on the record his "strategic" basis for consenting to it:

> based on the quality of the evidence against him and the nature of some of that evidence . . . . I have always realized that it we had anything to say and wanted credibility, we have to do it in the penalty phase. That's why I am willing to go along with this. Mr. Evans [the prosecutor] is going to put this evidence on anyways, some of it, and hopefully it will be

> lesser than he would have otherwise. And I need, if I am going to have the hope of looking jurors in the eyes and making the pitches I want to make, that I have to have the highest degree of credibility with them, and that I can have that credibility by pointing out that Mr. Mai has done the right thing.

(1 RT 189-190.)

Of course, as previously discussed, Mr. Mai insisted that he was *not* entering the plea in order to gain an advantage at the penalty phase and seek a life sentence (1 RT 197-190; 2 RT 207-210), and defense counsel in fact never utilized the plea for any benefit at the penalty phase, in which they effectively stipulated to a death sentence. Furthermore, contrary to Mr. Peters's representation, there was certainly "something to say" about the deficiencies in the state's case to prove the "lawful performance of duties" element of the sole special circumstance allegation. As defense counsel apparently failed to appreciate that fact, their "strategy" was unreasonable. (See, e.g., *Kimmelman v. Morrison* (1986) 477 U.S. 365, 385 [counsel's decision based upon ignorance or misunderstanding of law is unreasonable].) Moreover, if Messrs. Peters and O'Connell's strategy was to gain an advantage at the penalty phase in hopes of avoiding a death verdict (despite Mr. Mai's insistence to the contrary), they obviously had no valid strategical reason not to present a compelling defense to the *sole* special circumstance allegation that would have prevented even the *possibility* of a death verdict.

Respondent may contend that counsel's performance was "reasonable," or that Mr. Mai is estopped from arguing that his counsel was ineffective, because it was Mr. Mai's wish to enter the plea and submit to execution. For all of the reasons above, any such contention must be rejected as contrary to Penal Code section 1018, in which the state has an

independent interest that cannot be waived by a defendant (*People v. Chadd, supra*, 28 Cal.3d at pp. 747-748; see also *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371, and authorities cited therein), prevailing professional norms, and indeed the fundamental underpinnings of our system of justice, which simply does not allow a defendant to commit suicide by submitting to execution when he or she is not even legally *eligible* for execution. (See, e.g., *People v. Chadd, supra*, 28 Cal.3d at p. 753 & fn. 9, citing, inter alia, *Commonwealth v. McKenna* (Pa. 1978) 383 A.2d 174, 181 [overwhelming public interest in ensuring that death penalty is imposed in constitutional manner warranted reviewing court's sua sponte reversal of death sentence on ground defendant was not eligible for death penalty, despite fact that appellate counsel did not raise issue on appeal because his client preferred a death sentence to life in prison and therefore instructed counsel not to challenge its imposition].)

Finally, respondent may speculate that counsel did not challenge the sufficiency of the evidence to support the special circumstance allegation because the prosecution might have had other evidence, which it had not presented at the preliminary hearing, to prove that Officer Burt's detention of Mr. Mai was lawful. Again, any such contention must be rejected.

The prosecution *agreed* to submit its case to the trial court based *solely* upon evidence it had presented at the preliminary hearing. (1 RT 181-182.) As both the court and defense counsel recognized, defense counsel nevertheless retained the right to argue that the preliminary hearing evidence left reasonable doubt regarding the truth of the sole special circumstance allegation. (1 RT 183-184; see, e.g., *Bunnell v. Superior Court, supra*, 13 Cal.3d at p. 604.) Under the law, if the trial court in Mr. Mai's case had reasonable doubt based upon that preliminary hearing

evidence, it was obligated to find that the sole special circumstance allegation was not true. (*People v. Martin*, *supra*, 9 Cal.3d at p. 695.)[87]

In sum, defense counsel explained their reasons for consenting to the slow plea and effectively stipulating to the sole special circumstance allegation that rendered Mr. Mai eligible for what they believed would be – and what their subsequent performance guaranteed would be – an inevitable death verdict. Neither was a *reasonable* strategic decision justifying their performance. (See, e.g., *People v. Pope*, *supra*, 23 Cal.3d at p. at p. 426.) Moreover, there is no *conceivable*, reasonable strategy that could justify their performance. (See, e.g., *People v. Nation*, *supra*, 26 Cal.3d at p. 179.) Hence, his Court should resolve the issue on appeal and conclude that defense counsel's effective stipulation to the special circumstance allegation fell below an objective standard of reasonably competent trial assistance demanded in a capital murder trial. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.)

Finally, for all of the reasons discussed in Argument II, *ante*, it is reasonably probable that if defense counsel *had* highlighted and argued the deficiencies in the state's preliminary hearing evidence to prove the lawful performance of duties element of the sole special circumstance allegation, the trial court would have had reasonable doubt regarding the truth of the allegation and entered a not true finding. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.) In other words, defense counsel's deficient performance undermines confidence in the outcome of the court trial on the

---

[87] In any event, as discussed in Part C, *post*, given the record as a whole, it is unreasonable to think that the prosecution might have had other, admissible evidence to prove the lawful performance of duties element of the sole special circumstance allegation which it had not presented.

special circumstance allegation, thereby resulting in a violation of Mr. Mai's state and federal constitutional rights to the effective assistance of counsel. (*Id.* at p. 694; U.S. Const., Amend. VI; Ca. Const. art. I, § 15.) Thus, the sole special circumstance in this case must be set aside and Mr. Mai's death judgment reversed.

D. Alternatively, Defense Counsel's Failure to Present Evidence to Support a Reasonable Doubt Defense to the Sole Special Circumstance Allegation Also Violated Mr. Mai's State and Federal Constitutional Rights to the Effective Assistance of Counsel

Assuming arguendo that defense counsel's consent to the slow plea and failure to argue against the sufficiency of the prosecution's preliminary hearing evidence to prove the sole special circumstance allegation did not alone deprive Mr. Mai of his rights to the effective assistance of counsel, defense counsel's agreement to submit the issue of Mr. Mai's guilt on the preliminary hearing transcript without presenting any additional evidence did. (1 RT 184.) The face of the record in this case reveals the existence of ample additional evidence casting further doubt on the "lawful performance of duties" element of the sole special circumstance allegation.

At the penalty phase, the prosecution presented additional evidence regarding the traffic stop and the events preceding the shooting, but presented no evidence at all (even Alex Nguyen's testimony or Mr. Mai's statement to Alex Nguyen that Officer Burt had told him that he stopped him because his headlights were not illuminated) to explain the reason for the traffic stop and seizure of Mr. Mai. The prosecution did present a photograph of the citation Officer Burt completed and signed, but it only cited the driver for driving on a suspended license. (3/16/07 3 SCT 420-421 [People's Exhibit 20]; 6 RT 1134.) The prosecution also presented the

transcript of Officer Burt's call to police dispatch, as well as the testimony of the dispatcher, but that evidence also demonstrated that Officer Burt only suspected the driver of driving on a suspended license. (4 CT 1129-1133 [People's Exhibit 36]; 6 RT 1173-1180.) As discussed in Argument II, *ante*, these facts were discovered after the traffic stop and thus did not explain, much less justify, Officer Burt's seizure and detention of Mr. Mai. (See, e.g., *Florida v. J.L.* (2000) 529 U.S. 266, 271; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188; *Florida v. Royer* (1983) 460 U.S. 491, 507-508; *People v. Hernandez*, *supra*, 45 Cal.4th at pp. 299-301, and authorities cited therein; *People v. Sanders* (2003) 31 Cal.4th 318, 331-334, and authorities cited therein.)

Similarly, the parties stipulated at the penalty phase that there was an active warrant for Mr. Mai's arrest at the time of the stop that *would have* been discovered if Officer Burt had run a standard record or warrant check in Mr. Mai's name. (6 RT 1181-1182.) However, as the transcript of Officer's Burt's conversation with the police dispatcher and the dispatcher's testimony demonstrated, Officer Burt did *not* run such a check. Nor was there a scintilla of evidence to suggest that Officer Burt *ever* had reasonable cause to suspect that the name of the driver of the BMW was not Phu Nguyen, the name Mr. Mai provided to Officer Burt, or that there was an active warrant for Mr. Mai's arrest. To the contrary, the evidence as a whole – including the citation Officer Burt wrote, his conversation with the police dispatcher, and Mr. Mai's description of the circumstances surrounding to shooting to Alex Nguyen – amply demonstrated that Officer Burt believed that the driver of the BMW was Phu Nguyen. Hence, because Officer Burt was not aware of the arrest warrant, it did not justify or render lawful his initial stop and seizure of Mr. Mai. (See, e.g., *Illinois v.*

Rodriguez, *supra*, 497 U.S. at p. 188 ["factual determinations bearing upon search and seizure" must be judged against an "objective standard" based on "facts available to the officer at the moment"]; *Moreno v. Baca* (9th Cir. 2005) 431 F.3d 633, 638-639, cert. denied *Baca v. Moreno* (2006) 537 U.S. 1207 [because officers were unaware of outstanding warrant at time of seizure and search, it did not justify or render lawful seizure and search]; cf. *People v. Sanders* (2003) 31 Cal.4th 318, 333-335 [because officers were unaware that defendant was parolee subject to search condition at time of search, it did not justify search].)

Thus, the prosecution presented no evidence at all to explain or justify the stop and seizure of Mr. Mai at the penalty phase. At the same time, the prosecution did present evidence to show that, even if it could prove beyond a reasonable doubt that Officer Burt had stopped Mr. Mai because he was driving with his headlights off, as he had told Mr. Mai, according to Alex Nguyen's preliminary hearing testimony, it could not prove that Officer Burt reasonably suspected that Mr. Mai had thereby committed a traffic violation and thus could not prove that Officer Burt was killed while engaged in the lawful performance of his duties. (See *Whren v. United States, supra*, 517 U.S. at pp. 809-810; *Delaware v. Prouse*, *supra*, 440 U.S. at p. 663; see also *People v. Mayfield, supra*, 14 Cal.4th at pp. 791-792; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1217; *People v. Curtis*, *supra*, 70 Cal.2d at p. 354.)

As discussed in Arguments I-E-5 and II, *ante*, at the time of the traffic stop in 1996, the Vehicle Code only required that headlights be illuminated "from one-half hour after sunset to one-half hour before sunrise" (Veh. Code, § 38335) or "during darkness" (Veh. Code, § 24400), which was defined as "any time from one-half hour after sunset to one-half

hour before sunrise or at any other time when visibility is not sufficient to render clearly discernable any person or vehicle on the highway at a distance of 1,000 feet" (Veh. Code, § 280). According to the *Old Farmer's Almanac*, the sun set at 8:04 p.m. on July 13, 1996 in Fullerton. (*The Old Farmer's Almanac*, http://www.almanac.com.)[88] Furthermore, it was a clear day with zero precipitation and a mean visibility of 11.4 miles, or 60,192 feet. (*Ibid.*)

Evidence Code section 452, subdivision (h), provides that judicial notice may be taken of "Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." According to the Assembly Committee Comment to section 452, "sources of 'reasonably indisputable accuracy'" under subdivision (h) include "treatises, encyclopedias, *almanacs* and the like." (Italics added; accord *Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1145 [subdivision (h) includes "facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter"]; 31 Cal.Jur.3d (2009) Evidence, § 50 ["courts take judicial notice of various incidents of time," including "the time the sun . . . rises and sets on the several days of the year . . . or that it was dark or light"]; see also, e.g., *People v. Chee Kee* (Cal. 1882) 10

---

[88] A request for judicial notice of the time of sunset and the weather conditions in Fullerton, California on July 13, 1996, pursuant to Evidence Code sections 452, subdivision (h) ["facts and propositions that are not reasonably open to dispute and are capable of immediate and accurate determination by resort to resources of reasonably indisputable accuracy" are proper subjects of judicial notice] and 459 accompanies this brief.

P.C.L.J. 142 [it was appropriate to admit into evidence almanac reflecting that the sun rose at a certain time on the relevant day since "the fact, for the proof of which the Almanac was offered, was one of those facts of which a Court may take judicial notice"]; *Scarborough v. Woodill* (1907) 7 Cal.App. 39, 42 [proper to take judicial notice of "climatic conditions"]; *People v. Harness* (1942) 51 Cal.App.2d 133, 138-139 [court sitting as trier of fact properly took judicial notice of time sun set on certain date].)

Furthermore, Evidence Code section 453 *mandates* that the trial court "shall take judicial notice of any matter specified in section 452 if a party requests it" so long as the party "furnishes the court with sufficient information to enable it to take judicial notice of the matter" and provides the adverse party notice and an opportunity to "meet the request." Thus, had Mr. Mai's trial counsel moved the trial court to take judicial notice of the facts that on July 13, 1996 in Fullerton, California, "one-half hour after sunset" was 8:34 p.m. and "darkness" did not occur until that time, the court would have been *required* to do so. Based upon these facts, if Mr. Mai was stopped before 8:34 p.m., he was not committing a traffic violation by driving with his headlights off and, thus, the stop was not lawful.

The prosecution's penalty phase evidence established that Mr. Mai was, in fact, stopped *before* 8:34 p.m.. According to penalty phase witness Robert Excell, he heard the shots at about 8:15 p.m., shortly afer which he witnessed Mr. Mai driving the C.H.P. car. (6 RT 1147-1151.)

Penalty phase witness and Reserve Fullerton Police Officer Michael Lyman testified that he witnessed the traffic stop itself between 8:00 and 8:20 p.m. (6 RT 1156-1157.) His estimate was consistent with the penalty phase evidence that Officer Burt listed 8:30 p.m. as the time that he *wrote the citation* for driving with a suspended license (3/16/07 3 SCT 420-421

[People's Exhibit 20] – which occurred *after* the initial stop, after Officer Burt's conversation with Mr. Mai, and after Officer Burt's communications with the dispatcher and the dispatcher's checks on two names, a driver's license number, and the license plate of the vehicle (4 CT 1130-1131 [People's Exhibit 36]). The police dispatcher estimated that Officer Burt first contacted dispatch to check the name and date of birth Mr. Mai provided – which occurred *after* the stop and Officer Burt's subsequent conversation with Mr. Mai – "shortly *before* 2032" (or 8:32 p.m.) (6 RT 1176-1177, italics added.)

Furthermore, prosecution witness Benjamin Baldauf agreed with the prosecutor's leading question that "about 8:00, 8:30" was "about the right time frame" when he noticed the C.H.P. car and BMW and the officer searching the BMW's trunk. (6 RT 1099-1100, 1102-1103.) As Mr. Baldauf described it, at that time it was "long on shadows, just before dark." (6 RT 1101.) Of course, absent some artificial light source, "shadows" are created by blocking the rays *of the sun*. (See, e.g., *Oxford American Dictionary* (1980) at p. 622 [defining "shadow," as, inter alia, "shade" or "a patch of this with the shape of the body that is blocking the rays"].) And it is common knowledge in this regard that shadows from the sun's rays become "long[er]" when the sun is low – i.e., shortly after sunrise or *before* sunset.

Finally, while Bernice Sarthou agreed with the prosecution's leading question that it was "about 8:30 in the evening" (6 RT 1189) when she first observed the C.H.P. car and BMW, her preliminary hearing testimony was inconsistent with that estimate. As discussed in Argument II, she repeatedly testified with certainty that "it was still daylight. It wasn't sunset yet." (1 Muni RT 190; see also 1 Muni RT 191-194.) Indeed, she was still wearing

sunglasses when she first observed the vehicles "because the sun was still bright enough to need them" (1 Muni RT 152; see also 6 RT 1190) and she was "facing toward the sun" (1 Muni RT 190). Hence, her testimony that the sun had not yet set meant that the stop occurred *before* 8:04 p.m. and not at 8:30 p.m.

The prosecution presented no other evidence regarding the time of the traffic stop.

Thus, while the prosecution's evidence did not establish the *precise* time of the traffic stop, *all* of its evidence established that it occurred *before* 8:34 p.m. (which was "one-half-hour after sunset" and when "darkness" commenced). Therefore, even if Officer Burt's statement to Mr. Mai that he had stopped him because his headlights were not illuminated had been offered and properly accepted for its truth (and even ignoring both Mr. Mai's own statement, which had been accepted for its truth, that he believed that his headlights *were* illuminated and the absence of any mention of headlights – or any other reason for the stop – on the citation Officer Burt completed and signed), the prosecution's own penalty phase evidence created more than a reasonable doubt that Officer Burt had a reasonable suspicion that Mr. Mai had committed a *traffic violation*. Hence, the prosecution's own evidence created compelling reasonable doubt that Officer Burt's seizure of Mr. Mai was lawful and thus, that Mr. Mai shot and killed him while he was engaged in the "lawful" performance of his duties, an essential element of the sole special circumstance allegation. (Pen. Code, § 190.2, subd. (a)(7); *People v. Mayfield, supra*, 14 Cal.4th at pp. 791-792; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1217; *People v. Curtis*, *supra*, 70 Cal.2d at p. 354.)

Of course, defense counsel was entitled to the prosecution's

evidence under state law (Pen. Code, § 1054.1) and the due process clause of the federal Constitution (*Brady v. Maryland* (1963) 373 U.S. 83, 87). Nevertheless, rather than presenting that evidence to support (or even argue) a reasonable doubt defense, Mr. Mai's counsel consented to his "slow plea" to the sole special circumstance allegation, making a true finding and death eligibility "a foregone conclusion." (*Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 602.) As discussed in Part C, *ante*, defense counsel's explained strategy that they consented to the slow plea and effectively stipulated to the sole special circumstance allegation because they did not "have anything to say" at the guilt phase and hoped to gain an advantage at the penalty phase was objectively unreasonable. (1 RT 189-190.) Hence, this Court should resolve the issue on appeal and conclude that defense counsel's consent to the unconditional slow plea and failure to mount a compelling reasonable doubt defense to the sole special circumstance allegation fell below an objective standard of reasonably competent assistance demanded of counsel in a capital murder trial. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.)

Finally, for all of the reasons explained above and in Argument II, *ante*, this Court cannot be confident that if counsel had presented a reasonable doubt defense to the sole special circumstance allegation, the trier of fact (court or jury) would have been convinced of the truth of the allegation beyond a reasonable doubt. (*Strickland v. Washington*, *supra*, at p. 694; accord, e.g., *Nix v. Whiteside*, *supra*, 475 U.S. at p. 175.) Mr. Mai was thus deprived of his state and federal constitutional rights to the effective assistance of counsel, requiring that the special circumstance be set aside and the death judgment reversed.

IV

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED MR. MAI'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE DEATH VERDICT BY FAILING TO SUSPEND THE CRIMINAL PROCEEDINGS AND INITIATE COMPETENCY PROCEEDINGS

A. Introduction

As discussed in Argument I-F, *ante*, the trial court was presented with a host of evidence – including the reports of defense counsel, the opinion of court-appointed psychologist Dr. Veronica Thomas, and Mr. Mai's own increasingly irrational behavior – which called into grave doubt Mr. Mai's ability to assist counsel in the preparation of his defense in a rational manner. Despite this evidence, at no time did the trial court question whether Mr. Mai was competent to stand trial.

Because there was substantial evidence to raise a reasonable or bona fide doubt as to Mr. Mai's competency to stand trial, the trial court violated state law, as well as Mr. Mai's federal constitutional rights to due process and a reliable determination that the death penalty was appropriate, by failing to order a competency hearing on its own motion. The death judgment must be reversed.

B. The Evidence of Mr. Mai's Decompensating Mental State and Inability to Participate in his Defense in a Rational Manner

As discussed in Argument I-F, *ante*, Mr. Mai was taken into federal custody on July 27, 1998, and remained in federal custody throughout his state capital murder trial, which ended on June 23, 2000. (8/29/07 SCT 164-170; 8/29/07 ART 5; 4 CT 1119-1123.) He was confined under unusually onerous special administrative restrictions pursuant to Code of

Federal Regulations § 501.3. (2 CT 405-406, 482.)[89] In addition to the special administrative restrictions, the federal Bureau of Prisons imposed additional restrictions on the conditions of Mr. Mai's confinement. (See, e.g., 3 RT 453-456.)

On July 23, 1999, the date on which Mr. Mai entered his slow plea in state court, Mr. Peters, first described some of those conditions to the court and his concern that their impact was having on Mr. Mai's mental health. Mr. Peters explained that the "administrative conditions on his custody . . . are extremely onerous, virtually keeping him isolated something like Hannibal Lechter in *Silence of the Lambs*." (1 RT 192; see also 3/16/07 3 SCT 308-320 [copy of section 501.3 restrictions as modified on July 23, 1999].) ". . . He is going to be in a very, very isolated condition, and I can speak personally that its effects on a human being are horrendous." (1 RT 193.)

A week later, on July 30, 1999, defense counsel Messrs. Peters and O'Connell filed a motion to continue the penalty phase trial with Mr. Peters's supporting declaration in which he further described the conditions of Mr. Mai's federal confinement and their impact on his mental state:

> Only 13 other individuals in the federal prison system have these draconian restrictions. As a result, Mr. Mai is kept in a single cell, he's not allowed contact with other inmates and his phone calls are restricted to an aunt, grandmother, and attorney.[90] He is not allowed writing instruments and must

---

[89] Indeed, Mr. Mai remains in federal custody, under severe special restrictions, to this day. (3 CT 1082-1085; 4 CT 1127.)

[90] Mr. Mai's grandmother was 92 years old, in "frail health," and living in a nursing home out of state. (2 RT 219; 3 RT 419.) She was, apparently, unable to communicate effectively, as defense counsel informed

(continued...)

> write under the supervision of the Bureau of Prisons ("BOP") who retrieve the writing instrument and letter immediately after completion. All incoming and outgoing mail is read and approved by the FBI. In essence, Mr. Mai has subjected himself to solitary confinement full-time except for a shower every other day and a three hour a week exercise by himself in an empty room. This intensive confinement and isolation has a very negative impact on his mental health. . . . That isolation and lack of sensory stimuli interfere with the defendant's ability to organize his thoughts and results in very hostile emotion.

(2 CT 497, 500-501.)

The toll of the isolation on Mr. Mai's ability to control his "hostile emotion[s]" soon became apparent to everyone. In proceedings held before he was taken into federal custody, Mr. Mai was able to control his behavior, even throughout the preliminary hearing in which Alex Nguyen – a friend who had offered him shelter only in order to betray him to benefit himself – testified at length against him. However, Mr. Mai's behavior changed dramatically after 15 months in federal custody under the special restrictions.

On October 18, 1999, Mr. Mai had a lengthy, furious outburst, prompting the court to warn him that if he had another "emotional outburst" he would be removed for the rest of the trial. (2 RT 305-309, 345, 349.) During the same proceeding, Mr. Peters informed the court that Mr. Mai

---

[90](...continued)
the court that the only relative from whom they could obtain any information at all was his aunt, who was uncooperative and with whom Mr. Mai had always had a very difficult relationship. (2 RT 219; 3 RT 419.) Thus, while Mr. Mai was permitted limited communications with his aunt and grandmother, this "privilege" appears to have been merely illusory.

had "decided" to wear jail garb, instead of civilian clothing, throughout the proceedings. (2 RT 319, 348.) When the court specifically inquired of Mr. Mai if that was his choice, he provided no audible response. (2 RT 319.) As the restrictions on Mr. Mai's confinement increased in severity over the following months, so too did their impact on his mental health.

On February 4, 2000, Mr. Peters informed the state court that at least since early January 2000, Mr. Mai had been housed in a one-man cell in which the lights and a camera were on 24 hours a day. (2 RT 372, 374, 383.) He was allowed "[n]o reading material or pens or papers or nothing." (2 RT 372.) His cell was "totally sealed off, so nothing can be slipped in and out" and he was not able to "flush his own toilet for fear sometimes communications can take place through toilets." (2 RT 372.) Apart from limited, sporadic visits with an aunt with whom Mr. Mai had a very difficult relationship, "he can have no contact with anybody." (2 RT 374; see also 3 RT 419.) He was only permitted to talk to a lieutenant; he was not allowed even verbal contact with other detention facility personnel or inmates; indeed, inmates could not even work near his cell. (2 RT 374, 383.) Mr. Peters, the federal district court judge, and other witnesses had seen for themselves during a surprise midnight visit to the detention facility that Mr. Mai "had to lay there with his t-shirt over his eyes because he had the lights on 24 hours a day, and literally had nothing to read, nothing to write, nothing to do, 24, seven." (2 RT 372, 374, 383.) While there had recently "been a slight modification, but only in terms of dimming the lights and giving him back his legal material" (2 RT 372), Mr. Peters expressed his concern over "how this virtual total isolation and lack of stimulation impact on Mr. Mai, which as tough as Mr. Mai is mentally and intellectually, he still can be subject to problems being so utterly isolated." (2 RT 374.) "So

believe me," Mr. Peters continued, "I believe that Mr. Mai is a very strong individual emotionally and psychologically, that he can withstand a great deal of that, but even Mr. Mai is not made of stone." (2 RT 383.) Indeed, the truth of this observation was born out in the next court session during which Mr. Mai was clearly disoriented and confused.

On February 25, 2000, after discussing scheduling matters, the court directed Mr. Peters to take Mr. Mai's time waiver. (2 RT 395-396.) The following colloquy occurred:

> Mr. Peters: Mr. Mai, your jury trial is set presently on March 13th.
> The defendant: I don't understand.
> Mr. Peters: Excuse me?
> The defendant: I don't understand.

(2 RT 396.) Mr. Peters reminded the court that Mr. Mai was incarcerated under "rigid conditions" and explained:

> [W]e were in court all day yesterday with Judge Carter exploring the nature of that, and trying to make some modifications that may alleviate some of the stress caused by isolation and sensory deprivation on Mr. Mai. And Mr. Mai is very agitated this morning. And part of that is no doubt a result of what the – some of the evidence we put on yesterday was about how stressful, even as tough as Mr. Mai is, how stressful that isolation is. And although he is not 1368, but his condition interferes with the ability to deal with him on a rational basis, but I am not saying he is 1368, if he was I would tell you, of course, my obligation.

(2 RT 396.) The court then attempted to take Mr. Mai's time waiver, to which Mr. Mai again expressed confusion:

> [The court:] is it all right with you the matter be set for April 3rd for jury selection?
> The defendant: I don't understand.
> The court: Pardon me?
> The defendant: I don't understand.

The court: You understand?
Mr. Peters: He said he didn't understand.
The defendant: Do not.
The court: You don't understand? Well, you understand that you have got a trial date set for March 13?
The defendant: I don't understand that either. I need, I need time to talk to my lawyers.
The court: Go ahead.
The defendant: There's only one lawyer here.
The court: Well, he is your chief lawyer here, Mr. Peters.
The defendant: That's only one of mine. I need two.

(2 RT 397-398.)

At the court's suggestion, a short recess was taken for Mr. Peters to confer with Mr. Mai in the holding cell. (2 RT 398.) Upon their return, Mr. Peters advised the court that Mr. Mai would waive time. (2 RT 398.) When the court asked Mr. Mai if that was correct, Mr. Mai responded with a simple "yes." (2 RT 398.) In closing, Mr. Peters reminded the court that "this is a very unique case, the federal court has jurisdiction over his custody situation, and yet you have constitutional responsibilities to see he gets a fair death penalty trial." (2 RT 400.)

During the next session on March 2, 2000, Mr. Peters informed the court that the conditions of Mr. Mai's confinement were having such a profound psychological impact on him that Mr. Peters was unable to proceed with necessary preparation for the penalty phase of his trial. (3 RT 403-405.) He explained that Dr. Veronica Thomas had testified to that effect in a hearing before Federal District Court Judge Carter and that Judge Carter had asked for the state court's recommendations regarding a solution. (3 RT 403-404.) To that end, Mr. Peters offered the testimony of Dr. Thomas, a clinical and forensic psychiatrist appointed as an expert in this case to explore and develop possible mitigating evidence. (3 RT 406-

407.)

According to Dr. Thomas, she began meeting with Mr. Mai in January of 1999. (3 RT 406-407.) Initially, Mr. Mai was cooperative and she was able to accomplish some of the work necessary to prepare his defense. (3 RT 408, 428.) However, as his confinement conditions increased in their severity, his mental condition deteriorated to the point that she was unable to complete the work necessary to prepare his defense. (3 RT 409-411, 428.)

Dr. Thomas described Mr. Mai's current confinement conditions, which she had witnessed herself. She said that Mr. Mai was housed in a one-man cell with two video cameras recording all of his movements and lights on 24 hours a day. (3 RT 409-410.) He was allowed no general reading material, but did have access to some legal material. (3 RT 410.) He was housed in his one-man cell for 24 hours a day except when he was allowed out for a shower every other day. (3 RT 409, 417.) The door to his cell, unlike any other cells, was painted red and a sign was affixed to it reading, "[n]o visual contact with inmate, no verbal communication with inmate." (3 RT 410.) There was a "little trap door" to which only a lieutenant had a key and only the lieutenant was permitted to communicate with Mr. Mai. (3 RT 410.) The door to the cell was also completely sealed. (3 RT 410.) Mr. Mai was unable to flush the toilet in his small, sealed cell, which was particularly difficult for him because he was "extremely fastidious." (3 RT 410, 415.) As Dr. Thomas explained, "this is a defendant who cleans his cell five times a day, and is very, very interested in being clean." (3 RT 416.) The combination of these conditions amounted to sensory deprivation, which was having a severe impact on Mr. Mai's mental health and his ability to assist in his defense. (3 RT 410-411,

427-428.)

Although Dr. Thomas opined that Mr. Mai was "not out of touch with reality," she said that he was "alternately enraged and irrational" and "his ability to process the issues that we needed to discuss with regard to his case had been impaired by, what I thought was the change in his security, and possibly in addition to that was a failure to have contact with the persons on his defense team that he could discuss the matters with." (3 RT 411.) Dr. Thomas spoke to Mr. Peters and his current investigator, Mr. Rasch, who also had contact with Mr. Mai, and their impressions were also that "the rage and the emotional lability of the defendant was impairing the process of the defense all the way around." (3 RT 411.) Mr. Mai no longer trusted anyone on his defense team, which made it "difficult to absolutely address the issues that are imperative, to at least my part, in finishing with this phase of the case" and his custodial situation was "causing his emotions to, on a frequent basis, to override his judgment." (3 RT 414.) Indeed, for the last two months, the defense team's entire focus had been on trying "to handle this emotional volatility" resulting from "restrictions that he can't cope with." (3 RT 421.) Given the conditions and the state of Mr. Mai's mental health, Dr. Thomas explained, she was "unable to move forward" in her preparation of evidence for the penalty phase defense. (3 RT 428.) Furthermore, she was unable "to do what I need to do to get him to be able to work with [defense counsel]." (3 RT 428.) If he remained in solitary confinement, her prognosis was that his ability to think and process information would only continue to diminish. (3 RT 428.)

As discussed, in Argument I-F, *ante*, defense counsel offered this evidence not to declare a doubt as to Mr. Mai's competency to stand trial due to his inability to rationally participate in his defense under Penal Code

sections 1367 and 1368, but rather to ask the state court to recommend to the federal court certain changes to the conditions of Mr. Mai's federal confinement. (3 RT 429.) The state court did make those recommendations, but the federal court rejected them for the most part (3 RT 446-448) and – as Dr. Thomas predicted – Mr. Mai's mental state continued to deteriorate.

On March 29, 2000, Mr. Peters informed the state court that "we have for some time talked about putting no penalty evidence on." (3 RT 449.) However, he explained, "Mr. Mai needs to be in a situation where he can make rational decisions about this" and his current mental state, which Mr. Peters believed was caused by the confinement conditions, precluded rational decision making. (3 RT 449.) Mr. Peters further explained that "the situation is still the same" with respect to Mr. Mai's "emotional difficulties" and inability to control his behavior in the courtroom. (3 RT 471-473.)

Nevertheless, Mr. Peters represented, "[i]f I wanted to play games I could declare him 1368 or something, but I don't believe he is 1368, he is just in a very difficult situation." (3 RT 452.) Therefore, rather than requesting the initiation of competency proceedings under section 1368, Mr. Peters informed the state trial court that he intended to "tak[e] a writ" to the Ninth Circuit Court of Appeals seeking relief from some of Mr. Mai's federal confinement conditions imposed by Judge Carter and the BOP. (3 RT 449.) However, the "writ" to which Mr. Peters referred flatly contradicted his statement that "I don't believe [Mr. Mai] is 1368." (RT 452.)

