IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

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

HONORABLE RICHARD WEATHERSPOON

MICHAEL J. HERSEK
State Public Defender

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

1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300
Renard@ospd.ca.gov

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL RULES

CONSTITUTIONS

TABLE OF AUTHORITIES

STATE STATUTES

TABLE OF AUTHORITIES

STATE RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. Unless expressly noted to the contrary, the absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

For the convenience of the Court, the arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

//

ARGUMENT

I

THE JUDGMENT MUST BE REVERSED BECAUSE MR. MAI'S COUNSEL LABORED UNDER AN ACTUAL CONFLICT OF INTEREST IN VIOLATION OF HIS RIGHTS UNDER ARTICLE I, SECTION 15 AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Mr. Mai argued that his attorneys labored under severe conflicts of interest in violation of his state and federal constitutional rights to the effective assistance of counsel uninfluenced by conflicting interests, a fair and reliable trial, and a reliability death verdict. (AOB 19-166.)[1] Although the trial court was aware of facts creating the potential for fatally divided interests, the court violated its constitutional duty to inquire into those conflicts and the potential they had to adversely affect their representation of Mr. Mai. (AOB 40-62, 108-110, and authorities cited therein.)[2] Furthermore, defense counsel and the state prosecutor violated their duties by affirmatively misleading the court and Mr. Mai's conflict attorney about facts critical to the likelihood that the conflicts would adversely influence defense counsel's trial decisions. (AOB 40-62.) As a result, the record fails to establish that Mr. Mai made a knowing and intelligent waiver of his right to the effective assistance of counsel

---

[1] In this brief, the following abbreviations are used: "AOB" refers to appellant's opening brief, "RB" refers to respondent's brief, and "RT" and "CT" refer to the reporter's and clerk's transcripts, respectively. Finally, all statutory references are to the Penal Code unless otherwise noted.

[2] For ease of reference, all future references to Mr. Mai's opening brief also incorporate by reference all legal authorities cited therein.

unencumbered by conflicting interest. (AOB 40-62, 108-110.)

In the end, the conflicts' potential to influence counsel's performance was realized through their self-serving advice and decisions which guaranteed a death sentence despite the strong likelihood that Mr. Mai was not even *eligible* for the death penalty. In other words, the conflicts ripened into an "actual conflict"
within the meaning of the state and federal Constitutions. (AOB 25-27, 63-141.)

While defense counsel themselves violated their basic constitutional and ethical duties, the state court and prosecutor were equally responsible for the resulting miscarriage of justice because they failed to comply with their own constitutional and ethical duties. (AOB 40-62, 108-110.) Thus, because the actual conflict was attributable at least in part to the state and created "'"circumstances of th[e] magnitude"' of the denial of counsel entirely or during a critical stage of the proceeding," the limited presumption of prejudice under *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348-349 (hereafter "*Sullivan* presumption") must "be applied in order to safeguard the defendant's fundamental right to the effective assistance of counsel under the Sixth Amendment" and the state Constitution. (*People v. Rundle* (2008) 43 Cal.4th 76, 169, 173, quoting *Mickens v. Taylor* (2002) 535 U.S. 162, 166, 175 [hereafter "*Mickens*"]; AOB 142-166.)

Respondent counters that there was no actual conflict of interest. (RB 23-27.) Respondent relies on the very limited waiver colloquy to contend that Mr. Mai knowingly and intelligently waived any and all potential conflicts. (RB 21-24.) Alternatively, respondent contends that Mr. Mai has failed to demonstrate adverse effect under the *Strickland* test (*Strickland v. Washington* (1984) 466 U.S. 668 (hereafter "*Strickland*") for

ineffective assistance because some hypothetical unconflicted attorney could have made the same decisions as Mr. Mai's counsel. (RB 27, 29, 32, 36-37.) Finally, respondent contends that the *Sullivan* "presumption of prejudice" standard does not apply to the conflicts in this case, as there was no "prejudice" as defined in *Strickland*, and therefore the judgment must be affirmed. (RB 37-40.)

Respondent's contentions are without support in either the facts or the law.

B. The Record Demonstrates the Existence of Potential Conflicts of Interest That Posed a Grave Danger of Improperly Influencing Counsel's Representation of Mr. Mai

1. An Actual Conflict is Shown by the Effect a Potential Conflict Actually Had on Defense Counsel's Performance

At the outset, respondent misconstrues the meaning of, and showing necessary to demonstrate, an unconstitutional conflict of interest. According to respondent, a defendant must first prove the existence of an "actual conflict" separate and apart from its adverse effect on counsel's representation. (RB 14-15, 26-27.)[3] Respondent is wrong.

As discussed in the opening brief, the United States Supreme Court has unequivocally explained that an "*actual conflict [is not] something separate and apart from adverse effect.*" (*Mickens*, *supra*, 535 U.S. at pp. 171-172 & fn. 5, italics added; accord, e.g., *People v. Doolin* (2009) 45

---

3 For instance, as respondent puts it, "there was no actual conflict . . ." but "even assuming arguendo an *actual conflict*," Mr. Mai has failed to "demonstrate deficient performance based on that actual conflict affecting counsel's performance." (See RB 26-27.)

Cal.4th 390, 418.) By definition, "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that [*actually*] adversely affects counsel's performance," as opposed to a mere "theoretical division of loyalties." (*Mickens*, *supra*, at pp. 171-172 & fn. 5; accord, e.g., *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 348-349; *Wood v. Georgia* (1981) 450 U.S. 261, 272-273; *People v. Doolin*, *supra*, 45 Cal.4th at pp. 421, 428 [adopting same standard under state Constitution].) In other words, under *Mickens*, "an 'actual conflict' is defined by the effect [i.e., adverse effect] a potential conflict had on counsel's performance." (*Alberni v. McDaniel* (9th Cir. 2006) 458 F.3d 860, 870; AOB 26, 64.)[4]

2. Defense Investigator Daniel Watkins's Indictment, Allegations Against Defense Counsel, and Other Evidence of Their Wrongdoing Related to Mr. Mai's Crimes Created A Conflict of Interest that Carried a Grave Potential to Adversely Affect Defense Counsel's Representation

As discussed in detail in the opening brief, Daniel Watkins was defense counsel's court-appointed investigator in this case. During the pre-trial, investigatory stage of this case, the federal government indicted Watkins, Mr. Mai, Mr. Mai's girlfriend, Vickie Pham, and a fourth person as co-conspirators in a plot to kill Alex Nguyen, the state's prosecution witness in this case. (AOB 19-22, 31-32.) According to the federal government's allegations and record evidence detailing his investigation in

---

[4] It is true that before the United State Supreme Court's 20002 decision in *Mickens*, a number of courts articulated the standard as the two pronged test respondent identifies, being whether an (1) "actual conflict" (2) "adversely affected" counsel's performance. However, that articulation of the standard has been incorrect for a decade. (See, e.g., *People v. Doolin*, *supra*, 45 Cal.4th at p. 418.)

this case, Watkins was indicted for activities he undertook in his role as defense counsel's agent and investigator. (*Ibid.*) Further, through a document his own counsel submitted to the Assistant United States Attorney (AUSA) prosecuting Watkins and Mr. Mai – and later submitted to the trial court in this case – Watkins admitted and alleged that he and defense counsel knew that Mr. Mai planned to kill Nguyen, that "plan . . . was well known among his defense team," Watkins simply "took [defense counsel's] directions" and "all his activities were blessed by [defense counsel] Peters . . . and O'Connell." (1-CT 156; AOB 19-22, 31-32.)

Watkins's allegation against defense counsel effectively accused them of being unindicted co-conspirators or otherwise criminally liable for their own and his conduct in connection to the related conspiracy to kill the state prosecution witness. (AOB 28-40.) This plausible allegation and other evidence detailed in the opening brief and below were more than sufficient to provoke defense counsel's fear of investigation, criminal and/or disciplinary charges so as to trigger the instinctive desire to protect their own liberty, livelihood and reputation. (AOB 28-40.) As such, defense counsel had powerful personal interests to curry favor with the state and federal prosecuting authorities and to avoid an adversarial trial and a vigorous defense which could open the door to evidence of their alleged wrongdoing and antagonize the state and federal prosecuting authorities. Hence, their instinctive interest in self-preservation carried a grave danger to conflict with Mr. Mai's best interests and influence defense counsel's choice of strategies in representing him. (AOB 28-40.)

Respondent does not dispute that a plausible allegation that counsel has engaged in criminal activity or other wrongdoing related to the crimes

for which his or her[5] client is charged creates a conflicting personal interest that could potentially influence, or "adversely affect," counsel's performance. (See AOB 28-31, citing inter alia, *United States v. Merlino* (3rd Cir. 2003) 349 F.3d 144, 151-152, *United States v. Fulton* (2nd Cir. 1993) 5 F.3d 605, 610, 613, and *United States v. Register* (11th Cir. 1999) 182 F.3d 820, 823-834.) Nor does respondent dispute that this potential is particularly acute when the allegation is made to the same entity prosecuting the client. (See AOB 29-30, citing, inter alia, *In re Gay* (1998) 19 Cal.4th 771, 828, *Thompkins v. Cohen* (7th Cir. 1992) 965 F.2d 330, 332, *United States v. Greig* (5th Cir. 1992) 967 F.2d 1018, 1020-1022, and *United States v. Levy* (2nd Cir. 1994) 25 F.3d 146, 153, 145.) Finally, respondent does not dispute that such a conflict ripens into an unconstitutional, "actual" one if it actually affects or influences counsel's performance. (See AOB 28-31, 63-69.)[6]

Respondent's only dispute is with the inferences to be drawn from the facts. According to respondent, Watkins's conduct and allegations did not create any conflicting interests that could even potentially impact defense counsel's representation of Mr. Mai in this case. (RB 23-27.)[7]

---

[5] For ease of reference, and since both defense attorneys and Mr. Mai were all male, Mr. Mai shall hereafter use to the male pronoun in discussing the law.

