COPY

MICHAEL J. HERSEK
State Public Defender
C. DELAINE RENARD
State Bar Number 169893
Deputy State Public Defender
Office of the State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105
415-904-5600

Attorneys for Appellant

SUPREME COURT
FILED
MAR 30 2010
Frederick K. Ohlrich Clerk
Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE, OF CALIFORNIA,	No. S089478
Plaintiff and Respondent	(Orange County Superior Court No. 96NF1961)
v.	
HUNG THANH MAI,	**MOTION FOR JUDICIAL NOTICE**
Defendant and Appellant.	

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant HUNG THANH MAI, through his attorney, C. Delaine Renard, and pursuant to Evidence Code sections 452 and 459, hereby moves for judicial notice of certain matters on which he relies in his opening brief.

DEATH PENALTY

A. The Relevant Statutes

Evidence Code section 452 provides in relevant part:

Judicial notice may be taken of the following matters . . . :

> (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.
>
> . . . .
>
> (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
>
> . . . .
>
> (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
>
> (h) 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.

Evidence Code section 459 provides in relevant part: "(a) . . . the reviewing court may take judicial notice of any matter specified in section 452. . . ."

B. Time of Sunset and Weather Conditions on July 13, 1996, in Fullerton, California

Appellant requests that this Court take judicial notice of the facts, as reflected in the *Old Farmer's Almanac* (*Old Farmer's Almanac*, http://www.almanac.com), that on July 13, 1996 in Fullerton, California:

1) there was zero precipitation;

2) the mean visibility was 11.4 miles, or 60,192 feet; and

3) the sun set at 8:04 p.m.

Copies of the relevant entries of the electronic version of the *Old Farmer's Almanac* reflecting these facts are attached herein as Exhibit A. (See also Declaration of C. Delaine Renard, appellate counsel, attached herein as Exhibit B.)

It is appropriate to take judicial notice of these facts, as reflected in the *Almanac*, under Evidence Code section 452, subdivision (h), which 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 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"]; *People v. Harness* (1942) 51 Cal.App.2d 133, 138-139 [court sitting as trier of fact was authorized to take judicial notice of time sun set on certain date].)

Furthermore, this Court should take judicial notice of these facts because they are highly relevant to support appellant's claims that he was deprived of his rights to the effective assistance of counsel under the Sixth Amendment and article I, section 15 of the California Constitution. (Appellant's Opening Brief ["AOB"], Arguments I and III.) The murder in this case arose from a traffic stop that the victim, a peace officer, effected of appellant. (See, e.g., 6 RT 1156-1160.)[1] The traffic stop occurred in Fullerton, California sometime between 8:00 and 8:20 p.m. on July 13, 1996 and the murder occurred shortly thereafter, during appellant's detention. (See 6 RT 1100-1101, 1148, 1156-1157, 1177-1180.) As fully discussed in the opening brief (AOB, Arguments I-E-5, II & III), the sole special circumstance alleged and found true following appellant's "slow plea" was that he murdered the peace officer victim while the officer was "engaged in the course of the performance of his or her duties." (Pen. Code, § 190.2, subd. (a)(7).)

A critical element of this special circumstance is that the peace officer must be engaged in the *lawful* performance of his or her duties. (See, e.g., *In re Manuel G.* (1997) 16 Cal.4th 805, 815, and authorities cited therein.) In order to prove that element in this case, the prosecution bore the burden of proving beyond a reasonable doubt that the peace officer's detention of appellant, during which the murder occurred, was lawful. (See AOB, Arguments I-E-5, II & III.) However, the *only* evidence regarding the basis for the traffic stop and detention came from a statement appellant made to an informant that the officer told him that he had stopped him for

---

[1] "RT" refers to the reporter's transcript on appeal. "Muni RT" refers to the reporter's transcript of the municipal court proceedings on appeal.

driving with his headlights off. (2 Muni RT 278, 422.) In the same statement, appellant told the informant that he believed that his headlights were on. (*Ibid.*) Even if appellant's headlights were off, based upon the time of sunset as reflected in the *Old Farmer's Almanac*, *supra*, appellant was not committing a traffic violation because the stop was not effected "during darkness" (Veh. Code, § 24400) or "from one-half hour after sunset to one-half hour before sunrise" (Veh. Code, § 38335). Nevertheless, appellant's defense counsel, who labored under a conflict of interest, consented to appellant's slow plea to the special circumstance allegation (see Pen. Code, § 1018 [guilty plea in capital case cannot be entered without the consent of counsel]) without arguing against the sufficiency of the evidence to prove it, or presenting evidence that the traffic stop was not lawful (because appellant had not committed a traffic violation) in order to disprove it. (AOB, Arguments I-E-5 and III.)

C. Unpublished Court Opinions

Appellant also requests that this Court take judicial notice of the following unpublished court opinions:

1) *People v. Vasquez* (Cal.App. 1st Dist., Jan. 1, 2006, No. A102559) 2006 WL 226759;
2) *People v. Ferris* (Cal. App. 4th Dist., Nov. 14, 2002, No. E030349) 2002 WL 31520553;
3) *Tran v. Borg* (9th Cir. 1990) 917 F.2d 566

Copies of these opinions are attached herein as Exhibit C.

Appellant's opening brief does *not* cite or rely on, or ask this Court to take judicial notice of, those unpublished decisions as precedent or legal authority or to prove the truth of the evidence described therein. (See Cal. Rules of Court, rule 8.1115.) Rather, appellant's opening brief simply

describes the *facts* reflected in those decisions – i.e., the evidence presented and the verdicts reached – facts which are "not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (Evid. Code, § 452, subd. (f)), the source being the records of courts of this state (*id.*, subd. (d)). Hence, these unpublished decisions are a proper subject of judicial notice for these purposes under Evidence Code section 452, subdivisions (d) and (f). Indeed, this Court has held that it is entirely appropriate to take judicial notice of unpublished opinions in unrelated cases, without violating the prohibition against citing unpublished opinions as precedent or legal authority, for precisely these purposes. (*People v. Hill* (1998) 17 Cal.4th 800, 847-848 & fn. 9 [court took judicial notice of unpublished opinions for purpose of recognizing facts – a particular prosecutor's closing arguments – reflected therein].)

Furthermore, this Court should take judicial notice of these unpublished opinions because they are highly relevant to appellant's claim that his trial counsel labored under an actual conflict of interest that violated his state and federal constitutional rights to the effective assistance of counsel. (See AOB, Argument I.) As set forth in the accompanying opening brief, conflicted counsel encouraged appellant not to present mitigation at the penalty phase, a course of action (or inaction) that served their own conflicting interests. (AOB, Argument I-G.) In this regard, while conflicted counsel advised appellant that his case was a hopeless one due to the nature of the charged crime of murdering a peace officer and regardless of what mitigating evidence they might present on his behalf, the facts reflected in the above-cited unpublished opinions demonstrate that their advice was misleading. Specifically, the evidence and verdicts reflected in

those opinions reveal that jurors (and other fact finders) *do* reject the death penalty for those convicted of murdering peace officers and are responsive to the kind of mitigating evidence that was available in this case. (AOB, Argument I-G.)

C. Indictment in *United States v. Mai*, et al., United States District Court, Central District of California, No. CR-98-82

On August 6, 1998, while awaiting trial in this case, appellant was indicted for (and ultimately pleaded guilty to): (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. The federal charges arose from an alleged conspiracy to have an undercover officer murder one of the state prosecution's witnesses in this case. The federal case was an integral part of appellant's state capital murder trial and many of the federal court records were included in the record on appeal. (See AOB, Argument I.) While the federal charges were described and referred to throughout appellant's state capital murder trial (see, e.g., 2 CT 381, 476-477, 488-490, 498; 1 RT 99), a copy of the actual indictment was not included in the record on appeal. A true and correct copy of the indictment is attached herein as Exhibit D. (See also Exhibit B.)

The indictment is a proper subject of judicial notice under Evidence Code sections 452, subdivision (d) and 459. Furthermore, this Court should take judicial notice of the indictment because the federal case figured prominently in appellant's state capital murder trial and is highly relevant to

several of the asserted state and federal constitutional violations raised in appellant's opening brief. (AOB, Arguments I-IV.)

D. Federal Court Records in *United States v. Watkins* and *United States v. Pham,* United States District Court, Central District of California, No. CR-98-82 and Facts Reflected Therein That Daniel Watkins and Victoria Pham Entered Guilty Pleas Pursuant to Plea Bargains and Waived Their Rights to Appeal on June 14 and April 29, 1999 Respectively

Appellant requests this Court to take judicial notice of the following official court records.

In *United States v. Pham*, United States District Court, Central District of California No. CR-98-82:

1) the plea agreement filed on April 29, 1999;

2) the criminal minutes for the change of plea proceedings held on April 29 and June 30, 1999; and

3) the Judgment and Probation/Commitment Order entered on July 2, 1999;

In *United States v. Watkins*, United States District Court, Central District of California No. CR-98-82:

1) the plea agreement filed on June 10, 1999;

2) the criminal minutes for the change of plea proceeding held on June 14, 1999; and

3) the Judgment and Probation/Commitment Order entered on August 19, 1999.

True and correct copies of the above described records are attached herein as Exhibit E.

Pursuant to Evidence Code sections 452, subdivisions (c) and (d), and 459, this Court may take judicial notice of official acts of judicial

departments of the United States, as well as the records of any court of record of the United States. Furthermore, this Court should take judicial notice of these records because they are highly relevant to support appellant's claim that his counsel labored under a conflict of interest that violated his state and federal constitutional rights to the effective assistance of counsel. (AOB, Argument I.)

Specifically, as noted above and discussed in the opening brief, while the state capital murder charge was pending against appellant, apellant, Daniel Watkins, Victoria Pham, and a fourth person were indicted by the federal government for conspiring to kill one of the state's witnesses against appellant. (AOB, Argument I.) Mr. Watkins was defense counsel's original investigator in appellant's state capital murder trial. He was indicted for activities he undertook in his role as defense counsel's investigator and agent. (AOB, Argument I-A & I-C-2.) Mr. Watkins and his own counsel alleged that both of appellant's defense attorneys were unindicted co-conspirators, in that they directed the activities for which he was indicted, with knowledge of the plot to kill the witness. (*Ibid.*)

Furthermore, appellant's defense attorneys represented appellant's indicted co-conspirator, Ms. Pham, in her federal sentencing proceeding. In so doing, they took a position adverse to appellant, and indeed developed and presented evidence harmful to appellant. (AOB, Argument I-G-1.) Despite the conflict of interests that arose from the above-described facts defense counsel continued to represent appellant throughout the state and federal proceedings, and orchestrated his unconditional plea to the state capital murder charge and effective stipulation to the death penalty. (AOB, Argument I.)

An important aspect of defense counsel's conflicting interests

involved their agreement with the state prosecutor that if they presented no penalty phase defense with mitigating evidence in this case, the prosecutor would not present any evidence regarding the federal conspiracy at the penalty phase; however, if defense counsel did present a penalty phase defense with mitigating evidence on appellant's behalf, the prosecutor would be free to present the conspiracy evidence on rebuttal. (AOB, Argument I-D-3 & I-G.)

Both Daniel Watkins and Victoria Pham would have been logical witnesses to prove the conspiracy. The court records that are the subjects of this motion for judicial notice reflect that both Ms. Pham and Mr. Watkins entered guilty pleas and waived their appellate rights on April 29, 1999 and June 14, 1999, respectively. These facts are necessary to demonstrate that Mr. Watkins and Ms. Pham no longer enjoyed the Fifth Amendment privilege against self-incrimination by the time the penalty phase of appellant's state capital murder trial commenced with jury selection on April 6, 2000. (*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]; *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].) Since they no longer enjoyed a Fifth Amendment privilege against self-incrimination, both Mr. Watkins and Ms. Pham would have been likely witnesses to prove the conspiracy at appellant's penalty phase trial in the event that appellant presented a penalty phase defense. If so, Mr. Watkins's allegations of criminal and other misconduct against defense counsel would likely have been aired and defense counsel would have faced insurmountable ethical dilemmas given

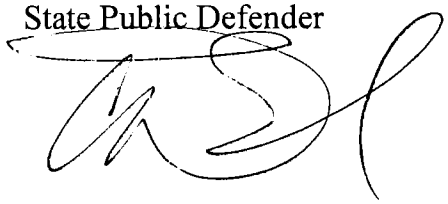
their prior representation of Ms. Pham and active development of evidence adverse to Mr. Mai. (AOB, Argument I-G-1.) Counsel's decision to present no penalty phase defense at all, and indeed to effectively stipulate to a death sentence, avoided these dilemmas and served their own conflicting interests. (AOB, Argument I-G.) Hence, the court records establishing that Mr. Watkins and Ms. Pham did not enjoy a privilege against self-incrimination, and thus could be called as witnesses at his penalty phase trial, are vital to a full and fair opportunity to present his claim that his counsel labored under actual conflicts of interest in violation of his state and federal constitutional rights.

For all of the foregoing reasons, appellant respectfully requests that this Court take judicial notice of the facts and records contained in Exhibits A, C, D, and E.

Dated: March 30, 2010

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



C. DELAINE RENARD
Deputy State Public Defender

Attorneys for Appellant

EXHIBIT A

Newsletters | Contests | E-Cards | Blogs & Forums | Multimedia | RSS | Marketplace | Classifi

WEATHER RISE & SET MOON PHASES


Tuesday
Hi 11°F
Lo 6°F


Wednesday
Hi 26°F
Lo 17°F

7-Day Forecast
Long-Range Weather Forecast

December 29, 2009

Dublin, NH: Log In or Register to personalize.

My Account **New? Register | Log In** Search Keywords... Go

Weather History for Fullerton, California

Location:
Fullerton, CA
ZIP/Postal Code or City,State
Month: Day: Year:
Jul 13 1996
Latest data available: Dec 27, 2009.
Search

Previous Day Next Day

FULLERTON MUNICIPAL

Temperature
Minimum Temperature
64.4 °F

Mean Temperature
73.8 °F

Maximum Temperature
82.4 °F

Pressure and Dew Point
Mean Sea Level Pressure
No data.

Mean Dew Point
59.7 °F

Precipitation
Total Precipitation
0.00 IN

Rain and/or melted snow reported during the day.

Visibility
11.4 MI

Snow Depth
No data.

Last report for the day if reported more than once.

Wind Speed and Gusts
Mean Wind Speed
6.10 MPH

Maximum Sustained Wind Speed
8.00 MPH

Maximum Wind Gust
No data.

Previous Day Next Day

Shop

B A S

Weathe
Almanac

Newsletters | Contests | E-Cards | Blogs & Forums | Multimedia | RSS | Marketplace | Classifi

WEATHER RISE & SET MOON PHASES


Tuesday
Hi 11°F
Lo 6°F


Wednesday
Hi 26°F
Lo 17°F

7-Day Forecast
Long-Range Weather Forecast

December 29, 2009

Dublin, NH: Log In or Register to personalize.