On or about April 3, 2000, defense counsel filed the "writ" – namely, a "Petition for Writ of Prohibition/Mandate Request for Emergency Stay" in

the Court of Appeals for the Ninth Circuit in *Mai v. United Stated District Court, Central District of California, et. al,* No. 0-70364. (2 CT 652; 3/16/07 2 SCT 28-156; see also, 5 RT 1075.) In the petition, defense counsel represented, inter alia:

> Petitioner's confinement has been so severe that it has caused substantial changes in Petitioner's mental health. Petitioner's counsel told both the Federal and State Court that he was unable to effectively communicate with the Petitioner. The Petitioner was not incompetent to stand trial, but e [*sic*] was a breakdown in the attorney-client relationship that is jeopardizing Petitioner's fundamental right to counsel guaranteed by the Sixth Amendment of the United States Constitution. [¶] The changes have become so dramatic that Dr. Veronica Thomas can no longer finish her evaluation of the Petitioner. Obviously a complete psychological evaluation of the Petitioner is a necessary component of the Petitioner's defense at his penalty phase trial. . . . . [¶] The conditions surrounding the Petitioner's custody status in the Metropolitan Detention Center are so inhuman and oppressive that Petitioner's counsel cannot complete and present to the Orange County Superior Court evidence of Petitioner's mental state in mitigation of the death penalty.

(3/16/07 2 SCT 42-44.)

The petition was served on the state superior court and received and reviewed by the state trial court. (3/16/07 2 SCT 156; 5 RT 1075.)

Also, on April 3, 2000, Mr. Peters informed the state court that he had filed the petition in the Ninth Circuit, describing it as "basically say[ing] the conditions set by the federal court are inadequate to allow Mr. Mai to properly defend himself and his witnesses." (3 RT 489.) On the same date, the penalty phase of the state trial commenced with jury selection. (2 CT 654; 3 RT 492.)

On April 6, 2000 and in the midst of voir dire, Mr. Peters informed

the state court that he and Dr. Thomas were of the opinion that Mr. Mai's mental state had not improved since Dr. Thomas's March 2 testimony. (4 RT 589.) While defense counsel made an unsuccessful request, unsupported by any authority, to the trial court to order that Mr. Mai remain in the county jail rather than returned to the federal confinement conditions (see Argument I-F-4, *ante*), they did not request the initiation of competency proceedings.

On April 7, 2000, defense counsel filed Petitioner's Reply Brief in the Ninth Circuit. (3/16/07 2 SCT 158-170; see also 5 RT 1075.) In that brief, defense counsel further represented, inter alia, that they "can not [*sic*] longer present evidence as to [Mr. Mai's] mental condition to the trier of fact at his penalty phase trial because the conditions of this [*sic*] confinement have caused him to become mentally unstable to a point where his Counsel and psychologist cannot prepared [*sic*] the Petitioner for trial. Neither Real Party has disputed this in their brief's [*sic*]." (3/16/07 2 SCT 161.) Also on April 7, 2000, the Ninth Circuit denied the petition. (3/16/07 3 SCT 353-354.)[91] This pleading was also served on, and reviewed by, the state trial court. (3/16/07 2 SCT 169; 5 RT 1075.)

---

[91] The Court's of Appeal's order denying the petition stated in relevant part:

> We construe Mai's petition for writ of prohibition and/or mandate as an emergency motion for injunctive relief and a petition for write of mandamus. The petition for writ of mandamus is denied. *See Bauman v. United States*, 557 F.2d 650, 654-655 (9th Cir. 1997). The request for injunctive relief is denied.

(3/16/07 3 SCT 354.)

On April 11, 2000, defense counsel informed the state court that he had filed a "Petition for Writ of Prohibition/Mandate Request for Emergency Stay" in *Mai v. Superior Court of Orange County, et al.*, in the Court of Appeal for the Fourth Appellate District of California, No. G027090. (5 RT 866.) That pleading was also served on the state trial court. (3/16/07 2 SCT 171-303; 3/16/07 3 SCT 304-369.)

In that petition, defense counsel again represented that the conditions of confinement were so "dehumanizing" (3/16/07 2 SCT 178, 180) that they have "caused substantial changes in the Petitioner's mental health" (3/16/07 2 SCT 187). Mr. Mai "has become increasingly unstable" (3/16/07 2 SCT 175) and "extremely volatile" (3/16/07 2 SCT 178, 180), "cannot control his emotions" (3/16/07 2 SCT 178, 180-181), and "cannot think clearly." (3/16/07 2 SCT 178). His mental state had deteriorated to the point that he was "having great difficulty assisting his Counsel in the defense of his case. . . . " (3/16/07 2 SCT 175), counsel is "unable to effectively communicate with the Petitioner" (3/16/07 2 SCT 187), and his court-appointed expert, Dr. Thomas, can "not complete her work up for the critical penalty phase trial" (3/16/07 2 SCT 178, 190), including an evaluation, which "is a necessary component of the Petitioner's defense at his penalty phase trial" (3/16/07 2 SCT 187).

As a result of Mr. Mai's mental state, caused by the federal confinement conditions, there was "a breakdown in the attorney client relationship that is jeopardizing Petitioner's fundamental right to counsel guaranteed by the Sixth Amendment to the United State Constitution." (3/16/07 2 SCT 187.) Moreover, "[t]he conditions surrounding the Petitioner's custody status in the Metropolitan Detention Center are so inhuman and oppressive that Petitioner's counsel cannot complete and

present to the Orange County Superior Court evidence of Petitioner's mental state in mitigation of the death penalty," in violation of his constitutional rights as defined by the United States Supreme Court in *Skipper v. South Carolina* (1986) 476 U.S. 1. (3/16/07 2 SCT 189-190.) Furthermore, "Petitioner is alleging that his mental state has been continually deteriorating since he has been in Federal custody." (3/16/07 2 SCT 190.) And, unless some of the conditions of his confinement were changed, "Petitioner will continue to deteriorate. . . . . If the Petitioner is forced to wait several years to have this issue resolved on appeal who knows what his mental state will be. It is very probable that after the time it takes to complete the appellate process, Petitioner's mental state will have deteriorated to a point where the effects of his restrictive incarceration have become irreversible." (3/16/07 2 SCT 190.)

Later during the same April 11, 2000, state court proceedings, the state trial court noted that it had reviewed the petition and reply brief filed in the Ninth Circuit Court of Appeals. (5 RT 1075.) The court expressed its concern over the representation in the petition that: "Petitioner is alleging that he cannot any longer present evidence as to his mental condition to the trier of fact at his penalty phase trial, because the conditions of his confinement have caused him to become mentally unstable, to the point where his counsel and psychologist cannot prepare petitioner for trial." (5 RT 1075.) The court then made certain "observations for the record" regarding Mr. Mai's courtroom demeanor on April 3, 6, 10, and 11. (5 RT 1075-1076.)

According to the court, during the voir dire proceedings held on those dates, Mr. Mai "attentively followed roll call page by page," read the juror questionnaires, made notes, consulted with both his attorneys

regarding the questionnaires and "has assisted Mr. Peters in the exercise of peremptory challenges." (5 RT 1075.) Furthermore, Mr. Mai "has not given an appearance of being nervous or upset. On the contrary, he has appeared to be rather calm and collected during this four-day time frame." (5 RT 1076.) Mr. Peters asked the court if he could respond. The court replied, "sure, respond, it won't change my observations, but you may respond." (5 RT 1076.)

Mr. Peters replied that Dr. Thomas had met with Mr. Mai again "last Wednesday" (April 5, 2000) and "she noted there was an increase in his physiological symptoms, headaches, nausea, dizziness. And that the – there was an increase in the intensity of his emotional reaction to innocuous stimuli, the smaller the problem, the bigger the reaction which she expected. And we still have those going on." (5 RT 1076.) Furthermore, "she confirmed her prior opinions that he can't be objective in dealing with her or me, because all his little efforts at anything are being thwarted, including flushing his own toilet. And this morning, of course, the defendant did have an outburst, and we did have to pause for a while to calm him down, or I did." (5 RT 1076.)

Once again, however, Mr. Peters took pains to emphasize that he was not requesting the initiation of competency proceedings. "[I]f he were 1368, I'd say that, I am not doing that because that would be a game, and I am not here to play games." (5 RT 1077.)

Also on April 11, 2000, the Fourth District Court of Appeal issued a postcard denial of the petition. (3/16/07 3 SCT 368-369.)

During the next court session on April 12, 2000, Mr. Peters noted for the record that he had been informed that Mr. Mai would not come out of his cell voluntarily and reminded the court that "with his mental state, the

little things drive him crazy." (6 RT 1079.) The court similarly noted that both defense counsel had been in the holding cell talking to Mr. Mai and that Mr. Mai "has been so loud you can almost hear it out in the courtroom." (6 RT 1079.) Furthermore, the jurors had been waiting over an hour while defense counsel attempted to calm Mr. Mai. (6 RT 1080-1081.) The court continued, ". . . you have told me his concerns with his custodial situation; is it something beyond that that is our problem this morning?" (6 RT 1081.) Mr. Peters responded, "there is a lot of things, he is not talking, and I am not saying 1368, I am not saying that, but he is very upset, and part of it he can control and part he can't because of the frustrations he goes through." (6 RT 1081.) For instance, "[i]t drives him crazy when there is lunch problems . . . . I mean, this is what kind of mentality he has . . . ." (6 RT 1081.)

Mr. Peters continued that Mr. Mai's emotions were volatile and erratic, as Dr. Thomas had testified to the court. (6 RT 1082.) After an outburst, Mr. Mai will "come out and be quite calm. And that is caused by being so isolated. And when anything goes wrong, like the visits with the father, or lunch, they become magnified. . . . . What I am trying to say to the court is, when we have little issues, please take into consideration . . . . he knows what the outcome is, he does and you do, we can't be certain, but this kind of case, and the fact that we may put on no defense, is the evidence is overwhelming and awfully brutal, you know, if we just – if we can get through this." (6 RT 1082.) The court again reminded counsel that Mr. Mai would be removed from the courtroom if he continued to "act out." (6 RT 1082-1083.)

After a brief off-the-record discussion with Mr. Mai, Messrs. Peters and O'Connell informed the court that Mr. Mai himself was concerned

about his inability to control himself. (6 RT 1086-1087.) Therefore, Mr. Mai requested that he be shackled throughout the remainder of the proceedings. (6 RT 1086-1087.) Mr. Peters joined in Mr. Mai's request – "for his [Mr. Mai's] safety and my safety and Dennis [O'Connell]'s safety." (RT 1086.) The court agreed and ordered that Mr. Mai be shackled with "Martin chains," which are chains around the waist to which handcuffs are attached (2 RT 348) – in addition to the leg chain the court had already ordered (2 RT 365) – for the remainder of the trial. (6 RT 1086.) As the court had pointed out in an earlier proceeding, "Martin chains" are visible to jurors. (2 RT 348.)

Within moments, Mr. Mai again acted out in front of the jurors and was admonished by the court. (6 RT 1089-1090.) Mr. Mai asked if he could address the court, but the court refused. (6 RT 1090.) Mr. Mai turned to Mr. Peters and asked, "Mr. Peters, my lawyer, can you please speak up for me?" (6 RT 1090.) After a brief conference, Mr. Peters informed the court – still in front of the jurors – "Mr. Mai just wanted to be assured it was your order that he be here this morning." (6 RT 1090.) The court replied that it was. (6 RT 1090.) Mr. Mai interjected: "if you have the order [*sic*] to do that, why don't you have the power to do anything else?" (6 RT 1090.) Again, the court admonished Mr. Mai not to disrupt the proceedings. (6 RT 1090.) Mr. Mai continued, "Excuse me, Mr. Peters, could you ask him if you have the power to do that, why you don't have the power to do other stuff?" (6 RT 1090.) Again, the court ordered Mr. Mai not to disrupt the proceedings. (6 RT 1090.)

The prosecutor commenced his penalty phase opening statement immediately thereafter, during which Mr. Mai again disrupted the proceedings, prompting another admonishment from the court. (6 RT

1091.) Nevertheless, Mr. Mai again disrupted the proceedings at the close of the prosecutor's statement, prompting yet another admonishment from the court. (6 RT 1098.)

On April 17, 2000, Mr. Mai had another outburst, disrupting the testimony of a prosecution witness. (7 RT 1319.) He later had yet another outburst, repeatedly disrupting the testimony of another prosecution witness. (7 RT 1325-1331.) He eventually became so irrational and enraged that he turned over counsel table (to which he was shackled) in front of the jurors and had to be removed from the courtroom by the bailiffs. (7 RT 1331.)[92]

//

//

---

[92] Mr. Mai was apparently incensed at the notion that someone in his position could be accused – as the witness had accused him – of trying "to carjack a piece of shit Honda." (RT 1325.) Aggression and poor impulse control are symptoms of a mental disorder caused in whole or in part by solitary, or segregated housing, confinement. (See, e.g., *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1265-1266, and authorities cited therein.)

C. The Trial Court's Failure to Suspend Criminal Proceedings and Initiate Competency Proceedings in the Face of Substantial Evidence That Mr. Mai's Mental State Had Deteriorated in Solitary Confinement to the Point That He Was Unable to Rationally Assist In the Preparation of his Defense Violated State Law and Mr. Mai's Federal Constitutional Right to Due Process

As discussed in Argument I-F-1, *ante*, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Penal Code section 1367 prohibit the state from trying or sentencing a criminal defendant while incompetent. (*Drope v. Missouri* (1975) 420 U.S. 162, 171; *Pate v. Robinson* (1966) 383 U.S. 375, 384-386; *Dusky v. United States* (1960) 362 U.S. 402, 403.) Under the federal constitutional standard, "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." (*Drope v. Missouri*, *supra*, 420 U.S. at p. 171; see also *Dusky v. United States*, *supra*, 362 U.S. at p. 402 [competency demands that defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him"].) Similarly, under Penal Code section 1367, a defendant is mentally incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

1. Due Process Imposes An Absolute Obligation On Trial Courts to Hold a Competency Hearing Whenever Substantial Evidence Raises a Reasonable Or Bona Fide Doubt as to the Defendant's Competency to Stand Trial

In order to prevent the trial of an incompetent person, the "applicable legal principles are well settled":

> Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law require a trial judge to suspend proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial.

(*People v. Halvorsen* (2007) 42 Cal.4th 379, 401; see also Pen. Code, § 1368, subds. (a)-(c) [trial court must suspend proceedings and initiate competency proceedings "if a doubt arises in the mind of the judge as to the mental competence of the defendant" or "[i]f counsel informs the court that he or she believes the defendant is or may be incompetent"]; *People v. Pennington* (1967) 66 Cal.2d 508, 518 [*Pate v. Robinson, supra,* transformed Penal Code Section 1368 into constitutional requirement].)

Faced with substantial evidence of incompetence, the trial court is required to declare a doubt and initiate competency proceedings sua sponte. (See, e.g., *Pate v. Robinson, supra,* 383 U.S. at pp. 384-386; *People v. Koontz* (2002) 27 Cal.4th 1041, 1064, and authorities cited therein; *Odle v. Woodford, supra,* 238 F.3d at pp. 1088-1089, and authorities cited therein; The trial court has no discretion in this regard. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 738; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 69; *People v. Pennington* (1967) 66 Cal.2d 508,518-519.) Furthermore, "the matter is jurisdictional, and cannot be waived by

counsel" or the defendant himself. (*People v. Hale* (1988) 44 Cal.3d 531, 541, and authorities cited therein; accord *People v. Marks* (1988) 45 Cal.3d 1335, 1340, 1342; *In re Davis* (1973) 8 Cal.3d 798, 808; *Pate v. Robinson*, 383 U.S. at p. 384 [defendant cannot waive his right to have the court determine his capacity to stand trial]; *Miles v. Stainer* (9th Cir. 1997) 108 F.3d 1109, 1112, and authorities cited therein.) The court's duty to conduct a competency hearing arises when substantial evidence of incompetence is presented at "*any time* 'prior to judgment.'" (*People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153, and authorities cited therein; accord, e.g., *Drope v. Missouri*, *supra*, 420 U.S. at p. 181; *Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666.)

2. The Sufficiency of Evidence to Raise a Reasonable or Bona Fide Doubt Regarding The Defendant's Competency and Demand The Initiation of Competency Proceedings

"Substantial evidence" of incompetence is judged by an objective standard. It does not mean unconflicting evidence (see, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1219; *People v. Welch*, *supra*, 20 Cal.4th at p. 738); it does mean persuasive evidence (*People v. Hale*, *supra*, 44 Cal.3d at p. 539; *People v. Pennington, supra*, 66 Cal.2d 518; *People v. Ary* (2004) 118 Cal.App.4th 1016, 1024-1025); and it does not mean evidence sufficient to raise a *subjective* doubt regarding the defendant's competence in the mind of the trial judge (see, e.g., *People v. Jones*, *supra,* 53 Cal.3d at p.1153 ["substantial evidence" is measured by an objective standard and, hence, cannot be defeated by the trial court's own observations of the defendant or judge's subjective belief that he appears competent]; accord, e.g., *People v. Pennington*, *supra*, 66 Cal.2d at p. 518; *People v. Castro* (2000) 78 Cal.App.4th 1415, 1402). As the Ninth Circuit Court of Appeals

has explained:

> Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court in applying *Pate*'s substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.

(*Moore v. United States*, *supra*, 464 F.2d at p. 666; see also *People v. Welch*, *supra*, 20 Cal.4th at p. 738, and authorities cited therein; *People v. Danielson* (1992) 3 Cal.4th 691, 726; *Tillery v. Eyman* (9th Cir. 1974) 492 F.2d 1052, 1058-1059.)

In this regard, this Court has consistently recognized that "[i]f a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused states under oath and with particularity that in his [or her] professional opinion the accused is, because of mental illness [or disorder], incapable of understanding the purpose or nature of the proceedings being taken against him *or* is incapable of assisting in his defense or cooperating with counsel, the substantial evidence test is satisfied." (*People v. Pennington*, *supra*, 66 Cal.2d at p. 519; accord, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1217; *People v. Welch*, *supra*, 20 Cal.4th at p. 748; *People v. Stankewitz* (1982) 32 Cal.3d 80, 92.)

Otherwise, in determining whether there is substantial evidence to require a competency hearing, the trial court must consider all of the

relevant circumstances. (*Drope v. Missouri, supra,* 420 U.S. at p. 180.) There are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Ibid.*) In some cases, many factors may be significant, while in others, just one factor may be enough to require that a competency hearing be held. (*Ibid.*; accord *People v. Laudermilk* (1967) 67 Cal.2d 272, 283 [what constitutes substantial evidence "cannot be answered by a simple formula applicable to all cases"].)

However, among the factors that courts have consistently considered in finding substantial evidence to raise a reasonable or bona fide doubt regarding the defendant's competency are:

(1) mental health professionals' prior determinations of incompetency and/or observations and conclusions regarding the defendant's present ability to understand the proceedings or rationally assist in his defense (see, e.g., *Drope v. Missouri, supra*, 420 U.S. at p. 180; *People v. Ary* (2004) 118 Cal.App.4th 1016, 1022, 1024; *Miles v. Stainer, supra*, 108 F.3d at p. 1112; *Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666; *Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 566);

(2) trial counsel's opinion regarding his client's mental state and competency (see, e.g., *Medina v. California* (1992) 505 U.S. 437, 450 [while counsel's opinion is not necessarily determinative, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"]; *Drope v. Missouri, supra*, 420 U.S. at p. 177 and

fn. 13 ["an expressed doubt in that regard by one with 'the closest contact with the defendant," is unquestionably a factor which should be considered]; *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 954-955, 959-960; *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103, 1109);

(3) the relevant observations of others in close contact with the defendant (see, e.g., *Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-180; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 385-386; *Odle v. Woodford*, *supra*, 238 F.3d at p. 1087);

(4) the defendant's irrational or unusual behavior, including outbursts and disturbances, inside and outside of the courtroom (*Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-180; *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 958-959, 961 [bona fide doubt of competency based, inter alia, on "odd behavior" during trial, including overreactive "temper tantrum" outside courtroom, possible disorientation, and threats to disrupt proceedings]; *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [same – continually disrupting proceedings, prompting defendant's removal, and threatening to assault attorney]; *United States v. Williams* (10th Cir. 1997) 113 F.3d 1155, 1160 [same – "outbursts, interruptions of the attorneys, and defiance of the district court's instructions"]; *Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 519 [emotional outbursts, one of which resulted in defendant's forcible removal]);

(5) the defendant's otherwise "self-defeating" behavior (*Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [insistence on wearing jail

garb and being shackled during proceedings]; accord *Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-180; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 385-386; *Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 565, and authorities cited therein ["guilty plea with no attempt to seek concessions from the prosecution may, when coupled with other evidence of mental problems, raise doubts as to the defendant's competency"]; *Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 519 [desire to plead guilty with no attempt to plea bargain, when combined with other evidence]; *United States v. Sandoval* (E.D.N.Y. 2005) 365 F.Supp.2d 319, 325; see also *Agan v. Dugger* (11th Cir. 1987) 835 F.2d 1337, 1340 [remanding for evidentiary hearing where defendant's "self-defeating behavior" including confessing to crime, waiving all constitutional rights regarding crime and pleading without seeking benefit, and attempting to prevent defense counsel from presenting mitigating evidence, along with other evidence, "should have alerted [counsel] to the possibility that [defendant] was incompetent to render his guilty plea" to capital murder]);

(6) evidence of a head injury or brain trauma followed by a change in behavior (see, e.g., *Pate v. Robinson*, *supra*, 383 U.S. at p. 378; *Odle v. Woodford*, *supra*, 238 F.3d 1084, 1087; *Torres v. Prunty*, *supra*, 223 F.3d at p. 1106 & fn. 2; *Burt v. Uchtman*, *supra*, 422 F.3d at pp. 555-556; *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 955-956); and

(7) evidence of suicide attempts or suicidal ideation (see, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 848; *Drope v.*

Missouri, supra, 420 U.S. at pp. 166-167, 179-180; *United States v. Loyola-Dominguez* (9th Cir. 1997) 125 F.3d 1315, 1318-1319; *Moran v. Godinez* (9th Cir. 1994) 40 F.3d 1567, 1572, modified 57 F.3d 690, 695-696 [previous suicide attempt along with defendant's expressed wish to "fire his attorneys, plead guilty to three counts of capital murder, and die"].)

"'Once such substantial evidence appears, a doubt as to the sanity [or competency] of the accused exists, no matter how persuasive other evidence – testimony of prosecution witnesses *or the court's own observations of the accused* – may be to the contrary.' (*People v. Pennington, supra*, 66 Cal.2d at p. 518.) . . . The existence of other evidence, even if deemed to be in conflict with the substantial evidence of incompetency, does not relieve the trial court of the duty to conduct a competency hearing." (*People v. Stankewitz, supra,* 32 Cal.3d at p. 93, italics in original.)

3. The Evidence Raised a Reasonable Doubt Regarding Mr. Mai's Competency to Stand Trial

Pursuant to the foregoing authorities, the trial court in this case was presented with substantial evidence calling into doubt Mr. Mai's competency to stand trial. As discussed in detail in Part B, above, the court was well aware that Mr. Mai was taken into federal custody in July 1998 and held under increasingly restrictive conditions of solitary confinement. (1 RT 192-193; 2 RT 372, 374, 382-383, 396; 3 RT 403-405, 409-411, 415-417, 419, 427-428, 449, 453-456, 471-473; 4 RT 589; 2 CT 405-406, 482, 497, 500-501; 3/16/07 2 SCT 52-44, 161, 175-177, 190; 3/16/07 3 SCT 308-320.)

As further discussed in Part B, one month before the penalty phase

trial commenced, court-appointed clinical and forensic psychologist, Dr. Veronica Thomas, who met with Mr. Mai several times over several months, testified before the court that Mr. Mai's mental state deteriorated as the severity of the confinement conditions and his sensory deprivation increased. (3 RT 409-411, 414-417, 421, 427-428.) Also according to Dr. Thomas, the observations of both trial counsel and the trial investigator and their interactions with Mr. Mai were similar to her own and led all members of the defense team to the conclusion that Mr. Mai could not "cope with" the sensory deprivation of his increasingly restrictive confinement conditions and "the rage and the emotional lability of the defendant was impairing the process of the defense all the way around." (3 RT 411.) Dr. Thomas was quite explicit in testifying that Mr. Mai's "alternately enraged and irrational" mental state compromised "his ability to process the issues" and had made it impossible for her to complete the work necessary to prepare his penalty phase defense. (3 RT 411, 414, 421, 428.) A month after Dr. Thomas gave this testimony, and in the middle of the penalty phase, defense counsel reported to the trial court that Dr. Thomas met with Mr. Mai again and "noted there was an increase in his physiological symptoms, headaches, nausea, dizziness. And that there was an increase in the intensity of his emotional reaction to innocuous stimuli, the smaller the problem, the bigger the reaction which she expected. And we still have those going on." (5 RT 1076.)

Indeed, at the time of trial, and consistent with Dr. Thomas's impressions in this case, it was "well accepted that conditions such as those in [segregated housing units] . . . can cause psychological decompensation to the point that individuals may become incompetent." (*Miller ex. rel. Jones v. Stewart* (9th Cir. 2000) 231 F.3d 1248, 1252; accord, e.g., *Comer*

v. Stewart (9th Cir. 2000) 215 F.3d 910, 915, and authorities cited therein.) As one court has explained, this phenomenon, known as solitary confinement or "Segregated Housing Unit ('SHU') Syndrome" is a "constellation of symptoms" and "made up of official diagnoses such as paranoid delusional disorder, disassociative disorder, schizophrenia, and panic disorder. The extremely isolated conditions in supermaximum confinement cause SHU Syndrome in relatively healthy prisoners . . . who have never suffered a breakdown in the past but are prone to breakdown when the stress and trauma become exceptionally severe. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment." (*Jones v. El Berge* (W.D. Wis. 2001) 164 F.Supp.2d 1096, 1101-1102; accord, e.g., *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1265-1266 ["social sciences and literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances," including "aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control"]; *Comer v. Stewart* (D. Ariz. 2002) 230 F.Supp.2d 1016, 1025, 1056-1057, fn. 18, affirmed in *Comer v. Schriro* (9th Cir. 2006) 480 F.3d 960, and authorities cited therein; *In re Medley* (1890) 134 U.S. 160, 168; Terry Kruper, *Prison Madness: Mental Health Crisis Behind Bars and What We Must Do About It* (1999), 56-64; Craig Hainey & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement* (1997) 23 N.Y.U. Rev. Of Law & Soc. Change 447; Dr. Stuart Grassian, *Psychopathological Effects of Solitary Confinement* (1983) 140 Am. J. Psychiatry 1450; David Fathi, *The Common Law of Supermax Litigation* (Spring 2004) 24 Pace Law Review 675)

As discussed in part C-2, above, this Court has consistently recognized that "[i]f a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused states under oath with particularity that in his [or her] professional opinion the accused is, because of mental illness [or disorder], incapable of understanding the purpose or nature of the proceedings being taken against him *or* is incapable of assisting in his defense or cooperating with counsel, the substantial evidence test is satisfied." (*People v. Pennington*, *supra*, 66 Cal.2d at p. 519; accord, e.g., *People v. Young*, *supra*, 34 Cal.4th 1149, 1217, *People v. Welch*, supra, 20 Cal.4th at p. 748.) While it is true that Dr. Thomas did not use the word "incompetent" or specifically address his mental condition under Penal Code section 1367 – because neither trial counsel nor the court asked her that question – it is clear from her testimony and reported impressions as a whole that, based on her expertise, meetings with Mr. Mai, and his defense team's reports, she believed that the "sensory deprivation" created by the confinement conditions resulted in Mr. Mai's inability to assist counsel in the conduct of his defense in a rational manner. (See Pen. Code, § 1367; *Drope v. Missouri*, *supra*, 420 U.S. at p. 180; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 386-387 [although psychologist "did not expressly state the opinion defendant was 'incompetent,'" she submitted a report in which she "addressed at length how and why defendant was unable to assist counsel," which was sufficient to raise reasonable doubt regarding competency and demand hearing]; *People v. Ary* (2004) 118 Cal.App.4th 1016, 1023-1024 [court erred in failing to initiate competency proceedings in face of substantial evidence raising reasonable doubt as to defendant's competency; despite fact psychologist did not offer an explicit opinion as to whether the defendant was competent to stand trial, he did

testify in effect that defendant was unable to understand the proceedings or assist counsel in his defense]; see also *Comer v. Stewart* (9th Cir. 2000) 215 F.3d 910, 915-917, and authorities cited therein [competency hearing ordered where, inter alia, defendant sought to be executed and there was evidence that the conditions of his confinement had such an adverse effect on his mental state that he was rendered incompetent].) Pursuant to the foregoing authorities, Dr. Thomas's testimony alone was sufficient to raise a reasonable doubt as to Mr. Mai's competency to stand trial – and indeed take control of his case and make decisions which made a death judgment a foregone conclusion – within the meaning of section 1367 and demand a competency hearing.

Even if Dr. Thomas's testimony alone were not sufficient, the trial court was aware of a wealth of other evidence which, in combination with Dr. Thomas's testimony, was clearly sufficient to raise a reasonable doubt that Mr. Mai was competent to stand trial and decide to die. (See, e.g., *Drope v. Missouri*, *supra*, 420 U.S. at pp. 175-180 [although psychiatrist's report did not specifically address issue of competency to stand trial because that question was not presented to him, information contained therein, including descriptions of "episodic irrational acts" and difficulties in participating, along with other evidence, was sufficient to raise a reasonable doubt regarding defendant's competency, which triggered the trial court's sua sponte duty to initiate competency proceedings].)

As discussed in Argument I-G-4, *ante*, the court was aware that Victoria Pham and Mr. Mai had lived together and been involved in a romantic relationship for 10 to 12 years. (3 RT 419; 7 RT 1315-1316; Muni RT 571-572; 2 CT 499.) According to defense counsel and Dr. Thomas, Ms. Pham informed them that Mr. Mai had been in a terrible, near fatal car

accident, after which his behavior changed dramatically, causing him to become quite violent. (2 CT 501; 1 RT 170-171; 2 RT 231-232.) In Dr. Thomas's opinion, this evidence suggested the possibility of brain damage. (1 RT 170-171; 2 RT 231-232.) As noted above, this type of evidence is well-recognized as raising a red flag regarding a defendant's competency, particularly where, as here, it accompanies other signs of irrational thinking or behavior. (See, e.g., *Pate v. Robinson*, *supra*, 383 U.S. at p. 378 [evidence that defendant suffered head injury, after which his behavior changed, along with evidence of irrational behavior, was sufficient to raise bona fide doubt as to the defendant's competency and court's failure to initiate proceedings violated defendant's right to due process]; *Odle v. Woodford*, *supra*, 238 F.3d at pp. 1087-1089 [evidence that defendant had been in a car accident and suffered brain injury, after which his behavior changed and became increasingly erratic, raised reasonable doubt as to defendant's competency and court's failure to initiate proceedings violated defendant's right to due process]; *Torres v. Prunty*, *supra*, 223 F.3d at pp. 1106, & fn. 2; *Burt v. Uchtman*, *supra*, 422 F.3d at pp. 555-556.)

Furthermore, as discussed in Part B, above, from the date of Mr. Mai's slow plea to capital murder throughout the penalty phase proceedings, defense counsel repeatedly informed the court, both orally and in writing, that Mr. Mai's mental state had deteriorated under the harsh conditions of confinement to the point that he was irrational and unable to assist the defense team with necessary preparation for the penalty phase defense. In this regard, the United States Supreme Court has recognized that defense counsel are often those in closest contact with the defendant and therefore "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." (*Medina v. California*,

supra, 505 U.S. at p. 450.) As such, counsel's representations regarding his or her client's mental state and ability to rationally assist in the defense are entitled to great weight. (*Ibid.*, accord *Drope v. Missouri*, *supra*, 420 U.S. at p. 177 and fn. 13; *People v. Howard* (1992) 1 Cal.4th 1132, 1164; *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 954-955, 959-960; *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109.)