[6] For ease of reference, Mr. Mai shall refer to conflicts that arise from plausible evidence or allegations of an attorney's criminal or unethical conduct related to his client's crimes that are made to the entities prosecuting his client (see AOB 27-31) as "related attorney wrongdoing conflicts."

[7] Although respondent uses the term "actual conflict" in making

(continued...)

Respondent offers a number of reasons in support of its contention. All are without merit.

a. Respondent Erroneously Contends That There Was No Conflict Because Watkins Neither Admitted His Own Culpability Nor Alleged That Defense Counsel Were Culpable in the Alleged Conspiracy to Kill the State Witness

Respondent does not dispute that the memo written by Watkins's attorney to, among others, the AUSA prosecuting him and Mr. Mai "says Mai told Watkins about Mai's plan to kill witness Nguyen. However, it also says Watkins denies all the allegations in the federal complaint and denies any wrongdoing. (1-CT 156.)" (RB 27.)[8] From this, respondent contends that "there is no 'admission' by Watkins to any criminal conduct in the Waltz Memo. (1-CT 156.)" (RB 24.)

Further, respondent contends, "[n]either defense counsel Peters nor O'Connell risked criminal liability because of their employing Watkins as a defense investigator in this case. . . . [T]he 987.9 records Mai relies on contain a list of legitimate investigative work for Mai's defense performed by Watkins in this case." (RB 24 & fn. 12.) Therefore, respondent

---

[7](...continued)
these contentions under the argument headings that Mr. Mai knowingly and intelligently waived any conflict (RB 21), and that the conflict did not adversely affect counsel's performance (RB 24), it is clear that the substance of respondent's contentions go to the initial question of whether there existed a conflict of interest that could potentially influence counsel's representation of Mr. Mai, or a "potential conflict." Hence, Mr. Mai shall use the correct term, "potential conflict," under the correct analysis in replying to respondent's contentions in this regard.

[8] Respondent refers to this document as the "Waltz memo." (RB 16-17, 23-24, 27, 31, 39.)

concludes, Watkins's statements "are easily reconciled with an interpretation that Mai's counsel were kept informed of Watkins' lawful activities in assisting the defense in this case, and approved of, and directed those activities. (See 987.9 CT dated Jan. 9, 2009, at p. 30; 987.9-CT 21-168.)" (RB 27.) Respondent's interpretation of the evidence is unreasonable.

The section 987.9 materials contain Watkins's billing records in which he documented various activities he undertook in his role as defense counsel's investigator and agent, including, among other things: (1) traveling to Nguyen's home town of Houston, Texas, and investigating and obtaining information about Nguyen and his family members, including all relevant addresses connected to them (987.9-CT 64-83); (2) providing "legal materials" to Mr. Mai in unredacted form and regularly conferring with him, as well as their other co-conspirator, Vickie Pham, in person and – upon defense counsel's motion – by way of unmonitored telephone calls (1-CT 54, 79; 987.9-CT 43-83, 67-75); and (3) personally obtaining all discovery directly from the District Attorney's office and providing it to Mr. Mai in unredacted form (1-RT 111-112; 987.9-CT 30-31, 54-63, 67-75). (AOB 34-35.)

Indeed, respondent concedes that Watkins furnished Mr. Mai with the information Mr. Mai allegedly used in an attempt to kill state prosecution witness Nguyen: "Mai provided the undercover officer [posing as a hitman] with extensive personal information about Nguyen . . . . Defense investigator Watkins had provided Mai with Nguyen's address, phone number, and photograph. The photograph and information was obtained by Watkins from the discovery provided by the Orange County District Attorney's office in this case." (RB 15.) The federal government

alleged that these very "activities" documented by Watkins comprised many of the overt acts committed in furtherance of the conspiracy to kill Nguyen. (AOB 34-35; 1-CT 138-144 [federal search and arrest warrant affidavit submitted to state trial court when issue of possible conflict arose]; see also 2-CT 392, 396-397, 512, 532.)

Although respondent contends that these "activities" – all performed in Watkins's capacity as defense investigator – were "legitimate" and "legal" (RB 24, fn. 12 & 27), the federal government obviously disagreed. If Watkins committed those acts knowing that they would assist Mr. Mai in his alleged plan to kill Nguyen, then they were neither "legitimate" nor "legal" but rather criminal. From Watkins's admission that he knew of Mr. Mai's plan to kill Nguyen (1-CT 156), it was more than reasonable to infer that he knew that the information he provided to Mr. Mai about Nguyen, including Nguyen's photograph, personal information, and all relevant addresses connected to Nguyen and his family, would further Mr. Mai's alleged plan to kill him.

An "admission" is a statement tending to prove guilt along with other evidence. (See, e.g., *People v. McClary* (1977) 20 Cal.3d 218, 230, and authorities cited therein.) Despite Watkins's protestation that he engaged in no "wrongdoing," he effectively admitted his criminal liability – whether for conspiring to kill Nguyen, as the federal government alleged, and/or aiding and abetting other related crimes (Pen. Code, § 31) such as Mr. Mai's (alleged) attempt to kill Nguyen (Pen. Code, § 164, 187) or to prevent his trial testimony (Penal Code section 136.1, subd. (c)(1).)[9]

---

[9] There is one possible explanation for Watkins's inconsistent denial of any wrongdoing despite his admissions (through his counsel as well as (continued...)

Moreover, through his own counsel and to the very entity prosecuting Mr. Mai, Watkins alleged that defense counsel directed his "activities" (1-CT 156) with knowledge of Mr. Mai's plan to kill Nguyen. Defense counsel effectively admitted they directed the activities for which Watkins had been indicted; the section 987.9 materials include defense counsel's own signed statements that Watkins's activities were "performed under my direction and at my request . . . ." (987.9-CT 43-53, 54-63, 67, 71-75, 80-83.) Hence, for the same reasons that Watkins's statements regarding his own knowledge and conduct effectively amounted to admissions of criminal liability, his allegations regarding defense counsel's knowledge and conduct effectively amounted to accusations of their criminal liability.

Furthermore, as respondent otherwise recognizes, one of the overt acts alleged in furtherance of the conspiracy was Watkins's provision of Nguyen's photograph and other personal information to Mr. Mai, which had obtained in discovery in his role as defense counsel's agent. (RB 15, citing

---

[9](...continued)
his billing records in this case) that he engaged in many of the overt acts the federal government alleged with knowledge of Mr. Mai's alleged plan to have Nguyen killed. Although Watkins's counsel did not articulate it or allege that defense counsel had advised Watkins that his conduct was lawful, he may have been attempting to lay the groundwork for an "advice of counsel" defense. That defense is essentially a mistake of law defense premised on the reliance on the advice of counsel that the charged act is not unlawful. (See, e.g., *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137-138.)

While the advice of counsel defense is available to the person who relies in on counsel's incorrect legal advice, it is not available to the advising attorney.

2-CT 392, 396-397; see also AOB 34-36, citing 1-CT 138-144 [federal affidavits submitted to trial court], 2-CT 396-397 [federal change of plea proceedings] and 2-CT 512, 532 [affidavit for wiretap, exhibit in support of prosecution's motion to shackle Mr. Mai].) But respondent ignores that defense counsel Peters admitted that they had directed Watkins to obtain all discovery from the prosecutor and provide it to Mr. Mai when they knew or reasonably should have known that it was in unredacted form.[10] (See AOB 34-36 & fn. 19.) Respondent no doubt ignores this evidence because it demonstrates – or at least constitutes "plausible" evidence – that defense counsel thereby committed a crime connected to those for which their client was being prosecuted. (AOB 34-36, citing Pen. Code, § 1054.2.)

Furthermore, respondent's sole focus on the evidence of counsel's potential *criminal* liability ignores the *ethical* violations raised by the evidence. (AOB 30-31, 37, citing, inter alia, *United States v. Levy*, *supra*, 25 F.3d at p. 156 ["many courts have found an actual conflict of interest when a defendant's lawyer faces possible . . . *significant disciplinary consequences* as a result of questionable behavior related to his representation of defendant"].) Certainly, if Watkins's allegations that defense counsel knew of Mr. Mai's alleged plot to kill Nguyen and not only

---

[10] As discussed in the opening brief, the only reasonable inference from defense counsel's representations (10-RT 111-112; 987.9-CT 30-31, 54-63, 67-75, 150-142) and the billing records of both Watkins (987.9-CT 21-28, 43-63, 67-83) and the new investigator appointed after Watkins's arrest and indictment (987.9-CT 226) is that defense counsel never instructed Watkins to redact Nguyen's personal information from the discovery before providing it to Mr. Mai. (AOB 34-35 & fn. 19.) Significantly, respondent does not dispute as much. Hence, respondent tacitly concedes that defense counsel thereby committed a crime under Penal Code section 1054.2.

did nothing to stop it but directed Watkins own activities that furthered it, defense counsel were at least ethically liable. (See, e.g., Bus. & Prof. Code, §§ 6068, subds. (e)(2), 6103; Cal. Rules of Prof. Conduct, Rule 3-700, subd. (C)(1)(b) & (c).) Even if Watkins's allegations were untrue and defense counsel were completely ignorant of the plot and their agent's actions to further it (which is contradicted by the record), defense counsel were still ethically responsible for the wrongdoing of their non-lawyer employee flowing from their failure to supervise him. (AOB 33-34, citing, inter alia, *In the Matter of Jones* (Review Dept. 1993) 2 Cal. St. Bar Ct. Rptr. 411 and *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857.)