My Account **New? Register | Log In** Search Keywords... Go

Rise & Set Fullerton, California

Location:
Fullerton, CA
ZIP/Postal Code or City,State
Month: Jul **Day:** 13 **Year:** 1996
Search

Previous Day Next Day

Saturday, July 13, 1996

	Rises	Sets	Day Length
Sun	5:51 A.M.	8:04 P.M.	14:13
Moon	4:21 A.M.	6:32 P.M.	
Mercury	6:01 A.M.	8:21 P.M.	
Venus	3:26 A.M.	5:09 P.M.	
Mars	3:38 A.M.	5:59 P.M.	
Jupiter	7:16 P.M.	5:12 A.M.	
Saturn	11:48 P.M.	12:00 P.M.	
Uranus	8:38 P.M.	6:53 A.M.	
Neptune	8:11 P.M.	6:24 A.M.	
Pluto	3:45 P.M.	3:13 A.M.	

All times are Pacific Daylight Time at sea level.

Previous Day Next Day

Shop

F
F
N

Weathe
Almanac

EXHIBIT B

DECLARATION OF C. DELAINE RENARD

IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

I, C. Delaine Renard, declare:

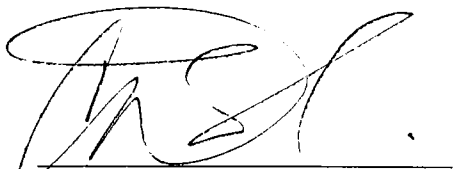
1. I am an attorney licensed to practice law in the State of California, and am the Deputy State Public Defender assigned to represent appellant, Hung Thanh Mai, on appeal in this capital case.

2. I obtained electronic copies of the *Old Farmer's Almanac* entries for the weather conditions and time of sunset on July 13, 1996, in Fullerton, California, from its website at http://www.almanac.com. Exhibit A contains true and correct copies thereof.

3. I also obtained copies of the unpublished court opinions contained in Exhibit C from Westlaw. The copies contained in Exhibit C are true and correct copies thereof.

4. Finally, I obtained copies of the federal court records contained in Exhibits D and E directly from the National Archives. The copies contained in Exhibits D and E are true and correct copies thereof.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was signed on March 30, 2010, in San Francisco, CA.



C. Delaine Renard

EXHIBIT C

Not Reported in Cal.Rptr.3d, 2006 WL 226759 (Cal.App. 1 Dist.)
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Briefs and Other Related Documents
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, First District, Division 4, California.
The PEOPLE, Plaintiff and Respondent,
v.
Ruben Eliceo VASQUEZ et al., Defendant and Appellant.

No. **A102559**.
(Alameda County Super. Ct. No. H27160).
Jan. 31, 2006.

John Diest, Office of Attorney General, San Francisco, CA, for Plaintiff and Respondent.

Russell W. Miller, Sacramento, CA, First District Appellate Project, San Francisco, CA, James Kyle Gee, Carol Strickman, Oakland, CA, for Defendant and Appellant.

RIVERA, J.

***1** Ruben Eliceo Vasquez, Miguel Galindo Sifuentes and Hai Minh Le appeal from judgments upon jury verdicts finding them guilty of first degree murder (Pen.Code,[FN1] § 187). The jury also found true three special circumstances pertaining to Vasquez-that he committed the murder during the course of a robbery, that he committed the murder during the course of a burglary (§ 190.2, subd. (a)(17)(A), (G)), and that he murdered a peace officer (*id.,* subd. (a)(7)). The jury also found that Vasquez personally used a firearm (§ 12022.53, subd. (d)). As to defendants Sifuentes and Le, the jury found true the allegations that they were armed with a firearm (§ 12022, subd. (a)(1)). The jury was unable to reach a verdict in the penalty phase trial for Vasquez; the court therefore declared a mistrial. The court sentenced Vasquez to life without the possibility of parole. The court sentenced Sifuentes and Le to 26 years to life in prison.

FN1. Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

Defendants contend that the trial court committed *Wheeler/Batson* error. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.) Vasquez also contends that the trial court erred in instructing the jury on the special circumstance for intentionally killing a peace officer. We affirm.

I. FACTS

We briefly summarize the facts of the case as they have only marginal relevance to the issues presented on appeal, and Vasquez did not dispute at trial that he was guilty of first degree felony murder in that he shot and killed Deputy John Monego during the course of a robbery of the Outback Steakhouse in Dublin.

At approximately 10:50 p.m. on December 11, 1998, defendants went to the Outback Restaurant in Dublin to commit a robbery. Sifuentes entered the restaurant and asked for a table. He told the server that he was waiting for friends and ordered a soda. Approximately a half hour later, the server prompted Sifuentes to place an order. Sifuentes was subsequently presented with a bill. He told the server that he needed to get some money from his car. As he was about to leave the restaurant,

Vasquez and Le entered. Le pulled out a pellet gun and marched a departing customer back into the restaurant, telling him, "This is what I do." Defendants spread out through the restaurant and commandeered the remaining customers and employees to the kitchen area. In the process, Vasquez robbed a man of his wallet.

Vasquez was armed with a nine-millimeter Sig Sauer P226 semiautomatic pistol, while Sifuentes and Le were armed with pellet guns. In the kitchen, Vasquez demanded money and fired his gun into a fryer on one side of the kitchen. Vasquez took the manager to his office where he stuffed his pockets with money from the cash drawer. While they were in the office, the telephone rang. Vasquez threatened the manager to tell the police that everything was alright or he would be killed. The manager complied with Vasquez's order. Meanwhile, an employee called 911 and hung up as defendants ordered the employees and customers into the restaurant's walk-in refrigerator. Another employee was able to activate a security device before being placed in the refrigerator.

***2** Deputy Sheriff Angela Schwab responded to the 911 call but was told by the dispatch operator that the restaurant manager had reported that everything was okay. Schwab entered the restaurant and was surprised by Vasquez. Vasquez pointed his gun at Schwab and demanded that she give him her gun. After he hit Schwab in the face, he took her gun. Le put a gun to her back and he and Sifuentes walked her to the back of the restaurant.

Deputy Monego arrived on the scene. As he was entering a door to the restaurant, Vasquez shot him. Vasquez fired additional shots at Monego after he had fallen to the ground. The police recovered four expended cartridges in the foyer of the restaurant and three others outside the door to the restaurant, all shot from Vasquez's pistol. Defendants fled the scene and were apprehended shortly thereafter.

At trial, Vasquez's defense was that the shooting was inadvertent, instinctive or accidental, while the prosecutor sought to prove that the shooting was an "execution" and intentional.

II. DISCUSSION

A. *Wheeler/Batson* Motions

The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under both the California Constitution and the United States Constitution. (*People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277; *Batson v.. Kentucky, supra,* 476 U.S. at p. 89; *People v. Ward* (2005) 36 Cal.4th 186, 200.) The *Batson* court established a three-part process for evaluating claims that a prosecutor used peremptory challenges improperly: "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Citation.] Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. [Citation.] Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329.) " 'The trial court's ruling on this issue is reviewed for substantial evidence.' [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " 'with great restraint.' " [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' (*People v. Burgener* [(2003)] 29 Cal.4th [833,] 864.)" (*People v. Ward, supra,* 36 Cal.4th at p. 200.)

Here, defendants made three *Wheeler* motions during jury selection following the prosecutor's exercise of peremptory challenges to prospective African-American jurors. Defendants made the first *Wheeler* motion after the prosecutor exercised three peremptory challenges against prospective African-American jurors. The court found that defendants had established a prima facie case of discrimination and asked the prosecutor for an explanation. The prosecutor offered numerous reasons for excusing the jurors. In particular, he stressed that T.J. lived in Berkeley, a "hotbed of anti-death-penalty people" and that the juror was reluctant to impose the death penalty. As to G. N., a probation officer, the prosecutor stated that the juror was philosophically opposed to the death penalty based

on his religious beliefs. Regarding A. J., a single mother with a six year old, the prosecutor noted her mixed feelings on the death penalty, and commented on her appearance-she wore leather pants-and her unfriendliness toward him. He was also concerned that her brother's friend was charged with murder. The court found the reasons proffered by the prosecutor as to the three prospective jurors were racially neutral, valid and not motivated by race and therefore denied the motion.

***3** Defendants renewed their *Wheeler* motion after the prosecutor excused two more African-American prospective jurors. The trial court again found that defendants had made a prima facie showing of group bias and asked the prosecutor to justify his challenges. The prosecutor first stated that he had passed the jury at least 10 times with Juror No. 4, an African-American female, on the jury. He then explained that he excused K.W. because he was hostile and argumentative during questioning and appeared not to like him. He also noted that K.W. was opposed to the death penalty and would find it difficult to vote for it. As to K. M., the prosecutor said that he "obviously didn't like me." He explained K.M. was affronted because the prosecutor had brought to the court's attention that K.M. failed to disclose his twin brother was arrested several times. The prosecutor further noted that K.M. had given equivocal answers regarding the death penalty. The court found the prosecutor's reasons were valid, facially neutral, and justified based on the record.

Defendants brought their final *Wheeler* motion after the prosecutor excused four additional African-American prospective jurors from the jury. The court again found that a prima facie showing of bias had been made and asked the prosecutor to justify his excusal of the jurors. The prosecutor explained that M.T. was active in the Baptist church, expressed extreme reservations about the death penalty, and while M.T. understood his duty to follow the law, his religious beliefs prevented him from passing judgment on another person. The prosecutor excused F.B. because he was extremely hostile and unfriendly. The prosecutor further noted that F.B. had a bad experience with the police when an officer pointed a gun at his head, and that he made contributions to the ACLU and Amnesty International, organizations that are opposed to the death penalty. He also disliked that F.B. gave what the prosecutor referred to as "[v]ery short, snippy answers."

Referring to K. S., the prosecutor excused her because she was a single mother with a seven year old and was only 27 years old. He opined that those facts showed a lack of responsibility. K.S. also had a conviction for forgery and would not consider the death penalty for nonshooters. Regarding R. G., the prosecutor disliked the fact that she had a son when she was 16 years old and that she was a lawyer. The prosecutor did not want a lawyer on the jury. R.G. also had numerous relatives who had served time in prison and was a born-again Christian, and the prosecutor opined that it was not clear she could impose the death penalty.

The court found that the prosecutor's explanations were racially neutral, valid, and that there was a good, cogent reason to excuse each of the jurors. The prosecutor reiterated that there was an African-American seated on the jury. "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." (*People v. Turner* (1994) 8 Cal.4th 137, 168.)

***4** Defendants contend that some of the prosecutor's reasons were implausible, pretextual, and unsupported or contradicted by the record. They argue that comparative juror analysis demonstrates that the prosecutor examined African-American jurors differently than other jurors and that his explanations were pretextual.

While in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221, the California Supreme Court disapproved of performing a comparative juror analysis for the first time on appeal, it recently acknowledged that its ruling has been called into question by the decision in *Miller-El v. Dretke* (2005) 545 U.S. ---- [162 L.Ed.2d 196; 125 S.Ct. 2317]. (*People v. Schmeck* (2005) 37 Cal.4th 240, 270; *People v. Ward, supra,* 36 Cal.4th at p. 203.) The *Miller-El* court observed that if a prosecutor's explanation for a challenged peremptory challenge "applies just as well to an otherwise-similar nonblack [juror] who is permitted to serve, that is evidence tending to prove purposeful discrimination...." (*Miller-El v. Dretke, supra,* 545 U.S. at p. ---- [162 L.Ed.2d at p. 196; 125 S.Ct. at p. 2325].) Assuming that a comparative analysis is now required, we conclude that the analysis fails

to demonstrate purposeful discrimination.

1. Prospective J uror T. J.

Defendants first complain that the prosecutor's reference to T.J.'s residence in Berkeley as "a hotbed of anti-death-penalty people" is pretextual because T.J.'s background as a retired trucker, a member of Neighborhood Watch, and a pistol owner did not necessarily equate to a liberal. T.J.'s background, however, did not dictate his views on the death penalty. Moreover, defendants' comparison of T.J. with Juror No. 6, who graduated from the University of California at Berkeley, does not withstand scrutiny.

Juror No. 6 lived in Castro Valley, not Berkeley, and she was in favor of the death penalty. T. J., in contrast, stated that he was not sure if he would vote for the death penalty, and expressed reservations about the death penalty in his questionnaire and during voir dire. In his questionnaire, he stated, "[a]s more [and] more new methods of investigation show the old flaws, I am becoming less inclined toward it." Further, during voir dire, T.J. explained that he had reservations about the death penalty: "My reservations still would be, is [the death penalty] being applied fairly. That would be my reservation: Are the investigation methods that we use really good enough, is the political system good enough, can poor people get the same kind of representation that rich people get, et cetera. That would be my reservation. [¶] ... Now, in this specific case, it's going to be your job, or whatever, to persuade me that all of the reservations that I have, all of the apprehensions that I have, that they don't apply in this particular case. And if you do that, I have no reservations about anything. [¶] [Deputy District Attorney]: And if I'm not able to do that? [¶] [T. J.]: Then you lose the case." FN2 "A prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty." (*People v. Burgener, supra,* 29 Cal.4th at p. 864.) This reason alone supports the trial court's finding that the challenge was not based on group bias. (*People v. Ward, supra,* 36 Cal.4th at p. 202.) Given his views on the death penalty, the prosecutor understandably challenged T.J. (*People v. Edwards* (1991) 54 Cal.3d 787, 831 [prosecutor's use of peremptory challenges to exclude prospective jurors who express any reservations about the death penalty not improper]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1263 [same].)

> FN2. Defendants point to Juror No. 7 as having reservations similar to T.J. in that she stated in her questionnaire that her views on the death penalty had changed "Slightly-Due to the number of inmates released due to DNA evidence proving their innocence." She, however, also indicated in her questionnaire that she would vote for the death penalty if it was on the ballot and that she was moderately in favor of the death penalty.

***5** Defendants suggest that seven of the seated jurors and two of the alternates expressed similar reservations about the death penalty. However, only Jurors No. 1 and No. 11 and Alternate Juror No. I indicated that they were not sure if they would vote for the death penalty if it was on the ballot, and both Juror No. 1 and Alternative Juror No. 1 affirmatively expressed during voir dire that there ought to be a death penalty in the state. Juror No. 11 did not express any reservations about imposing the death penalty during voir dire. Indeed, none of the jurors cited by defendants expressed any of the reservations stated by T.J. The other six jurors cited by defendants as expressing similar sentiments as T.J. indicated on their questionnaires that they would vote for the death penalty.FN3

> FN3. Defendants also fault the prosecutor for asserting that T.J. "indicated in his questionnaire that he has problems with the system with respect to the fairness of the death penalty." While this exact statement does not appear in T. J.'s questionnaire, he did make a similar statement when he was voir dired by the court on the issue. In addition, the prosecutor mistakenly relied on a comment made by Prospective Juror A.J. in his comments explaining the exercise of a peremptory challenge against T.J. The prosecutor attributed A. J.'s statement in her questionnaire, "I don't know if I can consciously end someone[']s life" and a similar statement during voir dire to T.J. Inasmuch as T.J. expressed other serious reservations about the death penalty, the prosecutor's mistake in attributing A. J.'s statement about hesitancy in imposing the death penalty to T.J. was insufficient to demonstrate discriminatory intent. (See *People v.*

Williams (1997) 16 Cal.4th 153, 189 [prosecutor's faulty memory or clerical error in explaining his peremptory challenge is not necessarily associated with impermissible reliance on group bias].)

2. Prospective Juror G. N.

Defendants argue that the prosecutor exaggerated some reasons and misrepresented others in exercising a peremptory challenge against G .N. Our review of the record, however, discloses that the prosecutor's reasons for challenging G.N. were not pretextual.