The manifestations of Mr. Mai's deteriorating mental health were not limited to his behavior with his defense team, but extended to the courtroom. As discussed in Part B, above, in some proceedings, Mr. Mai seemed disoriented and confused. (2 RT 395-398; see *McGregor v. Gibson*, *supra*, 248 F.3d at p. 959 [statements suggesting possible disorientation was among evidence raising reasonable doubt of competency].) In others, he was irrational and violent both inside and outside of the courtroom. (2 RT 305-309, 345, 349; 5 RT 1076; 6 RT 1079, 1082-1083, 1089-1091, 1098; 7 RT 1319, 1325-1331; *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [substantial evidence raising reasonable doubt of competency based, inter alia, on continual disruption of proceedings]; accord *United States v. Williams*, *supra*, 113 F.3d at p. 1160, and authorities cited therein [same – proper and rational assistance includes "'comportment in the courtroom before the jury'"]; *Chavez v. United States*, *supra*, 656 F.2d at p. 519; *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 958-959, 961.) The trial court repeatedly admonished Mr. Mai to stop disrupting the proceedings and warned him that he would be removed if he could not control himself – orders Mr. Mai would not or could not follow. (2 RT 305-309, 345, 349, 1082-1083, 1089-1091, 1098; see, e.g., *United States v. Williams* (10th Cir. 1997) 113 F.3d 1155, 1160 [substantial evidence in light of, inter alia, "outbursts, interruptions of the attorneys, and defiance of the district court's

instructions"].) His outbursts outside of the courtroom caused substantial delays in the proceedings. (5 RT 1076; 6 RT 1079-1082.) Indeed, Mr. Mai eventually became so irrational and enraged that he overturned counsel table – to which he was shackled – in front of the jurors and had to be forcibly removed from the courtroom by the bailiffs. (7 RT 1331; see, e.g., *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [substantial evidence where, inter alia, there were disruptions resulting in defendant's removal from courtroom]; *Chavez v. United States*, *supra*, 656 F.2d at p. 519 [same].)

Moreover, Mr. Mai engaged in other increasingly self-defeating behavior. (See also *Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-180; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 385-386.) The trial court was aware that Mr. Mai agreed to, and did, plead guilty to all of the federal charges, plead guilty to the state murder charge with special circumstances, and remain in the custody of the federal government under draconian confinement conditions in exchange for virtually nothing: a mere promise from the federal government to "recommend" a sentence reduction for Ms. Pham, which was ultimately rejected by the federal court. (See Argument I-E, *ante*.) Even after Ms. Pham was sentenced and Mr. Mai could no longer help her with his own sacrifices, Mr. Mai insisted on pleading guilty to capital murder in state court, despite the existence of a viable "defense" (the insufficiency of evidence to prove the sole special circumstance allegation, as discussed in Argument II, *ante*), without seeking (or receiving) any concession or benefit from the state. (See Argument I-E, *ante*e.) As noted above, a "guilty plea with no attempt to seek concessions from the prosecution may, when coupled with other evidence of mental problems, raise doubts as to the defendant's competency." (*Burt v. Uchtman*, *supra*, 422 F.3d at p. 565, and authorities cited therein; accord *Agan v. Dugger*,

supra, 835 F.2d at p. 1340; *Chavez v. United States*, *supra*, 656 F.2d at p. 519; *United States v. Sandoval, supra*, 365 F.Supp.2d at p. 325.)

Indeed, Mr. Mai's explanation for his state guilty pleas was nonsensical. As discussed in Argument I-E-2, *ante*, Mr. Mai was emphatic that he was not pleading guilty to capital murder in order to "beg for his life" or gain some tactical advantage in the penalty phase. (1 RT 197-198; 2 RT 207-210.) Despite defense counsel's repeated representations that nothing Mr. Mai did could now help Ms. Pham because she had already been sentenced, Mr. Mai was adamant that he was entering the plea in order to help Ms. Pham. (1 RT 197-198; 2 RT 207-210; see also 3 RT 489-490.) The court recognized that Mr. Mai's explanation made no sense if what Mr. Peters was telling him was true and inquired into the rationality of Mr. Mai's explanation by asking counsel if there was some possible benefit to Ms. Pham for Mr. Mai's plea that had not been disclosed. (2 RT 209-210.) According to Mr. Peters, there was no potential benefit: "it is all done." (2 RT 210.) Nevertheless, despite the on-record emphasis by both the court and counsel that Mr. Mai's slow plea would in no way help Ms. Pham, Mr. Mai insisted that he was entering the plea for just that reason. (2 RT 209-210.) Mr. Mai's explanation for entering a slow plea and admitting a special circumstance allegation unsupported by sufficient evidence, without the promise of any benefit at all, was compelling evidence to buttress Mr. Peters's and Dr. Thomas's impressions that Mr. Mai simply was not engaging in rational, competent decision-making. (See, e.g., *Burt v. Uchtman*, *supra*, 422 F.3d at p. 565; *Agan v. Dugger*, *supra*, 835 F.2d at p. 1340; *Chavez v. United States*, *supra*, 656 F.2d at p. 519; *United States v. Sandoval,* supra, 365 F.Supp.2d at p. 325.)

Of course, as further discussed in Part B, ante, Mr. Mai's self-

defeating "decisions" extended to the penalty phase, as well. During sessions in which he continually displayed irrational behavior through violent outbursts and constant disruptions, defense counsel also informed the court that Mr. Mai wished to appear in jail garb and visible shackles in front of the penalty phase jurors – requests that were granted. (2 RT 305-309, 319, 348, 365; 3 RT 490; 4 RT 586; 6 RT 1086-1090 1089-1090; *Torres v. Prunty* (9th Cir. 2000) 223 F.3d at p. 1109 [bona fide doubt where, inter alia, defendant insisted on wearing jail garb and being shackled during trial].) When the court specifically inquired of Mr. Mai if he wished to appear in jail garb, he provided no audible response. (2 RT 319; see, e.g., *United States v. John* (7th Cir. 1984) 728 F.2d 953, 956-957, and authorities cited therein [substantial evidence raised doubt about competency where, in combination with other evidence, defendant either remained silent when questioned by the judge or provided monosyllabic responses].) According to defense counsel, Mr. Mai wished to be shackled because he himself was concerned about his inability to control himself during the proceedings. (2 RT 348, 365; 6 RT 1086-1087; see, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 846, and authorities cited therein [recognizing the "pain 'and consequential burden on the mind and body of the defendant'" caused by physical restraints, which can "'impair[] his mental faculties'" and his "ability to cooperate or communicate with counsel"]; accord *Illinois v. Allen* (1970) 397 U.S. 337, 344; *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748 [visible restraints are inherently prejudicial during the penalty phase because they "may create the impression in the minds of the jurors that the court believes the defendant is a particularly dangerous and violent person," which is often a critical issue in the penalty phase].) And defense counsel joined in Mr. Mai's request "for his safety

and my safety and [co-counsel]'s safety." (6 RT 1086.)

As further discussed in detail in Argument I, *ante* Mr. Mai declined to present any penalty phase defense at all, including the presentation of compelling mitigating evidence or closing argument. Indeed, he threatened to "act out" again, as he had when he overturned counsel table to which he was shackled, if his defense attorneys presented closing argument pleading for his life. (8 RT 1399, 1400, 1402-1403; see *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 958-959, 961 [bona fide doubt where, inter alia, defendant threatened to disrupt proceedings, which prompted his removal, and threatened to assault attorney].) And, at his request, he took the stand and testified that the jurors should return a death verdict. (8 RT 1409-1410.)

Again, Mr. Mai did not offer any rational explanation for his decision to die. His *counsel* told the court that Mr. Mai wished to commit suicide by jury "for what he believes are valid moral reasons" (8 RT 1399), but Mr. Mai himself never offered any "valid moral" or any other coherent reason for his choice. Mr. Mai simply volunteered to the court:

> Your honor, I am not suicidal, if I was suicidal I wouldn't be here this day. I just feel this is something I need to do. I feel this is something that is important to everybody, I believe. I am just doing the right thing that I feel that's necessary. I am not looking at this the way everyone else here is looking at it. I feel I am competent, I can do this, and I would appreciate my lawyer not to say anything.

(8 RT 1402.)

Mr. Mai did not elaborate on why this was the "right thing" or "necessary" or in what way his view of "looking at this" was different from "the way everybody else here is looking at it" nor did the court ask him to do so. His testimony to the jurors, however, did provide some hints regarding the impetus for his decisions. He told the jurors that imposition

of the death penalty was right and appropriate because it followed the law of the streets: "I believe in two eyes for every eye. If you were to take down one of my fellows, I would do everything that is necessary to take down at least two of yours, just to be even." (8 RT 1409.) Therefore, the jurors should do the same "because is only fair, there's a price to pay for everything in life, now that I am here it's time I pay that price. Because, after all of this entire ordeal, *it is just part of the game*." (8 RT 1410, italics added.)

It is true that this Court has held that "a defendant's preference for the death penalty and overall death wish does not *alone* amount to substantial evidence of incompetence requiring the court to order an independent psychiatric evaluation." (*People v. Ramos* (2004) 34 Cal.4th 494, 509, italics added; accord *People v. Guzman* (1988) 45 Cal.3d 915, 964.) However, it is equally true that suicidal behavior or ideation and other self-defeating behavior, "in combination with other factors, may constitute substantial evidence raising a bona fide doubt regarding a defendant's competence to stand trial." (*People v. Rogers*, *supra*, 39 Cal.4th at p. 848; accord, e.g., *Drope v. Missouri, supra*, 420 U.S. at pp. 166-167, 179-180 ["we need not address the Court of Appeals' conclusion that an attempt to commit suicide does not create a reasonable doubt of competence to stand trial as a matter of law" because that attempt "did not stand alone"; the attempt in combination with other evidence created reasonable doubt as to competency to stand trial]; *United States v. Loyola-Dominguez* (9th Cir. 1997) 125 F.3d 1315, 1318-1319; *Moran v. Godinez* (9th Cir. 57 F.3d 690, 695-696.) This is just such a case. Mr. Mai's wish to commit state-assisted suicide, *in combination with* the other substantial evidence that it was influenced by his irrational and decompensating mental state, was more

than sufficient to raise an objectively reasonable doubt regarding his competency and trigger the trial court's duty to order a competency hearing.

Although the trial court never explicitly addressed the issue of Mr. Mai's competence to stand trial, the record suggests two reasons for the court's failure to declare a doubt regarding Mr. Mai's competency, suspend the criminal proceedings and initiate competency proceedings: (1) defense counsels' statements that although they and Dr. Thomas believed that Mr. Mai's mental state had so deteriorated in solitary confinement that he was no longer able to rationally participate in his defense, defense counsel also did not believe that he was incompetent under state law; and (2) the court's own observations of Mr. Mai's courtroom demeanor. However, neither reason negated the substantial evidence raising an objective, reasonable doubt regarding Mr. Mai's competency or relieved the trial court of its independent duty to initiate competency proceedings in the face of that evidence.

4. Neither Defense Counsels' Statements That, Although They Believed That Mr. Mai Was Unable to Rationally Participate in His Defense, They Did Not Believe That He Was Incompetent, Nor the Trial Court's Own Observations of Mr. Mai's Demeanor Relieved the Trial Court of its Independent Duty to Declare a Doubt Regarding Mr. Mai's Competency to Stand Trial and Initiate Competency Proceedings

To be sure, Mr. Peters repeatedly stated that he did not believe that Mr. Mai "was 1368." However, these statements were irreconcilable with his other, repeated remarks to the state trial court, the federal district court, the Ninth Circuit Court of Appeals, and the Court of Appeal for the Fourth Appellate District, that Mr. Mai's mental state had deteriorated to the point that he could no longer rationally participate in his defense. While Mr.

Peters's statements regarding his interactions with Mr. Mai in the preparation of his defense were entitled to significant weight, as discussed above, his further, nonsensical and indefensible statements that he did not believe that Mr. Mai was incompetent were not. (Cf. *Odle v. Woodford*, *supra*, 238 F.3d at p. 1089 ["counsel is not a trained mental health professional and his failure to raise petitioner's competence does not establish that petitioner was competent;" holding other evidence in the record, including evidence of head trauma and brain injury followed by psychotic behavior, some of which occurred while awaiting trial, sufficient to raise doubt in a reasonable jurist regarding competency to stand trial].) Those statements certainly did not relieve the trial court of its independent duty to initiate competency proceedings in the face of substantial evidence raising an objective, reasonable doubt regarding Mr. Mai's competency. (See, e.g., *United States v. John*, *supra*, 728 F.3d at p. 957 [substantial evidence raising doubt regarding defendant's competency demanded hearing despite defense counsel's statement that he believed his client was competent]; *People v. Ary*, *supra*, 118 Cal.App.4th at p. 1025 [same]; *United States v. Timmins* (9th Cir. 2002) 301 F.3d 974, 981 [same – "Courts must resist the unquestioning acceptance of counsel's representations concerning client competence"].)

In addition, as discussed in Part B, above, after having received and reviewed the pleadings filed in the Ninth Circuit, the trial court expressed its concern over defense counsel's representation in those pleadings that "the conditions of [Mr. Mai's] confinement have caused him to become mentally unstable, to the point where his counsel and psychologist cannot prepare petitioner for trial." (5 RT 1075.) The court then "observ[ed] for the record" that, during those voir dire proceedings, Mr. Mai "attentively

followed roll call page by page," read the juror questionnaires, made notes, consulted with both his attorneys regarding the questionnaires and "has assisted Mr. Peters in the exercise of peremptory challenges." (5 RT 1075.) Furthermore, Mr. Mai "has not given an appearance of being nervous or upset. On the contrary, he has appeared to be rather calm and collected during this four-day time frame." (5 RT 1076.) In addition to informing the court that Dr. Thomas had spent "considerable time with" Mr. Mai just days earlier and "noted an increase in his physiological symptoms . . . and confirmed her prior opinions that he can't be objective in dealing with her or me," Mr. Peters pointed out that the court's observations about Mr. Mai's seeming calmness was simply incorrect: "this morning, of course, the defendant did have an outburst, and we did have to pause for a while to calm him down, or I did." (5 RT 1076.)

Not only were the trial court's observations incorrect; they were entirely speculative. The trial court simply had no way of knowing whether Mr. Mai was actually reading the juror questionnaires for voir dire purposes, simply appearing to read them, or reading them for hidden messages from aliens conspiring to kill him. Nor could the court know that when Mr. Mai spoke with his attorneys on those days, he was rationally consulting with them about voir dire, and not about the stench from his full toilet, or a desire to remove all jurors with red hair, or about little green men. The most that the court could say was that Mr. Mai *appeared* to be participating in the voir dire.

It seems clear from the court's remarks that it believed that its own observations regarding Mr. Mai's demeanor and *apparent* participation in the voir dire process trumped the overwhelming other evidence – including the representations of his own counsel and a qualified psychologist who had

frequent contact with Mr. Mai – that he was unable to participate in his defense *in a rational manner*. Of course, the court was wrong.

As discussed in part C, above, "[t]he doubt which triggers the obligation of the trial judge to order a hearing . . . is not a subjective one but rather a doubt determined objectively from the record." (*People v. Humphrey* (1975) 45 Cal.App.3d 32, 36; accord, e.g., *People v. Jones*, *supra*, 53 Cal.3d at p. 1153; *People v. Pennington*, *supra*, 66 Cal.2d at p. 518; *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1402; *McGregor v. Gibson*, *supra*, 248 F.3d at p. 952; *United States v. Williams* (5th Cir. 1988) 819 F.2d 605, 619.) Consistent with this objective standard:

> Although section 1368, subdivision (a), refers to a doubt that arises "in the mind of the judge as to the mental competence of the defendant," case law interpreting this subdivision establishes that when the court becomes aware of substantial evidence which objectively generates a doubt about whether the defendant is competent to stand trial, the trial court must on its own motion declare a doubt and suspend proceedings even if the trial judge's own observations lead the judge to a belief that the defendant is competent.

(*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1415, citing *People v. Jones*, *supra*, 53 Cal.3d at p. 1153 and *People v. Pennington*, *supra*, 66 Cal.2d at p. 518.)

Here, the court was aware of substantial evidence raising an objective, reasonable doubt regarding Mr. Mai's competency, or ability to participate in his defense in a rational manner. Once presented with such evidence, the court had absolutely no discretion to decline to declare a doubt and suspend criminal proceedings based on its own observations of Mr. Mai's demeanor or its subjective belief that he was competent. (See, e.g., *People v. Jones*, *supra*, 53 Cal.3d at p. 1153 ["substantial evidence" is measured by an objective standard and, hence, cannot be defeated by the

trial court's own observations of the defendant]; accord, e.g., *People v. Pennington*, *supra*, 66 Cal.2d at p. 518.)

In any event, even assuming arguendo the correctness of the court's implicit conclusion that Mr. Mai was competent during the voir dire proceedings on April 3, 6, 10, and 11 based on its observations of his demeanor, Mr. Mai's later behavior – in combination with the other evidence – called his competency into doubt, as fully discussed above. The trial court has a continuing obligation to initiate competency proceedings whenever substantial evidence of incompetence is presented at "any time prior to judgment." (*People v. Jones*, *supra*, 53 Cal.3d at pp. 1152-1153; accord, e.g., *Drope v. Missouri*, *supra*, 420 U.S. at p. 181 [the court "must always be alert" to new evidence suggestive of incompetency and suspend proceedings whenever competency is in reasonable doubt].) The remarks of one court are particularly apt here:

> Even were we to credit the [judge's] interpretation of that event [as proof of defendant's competency], the due process requirement of competency continues throughout trial; one instance of demonstrable competency on [defendant's] part does not overcome the numerous occasions, occurring before and after [that event], in which his competency was called into doubt.

(*McGregor v. Gibson*, *supra*, 248 F.3d at p. 961.) For all of these reasons, the trial court's failure to declare a doubt regarding Mr. Mai's competency to stand trial violated both state law and Mr. Mai's federal constitutional right to due process.

D. The Court's Failure to Hold a Competency Hearing Requires Reversal

Where, as here, a defendant shows that the trial court failed to hold a competency hearing in the face of substantial evidence raising a doubt as to his competency to stand trial, the ensuing due process violation typically demands reversal per se of the judgment. (See, e.g., *People v. Young*, *supra*, 34 Cal.4th at pp. 1216-1217; *People v. Welch*, *supra*, 20 Cal.4th at p. 738; *People v. Pennington*, *supra*, 66 Cal.2d at p. 521; *Drope v. Missouri*, *supra*, 420 U.S. at p. 183; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 386-387; *Dusky v. United States*, *supra*, 362 U.S. at p. 403.) As the United States Supreme Court has explained, this is so because a limited remand for a retrospective determination of the defendant's competency to stand trial years earlier would generally be futile and inappropriate because the "jury would not be able to observe the subject of their inquiry [i.e., the defendant at the time of trial], and expert witnesses would have to testify solely from information contained in the printed record. That [the defendant's] hearing would be held . . . years after the fact aggravates these difficulties." (*Pate v. Robinson*, *supra,* 383 U.S. at p. 387 [reversing outright, rather than remanding, six years after the fact]; accord *Dusky v. United States,* 362 U.S.at p. 403 [observing the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago," Court reversed outright for failure to hold competency hearing]; *Drope v. Missouri*, *supra*, 420 U.S. at p. 183 [given "inherent difficulties of . . . a *nunc pro tunc* determination [of competency] under the most favorable circumstance," retrospective determination would be inadequate when seven years had elapsed since trial].)

While this Court has observed that the United States Supreme Court

in *Drope v. Missouri*, *supra*, recognized "the *possibility* of a constitutionally adequate posttrial or even postappeal evaluation of the defendant's pretrial competence" (*People v. Superior Court (Marks)*, *supra*, 1 Cal.4th at p. 67, citing *Drope v. Missouri*, *supra*), retrospective competency hearings are "strongly disfavored" (*Weisberg v. State* (8th Cir. 1994) 29 F.3d 1271, 1278). It is only in the "rare" and "highly unusual" case, in which there is extensive record evidence, including qualified expert opinions, on which a reliable retrospective competency determination *might* be possible, that remand is appropriate. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1028-1030, cited without approval or disapproval in *People v. Young*, *supra*, 34 Cal.4th at p. 1217, fn. 16 [while reliable retrospective competency determinations are often impossible, under "highly unusual" circumstances of case wherein there were two pretrial proceedings on defendant's competence to waive *Miranda* rights at which "extensive expert testimony and evidence was proffered regarding defendant's mental retardation and ability to function in the legal arena," which were held only four and five years earlier, a reliable retrospective determination *might* be possible].) Indeed, in *Drope* itself, the Court held that a reliable retrospective competency determination would be impossible and inappropriate "[g]iven the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances." (*Drope v. Missouri*, *supra*, 420 U.S. at p. 183.) Of course, as the *Pate* court recognized, these "inherent difficulties" are most acute when a substantial period of time has passed since the trial. (See, e.g., *Pate v. Robinson*, *supra*, 383 U.S. 375, 387 [six years]; see also *Drope v. Missouri*, *supra*, 420 U.S. 162, 183 [seven years]; *Dusky v. United States*, *supra*, 362 U.S. at p. 403 [more than a year]; *People v. Pennington* (1967) 66 Cal.2d 508, 511 [two years]; see also, e.g., *United States v. Day*

(8th Cir. 1991) 949 F.2d 973, 982 & fn. 9 ["to require a . . . court to decide whether a defendant was competent during proceedings that took place years earlier would be an exercise in futility"].) In fact, in every case in which this Court and the United States Supreme Court have found error in the failure to hold a competency hearing, complete reversal has been ordered. (*Drope v. Missouri*, *supra*, 420 U.S. 162, 183; *Pate v. Robinson*, *supra*, 383 U.S., at pp. 386-387; *Dusky v. United States*, *supra*, 362 U.S.at p. 403; *People v. Marks*, *supra*, 45 Cal.3d at p. 1344; *People v. Hale*, *supra*, 44 Cal.3d at p. 541; *People v. Stankewitz*, *supra*, 32 Cal.3d at p. 94; *People v. Pennington*, *supra*, 66 Cal.2d at p. 521.)

As of this writing, nearly 10 years have passed since the issue of Mr. Mai's competence to stand trial arose – more time than that at issue in *Drope*, *Pate*, and *Dusky*. Furthermore, because this is a capital case, state law and the Eighth and Fourteenth Amendments demand a heightened need for reliability in all stages of the proceedings. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 732 ["'we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding'"]; accord *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [same – applying heightened scrutiny standard to determination of competency to be executed]; *Spaziano v. Florida* (1984) 486 U.S. 447, 456; *People v. Coffman* (2004) 34 Cal.4th 1, 44 [pre-trial rulings]; *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [penalty phase].) Thus, the question is not merely whether a retrospective competency determination is possible, but whether a *highly reliable* determination that Mr. Mai was competent to stand trial 10 year ago is possible. The answer is no.

In this regard, any retrospective competency determination must be limited to evidence in the trial record or that existed at the time of trial. (See, e.g., *Pate v. Robinson*, *supra*, 383 U.S. at p. 387 [at any retrospective competency hearing, expert witnesses would have to testify solely from information contained in the printed record"]; *People v. Ary*, *supra*, 118 Cal.App.4th at p. 1028 [retrospective competency determination is limited to evidence in trial record; only "new" evidence permissible is that from qualified experts who evaluated defendant at trial based on those evaluations; thus, since the trial record is generally deficient in this regard, meaningful retrospective competency determinations are usually impossible]; *People v. Robinson* (2007) 151 Cal.App.4th 606, 617-618, citing *United States v. Collins* (10th Cir. 2005) 430 F.3d 1260, 1267 [retrospective competency determination based on reports and other evidence in trial record and testimony – if available – of individuals based on their memories of interactions with defendant before and during trial]; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089-1090 ["We have said that retrospective competency hearings may be held when the record contains sufficient information upon which to base a reasonable psychiatric judgment"]; *Silverstein v. Henderson* (2nd Cir. 1983) 706 F.2d 361, 369 ["a retrospective determination of [defendant's] competency to stand trial would have to be based on three conflicting written reports [in record], a cold, sparse record, and the recollection of those who saw and dealt with him six years ago. Such a hearing would be wholly inadequate to substitute for the 'concurrent hearing' into competency mandated by *Pate v. Robinson*"].)

Here, the *only* expert to evaluate Mr. Mai was Dr. Thomas. She came to the conclusion that Mr. Mai's mental health had so deteriorated in

solitary confinement that he was not able to rationally participate in the preparation of his defense. Furthermore, the face of the record provides ample evidence regarding defense counsel's impressions of Mr. Mai – despite their nonsensical statements that Mr. Mai was "not 1368," they firmly believed that Dr. Thomas was correct and Mr. Mai was unable to participate in his defense, or make a decision to waive all rights and voluntarily submit to execution, in a rational manner. (See, e.g., *Odle v. Woodford*, *supra*, 238 F.3d at pp. 1089-1090 [trial counsel's statements in record regarding interactions with defendant and competency relevant to retrospective competency determination].) Thus, based on this evidence, it is certainly possible to make a retrospective determination that Mr. Mai was *incompetent* to stand trial 10 years ago. However, the opposite is not true.

If, as the United States Supreme Court has explicitly recognized, reliable retrospective competency determinations are extraordinarily difficult under even the "most favorable circumstances" (*Drope v. Missouri*, *supra*, 420 U.S. at p. 183), the circumstances here make a *highly* reliable determination, consistent with Mr. Mai's Eighth and Fourteenth Amendment rights, that Mr. Mai was *competent* to stand trial 10 years ago impossible. Thus, the judgment must be reversed outright. Of course, the state is free to retry Mr. Mai *if he is competent* to be retried. (See *Drope v. Missouri*, *supra*, 420 U.S. at p. 183.) Hence, this Court should reverse with directions that if the state elects to retry him, the trial court must suspend criminal proceedings and initiate competency proceedings. (See, e.g., *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1420.)[93]

---

[93]This is particularly appropriate here since Mr. Mai has remained in the custody of the federal government, under onerous special restrictive

(continued...)

Finally, should this Court determine that a limited remand is appropriate, it must do so with directions to the trial court to *first* determine whether the trial "'record contains sufficient information upon which to base a reasonable psychiatric judgment'" that Mr. Mai was competent to stand trial 10 years ago. (*People v. Ary*, *supra*, 118 Cal.App.4th at p. 1028 [remanding with directions to the trial court to determine if the trial record contained sufficient evidence on which to base a reliable, retrospective competency determination]; accord, e.g., *People v. Kaplan* (2007) 149 Cal.App.4th 372, 386-387 [remanding with same directions where record contained four-year-old competency evaluations].) The prosecution shall carry the burden of proving that a retrospective competency determination would not only be feasible, but – consistent with the Eighth Amendment – *highly reliable*. (*Ibid.*; cf. *Ford v. Wainwright*, *supra*, 477 U.S. at p. 411 [Eighth Amendment demands heightened reliability in procedure to determine competency to be executed].) If such a determination is not possible, then the judgment must be reversed.

If the prosecution carries its initial burden of proving the feasibility of a highly reliable retrospective determination that Mr. Mai was competent to stand trial in 1999 and 2000, the prosecution carries the further burden of proving that Mr. Mai was, in fact, competent to stand trial. As one court has explained, the United States Supreme Court in "*Pate*, [*supra*,] in essence, established a rebuttable presumption of incompetency upon a showing by a habeas petitioner [or appellant] that the state trial court failed to hold a competency hearing on its own initiative despite information

---

[93](...continued)
confinement conditions, for approximately the last 12 years, as of this writing. (See 3 CT1082-1085; 4 CT 1127.)

raising a bona fide doubt as to petitioner's [or appellant's] competency. According to *Pate*, the state could rebut this presumption by proving that the petitioner had, in fact, been competent at the time of trial." (*James v. Singletary* (11th Cir. 1992) 957 F.2d 1562, 1570-1571; accord, e.g., *Watts v. Singletary* (11th Cir. 1996) 87 F.3d 1282, 1287 & fn. 6; *United States ex rel. Lewis v. Lane* (7th Cir. 1987) 822 F.2d 703, 706; compare Pen. Code, §§ 1368, 1369 subd. (f) [for competency hearings held "*during the pendency of an action and prior to judgment*," burden on defendant to prove incompetency by preponderance] and *Medina v. California* (1992) 505 U.S. 437, 447 [placing burden of proof on defendant to prove *present* incompetency by preponderance at contemporaneous competency hearing does not violate due process].)[94] Indeed, a remand for a retrospective competency determination is, in essence, a remand to determine whether the due process violation arising from the trial court's failure to hold a contemporaneous competency hearing was harmless. (See, e.g., *James v. Singletary*, *supra*, at pp. 1570-1571 & fns. 11 & 12, citing *Pate v. Robinson*, *supra*, 383 U.S. at p. 387; see also, e.g., *Odle v. Woodford*, *supra*, 238 F.3d at pp. 1089-1090 [remanding for a retrospective competency determination allows state to "cure" the federal constitutional violation resulting from failure to hold contemporaneous hearing].) And, of course, the state bears the burden of proving federal constitutional errors harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) If the prosecution fails to carry its burden, the death judgment

---

[94] This Court has recently granted review in order to resolve whether the prosecution bears the burden of proving competency upon remand for the erroneous failure to hold a competency hearing. (*People v. People v. Ary* (2009) 173 Cal.App.4th 80, rev. granted July 29, 2009 (S173309.)

must be reversed.

//

//

V

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS BY PERMITTING MR. MAI TO PRESENT AN IRRELEVANT AND INFLAMMATORY STATEMENT TO THE JURORS THAT DEATH WAS THE APPROPRIATE PENALTY IN THIS CASE

A. Introduction

As discussed in Argument I-G-3-c, *ante*, Mr. Mai and his counsel informed the trial court that Mr. Mai wished to take the stand and testify that the jurors should return a death verdict. (8 RT 1399, 1401.) Neither the prosecution nor defense counsel had any objection to this proposed testimony. (8 RT 1400.)

The court informed Mr. Mai that his proposed testimony would be "tantamount to suicide and the state of California doesn't assist or participate in suicides." (8 RT 1401.) While the court "recommend[ed] that [Mr. Mai] not do that" (8 RT 1401), it ruled that Mr. Mai had "the right to take the stand and talk to the jurors" (8 RT 1401).

Based upon Mr. Mai's proposed testimony, defense counsel's *only* statement to the jurors was: "[A]s you can see, Mr. Mai is going to tell you what he wants to tell you, and this will be the only defense evidence, this is Mr. Mai's request. And he will be addressing you directly and speaking, with the agreement of the prosecutor, in narrative, he will just tell you what he wants to tell you." (8 RT 1409.) Mr. Mai then made the following sworn statement to the jurors:

> Before I start, I would like to say that I did request for my lawyers not to say anything on my behalf, and I appreciate that. Jurors, I am not here to ask or beg for your sympathy or pity. Nor am I here to ask or beg of you, the jurors, to spare my life. Personally, I believe in an eye for an eye. I believe

> in two eyes for every eye. If you were to take down one of my fellows, I would do everything that is necessary to take down at least two of yours, just to be even. In this penalty phase trial, the prosecutor, Mr. Jacobs, is seeking the maximum penalty, which we all know is death. I personally feel that the maximum penalty is properly suited for this occasion. I also feel that it is the right thing, for you, the jurors, to do so. Being in my situation now I feel it is only fair, there's a price to pay for everything in life, now that I am here it's time I pay that price. Because, after all of this entire ordeal, it is just part of the game. That's all I have to say, your honor.

(8 RT 1409-1410.)

Mr. Mai's "testimony" was the last piece of evidence presented at the penalty phase. And it formed the basis for the last words the jurors heard before retiring to deliberate: in the only summation presented to the jurors, the prosecutor closed by reminding them, "Mr. Mai testified and told you what he expects from you and what he believes he deserves. I don't see a reason to disappoint him on this point. . . . [T]he death penalty is the only appropriate verdict." (8 RT 1424.) The jurors agreed, returning their death verdict only minutes later. (3 CT 867-868.)

As will be demonstrated below, the trial court violated state law and the Eighth and Fourteenth Amendments of the United States Constitution by permitting Mr. Mai to present irrelevant, inadmissible, and extraordinarily damaging testimony that death was the appropriate penalty in this case, which the jurors were encouraged to consider and weigh on death's side of the scale. Because it cannot be shown beyond a reasonable doubt that no juror relied on this evidentiary bombshell in returning his or her death verdict, the death judgment be reversed.