Hence, all of this plausible evidence of defense counsel's wrongdoing related to the crimes charged against their client was more than sufficient to threaten, and thereby trigger defense counsel's interest in protecting their own liberty, livelihood and reputation. (AOB 34-36.) Pursuant to the authorities cited in the opening brief, these powerful personal interests carried a grave danger of conflicting with Mr. Mai's best interests and influencing defense counsel's choice of strategies in representing him. (AOB 27-40.)

b. Respondent Erroneously Contends That There Was No Potential Conflict Because Defense Counsel "Denied Any Knowledge of Watkins Conspiring with Mai" and Were Not Charged or Indicted for Any Wrongdoing Relating to Mr. Mai's Crimes

Respondent next contends that there existed no potential for conflicting interests because "both Peters and O'Connell denied any knowledge of Watkins conspiring with Mai" and neither was ever charged or indicted for any wrongdoing related to Mr. Mai's crimes. (RB 26-27.)

The first flaw in respondent's contention is that it seems to rest on the incorrect premise that allegations of related attorney wrongdoing only create potentially conflicting self interests if the allegations *are true*. As discussed in the opening brief, it is well recognized that "counsel's *fear of*, and *desire to avoid*, criminal charges, or even the reputational damage from an *unfounded, but ostensibly plausible accusation*, [may] affect virtually every aspect of his or her representation of the defendant." (*United States v. Fulton*, *supra*, 5 F.3d at p. 613, italics added; AOB 28-29.) And where – as here – allegations of related attorney wrongdoing "are supported by some credible evidence, disciplinary or criminal charges become more than mere threats, and the attorney has 'reason to fear that vigorous advocacy on behalf of his client would expose him to criminal liability or any other sanction.' [Citation.]" (*United States v. Jones* (2nd Cir. 1990) 900 F.2d 512, 519.)

Furthermore, it is simply untrue that defense counsel "denied any knowledge of Watkins conspiring with Mai" during the "hearing" into the possible conflicts Watkins's indictment may have created. (RB 26-27, citing 1-RT 80-82.) Watkins's allegations were never discussed at the hearing.

Instead, as discussed in the opening brief, the only time defense counsel ever responded to Watkins's accusations was *long after* the death verdict had been rendered against Mr. Mai, in a confidential letter written to the judge presiding over section 987.9 matters. (AOB 36-37.) Mr. Peters represented, "Within several days of the arrest of investigator Dan Watkins on the federal case his federal attorney faxed the federal prosecutor and inferred on this fax that Dennis O'Connell and I knew about Mr. Mai's plot to kill a witness. As a result, I initially refused to be Mr. Mai's federal

counsel because of the possibility of a legal conflict where I might be a witness. This difficult accusation dissolved some days later when it became obvious there was a difference in knowing that Mr. Mai hated the turncoat witness and knowing of a specific plot to murder this witness." (987.3-CT 30.)

Thus, Mr. Peters did not deny that he had directed Watkins to investigate the whereabouts of Nguyen and his family, obtain discovery containing Nguyen's personal information, and provide all of that information to Mr. Mai while knowing at the very least his client's history of violence and his extreme hatred for that witness. The only allegation that Mr. Peters disputed was that he had done so with the precise knowledge that Mr. Mai would use the information to have Nguyen killed.

Thus defense counsel's own admissions lent credibility or further "plausibility" to Watkins's allegation to the contrary given Watkins's allegation that he aided Mr. Mai in locating the targeted witness under counsel's direction and with counsel's knowledge that Mr. Mai was allegedly a high-ranking member of a powerful Vietnamese gang, that Nguyen claimed to be a protected witness with a "contract" out on his life, and that Mr. Mai "hated" the "turncoat witness," whose whereabouts and other vital information their agent had provided to Mr. Mai. (AOB 36-37, citing 2-Muni RT 268, 320-321; 987.3-CT 30.) In sum, Watkins's allegation that defense counsel were implicated in Mr. Mai's plan to kill Nguyen were certainly "plausible" enough to provoke counsel's fear that the state would investigate and pursue charges against them, just as the federal government had against their agent. (See *People v. McRae* (1947) 31 Cal.2d 184, 187 [even uncorroborated testimony of accomplice is sufficient to establish probable cause to hold a defendant to answer to

criminal charges]; *People v. Fauber* (1992) 2 Cal.4th 792, 834-835 [only slight corroboration required for accomplice testimony to prove guilt beyond a reasonable doubt].)

Equally without merit is respondent's contention that since "no charges were ever filed against Mai's counsel relating to the matter," defense counsel had no conflicting interests that could even potentially affect their representation of Mr. Mai. (RB 26.) To the contrary, the fact that charges had not been filed against defense counsel when Watkins was indicted and made his allegations against them only *heightened* their compelling personal interest to *ensure* that no charges *would be* filed against them by currying favor with the prosecution and avoiding an adversarial trial. (See AOB 28-30, 103-110.)

Nor does respondent's assertion that defense counsel were *never* charged with any wrongdoing connected to Mr. Mai's crimes (an assertion of fact that does not appear in the record, but which Mr. Mai shall assume for sake of argument) demonstrate that they had no conflicting interests *during the course of their representation of Mr. Mai.* (RB 26-27.) Respondent reverses cause and effect. The fact that defense counsel were *never* charged is readily susceptible of a reasonable explanation: defense counsel's self-interested trial strategy *worked.* They did the prosecutor's job for him, consented to an unconditional plea to capital murder despite a dearth of evidence to prove the sole special circumstance allegation and effectively stipulated to the death penalty. This "strategy" undoubtedly curried great favor with the prosecution. Its decision not to pursue charges against them based on the evidence of their wrongdoing could reasonably be interpreted as their "reward."

c. Respondent's Erroneously Contends That Watkins's Statements and Allegations Against Defense Counsel, Made in Writing Through His Own Attorney, Were Insufficient to Create a Potential Conflict Because They Were Hearsay

Next, respondent asserts for the first time on appeal that Watkins's allegations were made in a writing by his own counsel, which "contains multiple layers of hearsay for which there is no exception." (RB 27.) As respondent does not expand on this assertion with any argument or authority, this Court should decline to consider it. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Clair* (1992) 2 Cal.4th 629, 653, fn. 2.) To the extent this Court addresses this contention, it must be rejected.

Virtually all of the evidence going to the potential conflicts in this case was in written form (the document written by Watkins's counsel which contained his allegations, together with the federal search and arrest warrants and supporting affidavits), submitted to the trial court to determine what, if any, potential conflicts they created, and made part of the trial record. (1-RT 83-84; 1-CT 125-156.) The prosecutor was present when those documents were submitted to the court and had ample opportunity to make any objections to the court's consideration of them but declined to do so. Having chosen not to object below, respondent cannot be heard to make a hearsay objection for the first time on appeal. (See, e.g., *People v. Mullens* (2004) 119 Cal.App.4th 648, 669, and fn. 9.)

In any event, respondent's belated hearsay objection is without merit. Although respondent does not elaborate on its assertion, no conceivable

hearsay objection would have been sustained. Simply put, Mr. Mai does not have to prove the truth of an allegation of related attorney wrongdoing in order to demonstrate that a conflict existed. (Evid. Code, § 1200 ["evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted" is inadmissible to prove its truth absent statutory exception]; AOB 28-29.)[11]

Moreover, any representations made on Watkins's behalf by his attorney-representative were effectively made by Watkins himself. Indeed, there was never any dispute that Watkins had made the statements his attorney represented he had made. To the contrary, as discussed in Part 2, *ante*, Mr. Peters acknowledged his allegations – and the potential conflict of interest they posed – in his confidential post-judgment letter. (987.3-CT 30.)

Finally, whenever a trial court is made aware of facts giving rise to a potential conflict of interest, the court has a sua sponte duty to investigate those facts, determine whether they create a possible conflict and, if so, how it might potentially impact upon counsel's representation. (*Wood v.*

---

[11] Respondent characterizes Mr. Mai's essential claim as follows:"[f]or the first time on appeal, based solely on the contents of the Waltz Memo, Mai contends defense attorneys Peters and O'Connell were aware of, and authorized defense investigator Watkins' actions as Watkins participated in the conspiracy with Mai to kill prosecution witness Nguyen, and therefore his attorneys in this case were unindicted co-conspirators in the plot to kill Nguyen." (RB 23.) This is not Mr. Mai's claim. Among other things, Mr. Mai does not argue that the evidence conclusively established that "his attorneys in this case were unindicted co-conspirators in the plot to kill Nguyen" nor – as discussed in the above text and the opening brief – does he *need* to conclusively establish that fact in order to demonstrate that counsel labored under an actual conflict.