Defendants concede that G.N. stated he was against the death penalty "for the most part," but note that he indicated that he could impose the death penalty. The record indicates that while G.N. asserted that the death penalty was an option in the case, he further averred that he was against the death penalty because of his Christian religion. Despite his religious convictions, however, G.N. maintained that he recognized his duty as a juror and could impose the death penalty. Later in his voir dire, G. N., in response to the court's question as to whether we should keep the death penalty in California, responded negatively. He reasoned that his response was probably based on his religious beliefs. In light of G. N.'s conflicting statements on the death penalty, the prosecutor properly exercised a peremptory challenge against him. (*People v. Mason* (1991) 52 Cal.3d 909, 938 & fn. 8 [prosecutor had valid basis for excluding jurors who gave conflicting statements about the death penalty].)

Contrary to defendants' suggestion, the fact that at some point during his voir dire, G.N. stated or implied that he could impose the death penalty did not preclude the prosecutor from validly excusing him. (*People v. Griffin* (2004) 33 Cal.4th 536, 561.) Moreover, defendants' suggestion G. N.'s response that he would "rather not be here" was similar to that of Juror No. 5 who stated "this is not something I want to do," fails to prove discriminatory intent in the prosecutor's exercise of a preemptory challenge against G.N. While Juror No. 5 during the course of voir dire concerning the death penalty did state that "this is not something I want to do" and "I don't know who would want to do that," she maintained throughout her voir dire that she could impose the death penalty and did not express reservations similar to those of G. N.

3. Prospective Juror A. J.

***6** Defendants also contend that the prosecutor improperly challenged Prospective Juror A.J. because she was open to imposing the death penalty and neutral on the issue of penalty. Our review of A. J.'s voir dire, however, reveals that A. J.'s views on the death penalty, like those of G. N., were conflicting and hence we cannot conclude that the prosecutor's reasons for excluding her were pretextual. Although she said she was open to imposing the death penalty, she also maintained that she had mixed feelings about it. Further, she stated on her questionnaire that she was not sure she would vote for the death penalty if the issue was on the ballot and in response to the question about her general feelings, she stated, "I have mixed feelings on whether or not killing someone is the right thing to do." Given her conflicting responses on the death penalty, the prosecutor's reasons, which included A. J.'s views on the death penalty, supported the trial court's finding that the prosecutor did not peremptorily challenge A.J. based on an impermissible group bias.

4. Prospective Juror K. W.

Defendants next challenge the prosecutor's reasons for challenging Prospective Juror K.W. as pretextual, urging that there is nothing in the record to show he was hostile or argumentative. They again ignore, however, the clear evidence in the record of K. W.'s concerns with the death penalty.

K. W., in response to questions from the prosecutor, stated that it was reasonably unlikely that he would vote for the death penalty for those defendants who were nonshooters, and that although he had not eliminated the death penalty as an option, it would be very difficult for him to impose it. He also opined that the death penalty was an "uncivilized penalty" and that he hoped one day that society would progress beyond it.[FN4] K. W.'s reservations about the death penalty justified the prosecutor's peremptory challenge.

FN4. K. W.'s responses prompted the prosecutor to challenge him for cause. The trial court denied the motion.

5. Prospe cti ve Juror K. M.

Unlike the other African-American jurors peremptorily challenged by the prosecutor, Prospective Juror K.M. was in favor of the death penalty and opined that it was an option in this case. Prior to his voir dire, however, the prosecutor informed the court that he had a four-page rap sheet on K.M. The court thus voir dired K.M. about the rap sheet, indicating that the prosecutor had provided it. The voir dire revealed that the arrest record belonged to K. M.'s identical twin brother. K. M., a postal worker, had not disclosed his brother's arrests on the juror questionnaire because he was not aware of them. FN5 The court was satisfied with K. M.'s responses and voir dired K.M. concerning the death penalty. The prosecutor, however, in his voir dire of K.M. asked additional questions concerning K.M. and his brother "to try and clear up this other situation that we brought up earlier. And just to see if-whether these records are all goofed up." He proceeded to ask K.M. his social security and driver's license numbers and several additional questions about his brother. The prosecutor, in explaining his peremptory challenge of K. M., reasoned that he had affronted K.M. with his questions about his twin brother; he opined that K.M. was irritated by the questions and that he believed K.M. had been deceptive about not disclosing his brother's arrests. The prosecutor's exercise of a peremptory challenge to excuse K.M. under these circumstances was justified. (See *People v. Wheeler, supra,* 22 Cal.3d at p. 275, fn. 16 [peremptory challenge "allows a party to remove a juror whom he has offended by a probing voir dire"].)

FN5. Jurors were required to respond to the following question on the questionnaire concerning prior arrests or convictions: "Have you, any family member or close friend ever been **accused of, arrested for, charged with or convicted of** any crime? If yes, please explain." K.M. responded, "Sister, I was young so I do not know what for" to this question.

***7** Defendants also seek to compare responses of certain jurors, in particular Juror No. 2, Alternate Juror No. 1, and Alternate Juror No. 2, which they allege were short and "snippy" with those of K.M. who the prosecutor said gave nonresponsive and unenlightening answers and to F.B. who the prosecutor said gave "snippy" responses. Our review of the voir dire, however, reflects that the reason the responses of Juror No. 2 and Alternate Jurors No. 1 and No. 2 were short was because their voir dire raised no red flags concerning the death penalty nor did it trigger a necessity for further follow up questions. On the contrary, the voir dire of K.M. and F.B. raised significant issues disclosing a possible bias. The prosecutor questioned K.M. about not disclosing an arrest record, while F.B. revealed that an officer had pointed a gun at his head. Hence, while defendants argue that African-American jurors were treated differently, the record demonstrates that it was the respective voir dire of the African-American jurors that raised certain questions that prompted the prosecutor to further probe the prospective jurors about their opinions.

6. Prospective Juror M. T.

Like K. M., M.T. also stated in his juror questionnaire that he was in favor of the death penalty, and during voir dire averred that he could impose the death penalty. M. T., however, disclosed that he is a Baptist minister, FN6 that a tenet of his religion is not to judge anyone, but at the same time his beliefs require him to obey the laws of the land. M.T. also stated that although it would depend on the circumstances, it was "hard to say" that nonshooters would be eligible for the death penalty. The prosecutor's reasons for excusing M.T. included his active participation in the Baptist church and its programs, and his equivocal responses about the death penalty. The trial court properly deemed these reasons to be race-neutral. (*People v. Cash* (2002) 28 Cal.4th 703, 725 [prosecutor may properly excuse juror who has a religious bent or bias that would make it difficult to impose the death penalty].)

FN6. He also noted in his questionnaire that he volunteered his time for his church food programs on a weekly basis.

7. Prospective Juror F. B.

In explaining his reasons for exercising a challenge against F. B ., the prosecutor remarked: "He was the juror, if the court remembers, that was extremely hostile and unfriendly to me. It was clear he didn't like me. He wouldn't answer any of the questions; he was very closed. And it turns out, we found out later why: He had bad experiences with the police. He gave short, snippy answers. He's the one who had the gun pointed at his head. Never smiled at me, but he certainly smiled at Walt [Walter Cannady, Vasquez's counsel] when Walt was questioning him. I made a note of that. [¶] He's donated to the ACLU, Amnesty International, both groups that are opposed to the death penalty. I evaluated him as a malcontent who doesn't like the police nor me, as he made me part of the police. And he said the criminal justice system could do with some improvements; and it would be found out later during the questioning it was referring to him getting stopped by the police and being-he felt his life was endangered because he apparently was mistaken for a robber and had a gun put to his head. And I think that would obviously spill over into this case. And he even said that: His experiences with the police have affected his view of the criminal justice system." The prosecutor continued to state several other reasons for excusing F.B. including that there were better jurors still on the panel.

***8** We are unable from the record to determine whether F. B.'s attitude to the prosecutor was indeed unfriendly, but the trial court was in a position to evaluate the prosecutor's reasons, and we accord great deference to its conclusion that the prosecutor's reasons were not pretextual. (*People v. Cash, supra,* 28 Cal.4th at pp. 725-726.) Further, the fact that F.B. had a negative experience with the police which the prosecutor opined might be an issue in this case was a valid concern. (See *People v. Wheeler, supra,* 22 Cal.3d at pp. 275-276 [prosecutor's fear that juror who has complained of police harassment may harbor bias a neutral reason for exercising peremptory challenge].)

8. Prospective Juror K. S.

Among other reasons, the prosecutor dismissed K.S. because of her hesitation about imposing the death penalty on the nonshooters and her prior criminal record that included a conviction for forgery. These were bona fide reasons for exercising a peremptory challenge and not pretextual. (See *People v. Edwards, supra,* 54 Cal.3d at p. 831; *People v. Wheeler, supra,* 22 Cal.3d at pp. 275-276.) Defendants argue that Juror No. 4 also expressed reluctance to impose the death penalty on a nonshooter. While Juror No. 4's voir dire on that issue is similar to that of K. S., Juror No. 4 did not have a prior criminal record; hence a comparison of K.S. with seated Juror No. 4 does not demonstrate that they were substantially similar. "The circumstance that the two jurors made a single comment having similarity does not establish that the prosecutor's reasons were pretextual or that defendant established purposeful discrimination under the facts of the present case." (*People v. Schmeck, supra,* 37 Cal.4th at p. 271.) One similarity does not demonstrate that pretextual reasons were given. (*Id.* at p. 273.)

9. Prospective Juror R. G.

R.G. was an inactive member of the State Bar. Her son served time in the county jail for a drug conviction and her brother was incarcerated in the late 1960's. She had several close relatives who had also served time. The prosecutor, who reasoned that he did not want lawyers on his jury, and cited the fact that R.G. had numerous relatives who had served time in the penitentiary among other grounds for exercising his peremptory challenge against R. G., was justified in excusing her. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 925, fn. 6 [prosecutor can peremptorily excuse potential juror because he believes "juror's occupation reflects *too much education,* and that a juror with that particularly high a level of education" might be biased against his witnesses or his party's position].) The *Wheeler* court also observed that a juror's personal experience of having a close relative who has been convicted of a crime and incarcerated "has often been deemed to give rise to a significant potential for bias against the prosecution." (*People v. Wheeler, supra,* 22 Cal.3d at p. 277, fn. 18.) While R.G. opined that she could impose the death penalty, she was also a born-again Christian who expressed the view that Christianity permitted her to "consider" the death penalty if you have the evidence and two or three witnesses. The prosecutor was uncomfortable with this response and also relied on it in excusing R .G. In sum, the record does not demonstrate that the prosecutor's reasons

were pretextual.

***9** Defendants' suggestion that the prosecutor did not probe the issue of the felony murder rule with other jurors as he did with R.G. does not support a finding of pretext here. None of the seated jurors referred to by defendants had attended law school, like R. G., and none had relatives who had served time in the penitentiary. Defendants also seek to compare R. G.'s background with that of several of the seated jurors who had relatives with prior criminal histories. Here, again, however, the seated jurors did not have issues with the death penalty and none had attended law school. A comparison of R.G. with the seated jurors does not demonstrate that her background was similar. The record supports the prosecutor's stated reasons, and our comparative analysis of the challenged prospective jurors with the seated jurors does not establish the existence of pretext.

10. Other Arguments

Relying on *People v. Silva* (2001) 25 Cal.4th 345, defendants contend that the trial court failed to evaluate the reasons proffered by the prosecutor to determine whether they are bona fide. In *Silva,* our Supreme Court reversed a sentence of death on *Wheeler* grounds because the record of voir dire provided no support for the prosecutor's stated reasons for exercising a peremptory challenge against a prospective Hispanic juror and the trial court failed to probe the issue. (*Silva,* at pp. 385-386.) The *Silva* court concluded that "when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Id.* at p. 386.) In *People v. Reynoso, supra,* 31 Cal.4th at page 923, the court limited the *Silva* court's opinion to its particular facts. The court, however, reaffirmed that the trial court must make a " ' "sincere and reasoned attempt" ' " to evaluate the prosecutor's explanation in light of the circumstances of the case, its knowledge of trial techniques, and its observations of the manner in which the prosecutor conducted voir dire and exercised challenges, noted that "the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's race-neutral reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (*Id.* at p. 919.)

Here, since the prosecutor's stated reasons for challenging the prospective African-American jurors were not inherently implausible and there were sound race-neutral reasons for each of the prosecutor's peremptory challenges, the trial court was not required to question the prosecutor further or to make more detailed findings. (*People v. Reynoso, supra,* 31 Cal.4th at p. 929.)

***10** Defendants next contend that the trial court committed *Wheeler/Batson* error by failing to permit defense counsel to rebut the prosecutor's proffered reasons for his challenges. They refer to this colloquy following their first *Wheeler* motion: "The Court: Let's go on to the next juror. [¶] Mr. Traback [counsel for Sifuentes]: Do you want us to respond-[¶] The Court: No. [¶] Mr. Traback: Can we respond afterwards? [¶] The Court: No. This isn't argument. I already made a prima facie finding. You put your statements on the record; now the district attorney has to justify his challenges. That's the way it works."

In *People v. Ayala* (2000) 24 Cal.4th 243, our Supreme Court considered the issue of whether it was error for the trial court to hold an ex parte hearing on a *Wheeler* motion to consider the prosecutor's reasons for exercising his peremptory challenges against prospective jurors. The court noted that *U.S. v. Thompson* (9th Cir.1987) 827 F.2d 1254 suggested that ex parte *Wheeler* proceedings may amount to a denial of due process, recognizing that adversary proceedings are fundamental to our system of justice. (*People v. Ayala, supra,* 24 Cal.4th at p. 263.) The *Ayala* court therefore concluded that the trial court committed error in conducting ex parte proceedings on the *Wheeler* motion "because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete." (*Ayala,* at pp. 263-264.) The court nonetheless determined that the error was harmless since under either the *Watson* or *Chapman* harmless error standard (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24), it was clear from the record that the challenged jurors were excluded for race-neutral reasons and the trial court was knowledgeable and engaged in the *Wheeler* proceedings. (*People v. Ayala, supra,* 24 Cal.4th at pp. 268-269.)

Here, as well, the trial court's error in failing to permit defense counsel to address the prosecutor's reasons was also harmless whether we apply the *Chapman* or *Watson* standard. The record fully supports the trial court's findings that the prospective African-American jurors were challenged for proper, race-neutral reasons.

Defendants further contend that the trial court erred in interjecting its own reason for a challenge to Prospective Juror G.N. After the prosecutor explained that he challenged G.N. because of his views on the death penalty, the trial court stated, "The record should also reflect that he failed to appear on the day that he was scheduled to appear and then we had to reschedule him. [¶] ... [¶] And then he failed to appear on time and he was an hour late...."

We agree with defendants that it was improper for the trial court to provide reasons for the prosecutor's exercise of a peremptory challenge. The trial court's reasons do not provide a basis for determining the prosecutor's actual motivations for his peremptory challenges. "[I]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken." (*Paulino v. Castro* (9th Cir.2004) 371 F.3d 1083, 1090.) The court's error was harmless, however, given that prior to the court's remarks, the prosecutor had already explained he exercised a peremptory challenge against G.N. because of his conflicting views on the death penalty; and the record supports his stated justification.