B. Mr. Mai's Testimony That Death Was The Appropriate Penalty In This Case Was Irrelevant and Inadmissible Under State Law and The Eighth and Fourteenth Amendments

1. The Right to Testify Is Not Absolute and Extends Only to Relevant and Admissible Material

A criminal defendant generally enjoys the right to take the stand and testify in his own *defense*. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-53, 55 [recognizing right under due process and compulsory process guarantees to present evidence in one's defense under the Fifth, Sixth, and Fourteenth Amendments]; *People v. Robles* (1970) 2 Cal.3d 205, 215 [recognizing right under California law].) But that right is not absolute. It encompasses only "the right to present *relevant* testimony." (*Rock v. Arkansas, supra*, at p. 55, italics added; see also, e.g., *People v. Lancaster* (2007) 41 Cal.4th 50, 101-102 [trial court properly precluded defendant from testifying to irrelevant matter at penalty phase without violating his constitutional right to testify]; *People v. Alcala* (1992) 4 Cal.4th 742, 806-807 [same]; *United States v. Carter* (7th Cir. 2005) 410 F3d 942, 951 ["Simply stated, a criminal defendant does not have an absolute, unrestrainable right to spew irrelevant – and thus inadmissible – testimony from the witness stand"]; *United States v. Moreno* (9th Cir. 1996) 102 F.3d 994, 998 [constitutional right to testify is not violated by exclusion of irrelevant testimony]; *United States v. Gonzalez-Chavez* (8th Cir. 1997) 122 F.3d 15, 18 [court's refusal to permit defendant to testify to irrelevant matter did not violate right to testify].) The defendant must comply with rules of procedure and evidence designed to assure fairness and reliability. (See, e.g., *United States v. Gallagher* (9th Cir. 1996) 99 F.3d 329, 332, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

Furthermore, the right to present even relevant testimony is "not without limitation" and "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" (*Rock v. Arkansas*, *supra*, 483 U.S. at p. 55, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 295.) Thus, the state may restrict the defendant's right to testify so long as the restrictions are not "arbitrary or disproportionate to the purposes they are designed to serve." (*Id.* at pp. 55-56; accord, e.g., *United States v. Gallagher*, *supra*, 99 F.3d 329, 332 [it is "neither arbitrary nor disproportionate" to refuse to allow a defendant to give narrative testimony]; *People v. Lucero* (2000) 23 Cal.4th 692, 717, and authorities cited therein ["we have repeatedly held there is no right of allocution at the penalty phase of a capital trial"].)

2. Mr. Mai's Opinion That Death Was the Appropriate Punishment Was Irrelevant and Inadmissible at the Penalty Phase of this Capital Trial, and Offended the Eighth Amendment and Fourteenth Amendments

In *Booth v. Maryland* (1987) 482 U.S. 496, 502-503, the United States Supreme Court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence, which is irrelevant to the jury's sentencing decision and thus risks arbitrary and capricious imposition of the death penalty. At issue in that case were two types of victim impact evidence: (1) the personal characteristics of the victims and the impact of the crimes on their families; and (2) the family members' opinions and characterizations of the defendant and his crimes, and their view of the appropriate sentence. (*Id.* at pp. 507-510.)

In *Payne v. Tennessee* (1991) 501 U.S. 808, the Court partially overruled *Booth*. The Court held "that if the State chooses to permit the

admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (*Payne v. Tennessee, supra*, 501 U.S. at p. 827.) However, the Court took care to note that its holding encompassed only the first category of evidence addressed in *Booth*, not the second category of evidence relating to the witnesses' views on the appropriate punishment. (*Id.* at p. 830, fn. 2.)

Hence, as this Court and others have recognized, the high court in *Payne* "left intact" that part of *Booth* holding that the Eighth Amendment prohibits admission of penalty phase testimony regarding the propriety of, or desire for, one penalty over another. (*People v. Smith* (2003) 30 Cal.4th 581, 622-623; accord, e.g., *Welch v. Sirmons* (10th Cir. 2006) 451 F.3d 675, 703, and authorities cited therein [admission of testimony that defendant deserved the death penalty violated Eighth Amendment]; *State v. Payne* (Idaho 2008) 199 P.3d 123, 148-149 [same]; see also *United States v. Brown* (11th Cir. 2006) 441 F.3d 1330, 1351 [collecting cases].) This prohibition applies with equal force to testimony offered by the prosecution and by the defense, and to testimony that either death or life without parole is the appropriate penalty. (See, e.g., *People v. Smith*, *supra*, 30 Cal.4th at pp. 622-623 [just as the prosecution may not present witness opinion that death is the appropriate penalty, so too is the defendant prohibited from presenting witness opinion that life without parole is the appropriate penalty, absent single narrow exception]; *United States v. Brown*, *supra*, 441 F.3d at p. 1351 & fn. 8, and authorities cited therein [testimony of victim's relative that appropriate punishment is life is irrelevant to jury's sentencing decision and inadmissible under *Booth*, even in light of *Payne*]; *Robison v. Maynard* (10th Cir. 1991) 943 F.2d 1216, 1217-1218 [same]; see also *People v. Lancaster*, *supra*, 41 Cal.4th at pp. 190-191 [trial court

properly precluded defense counsel from arguing victim's opposition to the death penalty].)

The only exception to this firm rule of exclusion is "testimony from somebody 'with whom defendant had a significant relationship, that defendant deserves *to live*, [which] is proper *mitigating* evidence as "indirect evidence of the defendant's character."' (Citations)." (*People v. Smith* (2003) 30 Cal.4th 581, 622-623.) But this exception exists not because opinion regarding appropriate punishment is relevant or admissible evidence; rather, it exists because evidence regarding the defendant's *good* character is admissible *mitigation* under Penal Code section 190.3, factor (k), and a close family member or friend's testimony that the defendant deserves to live provides insight into the defendant's good character. (*People v. Smith*, *supra*, 30 Cal.4th at p. 623; accord *People v. Ervin* (2000) 22 Cal.4th 48, 102.) This exception is a narrow one that does not include, for instance, testimony from a victim with whom the defendant did *not* have a significant relationship that the appropriate punishment is life, not death. (See, e.g., *People v. Smith, supra*, 30 Cal.4th at pp. 621-622; *United States v. Brown*, *supra*, 441 F.3d at p. 1351 & fn. 8.)

In addition to the Eighth Amendment bar, due process prohibits death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 885; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 192 [Eighth and Fourteenth Amendments demand that aggravation be "particularly relevant to the sentencing decision"].) A witness's testimony that death is the appropriate punishment is certainly aggravating in that it weighs on death's side of the scale; because such evidence is irrelevant to the jury's sentencing decision

(*Booth v. Maryland*, *supra*, 482 U.S. at pp. 507-510), "due process of law would require that the jury's decision to impose death" based on such aggravating evidence "be set aside" (*Zant v. Stephens*, *supra*, 462 U.S. at p. 885; accord, e.g., *Brown v. Sanders* (2006) 546 U.S. 212, 220 [due process violation where juror is permitted to consider aggravating evidence in the weighing process that it would not otherwise have heard]).

Consistent with the foregoing principles, this Court has recognized that "a defendant's opinion regarding the appropriate penalty the jury should impose usually would be irrelevant to the jury's penalty decision" and inadmissible. (*People v. Danielson* (1992) 3 Cal.4th 691, 715.) Indeed, as this Court has emphasized with respect to the general prohibition against witness opinions regarding the appropriate penalty, the United States Supreme Court "has never suggested that the defendant must be permitted to do what the prosecution may not do" – in this case, offer irrelevant and inadmissible opinion testimony that death is the appropriate punishment. (*People v. Smith*, *supra*, 30 Cal.4th at p. 622.)

Pursuant to the foregoing principles, while Mr. Mai did indeed have a right to testify *in his defense* at the penalty phase of his trial, he did *not* have the right to offer irrelevant and otherwise inadmissible "testimony" that death was the appropriate or desired punishment in this case. Indeed, he had no right to make the narrative statement he made at all. (See, e.g., *United States v. Gallagher* (9th Cir. 1996) 99 F.3d 329, 332 [right to testify does not include right to present narrative testimony]; *People v. Lucero* (2000) 23 Cal.4th 692, 717, and authorities cited therein ["we have repeatedly held there is no right of allocution at the penalty phase of a capital trial"].) Thus, the trial court erred in ruling that Mr. Mai had the right to make such a statement, and violated state law and the Eighth and

Fourteenth Amendments in permitting the testimony and allowing the jurors to consider it in reaching their penalty phase decision. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 507-510; see also *Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 585-586; *Zant v. Stephens*, *supra*, 462 U.S. at p. 885.)

Certainly, the exclusion of Mr. Mai's statement as irrelevant and inadmissible would not have been deemed "arbitrary or disproportionate." (*Rock v. Arkansas*, *supra*, 483 U.S. at pp. 55-56 [state may restrict the defendant's right to testify so long as the restrictions are not "arbitrary or disproportionate to the purposes they are designed to serve"]; *United States v. Gallagher*, *supra*, 99 F.3d at p. 332.) To the contrary, the United States Supreme Court has held that *admitting* such testimony and allowing it to enter into the jury's penalty decision risks arbitrary and capricious imposition of the death penalty. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 507-510.) With one limited exception, opinion testimony regarding the appropriate penalty is irrelevant and inadmissible when it comes from any other witness. It would be both arbitrary and capricious *not* to apply that same rule of exclusion to a defendant's testimony when his constitutional right to testify is *not* absolute, but rather encompasses only relevant evidence.

Morever, and as more fully discussed in Argument VIII, *post*, the *public* has a legitimate, vital interest – one that cannot and should not be overridden by a particular criminal defendant – in ensuring that criminal trials are both fair and *appear* to be fair, and that death verdicts are just, based on reason, and reliable. (See, e.g., *Indiana v. Edwards* (2008) ___ U.S. ___, 128 S.Ct. 2379, 2387 [state has independent interest in ensuring that criminal trials are fair "and appear to be fair to all who observe them"];

Beck v. Alabama (1980) 447 U.S. 625, 637-638 [recognizing "vital importance to the . . . community that any decision to impose the death sentence be, and appear to be, based on reason"]; *People v. Guzman* (1988) 45 Cal.3d 915, 962 ["Beyond doubt, the state has a strong interest in promoting the reliability of a capital jury's sentencing decision"]; *People v. Deere* (1985) 41 Cal.3d 353, 362-364.) In other words, society has a legitimate and vital interest in ensuing that the penalty phase of a capital trial transcends a particular defendant's desire to commit suicide. (See, e.g., *People v. Chadd* (1981) 28 Cal.3d 739, 744-745, 753; see also Argument VIII, *post*, and authorities cited therein.)

To be sure, defense counsel not only failed to object to Mr. Mai's request to testify that death was the appropriate penalty in this case, they actively presented his testimony to the jurors as the only "evidence" the defense was offering. (RT 1409.) As discussed in Argument I-G, *ante*, counsel's performance in this regard deprived Mr. Mai of his state and federal constitutional rights to the effective assistance of counsel. In any event, whether constitutionally defective or not, defense counsel's actions did not relieve the trial court of its independent obligation to ensure that this capital murder trial comported with fundamental notions of fairness, reliability and justice by excluding Mr. Mai's testimony.

C. The Trial Court Had an Independent Obligation to Exclude Mr. Mai's Testimony that Death Was the Appropriate Penalty, Which was Not Relieved by Defense Counsel's Failure to Object

The United States Supreme Court long ago recognized that "[i]t is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." (*Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co* (1919) 249 U.S. 134, 145-146, citations omitted; *United States v. Young* (1985) 470 U.S. 1, 10 [duty of trial court to keep trial within proper bounds]; *Glasser v. United States* (1942) 315 U.S. 60, 71 ["Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused"].) Indeed, as Justice Learned Hand emphasized over 60 years ago, "[a] judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary." (*Brown v. Walter* (2nd Cir. 1933) 62 F.2d 798, 799.)

California judges are held to the same standard. As this Court has held:

> "The rule that a trial judge's unwarranted interference with the handling of a case is misconduct . . . is sometimes distorted into a prohibition against any participation in the trial contrary to the desires or strategy of counsel. This is a complete misconception. 'It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, *it is not only the right but the duty* of a trial judge to clearly

> bring out the facts so that the important functions of his office may be fairly and justly performed.' (*Estate of Dupont* (1943) 60 Cal.App.2d 276, 290.)"

(*People v. Carlussi* (1979) 23 Cal.3d 249, 256, italics in added; accord *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 ["'the court has a duty to see that justice is done'"]; *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627, quoting ABA Standards for Criminal Justice – Special Functions of the Trial Judge, std. 6-1.1 ["The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial"]; *People v. Santana* (2000) 80 Cal.App.4th 1994, 1206; *People v. Shelley* (1984) 156 Cal.App.3d 521, 530-532.)

This duty is codified in Penal Code section 1044, which provides:

> It shall be the duty of the judge to control all proceedings during the trial and to limit the introduction of evidence and argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of truth regarding the matters involved.

(See, e.g., *People v. Sturm, supra*, 37 Cal.4th at p. 1237 [under section 1044, "the court has a statutory duty to control the trial proceedings, including the introduction and exclusion of evidence"].)

Here, presented with a suicidal defendant at best and an incompetent defendant at worst, and with defense counsel who abandoned their client to his own irrational whims at best and to the service of their own personal interests at worst, it became incumbent upon the *trial court* to take control of the proceedings, "limit the introduction of evidence . . . to relevant and material matters," and ensure that the penalty phase trial was fair, *appeared* fair, and produced a just and reliable verdict. (Pen. Code, § 1044; see also

People v. McKenzie, *supra*, 34 Cal.3d at pp. 626-627 [by permitting proceeding to go forward when defense counsel declined to participate in trial, the trial court violated its independent "duty to protect the rights of the accused *and* its duty to ensure a fair determination of the issues on the merits" and its obligation to promote "the orderly administration of justice"]; *People v. Shelley*, *supra*, 156 Cal.App.3d at pp. 530-533 [same, even though client assented in defense counsel's non-participation]; *Clisby v. Jones* (11th Cir. 1992) 960 F.2d 925, 934 & fn. 12 [suggesting that trial courts have independent "duty to intervene" when the "trial proceedings are so evidently and so fundamentally unfair as to threaten to render the trial a mockery of justice"]; *United States v. ex rel. Darcy v. Handy* (3d Cir. 1953) 203 F.2d 407, 427 [there are circumstances under which counsel's representation is "so lacking in competency or good faith that it would become the duty of the trial judge or the prosecutor, as officers of the state, to observe and correct it" so as to avoid a trial that amounts to a "farce and a mockery of justice" in violation of due process]; cf. *Commonwealth v. McKenna* (PA 1978) 383 A.2d 174, 181 [overwhelming public interest in ensuring that death penalty is imposed in constitutional manner warranted reviewing court's sua sponte reversal of death sentence based upon issue appellate counsel did not raise due to client's preference for the death penalty]; *Massaro v. United States* (2003) 538 U.S. 500, 508 [recognizing that appellate court may find *sua sponte* ineffective assistance of counsel when there are "obvious deficiencies in representation" in the trial record].)

In sum, "[i]n a death penalty case, [this Court] expects *the trial court and* the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure. The proceedings here fell well short of this goal." (*People v. Hernandez* (2003) 30 Cal.4th 835,

878, italics added.)

D. This Court's Decisions in *People v. Guzman* and its Progeny Do Not Compel a Contrary Result

Respondent may argue that Mr. Mai's testimony was appropriate and admissible under this Court's decisions in *People v. Guzman* (1988) 45 Cal.3d 915 and its progeny. (See, e.g., *People v. Webb* (1993) 6 Cal.4th 494, 535; *People v. Grant* (1988) 45 Cal.3d 829, 848-849.) Any such argument must be rejected.

In *Guzman*, the defendant testified extensively to substantial mitigating evidence regarding a childhood marked by abandonment and horrific abuse, periods in state mental hospital hospitals, having been the victim of threatened rape while incarcerated as a juvenile, his remorse, and his efforts to solve and control the problems he had "inherited" in his life by asking for help, attempting to educate himself, committing charitable acts, and turning himself in when he had committed crimes. (*People v. Guzman*, *supra*, 45 Cal.3d at pp. 929-933.) He told the jurors that he would prefer the "mercy" of the death penalty over a "cruel and inhumane" life in prison without the possibility of parole. (*Id.* at p. 933.) He explained that if he were sentenced to prison, he would be forced to kill or be killed, that life in prison held the promise of a relentless lifetime of "fighting and violence, which (had) been (typical of his) last 15 years," and that he could not "bear being alone anymore." (*Ibid.*)

On appeal from his ensuing death judgment, Guzman argued that the admission of his death-preference testimony: (1) diminished the jury's sense of responsibility in selecting the appropriate punishment and thus its death verdict may have been unreliable in violation of the Eighth Amendment; and (2) amounted to improper aggravating evidence under *People v. Boyd* (1985)

38 Cal.3d 762, 774. (*People v. Guzman*, *supra*, 45 Cal.3d at p. 961.) This Court rejected both arguments.

Importantly, the *Guzman* court did *not* hold that a defendant's constitutional right to testify is absolute or encompasses the right to testify to the appropriate penalty in a capital case. Instead, this Court recognized that a defendant's desire to testify might sometimes be at odds with the public's "strong interest in promoting the reliability of a capital jury's sentencing determination." (*People v. Guzman*, *supra*, 45 Cal.3d at p. 961.) Nevertheless, this Court held that Guzman's testimony did not render the ensuing death verdict constitutionally unreliable for a number of reasons. Guzman had testified at length to substantial mitigating evidence and his defense counsel argued that mitigating evidence to the jurors. (*People v. Guzman*, *supra*, 45 Cal.3d at pp. 959-960, 962-963.) Furthermore, the prosecutor did not even mention Guzman's death-preference testimony in closing argument, much less argue it as a basis for a death verdict. (*Id.* at pp. 962-963.) Finally, the jurors understood the scope of their consideration of Guzman's mitigating evidence and their duty to exercise their discretion to determine the appropriate punishment notwithstanding his testimony. (*Ibid.*)

This Court rejected the claim of error under *Boyd* for similar reasons. First, this Court reasoned, *Boyd* "is distinguishable [because] [i]t stands for the proposition that the 1978 [death penalty] law prevents the prosecution from introducing, in its case-in-chief, aggravating evidence not contained in the various factors listed in section 190.3. But no such event occurred here; defendant, not the prosecution, presented the evidence." (*People v. Guzman*, *supra*, 45 Cal.3d at p. 963.) Second, because "the prosecutor made no effort to capitalize on the testimony. . . . [w]e conclude no *Boyd* error occurred here." (*Ibid.*; accord *People v. Webb*, *supra*, 6 Cal.4th at pp. 534-535 & fn.

29 [following *Guzman* to hold that defendant's death-preference testimony did not render death verdict unreliable given "extensive case in mitigation" and limiting instruction]; *People v. Grant* (1988) 45 Cal.3d 829, 848-849 [following *Guzman* where defendant presented evidence to rebut prosecution's aggravating evidence, as well as mitigating evidence, prosecutor did not mention defendant's death-preference testimony in argument, and jurors were given limiting instruction]; see also, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 311 [it is unlikely that jurors would believe that a defendant "who by presenting a substantial case in mitigation was actively fighting a death verdict, truly believed that he deserved to die"].)

Guzman and its progeny do not compel a rejection of Mr. Mai's claim for two reasons. First, this case is readily distinguished from *Guzman*. Unlike *Guzman*, Mr. Mai's jurors heard *no* mitigating evidence at all – not from Mr. Mai or any other witnesses – or even a plea for mercy from his own counsel. Furthermore, unlike *Guzman*, Mr. Mai's prosecutor *did* capitalize on Mr. Mai's "testimony;" his final words to the jurors reminded them of Mr. Mai's statement that the death penalty was the appropriate sentence and urged them to return the very verdict Mr. Mai himself asked them to return. (8 RT 1424.)

Second, and even more importantly, the *Guzman* court did not consider the claims raised here. Here, Mr. Mai argues that his testimony was *irrelevant* to the jury's sentencing decision and inadmissible under well settled principles of state law and the federal Constitution, as construed in *Booth v. Maryland*. No such claim was made in *Guzman*. Furthermore, while the *Guzman* court recognized a defendant's fundamental right to testify, it did not address or consider the black letter law that this right is not absolute and does not encompass irrelevant or otherwise inadmissible

matter. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566, and authorities cited therein.)

To be sure, since *Guzman*, this Court has cited that case, without independent analysis, for the broad proposition that "*Guzman* implies that a defendant's *absolute* right to testify cannot be foreclosed or censored based on content" (*People v. Webb*, *supra*, 6 Cal.4th at p. 535), that "[t]he defendant has the right to take the stand and . . . request imposition of the death penalty" (*People v. Clark* (1990) 50 Cal.3d 617), and that "every defendant has the right to testify . . . even if that testimony indicates a preference for death" (*People v. Nakahara* (2003) 30 Cal.4th 705, 719). However, as this Court recently recognized in *People v. Lancaster*, *supra*, 41 Cal.4th 50, in which it held that the trial court properly excluded the defendant's testimony regarding cases in which innocent people had been sentenced to death as irrelevant, those statements are overly broad. (*Id.* at pp. 101-102.)

In *Lancaster*, this Court held that the statements in the above-cited cases must be viewed in the context of their limited holdings that the defendants' death-preference testimony did not render the ensuing verdicts in those cases unreliable. Importantly, however, this Court explained, in those cases, "[*t*]*he relevance of the testimony was not challenged.* It is beyond cavil that evidence presented in mitigation must be relevant" and "'evidence of third persons' having been wrongfully convicted of capital offenses is irrelevant to the jury's function in the case before them and is inadmissible.' (Citation.)" (*Id.* at p. 102, italics added; accord, e.g., *People v. Alcala* (1992) 4 Cal.4th 742, 806-807.)

Pursuant to the authorities discussed in the previous section, it is

equally "beyond cavil that evidence presented in [aggravation or support of a death verdict] must be relevant," that a defendant's constitutional right to testify does *not* extend to irrelevant matter, and that *any* witness' opinion that death is the appropriate punishment is totally "irrelevant to the jury's function in the case before them and is inadmissible." (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 102.) Permitting the jurors to hear and consider Mr. Mai's statement that they should return a death verdict, compounded by the prosecutor's argument that the jurors should return a death verdict based on that testimony, violated state law, as well as the Eighth and Fourteenth Amendments.

E. The Death Judgment Must be Reversed

A violation of the federal Constitution demand reversal unless the state can prove that the violation was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) When an error results in penalty phase jurors hearing aggravating evidence (or evidence in support of a death verdict) that they should not have otherwise heard, and that evidence is considered by them in assessing the appropriate penalty, the ensuing death judgment is constitutionally invalid and must be reversed. (*Brown v. Sanders* (2006) 546 U.S. 212, 220-221 [when an "improper element" has been "add[ed] to the aggravation scale in the weighing process," and results in the jurors hearing and considering facts or evidence it could not otherwise have heard or considered, the ensuing death judgment is unconstitutional]; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586 [due process demands that death sentence based even in part upon improper or totally irrelevant aggravation must be set aside]; *Zant v. Stephens*, *supra*, 462 U.S. 862, 885 [if death sentence were based upon "totally irrelevant" aggravation, "due process of law would require that the jury's decision to impose death be

set aside"]; see also *Tuggle v. Netherland* (1995) 516 U.S. 10, 13-14 [construing *Zant* for proposition that reliance on invalid aggravating factor does not necessarily demand reversal *if* the evidence in support of that factor were otherwise properly admitted].) Hence, when, as here, a defendant's constitutionally irrelevant and inadmissible testimony that the jurors should return a death verdict is admitted erroneously, the state bears the burden of proving beyond a reasonable doubt that no single juror's vote for death was based – even in part – upon it. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Under this analysis, the results of *Guzman* and some of its progeny, discussed in part D, *ante*, might arguably have been correct: based on the facts of those cases – such as the absence of prosecutorial reliance on the defendants' death-preference testimony, the mitigating nature of the testimony, or the defendant's presentation of other substantial mitigating evidence which makes the defendant's testimony that he deserved to die unbelievable – this Court could arguably determine that the jurors did *not* rely on the testimony as a basis for their death verdict and therefore that admission of the testimony was harmless beyond a reasonable doubt and did not render the ensuing verdict unreliable or otherwise constitutionally invalid. (*People v. Guzman*, *supra*, 45 Cal.3d at pp. 959-960, 962-963; *People v. Webb*, *supra*, 6 Cal.4th at pp. 534-535 & fn. 29; *People v. Grant*, *supra*, 45 Cal.3d at pp. 848-849; see also *People v. Sapp*, *supra*, 31 Cal.4th at p. 311.) The facts in this case stand in stark contrast to those in *Guzman* and its progeny. Based upon the record in this case, respondent cannot carry its burden of proving beyond a reasonable doubt that none of the jurors based his or her death verdict – even in part – upon Mr. Mai's erroneously admitted statement.

Jurors are, of course, presumed to be intelligent people. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 390.) Those intelligent people no doubt inferred that if the trial court admitted Mr. Mai's testimony, then that testimony was both relevant to and should be considered by them in their sentencing decision. (See also Evid. Code, § 402, subd. (c) [ruling on admissibility of evidence implies whatever finding of fact is requisite thereto, such as relevance].)

Indeed, the trial court's instructions effectively told Mr. Mai's jury that it should consider Mr. Mai's testimony in assessing the appropriate penalty and that it could weigh it on death's side of the scale. The court broadly, and repeatedly, instructed the jury in *mandatory* language that "in determining which penalty is to be imposed on the defendant, *you shall consider all of the evidence*" introduced at trial – which included Mr. Mai's testimony – unless instructed otherwise. (8 RT 1425-1426, italics added; 3 CT 725 [CALJIC No. 8.85]; see also 8 RT 1424; 3 CT 724 [CALJIC No. 8.84.1].)

In addition, in obvious recognition of the legal prohibition against a penalty phase jury's consideration of a witness's opinion that death is the appropriate sentence, the trial court specifically instructed the jurors that they could "not consider a *victim's family member's* . . . opinions (if any) about the . . . appropriate sentence." (8 RT 1430-1431, italics added; 3 CT 731.) Jurors apply logic and commonsense to their understanding of instructions. (See, e.g., *Boyde v. California* (1990) 494 U.S. 370, 381; *People v. Coddington* (2000) 23 Cal.4th 529, 594.) The maxim *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of another, is "a product of logic and common sense" (*Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607-608; accord *People v. Superior Court*

(Romero) (1996) 13 Cal.4th 497, 522), and a "deductive concept commonly understood" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020, conc. opn. of Brown, J.). The maxim holds that where specific items are listed, it is assumed that the omission of items similar in kind is intentional and the omitted items are therefore excluded. (*Ibid.*) This Court, the United States Supreme Court, and many other appellate courts consistently apply the maxim in resolving how lay jurors would understand a particular instruction, whether explicitly (see, e.g., *People v. Castillo*, *supra*, at p. 1020; *People v. Watson* (1899) 125 Cal. 342, 344) or implicitly (see, e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [instruction specifying factors jurors "may" consider necessarily implied that it "may not" consider factors that were not mentioned]; *People v. Vann* (1974) 12 Cal.3d 220, 226-227 [where standard reasonable doubt instruction omitted, provision of instruction applying reasonable doubt standard to circumstantial evidence implied that the standard did *not* apply to direct evidence]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [instruction that doubts between greater and lesser offenses are to be resolved in favor of lesser specified first and second-degree murder but did not mention second-degree and manslaughter left "clearly erroneous implication" that rule did not apply to omitted choice]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [instruction on circumstantial evidence specifically directed to intent element of one charge created reasonable probability that jurors understood omission of second charge to be intentional and thus that circumstantial evidence rules did not apply to second charge].)

Applying that maxim to the court's specific instruction prohibiting the jurors from considering *only* the "*victim's family member's* . . . opinions (if any) about the . . . appropriate sentence" (8 RT 1430-1431, italics added; 3

CT 731), the jurors would have understood that they could consider any *other* witness's opinion regarding "the appropriate sentence," such as Mr. Mai's opinion that death was the appropriate sentence in this case. Again, it must be presumed that the jurors followed these instructions. (See, e.g., *People v. Bennett* (2009) 45 Cal.4th 577, 596, and authorities cited therein.)

Finally, and in contrast to *Guzman* and some of its progeny, the prosecutor explicitly told Mr. Mai's jury to consider and rely upon Mr. Mai's statement that death was appropriate and return a death verdict, just as he had asked them to do. (8 RT 1424.) It is reasonable to infer that the jurors believed that they could do what the prosecutor urged them to do. (See, e.g., *People v. Perez* (1962) 58 Cal.2d 229, 247 ["juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence"].) And it is likely that the jurors did just that. It is well-settled in this regard that a prosecutor's reliance on erroneously admitted aggravating evidence is a compelling indication that the jurors also relied on that evidence, and indeed were swayed by that evidence, in returning their death verdict. (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 586 [prosecutor's reliance in summation on erroneously admitted aggravating evidence was critical factor in Court's conclusion that error was not harmless]; see also *People v. Quartermain* (1997) 16 Cal.4th 600, 622 [error in admitting evidence prejudicial due in large part to prosecutor's reliance upon it in summation]; *People v. Woodard* (1976) 23 Cal.3d 329, 341 [same]; *People v. Powell* (1967) 67 Cal.2d 32, 56-57.) Certainly, the swiftness with which the jurors returned their verdict in this case – only a matter of minutes – is a compelling indication that they took the easy way out, and based the death verdict upon Mr. Mai's testimony, just as the prosecutor encouraged them to do. (Cf. *People v.*

Barnes (1997) 57 Cal.App.4th 552, 557 & fn. 3 [brevity of jurors' deliberations indicated that they based verdict on factually easy, but legally erroneous, theory, just as the prosecutor urged them to do in summation]; *Bollenbach v. United States* (1946) 302 U.S. 607, 612, 614 [prompt return of verdict following erroneous instruction demonstrates prejudice]; accord, e.g., *People v. Stouter* (1904) 142 Cal. 146, 149-150; *Powell v. United States* (9th Cir. 1965) 347 F.2d 156, 158.)

In sum, the trial court's admission of Mr. Mai's testimony and its instructions effectively told the jurors that the testimony was relevant evidence that they could consider and rely upon in returning a death verdict and the prosecutor encouraged them to do just that. On this record, respondent cannot, as it must, prove beyond a reasonable doubt that no single juror considered and weighed Mr. Mai's statement on death's side of the scale and based his or her verdict at least in part upon it. (Cf. *People v. Brown* (1988) 45 Cal.3d 1247, 1255-1256 [where it is reasonably likely that "the interplay of argument and individually proper instructions produced a distorted meaning" of the applicable legal principles, error has occurred under state law]; accord, e.g., *People v. Claire* (1992) 2 Cal.4th 629, 663; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1035-1040; *Estelle v. McGuire* (1991) 502 U.S. 62, 71-72 [where it is reasonably likely that jurors would apply law in a manner inconsistent with federal Constitution, error has occurred under federal Constitution]; accord, e.g., *People v. Roder* (1983) 33 Cal.3d 491, 503-504, and fn. 13; *Belmontes v. Woodford* (9th Cir. 2003) 350 F.3d 861, 900-907.)

It is true that at the close of Mr. Mai's testimony, the trial court admonished, "the jury is instructed that it is obligated to decide for itself, based upon the statutory factors, whether death is appropriate." (8 RT

1410.) But this instruction did nothing to ameliorate the prejudice in this case. The harm from Mr. Mai's statement was not that it *removed* the penalty decision from the jurors. Rather, the harm was that the jurors were permitted, indeed *encouraged*, to consider and weigh Mr. Mai's constitutionally irrelevant and extraordinarily inflammatory testimony as appropriate aggravating evidence in support of a death verdict.

Because respondent cannot prove beyond a reasonable doubt that none of the 12 jurors weighed Mr. Mai's testimony on death's side of the scale and based his or her death verdict at least in part upon it, respondent cannot prove beyond a reasonable doubt that its admission did not render the ensuing death judgment constitutionally invalid. (*Brown v. Sanders*, *supra*, 546 U.S. at pp. 220-221; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 585-586; *Zant v. Stephens*, *supra*, 462 U.S. 862, 885.) Hence, the death judgment must be reversed.

//

//

VI

THE SEATING OF A BIASED JUROR VIOLATED MR. MAI'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR AND RELIABLE PENALTY TRIAL BY AN IMPARTIAL JURY AND DEMANDS REVERSAL OF THE DEATH JUDGMENT

A. Introduction

On her questionnaire, Juror Number 12 reported that a family member was a fireman who had tried to save Officer Burt's life at the crime scene.[95] (5 CT 1413.) In addition, she had followed the case against Mr. Mai through newspaper and television coverage. (5 CT 1413.) Asked if she had formed any opinions about the case based upon that information, Juror Number 12 admitted that she had already formed the opinion that Mr. Mai should receive a death sentence. (5 CT 1413.) In contrast to her unequivocal "yes" answers to other questions (see, e.g., 5 CT 1414 [question 4 regarding willingness to set aside prior knowledge; question 6 regarding willingness not to follow media coverage or discuss case with others; question 7 regarding willingness to inform court if accidentally exposed to media coverage]), when asked if she would be willing or able to set aside that pre-formed opinion and decide the case based upon the evidence and the law, Juror Number 12 wrote only, "I think so." (5 CT 1414.)