Georgia, supra, 450 U.S. at p. 272; *Holloway v. Arkansas* (1978) 435 U.S. 475, 485; *Glasser v. United States* (1942) 315 U.S. 60, 76; *People v. Bonin* (1989) 47 Cal.3d 808, 836.) Respondent cites no authority for its implicit proposition that the duty of inquiry is triggered only by *admissible* evidence or live testimony. Nor is there such authority. To the contrary, as this Court has explicitly held: *"It is immaterial how the court learns, or is put on notice, of the possible conflict. . . ."* (*People v. Bonin*, *supra*, at p. 836, italics added; cf. *United States v. Hobson* (11th Cir. 1982) 672 F.2d 825, 827-829 [*disqualifying* attorney due to conflict based on written allegations of related attorney wrongdoing].)

In sum, as the trial court, defense counsel, and the prosecution implicitly recognized by withholding a hearsay or any other objection below, the trial court was required to consider the written evidence of defense counsel's wrongdoings – including Watkins's written allegations made through his counsel – in assessing the existence and potential impact of any conflicts of interest. Just as the trial court was required to consider that evidence and did so without objection from the parties below, so too must this Court consider that evidence in assessing whether, in the first instance, a potential conflict existed.

3. Mr. Mai's Defense Counsel's Simultaneous Representation of One of Mr. Mai's Indicted Co-Conspirators, Vickie Pham, In Her Substantially Related Federal Sentencing Proceedings Added to And Compounded the Conflicts Face By Defense Counsel

Rather than mitigating the conflict resulting from the federal indictment, lead defense counsel Peters compounded the problem by twice injecting himself into the federal proceedings – the first time in representing

Mr. Mai (see Part E, *post*; AOB 69-73) and the second in representing Ms. Pham (AOB 108-110). On March 5, 1999, Mr. Mai pleaded guilty to the federal conspiracy and related charges. (2-CT 400-413, 500-501; 1-RT 191-192.) On July 23, 1999, he entered his unconditional slow plea to the state capital murder charge in state court with defense counsel's consent. (2-CT 491; 1-RT 180-198.) On July 30, 1999, the state trial court adjudged Mr. Mai guilty. (2-CT 503.) On the same date, lead counsel Peters filed a motion in the state court to continue the penalty phase. (2-CT 497.) Among the reasons for which a continuance was necessary, Mr. Peters explained to the state court, was that he had been simultaneously representing Mr. Mai's indicted co-conspirator, Vickie Pham, for nearly four months. (2-CT 500-501; see also 1-RT 158, 170, 202-203; 2-RT 223.)

As Mr. Peters explained in that motion, from the date of Mr. Mai's March 5, 1999, guilty pleas in federal court (and while he was representing Mr. Mai in this case), Mr. Peters's "*exclusive priority has been the June 30, 1999 sentencing of Vickie Pham. I coordinated meetings between Mr. Mai's and Ms. Pham's counsel, Kenny Reed, in which we organized a strategy for a presentation at Ms. Pham's sentencing. I arranged for Dr. Veronica Thomas, Ph.D. to present testimony at the sentencing to the affect that Ms. Pham had acted under Mr. Mai's duress caused by physical and mental abuse,*" which caused "*battered women's syndrome.*" (2-CT 500-501, italics added.) Mr. Peters also explained that Dr. Thomas was *Mr. Mai's state court appointed* psychological expert. (2-CT 500; see also 1-RT 170, 202-203; 3 RT 403-407; AOB 108-110.)[12]

---

[12] Mr. Peters's reference to "Mr. Mai's counsel" appears to be a typographical error, as "Kenny Reed" was not "Mr. Mai's counsel," but (continued...)

These admissions established that Mr. Peters had simultaneously represented and advanced an interest adverse to Mr. Mai's best interests by using Mr. Mai's own state-court appointed psychologist. (AOB 108-110.) Certainly, that conflict carried a grave potential of influencing counsel's choice of strategies in this case. As discussed in the opening brief and Part C, *post*, the state prosecutor and defense counsel had an understanding that if defense counsel were to mount a penalty phase defense on Mr. Mai's behalf and "put on some penalty evidence" (3/16/07 2-SCT 132-133), the state prosecutor could (and undoubtedly would) introduce the evidence of the conspiracy to kill Nguyen on rebuttal. (AOB 40-62, 104-110.) If so, Ms. Pham would have been a likely prosecution witness to the conspiracy, but defense counsel would have been precluded from effectively cross-examining her given that she was a client in a related case to whom they owed a duty of loyalty. (AOB 108-110, citing, inter alia, *United States v. Shwayder* (9th Cir. 2002) 312 F.3d 1109, 1118-1119, as amended by (9th Cir. 2003) 320 F.3d 889, *United States v. Malpiedi* (2nd Cir. 1995) 62 F.3d 465, 469, and *People v. Easley* (1988) 46 Cal.3d 712, 722-725.) And the damning evidence defense counsel developed and presented on her behalf – using Mr. Mai's own state-appointed psychologist – would be very likely aggravating evidence. (AOB 109, citing *People v. Easley*, *supra*, at pp.

---

[12](...continued)
rather Ms. Pham's counsel. As discussed in the opening brief and Part E, *post*, Neisen Marks was Mr. Mai's appointed federal counsel. (2-CT 377-379; AOB 69-72.) However, on the date that Mr. Mai entered his guilty pleas in federal court, the federal court granted Mr. Peters's request to appear with "coequal powers with Mr. Marks for the plea and sentencing purposes." (2-CT 409.) Mr. Marks refused to concur in Mr. Peters's machinations in federal court. (2-CT 409-412; AOB 69-72.)

722-725 [finding actual conflict in violation of federal Constitution where, inter alia, in course of representing another client in a civil case arising from arson of building, defense counsel elicited the defendant's confession to the arson and the prosecution intended to introduce the arson evidence in penalty phase of defendant's own trial].) These possibilities created serious potential conflicts of interest in this case. (See, e.g., *Wheat v. United States* (1988) 486 U.S. 153, 159-163 [potential conflict based on possibility – disputed by defendant – that counsel's former client might be called as a witness if defendant's case went to trial]; *People v. Jones* (2004) 33 Cal.4th 234, 237-238, 241-242 [same based on possibility that former client might be viable alternative suspect despite defendant's protestations that he did not wish to pursue strategy implicating counsel's former client].)

Absent defense counsel's conduct in representing Ms. Pham, she might otherwise have been a logical penalty phase *defense* witness given her long relationship with Mr. Mai and her evidence that his violent behavior increased dramatically after suffering near fatal injuries in a car accident. (2-CT 501; 1-RT 170-171; 2-RT 231-232; see AOB 114-118; Part 2, *post*.) But defense counsel destroyed any value she could have had as a witness in mitigation. Defense counsel similarly destroyed or severely diminished the value that Mr. Mai's court-appointed psychologist might otherwise have had as a mitigation witness. For all of these reasons, this conflict only increased counsel's incentive to discard the strategy of engaging in an adversarial penalty trial with mitigating evidence and thereby "paper[] over the conflict that would have arisen." (*People v. Mroczko* (1983) 35 Cal.3d 86, 107-108 [adverse effect under federal Constitution established where, "[b]y discarding" viable alternative strategy, counsel "papered over the conflict that would have arisen" had he

pursued it and thus his "very choice of strategies was colored by the conflict he faced"]; AOB 108-110.)

Respondent does not address this conflict of interest at all.

C. The Trial Court Failed Adequately to Inquire into the Conflicts and the Record Fails to Demonstrate that Mr. Mai Knowingly and Intelligently Waived His Right to Representation By Counsel Uninfluenced by the Conflicts Raised on this Appeal

In his opening brief, Mr. Mai argued that the evidence before the trial court at the only conflict hearing in August 1998, which included (1) the undisputed representations that the federal government had indicted defense counsel's agent and investigator, Watkins, and Mr. Mai as co-conspirators in the alleged plot to kill the state's prosecution witness in this case, Nguyen; (2) the federal search and arrest warrants and supporting affidavits, which demonstrated that many of the overt acts alleged in furtherance of the conspiracy were committed in Watkins's role as defense counsel's investigator and agent in this case; *and* (3) the admission and allegations against defense counsel by Watkins through his own counsel, triggered the trial court's constitutional duty to inquire into the related attorney wrongdoing conflicts. (AOB 19-20, 50-62, citing, inter alia, *Wood v. Georgia*, *supra*, 450 U.S. at pp. 267, 272). Indeed, in the document containing Watkins's allegations, Watkins's counsel urged that defense counsel "should be disqualified from further representing Mai in state court . . . . If not disqualified, the state will otherwise easily convict Mai in both cases and give the defense a great appellate issue which now can be so easily avoided." (1-CT 156.)

Given this evidence, the federal Constitution demanded a "searching" (*Garcia v. Bunnell* (9th Cir. 1994) 33 F.3d 1193, 1197) and

"targeted" (*Selsor v. Kaiser* (10th Cir. 1996) 81 F.3d 1492, 1501) inquiry by the court into the evidence of related attorney wrongdoing, as well as defense counsel's "forthright[] and honest[]" response (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 112), and Mr. Mai's knowing and intelligent waiver made with "sufficient awareness of the relevant circumstances and likely consequences" (*Id.* at p. 110; accord, *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 346-347; *Glasser v. United States*, *supra*, 315 U.S. at pp. 70-71; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; AOB 50). None of these requirements were satisfied. (AOB 50-62.)