***11** Defendants also argue that the trial court erred in permitting the prosecutor to incorporate by reference the questionnaires and voir dire of the prospective jurors into his statement of reasons. On the record before us, we cannot conclude that the trial court erred by permitting the prosecutor to incorporate the questionnaires and voir dire of the jurors. The prosecutor gave lengthy statements for excusing each of the prospective jurors and the record supports his justifications. We perceive no error.

B. Challenges for Cause

Defendants contend that the trial court violated their due process and equal protection rights by granting the prosecutor's challenge for cause of 11 prospective jurors who failed to disclose their prior arrests, charges or convictions on their written questionnaires. They argue that the court had no statutory basis for excusing the jurors for implied bias, and that the court should not have presumed bias without conducting voir dire of the prospective jurors.

Each prospective juror was required to fill out a questionnaire which contained the following question: "Have you, any family member or close friend ever been **accused of, arrested for, charged with or convicted of** any crime? If yes, please explain." In reviewing the questionnaire with counsel, the court explained, "I allude specifically to that question because I can tell you now that if anybody-if the district attorney determines that somebody was in fact arrested for a crime, didn't put it down-and I tell them drunk driving, too-or doesn't put down the fact that they were arrested for a crime, charged with a crime or convicted of any crime, no matter how minor it is, under *People v. Wright,*[FN7] that's a challenge for cause and they'll be excused." The court emphasized this question when it reviewed the questionnaire with the prospective jurors. For example, the court said to the second FN8 jury pool, "There's one question: Have you or any family members or close friends ever been accused of or arrested or charged with or convicted of any crime? That includes driving under the influence of alcohol. That's still against the law. People always forget that. It says accused of, arrested for, charged with or convicted. If you were arrested and you weren't charged, we still want you to put it down." The court made similar comments to each of the other jury pools.

FN7. The court was apparently referring to *People v. Price* (1991) 1 Cal.4th 324, 400-401 [concealment by a potential juror of material information on voir dire tending to show bias constitutes grounds for discharging the juror].

FN8. Twenty panels of prospective jurors were asked to complete the questionnaire.

During the course of voir dire, the prosecutor determined that 15 jurors failed to disclose arrests or convictions on their questionnaires. The court granted the prosecution's challenge for cause as to 11 of those prospective jurors, including eight African-Americans. In addition, on its own motion, the court dismissed a prospective juror because she suffered a prior felony conviction. As to the remaining three prospective jurors who had not disclosed prior criminal backgrounds, the court determined that two of those jurors were mistakenly identified as having suffered criminal convictions including Prospective Juror K. M., discussed *ante;* and that the third had not deliberately failed to disclose prior arrests.

***12** Defendants argue that the court's granting of the prosecutor's challenges for cause violated due process because the jurors were not convicted of felonies [FN9] and were presumptively eligible to serve on a jury. This argument, however, ignores the fact that the jurors were excused because they failed to disclose relevant facts regarding their criminal background. Concealment of prior criminal charges or convictions constitutes good cause for discharge of a juror. (*People v. Johnson* (1993) 6 Cal.4th 1, 22; see also *People v. Price, supra,* 1 Cal.4th at pp. 399-401 [same]; see also *In re Hitchings* (1993) 6 Cal.4th 97, 111 [juror who conceals relevant facts or gives false answers during voir dire undermines jury selection process and commits misconduct].) Thus, defendants' contention that the court was without statutory authority to find "implied bias" under Code of Civil Procedure section 229 for a failure to disclose is of no merit.

> FN9. Code of Civil Procedure, section 203, subdivision (a)(5) provides that "[p]ersons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored" are ineligible to be prospective trial jurors.

"The qualification of a juror challenged for cause is a matter within the discretion of the trial court and is seldom a ground for reversal on appeal." (*People v. Morris* (1991) 53 Cal.3d 152, 183; *People v. Holt* (1997) 15 Cal.4th 619, 655-656 [erroneous exclusion of a juror for cause provides no basis for reversal].) While the court's practice here of granting the prosecutor's challenges for cause based on a failure to disclose a criminal background without affording the prospective jurors an opportunity to confirm or rebut the information is not a practice we would endorse (Cf. *People v. Stewart* (2004) 33 Cal.4th 425, 451-452 [trial court erred in dismissing prospective jurors for cause based on their opposition to the death penalty without first conducting any follow-up questioning]), any error in the court's failure to conduct an investigative voir dire was harmless. " ' "Since a defendant or a party is not entitled to a jury composed of any particular jurors, the court may of its own motion discharge a qualified juror without committing any error, provided there is finally selected a jury composed of qualified and competent persons." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 148, quoting *Dragovich v. Slosson* (1952) 110 Cal.App .2d 370, 371.)

Finally, defendants contend that the court's excusal of the eight African-American prospective jurors for cause based on their failure to disclose their criminal backgrounds violated equal protection because the challenges were not based on juror impartiality, had a disproportionate impact on African-American jurors, and demonstrated systematic discrimination. The record does not support defendants' contention.

The trial court indicated prior to voir dire that it would grant the prosecutor's challenges for cause as to jurors who concealed their criminal backgrounds. Defendants have not shown that the prosecutor sought to challenge only African-Americans who failed to reveal their criminal backgrounds. To the contrary, the record shows that there were four additional prospective jurors who the prosecutor sought to challenge for cause for the same reasons. Defendants have failed to show systematic discrimination. (*People v. Howard* (1992) 1 Cal.4th 1132, 1160 ["defendant cannot demonstrate systematic exclusion based upon the even-handed application of a neutral criterion ..."].)

C. Instructional Error on Special Circumstance Finding

***13** Vasquez argues that the trial court erred in its instructions on the special circumstance

alleging he intentionally killed a peace officer. He asserts the court failed to instruct the jury that the special circumstance required the specific intent to kill. We are not persuaded.

Section 190.2 sets forth the special circumstances under which the penalty for first degree murder is the imposition of the death penalty or life imprisonment without parole. Vasquez was charged with three special circumstances including murder of a peace officer, which is defined in section 190.2, subdivision (a)(7): "The victim was a peace officer ... who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties...."

The trial court instructed the jury on the special circumstance of murder of a peace officer in the language of CALJIC No. 8.81.7 and No. 8.81.8 as follows: "To find that the special circumstance referred to in these instructions as murder of a peace officer is true, each of the following facts must be proved: One, the person murdered was a peace officer; and, two, the person murdered was intentionally killed while engaged in the performance of his duties; and, three, the defendant knew or reasonably should have known that the person killed was a peace officer engaged in the performance of his duties. [¶] The phrase 'in the performance of his duties' as used in these instructions means any lawful act or conduct while engaged in the maintenance of the peace and security of the community or in the investigation or prevention of crime." The jury was also instructed pursuant to CALJIC No. 8.80.1, following recitation to the jury of the two other alleged special circumstances-murder in the course of a burglary and murder in the course of a robbery-that "[u]nless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant Ruben Eliceo Vasquez actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true."

Vasquez contends that the court's instructions as a whole did not clearly inform the jury of the intent to kill element of the murder of a peace officer special circumstance. Since this was the only element that he contested, Vasquez argues that he was prejudiced because the instructions given on intent were confusing and ambiguous.

There was no ambiguity in the instructions. The court's instructions pursuant to CALJIC No. 8.80.1 were given following the court's explanation of the special circumstances alleged against each defendant and simply set forth that unless an intent to kill was an element of a special circumstance,[FN10] the jury need not find that the defendant intended to kill in order to find the special circumstance true. The court's instruction on the special circumstance pertaining only to Vasquez clearly informed the jury that an intent to kill was an element that must be proved. The issue was brought home to the jury during closing arguments when counsel for Vasquez focused his argument on the intent issue, having conceded that the prosecutor had proved that Vasquez committed first degree murder and the two special circumstances alleging murder during the course of a robbery and burglary. We must presume that the jury understood and correlated all of the instructions given to it on the issues. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.)

> FN10. The special circumstances alleging murder in the course of a robbery and murder in the course of a burglary do not require an intent to kill. (§ 190.2, subd. (a)(17)(A), (G).)

D. Reasonable Doubt Instruction

***14** Vasquez and Le also contend that the trial court erred in instructing on reasonable doubt pursuant to CALJIC No. 2.90 that "[a] defendant in a criminal action is presumed to be innocent *until* the contrary was proved." (Italics added.) They argue that the use of the term, until, undercut the presumption of innocence and lightened the prosecution's burden of proof.

Defendants' argument was rejected in *People v. Lewis* (2001) 25 Cal.4th 610, 652. We are bound by our Supreme Court's ruling on the issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III. DISPOSITION

The judgments are affirmed.

We concur: REARDON, Acting P.J., and MUNTER, J.[FN*]

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

Cal.App. 1 Dist.,2006.
People v. Vasquez
Not Reported in Cal.Rptr.3d, 2006 WL 226759 (Cal.App. 1 Dist.)
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

Briefs and Other Related Documents (Back to top)

- A102559 (Docket) (May 2, 2003)

END OF DOCUMENT

(c) 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw.

Not Reported in Cal.Rptr.2d, 2002 WL 31520553 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2002 WL 31520553 (Cal.App. 4 Dist.))

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 2, California.
The PEOPLE, Plaintiff and Respondent,
v.
James Murrell FERRIS, Defendant and Appellant.
No. E030349.
(Super.Ct.No. FCH-02208).

Nov. 14, 2002.

Defendant was convicted by jury in the Superior Court, San Bernardino County, No. FCH-02208,Ingrid A. Uhler, J., of first degree murder, and of assault by a life prisoner by means of force likely to produce great bodily injury. Defendant appealed. The Court of Appeal, McKinster, J., held that sufficient evidence supported defendant's conviction for assault with means of force likely to produce great bodily injury.

Affirmed.

West Headnotes

Prisons 310 ⇐436

310 Prisons
310VII Offenses
310k431 Offenses by Prisoners, Inmates, or Other Detainees
310k436 k. Use of Force or Violence. Most Cited Cases
(Formerly 98k5)
Sufficient evidence supported defendant's conviction for assault by life prisoner with means of force likely to produce great bodily injury; although defendant argued statute governing assault with means of force likely to produce great bodily injury did not apply to him since he had not been sentenced to state prison at time he committed assault, but rather had been sentenced to state Youth Authority, defendant was sentenced to state prison, even though he was housed in a state Youth Authority facility, and thus, sentence brought defendant within purview of statute. West's Ann.Cal.Penal Code § 4500.

APPEAL from the Superior Court of San Bernardino County. Ingrid A. Uhler, Judge. Affirmed.Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J.T. Carlton, Supervising Deputy Attorney General and Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

OPINION

McKINSTER, J.

*1 A jury found James Murrell Ferris (hereafter, defendant) guilty, as charged, of first degree murder (count 1) and of assault by a life prisoner by means of force likely to produce great bodily injury (count 2). The jury also made true findings on two of three special circumstance allegations-that the killing occurred while the victim was engaged in the performance of her duties as a peace officer (Pen.Code, § 190.2, subd.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

(a)(7)) [FN1] and that defendant committed the murder while perfecting or attempting to perfect an escape from lawful custody (§ 190.2, subd. (a)(5)). After the trial court granted defendant's motion to bifurcate and defendant waived his right to a jury, the trial court found a third special circumstance allegation, that defendant previously had been convicted of first degree murder (§ 190.2, subd. (a)(2)), to be true. After juries twice deadlocked on the penalty, the prosecution elected not to seek death and the trial court sentenced defendant to life in prison without the possibility of parole on the first degree murder conviction.[FN2]

FN1. All further statutory references are to the Penal Code, unless otherwise indicated.

FN2. The trial court stayed execution of defendant's life sentence on count two.

Defendant raises four claims of error in this appeal, all directed at challenging his sentence of life in prison without the possibility of parole. Defendant's first two claims challenge the validity of the jury's true finding on the special circumstance allegation under section 190.2, subdivision (a)(5) that defendant committed the murder while perfecting or attempting to perfect an escape from lawful custody. {AOB 18-22, 23-25} Defendant also challenges the sufficiency of the evidence to support the jury's true finding on the special circumstance allegation under section 190.2, subdivision (a)(7) that, at the time of the murder, the victim was engaged in the course of her duties as a peace officer. {AOB 26-28} Defendant's final contention is that the evidence is insufficient as a matter of law to prove that defendant had been sentenced to state prison at the time he committed the assault and therefore was insufficient to prove a violation of section 4500.[FN3] {AOB 29-32}

FN3. A violation of section 4500 is punishable by death, or life in prison without the possibility of parole. (§ 4500.)

We conclude for reasons explained below that defendant's first three claims are irrelevant and we will not address those claims. We further conclude that defendant's fourth claim lacks merit. Therefore, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are accurately recounted in detail in the parties' respective briefs. Because the only claim we address and resolve in this appeal is not dependent on the facts of defendant's crime, we will not recount those facts here. It is sufficient to note that Ineasie Baker was a youth correctional counselor at the California Youth Authority facility in Chino and defendant was a ward at that facility, serving a sentence of 25 years to life in state prison for first degree murder. On August 9, 1996, defendant attacked and killed Baker apparently in a storage room at the facility. Defendant or someone acting at his behest placed Baker's body in a dumpster. The body was recovered on August 11, 1996, from the landfill where the dumpster had been emptied. Although there were no witnesses to the murder, the circumstantial evidence included testimony that defendant had been seen entering the storage room around 1 p.m. on August 9 followed a short time later by Baker; later that day, several people noticed defendant had scratches on his face and bruises around his eyes and when asked defendant offered different ex-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

planations for his injuries; when defendant's room eventually was searched, Baker's keys were found in a can of Ajax cleanser; a bloody palm print in the storage room matched defendant's palm and the blood matched that of Baker.

DISCUSSION

***2** Defendant does not challenge his first degree murder conviction. Instead, as noted above, he challenges the validity of the jury's true findings on the special circumstance allegations. With respect to the allegation under section 190.2, subdivision (a)(5) that defendant committed the murder for the purpose of perfecting or attempting to perfect an escape from lawful custody, defendant claims, first, that the evidence was insufficient to support that true finding and, next, that the jury was not instructed on the legal principles pertinent to an attempt to commit a crime. Similarly, defendant claims that the evidence was insufficient to prove that Baker was performing her duties as a peace officer at the time of the murder and on that basis defendant challenges the jury's true finding on the section 190.2, subdivision (a)(7) special circumstance.

Although interesting, defendant's contentions are irrelevant because there is a third special circumstance true finding that defendant does not challenge, namely the allegation under section 190.2, subdivision (a)(2) that defendant previously had been convicted of first degree murder. {CT 738-740} Because that true finding supports the sentence of life in prison without the possibility of parole that the trial court imposed on count one, even if we were to agree with defendant's claims, the result in this case would not change.[FN4] Therefore, we will not address defendant's claims regarding the validity of the special circumstance true findings.

> FN4. In sentencing defendant, the trial court only cited the two special circumstance findings that the jury had returned and did not mention the trial court's own true finding on the multiple murder special circumstance. Although not mentioned by the trial court, that special circumstance was not dismissed or stricken. Because it is extant, the multiple murder special circumstance finding would warrant imposition of a life sentence without the possibility of parole independent of the two challenged special circumstance findings.

We will only address defendant's challenge to the jury's guilty verdict on count two, the charge that defendant violated Penal Code section 4500. Although the trial court stayed execution of defendant's sentence on that count under section 654, if the evidence is insufficient to support the conviction, defendant is entitled to a reversal and dismissal of that charge. Defendant's life sentence on count one would not be affected.