Later in the questionnaire, the jurors were informed that, under the law, "in order to fix the penalty of death, [you] must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without the possibility of parole." (5 CT 1418.) When asked if she could set aside her

---

[95] The record does not reflect Juror Number 12's gender. For ease of reference only, the feminine pronoun will be used to refer to Juror Number 12.

personal feelings and follow that law, Juror Number 12 checked the box marked "yes," but qualified that answer by explaining, "I'm for the death penalty but if court *proved* to me that defendant should be spared death – I *might* not vote death." (5 CT 1420, italics added.)

On voir dire, the court inquired into Juror Number 12's failure to unequivocally promise on her questionnaire that she could set aside her pre-formed opinion that Mr. Mai should be executed. (5 RT 886.) The court asked, "Can you assure counsel and I that you can set aside any preconceived opinion and decide this case –," at which point Juror Number 12 interjected and simply reiterated her questionnaire answer that, "I *think* I can *if* they can give me good reason that somebody shouldn't be put to death, I believe I would vote in that direction." (5 RT 887, italics added.) Juror Number 12 agreed with the court that her "position is that they have to prove why someone should not be put to death." (5 RT 887.) The court simply responded, "well, I am sure when we get to counsel they will have some further questions in that area" and it terminated the voir dire. (5 RT 887.) However, neither the prosecutor nor defense counsel questioned Juror Number 12 about these remarks.

Instead, lead defense counsel Mr. Peters simply inquired into a statement Juror Number 12 had made on her questionnaire that the death penalty was used too seldom because there are "too many appeals that take too long." (5 CT 1420; 5 RT 914.) Mr. Peters asked, "is that going to leak over into the facts of this case, the law involved in this case?" (5 RT 914.) Juror Number 12 replied, "I don't think so." (5 RT 914.) Mr. Peters further inquired if she could "weigh the aggravating and mitigating, whatever those turn out to be, and render a fair verdict?" (5 RT 914-915.) Juror Number 12 replied, "I think so." (5 RT 931.)

Thereafter, the prosecutor asked Juror Number 12 only, "from what you have heard about this case, what it is about, a police officer victim, do you think you can sit and be that kind of juror we were talking about who can consider both, who can accept the death penalty and vote or impose either one," Juror Number 12 replied in the affirmative. (5 RT 931.)

Juror Number 12 was sworn and seated on the jury that voted to execute Mr. Mai.

As will be demonstrated below, Juror Number 12's statements demonstrated her actual bias in favor of execution in this case, thus establishing her disqualification as a juror. The seating of this biased juror violated Mr. Mai's state and federal constitutional rights to an impartial jury, a fair trial, and a reliable death verdict – a structural defect that disentitles the State from executing the death judgment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 16, 17.)

B. The Seating of a Juror Actually Biased in Favor of Execution Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the California Constitution, and Disentitles the State from Executing any Ensuing Death Judgment

The Eighth Amendment to the United States Constitutions demands a heightened degree of reliability in death verdicts. (See, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Moreover, all criminal defendants are entitled to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. (See, e.g. *Morgan v. Illinois* (1992) 504 U.S. 719, 727, and authorities cited therein; *People v. Wheeler* (1978) 22 Cal.3d 258, 272.) These guarantees apply equally to the guilt and

penalty phases of a capital trial. (See, e.g., *Morgan v. Illinois*, *supra*, at p. 729; *People v. Earp* (1999) 20 Cal.4th 826, 852.)

These guarantees forbid the seating of an actually biased juror. Indeed, "quite apart from offending the Sixth Amendment, trying an accused before a jury that is actually biased violates even the most minimal standards of due process." (*United States v. Nelson* (2nd Cir. 2002) 277 F.3d 164, 206.)

Under both California and federal law, actual bias, sometimes referred to as "bias in fact," is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code of Civ. Proc., § 225, subd. (B)(1)(c); see, e.g., *United States v. Torres* (2nd Cir. 1997) 128 F.3d 38, 43, citing *United States v. Wood* (1936) 299 U.S. 123, 133 ["Actual bias is 'bias in fact' – the existence of a state of mind that leads to an inference that the person will not act with entire partiality"].) "The label 'biased' is applied to two sorts of jurors. In the usual sense, a biased juror is one who has a predisposition against or in favor of the defendant. In a more limited sense, a biased juror is one who cannot 'conscientiously apply the law and find the facts.' *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)." (*Franklin v. Anderson* (6th Cir. 2006) 434 F.3d 412, 422, cert. denied, *Houk v. Franklin* (2007) 549 U.S. 1156.)

Impartiality demands that a potential juror swear that he or she can "can lay aside his impression or opinion and render a verdict based upon the evidence presented in court." (*Irvin v. Dowd* (1961) 366 U.S. 717, 723; accord *Patton v. Yount* (1984) 467 U.S. 1025, 1036 [juror must "swear that he could set aside any opinion he might hold and decide the case based on

the evidence"].) The juror's promise must be "*unequivocal.*" (*Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 503, italics added; accord, e.g., *White v. Mitchell* (6th Cir. 2005) 431 F.3d 517, 540; *Miller v. Webb* (6th Cir. 2004) 385 F.3d 666, 675; *Thompson v. Altheimer & Gray* (7th Cir. 2001) 248 F.3d 621, 624, 626 [juror must give "unwavering assurances" that he or she can set aside pre-formed opinion and decide the case based on the evidence and the law as stated in the court's instructions]; *United States v. Sithongtham* (8th Cir. 1999) 192 F.3d 1119, 1121.) "If the juror does not make such an unequivocal statement, then a trial court cannot believe [any] protestation of impartiality." (*Miller v. Webb*, *supra*, at p. 675.) Hence, a juror's tentative statements that he or she will "try" to be impartial and decide the case fairly is insufficient: the federal Constitution guarantees a defendant "the right to a jury that will hear his case impartially, not one that tentatively promises to try." (*Wolfe v. Brigano*, *supra*, 232 F.3d at p. 503; accord, e.g., *White v. Mitchell* 431 F.3d 517, 540; *Thompson v. Altheimer & Gray*, *supra*, 248 F.3d at pp. 624, 626 [juror who simply stated that she would "*try* to be fair, but . . . expressed no confidence in being able to succeed in that attempt" and gave no "unwavering assurances" of impartiality was not impartial]; *United States v. Sithongtham* (8th Cir. 1999) 192 F.3d 1119, 1121 [prospective juror's statement that he could "probably" be fair and impartial was insufficient to demonstrate impartiality; "'probably' is not good enough"]; see also *People v. Avila* (2006) 38 Cal.4th 491, 532-533 & fn. 26 [juror whose questionnaire answers expressed strong pro-life views and who twice answered that he did not know if he could set those views aside and follow the law, was sufficiently, unambiguously biased to permit dismissal for cause based on questionnaire alone, without need for voir dire]; *People v. Green* (1956) 47 Cal.2d 209, 215-216, overruled on another ground in *People v. Morse* (1964)

60 Cal.2d 631 [juror who stated that she did not "think" she could be fair to the prosecution if she had "any doubt" about defendant's guilt established bias and good cause for her removal after jury was sworn].)

In capital cases in particular, a potential juror is sufficiently impartial and qualified to serve if she can set aside her personal feelings about the death penalty, decide the case based upon the evidence and the law as stated in the court's instructions, and in a fair and impartial manner. (See, e.g., *Lockhart v. McCree* (1986) 476 U.S. 162, 176; accord *Adams v. Texas, supra*, 448 U.S. 38, 50 *Wainwright v. Witt* (1985) 469 U.S. 412, 420-421, 425-426.) However, if a potential juror's questionnaire and voir dire answers indicate that his views regarding the case or the death penalty "would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath," he is actually biased, disqualified to serve as a juror, and must be removed for cause. (*Wainwright* v. *Witt, supra*, at p. 424, adopting test applied in *Adams v. Texas* (1980) 448 U.S. 38, 45; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting *Witt* standard]; accord, e.g., *People v. Heard* (2003) 31 Cal.4th 946, 963; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.)

For instance, if a potential juror's "'views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror'" he or she must be excluded. (*People v. Heard, supra*, 31 Cal.4th at p. 959.) Similarly, a juror who states that he would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty" would apply a "higher standard to a life sentence . . . than to one of death," which is inconsistent with the law, must be excluded. (*People v. Boyette* (2002) 29 Cal.4th 318, 418; see also,

e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 [juror may return death verdict only if aggravating circumstances "substantially outweigh" mitigating]; CALJIC No. 8.88 [pattern instruction directing, "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole"].) "Because this juror's views would have 'prevent(ed) or substantially impair(ed) the performance of his duties as a juror in accordance with his instructions and his oath,' (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424)," he is actually biased and must be removed for cause. (*People v. Boyette*, *supra*, at p. 419.)

When a prospective juror admits that she has a pre-formed opinion about the case or about a principle that is inconsistent with the law, the federal Constitution demands that she be examined individually in order to obtain her explicit, unequivocal or "unwavering assurances" that she can set that opinion aside and decide the case based upon the evidence and the law as stated in the court's instructions. (See, e.g., *White v. Mitchell*, *supra*, 431 F.3d at p. 540; *Miller v. Webb*, *supra*, 385 F.3d at p. 675; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 456-460; *Thompson v. Altheimer & Gray*, *supra*, 248 F.3d at p. 627; *United States v. Sithongtham*, *supra*, 192 F.3d at p. 1121; *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 750, 753-754.) Voir dire directed to the prospective jurors *en masse* is insufficient to rehabilitate such a juror. (*Hughes v. United States*, *supra*, 258 F.3d at p. 461, and authorities cited therein.) Absent such follow up and unequivocal assurances of impartiality, the juror must be dismissed. (*White v. Mitchell*, *supra*, 431 F.3d at p. 540; *Miller v. Webb*, *supra*, 385 F.3d at p. 675; *Hughes v. United States*, *supra*, 258 F.3d at pp. 456-460; *Thompson v.*

Altheimer & Gray, *supra*, 248 F.3d at p. 627; *United States v. Sithongtham*, *supra*, 192 F.3d at p. 1121; *Johnson v. Armontrout*, *supra*, 961 F.2d at pp. 750, 753-754.)

In *Hughes v. United States, supra,* 258 F.3d 453, for instance, a prospective juror admitted that because of close personal ties to law enforcement, she did not think she could be fair to the defendant. (*Id.* at p. 456.) Neither the trial court nor the attorneys attempted to rehabilitate her on individual voir dire, but rather posed general questions to the potential jurors *en masse* regarding their ability to be impartial. (*Ibid.*) The defense did not challenge the prospective juror for cause or with a peremptory strike and she was eventually sworn as a juror. The Sixth Circuit Court of Appeals held that the record demonstrated that the juror was actually biased and thus her seating on the jury violated the defendant's Sixth and Fourteenth Amendment rights to an impartial jury:

> [W]hat distinguishes Petitioner's case from [other cases] is the conspicuous lack of response, by both counsel and the trial judge, to [the biased juror's] clear declaration that she did not think she could be a fair juror. The district court's reliance on unrelated group questioning of potential jurors on voir dire does not address the simple fact that neither counsel *nor the court* offered any response to [the biased juror's] declaration or follow-up questions directed to [her]. Although the precedent of the Supreme Court and this Court makes us circumspect about finding actual juror bias, such precedent does not prevent us from examining the compelling circumstances presented by the facts of this case – where both the district court and counsel failed to conduct the most rudimentary inquiry of the potential juror to inquire further into her statement that she could not be fair. The [previously cited] precedent included key elements of juror rehabilitation and juror assurances of impartiality which are absent here. . . .
>
> [B]ecause [the juror's] declaration [of her inability to be fair]

> was not followed by any attempt at clarification or rehabilitation, there is no ambiguity in the record as to her bias. [The juror's] express admission is the only evidence available to review.

(*Hughes v. United States*, *supra*, 258 F.3d at pp. 458-460, italics added.) Based upon her express admission of bias, and the fact that "she never said that she would be able to render a fair an impartial verdict," the court found that the juror was actually biased. (*Id.* at p. 460.)

In other words, just as a juror's partiality, and thus disqualification, cannot be established if she is never asked if she can set aside her personal feelings and follow the law (see, e.g., *People v. Stewart* (2004) 33 Cal.4th 425, 447, 449-459 [removal of juror personally opposed to death or life for cause on grounds of bias is improper if the "critical question" of whether he or she can subordinate those opinions and follow the law is never put to him or her]), so too a juror's *im*partiality, and thus qualification, cannot be established if she has expressed a pre-formed opinion about the case or the penalty, but is never directly asked if she can set aside that opinion and decide the case based upon the evidence and the court's instructions on the law.

As this Court has observed, "[a] defendant is entitled to be tried by 12, not 11, impartial and unprejudiced jurors." (*People v. Harris* (2008) 43 Cal.4th 1269, 1303, and authorities cited therein.) Hence, under both the state and federal Constitutions, empaneling even a single penalty phase juror who is actually biased in favor of execution under these standards violates the Sixth, Eighth and Fourteenth Amendments and precludes executing any ensuing death sentence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *People v. Boyette*, *supra*, 29 Cal.4th at p. 416; *People v. Weaver* (2001) 26 Cal.4th 876, 910; see also *In re Carpenter* (1995) 9 Cal.4th 634, 654 [the

seating of a biased juror violates right to impartial jury and is structural error demanding reversal without any showing of prejudice]; accord, e.g., *Gomez v. United States* (1989) 490 U.S. 858, 876, and authorities cited and quoted therein ["Among those basic fair trial rights that '"can never be treated as harmless"' is a defendant's 'right to an impartial adjudicator, be it judge or jury'"]; *Standen v. Whitley* (9th Cir. 1993) 994 F.2d 1417, 1422.) This is just such a case.

C. Juror Number 12 was Actually Biased in Favor of Executing Mr. Mai

As noted in the Introduction, Juror Number 12 had a family member who attempted to save Officer Burt's life after Mr. Mai shot him. (5 CT 1413.) Based upon that fact, as well as media reports of the case against Mr. Mai, she candidly admitted that she had already formed the opinion that Mr. Mai should be executed. (5 CT 1413; 5 RT 886-887.) The questionnaire clearly informed the jurors that, under the law, "in order to fix the penalty of death, [you] must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without the possibility of parole." (5 CT 1418.)

Nevertheless, Juror Number 12 never unequivocally swore that she could set aside her pre-formed opinion and decide the case based on the evidence and the law. To the contrary, the only way in which she could conceive that she "*might*" be able to set aside her pre-formed opinion, and subordinate her personal feelings to the law, would be if the defense "proved to me that defendant should be spared death" or "can give me good reason why somebody shouldn't be put to death, I believe I would vote in that direction." (5 CT 1413-1414, 1420; 5 RT 886-887.) When the court inquired into this answer, she simply confirmed that her "position is that they

have to prove why someone should not be put to death." (5 RT 887.) This was, of course, inconsistent with California law. (See, e.g., *People v. Boyette*, *supra*, 29 Cal.4th at pp. 417-419 [juror's statement that he would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty . . . . indicated he would apply a higher standard . . . to a life sentence than to one of death," and unequivocally demonstrated his disqualification under *Witt* standard]; *People v. Prieto, supra*, 30 Cal.4th at p. 263 [juror may return death verdict only if aggravating circumstances "substantially outweigh" mitigating].)

The court clearly seemed to appreciate the problem in her answers by pointedly observing that the attorneys would undoubtedly examine her about these answers. (5 RT 887.) However, neither the attorneys nor the court followed up on these answers and obtained Juror Number 12's "unwavering assurance" that she would set aside her pre-formed opinion and follow the law.

Instead, on subsequent voir dire, when defense counsel simply asked Juror Number 12 whether she could "weigh the aggravating and mitigating, whatever those turn out to be, and render a fair verdict?" she replied, "I think so." (5 RT 914-915.) Similarly, when the prosecutor asked her generally, "from what you have heard about this case, what it is about, a police officer victim, do you think you can sit and be that kind of juror we were talking about who can consider both, who can accept the death penalty and vote or impose either one," Juror Number 12 replied "yes." (5 RT 931.) However, there is nothing inconsistent between these answers and those establishing her bias. Juror Number 12 had quite clearly explained the circumstances under which she "thought" she could "weigh the aggravating and mitigating, whatever those turn out to be" and "consider both . . . accept the death

penalty and vote or impose either one" – death was the presumptive penalty in her mind and she would consider life without parole *only* if the defense "proved" to her that Mr. Mai's life should be spared. (5 CT 1413-1414, 1420; 5 RT 886-887.)

As in *Hughes v. United States*, *supra*, 258 F.3d 453, discussed in part B, above, Juror Number 12 repeatedly and unequivocally stated that she had a pre-formed opinion that Mr. Mai should be executed. As in *Hughes*, there was no effort to rehabilitate her by obtaining her unwavering assurances that she could subordinate that pre-formed opinion to follow the *law*, which does *not* place the burden on the defendant to rebut a presumption of execution and prove that his life should be spared. (*Id.* at p. 456.) To the contrary, when the court did follow up on her questionnaire answers that she could only conceive of possibly setting aside her pre-formed opinion if the defendant proved to her that she should not vote for execution, , she simply confirmed them. As in *Hughes*, any group questioning of the panel of jurors as a whole was insufficient to rehabilitate Juror Number 12. Hence, as in *Hughes*, *supra*, " because [Juror Number 12's] declaration [of her pre-formed opinion that she could not set aside in a manner consistent with the law] was not followed by any attempt at clarification or rehabilitation, there is no ambiguity in the record as to her bias. [Juror Number 12's] express admission is the only evidence available to review." (*Id.* at pp. 458-460, emphasis added.) That evidence demonstrates her actual bias. (Accord, e.g., *Miller v. Webb*, *supra*, 385 F.3d at p. 675 [where juror stated that she thought she would be "kind of partial" to witness and, upon the court's follow-up stated that, "I think I can be fair, but I do have some feelings about" the witness, further questioning regarding *specific* statement of partiality and promise to set aside that opinion and decide case based on

evidence and law was necessary to demonstrate impartiality; absent such questioning and promise, juror was actually biased and should have been dismissed]; *Thompson v. Altheimer & Gray*, *supra*, 248 F.3d at pp. 624-626 [where juror expressed pre-formed opinion about nature of case stated that she would "try to be fair, but [who] expressed no confidence in being able to succeed," trial judge had duty to ask her individually if she could set aside that opinion and follow the law, which was not fulfilled by posing that question to the jurors *en masse* who all responded in the affirmative; absent such individual follow-up and unwavering assurances from the juror that she could set aside her opinion and decide case fairly and based on the law, actual bias was established and verdict was reversed]; *Johnson v. Armontrout*, *supra*, 961 F.2d at pp. 750, 753-754 [despite silence in face of group voir dire questions regarding ability to be impartial or set aside pre-formed opinions, in the absence of any *explicit* promises of impartiality, fact two jurors had already formed opinion that defendant was guilty established actual bias].)

Certainly, it is true that juror credibility is an issue for the trial court to resolve and its resolution of that issue is entitled to deference on appeal. (See, e.g., *Uttecht v. Brown* (2007) 551 U.S. 1, 127 S.Ct. 2218, 2222-2223; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 429.) Hence, where a claim of bias rests on the premise that a juror's assurance of impartiality should not have been *believed* or that the juror provided equivocal, ambiguous, or conflicting statements regarding bias, the trial judge should determine the juror's credibility in the first instance and its determination is entitled to deference. (*Uttecht v. Brown*, *supra*, at pp. 2222-2223, and authorities cited therein.) However, where – as here – a prospective juror has unequivocally admitted a pre-formed opinion and has *not* promised to set it aside and decide the case

based on the evidence and the court's instructions on the law, she has made no protestations of impartiality and there is no ambiguity in the record. As the Court of Appeals explained in *Hughes*, *supra*, "because [the juror's] declaration [of her partiality] was not followed by any attempt at clarification or rehabilitation, there [was] no ambiguity in the record as to her bias." (*Hughes v. United States*, *supra*, 258 F.3d [needs volume cite because Hughes not cited previously in this paragraph] at pp. 458-460, italics added.) Thus, there is simply no issue of credibility for the judge to resolve and no finding to which to defer on review. The jurors's "express admission is the only evidence available to review." (*Ibid.*) The issue is one of pure law: based upon the undisputed and unambiguous facts in the record, was the juror actually biased?

For all of these reasons, the record demonstrates that Juror Number 12 was actually biased in favor of execution in this case. Her empanelment on the jury that voted to execute Mr. Mai violated his state and federal constitutional rights to trial by a fair and impartial jury, to a reliable death verdict, and demands that the death judgment be reversed. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *People v. Weaver*, *supra*, 26 Cal.4th at p. 910.)

D. Because Juror Number 12 Was Actually Biased, the Death Judgment Cannot be Executed Notwithstanding Defense Counsel's Failure to Move to Exclude her For Cause

It is true, but irrelevant to the outcome the constitution demands here, that defense counsel did not move to exclude Juror Number 12 for cause. When a biased juror has been seated, the defendant has been deprived of his fundamental right to trial by a fair and impartial jury. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *People v. Weaver*, *supra*, 26 Cal.4th at p. 910; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111; *United*

States v. Eubanks (9th Cir. 1979) 591 F.2d 513, 517.) Without qualification, the United States Supreme Court has unambiguously declared that where such a violation has occurred and "the death sentence is imposed, the State is disentitled to execute the sentence." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; see also *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316 ["the seating of any juror who should have been dismissed for cause . . . would require reversal"].)

Indeed, courts consistently hold that the seating of a biased juror demands reversal regardless of defense counsel's inaction, albeit sometimes by way of different analyses. Some courts have held that, if it can be waived at all, a defendant's right to an impartial jury cannot be waived by his counsel's failure to act. It is beyond dispute that any waiver of the Sixth Amendment right to jury trial requires the defendant's *express and personal* waiver. (See, e.g., *Patton v. United States* (1930) 281 U.S. 276, 308-312 [express personal waiver required under federal Constitution]; see also Fed. Rules of Crim. Proc. Rule 23 [express, written waiver required under federal rules]; *People v. Collins* (2001) 26 Cal.4th 297, 304-305 & fn. 2 [express waiver in open court required under both state and federal law]; Calif. Const., art. I, § 16.) According to the very text of the Sixth Amendment, trial by jury means trial by an "*impartial* jury" and thus the right to an impartial jury "'"is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."' [Citations]." (*In re Hitchings* (1993) 6 Cal.4th 97, 110; see also *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 265-266 [although right to impartial jury is not explicitly stated in California Constitution, it is implied].) Hence, these courts reason that "if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the

client' [Citation], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury." (*Hughes v. United States, supra*, 258 F.3d at p. 463; accord, e.g., *Franklin v. Anderson, supra*, 434 F.3d at pp. 427-428 [defense counsel cannot waive client's right to impartial jury by failing to object, or attempting to remove, biased juror]; *Johnson v. Armontrout, supra*, 961 F.2d at p. 754 [rejecting state's argument that counsel's failure to object to seating of biased juror waived claim for review: "When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias. (Citations.) If a defendant proves that jurors were actually biased, the conviction must be set aside (Citations)"]; *United States v. Nelson* (2d Cir. 2002) 277 F.3d 164, 204-213 [questioning whether seating of biased juror , and thus right to be tried by an impartial tribunal, is waivable at all, but in any event holding defendant's express waiver was invalid and thus trial court's failure to remove biased juror for cause was reviewable on appeal].)

Other courts have held that: (1) an attorney's failure to remove a biased juror falls below an objective standard of reasonably competent assistance that can never be justified by any conceivable, reasonable trial tactic or strategy; and (2) the seating of a biased juror necessarily establishes the prejudice prong necessary to establish that counsel was constitutionally ineffective. (*Virgil v. Dretke* (5th Cir. 2006) 446 F.3d 598, 609-613; *Franklin v. Anderson, supra*, 434 F.3d at pp. 427-428; *Miller v. Webb, supra*, 385 F.3d at pp. 675-676; *Hughes v. United States, supra*, 258 F.3d at pp. 463-464; *Johnson v. Armontrout, supra*, 961 F.2d at pp. 754-755.) In other words, establishing the bias of a deliberating juror necessarily establishes that counsel was ineffective, in violation of the Sixth Amendment, for failing to remove (or attempt to remove) that juror with a

challenge for cause or peremptory challenge. (*Virgil v. Dretke*, *supra*, 446 F.3d at pp. 609-613; *Franklin v. Anderson*, *supra*, 434 F.3d at pp. 427-428; *Miller v. Webb*, *supra*, 385 F.3d at pp. 675-676; *Hughes v. United States*, *supra*, 258 F.3d at pp. 463-464; *Johnson v. Armontrout*, *supra*, 961 F.2d at pp. 754-755; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694.) This Court is in accord. As it observed in *People v. Weaver*, *supra*, "because the presence of even a single juror compromising the impartiality of the jury requires reversal, counsel would be constitutionally ineffective if he had failed to" attempt to remove or remove that juror if he had the power to do so. (26 Cal.4th at p. 411.)

Other courts have held that trial courts have a sua sponte duty to remove actually biased jurors and potential jurors. (*Miller v. Webb*, *supra*, 385 F.3d at p. 675; *United States v. Torres* (2d Cir. 1997) 128 F.3d 38, 43; *Hughes v. United States*, *supra*, 258 F.3d at p. 463 [trial court and counsel ultimately share responsibility for removing biased jurors].) This view rests on the fundamental principle that trial courts are vested with the final authority for ensuring that a criminal defendant receives a fair trial before an impartial jury and a biased tribunal is a structural defect in the constitution of the trial mechanism. (See, e.g., *United States v. Frazier* (1948) 335 U.S. 497, 511, emphasis added ["duty reside[s] in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality"]; *Dennis v. United States* (1950) 339 U.S. 162, 168 ["the trial court has a serious duty to determine the question of actual bias"]; *In re Carpenter* (1995) 9 Cal.4th 634, 654 [violation of right to impartial jury is structural error]; accord, e.g., *Gomez v. United States* (1989) 490 U.S. 858, 876; *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *Standen v. Whitley* (9th Cir. 1993) 994 F.2d 1417, 1422; *Johnson v. Armantrout*, *supra*, 961 F.2d

748, 755.) California law certainly supports this view.

As this Court has observed, under California law, "the duty to examine prospective jurors and to select a fair and impartial jury is a duty imposed upon the court . . . ." (*People v. Mattson* (1990) 50 Cal.3d 826, 845.) Consistent with this duty, this Court has held that the trial court has the power to dismiss jurors for cause even when the parties pass or object to removal of the jurors. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 981-982.) Indeed, "[t]he trial judge's duty to select a fair and impartial jury impliedly includes the duty to excuse a juror for cause when voir dire indicates the juror cannot be fair and impartial. The trial court's duty to excuse such jurors is not obviated by the absence of an objection by a party." (*People v. Jiminez* (1992) 11 Cal.App.4th 1611, 1620, and authorities cited therein, disapproved on other grounds in *People v. Kobrin* (1995) 11 Cal.4th 416, 419.) In other words, the ultimate responsibility for removing disqualified or biased jurors lies with the trial judge. (Code of Civ. Proc., § 225, subd. (b)(1)(c); see also Code of Civ. Proc., §§ 230 [trial judge decides all issues related to challenges of prospective jurors] and 1089 [trial judge has authority, at any time during the proceedings and before verdict is reached, to remove juror on its own motion who is "unable to perform his or her duty"].)

Finally, some courts have held that defense counsel's failure to attempt to remove an actually biased potential juror does not "waive" the defendant's right to challenge the ensuing violation of his right to an impartial jury based on a combination of the above-described analyses. (See, e.g., *Franklin v. Anderson*, *supra*, 434 F.3d at pp. 427-428; *Johnson v. Armontrout*, *supra*, 961 F.2d at pp. 754-755; *Miller v. Webb*, *supra*, 385 F.3d at pp. 375-376.) In *Franklin v. Anderson*, *supra*, for instance, the Court of

Appeals held that a potential juror's inability to follow the law, as required by *Wainwright v. Witt*, *supra*, demonstrated her actual bias and demanded her removal for cause. The fair and impartial jury violation that arose from seating that biased juror was cognizable on appeal, and demanded reversal of the judgment, despite the fact that trial counsel made no attempt to remove that juror in the proceedings below. (*Franklin v. Anderson*, *supra*, 434 F.3d at pp. 427-428.) And for these reasons, appellate counsel's failure to challenge the violation *on appeal* amounted to ineffective assistance of appellate counsel. (*Id.* at pp. 426-431.) In so holding, the court rejected any argument that trial counsel's failure to move to remove the biased juror waived his client's right to challenge the violation of his right to an impartial jury on appeal:

> "The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir.2001) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)). "'Failure to remove biased jurors taints the entire trial, and therefore . . . [the resulting] conviction must be overturned.' " *Ibid.* (quoting *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir.2000)). There is no situation under which the impaneling of a biased juror can be excused. "The impaneling of a biased juror warrants a new trial. . . . The 'presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.'". *Ibid.* (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir.2000)). Accordingly, the State can make no argument that . . . trial counsel acted strategically in keeping [the biased juror] on the panel because she was, like [petitioner], African-American. To permit this would be to allow trial counsel to waive the defendant's right to an impartial jury.

(*Id.* at pp. 427-428, cert. denied, *Houk v. Franklin* (2007) 549 U.S. 1156.)

Similarly, in *Hughes v. United States, supra*, 258 F.3d 453, discussed in part C, above, defense counsel did not challenge a biased juror for cause

or with a peremptory challenge. The Court of Appeals held that, because the juror was biased, the ensuing violation of the defendant's right to an impartial jury demanded a new trial notwithstanding his trial counsel's inaction for two reasons. First, defense counsel's failure to remove the juror amounted to ineffective assistance as a matter of law. Second, counsel's inaction cannot functionally "waive" a defendant's Sixth Amendment right to trial by impartial jury:

> The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). "Failure to remove biased jurors taints the entire trial, and therefore . . . [the resulting] conviction must be overturned." [Citation.] "A court must excuse a prospective juror if actual bias is discovered during voir dire." [Citation.] . . . .
>
> If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury "without the fully informed and publicly acknowledged consent of the client," *Taylor v. Illinois*, 484 U.S. 400, 417 n. 24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury. Indeed, given that the presence of a biased juror, like the presence of a biased judge, is a "structural defect in the constitution of the trial mechanism" that defies harmless error analysis, [citations], to argue sound trial strategy in support of creating such a structural defect seems brazen at best. We find that no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury.
>
> The impaneling of a biased juror warrants a new trial. If an

> impaneled juror was actually biased, the conviction must be set aside. [Citations.] The "presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." [Citations.]. Accordingly, given that a biased juror was impaneled in this case, prejudice under *Strickland* is presumed, and a new trial is required.

(*Id.* at p. 463.)

It is true that this Court has held that a defendant must attempt to remove a biased juror – if he or she has the power to do so – in order to challenge his or her empanelment on appeal. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 487 [defendant must exhaust peremptory challenges in order to preserve for appeal the trial court's denial of for cause challenges]; *People v. Staten* (2000) 24 Cal.4th 434, 454; *People v. Bolin* (1998) 18 Cal.4th 297, 316; *People v. Kipp* (1998) 18 Cal.4th 349, 365.) However, this Court has *never* held that a juror was biased, but also that the defendant "waived" his right to challenge the ensuing violation of his right to an impartial jury on appeal because his attorney failed to attempt to remove that juror. Indeed, for all of the reasons discussed above, any such holding would be inconsistent with the federal Constitution.

Here, Juror Number 12 was actually biased. Pursuant to the foregoing authorities, defense counsel could not waive Mr. Mai's right to an impartial jury by failing to object to the empanelment of, or failing to attempt to remove, Juror Number 12. If that right could be waived at all, it required Mr. Mai's personal and express waiver on the record. In the alternative, defense counsel's failure to remove or attempt to remove the biased juror deprived Mr. Mai of his state and federal constitutional rights to the effective assistance of counsel as a matter of law. (U.S. Const., Amend. VI; Calif. Const., art. I, § 15.) In any event, the trial court had a sua sponte duty to remove her.