Nor did the court inquire at all into the later evidence revealing the additional conflict arising from defense counsel's simultaneous representation of Ms. Pham. (AOB 108-110.) This conflict was never directly addressed on the record and hence the record also fails to demonstrate Mr. Mai's knowing and intelligent waiver of his right to the effective assistance of counsel in these proceedings, uninfluenced by that conflict. (*Ibid.*)

1. Respondent Fails to Dispute That the Court's Inquiry Was Limited to the Witness/Advocate Conflict and thus Fails to Dispute that the Court Failed to Discharge Its Duty to Inquire Into the Related Attorney Wrongdoing And Other Conflicts Created By the Related Federal Conspiracy Prosecution

Respondent does not dispute that "the 'only possible' conflict discussed on the record was the potential that [Mr. Mai's] two attorneys could be called as witnesses in [Watkins's] federal conspiracy trial." (RB 21-22; see also AOB 43-60; 1-RT 74-88.) Moreover, respondent does not even address the fact that defense counsel and the state prosecutor *affirmatively misled* the state trial court at that hearing to minimize the

potential the alleged conspiracy had to adversely affect their representation of Mr. Mai. (See AOB 53-55; see also AOB 103-110.) Both the state prosecutor and defense counsel assured the state court that the prosecution would not introduce evidence of the conspiracy to kill its witness in Mr. Mai's state trial, which "reduces the conflict to about zero." (1-RT 80-81; AOB 53-60.) The trial court accepted this representation without reservation. (1-RT 85-87.)

Federal District Court Judge Carter was not so accepting. When the same representation was made to him in later federal court proceedings, he expressed skepticism and pressed the state prosecutor and defense counsel for further explanation. (3/16/07 2-SCT 132-133.) It was only then that they confessed to the true nature of their agreement: the state prosecutor had simply agreed not to present evidence of the threats or conspiracy to kill Nguyen in his *case-in-chief*; the prosecution and defense counsel understood that if defense counsel were to mount a penalty defense and "put on some penalty evidence," the prosecution reserved its right to introduce the conspiracy evidence on rebuttal. (3/16/07 2-SCT 132-133.)[13]

As discussed at length in the opening brief, far from "reduc[ing] the conflict to about zero," the *true* nature of the agreement created a powerful incentive for defense counsel to avoid an adversarial trial and the presentation of mitigating evidence. (AOB 53-55, 103-110.) If they attempted to save Mr. Mai's life with mitigating evidence, the state would

---

[13] As this discussion occurred *after* Mr. Mai had already entered his slow plea, the parties discussed the possibility of the evidence being presented only at the penalty phase. (AOB 53-54, citing 3/16/07 2 SCT 132-133.) However, the true nature of the agreement – that the state simply would not introduce the evidence in its *case-in-chief*, but reserved the right to present it on rebuttal – may have applied to the guilt phase, as well.

present evidence about the conspiracy to kill Nguyen in rebuttal – a prospect that posed grave threats counsel's liberty, livelihood and reputation and would have created even more insurmountable ethical dilemmas. (*Ibid.*) Thus, defense counsel (and the state prosecutor) violated their legal and ethical duties by seriously misleading the trial court regarding the true nature of the agreement and its potential to adversely influence their trial decisions. (See, e.g., *Holloway v. Arkansas*, *supra*, 435 U.S. at pp. 485-486; *People v. Mroczko*, *supra*, 35 Cal.3d at p. 112; Bus. & Prof. Code., § 6068, subd. (d) [attorney had duty "never to seek to mislead the judge . . . by an artifice or false statement of fact or law"].)

Indeed, defense counsel's efforts to conceal or minimize the most serious of the potential conflicts were themselves evidence of their inability to place loyalty to Mr. Mai above their own self-interest. (AOB 54-60, citing inter alia, *People v. Mroczko*, *supra*, 35 Cal.3d at pp. 110-113; cf. *In re Gay*, *supra*, 19 Cal.4th at p. 795 [counsel's fraudulent and unethical representations in obtaining appointment were highly relevant to "assessing his commitment to act as a zealous advocate"].) Their behavior certainly reveals that they were determined to act as Mr. Mai's counsel in both his state and federal cases, which served their personal interests in concealing evidence of their wrongdoing and currying favor with the federal and state authorities prosecuting Mr. Mai. (Cf. *Rubin v. Gee* (4th Cir. 2002) 292 F.3d 396, 398, 402-405 ["actual conflict" in violation of federal Constitution where attorneys and their investigator assisted defendant in concealing evidence then "took cover as part of the defense team"].) Given the legal and ethical ramifications of their position and the seriousness of the capital murder charge against their client, being honest with the court about the potential conflict and moving to withdraw as counsel was – at the very least

– an "objectively reasonable" or plausible alternative. (Part D, *ante*; see also, e.g., Cal. Rules of Prof. Conduct, rule 3-700, subd. (B)(2).) But that alternative inherently conflicted with their personal interests. (*Ibid.*) Hence, the record demonstrates that the conflict influenced, and their misrepresentations to the state court surely "adversely affected," their performance as early as the conflict hearing itself.

Respondent also does not address Mr. Mai's arguments that subsequent evidence triggered the trial court's duty to inquire further into the conflicts created by the federal conspiracy prosecution and circumstances surrounding it. (AOB 53-56 & fn. 24, 108-110.) First, as discussed above, on July 30, 1999 – nearly a year after the August 1998 conflict hearing and a week after Mr. Mai tendered his slow plea to capital murder in state court – defense counsel filed a motion to continue the penalty phase in which he informed the court that he had simultaneously represented Mr. Mai's indicted co-conspirator, Ms. Pham, in federal court. (2-CT 497, 501; see also 1-RT 158, 170, 202-203; 2-RT 223.) Worse yet, he had had utilized Mr. Mai's own state-court appointed psychologist to develop and present evidence on her behalf that she "had acted under Mr. Mai's duress caused by physical and mental abuse," from which she also suffered "battered women's syndrome." (2-CT 500-501; see also 1-RT 170, 202-203; 3-RT 403-407.)

These representations by Mr. Peters, demonstrating sharply divided loyalties, should, at the very least, have prompted further inquiry by the trial court. (AOB 108-110.) The trial court was already aware that defense counsel gave his highly unusual consent to Mr. Mai's unconditional slow plea to the state capital murder charge. (See, e.g., *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300-1301 [Orange County Superior Court judge

"expressed doubt that any attorney in Orange County 'would consent to somebody pleading guilty to a capital offense'"].) And, as discussed in the opening brief and Arguments III and IV, *post*, counsel's consent was given under circumstances that should have alerted the court that something was amiss. (AOB 78-79, 231-232; 1-RT 189-198, 207-210.) All of this evidence, together with the other evidence of which the trial court was already aware from the conflict hearing, triggered the court's constitutional duty to inquire into this conflict and its potential to influence defense counsel's choice of strategies in this case. (*People v. Easley*, *supra*, at pp. 722-725; *Wood v. Georgia*, *supra*, 450 U.S. at pp. 267, 272.) But the court did nothing.

Furthermore, defense counsel later submitted evidence that contradicted key representations made by them and the prosecutor during the August 1998 conflict hearing. (AOB 53-56 & fn. 24, 109-110.) On March 30, 2000, lead counsel Peters filed a pleading in federal court, which he served on the state trial court. (3/16/07 2-SCT 28-156.) Attached as an exhibit to that pleading was the transcript of the federal proceeding (cited and discussed above) in which it was revealed that the prosecutor reserved the right to introduce the conspiracy evidence in this trial if defense counsel presented a penalty phase defense, or "put on some penalty evidence." (3/16/07 2-SCT 132-133.) On April 11, 2000, the state trial judge noted that it had received and reviewed that pleading. (5-RT 1075.) Thus, the court should have been alerted that defense counsel and the state prosecutor had misled the court at the conflict hearing and that the federal conspiracy evidence – which implicated counsel in Watkins's wrongdoing – could and likely would be introduced in this trial if counsel presented a defense on Mr. Mai's behalf, which created a powerful incentive for counsel to discard the

strategy of presenting a penalty phase defense.

By this time (April 11, 2000) the trial court was also aware that defense counsel had already made a number of unusual trial decisions. Prominent among these was counsel's brokering the federal plea agreement that included Mr. Mai's promise to plead guilty to the state capital murder charge over his federal counsel's objection and then consenting to Mr. Mai's unconditional slow plea to that charge in state court. (AOB 69-77; Part E, *post.*) The court was also aware that Peters represented Mr. Mai's indicted co-conspirator, Ms. Pham, in her federal sentencing proceedings while representing Mr. Mai in these proceeding, and had used Mr. Mai's appointed psychological expert, Dr. Thomas, to develop and present evidence adverse to Mr. Mai on her behalf. By this time, the court was also aware that defense counsel (as well as Dr. Thomas) believed that Mr. Mai was suffering from a mental condition that precluded his ability to make rational decisions or assist in the preparation of his case, yet inexplicably insisted that no competency proceedings be initiated. (AOB 200-216; Part F, *post.*) Also by this time, the court was aware that defense counsel and Mr. Mai had "for some time talked about putting no penalty evidence on" (3-RT 449), and should have been aware that defense counsel had advised Mr. Mai that the nature of the special circumstance alone made a death verdict virtually a foregone conclusion no matter what mitigating evidence they might unearth and offer (AOB 118-126; Part G-2, *post.*)

This mountain of evidence should have alerted the trial court that something was terribly amiss: defense counsel had lied to the court, their otherwise highly irregular and seemingly inexplicable performance to that point could be explained by their conflicting interests; and those interests carried a substantial risk of influencing defense counsel's decision about

whether to present a penalty phase defense at all. (AOB 53-56 & fn. 24, 109-110; *Wood v. Georgia*, *supra*, 450 U.S. at pp. 268, 272-273 [evidence that defense counsel's fees were paid by third party *and* that counsel pursued some strategies that did not appear to serve defendant's best interests was sufficient to alert trial court to possibility of conflict and trigger its constitutional duty of inquiry].) The court's failure to make any inquiry in the face of this evidence violated its constitutional duties. (*Ibid.*) Once again, Mr. Mai takes respondent's failure to dispute that this additional, post- hearing evidence triggered the trial court's duty to reopen its inquiry into the potential conflicts defense counsel faced as another tacit concession.