As the trial court instructed the jury, "Every person who is sentenced to state prison within this state and, who with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury which leads to the death of the victim, is guilty of a violation of Penal Code section 4500, a crime." [FN5] {CT 673}

> FN5. Penal Code section 4500 actually pertains to a person "undergoing a life sentence, who is

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

> sentenced to state prison within this state ...." The trial court modified the standard CALJIC jury instruction by removing the "life sentence" language.

Defendant contends the evidence was insufficient as a matter of law to support a guilty verdict on this charge because he had not been sentenced to state prison but, instead, had been sentenced to the California Youth Authority and therefore did not come within the statutory definition of the crime set out in section 4500. {AOB 26-32} We disagree.

According to the pertinent evidence, defendant had been tried as an adult and convicted of first degree murder in Orange County. The judge in the Orange County case sentenced defendant to a term of 25 years to life and ordered that he be housed in the California Youth Authority until defendant turned 25. {CT 127-130} Defendant argues that the sentence was a sentence to CYA and not to state prison and therefore section 4500 does not apply to him. Defendant is wrong.

***3** Welfare and Institutions Code section 1731.5, subdivision (c) authorizes a court in sentencing a person under the age of 18 [FN6] to order "that the person shall be transferred to the custody of the Youth Authority .... The transfer shall be solely for the purposes of housing the inmate ... who, in all other aspects shall be deemed to be committed to the Department of Corrections and shall remain subject to the jurisdiction of the Director of Corrections and the Board of Prison terms." In short, and under the express authority of the quoted Welfare and Institutions provision, the trial court sentenced defendant to state prison but ordered that he be housed at a CYA facility.

> FN6. At the time of defendant's sentence in the Orange County murder, the specified age was 21.

Defendant cites *People v. Nunez* (1984) 162 Cal.App.3d 280, 208 Cal.Rptr. 450 to support his view that because he was not housed in state prison, he did not come within the statutory definition of the crime set out in section 4500. {AOB 31} *Nunez* involves an earlier version of section 4500 which pertained to persons "undergoing a life sentence *in a state prison* .... " (*Id.* at p. 283, 208 Cal.Rptr. 450, orig. emphasis.) The *Nunez* court held, because the defendant in that case was in county jail and not in state prison at the time that he committed the assault, section 4500 did not apply. (*People v. Nunez, supra,* at p. 284, 208 Cal.Rptr. 450.)

As quoted above, the version of section 4500 at issue in this appeal pertains to a person serving a life sentence and "who is *sentenced* to state prison." The version of section 4500 at issue in *Nunez* focused on the defendant's physical location at the time of the crime whereas the version at issue here focuses on the sentence. If the former version were still in effect, *Nunez* would apply and defendant's conduct would not constitute a violation of section 4500. The version of section 4500 at issue here focuses on the defendant's sentence, namely a sentence to state prison. Defendant was sentenced to state prison, even though he was housed in a CYA facility. That sentence brings defendant within the purview of section 4500 and therefore we must reject his challenge to his conviction on that charge.

DISPOSITION

The judgment is affirmed.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

We concur: RAMIREZ, P.J., and HOLLENHORST, J.

Cal.App. 4 Dist.,2002.
People v. Ferris
Not Reported in Cal.Rptr.2d, 2002 WL 31520553 (Cal.App. 4 Dist.)

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw.

917 F.2d 566, 1990 WL 164651 (C.A.9 (Cal.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 917 F.2d 566, 1990 WL 164651 (C.A.9 (Cal.)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
TRUNG BUU TRAN, Petitioner-Appellant,
v.
Robert Glen BORG, Warden, Respondent-Appellee.
No. 89-15009.

Argued and Submitted Oct. 3, 1990.
Decided Oct. 26, 1990.

Appeal from the United States District Court for the Northern District of California; Robert P. Aguilar, District Judge, Presiding.
N.D. Cal.

AFFIRMED.

Before GOODWIN, Chief Judge, JAMES K. BROWNING and RYMER, Circuit Judges.

MEMORANDUM [FN*]

***1** Trung Buu Tran appeals from an order dismissing his petition for a writ of habeas corpus. He makes three claims, none supported by the state court trial record. We affirm.

Tran was convicted in a California state court of first degree murder with special circumstances, and sentenced to life in prison.

The defense conceded that Tran was guilty of first degree felony murder, in that he was an accomplice in a robbery in which a homicide occurred. However, the defense argued that Tran was not the man who actually did the killing.

Tran did not testify at the guilt phase of his trial. At the penalty phase, he testified that he was the second man without the gun, and that he was not present in the back of the store when the shooting occurred. Before closing argument in the penalty phase, juror number six sent a note to the court which read, "In view of the late testimony, will the jury have an alternate chance of change of verdict?" The court responded to this question when it instructed the jury at the penalty phase as follows:

During this phase of the trial, you have heard evidence from the defendant regarding his participation in the robbery of the Hong Kong Market. Such evidence, even if it creates a reasonable doubt in your mind as to the role the defendant played in the robbery, will not have the effect of reversing your previous verdict as to the truth of the special circumstances. However, such evidence may be considered by you at this time as a mitigating factor in determining penalty.

California Court of Appeal Opinion at 5-7 (Appellee's Brief, Exhibit A).

Because the jury during the guilt phase had found Tran guilty of first degree murder with special circumstances, the jury was limited during the penalty phase to choos-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

ing between the death penalty and life in prison without possibility of parole, depending on whether it found aggravating or mitigating circumstances to predominate. *Id.* at 7.

As aggravating circumstances, the prosecution presented evidence of a prior conviction for manslaughter, an unadjudicated robbery, and an unadjudicated homicide. Tran, in addition to his testimony that he was not the killer, presented evidence describing the violence of life in Saigon, his escape from Vietnam, and the psychological trauma and adjustment problems facing Vietnamese refugees, especially unaccompanied minors such as Tran. Tran was sentenced to life imprisonment without the possibility of parole.

The California Court of Appeal affirmed Tran's conviction and sentence in an unpublished opinion. The California Supreme Court denied review. Tran later filed two petitions for writ of habeas corpus in the California Supreme Court. These petitions were denied.

Tran next filed a petition for writ of habeas corpus in federal district court. The district court denied the petition for failure to state a claim.

This appeal followed. A motions panel denied a motion to dismiss the appeal as time barred, relying on *Houston v. Lack,* 108 S.Ct. 2379, 2382 (1988) (notices of appeal filed by pro se prisoners deemed filed when they are delivered to prison authorities for forwarding to the court) and *Miller v. Sumner,* 872 F.2d 287, 288 (9th Cir.1989) (same).

DISCUSSION

I. *Reopening the Guilt Phase*

***2** Appellant's first two arguments are essentially two prongs of the same argument based upon the question posed by juror number six during the *penalty* phase of the trial, asking whether the jury *at that stage* could have the option of reconsidering the guilt phase verdict.

A. *Proportionality*

Tran contends that his sentence of life without possibility of parole is so disproportionate to his crime as to constitute cruel and unusual punishment under *Solem v. Helm,* 463 U.S. 277, 290 (1983). Tran argues that his sentence was determined based on the jury's finding at the guilt phase that he committed first-degree murder with special circumstances. However, at the penalty phase "[a]t least one juror indicated that he might change the guilt-phase verdict if he could." Tran asserts that if the jury had been permitted to reconsider the guilt verdict, "in all probability they would have elected to find against the special circumstance allegation." This kind of speculation can follow every guilty verdict where a defendant does not take the stand in the trial on the guilt question but does take the stand at the penalty trial.

There is clearly no basis for conducting a proportionality review based on what facts the jury *might* have found, rather than on the facts that the jury actually did find. The only conceivable basis for this claim would be if the guilt-phase verdict were in fact to be overturned, and a new jury were to find the facts to be as Tran asserts them.

B. *Reopening the Guilt Phase*

Tran's second argument, which is an attack

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

on the jury's guilt-phase verdict, is equally without merit. Tran argues that because one juror during the penalty phase asked about reconsidering the guilt-phase verdict, due process required the judge either to grant this request or to submit a third alternative penalty to the jury. Under California law, trial judges have the power to dismiss special circumstances findings if a jury imposes a penalty of life without possibility of parole, thus making the defendant eligible for parole. *People v. Carrera,* 49 Cal.3d 291, 333-34, 261 Cal.Rptr. 348, 374-75, 777 P.2d 121, 147 (1989) (construing Cal.Penal Code Sec. 1385). Tran does not contend that the jury directly possessed the judge's power to set aside the special circumstances finding. However, he argues that since a sentencing jury "has something of the power of the judge," the court "had the power, under the strictures of due process, to give the jury an opportunity to exercise something of these equitable powers normally vested in the judge." Appellant's Opening Brief at 24-25.

At most, Tran's argument is that California law might have permitted the court to grant the jury this power. He cites no precedent for the proposition that federal due process required the judge to do so. Perhaps recognizing the lack of precedential support for this claim, Tran states that "[t]he justification for this lies in no one rule of law but in due process itself." *Id.* at 25. However, there is no basis at all for the claim that due process requires the reconsideration Tran is requesting.

***3** Further, strong policy reasons exist for rejecting such a requirement. As the California Court of Appeal explained in rejecting Tran's argument, "The reopening of the guilt phase verdict ... would allow reconsideration of that verdict in light of evidence (heard at the penalty phase) not properly admissible on the issue of guilt." California Court of Appeal Opinion at 17. In addition, such reopening would disrupt the procedure of the bifurcated trial, *id.* at 16, and would give defendants in capital cases strong tactical incentives not to testify at the guilt phase:

> With the knowledge that a favorable impression upon the jury during the penalty phase may be drawn upon to attempt to change the effect of a guilt phase verdict, no sensible defendant would take the risk of testifying at the earlier stage. The failure to testify would tend to deprive the jury of evidence relevant to guilt which it might otherwise receive.

Id. at 16-17. Tran's attack on the finality of the verdict fails.

II. *Improper Jury Instructions*

Tran's initial trial was a California murder trial in which he was potentially subject to the death penalty. Under California's bifurcated procedure for such trials, Cal.Penal Code §§ 190.1, 190.3, the jury was first required to determine whether he had committed intentional first degree murder with special circumstances. Once the jury made that determination, they moved to the penalty phase, in which they were limited by statute to choosing between the death penalty or a sentence of life without possibility of parole. Cal.Penal Code §§ 190.2(a).

The Supreme Court has held that it violates the Eighth Amendment prohibition against cruel and unusual punishment to impose the death penalty on a defendant who participates in a robbery but does not "himself kill, attempt to kill, or intend that a killing

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

take place or that lethal force will be employed." *Enmund v. Florida,* 458 U.S. 782, 797 (1982). Tran conceded that he "was guilty of first-degree felony murder in that he was an accomplice in a robbery during which a homicide occurred." Tran requested, and the trial court gave an *Enmund* instruction concerning whether Tran was the actual killer or had an intent to kill. The jury was properly instructed on the law and found Tran guilty of first degree murder with special circumstances-intentionally killing during the course of a robbery.

Tran contends in these proceedings that the *Enmund* instruction was not given, but the record refutes his contention.

Other claims were briefed and argued but none has support in the record.

AFFIRMED.

> FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

C.A.9 (Cal.),1990.
Tran v. Borg
917 F.2d 566, 1990 WL 164651 (C.A.9 (Cal.))

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

EXHIBIT D

CLERK, U.S. DISTRICT COURT
AUG 6 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

October 1997 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. HUNG THANH MAI, VICTORIA PHAM, HUY NGOC HA, and, DANIEL BRUCE WATKINS, Defendants.	SA CR 98-82 LHM I N D I C T M E N T [18 U.S.C. § 1958: Conspiracy to Use Interstate Commerce Facility in the Commission of Murder-for-Hire; 18 U.S.C. § 1958: Use Of Interstate Commerce Facility In The Commission of Murder-for-Hire; 18 U.S.C. § 2(a): Aiding And Abetting; 18 U.S.C. § 922(o)(1): Possession or Transfer of Machine Gun]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. § 1958]

I. OBJECT OF THE CONSPIRACY

Beginning on a date unknown to the Grand Jury and continuing to on or about July 27, 1998, in Orange County, within the Central District of California, and elsewhere, defendants HUNG THANH MAI, VICTORIA PHAM, HUY NGOC HA, and DANIEL BRUCE WATKINS and others known and unknown to the grand jury, knowingly and

34

ENTERED ON ICMS

intentionally agreed and conspired together to commit an offense against the United States, namely, murder, in violation of State law, as consideration for a promise and agreement to pay money, in violation of Title 18, United States Code, Section 1958. In furtherance of the conspiracy, the defendants used the United States mail, and traveled and caused another to travel in interstate commerce.

II. MEANS AND METHODS OF THE CONSPIRACY

The object of the conspiracy was to be accomplished in substance as follows:

While incarcerated at the Orange County Jail, awaiting trial for murder, defendant HUNG THANH MAI planned to have Alex Nguyen, or his family, killed because of Alex Nguyen's cooperation with law enforcement. Defendant MAI believed that his (MAI's) arrest was due, in part, to Nguyen's cooperation with law enforcement. Defendant MAI hired a person he believed was willing to murder Nguyen in exchange for money. However, the person MAI hired to commit the murder was an undercover officer ("UCO").

Defendant DANIEL BRUCE WATKINS traveled to Houston, Texas to locate Alex Nguyen and his family. Defendant WATKINS provided defendants MAI and PHAM with information about Alex Nguyen so that Nguyen could be located and killed.

Defendant MAI mailed a photograph of Alex Nguyen to defendant VICTORIA PHAM. Defendant MAI told defendant PHAM to give the photograph to defendant HUY NGOC HA. Defendant PHAM gave the photograph of Alex Nguyen to defendant HA and defendant HA provided it to the UCO so that the UCO could

identify the intended victim, Alex Nguyen.

After the UCO received the photograph of Alex Nguyen from defendant HA, the FBI created a fake postmortem photograph of Alex Nguyen. In the photograph, Alex Nguyen appears to have died as the result of a gunshot wound in the side of his head.

After the murder had allegedly taken place, defendants HA, PHAM and MAI were provided with the supposed postmortem photograph of Alex Nguyen. After viewing the postmortem photograph, MAI spoke with PHAM and HA and confirmed that the person in the photograph was Alex Nguyen.

Thereafter, defendant MAI asked defendant WATKINS to investigate whether law enforcement authorities knew of Alex Nguyen's disappearance, by asking defendant WATKINS to look for a "missing persons report." Defendant WATKINS warned MAI that if he looked for a missing persons report, it might disclose to law enforcement authorities that defendants MAI and WATKINS knew that Alex Nguyen was dead, which might arouse suspicion.

III. OVERT ACTS

In furtherance of the conspiracy and to accomplish the object of the conspiracy, defendants HUNG THANH MAI, VICTORIA PHAM, HUY NGOC HA, DANIEL BRUCE WATKINS and others known and unknown to the Grand Jury committed various overt acts, within the Central District of California, and elsewhere, including but not limited to the following:

1. On or about December 24, 1997, in Santa Ana, California, defendant HA met with the UCO and discussed MAI's desire to kill Alex Nguyen.

2. On or about December 30, 1997, in Santa Ana,

California, defendant MAI called the UCO and told him that he (MAI) would send the UCO a picture of Alex Nguyen through either defendant HA or defendant WATKINS.