Furthermore, as discussed in the preceding section, while a trial court's resolution of juror credibility is entitled to deference when the juror's answers are conflicting or ambiguous, there is no credibility determination to which to defer where, as here, the juror's answers are unambiguous. (See, e.g., *Uttecht v. Brown*, *supra*, 551 U.S. 1, 127 S.Ct. 2218, 2222-2223; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 429.) The jurors's "express admission is the only evidence available to review." (*Ibid.*) Hence, the issue is one of pure law: based upon the undisputed and unambiguous facts in the record, was the juror actually biased? (See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 118 [and authorities cited therein – reviewing court may consider claim raised for first time on appeal if it involves a pure question of law based on undisputed facts].) Because this Court can determine that question in the first instance, it should do so given the fundamental nature of the right at stake here. (See, e.g., *Johnson v. United States* (1997) 520 U.S. 461, 467, citing *United States v. Young* (1985) 470 U.S. 1, 15 and *United States v. Atkinson* (1936) 297 U.S. at 157, 160 [reviewing court should invoke its remedial discretion to notice a forfeited error if that error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings"].) At the very least, because the question of whether defense counsel's inaction could waive Mr. Mai's fundamental right to an impartial jury is a "close and difficult" one, it must be resolved in favor of preservation. (*People v. Champion* (1995) 9 Cal.4th 879, 908 & n. 6.)

For all of these reasons, regardless of the analytical approach and whether the blame for the constitutional violation is placed on the shoulders of the trial court, trial counsel, or both, the end result is that Mr. Mai was deprived of his right to an impartial jury. "The direction of the blow is less important than the wound inflicted." (*People v. Estrada* (1998) 63

Cal.App.4th 1090, 1096.) Here, the wound was fatal, resulting in a structural defect undermining the integrity of the trial mechanism itself, akin to providing Mr. Mai with no penalty trial at all. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *Johnson v. Armontrout*, *supra*, 961 F.2d 755.) The empanelment of Juror Number 12 violated Mr. Mai's state and federal constitutional rights to an impartial jury, a fair penalty trial, a reliable penalty verdict, and demands reversal of the death judgment. (See *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.)

//

//

VII

THE TRIAL COURT'S DENIAL OF MR. MAI'S *WHEELER/BATSON* MOTION VIOLATED STATE LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEMANDS REVERSAL OF THE DEATH JUDGMENT

A. Introduction

The trial court used what it termed an "eight-pack" procedure for penalty phase jury voir dire, a modification of what is commonly known as a "six-pack" procedure. (2 RT 284; see, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903, 942, fn. 6, dis. opn of Moreno, J.) That is, after the pools of jurors were time-qualified and completed questionnaires, groups of 20 were called – 12 in the jury box, eight outside of the jury box – subjected to voir dire, for-cause challenges, and any additional hardship excuses. (See, e.g., 4 RT 599-732.) Once a panel of 20 so qualified, a total of nine peremptory challenges were exercised against the 12 jurors in the box. (4 RT 599-732.) As each potential juror in the box was dismissed, one of the eight jurors outside of the box took his or her place. (See, e.g., 4 RT 732.) At this juncture, more jurors were called and the procedure began anew.

By the third round of peremptory challenges, the prosecutor had exercised challenges to the only three African-Americans in the pool. (4 RT 788-789; 5 RT 936; see also 5 RT 938-939.) Immediately after the prosecutor's challenge to the last remaining African-American venireperson, defense counsel moved for a mistrial under *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79.[96] (5 RT 937.) The

---

[96] At the time he objected to the prosecutor's peremptory challenges, defense counsel cited only this Court's decision in *People v. Wheeler*, *supra*. Nevertheless, an objection under *People v. Wheeler*, *supra*, to (continued...)

court reluctantly found a prima facie showing that the challenges had been based on race and ordered the prosecutor to explain his challenges. (5 RT 940-942.)

The prosecutor then offered *facially* race-neutral reasons for his challenges. (5 RT 942-943.) The trial court, however, made no inquiry into those reasons, and refused to hear defense counsel's attempt to rebut them. Instead, the court denied the *Wheeler/Batson* motion simply stating, "the Court finds that no discriminatory intent is *inherent* in the explanations, and the reasons *appear* to be race neutral, and on those grounds, the Court will deny the *Wheeler* motion." (5 RT 943-944, italics added.)

As will be demonstrated below, the trial court violated the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 16 of the California Constitution in denying the *Wheeler/Batson* motion by terminating the analysis of that motion at step two of the constitutionally-mandated inquiry – i.e., determining that the prosecutor had offered facially race-neutral reasons for dismissing the minority jurors – and failing to undertake step three of the mandated inquiry – i.e., making a sincere and reasoned attempt to evaluate those reasons and determine whether they were bona fide or pretexts for discrimination.

The death judgment must be reversed. Alternatively, the case should be remanded with directions to the trial court to conduct the third step of the *Wheeler/Batson* analysis.

---

[96](...continued)
peremptory strike of a potential juror based on his or her race or gender encompasses the same objection under *Batson v. Kentucky*, *supra*. (See, e.g., *People v. Lenix* (2008) 44 Cal.4th 602, 610 & fn. 5, and authorities cited therein.)

B. The Controlling Law

The United States Supreme Court has long held that the Equal Protection and Due Process clauses of the Fourteenth Amendment prohibit prosecutors from discriminating in the exercise of their peremptory challenges on the basis of a juror's race or membership in a cognizable group. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231, 238, and authorities cited therein ("*Miller-El II*"); *Batson v. Kentucky* (1986) 476 U.S. 79, 84-87.) The prohibition against a prosecutor's discriminatory use of peremptory challenges also rests on the defendant's state and federal constitutional rights to an impartial jury drawn from a representative cross section of the community. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 89; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 265-273; accord, e.g., *People v. Lenix* (2008) 44 Cal.4th 602, 612, and authorities cited therein; Calif. Const., art. I, § 16; U.S. Const., Amend. VI.)

Under both the state and federal constitutional standards, the discriminatory striking of even a single member of a cognizable group, such as African-Americans, is prohibited. (*Snyder v. Louisiana* (2008) 552 U.S.472, ___, 128 S.Ct. 1203, 1208; *Batson v. Kentucky, supra*, 476 U.S. at p. 100; *People v. Silva* (2001) 25 Cal.4th 346, 386; *People v. Montiel* (1993) 5 Cal.4th 877, 909.) Thus a constitutional violation may arise even if others in the group are ultimately seated as jurors or were excluded for genuine race-neutral reasons. (See, e.g., *Snyder v. Louisiana, supra*, at p. 1208 [declining to resolve whether prosecutor's dismissals of other black jurors were legitimately race-neutral because its determination that prosecutor's explanations for excusing one black juror were pretextual was sufficient to make out constitutional violation and warrant relief]; *United States v. Battle* (10th Cir. 1987) 836 F.2d 1094, 1086 ["under *Batson*, the striking of a single

black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black members"]; *People v. Montiel*, *supra*, 5 Cal.4th at p. 909.)

Challenging a prosecutor's dismissal of a potential juror for racial reasons under both the state and federal Constitution involves a well-established three-step process. (See, e.g., *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1207, and authorities cited therein; *Johnson v. California* (2005) 542 U.S. 162, 168; *Purkett v. Elem* (1995) 514 U.S. 765, 767-768 (per curium); *People v. Bonilla* (2007) 41 Cal.4th 313, 341 [state and federal constitutional standards incorporate the same three-step procedure]; *People v. Lenix*, *supra*, 44 Cal.4th at p. 612, and authorities cited therein; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-283.)

First, the defendant has the initial burden of establishing a prima facie case of discrimination by showing that the facts give rise to an inference that the peremptory challenges are being exercised for discriminatory reasons (step one). (See, e.g., *Johnson v. California, supra*, 542 U.S. at p. 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97; *People v. Bell* (2007) 40 Cal.4th 582, 596-597; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) The threshold for establishing a prima facie case is "quite low." (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145.)[97]

There are several factors that should be considered in determining

---

[97] While California law formerly required a "strong likelihood" of discrimination in order to make out a prima facie case – cited by the trial court (5 RT 940-941) – that more stringent standard has since been disapproved in favor of an "inference" of discrimination. (*Johnson v. California*, *supra*, 542 U.S. at p. 168; *People v. Bell*, *supra*, 40 Cal.4th at pp. 596-597.)

whether a prima facie case of discrimination has been shown. For instance, striking most or all of the members of the identifiable group from the panel (see, e.g., *People v. Wheeler, supra*, 22 Cal.3d at p. 280; *Harris v. Kuhlmann* (2nd Cir. 2003) 346 F.3d 330, 345), the prosecution's use of a "disproportionate number of peremptories against the group" (*People v. Wheeler, supra*, at p. 280), or a "pattern" of strikes against the group, raises an inference of bias (*Batson v. Kentucky, supra*, 476 U.S. at p. 96).

Once the trial court finds that a prima facie case has been shown, the burden shifts to the prosecutor to justify the challenges with facially race-neutral explanations related to the facts of the case (step two). (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768; *Batson v. Kentucky, supra*, 476 U.S. at p. 96-98; *People v. Fuentes* (1991) 54 Cal.3d 707, 715; *People v. Wheeler, supra*, 22 Cal.3d at p. 281-282.) At step two, "the issue is the *facial* validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral" and the analysis proceeds to step three. (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768, italics added, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 360.)

The third and final step of the analysis requires the trial court to make a "sincere and reasoned attempt to evaluate the prosecutor's" facially race-neutral explanations and decide whether they are bona fide or pretextual (step three). (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768; accord, e.g., *Batson v. Kentucky, supra*, 476 U.S. at p. 98, fn. 20; *People v. Lewis* (2008) 43 Cal.4th 415, 471; *People v. Hall* (1983) 35 Cal.3d 161, 167-168.) The third step of the *Wheeler/Batson* analysis is the most critical. (See, e.g., *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339 ("*Miller-El I*") [step three embodies the "critical question"]; *Hernandez v. New York, supra*, 500

U.S. 352, 365 [third step embodies the "decisive question"]; *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830 [third step is "the real meat of a *Batson* challenge"]; *People v. Hall*, *supra*, at pp. 167-168 ["if the constitutional guarantee is to have real meaning . . . [it] demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation . . . ."].)

In undertaking step three of the analysis, the trial court may *not* simply accept the prosecutor's explanation at face value. (See, e.g., *People v. Fuentes* (1991) 54 Cal.3d 707, 720; *People v. Turner* (1986) 42 Cal.3d 711, 723, 725, 727-728; *People v. Hall*, *supra*, 35 Cal.3d at pp. 168-169; *Miller-El II*, *supra*, 545 U.S. at p. 248; *Purkett v. Elem*, *supra*, 514 U.S. at p. 768; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101, 1108, and authorities cited therein.) To the contrary, "the trial court must determine not only that a valid reason existed but also that the reason *actually* prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes, supra*, 54 Cal.3d at p. 720, italics added; accord, e.g., *Purkett v. Elem, supra*, 514 U.S. at p. 767 [once "a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination" by determining whether the facially race-neutral reason is bona fide or a pretext for discrimination]; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101, 1108 [at step three, "the trial court must not simply accept the proffered reasons at face value; it has a duty to 'evaluate meaningfully the prosecutor's [race]-neutral explanations' to discern whether it is a mere pretext for discrimination"]; *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969 ["It is not enough that the [trial] court considered the government's [race]-neutral explanations 'plausible.' Instead, it is necessary that the district court make a deliberate decision whether purposeful discrimination

occurred"].)

In making this determination, "*all* of the circumstances that bear upon the issue of racial animosity must be consulted." (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208.) For instance, the trial court must evaluate the prosecutor's credibility (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208, and authorities cited therein), by assessing "among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy" (*Miller-El I*, *supra*, 537 U.S. at p. 339). Further, when the proffered reasons are unsupported, logically or otherwise implausible, or apply equally to non-minority venirepersons whom the prosecutor has not challenged, "that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El II*, *supra*, 545 U.S. at p. 241; accord, e.g., *Purkett v. Elem*, *supra*, 514 U.S. at p. 768; *People v. Silva, supra*, 25 Cal.4th at p. 385; *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1181-1191, and authorities cited therein; *Lewis v. Lewis, supra*, 321 F.3d at pp. 830-831, and authorities cited therein.) Discriminatory intent may be established if one or more of the prosecutor's explanations do not withstand scrutiny. (*Lewis v. Lewis, supra*, 321 F.3d at p. 830 ["The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge"]; accord, e.g., *Snyder v. Louisiana*, *supra*, at p. 1212; *Ali v. Hickman*, *supra*, 584 F.3d at pp. 1181-1191; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360 (*en banc*); *McClain v. Prunty*, *supra*, 217 F.3d at p. 1221.)

Finally, where a trial court engages in the third step of the analysis, rules on the ultimate question of whether the prosecutor's exercise of

peremptory challenges against minority venirepersons were actually motivated by a discriminatory intent, and thus makes factual findings susceptible of review, those findings are entitled to deference. (See, e.g., *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208, and authorities cited therein; *People v. Silva* (2001) 25 Cal.4th 345, 385-386.) But where the trial court has failed to engage in the third step of the analysis, and thus made no determination on the ultimate question in denying a *Wheeler/Batson* motion, it has made no factual findings that are entitled to deference. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-385, and authorities cited therein.) Similarly, where the prosecutor proffers an explanation that cannot be reviewed based on the cold record – such as a juror's demeanor – and the trial court simply "allow[s] the challenge without explanation," a reviewing court cannot presume that the trial court credited the explanation and, thus, there is no factual finding to which to defer. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at pp. 1208-1209 [where prosecutor offered one subjective, demeanor-based reason for challenging juror and a second, objective reason for challenging him, but trial court "simply allowed the challenge without explanation," Supreme Court refused to presume that trial court credited demeanor-based reason and, thus, presumed no factual finding to which deference was due]; *People v. Silva*, *supra*, 25 Cal.4th at pp. 285-386 [where prosecutor proffered demeanor-based reason for challenging juror that had no support in the record and trial court denied motion without making factual findings, ruling denying motion entitled to no deference].)

C. The Record Affirmatively Demonstrates that the Trial Court Terminated the Constitutionally-Mandated *Wheeler/Batson* Analysis at Step Two of the Inquiry And Failed Entirely to Engage In the Critical Third Step, and Thereby Violated The Sixth And Fourteenth Amendments and Article I, section 16 when it Denied the Motion

1. The Trial Court Correctly Found That a Prima Facie Case of Discrimination Had Been Shown under Step One

In support of the *Wheeler/Batson* motion, defense counsel pointed out that the prosecutor "whom I have the greatest respect for, has excused *all* the black jurors. I can't perceive on its face a reason for doing that . . . . The three black jurors we have had are gone." (5 RT 937, italics added.) The trial judge responded, "I would like for [defense counsel] to show the court, to demonstrate the strong likelihood that the juror was challenged solely because of their group association" and "not for a genuine non-discriminatory purpose." (5 RT 940.)

In addition to the grounds already stated, defense counsel pointed out that the excluded black venirepersons were all educated, had college degrees and "responsible jobs," there was nothing to distinguish them from the other potential jurors in the venire apart from race, and there were no patent reasons for excusing them apart from race. (5 RT 940.) The court replied, "Well, it is my understanding that an allegation that the juror belongs to an identifiable group in and of itself is insufficient. I mean it is basically, that's what you are telling me because they were all three of the same racial group." (5 RT 940.) Defense counsel responded, "Well, that is a piece of circumstantial evidence, and when there is nothing else differentiating them from other jurors . . . ." (5 RT 940.) The court repeated that a prima facie showing under *Batson* and *Wheeler* requires more: "You have to prove or

demonstrate that there is a strong likelihood that the juror was challenged solely because of their group association. . . . . It is important you make a complete record of the circumstances; is there anything other than the fact –" (5 RT 941.) Defense counsel repeated that, in addition to the other factors he had cited, there were very few black jurors in pool and the only "three that we have had have been challenged with a peremptory by the People." (5 RT 941.) The court demanded, "so it is simply a pattern, then?" When counsel agreed that there was, indeed, "a pattern," the court again insisted that the law requires more. (5 RT 941.) Defense counsel reiterated that there was a "pattern" plus nothing to distinguish the excluded black venirepersons from the non-black venirepersons the prosecutor had not challenged. (5 RT 941.)

Finally, the court ruled, "well, I think it is marginal, but I am going to ask the People to step forward and give their reason for excluding the jurors." (5 RT 942.) Thus, the trial court correctly found that the prosecutor's exclusion of all three African-Americans from the pool established a prima facie showing of discriminatory intent (step one) and ordered the prosecutor to offer explanations for the challenges (step two). (5 RT 942; see *Johnson v. California, supra*, 545 U.S. at pp. 165-166 [prosecutor's exclusion of all three African-Americans from venire was sufficient to raise inference of discrimination and thereby establish *prima facie* case]; see also *People v. Jackson* (1993) 13 Cal.4th 1164, 1196 [where court directed prosecutor to state reasons for challenges, it implicitly found *prima facie* case]; *People v Fuentes, supra*, 54 Cal.3d at p. 716 [same].)

While the court ultimately made the correct ruling in this regard, its remarks in reaching that ruling – i.e., showing a "pattern" of strikes against black jurors, showing that *all* black jurors have been stricken, and an offered showing that nothing differentiated the minority jurors from the non-minority jurors who had not been struck, was insufficient or even "marginal" (5 RT 940-942) – betrayed an alarming misunderstanding of the basic and long standing legal principles guiding its evaluation of Mr. Mai's motion. (See, e.g., *Batson v. Kentucky*, *supra*, 476 U.S. at p. 96 [showing a "pattern" of strikes against the group makes out prima facie case]; *People v. Wheeler, supra*, 22 Cal.3d at p. 280 [showing that "opponent has struck most or all of the members of the identifiable group" makes out prima facie case]; see also *Harris v. Kuhlmann*, *supra*, 346 F.3d at p. 345 ["where every black juror was subject to a peremptory strike, a 'pattern' plainly exists" under *Batson*, clearly establishing a prima facie case].) That misunderstanding informs Mr. Mai's contention that the trial court failed entirely to engage in the critical third step of the analysis because it erroneously believed that the prosecutor's mere proffer of facially race-neutral explanations at step two was sufficient to defeat the motion.

2. The Prosecutor's Stated Reasons for the Challenges under Step Two and the Trial Court's Denial of the Motion

The prosecutor explained that one of the black jurors he had excluded, Michelle Howard, was unmarried with no children, "she is younger than the juror I prefer[,] [s]he is in her 30s," and her "attitude about the death penalty was personal and emotional, not philosophical. She's the one who talked about, if it's my family I could understand it." (5 RT 942.) "But primarily, the reason she is young, single and no children. There is no other jurors on

the jury presently who fit that pattern." (5 RT 942.)[98]

The second black juror the prosecutor excluded was Penny Franklin. While Ms. Franklin was married with two children (4 RT 676-677), the prosecutor explained that she "is also younger than I want, in her 30s." (5 RT 942.) In addition, she stated in her questionnaire that the death penalty was "appropriate only where there was a pattern of violent conduct, which is not the law." (5 RT 942.) Finally, she "had a very casual attitude and dress." (5 RT 942.) She "didn't seem particularly interested in the proceedings," and "seemed rather bored with" the questions. (5 RT 942-943.)

The third and final black person the prosecutor excluded from the jury was Linda Polk. The prosecutor explained that he had challenged her for two reasons. First, she was a social worker, whom he usually tried to keep off of his juries. (5 RT 943.) Second, "she said she couldn't vote for the death penalty unless the facts were proved beyond a shadow of a doubt, which is not the law, either." (5 RT 943.) Thus, according to the prosecutor, he feared that she would hold the other jurors to a higher standard than the law required. (5 RT 943.)

Thus, the explanations offered by the prosecutor for his challenges of the three black jurors were *facially* race-neutral, and therefore satisfied step *two* of the analysis. Put another way, the prosecutor did not admit that his challenges were race-based.

Defense counsel attempted to rebut those explanations and persuade the court that, while *facially* race-neutral, they were not bona fide because they applied equally to other jurors who had not been challenged (step three).

---

[98] While the prosecutor referred to "jurors . . . on the jury," he presumably meant *potential* jurors on the panel of 20 venirepersons subject to voir dire at that time, since the jury had not yet been selected or sworn.

Although the prosecutor had *explicitly* represented that "no other jurors on the jury presently" were unmarried, without children, and "in [their] thirties," like Ms. Howard (5 RT 942), defense counsel pointed out that Juror Number 12 was also unmarried, but the court immediately dismissed the point. (5 RT 943-944.) When defense counsel attempted to continue, "I am finding everything, I am a lawyer, I am finding every – ," the court cut him off and asked the prosecutor, "anything further?" (5 RT 944.) When the prosecutor replied in the negative, the court denied the motion, stating: "Well, the Court finds that no discriminatory intent is *inherent* in the explanations, and the reasons *appear* to be race neutral, and on those grounds, the Court will deny the *Wheeler* motion." (5 RT 944, italics added.)

3. The Trial Court's Statements in Denying the Motion Affirmatively Establish That it Terminated the Analysis at Step Two and Failed to Engage in Step Three

The court's stated reason for denying the motion – that "no discriminatory intent is *inherent* in the explanations, and the reasons *appear* to be race neutral" – was simply another way of stating that the prosecutor had satisfied step *two* of the *Wheeler/Batson* analysis. As the United States Supreme Court has clearly explained, it is *only* "'at th[e] *second* step of the inquiry [that] the issue is the *facial* validity of the prosecutor's explanation. Unless a discriminatory intent is *inherent* in the prosecutor's explanation, the reason will be deemed race-neutral'" and the analysis *proceeds to step three.* (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 360, italics added; accord, e.g., *Lewis v. Lewis, supra*, 321 F.3d at p. 830, and authorities cited therein ["'unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral,'" at second step, at which point the court

must undertake third step of the analysis and evaluate whether the "facially race-neutral reasons are a pretext for discrimination"].)

As discussed in part B, above, at step three of the analysis, the trial court may *not* simply accept the prosecutor's explanations at face value, but rather must make a "sincere and reasoned attempt to evaluate" those *facially* race-neutral explanations and determine whether they are bona fide or pretextual (step three). (*Purkett v. Elem*, *supra*, 514 U.S. at pp. 767-768; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98, fn. 20; *Williams v. Rhoades*, *supra*, 354 F.3d at p. 1108; *United States v. Alanis*, *supra*, 335 F.3d at p. 969; *Lewis v. Lewis*, *supra*, 321 F.3d at p. 830; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 720.)

In *United States v. Alanis*, *supra*, for instance, after the prosecutor offered facially gender-neutral reasons at step two for his challenges to women, the trial judge denied the defendant's *Batson* motion, stating: "it appears to the court that the government has offered a plausible explanation based upon each of the challenges discussed that is grounded other than in the fact of gender of the person struck. The *Batson* challenge is denied." (335 F.3d at pp. 968-969.) The Court of Appeals held that these remarks made it clear that the trial judge had failed to engage in step three of the *Batson* analysis.

In so holding, the Court explained:

> The government argues that the [trial judge] in fact conducted step three of the *Batson* process by deeming the prosecutor's [race]-neutral explanations "plausible." But under *Batson* it is not sufficient for equal protection purposes that a trial court deem a prosecutor's [race]-neutral explanations facially plausible. Rather, in determining whether a challenger has met his or her burden of showing intentional discrimination, the

> district court must conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be, as we noted above. *Batson*, 476 U.S. at 93, 106 S.Ct. 1712. The district court's deeming the prosecutor's explanation "plausible" was not the required "sensitive inquiry."

(*United States v. Alanis*, *supra*, 335 F.3d at p. 969, fn. 3; accord, e.g., *People v. Hall*, *supra*, 35 Cal.3d at pp. 165-166, 168-169 [trial court's statements that *Wheeler* motion must be denied unless prosecutor's explanation admits intent to exclude jurors based on race, even if prosecutor's seemingly race-neutral explanations might appear to be disingenuous, demonstrated that trial court erroneously failed to undertake third step of *Wheeler* analysis]; *Dolphy v. Mantello* (2nd Cir. 2009) 552 F.3d 236, 239 [trial court's denial of motion with statement, "I'm satisfied that is a race-neutral explanation, so the strike stands," demonstrated that court erroneously terminated the analysis at step two and failed to engage in step three]; *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 286, 291 [trial court's denial of *Batson* motion with "terse" and "abrupt" "comment that the prosecutor has satisfied *Batson*" demonstrated that it failed to perform "the crucial [third] step of evaluating the State's proffered explanations in light of all the evidence"]; *Jordan v. Lefevre* (2nd Cir. 2000) 206 F.3d 196, 200 [trial court's denial of *Batson* motion with "conclusory statements" that there "is a basis for the challenge" and "there is some rational basis for the exercise of the challenge," simply indicated that prosecutor's explanations were facially race-neutral and, thus, that court did not engage in third step of *Batson* analysis by determining credibility and validity of those explanations]; *Lewis v. Lewis*, *supra*, 321 F.3d at pp. 831-832 [trial court's denial of *Batson* motion with statement that the prosecutor's proffered reason was "probably . . . reasonable" was "more like the analysis required in *Batson* step two than in step three" and thus indicated that court

terminated the analysis at step two and failed to engage in step three]; *McCain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223 [court's denial of *Batson* motion with statements that prosecutor had "articulated a basis which I find to be a good faith articulation of [her] reasons" and, in response to defense counsel's effort to rebut those reasons, "I'm not here to second-guess [the prosecutor's'] reasons" demonstrated that the "trial court abdicated its duty to make the ultimate determination on the issue of discriminatory intent"].)

Here, just as in the foregoing cases, the trial court's stated reason for denying the motion – "no discriminatory intent is *inherent* in the explanations, and the reasons *appear* to be race neutral" (5 RT 944) – affirmatively demonstrates that it terminated the analysis at step two and failed to engage in the critical third step by evaluating whether the prosecutor's "apparently" race-neutral reasons were bona fide or pretextual. In so doing, the court clearly erred in violation of the state and federal Constitutions. (See, e.g., *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 720-721; *People v. Turner*, *supra*, 42 Cal.3d at pp. 715, 727-728; *People v. Hall*, *supra*, 35 Cal.3d at pp. 168-169; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1015-1020; *People v. Jackson* (1992) 10 Cal.App.4th 13, 23.)

4. Other Evidence in the Record, and the Lack Thereof, Bolsters the Affirmative Evidence That the Trial Court Failed Entirely to Engage in the Critical Third Step of the Analysis

That the trial judge here terminated the analysis at step two and did not engage in the third step is further demonstrated by his refusal to hear or permit defense counsel's argument rebutting the legitimacy of the prosecutor's reasons. (5 RT 943-944; see, e.g., *Lewis v. Lewis*, *supra*, 321 F.3d at pp. 831-832 [court's denial of motion with statement that prosecutor's

explanation was "probably reasonable," along with its refusal to hear defense counsel's arguments regarding validity of those reasons, demonstrated that trial court failed to engage in third step of analysis] *Jordan v. Lefevre*, *supra*, 206 F.3d at p. 200 [court's denial of *Batson* motion with conclusory statements indicating only that prosecutor had proffered facially race-neutral reasons for challenges, along with refusal to hear defendant's arguments regarding validity of those reasons, demonstrated that trial court failed to engage in third step of *Batson* analysis]; see also *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438 [defense counsel must be given opportunity to point out that prosecutor's explanations are false, irrational, or apply equally to non-minority jurors]; accord *People v. Ayala* (2000) 24 Cal.4th 243, 293-294.) The court's refusal to hear or permit defense counsel's arguments against the legitimacy of the prosecutor's explanations, coupled with its stated reason for denying the motion, clearly demonstrate that *it* did not evaluate the legitimacy of those explanations, either.

Further bolstering the affirmative evidence that the trial court failed to engage in the third step of the analysis is the fact that some of the prosecutor's stated reasons were simply incorrect, implausible, or otherwise demanded further inquiry as part of the step three analysis, yet the trial court made none. In this regard, and as this Court has held, "when the prosecutor's stated reasons are either unsupported, inherently implausible, or both, more is required of the trial court['s step three analysis] than a global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.) A sincere and reasoned effort to determine whether the prosecutor's facially race-neutral reasons were bona fide or prextual required the trial court to point out the inconsistencies between the prosecutor's explanations and the true facts and further inquire into his unsupported or implausible

explanations. (*Ibid.*; accord, e.g., *People v. Turner*, *supra*, 42 Cal.3d at p. 728.)

For instance, the prosecutor explained that his "*primar*[]*y*" reason for removing Ms. Howard was that she was "younger than the jurors I prefer," being in her "thirties," and was single with no children, while there were "no other jurors on the jury presently who fit that pattern." (5 RT 942, italics added.) In fact, Ms. Howard was 40 years old. (4 RT 674, 8 CT 2416.) The prosecutor's representation that no other "jurors" were "young," like Ms. Howard, unmarried and childless, was also incorrect. As defense counsel attempted to point out before the court cut him off, contrary to the prosecutor's representation, there were other venirepersons who were unmarried, such as Juror Number 12. (5 RT 908, 943.) Indeed, like Ms. Howard, Juror Number 12 (who ultimately sat on the jury that voted to execute Mr. Mai), was not only unmarried, she had no children and was only three years older than Ms. Howard. (5 RT 908-909.)[99] Had the trial court understood and correctly applied the law and actually engaged in the third step of the *Wheeler/Batson* analysis, it would have pointed out the inconsistencies between the prosecutor's justifications and the evidence and probed further. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th at p. 385, and authorities cited therein ["when the prosecutor gave reasons that

---

[99] The jury questionnaire did not ask the potential jurors if they had children. However, from the answers of the potential jurors on live voir dire, it was clear that they answered several questions on the board, including whether they had children and, if so, their gender, ages and employment. (See, e.g., RT 907-909.) Since Juror Number 12 did not answer any of the questions regarding children, and since neither the prosecutor nor anyone else posed that question to her, it clearly appears that she, like Ms. Howard, had no children. (RT 909.)

misrepresented the record, the trial court erred in failing to point out inconsistencies and ask probing questions"].) The fact that the court did not further demonstrates that it did not engage in the third step of the analysis.

Also incorrect was the prosecutor's representation that Ms. Howard's "attitude about the death penalty was personal and emotional, not philosophical[,] [s]he's the one who talked about, if its my family I could understand it." (5 RT 942.) On her questionnaire, Ms. Howard stated: "I am for the death penalty" and "I feel the death penalty has been used appropriately. Especially given that some of the defendants have spent years on death row." (8 CT 2420-2421.) On defense counsel's voir dire, he asked Ms. Howard if her support for the death penalty were based on some personal experience she had had. (4 RT 695.) Ms. Howard replied, "Oh, no, no, not personally. But I figure if someone came to my house and blew my family away, I would flip the switch. But that's personal, that's why I believe in it. But I don't – I wouldn't sit here and tell this young man, okay, you need it because you killed somebody. I think there is also circumstances. But I know if it was my family, I couldn't honestly say that I wouldn't be emotional about it." (4 RT 695-696.) Defense counsel explained, "But in our system the families are not the prosecutors." Ms. Howard replied, "Oh, I agree with that." Defense counsel continued, "they are not the executors [*sic*]" to which Ms. Howard replied, "That's what I'm saying, in my personal experience, I haven't had any, but if it was me personally and my family, that's totally different for me." (4 RT 696.) Defense counsel pointed out, "you would expect most everybody would have that same reaction," to which Ms. Howard agreed, "oh yes." (4 RT 696.) When defense counsel asked if costs or a belief in deterrence also factored into her support for the death penalty, she answered no. (4 RT 696.) The prosecutor did not subject Ms. Howard to

any voir dire at all. (See, e.g., *Miller-El II, supra*, 545 U.S. at p. 246 [prosecutor's failure engage in any meaningful voir dire examination on subject he asserts he is concerned about suggests that stated concern is pretextual].)

Thus, Ms. Howard's support for the death penalty was not "personal and emotional," in the sense of being grounded on some personal experience. And she was "emotional" about it only in the sense that she would be "emotional" about wanting the murderer of her *own* family to be executed, as opposed to looking at the "circumstances," which is the way in which she believed the death penalty should be applied. (5 RT 695-696.) At most, her answers as a whole demonstrated that her support for the death penalty was based upon principles of retribution.