Respondent's concessions are fatal. As discussed in the opening brief, the court's duty of inquiry is intended not simply to obtain a defendant's knowing and intelligent waiver – the only issue respondent addresses. (RB 21-24.) It is intended to discharge the court's independent obligation to ensure that "criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment" and that "legal proceedings *appear* fair to all who observe them." (*Wheat v. United States*, *supra*, 486 U.S. at p. 160; accord, *People v. Jones*, *supra*, 33 Cal.4th at pp. 240-241.) In discharging this obligation, the court may determine that a potential conflict is waivable and obtain the defendant's knowing and intelligent waiver. However, the court may also determine that a potential conflict is so severe that the defendant cannot waive it at all and disqualify counsel even over the defendant's objection. (Wheat, *supra*, at pp. 160-163; *Jones*, *supra*, 33 Cal.4th at pp. 240-242.)

Had the state court satisfied its duty to inquire in this case and the state prosecutor been forthcoming about introducing the conspiracy

evidence if Mr. Mai presented a penalty phase defense, the state could have prevented the potential conflicts from ripening into actual ones by disqualifying Messrs. Peters and O'Connell. (See, e.g., *Wheat v. United States, supra,* 486 U.S. 153, 159-163 [trial court properly disqualified retained counsel of choice over defendant's objection based on possibility – disputed by defendant – that counsel's former client might be called as a witness if defendant's case went to trial]; accord, *People v. Jones*, *supra*, 33 Cal.4th at pp. 237-238, 241-242; *United States v. Merlino*, *supra*, 349 F.3d at pp. 151-152 ["suggestion of (attorney's) potential criminal liability" related to client's crimes created potential conflict sufficient to permit disqualification of counsel over client's objections and constitutional right to counsel of choice]; *United States v. Fulton, supra*, 5 F.3d at pp. 611-613 [disqualification *mandatory* and conflict unwaivable where co-defendant/government witness alleged that defense counsel "engaged in criminal conduct related to the charges for which the defendant is on trial"].) Indeed, as Watkins's counsel urged in the first place, defense counsel "should be disqualified from further representing Mai in state court . . . . If not disqualified, the state will otherwise easily convict Mai in both cases and give the defense a great appellate issue *which now can be so easily avoided.*" (1-CT 156, italics added.)

Certainly, the court and counsel's errors prevented Mr. Mai's knowing and intelligent waiver of his right to the effective assistance of counsel unencumbered by the conflicts raised on this appeal. (*People v. Mroczko*, *supra*, 35 Cal.3d 86, 98-105; *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732.)

2. Respondent's Contention That Mr. Mai Knowingly and Intelligently Waived His Right to the Effective Assistance of Counsel Unencumbered by the Conflicts Raised on this Appeal Is Belied by the Record and the Law

As previously noted, respondent does not dispute that those conflicts were not addressed on the record or that "the 'only possible' conflict discussed on the record was the potential that his two attorneys could be called as witnesses in [Watkins's] federal conspiracy trial." (RB 21-22.) Nevertheless, relying on isolates passages from this Court's decisions that "a defendant's waiver of conflict is not limited to merely matters discussed on the record" and it is unnecessary for every "conceivable ramification" to be explained to him (RB 22, citing *People v. Sanchez* (1995) 12 Cal.4th 1, 48), respondent contends: (1) this Court may *presume* that independent counsel, Mr. Pohlson, adequately explained the existence and potential drawbacks of the related attorney wrongdoing conflicts notwithstanding the absence of record evidence demonstrating as much; and (2) the record reflecting that Mr. Mai knowingly and intelligently waived *one* potential conflict – the potential witness/advocate conflict – is sufficient to establish his knowing and intelligent waiver of the attorney related wrongdoing conflict. (RB 21-22.) Respondent is wrong on both counts.

It is, of course, well settled that courts must "indulge every reasonable presumption *against* the waiver" of the fundamental right to the effective assistance of conflict-free counsel. (*People v. Mroczko*, *supra*, 35 Cal.3d at pp. 109-110; accord *Glasser*, *supra*, 315 U.S. at p. 71, citing *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464.) That presumption may only be rebutted by *an affirmative record showing* that the waiver was a "knowing, intelligent act[] done with sufficient awareness of the relevant

circumstances and likely consequences." (*People v. Mroczko*, *supra*, at p. 110; accord *Glasser*, *supra.*; AOB 42-43)

Contrary to respondent's reading, *Sanchez* is consistent with these fundamental principles. It merely observed and applied the general rule that a reviewing court is not limited to considering "matters discussed on the record" of the *waiver colloquy*, but rather may "*look[] at the whole record* [in] determin[ing] whether defendant was aware of the potential drawbacks and possible consequences of retaining [counsel], and whether he understood his right to conflict-free counsel and knowingly waived that right." (*Sanchez*, *supra*, 12 Cal.4th at p. 48; accord, e.g., *People v. Howard* (1992) 1 Cal.4th 1132 [while federal Constitution demands that "record affirmatively shows" the knowing and intelligent nature of admission and accompanying waivers, determination may be based on "totality of circumstances" by "reviewing the whole record instead of just the record of the plea colloquy"].)

Furthermore, although the validity of a waiver does not require record evidence that the defendant is advised of every conceivable consequence of a particular conflict, no matter how remote (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 48; accord, e.g., *People v. Clark* (1992) 3 Cal.4th 41, 140), it *does* require affirmative record evidence reflecting that the defendant is "*advised of the basic problem*" (*Clark*, *supra*) and its most significant, "full range of dangers" (*People v. Easley*, *supra*, 46 Cal.3d at pp. 730-731) or "likely consequences" (*People v. Morczko*, *supra*, 35 Cal.3d at pp. 110-113; accord *Lockhart v. Terhune* (9th Cir. 2001) 250 F.3d 1223, 1232-1233). (AOB 56-61 & fn. 25.) In *Sanchez*, the defendant was advised of the "basic problem" of a potential conflict wholly unrelated to the defendant's case and its reasonably foreseeable consequences.

(*Sanchez, supra*, 12 Cal.4th at p. 38 [impending disbarment proceedings based on the attorney's mishandling of other client funds].) The matters undiscussed were simply additional, more remote potential ramifications. (*Ibid.*)

Here, there were several *distinct* potential conflicts arising from the parallel related federal prosecution. The record reflects that only *one* of them – the least serious potential witness/advocate conflict – was explained to Mr. Mai. There is no indication *anywhere* in the record – nor does respondent cite to any record evidence – that any one, including Mr. Pohlson, explained to Mr. Mai the far more serious *related attorney wrongdoing conflict* and its well-recognized and reasonably foreseeable risks – i.e., how the facts created a self-interest on the part of Mr. Mai's counsel that could potentially conflict with his best interests, or any of the ways in which that conflict could potentially impact or affect their representation of him in these proceedings (See, e.g., *United States v. White* (5th Cir. 1983) 706 F.2d 506, 507-510 & fns. 2 & 4 [knowing and intelligent waiver of this kind of conflict was not established by record that failed to include discussion of its unique potential ramifications, despite record evidence that defendant was advised that potential conflict *existed* and non-specific testimony that counsel explained the "difficulties" of their representation under the circumstances]; AOB 27-31, 103-110; Parts B & C, *ante*.) To the contrary, the record *affirmatively demonstrates* the opposite.