3. On or about March 4, 1998, in Santa Ana, California, defendant MAI called the UCO and told the UCO that Alex Nguyen had "crossed the line" by cooperating with law enforcement.

4. On or about March 12, 1998, in Santa Ana, California, defendant MAI called the UCO and told the UCO that he had sent defendant WATKINS to Texas to locate Alex Nguyen.

5. On or about March 18, 1998, in Santa Ana, California, defendant MAI called the UCO and told him that he would get the UCO the picture of Alex Nguyen and that his investigator would pinpoint Alex Nguyen's location in Texas.

6. On or about April 9, 1998, in Santa Ana, California, defendant MAI instructed defendant PHAM to contact defendant WATKINS and to get from him Alex Nguyen's address and phone number.

7. On or about April 9, 1998, in Santa Ana, California, defendant MAI instructed defendant PHAM to check the post office box to see if she had yet received the photograph of Alex Nguyen that he had sent.

8. On or about April 12, 1998, in Santa Ana, California, defendant HA gave the UCO a photograph of Alex Nguyen.

9. On or about April 14, 1998, in Santa Ana, California, the UCO provided defendant HA with a purported postmortem photograph of Alex Nguyen.

10. On or about April 15, 1998, in Santa Ana, California, defendant MAI spoke with defendant HA about the manner in which

Alex Nguyen had been killed and the manner in which payment was to be made to the UCO.

11. On or about April 17, 1998, in Santa Ana, California, defendant MAI told defendant PHAM to bring the postmortem picture of Alex Nguyen to the jail so that he could look at it.

12. On or about May 7, 1998, in Santa Ana, California, defendant MAI told the UCO that the person in the photograph was Alex Nguyen.

13. On or about May 28, 1998, in Santa Ana, California, defendant MAI told the UCO that he wanted to know if a "missing persons report" had been filed for Alex Nguyen.

14. On or about May 29, 1998, in Santa Ana, California, defendant MAI asked defendant WATKINS to check to see if a "missing persons report" had been filed in Houston, Texas for Alex Nguyen.

15. On or about May 29, 1998, in Santa Ana, California, defendant WATKINS told defendant MAI that if he checked with law enforcement about the filing of a "missing persons report" it might disclose to law enforcement that they (MAI and WATKINS) knew that Alex Nguyen had disappeared.

COUNT TWO

[18 U.S.C. § 1958; 18 U.S.C. § 2(a)]

On or about April 9, 1998, in Orange County, within the Central District of California, defendant HUNG THANH MAI knowingly and willfully used and caused another to use the United States Mail, with the intent that a murder be committed in violation of State law, as consideration for a promise and agreement to pay money.

At that time and place, defendants VICTORIA PHAM, HUY NGOC HA, and DANIEL BRUCE WATKINS aided, abetted, counseled, commanded, induced and procured the commission of the above offense, in violation of Title 18, United States Code, Section 2(a).

COUNT THREE

[18 U.S.C. § 922(o)(1); 18 U.S.C. § 2(a)]

On or about January 27, 1998, in Orange County, within the Central District of California, defendant HUY NGOC HA knowingly and unlawfully possessed a machine gun, to wit: a MAC-11 fully automatic machinegun, in violation of Title 18, United States Code, Section 922(o)(1).

At that time and place, defendant HUNG THANH MAI aided, abetted, counseled, commanded, induced and procured the commission of the above offense, in violation of Title 18, United States Code, Section 2(a).

A TRUE BILL

Foreperson

NORA M. MANELLA
United States Attorney

JOHN S. GORDON
Assistant United States Attorney
Acting Chief, Criminal Division

MONICA BACHNER
Assistant United States Attorney
Chief, Santa Ana Branch Office

ALEJANDRO N. MAYORKAS
United States Attorney
GEORGE S. CARDONA
Assistant United States Attorney
Chief, Criminal Division
MARC R. GREENBERG
Assistant United States Attorney
Cal. State Bar # 123115
411 W. Fourth Street
U.S. Courthouse
Santa Ana, California 92701
Telephone: (714) 338-3590

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. HUNG MAI ET AL, Defendants.	No. CR 98-82-DOC PLEA AGREEMENT FOR DEFENDANT DANIEL B. WATKINS

1. This constitutes the plea agreement between DANIEL B. WATKINS ("defendant") and the United States Attorney's Office for the Central District of California ("the USAO") in the above-captioned case. This agreement is limited to the USAO and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities.

PLEA

2. Defendant agrees to plead guilty to count One of the single count superseding information attached hereto.

NATURE OF THE OFFENSE

3. In order to be guilty of accessory after the fact, as alleged in the First Superseding Information, you must have

knowing that an offense against the United States had been committed, received, relieved, comforted, or assisted the offender(s) with the intent to hinder or prevent his apprehension, trial or punishment. In this case, the offense that is alleged to have been committed against the United States is murder for hire, in violation of 18 U.S.C. Section 1958. By signing this agreement, you admit that you are, in fact, guilty of the offense of accessory after the fact.

PENALTIES

4. The statutory maximum sentence that the court can impose for a conviction of accessory after the fact is one half the maximum term of imprisonment, or fined not more than one half the maximum fine prescribed for the punishment of the principal, or both. The maximum penalty for the principal offense in this case is 10 years incarceration; a 3 year period of supervised release; a fine of $250,000; and a mandatory special assessment of $ 100. Therefore, the total maximum sentence for the offense to which you are pleading guilty is 5 years incarceration; a 3 year period of supervised release; a fine of $125,000; and a mandatory special assessment of $100.

5. Supervised release is a period of time following imprisonment during which defendant will be subject to various restrictions and requirements. Defendant understands that if defendant violates one or more of the conditions of any supervised release imposed, defendant may be returned to prison for all or part of the term of supervised release, which could result in defendant serving a total term of imprisonment greater

than the statutory maximum stated above.

FACTUAL BASIS

6. Defendant and the USAO agree and stipulate to the following statement of facts:

I. **Background**

On July 13, 1996, California Highway Patrol Officer Donald Bert was murdered during a routine traffic stop of a vehicle being driven by Hung Mai. After shooting the officer, Mai fled in the officer's patrol car. Mai then traveled to Houston, Texas where he took refuge at the house of a friend, Alex Nguyen. When Nguyen learned of the shooting of the officer, he contacted the FBI. Mai was arrested soon thereafter at Nguyen's house. Mai was then transported to the Orange County jail to face first degree murder charges for the death of Officer Burt in the case of People v. Hung Mai, 96NF1961.

II. **Murder For Hire Conspiracy**

While awaiting trial, Mai maintained contact with his associates in the Orange Boyz and Tiny Rascals Vietnamese gangs. Mai used his contacts outside of the Orange County Jail to continue his distribution of counterfeit securities and weapons.

In October 1997, an undercover officer (UCO) with the Santa Ana Police Department, visited Mai and talked to Mai about Mai's desire to fortify relations between the different prison gangs. During one of the meetings, Mai asked the UCO if he could help him kill a witness on his case. Mai told

the UCO that the witness had been a friend of his, and that he had cooperated with the government. Mai identified the witness as Alex Nguyen. The death of Alex became a recurring point of discussion in the weekly phone calls Mai made to the UCO.

On April 9, 1998, Mai provided the UCO with extensive personal information about Alex Nguyen, to assist the UCO in locating Nguyen so that Nguyen and his family could be murdered.

Also on April 9, 1998, Mai mailed to Pham a photograph of Alex Nguyen. Mai instructed Pham to give the photo to Ha and to tell Ha to give it to the UCO. Pham did as she was instructed by Mai. She obtained the photo from the P.O. Box that she had set up at Mai's direction, and gave it to Ha. Ha then delivered the photo of Alex Nguyen to the UCO.

Thereafter, on April 14, 1998, the UCO met with Ha told him that the murder of Alex Nguyen had been completed. The UCO gave Ha two photographs of Alex Nguyen. The first photograph depicted Nguyen with his head pulled back by the hair and a gun pointed at the side of his head. The second photograph depicted Nguyen as if he had been shot in the head.

After the photographs were given to Ha, Ha, Pham and Mai had several discussions regarding whether the person depicted in the photographs was Alex Nguyen and whether or not the photographs were authentic. Ultimately, Pham took the photographs into the prison and showed them to Mai. Mai

looked at the photographs and was convinced that Alex Nguyen was dead.

On May 29, 1998, Mai contacted defendant Watkins and asked him to see if a missing persons report had been filed on Alex Nguyen. Mai was surprised that no one had come to interview him regarding the disappearance of Alex Nguyen. Watkins, knowing that Mai was conspiring with others to murder Alex Nguyen, told Mai that it would be unwise to check for a missing persons report because "that would be showing your hand." Watkins suggested rather that while he was in Houston, he would make some inquiries using a pay phone. Defendant Watkins thereby counseled Mai and assisted him in his effort to avoid apprehension, trial and punishment for the crime of murder for hire.

WAIVER OF CONSTITUTIONAL RIGHTS

7. By pleading guilty, defendant gives up the following rights:

a) The right to persist in a plea of not guilty.

b) The right to a speedy and public trial by jury.

c) The right to the assistance of counsel at trial, including, if defendant could not afford an attorney, the right to have the Court appoint one for defendant.

d) The right to be presumed innocent and to have the burden of proof placed on the government to prove defendant guilty beyond a reasonable doubt.

e) The right to confront and cross-examine witnesses against defendant.

f) The right, if defendant wished, to testify on defendant's own behalf and present evidence in opposition to the charges, including the right to call witnesses and to subpoena those witnesses to testify.

g) The right not to be compelled to testify, and, if defendant chose not to testify or present evidence, to have that choice not be used against defendant.

By pleading guilty, defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could be filed.

SENTENCING FACTORS

8. Defendant understands that the Court is required to consider and apply the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") but may depart from those guidelines under some circumstances.

9. Defendant and the USAO agree and stipulate to the following applicable sentencing guideline factors: that the base offense level for the count of conviction is 26, pursuant to sections 2X3,1, and 2E1.4 of the United States Sentencing Guidelines and that no adjustments or departures are appropriate.

However, defendant understands that defendant's base offense level could be increased if defendant is a career offender under U.S.S.G. §§ 4B1.1 and 4B1.2. In the event that defendant's offense level is so altered, the parties are not bound by the base offense level stipulated to above.

10. There is no agreement as to defendant's criminal history or criminal history category.

11. The stipulations in this agreement do not bind either the United States Probation Office or the Court. The Court will determine the facts and calculations relevant to sentencing. Both defendant and the USAO are free to: (a) supplement the facts stipulated to in this agreement by supplying relevant information to the United States Probation Office and the Court, (b) correct any and all factual misstatements relating to the calculation of the sentence, and (c) argue on appeal and collateral review that the Court's sentencing calculations are not error, although each party agrees to maintain its view that the calculations in paragraph [9] are consistent with the facts of this case.

DEFENDANT'S OBLIGATIONS

12. Defendant agrees:

a) To plead guilty as set forth in this agreement.

b) To abide by all sentencing stipulations contained in this agreement.

c) To appear as ordered for all court appearances, to surrender as ordered for service of sentence, to obey all conditions of any bond, and to obey all other court orders.

d) Not to commit any crime.

e) To be truthful at all times with Pretrial Services, the U.S. Probation Office, and the Court.

f) To pay the applicable special assessment at or before the time of sentencing unless defendant lacks the ability to pay.

THE USAO'S OBLIGATIONS

13. If defendant complies fully with all defendant's obligations under this agreement, the USAO agrees:

a) To abide by all sentencing stipulations contained in this agreement.

b) At the time of sentencing to move to dismiss the remaining counts of the indictment as against defendant. Defendant agrees, however, that at the time of sentencing the Court may consider the dismissed counts in determining the applicable Sentencing Guidelines range, where the sentence should fall within that range, and the propriety and extent of any departure from that range.

c) At the time of sentencing, provided that defendant demonstrates an acceptance of responsibility for the offense up to and including the time of sentencing, to recommend a two-level reduction in the applicable sentencing guideline offense level, pursuant to U.S.S.G. § 3E1.1, and an additional one-level reduction if available under that section; and,

d) To recommend that the court sentence the defendant at the low end of the applicable Guideline range.

BREACH OF AGREEMENT

14. If defendant, at any time between the execution of this agreement and defendant's surrender for service of defendant's sentence, knowingly violates or fails to perform any of defendant's obligations under this agreement, the USAO may declare this agreement breached. If the USAO declares this agreement breached, and the Court finds such a breach to have

occurred, defendant will not be able to withdraw defendant's guilty plea, and the USAO will be relieved of all of its obligations under this agreement.

15. Following a breach of this agreement by defendant, should the USAO elect to pursue any charge that was either dismissed or not filed as a result of this agreement, then:

a) Defendant agrees that any prosecution not time-barred by the applicable statute of limitations as of the date of defendant's signing of this agreement may be initiated against defendant notwithstanding the expiration of the statute of limitations between the signing of this agreement and the commencement of any such prosecution.

b) Defendant gives up all defenses based on the statute of limitations, any claim of preindictment delay, or any speedy trial claim with respect to any such prosecution.

LIMITED MUTUAL WAIVER OF APPEAL AND COLLATERAL ATTACK

16. Defendant gives up the right to appeal any sentence imposed by the Court, and the manner in which the sentence is determined, provided that (a) the sentence is within the statutory maximum specified above, (b) the Court does not depart upward in offense level or criminal history category, and (c) the Court determines that the total offense level is 26 or below. Defendant also gives up any right to bring a post-conviction attack on the conviction or sentence, except a post-conviction attack based on a claim of ineffective assistance of counsel, a claim of newly discovered evidence, or an explicitly retroactive change in the applicable Sentencing Guidelines, sentencing

statutes, or statutes of conviction.

17. The USAO gives up its right to appeal the Court's Sentencing Guidelines calculations, provided that (a) the Court does not depart downward in offense level or criminal history category and (b) the Court determines that the total offense level is 23 or above.

SCOPE OF AGREEMENT

18. The Court is not a party to this agreement and need not accept any of the USAO's sentencing recommendations or the parties' stipulations. Even if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the maximum established by statute, defendant cannot, for that reason, withdraw defendant's guilty plea, and defendant will remain bound to fulfill all defendant's obligations under this agreement. No one -- not the prosecutor, defendant's attorney, or the Court -- can make a binding prediction or promise regarding the sentence defendant will receive, except that it will be within the statutory maximum.

19. This agreement applies only to crimes committed by defendant, has no effect on any proceedings against defendant not expressly mentioned herein, and shall not preclude any past, present, or future forfeiture actions.

NO ADDITIONAL AGREEMENTS

20. Except as set forth herein, there are no promises, understandings or agreements between the USAO and defendant or defendant's counsel. Nor may any additional agreement,

understanding or condition be entered into unless in a writing signed by all parties or on the record in court.

This agreement is effective upon signature by defendant and an Assistant United States Attorney.

AGREED AND ACCEPTED

UNITED STATES ATTORNEY'S OFFICE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALEJANDRO N. MAYORKAS
United States Attorney

MARC R. GREENBERG — Date 6/7/99
Assistant United States Attorney

I have read this agreement and carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement. No promises or inducements have been made to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

DANIEL B. WATKINS — Date 9 JUN 99
Defendant

I am DANIEL WATKINS' attorney. I have carefully discussed

every part of this agreement with my client. Further, I have fully advised my client of his rights, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this agreement. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.