Retribution is, of course, one of the two societal interests that the United States Supreme Court has held is both legitimate and served by the death penalty. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 183.) Indeed, "retribution is the most common basis of support for the death penalty" among death penalty advocates. (*Baze v. Rees* (2008) 553 U.S. 35,___, 128 S.Ct. 1520, 1547, fn. 14, conc. opn. by Stevens, J., and authorities cited therein].) Cost and deterrence are cited far less frequently as bases of support for the death penalty. (*Ibid.*) Moreover, the purpose of criminal punishment *is* a "philosophical" question and retribution *is* a "philosophical" justification for it – a justification argued, perhaps most famously, by the philosopher Immanuel Kant. (See, e.g., Kant, Immanuel, *Metaphysical Elements of Justice* (1797); *Furman v. Georgia* (1972) 408 U.S. 238, 394-395 & fn. 20; Dolinko, D., *"Three Mistakes of Retributivism"* (1992) 39 UCLA Law Review 1623, [retribution "is the leading philosophical justification of the institution of criminal punishment"].)

In other words, Ms. Howard's support for the death penalty based on retributivist principles *was* "philosophical" – a philosophical justification on which the death penalty is based and one shared by most death penalty supporters. The prosecutor's explanation that he challenged Ms. Howard because her support for the death penalty was "personal and emotional and not philosophical" was thus without factual support. (See, e.g., *Miller-El II*, *supra*, 545 U.S. at p. 247 [juror's answers as a whole must be considered in determining whether prosecutor's explanation is supported, plausible, and, thus, bona fide or pretextual]; *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 377-378 [prosecutor's explanation that he had challenged juror because she had indicated that the state would have to prove a "strong possibility" of future dangerousness was prextual given, inter alia, her answers as a whole qualifying that isolated statement].) And, because it exceeds the bounds of reason to believe that a prosecutor seeking the death penalty would want to exclude jurors whose support for the death penalty was grounded on retributivist principles – which would exclude most death penalty supporters – it was also fantastic and implausible. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768 ["implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"]; accord *Miller-El I*, *supra*, 537 U.S. at p. 339; *Ali v. Hickman*, *supra*, 584 F.3d at pp. 1181-1188 [prosecutor's explanation that he had challenged black juror because her daughter had been molested was implausible because, if anything, this fact would bias her in favor of prosecution].) Certainly, step three of the *Wheeler/Batson* analysis clearly demanded probing questioning of the prosecutor regarding this explanation, such as just what distinction the prosecutor drew between a "personal" and a "philosophical" view regarding the death penalty, how Ms. Howard's answers manifested that distinction,

and why that distinction was important in this particular case. (See, e.g., *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98 [proffered race-neutral reasons must be "related to the particular case to be tried"]; *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1030 [at the third step, trial court must decide whether the facially race-neutral reasons "are relevant to the case" and "genuine" rather than "pretexts"]; *Dolphy v. Mantello*, *supra*, 552 F.3d at p. 239 [even if prosecutor's facially race-neutral characterization of excluded jurors as overweight were correct, third step of the analysis demanded that trial court probe into correlation between obesity and undesirability as juror]; *Kesser v. Cambra*, *supra*, 465 F.3d at p. 364 [even if prosecutor's characterizations of jurors as "unusually pretentious about her work" and "emotional" because she "teared up" were accurate, he did not explain why those impressions were relevant, which would be expected if they were truly bona fide reasons for challenges].) The fact that the trial court did not probe into this explanation further bolsters the affirmative record evidence that it did not engage in the third step of the analysis, but rather terminated it at step two by accepting the prosecutor's explanations at face value. (See, e.g., *Dolphy v. Mantello*, *supra*, at pp. 238-239 [trial court's denial of motion with bare statement, "I'm satisfied this is a race-neutral explanation," along with its failure to probe into prosecutor's stated explanation that he excluded jurors because they were overweight, demonstrated that court erroneously failed to engage in third step of *Batson* analysis].)[100]

---

[100] Indeed, Ms. Howard appeared to be an ideal juror for a prosecutor seeking a death verdict. In addition to her strong support for the death penalty, she had a college degree, had been employed by the same company as a computer consultant for 15 years, and had sat on *three* juries, one of which was a criminal case, and all of which resulted in verdicts. (4 (continued...)

As to Ms. Polk, the prosecutor's explanation that he excused her because "she said she couldn't vote for the death penalty unless the facts were proved "beyond a shadow of a doubt, which is not the law, either" (5 RT 943), was flatly contradicted by the record. Ms. Polk *never* suggested that she *would not vote to impose the death penalty* unless the facts were proved beyond a shadow of a doubt. Instead, on the questionnaire simply asking the potential jurors about their personal or "*general feelings* regarding the death penalty," Ms. Polk wrote, "My general feelings are that it is important when inflicting it to make sure that the person is guilty beyond a shadow of a doubt before imposing it." (8 CT 2394.) She further stated that she could set aside her *personal* feelings and follow the law, adding "as a county employee, I do that often (following the law)." (8 CT 2395; see, e.g., *Miller-El II*, *supra*, 545 U.S. at pp. 243-244 [prosecutor's statement that he challenged black juror because juror stated that he would not vote for death if rehabilitation was possible mischaracterized juror's actual statements regarding his *personal* beliefs, beliefs he stated would not stand in the way of his voting for death, a mischaracterization that tended to show that prosecutor's facially race neutral explanation was pretextual]; accord, *Ali v. Hickman*, *supra*, 584 F.3d at pp.1181-1189.) Furthermore, on voir dire Ms. Polk clarified what her *personal* feelings – feelings she agreed she could set aside as a juror – were: "I wanted to make sure the people were *convicted* beyond a shadow of a doubt." (4 RT 778, italics added.) This concern was legitimate in this case since these jurors were asked to accept that Mr. Mai had been *convicted* of first-degree murder with special circumstances and *only* determine the

---

[100](...continued)
RT 641-642, 644, 674.)

penalty. Thus, her concern that she wanted to be certain that Mr. Mai had actually been *convicted* of first degree murder before sentencing him to death was, in fact, entirely consistent with the law that limits death eligibility to people *convicted* of first degree murder with special circumstances. (Pen. Code, §, 190.4.) Once again, had the court understood and correctly applied the law and actually engaged in the third step of the analysis, it would have realized the inconsistency between the prosecutor's explanation and the true facts and – at the very least – probed further. (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386, and authorities cited therein; cf. *Miller-El II*, *supra*, 545 U.S. at pp. 265-266 [state trial and appellate courts' findings that prosecutor's explanation for dismissing juror was credible were unreasonable and erroneous since, inter alia, explanation mischaracterized juror's actual statements].)[101]

Similarly, as to Ms. Franklin, nothing in the voir dire or her questionnaire answers suggested that she "had a very casual attitude and dress," "didn't seem particularly interested in the proceedings," or "seemed rather bored with" their questions, as the prosecutor represented. (5 RT 942-943.) Ms. Franklin was a 911 operator with the police department who identified herself as a "strong" proponent of the death penalty – thus a seemingly ideal juror for a prosecutor seeking the death penalty. (8 CT 2404; 4 RT 662, 710-711; see *Miller-El II*, *supra*, 545 U.S. at p. 242 [fact excluded black juror supported the death penalty and otherwise seemed ideal juror for

---

[101] Ms. Polk, too, seemed an ideal juror for the prosecutor. In addition to her general support for the death penalty, she had a graduate degree, a son in college and, while the prosecutor was correct that she worked as a social worker, she had also worked as a probation officer and a parole officer. (4 RT 748-749.)

prosecutor seeking death important factors considered in concluding explanations pretextual]; *Reed v. Quarterman*, *supra*, 555 F.3d at p. 376 [fact that challenged juror supported death penalty and would have been an "ideal juror for the State" was important consideration in determining prosecutor's challenge was race-based].) She had sat on a jury before and reached a verdict. (4 RT 645-646.) She answered all of the questions on the questionnaire and on voir dire, providing thorough and thoughtful responses. (8 CT 2400-2411; 4 RT 618, 645-646, 651, 662, 676-677, 710-711, 731.) For instance, asked on the questionnaire about her "general feelings regarding the death penalty," she wrote, "the death penalty is a very serious consequence for committing a serious offense (murder). In order for someone to receive this punishment, I believe the person must have maliciously set out to destroy the life of someone else (and their loved ones) and have a history of such violent behavior w/o remorse." (8 CT 2407.) Asked if she believed it was used too often or too seldom, she expounded, "in my opinion the death penalty is not used often enough in cases where convicted felons have a repeated behavior pattern for committing violent crimes against others, such as murder." (8 CT 2408.) Given the absence of any indication in her questionnaire or voir dire answers suggestive of a person "uninterested" in the proceedings or "bored" with the questions put to her, a sincere and reasoned attempt to evaluate the prosecutor's explanation demanded further inquiry. (See, e.g., *People v. Silva, supra*, 25 Cal.4th at p. 385 [since nothing in potential juror's voir dire or questionnaire answers supported prosecutor's explanation that he was an "extremely aggressive" person, trial court erred by not further inquiring into that explanation].)

Moreover, the prosecutor's statement that Ms. Franklin believed the death penalty was "appropriate *only* where there was a pattern of violent

conduct, which is not the law" misrepresented her answers as a whole. (5 RT 942, italics added; see, e.g., *Miller-El II*, *supra*, 545 U.S. at p. 247 [juror's answers as a whole must be considered in determining whether prosecutor's explanation is supported, plausible, and, thus, bona fide or pretextual].) As noted above, she did state on her questionnaire that "in order for someone to receive [the death penalty], I believe the person must have maliciously set out to destroy the life of someone else (and their loved ones) and have a history of such violent behavior w/o remorse" and that "the death penalty is not used often enough in cases where convicted felons have a repeated behavior pattern for committing violent crimes against others, such as murder." (8 CT 2407-2408.) However, she also stated that she could set aside her personal feelings and follow the law. (8 CT 2408.) More importantly, she clarified her questionnaire answers on voir dire, explaining that while she believed that the death penalty was appropriate when "the person just had a pattern of no regard for life," a pattern of violent conduct was *not* "*something exclusive*," or the *only* factor she would consider in determining whether the death penalty was appropriate, but simply *a* "strong consideration." (4 RT 731, italics added; see, e.g., *Reed v. Quarterman*, *supra*, 555 F.3d at pp. 377-378 [prosecutor's explanation that he had challenged juror because she had indicated that the state would have to prove a "strong possibility" of future dangerousness was prextual given, inter alia, her answers as a whole qualifying that isolated remark].) Once again, had the court engaged in step three of the analysis, it would have noted these inconsistencies and probed further. The fact that the court did not provides yet more evidence that the court failed entirely to engage in the third step of the *Wheeler/Batson* analysis.

For all of these reasons, the record affirmatively demonstrates that the trial court terminated the *Wheeler/Batson* analysis at step two, denying the motion simply because the prosecutor had offered *facially* race-neutral reasons for his challenges, without engaging in the most critical third step of the analysis. In so doing, the court violated the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution.

D. The Death Judgment Must Be Reversed

Having established error, the question becomes one of remedy. As will be demonstrated below, the death judgment must be reversed. In the alternative, the case should be remanded with directions to the trial court to conduct the third step of the *Wheeler/Batson* analysis.

1. Under This Court's Precedent Consistently Holding That *Wheeler* Error is Prejudicial Per Se, the Death Judgment Must be Reversed

This Court has repeatedly held that *Wheeler* error is "prejudicial per se" and demands reversal of the ensuing judgment. (Cal. Const., art. I, § 16; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283, [*Wheeler* error "prejudicial per se"]; see also *People v. Johnson* (2006) 38 Cal.4th 1096, 1105, fn. 2, conc. opn. of Werdegar, J. [same – collecting cases]; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 [reversal per se applied to first step *Wheeler* error]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 6 [same, refusing "limited remand"].) And this Court has consistently applied the rule of per se reversal to a trial court's erroneous failure to engage in the third step of the *Wheeler* analysis. (See, e.g., *People v. Fuentes*, *supra*, 54 Cal.3d at p. 721 [trial court's failure to engage in third step of *Wheeler* inquiry "compelled" reversal]; *People v. Turner*, *supra*, 42 Cal.3d at p. 728 [trial court's failure to engage in third step of *Wheeler/Batson* was "reversal per se" under state law

and, as structural defect, under federal Constitution]; *People v. Hall*, *supra*, 35 Cal.3d at pp. 170-171 [failure to engage in third step required reversal per se].) Hence, pursuant to this long and well-settled line of authority, the *Wheeler* error in this case demands reversal of Mr. Mai's death judgment.

2. Because the Error Cannot Realistically be Remedied By a Remand Under the Circumstances of this Case, the Death Judgment Must be Reversed; Alternatively, the Court Should Remand the Case to the Trial Court with Directions

Batson error is also structural, not subject to harmless error review, and hence requires reversal without any showing of prejudice. (*United States v. McFerron* (6th Cir. 1998) 164 F.3d 952, 955 [*Batson* error is structural and thus application of harmless-error analysis in the *Batson* context "has been resoundingly rejected by every circuit court that has considered the issue"]; accord, e.g., *United States v. v. Serino* (1st Cir. 1998) 163 F.3d 91, 93; *Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3d 235, 240, 248; *Ramseur v. Beyer* (3rd Cir. 1992) 983 F.2d 1215, 1225, fn. 6; *United States v. Broussard* (5th Cir. 1993) 987 F.2d 215, 221; *Rosa v. Peters* (7th Cir. 1994) 36 F.3d 625, 634, fn. 17; *Ford v. Norris* (8th Cir. 1995) 67 F.3d 162, 171; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 371; *Davis v. Sec'y for the Dep't of Corr.* (11th Cir. 2003) 341 F.3d 1310, 1316.) Where, for instance, a complete *Batson* hearing was conducted, but the trial court's ultimate finding that the prosecutor's explanations were *genuinely* race neutral is unsupported by substantial evidence or its denial of the motion was otherwise erroneous, the ensuing judgment will be reversed without any inquiry into prejudice. (See, e.g., *Miller-El II*, *supra*, 545 U.S. at p. 266.)

However, where the error lies in the trial court's failure to engage in the third step of the *Batson* analysis, federal courts ordinarily remand for the

trial court to do so, so long as the passage of time or other factors have not made a meaningful or reliable retrospective third step analysis impossible. (See, e.g., *Dolphy v. Mantello*, *supra*, 552 F.3d at p. 240 [remanding for trial court to conduct third step of *Batson* inquiry]; see also *People v. Johnson*, *supra*, 38 Cal.4th at pp. 1103-1105, and authorities cited therein [finding limited remand for trial court to conduct second and third steps of *Batson* analysis, seven to eight years after voir dire, appropriate under *federal* Constitution].) Some California appellate courts have followed suit for *Wheeler* error. (See, e.g., *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1281-1283; *People v. Tapia*, *supra*, 25 Cal.App.4th at pp. 1031-1032; see also, *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125-1126 & fn. 3; Pen. Code, § 1260 [appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"].)

A remand under these circumstances – as opposed to the reviewing court's harmless error analysis based on the cold record – is ordinarily the appropriate remedy because "the trial court is in the best position to determine whether a given explanation is genuine or a sham." (*People v. Fuentes*, *supra*, 54 Cal.3d at pp. 720-721; accord, e.g., *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208; *Hernandez v. New York* (1991) 500 U.S. 352, 365.) "*Batson's* third step . . . presents factual questions that hinge on ring-side credibility determinations that no appellate court can fairly make on the basis of a non-sentient record." (*United States v. Kimbrell* (6th Cir. 2008) 532 F.3d 461, 468-469, and authorities cited therein [refusing to engage in harmless error analysis of trial court's erroneous failure to conduct, or application of wrong legal standard to, third step of *Batson* analysis]; accord, e.g., *Lewis v. Lewis*, *supra*, 321 F.3d at p. 830, citing *Batson*, *supra* [at the

third step of the *Batson* analysis, the trial "court's own observations are of paramount importance . . . . Unlike a trial court, a court of appeal is not in an ideal position to conduct a step three evaluation"].)

As the United States Supreme Court has recently explained with regard to the trial judge's role at the third step of the *Batson* (and *Wheeler*) inquiry:

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, see [*Batson*] 476 U.S., at 98, n. 21, 106 S.Ct. 1712, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez*, 500 U.S., at 365, 111 S.Ct. 1859 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie " 'peculiarly within a trial judge's province,' " *ibid.* (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)) . . . .
>
> (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208.)

Thus, when a prosecutor proffered *subjective* reasons for a challenge – for instance, based on the potential juror's demeanor – and the trial court did *not* assess the validity of those reasons, a reviewing court cannot assess the validity of those explanations on a cold record. (See, e.g., *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1209 [meaningful review of proffered reason based on juror demeanor is impossible when "the record does not show that the trial judge actually made a determination concerning [the juror's] demeanor"]; accord, e.g., *McCurdy v. Montgomery County, Ohio* (6th

Cir. 2001) 240 F.3d 512, 521 [need for "explicit on-the-record analysis" and trial court findings are critical "when purported race-neutral explanation is predicated on subjective explanations, such as body language or demeanor"].) Even when a prosecutor offers objective reasons, or reasons based on the record, for a challenge, a reviewing court cannot fully assess the *prosecutor's* credibility on a cold record. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208; *Miller-El I*, *supra*, 537 U.S. at p. 339, and authorities cited therein [courts assess prosecutor's credibility "by, among other factors, the *prosecutor's demeanor*"]; *Hernandez v. New York*, *supra*, 500 U.S. at p. 365 ["the best evidence of [discriminatory intent] often will be the demeanor of the attorney exercising the challenge"]; *Lewis v. Lewis*, *supra*, 321 F.3d at p 830, and authorities cited therein; *People v. Lenix* (2008) 44 Cal.4th 602, 613.)

To be sure, when a prosecutor's *objective* explanations are contradicted by the record or otherwise implausible, a reviewing court may conclude that the prosecutor's credibility is suspect or destroyed based on the cold record. (See, e.g., *Snyder v. Louisiana*, *supra*, 128 S.Ct. at pp. 1211-1212; *Miller-El I*, *supra*, 537 U.S. at p. 339; *Lewis v. Lewis, supra*, 321 F.3d at p. 830.) And where the prosecutor offered objective explanations *and* the trial court did engage in the third step of the analysis (thereby making factual findings) and the claim of error is that substantial evidence does not support the trial court's findings, an appellate court can review the court's ruling based on the cold record. (See, e.g., *Miller-El II*, *supra*, 545 U.S. at pp. 236, 241-266 [where prosecutor offered objective explanations only and trial court did undertake step three of analysis and specifically found the prosecutor's explanations "credible," Supreme Court concluded trial court's findings, along with appellate court's affirmance, were unreasonable and incorrect

based on its review of record evidence]; *Lewis v. Lewis*, *supra*, 321 F.3d at p. 832 ["unlike a trial court, a court of appeal is not in an ideal position to conduct step three of the evaluation. It can, however, use the trial court's *findings* and the evidence on the record to evaluate the support of the record for the prosecutor's reasons and credibility and to compare the struck and empaneled jurors"].)

However, when the trial court has *completely failed* to engage in the third step of the analysis, the cold record simply does not provide sufficient information for a reviewing court to *remedy* or deem harmless the trial court's error by itself engaging in the third step of the analysis, particularly where – as here – the prosecutor's explanations are based in part on a potential juror's demeanor. (See, e.g., *United States v. Kimbrell*, *supra*, 532 F.3d at pp. 468-469, and authorities cited therein ["*Batson's* third step . . . presents factual questions that hinge on ring-side credibility determinations that no appellate court can fairly make on the basis of a non-sentient record"]; *Lewis v. Lewis*, *supra*, 321 F.3d at pp. 833-834 [where trial court made no factual findings and did not state whether it credited prosecutor's explanation and characterization of juror as a "loner," appellate court could not substitute its judgment for the trial court's and determine whether characterization was accurate or, thus, whether explanation was genuinely race-neutral]; cf. *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208 [where prosecutor offered one demeanor-based reason and trial court made no explicit factual findings, Supreme Court refused to presume that trial court credited that explanation or made an implicit finding deserving of any deference because it was impossible to review and, thus, impossible to affirm trial court's denial of motion on that basis].) Indeed, this case provides compelling examples of the kinds of facially race-neutral explanations that a reviewing court simply

cannot deem bona fide (and thereby deem harmless the trial court's erroneous failure to engage in the third step of the *Wheeler/Batson* analysis) based solely on the appellate record.

As previously discussed, the prosecutor explained that he had excluded Ms. Franklin because she "had a very casual attitude and dress" (5 RT 942) and "didn't seem particularly interested in the proceedings," but rather "seemed rather bored with" the questions. (5 RT 943.) As discussed at length in part C-2, above, nothing in the cold record supports this representation; in fact, the record contradicts it. Under these circumstances, a reviewing court – which had no opportunity to observe Ms. Franklin and her demeanor – simply cannot making the factual finding that, despite her seeming engagement in the proceedings reflected on the record, Ms. Franklin was "casual," "bored," or "uninterested" in the proceedings and, thus, that this explanation was genuine or bona fide. (See *Snyder v. Louisiana*, *supra*, 128 S.Ct. at pp. 1208-1209 [where prosecutor offered one explanation based on potential juror's demeanor and trial court denied motion without making any explicit factual findings, Supreme Court refused to presume that trial court credited that explanation or made an implicit finding deserving of any deference because it was impossible to review and, thus, refused to affirm trial court's denial of motion on that basis]; *People v. Silva*, *supra*, 25 Cal.4th at p. 385 [where prosecutor offered one demeanor-based reason that found no support on cold record and where trial court made no findings, court refused to assume that court credited explanation and, thus, refused to affirm on that basis].)

Similarly, and as further discussed in part C-2, above, a number of the prosecutor's explanations demanded probing because they were unsupported by the record or otherwise implausible. (See, e.g., *People v. Silva*, *supra*, 25

Cal.4th at pp. 385-386.) Thus, without further explanation or testimony from the prosecutor – evidence dehors the appellate record – a reviewing court simply cannot conclude that those explanations were bona fide rather than pretextual. (See, e.g., *ibid.* [court's erroneous failure to further inquire of explanations that were unsupported by the record or otherwise implausible demanded reversal].)[102]

Unfortunately, while a remand for the trial judge to engage in such analysis may arguably be appropriate in *some* cases, it would not be appropriate in this case. A meaningful and reliable third step *Wheeler/Batson* hearing in this case would demand that at least three different parties have

---

[102] On occasion, when faced with a trial court's failure to engage in the third step of the analysis after the prosecutor offered objective reasons for the challenges, federal courts will decline to remand when the appellate record is sufficient for the reviewing court to conclude that the prosecutor's explanations are *pretextual* and, thus, the defendant is entitled to relief. (See, e.g., *Green v. LeMarque* (9th Cir. 2008) 532 F.3d 1028, 1031 [where state courts did not engage in third step of the analysis, appellate court reviewed prosecutor's proffered objective explanations, concluded they were pretextual, and ordered new trial on that basis]; *United States v. Alanis, supra,* 335 F.3d at pp. 969-970 ["had the court properly proceeded to step three, it would have concluded that the prosecutor's [objective] gender-neutral explanations were pretextual," based upon comparative analysis].) However, the converse is not true. Due to the structural nature of the error and the inability of a reviewing court to make the credibility determinations necessary for a step three analysis, reviewing courts may *not* remedy a trial court's erroneous failure to engage in the third step of the analysis by itself engaging in the third step and concluding that the trial court's error is *harmless*, particularly when the prosecutor has offered demeanor-based explanations. (See, e.g., *United States v. Kimbrell* (6th Cir. 2008) 532 F.3d 461, 468-469, and authorities cited therein [because it is impossible for appellate court to make credibility determinations required at third step of the analysis, reviewing court refused to apply harmless error analysis to trial court's failure to engage in, or its application of wrong legal standard to, third step of *Batson* analysis and instead ordered new trial].)

full recall of the voir dire, the potential jurors, their demeanor, their answers, and the prosecutor's demeanor: (1) the trial judge; (2) the prosecutor, who would have to provide further explanations regarding some of his stated reasons for challenging the black jurors in order for the trial judge to conclude at the third step that those reasons were bona fide, rather than pretextual, as discussed in part C-2, above; and (3) defense counsel, who must be given the opportunity that he was denied at the original *Wheeler/Batson* hearing to rebut the prosecutor's explanations, as further discussed in part C-2 above (see, e.g., *United States v. Alcantar*, *supra*, 897 F.2d at p. 438; *People v. Ayala*, *supra*, 24 Cal.4th at pp. 293-294).

However, as of this writing, *nearly 10 years have passed since the voir dire in this case*. More years will pass before the final resolution of this appeal and any remand may be ordered. This is a far greater passage of time between the voir dire and a retrospective *Wheeler/Batson* hearing than those in which a remand has been ordered in other cases. (*People v. Garcia*, *supra*, 77 Cal.App.4th 1269, 1281-1283 [expressing skepticism over trial court's ability to intelligently evaluate prosecutor's explanations based on memory of voir dire that occurred only two and a half years earlier, but remanding for the trial court to attempt to do so out of abundance of caution]; *People v. Johnson*, *supra*, 38 Cal.4th at p. 1101 [seven to eight years]; *People v. Tapia*, *supra*, 25 Cal.App.4th at pp. 1031-1032 [three years or less];[103] *People v. Williams*, *supra*, 78 Cal.App.4th at pp. 1125-1126 & fn. 3 [approximately one

---

[103] While the *Tapia* decision does not reflect the date on which the motion was made or even when the trial occurred, it does refer to witness testimony describing a 1991 event. (*People v. Tapia*, *supra*, 25 Cal.App.4th at p. 1006.) Hence, the trial and motion must have occurred sometime after that 1991 event, or at most three years before the appellate court's 1994 decision.

year *and* no defense objection to remand].)

Indeed, as the United States Supreme Court recently observed in reversing for a third step *Batson* error that had occurred a decade earlier: there is no "realistic possibility that [the prosecutor's proffered explanations] could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." (*Snyder v. Louisiana, supra,* 128 S.Ct. at p. 1212; see also *People v. Carrassi* (2008) 44 Cal.4th 1263, 1333, fn. 8, conc. & dis. opn. of Werdegar, J., joined by Kennard J [observing that remand procedure approved in *People v. Johnson, supra*, 38 Cal.4th at p 1011 has been "called into question in *Snyder*"].) So, too, in this case, there is no realistic possibility that the trial judge, the prosecutor, and defense counsel will *all* have sufficient recall of the proceedings, the demeanor of the potential jurors, and the credibility of the prosecutor in offering his explanations, for a meaningful and reliable retrospective third-step *Wheeler/Batson* hearing. (See, e.g., *People v. Snow, supra,* 44 Cal.3d at p. 226-227 [reversing rather than remanding where six years had passed since the original *Wheeler/Batson* motion]; *People v. Hall* (1983) 35 Cal.3d 161, 170-171 [same – three years]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 4 [same]; *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 293-294 [declining to remand and instead ordering new trial for *Batson* error given 13-year passage of time, making a meaningful hearing "highly unlikely"]; see also *People v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-440 [*Batson* hearing on remand two years after erroneous denial of motion was inadequate because trial judge could not recall excluded jurors; new trial ordered]; *Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 696-697, 700-703 [upon remand for *Batson* hearing held eight years after erroneous denial of motion, prosecutor had no independent recollection of voir dire or reasons for challenges and transcript

did not refresh her recollection, trial judge's memory was similarly flawed, and prosecutor could only explain challenges based on her personal ethics and practice; held: conjecture, rather than recollection of actual reasons, made reliable retrospective analysis impossible and new trial ordered]; *People v. Johnson*, *supra*, 38 Cal.4th 1096, 1103-1104 [taking judicial notice that, on remand ordered in *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1080, seven years after erroneous denial of *Batson* motion, trial judge's lack of recollection due to passage of time made retrospective analysis impossible and therefore new trial ordered].) Hence, this Court should find that a remand is unfeasible in this case and reverse the death judgment.

In the alternative, this Court should order a remand with directions to the trial judge to attempt to evaluate the legitimacy of the prosecutor's explanations. "If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage, or it determines that the prosecutor exercised his peremptory challenges improperly," the judgment must be reversed. (See, e.g., *People v. Johnson*, *supra*, 38 Cal.4th at pp. 1103-1104; accord, e.g., *Dolphy v. Mantello*, *supra*, 552 F.3d 239-240.) Only if the judge determines that the prosecutor's explanations can be adequately assessed *and* are bona fide or genuine, and, thus, that a preponderance of the evidence does not demonstrate that discrimination prompted the removal of the only three black potential jurors from the pool, may the judgment be reinstated. (*Ibid.*)

VIII

THE DEATH ELIGIBILITY FINDING AND DEATH VERDICT IN THIS CASE ARE UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I AND SECTION 17 OF THE CALIFORNIA CONSTITUTION AND MUST BE SET ASIDE

As discussed in the preceding arguments, Mr. Mai professed a desire to be executed and the trial court, trial counsel, the prosecutor, and the jurors expressed no hesitation in deferring to his wish, even at the cost of the court and counsel's independent, constitutionally-mandated duties to Mr. Mai and the trial process itself. The result was a capital murder "trial" that was an empty charade – nothing more than the instrument of a questionably competent defendant's professed desire to die. Even if no single event discussed in the preceding arguments requires reversal, the trial as a whole, and the death verdict that resulted, fell far short of meeting the state's independent interest in the fairness and integrity of its proceedings and the heightened degree of reliability demanded of death verdicts. (U.S. Const., Amends. V, VIII & XIV; Cal. Const., art. I, §§ 15, 16 & 17.) The death eligibility finding and death verdict must be set aside.

A. Constitutional Bases for Society's Independent Interest in the Fairness and Accuracy of Criminal Proceedings and the Reliability of Death Judgments

The federal Constitution demands that all criminal trials be fair. (U.S. Const., Amends. V, XIV.) "Further, proceedings must not only be fair, they must *'appear* fair to all who observe them.'" (*Indiana v. Edwards* (2008) ___ U.S. ___, 128 S.Ct. 2379, 2387.)

In capital trials, the United States Supreme Court has repeatedly emphasized that given the "irremediable and unfathomable" nature of the death penalty, the Eighth Amendment demands a heightened degree of

reliability in all stages of a capital proceeding. (*Ford v. Wainwright, supra,* 477 U.S. at p. 411; *Oregon v. Guzek* (2006) 546 U.S. 517, 525 [Eighth Amendment demands heightened degree of reliability in penalty determination]; *Beck v. Alabama* (1980) 447 U.S. 625, 637 [Eighth Amendment demand for heightened reliability applies to both guilt and penalty determinations in capital cases]; accord, e.g., *Deck v. Missouri* (2005) 544 U.S. 622, 632, and authorities cited therein; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358, plur. opn.; *Lockett v. Ohio, supra,* 438 U.S. at p. 605, plur. opn.; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885.)

As discussed in Argument V, *ante*, the federal constitutional guarantees to fair criminal proceedings and reliable death eligibility and penalty determinations do not belong to the defendant alone. "[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.'" (*Indiana v. Edwards, supra,* ___ U.S. ___, 128 S.Ct. 2379, 2387, quoting *Sell v. United States* (2003) 539 U.S. 166, 180, and authorities cited therein.)

Moreover, society has a legitimate, vital, and independent interest in ensuring that verdicts in capital cases are just, based on reason, and reliable. As the United States Supreme Court has emphasized in this regard, "[f]rom the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any legitimate state action. It is of vital importance to the defendant *and to the community* that any decision to impose the death sentence be, and appear to be, based on reason[,] rather than caprice or emotion," and reliable. (*Gardner v. Florida* (1977) 430 U.S. 349 357-358, italics added; accord, e.g., *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638; *People v. Alfaro* (2007) 41 Cal.4th

1277, 1300, and authorities cited therein [recognizing state's independent and "strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings"]; *People v. Guzman* (1988) 45 Cal.3d 915, 962; *People v. Deere* (1985) 41 Cal.3d 353, 362-364; *People v. Chadd* (1981) 28 Cal.3d 739, 747-750.)