Mr. Pohlson carefully detailed on the record the advice he had provided to Mr. Mai off the record. (AOB 45-48.) As discussed in greater detail in the opening brief, Mr. Pohlson's careful and thorough recitation of that advice was merely that there was the "appearance" of a conflict based

on the likelihood that defense counsel would be called as witnesses in Watkins's federal trial, but that it had absolutely *no* potential to impact defense counsel's representation of Mr. Mai in this case. (*Ibid.*, citing 1-RT 75-79, 83.) In advising Mr. Mai on the record, the trial court simply repeated Mr. Pohlson's opinion in this regard and confirmed with Mr. Mai that Mr. Pohlson had advised him of the "*same* possibilities." (1-RT 85-87.) In short, the record affirmatively establishes that Mr. Mai was *not* advised – either on or off the record – about even the existence of the distinct and far more serious *related attorney wrongdoing conflict*, much less *any* of its well recognized dangers. (AOB 45-53, 59-60.) To the contrary, Mr. Mai was *misinformed* that there was no conflict at all, much less one that had any potential to impact counsel's performance in this case. (*Ibid.*)

Furthermore, respondent ignores that defense counsel and the state prosecutor *affirmatively misrepresented* that the evidence of the conspiracy to kill Nguyen (which would presumably include any evidence of their own roles in it) had "zero" potential to impact Mr. Mai's state case because the prosecutor had agreed not to present it. (1-RT 80-81.) As discussed at length in the opening brief, defense counsel's misrepresentations, the trial court's inquiry, the record advice given to Mr. Mai, and Mr. Mai's own response is nearly identical to that in *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-731, and *People v. Mroczko*, *supra*, 35 Cal.3d at p. 110-113. (AOB 56-61.) In both of those cases, this Court held that the record failed to demonstrate the defendants' knowing and intelligent waivers largely due to defense counsel's denials of the existence of potential conflicts and misrepresentations. (*Ibid.*; accord, e.g., *Lockhart v. Terhune*, *supra*, 250 F.3d at p. 1232.) Respondent does not even address, much less refute,

Easley and *Mroczko* in this regard. The omission speaks for itself.

In sum, contrary to respondent's contentions, this Court must presume every reasonable presumption against the waiver of Mr. Mai's fundamental right to the effective assistance of counsel uninfluenced by the related attorney wrongdoing conflict. (See, e.g., *Glasser*, *supra*, 315 U.S. at p. 71; *People v. Mroczko*, *supra*, 35 Cal.3d at p. 110.) In the absence of record evidence affirmatively demonstrating as much, this Court may not presume that Mr. Mai was advised of the existence and well recognized dangers of the attorney related wrongdoing conflict and made a knowing and intelligent waiver thereof. (*Ibid.*) In any event, for these and all of the other reasons discussed in the opening brief, the record here belies such a presumption. (AOB 40-62.)

Finally, respondent does not address or dispute Mr. Mai's argument that the record is completely silent with regard to whether he knowingly and intelligently waived his right to the effective assistance of counsel uninfluenced by the conflict created by his counsel's simultaneous representation of Ms. Pham in federal court. (AOB 108-110.) As this Court cannot presume a waiver on a silent record, no further reply is necessary.

D. Respondent Misconstrues the Showing Necessary To Demonstrate that a Potential Conflict Ripened into An Actual One By Influencing, and Thus Adversely Affecting, Counsel's Performance

According to respondent, Mr. Mai has failed to prove that the conflict resulted in counsel's "deficient performance" because "reasonable and unconflicted" counsel *could* have made the same trial decisions as defense counsel made and "the record does not demonstrate the absence of any [reasonable] tactical" basis for counsel's. (RB 27, 29, 32, 36-37.)

Therefore, respondent concludes, Mr. Mai has failed to prove that the conflicts ripened into actual ones by adversely affecting counsel's performance within the meaning of the state and federal Constitutions. (RB 27-37.) Respondent's conclusion does not follow from its premise.

Respondent's analysis is consistent with the first, "deficient performance" prong of the traditional *Strickland* analysis, which requires a showing that defense counsel committed trial errors so serious that they fell below objective standards of reasonableness under prevailing professional norms, unjustified by any reasonable trial "tactic" or "strategy." (*Strickland, supra,* 466 U.S. 668, 688.) However, respondent's analysis is *inconsistent* with the showing necessary to demonstrate a conflict's "adverse affect" on counsel's performance under the appropriate analysis governing such claims. (See AOB 25-31, 63-68.)

It is well-settled that "[w]hen a[n appellant] premises his ineffective assistance claim on the existence of a conflict of interest, the claim is subjected to the specific standard spelled out in *Cuyler v. Sullivan*, 446 U.S. 335 . . . instead of that articulated in *Strickland*." (*United States v. Nicholson* ["*Nicholson I*"] (4th Cir. 2007) 475 F.3d 241, 249; see also AOB 25-27.) Indeed, as the high court explicitly recognized in *Strickland*, its two-pronged test to establish ineffective assistance of counsel *presupposes the absence of a conflict of interest*. Ineffective assistance of counsel claims premised on conflicts of interest are subject to a different analysis: under *Cuyler v. Sullivan, supra*, 446 U.S. at pp. at pp. 345-350, the defendant must demonstrate that his lawyer labored under a conflict of interest that adversely affected his performance. (*Strickland, supra*, 466 U.S. at pp. 687-688, 690-693.) The high court explained why the two standards are different as to both the performance and prejudice inquiries.

In the case of actual conflicts, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." (*Strickland, supra*, 466 U.S. at p. 692.) Counsel have clearly delineated obligations "to avoid conflicts of interest" and trial courts must make "early inquiry in certain situations likely to give rise to conflicts [Citation] . . . ." (*Ibid.*) When an "actual conflict" is shown, prejudice is presumed because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." (*Ibid.*) Furthermore, "given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for [actual] conflicts of interest." (*Ibid.*)

In contrast, *other* "[a]ttorney errors come in an infinite variety . . . [which, unlike conflicts, cannot] be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." (*Strickland, supra*, 466 U.S. at p. 693.) "They cannot be classified according to likelihood of causing prejudice . . . and are as likely to be utterly harmless in a particular case as they are to be prejudicial." (*Ibid.*) Furthermore, unlike conflicts of interest that can be prevented by the trial court's duty to make early inquiry, the state is not "able to prevent [other] attorney errors that will result in reversal of a conviction or sentence." (*Ibid.*)

Under the appropriate conflict of interest analysis, respondent's focus on what *unconflicted* counsel *could* have done without violating prevailing professional norms is misplaced. When an *unconflicted* attorney makes a choice between strategies, there is no question that his choice was impelled only by his independent professional judgment and not any improper outside influences; therefore, the relevant question for Sixth Amendment purposes is whether that independent professional judgment

was objectively reasonable under the traditional *Strickland* analysis. (See, e.g., *People v. Mroczko*, *supra*, 35 Cal.3d at p. 107-108.) But where, as here, an attorney with conflicting interests makes a choice between strategies, the issue of whether that choice was influenced by a conflicting interest is very much in question; indeed, it is the very focus of "adverse effect" analysis. (AOB 65-68; see, e.g., *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 907-909 [under *Strickland*'s first prong, question is whether act or omission was due to "incompetence," while under conflict analysis, question is whether act or omission was influenced by conflict].)

As the United States Supreme Court has held, a conflict's "adverse effect" is demonstrated when it appears likely that counsel was "*influenced* in his basic strategic decisions by" the conflict. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273;[14] accord, e.g., *Mickens v. Taylor* (2002) 535 U.S. 162, 170-172 [citing *Wood* as appropriately describing "adverse effect" requirement]; *People v. Mroczko*, *supra*, 35 Cal.3d at pp. 107-108; *United States v. Malpiedi*, *supra*, 62 F.3d at p. 469; *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1452; *Thomas v. Folz* (6th Cir. 1987) 818 F.2d 476, 483.) Unlike *Strickland*'s first prong, this showing may be satisfied when it appears that counsel's "representation . . . was [simply] not *as effective as it*

---

[14] In his opening brief, Mr. Mai misattributed the quotation that adverse effect is established if it appears that counsel "was influenced in his basic strategic decisions" by the conflict to *Wheat v. United States* (1988) 486 U.S. 153, 160, and cited the Supreme Court's decision in *Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273 in accord. (AOB 65.) In fact, the quoted language is found in *Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273, not *Wheat*. In *Mickens, supra*, the Supreme Court held that the quoted language in *Wood* is a correct statement of the "adverse effect" showing necessary to establish an "actual conflict" in violation of the Sixth Amendment. (*Mickens*, *supra*, 535 U.S. at pp. 169-172.)

might have been" absent the conflict. (*Glasser*, *supra*, 325 U.S. at p. 76, italics added; accord, *Cuyler v. Sullivan*, *supra*, 446 U.S at pp. 348-350; *People v. Rundle*, *supra*, 43 Cal.4th at p. 169, and authorities cited therein [adverse effect if record shows counsel "'pulled his punches'" – i.e., failed to represent defendant *as vigorously as he might have* had there been no conflict'"].)