Jana L. Waltz

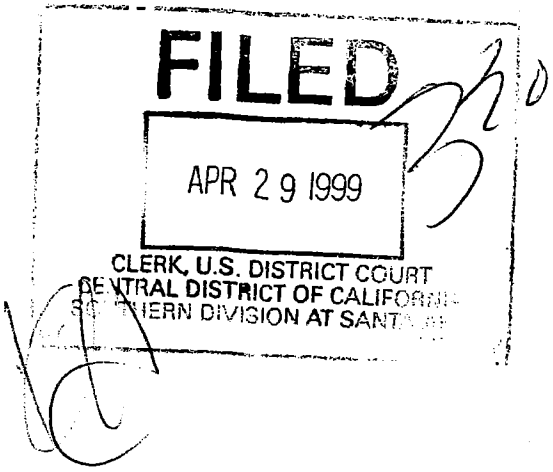
JAMES WALTZ
Counsel for Defendant

June 9, 1999
Date

EXHIBIT E

ALEJANDRO N. MAYORKAS
United States Attorney
GEORGE S. CARDONA
Assistant United States Attorney
Chief, Criminal Division
MARC RICHARD GREENBERG
Assistant United States Attorney
C. MICHAEL ZWEIBACK
Assistant United States Attorney
411 West Fourth Street
Santa Ana, California 92701
Telephone: (714) 338-3590

Attorneys for Plaintiff
UNITED STATES OF AMERICA



UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. VICTORIA PHAM, Defendant.	No. SA CR 98-82 DOC PLEA AGREEMENT FOR DEFENDANT VICTORIA PHAM

1. This constitutes the plea agreement between VICTORIA PHAM ("you" or "defendant") and the United States Attorney's Office for the Central District of California ("the U.S. Attorney's Office") in the above-captioned case. The terms of the agreement are as follows:

PLEA

2. You agrees to plead guilty to Count Two of the indictment in United States v. Victoria Pham, No. SA CR 98-82 DOC. Count Two charges you with aiding and abetting murder-for-hire in violation of Title 18 U.S.C. § 1958 and Title 18 U.S.C. § 2.

ENTERED ON ICMS 112

NATURE OF THE OFFENSE

3. In order to be guilty of aiding and abetting a violating 18 U.S.C. § 1958 as alleged in Count Two, you must have knowingly aided, abetted, counsel, commanded or induced others to travel in interstate commerce, or use or cause another to use the mail or any facility in interstate commerce with the intent that a murder be committed by someone as consideration for money or other pecuniary gain. By signing this agreement, you admit that you are, in fact, guilty of this offense.

PENALTIES

4. The statutory maximum sentence that the court can impose for a conviction of aiding and abetting a violation of 18 U.S.C. § 1958, is 10 years incarceration; a 3 year period of supervised release; a fine of $250,000; and a mandatory special assessment of $ 100.

Therefore, the total maximum sentence for the offense to which you are pleading guilty is 10 years incarceration; a 5 year period of supervised release; a fine of $250,000; and a special assessment of $100.

5. Supervised release is a period of time following imprisonment during which defendant will be subject to various restrictions and requirements. Defendant understands that if defendant violates one or more of the conditions of any supervised release imposed, defendant may be returned to prison for all or part of the term of supervised release, which could result in defendant serving a total term of imprisonment greater than the statutory maximum stated above.

FACTUAL BASIS

6. Defendant and the U.S. Attorney's Office agree and stipulate that the facts set forth in the attached statement of facts are accurate and that they form the factual basis of the plea.

SENTENCING FACTORS

7. Defendant understands that the Court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances.

8. Defendant and the U.S. Attorney's Office agree and stipulate to that the base offense level for the count of conviction is 32, pursuant to section 2E1.4 of the United States Sentencing Guidelines. Defendant and the U.S. Attorney's Office reserve the right to argue that additional specific offense characteristics, adjustments and departures are appropriate. Moreover, defendant understands that defendant's base offense level could be increased if defendant is a career offender under United States Sentencing Guidelines §§ 4B1.1 and 4B1.2. In the event that defendant's offense level is so altered, the parties are not bound by the base offense level stipulated to above.

9. There is no agreement as to defendant's criminal history or criminal history category.

10. Defendant understands that neither the United States Probation Office nor the Court is bound by any stipulation in this agreement, and that the Court, with the aid of the presentence report, will determine the facts and calculations relevant to sentencing. Both defendant and the U.S. Attorney's Office are free to supplement the facts stipulated to in this agreement by supplying relevant information to the United States Probation Office and the

Court, and to correct any and all factual misstatements relating to the calculation of the sentence. Defendant understands that if the Court finds facts or reaches conclusions different from those in any stipulation contained in this agreement, defendant cannot, for that reason alone, withdraw defendant's guilty plea. In the event that the Court's sentencing calculations are different than those set forth in paragraph [8] above, each party agrees to maintain its view on appeal or collateral review that the calculations in paragraph [8] are consistent with the facts of this case, but reserves the right to argue on appeal and collateral review that the Court's calculations are not error.

CONSIDERATION BY THE U.S. ATTORNEY'S OFFICE

11. In exchange for defendant's guilty plea and the complete fulfillment of all defendant's obligations under this agreement, the U.S. Attorney's Office agrees to the following:

a) To recommend a two-level reduction in the applicable sentencing guideline offense level, pursuant to United States Sentencing Guideline §3E1.1, provided that defendant demonstrates an acceptance of responsibility for the offenses up to and including the time of sentencing;

b) To recommend an additional one-level reduction in the applicable sentencing guideline offense level for acceptance of responsibility pursuant to United States Sentencing Guideline §3E1.1(b)(2), provided that: (1) defendant's adjusted offense level is determined by the court to be level 16 or greater; and (2) defendant demonstrates an acceptance of responsibility for the offenses up to and including the time of sentencing; and,

c) To recommend a reduction in the applicable sentencing

guideline offense level due to the defendant's mitigating role in the offense, pursuant to United States Sentencing Guideline §3B1.2.

WAIVER OF CONSTITUTIONAL RIGHTS

12. By pleading guilty, defendant gives up the right to persist in a plea of not guilty and the right to a speedy and public trial by jury. At any trial, whether by jury or by the Court, defendant would have the following rights, which defendant now gives up:

a. The right to the assistance of counsel, including, if defendant could not afford an attorney, the right to have the Court appoint one to represent defendant.

b. The right to be presumed innocent and to have the burden of proof placed on the government to prove defendant guilty beyond a reasonable doubt.

c. The right to confront and cross-examine witnesses against defendant.

d. The right, if defendant wished, to testify on defendant's own behalf and present evidence in opposition to the charges, including the right to call witnesses and to subpoena those witnesses to testify.

e. The right not to be compelled to testify, and, if defendant chose not to testify or present evidence, to have that choice not be used against defendant.

13. By pleading guilty, defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could be filed.

WAIVER OF APPEAL AND COLLATERAL ATTACK

14. Defendant understands that the law gives defendants the right to appeal sentences imposed under the Sentencing Guidelines. Defendant, however, gives up the right to appeal any sentence imposed, and the manner in which the sentence is determined, provided that defendant's sentence is within the statutory maximum specified above. Defendant also gives up any right to bring a post-conviction attack on the sentence, except a post-conviction attack based on a claim of ineffective assistance of counsel.

15. This agreement does not affect in any way the right of the U.S. Attorney's Office to appeal the sentence imposed by the Court.

16. Defendant agrees that if, at or before the time of sentencing, defendant believes that the U.S. Attorney's Office has acted in violation of this agreement in any way, defendant will make that claim at or before the time of sentencing. If defendant does not object at or before the time of sentencing, defendant gives up any right to later make that claim in challenging the conviction or sentence on appeal or collateral attack.

PARTIES TO AGREEMENT

17. Defendant understands that the Court is not a party to this agreement and is under no obligation to accept any recommendation by the U.S. Attorney's Office or the parties regarding the sentence to be imposed. Defendant further understands that even if the Court ignores such a recommendation and/or imposes any sentence up to the maximum established by statute, defendant cannot, for that reason, withdraw defendant's guilty plea, and defendant will remain bound to fulfill all defendant's obligations under this agreement. Defendant understands that no one -- not the

prosecutor, defendant's attorney, or the Court -- can make a binding prediction or promise regarding the sentence defendant will receive, except that it will be within the statutory maximum.

18. This agreement is limited to the U.S. Attorney's Office and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities. This agreement applies only to crimes committed by defendant. This agreement does not apply to any forfeiture proceedings, and shall not preclude any past, present, or future forfeiture actions.

NO ADDITIONAL AGREEMENTS

19. Except as set forth herein, there are no promises, understandings or agreements between the government and defendant or defendant's counsel. Nor may any additional agreement, understanding or condition be entered into unless in a writing signed by all parties or on the record in court.

AGREED AND ACCEPTED

UNITED STATES ATTORNEY'S OFFICE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALEJANDRO N. MAYORKAS
United States Attorney

MARC RICHARD GREENBERG
Assistant United States Attorney

I have read this agreement and carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement.

No promises or inducements have been made to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

VICTORIA PHAM
Defendant

4/29/99
Date

I am Victoria Pham's attorney. I have carefully discussed every part of this agreement with my client. Further, I have fully advised my client of her rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.

KENNETH REED
Counsel for Defendant
Victoria Pham

4/29/99
Date

UNITED STATES V. HUNG MAI ET AL
FACTUAL BASIS

I. Background

On July 13, 1996, California Highway Patrol Officer Don J. Burt conducted a routine traffic stop of a vehicle being driven by Hung Mai. When Officer Burt discovered that Mai was in possession of thousands of dollars of counterfeit traveler's checks, Mai shot the officer, killing him.

Mai fled in the officer's patrol car. Mai then traveled to Houston, Texas where he took refuge at the house of a friend, Alex Nguyen. When Nguyen learned of the shooting of the officer he contacted the FBI. Mai was arrested soon thereafter at Nguyen's house. Mai was transported to the Orange County jail to face first degree murder charges for the death of Officer Burt in the case of People v. Hung Mai, Case No. 96NF1961, charging a violation of California Penal Code Sections 187(a) (murder) and 190.2(a)(7) (intentional killing of a peace officer while engaged in the course of the performance of his duties).

II. Murder For Hire Conspiracy

The United States and defendant, stipulate and agree that if the case proceeded to trial, the following facts would be established beyond a reasonable doubt:

While awaiting trial in the Orange County jail, Mai maintained contact with his associates inside and outside the jail. Mai uses his contacts outside of the Orange County Jail to continue his distribution of counterfeit securities and weapons. Within the prison system, Mai used his contacts in the jail in an attempt to organize the disparate Asian gangs into a single commission, the "Asian Mafia."

In October 1997, an undercover officer (UCO) with the Santa Ana Police Department,

visited Mai and talked to Mai about Mai's desire to fortify relations between the different prison gangs. During one of the meetings, Mai asked the UCO if he could help him kill a witness on his case. Mai told the UCO that the witness had been a friend of his, and that he had cooperated with the government. Mai identified the witness as Alex Nguyen. The death of Alex Nguyen became a recurring point of discussion in the weekly phone calls Mai made to the UCO.

On January 25, 1998, Mai arranged for the sale of a machine gun and silencer to the UCO. The gun, a MAC-11 machine gun, was delivered to the UCO by Ha. Two days later, during a test firing of the weapon, the weapon mis-fired. The range officer, Joseph Boyd, sustained a fatal gun shot wound to the head. The gun was subsequently tested by the Bureau of Alcohol, Tobacco and Firearms and determined to be a machine gun.

On January 30, 1998, Judge Alicemarie H. Stotler authorized the interception of wire communications to and from the prison phone used by Mai. The court authorized the continued interception of wire communications on April 1, 1998, and again on May 1, 1998. During these interception periods, the UCO received three additional machine guns with silencers, counterfeit traveler's checks, counterfeit cashier's checks and stolen merchandise from Ha. All of the transactions were coordinated through Mai.

On April 9, 1998, Mai provided the UCO with extensive personal information about Alex Nguyen to assist the UCO in locating Nguyen so that Nguyen and his family could be murdered. He provided the UCO with Nguyen's social security number, phone number, home address, business address, driver's license number and a description of the cars he and his family drive.

On April 9, 1998, Mai spoke with Pham and Ha in a three-way phone call. Mai instructed Pham to contact Watkins to obtain the most current address and phone number for Alex Nguyen.

Mai told Pham to give the information she got from Watkins to Ha and instructed Ha to give it to the UCO.

Also on April 9, 1998, Mai mailed to Pham a photograph of Alex Nguyen. Mai instructed Pham to give the photo to Ha and to tell Ha to give it to the UCO. Pursuant to Mai's orders, Pham obtained the photograph from a Post Office Box that she had set up at Mai's direction, and gave it to Ha. Ha then delivered the photo of Alex Nguyen to the UCO. The photograph of Alex Nguyen had previously been given to Mai by Watkins. Watkins had obtained it from the discovery materials provided to him by the District Attorney on the State murder case.

Prior to the planned murder of Alex Nguyen, it was agreed between Mai and the UCO that Mai would pay the UCO's expenses incurred in carrying out the murder of Alex Nguyen, including the UCO's travel expenses and payments to the "assassins."

Thereafter, on April 14, 1998, the UCO met with Ha, at which time the UCO told Ha that the murder of Alex Nguyen had been completed. The UCO gave Ha two photographs of Alex Nguyen. The first photograph depicted Nguyen with his head pulled back by the hair and a gun pointed at the side of his head. The second photograph depicted Nguyen as if he had been shot in the head. The computer enhanced photograph made it appear that Nguyen had been executed.

After the photographs were given to Ha, Pham, Mai and Ha had a discussion regarding whether the person depicted in the photographs was Alex Nguyen and whether or not the photographs were authentic. At Mai's direction, Pham took the photographs into the prison and showed them to Mai. Mai looked at the photographs and was convinced that Alex Nguyen was dead.

CERTIFICATE OF SERVICE BY MAIL

I, **LAURIE B. FINNEY**, declare:

That I am a citizen of the United States and resident or employed in Orange County, California; that my business address is Office of United States Attorney, 411 W. Fourth Street, Suite 8000, Santa Ana, California 92701-4599; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on **April 29, 1999**, I deposited in the United States mail, Santa Ana, California in the above-entitled action, in an envelope bearing the requisite postage, a copy of **PLEA AGREEMENT FOR DEFENDANT VICTORIA PHAM** addressed to: **SEE ATTACHED** at THEIR last known address, at which place there is delivery service by United States mail.

This Certificate is executed on April 29, 1999 at Santa Ana, California.

I certify under penalty of perjury that the foregoing is true and correct.

Laurie B. Finney

LAURIE B. FINNEY

ATTACHMENT

KENNETH REED
1605 E. 4th Street
Santa Ana, CA 92701

U.S. PROBATION OFFICE
312 N. Spring Street
6th Floor
Los Angeles, CA 90012

UNITED STATES DISTRICT CO T
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES - GENERAL

Case No: SA CR 98-82-2-DOC Date: April 29, 1999

==========

PRESENT: HONORABLE DAVID O. CARTER, JUDGE

Susan R. Sedei	Debbie Gale	Marc Greenberg & Michael Zweiback
Deputy Clerk	Court Reporter	Asst. U. S. Attorney

INTERPRETER: _____

==========

U.S.A. vs (Dfts listed below) Attorneys for Defendants

1) VICTORIA PHAM — X pres X custody ___bond
1) Kenneth Reed — X pres X apptd ____retnd

PROCEEDINGS: CHANGE OF PLEA

__X__ Defendant moves to change plea to the Indictment.

__X__ Defendant sworn

__X__ Defendant enters new and different plea of GUILTY to Count(s) 1 and 2 of the Indictment.

__X__ The Court questions the defendant regarding plea of GUILTY and FINDS that a factual basis has been laid and Further FINDS the plea is knowledgeable and voluntarily made. The Court ORDERS the plea accepted and entered.