There are occasions in which these interests may be at odds with a particular defendant's desires. When the defendant's wishes – if followed – will subvert society's independent interest in the fairness of its proceedings and the reliability of death verdicts, the state's interests win out. (See, e.g., *Indiana v. Edwards*, *supra*, 128 S.Ct. 2379, 2387, and authorities cited therein [state's independent interest in the fairness of its proceedings permits it to impose a higher competency requirement for a defendant who wishes to control his trial through self-representation than that applied to a defendant's ability to stand trial]; *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 162 ["the government's interest in assuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"]; *Wheat v. United States* (1988) 486 U.S. 153, 160, 162 [state's "independent interest in ensuring criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear to be fair to all who observe them" may override defendant's right to counsel of choice and willingness to waive conflict]; *Pate v. Robinson* (1966) 383 U.S. 375, 384 [defendant cannot waive due process prohibition against being tried if incompetent to stand trial]; *Sell v. United States*, *supra*, 539 U.S. at pp. 179-182 [government's interest in "assuring a defendant a fair trial" and trying defendants while competent may, under certain circumstances, outweigh defendant's

constitutionally protected liberty interest in avoiding involuntary medication]; *People v. Richardson* (2006) 43 Cal.4th 959, 1169-1171, and authorities cited therein [state's independent interest in fairness and appearance of fairness permits trial court to substitute counsel over defendant's objection]; *People v. Breverman* (1998) 19 Cal.4th 142, 153 [court's duty to provide lesser included offense instruction even over defendant's objection is grounded on policy concerns "not only for the rights of the accused, but also for the overall administration of justice"]; *People v. Stanley* (1995) 10 Cal.4th 764, 804-805 [in the face of substantial evidence of incompetence, due process demands competency hearing and "attorney representing the defendant is required to 'advocate the position counsel perceives to be in the client's best interests even when that interest conflicts with the client's stated position'"].) Indeed, California law has long provided that while criminal defendants may waive rights and procedures that exist for their own benefit, they may not waive rights or procedures that exist for the public's benefit. (See, e.g., *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371, and authorities cited therein [criminal defendants may not waive rights in which the public has an interest or when waiver would be against public policy]; Civ. Code, § 3513 ["anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement"].)

This principle applies with equal force when the defendant's desire to be executed will subvert society's independent interest in the fairness of its proceedings and the reliability of death judgments. Certainly, this is true under California's death penalty scheme, which prohibits particular defendants from unilaterally waiving "rights" that exist not only for their own benefit but also to protect California's independent interest in the fairness of

its proceedings and the reliability of its death judgments. (See, e.g., *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1301 [California's death penalty legislation "has its roots in the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings"]; *People v. Chadd* (1981) 28 Cal.3d 739, 750, 753; *People v. Deere*, *supra*, 41 Cal.3d at pp. 362-364; *People v. Stanworth* (1969) 71 Cal.2d 820, 834, and authorities cited therein.)

B. California's Death Penalty Scheme Reflects Society's Paramount, Independent Interest in the Fairness of its Criminal Proceedings and the Reliability of Death Judgments

Four features of California's death penalty scheme reflect the fundamental principle that under state law society has an independent interest in the fairness and reliability of capital trials. First, Penal Code section 1018 explicitly provides in relevant part that no guilty plea to a capital offense "shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel." This statute, read together with the constitutional guarantee to the effective assistance of counsel, requires counsel to exercise his "independent," objectively reasonable and *disinterested* "professional judgment" in determining whether the defendant should enter a guilty plea to a capital case. (*People v. Massie* (1985) 40 Cal.3d 620, 625.) Counsel's duty to exercise his *independent* judgment in this regard overrides the defendant's own wishes. (*Ibid.* [trial court erred in accepting guilty plea to capital offense, and counsel erred in formally consenting to the plea, where it was clearly made against counsel's advice, but counsel felt pressured into "going along simply because his client was 'adamant' in his decision to plead guilty"].) Further, a particular defendant cannot avoid the statute's

restrictions by discharging his attorney in order to represent himself and thus enter a plea without the consent of counsel, even if he or she is found legally competent to do so. (*People v. Massie*, *supra*, 40 Cal.3d at p. 625 [defendant could not avoid requirement of counsel consent under section 1018 by discharging counsel and entering guilty plea in propia persona]; *People v. Chadd*, *supra*, 28 Cal.3d at pp. 745, 751; see also, *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1302.)

Second, consistent with California's "independent interest in the accuracy of the special circumstance and penalty determinations, [California does] not . . . permit a defendant to stipulate to the death penalty . . ." (*People v. Teron* (1979) 23 Cal.3d 103, 115, fn. 7, citing *People v. Stanworth, supra,* 71 Cal.2d at pp. 833-834, overruled on other grounds in *People v. Chadd*, *supra*, 28 Cal.3d at p. 750 & fn. 7.) Rather, a penalty hearing is required in which a *trier of fact*, guided by strict constitutional and statutory guidelines intended to assure reliable death judgments, determines the appropriate penalty. (Pen. Code, §§ 190.3, 190.4, subd. (a).)

Third, if the trier of fact determines that death is appropriate, California law mandates an *automatic* motion before the trial judge to modify the death verdict. (Pen. Code, § 190.4, subd. (e) ["in every case in which the trier of fact has returned a verdict or finding imposing the death penalty, *the defendant shall be deemed to have made an application for modification of such verdict or finding* . . . ."].) (Italics added.) In other words, the motion is made irrespective of whether a particular defendant seeks or even desires modification.

Finally, Penal Code section 1239, subdivision (b), provides for an automatic appeal in capital cases, which a defendant has no power to waive. As this Court has explained, "it is manifest that the state in its solicitude for a

defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has imposed a duty upon this court to make such review. We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him." (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 834; accord, e.g., *People v. Massie* (*Massie II*) (1998) 19 Cal.4th 550, 566, 570-572 [whether to appeal capital conviction is not one of few fundamental rights over which defendant has control; section 1239, subd. (b) does not violate defendant's constitutional right to "control his defense" or create an unconstitutional conflict of interest between client's wishes and state's independent interest in reliability of death judgments].)

Thus, California's death penalty scheme as a whole makes clear that capital trials may not be used as mere instruments for particular defendants to achieve their own desires. To the contrary, "we are concerned with a principle of fundamental public policy." (*People v. Stanworth, supra*, 71 Cal.2d at p. 834; see also, e.g., *Cowan v. Superior Court*, *supra,* 14 Cal.4th at p. 371 [while criminal defendants may waive rights that exist for their *own* benefit, they may not waive rights in which the public has an interest or when waiver would be against public policy].) Three of this Court's decisions are illustrative.

In *People v. Chadd*, *supra*, 28 Cal.3d 739, the defendant sought to enter a guilty plea to a capital offense in order to receive the death penalty, but his counsel refused to consent on the ground that "the defendant's basic desire is to commit suicide, and he's asking for the cooperation of the State in that endeavor." (*Id.* at pp. 744-745.) The trial court recognized Penal Code section 1018's requirement of counsel consent in guilty pleas to capital offenses, but ruled that if the defendant was sufficiently competent to

discharge counsel and act as his own attorney under *Faretta v. California* (1975) 422 U.S. 806, then the defendant could enter his plea without the consent of counsel. (*Ibid.*) The trial court initiated competency proceedings, found the defendant competent, and accepted the defendant's plea of guilty without the consent of counsel. (*Id.* at pp. 745-746.)

The defendant appealed his conviction and the ensuing death judgment on the ground, inter alia, that the trial court violated Penal Code section 1018 by accepting his guilty plea without the consent of counsel. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 746.) Defending the judgment, the state argued that Penal Code section 1018 is unconstitutional because it "disturbs the 'uniquely personal' nature of the defendant's right to plead guilty, denies him his 'fundamental right' to control the ultimate course of the prosecution, and destroys the constitutionally established relationship of counsel as the defendant's 'assistant' rather than his master." (*Id.* at p. 747.)

This Court flatly rejected the state's reasoning because it "fails to recognize the larger public interest at stake in pleas of guilty to capital offenses." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 747.) Although it is true that, under California law, the decision to plead is ordinarily personal to the defendant, "it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised." (*Id.* at pp. 747-748.)

The 1973 amendment to section 1018, prohibiting a guilty plea to a capital offense without the consent of counsel, was part of an extensive revision of California's death penalty law meant to satisfy the Eighth Amendment and avoid arbitrary and capricious imposition of the death penalty and thus was "intended . . . to serve as a further independent safeguard against erroneous imposition of a death sentence." (*People v.*

Chadd, *supra*, 28 Cal.3d at p. 750.) Considering the interplay between that interest and a defendant's rights under *Faretta*, *supra*, the Court reasoned that while the *Faretta* decision recognized that the Sixth Amendment "grants to the accused personally 'the right to *make his defense*' . . . ," it does not necessarily follow that he also has the "right to make *no such* defense and to have no such trial, even when his life is at stake." (*Id.* at p. 751, italics added.)

To the contrary, "in capital cases, as noted above, the state has a strong interest in reducing the risk of mistaken judgments." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 751.) This strong interest is reflected in California's entire death penalty scheme – from plea through appeal. (*Id.* at pp. 751-752, citing *People v. Stanworth*, *supra*, 71 Cal.2d 820, 833, and quoting *Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, 74 ["While Massie is correct in that he enjoys a constitutional right to self-representation, this right is limited and a court may appoint counsel over an accused's objection in order to protect the *public interest* in the fairness and integrity of the proceedings"].) Consistent with the intent of California's statutory death penalty scheme, section 1018 furthers the state's independent interest in the reliability of death judgments and reducing the risk of mistaken death judgments by "serv[ing] inter alia as *a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant, as here, simply wants the state to help him commit suicide*." (*Id.* at p. 753, italics added.) This strong interest outweighs any possible "minor infringement" on a defendant's rights under *Faretta*. (*Id.* at pp. 751-752; accord *Massie*, *supra*, 40 Cal.3d at p. 625 [*Faretta* right to self-representation does not trump society's independent interest in the reliability of death judgments so as to allow defendant to discharge counsel and enter guilty plea

to capital offense against counsel's advice].)

Four years after *Chadd*, in *People v. Deere*, *supra*, 41 Cal.3d 353, this Court again had occasion to consider the tension between society's interest in the reliability of death judgments and a particular defendant's desire for execution. This Court recognized, as it had in *Chadd* and *Stanworth*, *supra*, that "'"[a]lthough a defendant may waive rights that exist for his own benefit, he may not waive those which also belong to the public generally."'" (*People v. Deere*, *supra,* at p. 363, quoting from *People v. Stanworth*, *supra*, 71 Cal.2d at p. 834.) In this regard, and as it had in *Chadd*, *supra*, this Court recognized that California has an independent, constitutionally compelled interest in the reliability of death judgments and "reducing the risk of mistaken judgments," as well as "a fundamental public policy against misusing the judicial system." (*Id.* at pp. 362-364.) The Legislature has legitimately determined that these interests override a defendant's contrary wishes throughout capital proceedings, from the entry of plea through appeal. (*Ibid.*) A capital trial that amounts to nothing more than an instrument by which the defendant commits state- assisted suicide violates public policy, defeats state and federal constitutional interests in the reliability of death judgments, and thus the death verdict it produces cannot stand. (*Ibid.*)

In *Deere*, this Court applied these principles to hold that where defense counsel acceded to the defendant's wish not to present available mitigating evidence and the defendant made a statement to the factfinder in which he asked for the death penalty, the resulting death verdict was unreliable. (*People v. Deere*, *supra*, 41 Cal.3d at pp. 361, 364; accord *People v. Burgener* (1986) 41 Cal.3d 505, 541-543.) This Court has since disapproved of *Deere* to the extent that it held that "failure to present mitigating evidence, in and of itself, is sufficient to make a death judgment

unreliable." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9; accord, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1372, and authorities cited therein; *People v. Sanders* (1991) 51 Cal.3d 471, 524-527.)[104] But it still adheres to the fundamental principles that the state has an independent interest in fair and reliable capital trials.

According to this Court's post-*Deere* decisions, a death verdict is not rendered unreliable simply because disinterested counsel accedes in his competent client's knowing, voluntary, and intelligent decision to present no penalty phase defense. (*People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527 ["in the absence of evidence showing counsel failed to investigate mitigating evidence or advise the defendant of its significance," death verdict was not rendered unreliable where presumably competent defendant made "knowing and voluntary" decision not to present penalty phase defense, where failure to present defense "did not amount to an admission that he believed death was the appropriate penalty," and where jurors heard mitigating evidence from guilt phase]; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228 [a death verdict is not necessarily unreliable simply due to competent, self-represented defendant's decision not to present mitigating evidence at the penalty phase; so long as a death verdict is returned under "proper instructions and procedures" the reliability requirement is satisfied].) Nevertheless, the essential premise of *Deere* – that society has an independent and constitutionally guaranteed interest in the fairness and reliability of its capital

---

[104] In addition, this Court held that the failure to present available mitigating evidence necessarily amounts to ineffective assistance of counsel. (*People v. Deere*, *supra*, 41 Cal.3d at pp. 364.) This aspect of *Deere* has also been disapproved. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1031.)

proceedings and judgments, which may be violated when a capital murder trial becomes nothing more than an instrument for a particular defendant's self-defeating desires – remains the law today. (See *People v. Sanders*, *supra*, 51 Cal.3d at p. 526, fn. 23 [while competent defendant's decision not to present mitigating evidence or closing argument does not itself render death verdict unreliable, the "state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present mitigating evidence, the jury was also given misleading instructions and heard misleading argument"]; accord *People v. Williams* (1988) 48 Cal.3d 1127, 1152 [in absence of misleading instructions or argument, or defendant's request to factfinder to return death verdict as in *Deere* and *Burgener*, *supra*, failure to present available mitigation does not, in and of itself, render death verdict unreliable]; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228 & fn. 9.)[105]

Indeed, this Court recently reaffirmed California's paramount, independent interest in the reliability of death judgments, in *People v. Alfaro* (2007) 41 Cal.4th 1277. There, defense counsel refused to consent to the defendant's unconditional guilty plea to a capital offense because "I know she's pleading guilty for all intents and purposes to a death sentence." (*Id.* at p. 1297.) Pursuant to section 1018, the trial court refused to accept

---

[105] This Court has also held that a defendant who exercises his Sixth Amendment right to self-representation may present no defense. (See, e.g., *People v. Koontz* (2002) 27 Cal,.4th 1041, 1074 .) As Mr. Mai did not formally move to represent himself and the trial court did not undertake the necessary steps to grant such a motion, and as Mr. Mai never even suggested that he would move to represent himself if his counsel refused to acquiesce in his purported death wish, the tension between a defendant's Sixth Amendment right to self-representation and the state's interest in the reliability of death judgments is not at issue here.

defendant's plea or to remove or substitute counsel. (*Id.* at pp. 1296-1298, 1319.) Defendant was convicted of murder and sentenced to death. (*Id.* at p. 1297.)

On appeal, defendant argued both that her counsel unreasonably withheld his consent to her guilty plea and that she had a fundamental right to enter a guilty plea, and make fundamental decisions about her defense, even against the advice of counsel, which the trial court violated when it refused to allow her to do so. (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1298.) Defendant attempted to distinguish *Chadd*, *supra*, on the ground that Chadd had sought to enter a plea in order to commit state-assisted suicide, whereas she had sought to enter a guilty plea in order to gain an advantage at the penalty phase by urging her remorse and acknowledgment of wrongdoing. (*Id.* at p. 1300.) She thus urged this Court to limit its holding in *Chadd* to those facts and argued its application to her case violated her rights to the assistance of counsel, to control over her own defense, and to a fair trial. (*Id.* at pp. 1295, 1300.) This Court rejected each of her arguments.

Central to the Court's rejection of her arguments was its finding that she did not seek to enter her plea in order to gain a tactical advantage in her penalty phase *defense*. (*People v. Alfaro*, *supra*, at pp. 1299-1300.) Instead, she wanted to enter an unconditional plea in order to prevent or avoid her counsel's intended strategy of implicating a third party as an accomplice in the charged murder. (*Ibid.*)

Thus, like counsel's refusal to consent to a plea made "in order to effectuate state-assisted suicide" in *Chadd*, counsel's refusal to consent to an unconditional plea that was not intended to benefit his client's *defense* served the function that section 1018 and the extensive revision of the California's death penalty legislation of which it was a part were intended to serve: as a

"safeguard against the erroneous imposition of a death sentence" and in furtherance of "the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings. (*Chadd*, *supra*, at pp. 750, 753.)" (*Id.* at pp. 1300-1301.) A death judgment may be erroneously imposed when the trier of fact has not determined, in accord with constitutionally and statutorily compelled procedures intended to ensure reliable death judgments, that the death penalty is warranted. In this regard, "had defense counsel capitulated to defendant's desire to plead guilty unconditionally despite the information she had conveyed to him implicating another person in the murder, defendant's plea would have cast doubt on potentially critical mitigating evidence. A guilty plea entered under such circumstances might very well lead to the erroneous imposition of the death penalty – precisely the outcome section 1018 is intended to prevent." (*Id.* at p. 1301.)

Moreover, while a defendant may have a right to control a fundamental aspect of his or her *defense* and the right to counsel to assist in his or her *defense*, those rights were not implicated or violated in that case because the defendant did not seek to enter the plea in order to benefit her penalty phase *defense*. (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1302.) Hence, defendant's dispute with her counsel "did not implicate a constitutionally protected fundamental interest that might override the plain terms of section 1018" or – it necessarily follows – society's independent interest in the reliability of death judgments that section 1018 and California's death penalty scheme is intended to serve. (*Ibid.*)[106]

---

[106] In this regard, this Court distinguished situations wherein a defendant has a personal, constitutionally protected right to accept or reject (continued...)

In other words, this Court implicitly, but undeniably, held that although a defendant enjoys the rights to present, control fundamental aspects of, and to the assistance of counsel in presenting, a *defense*, she enjoys no concomitant right to present *no defense* that will override the state's independent interest in the reliability of death judgments. This holding is entirely consistent with *Chadd*, with the fundamental premise of *Deere*, *supra*, and indeed with the very text of the Sixth Amendment, which "requires not merely the provision of counsel to the accused, but 'Assistance' which is to be '*for his defence*.' . . . If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." (*United States v. Cronic* (1984) 466 U.S. 648, 654, quoting text of Sixth Amendment, italics added.)

To be sure, as mentioned above, this Court has held that a death judgment is not rendered unreliable simply because disinterested counsel accedes in his or her competent client's knowing, intelligent and voluntary decision not to present a penalty phase defense. (See, e.g., *People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527 & fns. 22-23, and authorities cited therein.) However, this Court has "left open the possibility that the state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present mitigating evidence, the jury was also given misleading instructions and heard misleading argument" (*People v. Sanders*, *supra*, 51 Cal.3d at p. 526, fn. 23), and the factfinder hears the defendant's

---

[106](...continued)
a plea *bargain* offer in which the defendant is offered some *benefit* in exchange for the plea. (*People v. Alfaro*, *supra*, at p. 1302 & fn. 5, citing *In re Alvernez* (1992) 2 Cal.4th 924.) There is no corresponding right to enter an *un*conditional plea. (*Ibid.*)

testimony requesting a death verdict (*People v. Williams*, *supra*, 48 Cal.3d at p. 1152). That possibility was realized in this case.

C. The Death Judgment Must be Set Aside Because the Penalty Phase Trial Was an Empty Charade That Did Not Produce A Reliable Death Verdict

Here, Mr. Mai's counsel was not disinterested, but rather labored under a conflict of interest in which their personal interests were served by acceding in, and even *encouraging*, his desire to enter an unconditional plea to the capital murder charge and effectively stipulate to a death sentence. (See Argument I, *ante*, and authorities cited therein.) The trial court not only failed in its duty to inquire into that conflict; the record reveals that Mr. Mai was not informed regarding that conflict and its implications in his case and his counsel affirmatively and actively misrepresented the true nature of the conflict to the trial court. (See Argument I-D, *ante*, and authorities cited therein.)

Furthermore, there was a plethora of evidence calling into grave doubt Mr. Mai's competency to stand trial, including defense counsel's repeated admissions that Mr. Mai's mental state had deteriorated to the point that they believed that he was incapable of making rational life and death decisions, yet neither the court nor his conflicted counsel fulfilled their duties to ensure that he was not tried – and did not decide to effectively stipulate to a death sentence – while incompetent. (See Arguments I-F, *ante*, and authorities cited therein; see also *Summerlin v. Shriro* (9th Cir. 2005) 427 F.3d 623, 639 [court and counsel must be assured that capital defendant's decision not to present penalty phase defense is competent]; compare *People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527 & fns. 22-23 [death verdict not rendered unreliable where, inter alia, defendant made "knowing and voluntary" decision not to present mitigating evidence or closing argument, counsel

stated that he believed decision was "rational," and both counsel and the court stated that they "did not perceive defendant to be suffering from any mental aberration"].) Even if Mr. Mai were competent to stand trial, the evidence was compelling that he was not competent to take control of the proceedings and make a rational decision to waive all rights and effectively stipulate to a death sentence. (See *Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2386 [standard for competency to stand trial "assumes representation by counsel and emphasize the importance of counsel," whereas defendant's ability to control his trial through self-representation "presents a very different set of circumstances, which in our view, calls for a different standard"].) Yet this is precisely what the court and counsel permitted him to do when counsel ceded control of the trial to their irrational client and abandoned their roles as advocates for his best interests.

Nor does the record in any way demonstrate that Mr. Mai's decision to effectively stipulate to a death sentence was "knowing and voluntary." (*People v. Sanders* 51 Cal.3d at pp. 524-527 & fn. 23; see also, e.g., *Wilkins v. Bowersox* (8th Cir. 1998) 145 F.3d 1006, 1012-1016.) To the contrary, there were deeply troubling questions regarding the knowing, voluntary, and intelligent nature of Mr. Mai's decision, including: (1) whether his irrational mental state precluded a knowing, voluntary, and intelligent decision (see, e.g., Arguments I, parts F and G and IV, *ante*; see also, e.g., *Wilkins v. Bowersox*, *supra*, at pp. 1012-1016 [defendant's emotional and mental problems, inter alia, precluded knowing, voluntary, and intelligent waiver of right to present mitigation in effort to obtain a death verdict]); (2) whether the decision was coerced and involuntary due to the onerous conditions of his federal confinement (See Arguments I, parts F and G and IV, *ante*; see also, e.g., *Comer v. Stewart*, *supra*, 215 F.3d at pp. 917-918, and authorities cited

therein [defendant's decision to waive rights and not challenge imposition of the death penalty must not only be competent, but also voluntary; harsh confinement conditions may coerce decision and thus render it involuntary]); (3) whether his decision was a fully informed and intelligent one because the face of the record reveals that defense counsel failed to investigate at least one piece of potentially critical mitigating evidence – the possible brain injury suggested by his head trauma and subsequent, marked change in his behavior (See Argument I-G-4, *ante*; see also, e.g., *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1089-1090 [defense counsel has duty to investigate potential mitigation, despite client's expressed opposition to presenting such evidence, in order, inter alia, to ensure that client's decision is a fully informed one]; compare *People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527 ["in the absence of evidence showing counsel failed to investigate mitigating evidence or advise the defendant of its significance," death verdict was not rendered unreliable where presumably competent defendant made "knowing and voluntary" decision not to present mitigation or closing argument]); and (4) whether his decision was the result of affirmative *dis*information based on defense counsel's misrepresentations regarding the hopelessness of the case or their encouragement of that decision by expressing their agreement with it on moral grounds (See Argument I-G-2-c, *ante*, and authorities cited therein).

Furthermore, Mr. Mai and his counsel took the "extraordinary" and "troubling" course of presenting no opening statement, failing to submit the prosecution's case to meaningful adversarial testing, calling no witnesses, and presenting no available mitigation and no closing argument. (*People v. Snow*, *supra*, 30 Cal.4th at p. 109-111.) Indeed, Mr. Mai and his counsel took additional, *affirmative* steps to ensure his execution by entering an *unconditional* plea to the murder charge and death qualifying special

circumstance allegation despite extremely weak evidence at best, and legally insufficient evidence at worst, to prove a critical element of the sole special circumstance allegation. (See Arguments I-E and II; see *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1300-1301 [counsel refused to consent to unconditional guilty plea to capital offense on the ground that "I can't turn around and say I consent to allow my client to plead guilty when I know she's pleading guilty for all intents and purposes to a death sentence" and trial court in refusing the plea "expressed doubt that any attorney in Orange County 'would consent to somebody pleading guilty to a capital offense"]; *People v. Chadd*, *supra*, 28 Cal.3d at pp. 744, 747-850 [defense counsel refused to consent to unconditional guilty plea on the ground that the "defendant's basic desire is to commit suicide, and he's asking for the cooperation of the State in that endeavor"].)[107]

Moreover, Mr. Mai and his counsel selected a jury which included a member whose family member had tried to save Officer Burt's life after the charged shooting. Based upon that relationship and her knowledge of the case from media reports, that juror candidly admitted that she had already decided that Mr. Mai should be executed and could only conceive of possibly changing her mind if he "*proved*" to her that his life should be spared. (5 CT 1413-1414, 1420; 5 RT 886-887; Argument VI, *ante*.)

In addition, the court permitted Mr. Mai's constitutionally irrelevant,

---

[107] Furthermore, the jurors here did not receive any instructions or evidence informing them that Mr. Mai's guilt had been established by plea, which they could conceivably consider mitigating. Rather, they were only instructed that "the defendant in this case has been found guilty of murder of the first degree. The allegation that the murder was committed under a special circumstance has been found true." (3 CT 723; 8 RT 1424; see also 3 CT 734-735; 8 RT 1431-1432.)

inflammatory, and inadmissible testimony that the jury should return a death verdict. (See Argument V, *ante*, and authorities cited therein; compare *People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527 [competent defendant's "knowing and voluntary" decision not to present mitigation did not render death verdict unreliable, or effectively amount to guilty plea to death sentence, in part because it did "not amount to an admission that he believed death was the appropriate penalty"]; *People v. Williams* (1988) 48 Cal.3d 1127, 1152 [defendant's failure to present available mitigation did not in itself render death verdict unreliable in part because, unlike *Deere* and *Burgener*, *supra*, the defendant did not testify or make statement to factfinder requesting death verdict].) And the prosecutor, without objection, urged the jurors to consider that testimony as a basis for their death verdict in the only closing argument they heard. (See Argument V, *ante*, and authorities cited therein; compare *People v. Guzman*, *supra*, 45 Cal.3d at pp. 959-960, 962-963 [defendant's death preference testimony did not render death verdict unreliable because, inter alia, the defendant testified to compelling mitigating evidence and the prosecutor did not mention the death preference testimony in closing argument]; *People v. Grant*, *supra*, 45 Cal.3d at pp. 848-849 [same].) Furthermore, the court's jury instructions only confirmed that the jurors could and should do what the prosecutor urged them to do: consider Mr. Mai's testimony and weigh it on death's side of the scale. (See Argument V-E, *ante*, and authorities cited therein.)

As mentioned above, this Court has "left open the possibility that the state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present mitigating evidence, the jury was also given misleading instructions and heard misleading argument" (*People v. Sanders*, *supra*, 51 Cal.3d at p. 526, fn. 23), the factfinder hears

the defendant's testimony requesting a death verdict (*People v. Williams*, *supra*, 48 Cal.3d at p. 1152), or defense counsel presents no opening statement, no challenge to the state's aggravating evidence, no mitigating evidence, or closing argument (*People v. Snow*, *supra*, 30 Cal.4th at pp. 122-123). That possibility was realized in this case.

In a case such as this, the trial process and the ensuing death qualification finding and death verdict run afoul of the state's "strong" independent interest in the fairness and integrity of its proceedings, in avoiding the erroneous imposition of death sentences, and in a heightened degree of reliability in death judgments. (Cf. *United States v. Cronic*, *supra*, 466 U.S. at pp. 656-659 [when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing" and the trial process "loses its character as a confrontation between adversaries," the "trial process" itself becomes "unreliable" and produces an unreliable result].) A death qualification finding and death verdict which is the result of such an empty charade is both constitutionally and morally intolerable. The special circumstance finding and death verdict must be set aside.

//

//

IX

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. MAI'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital-sentencing scheme violate the United States Constitution. This Court consistently has rejected a number of arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, Mr. Mai briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, Mr. Mai requests the right to present supplemental briefing.[108]

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313, conc. opn. of White, J.) Meeting this criteria requires a state to

---

[108] These claims of error are cognizable on appeal under section 1259, even when Mr. Mai did not seek the specific instruction or raise the precise claim asserted here.

genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against Mr. Mai, Penal Code section 190.2 contained nineteen special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3, Factor (a), Violated Mr. Mai's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 3 CT 725-726; 8 RT 1426.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the

location of the killing.

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) Mr. Mai is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) He urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Mr. Mai's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior

criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, Mr. Mai's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.85; 3 CT 725-726; CALJIC No. 8.88; 3 CT 787.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct.856, 864-865, 871, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, Mr. Mai's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 3 CT 787; 7 RT 1468.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court's failure to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Mr. Mai is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of

Apprendi (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Mr. Mai urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Mr. Mai contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment due process or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Mr. Mai requests that the Court reconsider this holding.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore Mr. Mai is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally

entitled to procedural protections afforded by state law].) Accordingly, Mr. Mai's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (3 CT 725, 787; 8 RT 1425-1426, 1468), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Mr. Mai is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Mr. Mai's Death Verdict was Not Premised on Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.) Mr. Mai asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than

a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Mr. Mai asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon Mr. Mai hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 3 CT 787.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th

281, 316, fn. 14.) Mr. Mai asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury that the Central Determination is Whether Death is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Mr. Mai urges this Court to reconsider that ruling.

6. The Penalty Jury Should be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty

phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Mr. Mai's right to due process of law (U.S. Const., Amend. XIV), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. VIII, XIV), and his right to the equal protection of the laws. (U.S. Const., Amend, XIV.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

The need for such an instruction, and the prejudice from its omission, was particularly acute in this case. As discussed in Argument V, above, Juror Number 12 readily admitted that death was the presumptively appropriate penalty in this case, and the defense would bear the burden of "proving" to her that Mr. Mai's life should be spared. (5 CT 1413-1414, 1418, 1420; 5 RT 886-887.) Given these remarks, a presumption of life instruction was vital and its omission violated Mr. Mai's Eighth and Fourteenth Amendment rights.

D. Failing to Require That The Jury Make Written Findings Violates Mr. Mai's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Mr. Mai's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Mr. Mai of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Mr. Mai urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Mr. Mai's Constitutional Rights

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Mr. Mai's case. The trial court failed to omit those factors from the jury instructions (3 CT 725; 8 RT 1425-1426), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Mr. Mai asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other

similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Mr. Mai urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates The Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Mr. Mai acknowledges that this Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider its ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency (*Trop v. Dulles* (1958) 356 U.S. 86, 101)." (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Mr. Mai urges this Court to reconsider its previous decisions.

//

//

CONCLUSION

For all of the foregoing reasons, the judgment must be reversed.

DATED: March 30, 2010

Respectfully submitted,

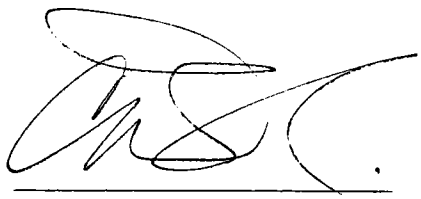
MICHAEL J. HERSEK
State Public Defender

C. DELAINE RENARD
Deputy State Public Defender
Attorneys for Appellant

CERTIFICATE OF COUNSEL
Cal. Rules of Court, rule 8.630

I, C. Delaine Renard, am the Deputy State Public Defender assigned to represent appellant, Hung Thanh Mai, in this automatic appeal. On August 25, 2009, this Court granted my motion to file appellant's opening brief in excess of the 102,000-word limit specified in Rule 8.630, subd. (b)(1)(A) of the California Rules of Court up to 112,000 words. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 110,013 words in length.

Dated: March 30, 2010



C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Hung Thanh Mai*

Cal. Supreme Ct. No. S089478
Orange Co. Superior Ct. No. 96NF1961

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105, that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing the same in an envelope addressed (respectively) as follows:

Adrienne Denault, D.A.G.
Office of the Attorney General
P. O. Box 85266
110 West "A" St., Ste. 1100
San Diego, CA 92186-2024

Hon. Francisco P. Briseno
Orange County Superior Court
P. O. Box 22024
700 Civic Center Dr. W. Dept. C-45
Santa Ana, CA 92702-2024

Verna Wefald
Attorney at Law
65 N. Raymond Ave., # 320
Pasadena, CA 91103

Hung Thanh Mai
(Appellant)

Each said envelope was then, on March 30, 2010, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on March 30, 2010, at San Francisco, California.

DECLARANT