__X__ The Court refers the defendant to the Probation Office for investigation and an expedited report and the matter is continued to May 28, 1999 at 8:00 a.m. for sentencing.

_____ The Court Further ORDERS _____

__X__ Other Pretrial Conference set 5-3-99 and Jury Trial set 5-4-99 are hereby vacated as to defendant Victoria Pham only

cc: AUSA
USPO
PSA

ENTERED ON ICMS

MINUTES FORM 6
CRIM - GEN

Initials of Deputy Clerk _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
CRIMINAL MINUTES - SENTENCING AND JUDGMENT

Case No. SA CR 98-82-2-DOC Date: June 30, 1999

Hon. DAVID O. CARTER, JUDGE

M. Cushman for S. Sedei	Debbie Gale	Marc Greenberg / Michael Zweiback
Deputy Clerk	Court Reporter	Asst. U. S. Attorney

Victoria Pham	Kenneth Reed	None
Defendant	Counsel apptd/rtnd	Interpreter

SENTENCE:

XX **REFER TO JUDGMENT AND PROBATION/COMMITMENT ORDER** (attached hereto) **and**
____ **SEE BELOW.**
____ Imprisonment for _____ on each of count(s) _____.
Count(s) _____ concurrent/consecutive to count(s) _____.
____ Fine of $_____ is imposed on each of count(s) _____.
____ Execution ____ Imposition of Sentence as to imprisonment only suspended on counts _____.
____ Imposition of fine suspended on count(s) _____.
____ Confined in a jail-type institution for _____ to be served on consecutive _____ from _____ to _____, commencing _____ to _____, and thereafter until the jail-type sentence has been completed;____
_____ months/years _____ SUPERVISED RELEASE _____ PROBATION imposed on count(s) _____ consecutive/concurrent to count(s) _____

under the usual terms and conditions (see back of Judgment/Commitment Order) and the following additional terms and conditions, under the direction of the Probation Office:

_____ Perform _____ hours of community service.
_____ Serve _____ in a CCC/CTC.
_____ Pay $_____ fine in amounts and times determined by P/O.
_____ Make $_____ restitution in amounts and times determined by P/O.
_____ Participate in a program for treatment of narcotic/alcohol addiction.
_____ Pay any fine, assessment or costs imposed by this sentence & that remains unpaid at commencement of community supervision.
_____ Comply with the rules/regulations of INS, if deported not return to U.S.A. illegally and upon any reentry during period of supervision report to the nearest P/O within 72 hours.
_____ OTHER CONDITIONS: _____

____ Pursuant to Section 5E1.2(f), all fines are waived, including costs of imprisonment and supervision. The Court FINDS the defendant does not have the ability to pay.
____ Pay $_____, per count, special assessment to the United States for a total of $_____.
____ Imprisonment for _____ and for a study pursuant to 18 USC _____ with results to be furnished to the Court within _____, not later than _____, whereupon the sentence shall be subject to modification. This matter is set for further hearing on _____.
XX On Government's motion, Count 1 of the Indictment, ORDERED dismissed.
XX Defendant informed of right to appeal.
____ ORDER sentencing transcript for Sentencing Commission. ____ FILED statement of reasons.
____ Bond exonerated ____ upon surrender ____ upon service of _____.
____ Execution of sentence is stayed until 12 noon, _____ at which time the defendant shall surrender to the designated facility of the Bureau of Prisons or, if no designation made, to the U.S.Marshal, Los Angeles.
____ Defendant ORDERED remanded to/released from custody of U.S. Marshal forthwith.
____ Issued remand/release #_____.
____ Present bond to continue as bond on appeal.
____ Appeal bond set at $_____.
XX OTHER: The Court hears testimony of Dr. Thomas and Dr. Nancy Kaser-Boyd and reviews Governments exhibits (see list of exhibits and witnesses filed June 30, 1999)

____ FILED and distributed judgment. Issd JS-3. ENTERED.

Deputy Clerk Initials SJ for MC

ENTERED ON ICMS 7/6.

ntral District of Californ a

UNITED STATES OF AMERICA vs.
Defendant VICTORIA PHAM
Residence Metropolitan Detention Center
535 N. Alameda
Los Angeles, CA 90012

SA CR 98-82-2-DOC
Social Security # 586-42-6526
Mailing Address Same

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on: June 30, 1999
Month / Day / Year

ENTERED
JUL - 2 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
BY DEPUTY

COUNSEL:

____ WITHOUT COUNSEL
However, the court advised defendant of right to counsel and asked if defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

__X__ WITH COUNSEL: Kenneth Reed, apptd.

PLEA:

__X__ GUILTY, and the Court being satisfied that there is a factual basis for the plea.

____ NOLO CONTENDERE ____ NOT GUILTY

FINDING:

There being a verdict of ____ GUILTY on _____, defendant has been convicted as charged of the offense(s) of:

18 USC 1958, 2(a): Use of Interstate Commerce Facility in the Commission of Murder-for Hire, Aiding and Abetting (Count 2), Class D Felony

JUDGMENT AND PROBATION/COMMITMENT ORDER:
The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to Section 5E1.2(e) of the Guidelines, all fines are waived as it is found that the defendant does not have the ability to pay a fine.

It Is ordered that the defendant shall pay to the United States a special assessment of $100.00, which is due immediately.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Victoria Pham, is hereby committed on Count 2 of the Indictment to the custody of the Bureau of Prisons to be imprisoned for a term of 87 months.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years under the following terms and conditions: (1) The defendant shall comply with the rules and regulations of the U. S. Probation Office and General Order 318; (2) During the period of community supervision the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment; and (3) The defendant shall participate in a psychological/psychiatric counseling or treatment program, as approved and directed by the Probation Officer.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

____ This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed by: District Judge David O. Carter
DAVID O. CARTER

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk

Dated/Filed 7-1-99
Month / Day / Year

By Susan R. Slagle for Mary Cushman, Deputy Clerk

ENTERED ON ICMS

ALEJANDRO N. MAYORKAS
United States Attorney
MONICA BACHNER
Assistant United States Attorney
Chief, Santa Ana Branch Office
MARC R. GREENBERG
Assistant United States Attorney
411 West Fourth Street
Suite 8000
Santa Ana, California 92701
Telephone: (714) 338-3590

Attorneys for Plaintiff

FILED
JUN 10 1999
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. HUNG MAI ET AL, Defendant.	No. SA CR 98-82-DOC PLEA AGREEMENT FOR DEFENDANT DANIEL B. WATKINS

United States of America, by and through its attorney of record, hereby files the attached plea agreement between plaintiff and defendant DANIEL B. WATKINS, in the above-captioned case.

DATED: June 10, 1999

Respectfully Submitted,

ALEJANDRO N. MAYORKAS
United States Attorney

MONICA BACHNER
Assistant United States Attorney
Chief, Santa Ana Branch Office

MARC R. GREENBERG
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

ENTERED ON ICMS 136

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DAN WATKINS, Defendant.	SA CR 98-82(A)-DOC F I R S T S U P E R S E D I N G I N F O R M A T I O N [18 U.S.C. § 3: Accessory After the Fact]

The United States Attorney charges:

COUNT ONE

[18 U.S.C. § 3]

On or about April 9, 1998, in Orange County, within the Central District of California, Hung Mai knowingly and willfully used and caused another to use the United States mail, with the intent that a murder be committed in violation of State law, as consideration for a promise and agreement to pay money, in violation of Title 18 United States Code, Section 1958.

MRG/mrg

Thereafter, on or about May 29, 1998, in Orange County, within the Central District of California, defendant Dan Watkins, knowing that the above described offense against the United States had been committed, assisted Hung Mai with the intent to hinder or prevent Hung Mai's apprehension, trial and punishment, in violation of Title 18 United States Code, Section 3.

ALEJANDRO N. MAYORKAS
United States Attorney

GEORGE S. CARDONA
Assistant United States Attorney
Chief, Criminal Division

MONICA BACHNER
Assistant United States Attorney
Chief, Santa Ana Office

CERTIFICATE OF SERVICE BY MAIL

I, **LAURIE B. FINNEY**, declare:

That I am a citizen of the United States and resident or employed in Orange County, California; that my business address is Office of United States Attorney, 411 W. Fourth Street, Suite 8000, Santa Ana, California 92701-4599; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on **June 10, 1999**, I deposited in the United States mail, Santa Ana, California in the above-entitled action, in an envelope bearing the requisite postage, a copy of **PLEA AGREEMENT FOR DEFENDANT DANIEL B. WATKINS** addressed to: **SEE ATTACHED** at THEIR last known address, at which place there is delivery service by United States mail.

This Certificate is executed on June 10, 1999 at Santa Ana, California.

I certify under penalty of perjury that the foregoing is true and correct.

Laurie B. Finney

LAURIE B. FINNEY

ATTACHMENT

JAMES WALTZ
23030 Lake Forest Drive
Suite 201
Laguna Hills, CA 92653

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES - GENERAL

Case No: SA CR 98-82-4-DOC Date: June 14, 1999

PRESENT: HONORABLE DAVID O. CARTER, JUDGE

Susan R. Sedei	Debbie Gale	Marc Greenberg & Michael Zweiback
Deputy Clerk	Court Reporter	Asst. U. S. Attorney

INTERPRETER: _____

U.S.A. vs (Dfts listed below) Attorneys for Defendants

1) DANIEL WATKINS — X pres X custody ___bond
1) James Waltz — X pres X apptd ____retnd

PROCEEDINGS: CHANGE OF PLEA

X Defendant moves to change plea to the 1st Superseding Information.

X Defendant sworn

X Defendant enters new and different plea of GUILTY to Count(s) 1 of the 1st Superseding Information .

X The Court questions the defendant regarding plea of GUILTY and FINDS that a factual basis has been laid and Further FINDS the plea is knowledgeable and voluntarily made. The Court ORDERS the plea accepted and entered.

X The Court refers the defendant to the Probation Office for investigation and report and the matter is continued to August 16, 1999 at 1:30 p.m. for sentencing.

X The Court Further ORDERS jury trial set 6-22-99 at 8:30 a.m. hereby vacated.

X Other Defendant orally and through counsel waived any Possible conflict with the Court. Waiver of Indictment signed and filed this date.

cc: AUSA
USPO
PSA

ENTERED ON ICMS 6/22
mn

MINUTES FORM 6
CRIM - GEN

Initials of Deputy Clerk

UNITED STATES DISTRICT COU
:NTRAL DISTRICT OF CALIFOR..A
CRIMINAL MINUTES - GENERAL

AMENDED

Case No: SA CR 98-82-4-DOC Date: June 14, 1999

PRESENT: HONORABLE DAVID O. CARTER, JUDGE

Susan R. Sedei	Debbie Gale	Marc Greenberg & Michael Zweiback
Deputy Clerk	Court Reporter	Asst. U. S. Attorney

INTERPRETER: _____

U.S.A. vs (Dfts listed below) Attorneys for Defendants

1) DANIEL WATKINS — X pres X custody ___bond
1) James Waltz — X pres X apptd ____retnd

PROCEEDINGS: CHANGE OF PLEA

X — Defendant is arraigned and states his true name is as charged. Defendant acknowledges receipt of a copy of the 1st Superseding Information and waives reading thereof.

X — Defendant moves to change plea to the 1st Superseding Information.

X — Defendant sworn

X — Defendant enters new and different plea of GUILTY to Count(s) 1 of the 1st Superseding Information .

X — The Court questions the defendant regarding plea of GUILTY and FINDS that a factual basis has been laid and Further FINDS the plea is knowledgeable and voluntarily made. The Court ORDERS the plea accepted and entered.

X — The Court refers the defendant to the Probation Office for investigation and report and the matter is continued to August 16, 1999 at 1:30 p.m. for sentencing.

X — The Court Further ORDERS jury trial set 6-22-99 at 8:30 a.m. hereby vacated.

X — Other Defendant orally and through counsel waived any Possible conflict with the Court. Waiver of Indictment signed and filed this date.

cc: AUSA
USPO
PSA

ENTERED ON ICMS 6/23

MINUTES FORM 6
CRIM - GEN

Initials of Deputy Clerk

United States District Court
Central District of California

UNITED STATES OF AMERICA vs.
Defendant DANIEL BRUCE WATKINS
Residence Metropolitan Detention Center
535 No. Alameda Street
Los Angeles, CA 90012

SA CR 98-82-4-DOC
Social Security # 572-80-9440
Mailing Address 5121 Webb Place
Yorba Linda, CA
92682

JUDGMENT AND PROBATION/COMMITMENT ORDER ON SENTENCING

ENTERED
AUG 19 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
DEPUTY

In the presence of the attorney for the government, the defendant appeared in person, on: 8-17-99
Month / Day / Year

COUNSEL:
____ WITHOUT COUNSEL
However, the court advised defendant of right to counsel and asked if defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.
__X__ WITH COUNSEL: James Waltz, appointed

PLEA:
__X__ GUILTY, and the Court being satisfied that there is a factual basis for the plea.
____ NOLO CONTENDERE ____ NOT GUILTY

FINDING:
There being a verdict of ____ GUILTY on _____, defendant has been convicted as charged of the offense(s) of:

18 USC 3: Accessory After the Fact (Single-Count First Superseding Information), Class D Felony.

JUDGMENT AND PROBATION/COMMITMENT ORDER:
The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

Forty-six (46) months on Count 1 of the Single-Count First Superseding Information. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years under the following terms and conditions: (1) The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318; (2) During the period of community supervision the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment; and (3) At the discretion of the Probation Officer, the defendant shall participate in a domestic violence treatment program/counseling as approved and directed by the Probation Officer.

Pursuant to Section 5E1.2(e) of the Guidelines, all fines are waived as it is found that the defendant does not have the ability to pay a fine.

IT IS ORDERED that the defendant shall pay to the United States forthwith a special assessment of $100.00.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Court RECOMMENDS that the defendant be placed at Metropolitan Detention Center until designation by the Bureau of Prisons.

Court RECOMMENDS that the defendant be housed at Nellis.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

____ This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed by: District Judge David O. Carter
DAVID O. CARTER

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk

Dated/Filed 8-18-99
Month / Day / Year

By Susan R. Sedei, Deputy Clerk
Susan R. Sedei

ENTERED ON ICMS 160

Defendant: Daniel Bruce Watkins
Case Number: SA CR 98-82-4

STATEMENT OF REASONS

_X_ The court adopts the factual findings and guideline application in the presentence report.

OR

____ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 23

Criminal History Category: I

Imprisonment Range: 46-57 months

Supervised Release Range: 3 years

Fine Range: $ ____ to $ ____

_X_ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

__ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

__ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

__ Partial restitution is ordered for the following reason(s):

____ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

____ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

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 MOTION FOR JUDICIAL NOTICE

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