Under the federal circuit courts' application of the high court's precedents and "longstanding and widely utilized standard" for determining whether a conflict improperly influenced counsel's performance (*United States v. Nicholson* ["*Nicholson II*"] (4th Cir. 2010) 611 F.3d 191, 212 & fn. 19), adverse effect is established when there was some "objectively reasonable" or "plausible alternative defense strategy or tactic that might have been pursued but was not and that the alternative strategy was inherently in conflict with . . . the attorney's other loyalties or interests.'" (AOB 66-68, quoting *United States v. Wells* (9th Cir. 2005) 394 F.3d 725, 733, and authorities cited therein.) As similarly stated by this Court in *People v. Mroczko*, *supra*, 36 Cal.3d 86, when defense counsel rejects a reasonable strategy that would conflict with an interest other than his client's in favor of pursuing a strategy that seemingly serves both interests and "paper[s] over the conflicts that would have arisen" by the discarded strategy, the record demonstrates that counsel's "very choice of strategies was colored by the conflict he faced" in violation of the federal Constitution. (*Id.* at pp. 107-108, AOB 67, 110.) This circumstantial showing is sufficient to compel the inference that defense counsel discarded the "plausible" or "objectively" reasonable strategy in whole or in *part because* of the conflict and hence that the conflict influenced and adversely affected counsel's performance. (See, e.g., *People v. Mroczko*, *supra*, 35

Cal.3d at pp. 107-108; *United States v. Malpiedi*, *supra*, 62 F.3d at p. 469; *Nicholson II*, *supra*, 611 F.3d at p. 213; cf. *People v. Easley* (1988) 46 Cal.3d 712, 727 [under United States Supreme Court jurisprudence, adverse effect does not demand "'affirmative evidence' in the record," but rather is determined by inferences drawn from the record as whole].)[15]

Upon a showing that counsel was influenced in his basic strategies by a conflicting interest under this standard, it is of no moment if unconflicted, objectively reasonable counsel "might have made precisely the same tactical decisions." (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 107; accord, e.g., *United States v. Malpiedi*, *supra*, 62 F.3d at p. 469; *Thomas v. Folz* (6th Cir. 1987) 818 F.2d 476, 483; *United States v. Hall*

---

[15] All of the federal circuits endorse and apply this test with minor variations. (*Reyes-Vejarano v. United States* (1st Cir. 2002) 276 F.3d 94, 97; *Winkler v. Keane* (2d Cir. 1993) 7 F.3d 304, 309; *United States v. Gambino* (3rd Cir. 1988) 864 F.2d 1064, 1070; *Nicholson II*, *supra*, 611 F.3d at p. 212 & fn. 19; *Mickens v. Taylor* (4th Cir. 2001) 240 F.3d 348, 361, aff'd by *Mickens v. Taylor*, *supra*, 535 U.S. at p. 176; *Perillo v. Johnson* (5th Cir. 2000) 205 F.3d 775, 807; *Moss v. United States* (6th Cir. 2003) 323 F.3d 445, 465-466; *United States v. Cirrincione* (7th Cir. 1985) 780 F.2d 620, 629; *Winfield v. Roper* (8th Cir. 2006) 460 F.3d 1026, 1039; *United States v. Bowie* (10th Cir. 1990) 892 F.2d 1494, 1500; *Freund v. Butterworth* (11th Cir. 1999) 165 F.3d 839, 860.)

Some circuit courts state this test in terms of a "plausible" alternative strategy inherently in conflict with the attorney's other interests. (*Nicholson II*, *supra*, 611 F.3d at p. 212 & fn. 19 [collecting cases].) Others state the test in terms of an "objectively reasonable" alternative strategy. (*Ibid.*) This Court need not resolve whether there is any meaningful difference between the two formulations and, if so, which is the more appropriate test, since the discarded alternative strategies inherently in conflict with defense counsel's interests in this case were both "objectively reasonable" and "plausible." Hence, Mr. Mai's references to "plausible alternatives" encompass both formulations of the tests.

(7th Cir. 2004) 371 F.3d 969, 974.) "The point is, of course, that if that had happened, it would have happened because [unconflicted counsel] decided that it should, thinking only of his own client's interests and *not* those of" anyone else. (*Mroczko*, *supra*, at pp. 107-108.)

Similarly, it is unnecessary to prove that counsel could have had no legitimate tactical reasons – uninfluenced by the conflict – for his or her acts or omissions. To the contrary, a showing that counsel discarded a plausible or reasonable alternative strategy that inherently conflicts with his other interests establishes adverse effect and makes "it is unnecessary – *and even inappropriate* – to accept and consider evidence of *any* benign motives for the lawyer's tactics." (*Nicholson II*, *supra*, 611 F.3d at p. 213, italics added; accord, e.g., *United States v. Malpiedi*, *supra*, 62 F.3d at p. 470; *Lewis v. Mayle* (9th Cir. 2004) 391 F.3d 989, 998-999, and authorities cited therein; *United States v. DeFalco* (3d Cir. 1979) 644 F.2d 132, 137.)

To be sure, this does not mean that a comparative inquiry into what a reasonable, unconflicted attorney would have done under the same circumstances is irrelevant. (See, e.g., *Glasser v. United States*, *supra*, 315 U.S. at pp. 172-175 [adverse effect demonstrated where it appear[ed] that counsel's performance was not "as effective as it might have been" absent conflict]; *People v. Rundle*, *supra*, 43 Cal.4th at pp. 169-170.) For instance, adverse effect may be established if unconflicted counsel would not have chosen the strategy conflicted counsel chose or would have pursued a strategy conflicted counsel discarded. (See, e.g., *People v. Rundle, supra*, at pp. 170-171; *People v. Easley*, *supra*, 46 Cal.3d at pp. 726-728.) Similarly, if the strategy conflicted counsel discarded was an objectively *unreasonable* one and therefore would necessarily have been discarded by a reasonable, unconflicted attorney, then adverse effect *cannot* be established.

(See, e.g., *United States v. Malpiedi*, *supra*, 62 F.3d at p. 469.) However, irrespective of what unconflicted counsel *could* reasonably have done within prevailing professional norms, when conflicted counsel discards a reasonable strategy that inherently conflicts with an interest other than the best interests of his client, adverse effect is demonstrated. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273.)[16]

Finally, once it is demonstrated that a conflict influenced counsel's performance, *Strickland*'s first prong is necessarily satisfied. Because counsel have "basic duties" to avoid actual conflicts, no reasonable attorney would permit a conflict to influence his trial decisions. (*Strickland*, *supra*, 466 U.S. at p. 693; see, e.g., *United States v. Malpiedi*, *supra*, 62 F.3d at p. 469 [counsel's failure or inability to make a "conflict-free decision is itself a lapse in representation".)

As demonstrated below and in the opening brief, the record amply demonstrates that the conflicts adversely influenced defense counsel's choices of strategy from beginning to end. Therefore, defense counsel's performance in fact *did* fall below objective standards of reasonableness

---

[16] Indeed, any contrary rule would be inconsistent with the high court's precedents and nonsensical. As discussed above, the United States Supreme Court has recognized compelling reasons to demand a lower burden of proof to establish unconstitutional conflicts of interest than that required to prove other forms of ineffective assistance of counsel. (*Strickland, supra*, 466 U.S. at p. 692, and authorities cited therein.) But respondent's formulation would turn the law on its head and impose a *greater* burden on defendants to prove an unconstitutional conflict: a defendant would not only be required to prove ineffective assistance under the traditional two-pronged *Strickland* test. (See also RB 37-40.) In addition, the defendant would have to prove that the conflict (and not merely incompetence) *caused* counsel's ineffective assistance. (See, e.g., *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 907-909.)

even within the meaning of *Strickland.* Hence, even under respondent's analysis, the conflicts adversely affected counsel's performance.[17]

E. The Potential Conflicts Ripened into Actual Ones by Adversely Influencing Defense Counsel's Decisions During the Pre-Plea and Plea Proceedings

Mr. Mai argued in the opening brief that the potential conflicts ripened into actual ones, influencing defense counsel's performance during the pre-plea and plea proceedings in four distinct but related ways. (AOB 63-92 [Argument I-E-2 through I-E-5].) First, the related attorney wrongdoing conflict adversely influenced lead counsel Peters's decision to insinuate himself into the federal proceedings in which Mr. Mai was already represented by unconflicted federal counsel and broker a plea agreement whereby Mr. Mai not only pled guilty to all federal charges and received the maxim sentence but also *and agreed to plead guilty to the* ***state*** *capital murder charge*, all in exchange for no return of any benefit to himself. (AOB 69-72 [Argument I-E-2].)

Respondent counter-argument is that: (1) there is no evidence that "defense counsel Peters and O'Connell *forced* Mai to plead guilty"; (2) no evidence "that Mai's plea in federal court was other than voluntary, knowing and intelligent"; and (3) "Mai cannot satisfy the deficient performance prong [of *Strickland*] because the record does not demonstrate an absence of any tactical reason for the entry of his federal plea" (RB 28-29, italics added). To the extent these contentions have not already been refuted, they are irrelevant to the issue at hand.

---

[17] In any event, even under respondent's analysis, Mr. Mai has established that no *reasonable*, unconflicted attorney would have performed as defense counsel did in this case.

As this Court has held, adverse effect is established if counsel chose a course that served a conflicting interest that an unconflicted attorney would *not* have pursued. (See, e.g., *People v. Rundle*, *supra*, 43 Cal.4th at p. 170.) This showing is readily satisfied in this case.

As to respondent's first point, Mr. Mai does not argue, nor must he show, that his attorneys "forced" him to do anything or that he is entitled to relief from his federal guilty pleas. A conflict of interest is far more insidious than "forcing" a client to take an action that will harm him or avoid taking an action that would benefit him. The essential vice in representation by counsel with conflicting personal interests of the unique kind presented here is that counsel is in a position of *trust* with the client and will *manipulate* that position to their own ends.

In this case, defense counsel had compelling personal reasons to avoid an adversarial trial and curry favor with the federal government – the very entity that was investigating and prosecuting their client and agent/investigator for conspiring to kill Nguyen and the very entity to whom their agent/investigator alleged that they were also complicit. (AOB 28-40.) These interests were served by Mr. Peters's orchestration of the federal plea agreement, which included a promise that Mr. Mai would plead guilty to the *state capital murder charge* without any actual or reasonably anticipated return benefit for himself. (AOB 69-72; see also AOB 103-110, citing, inter alia, *United States v. Fulton*, *supra*, 5 F.3d at p. 610; *United States v. Levy, supra*, 25 F.3d at p. 156.) It is most telling that Mr. Mai's unconflicted federal counsel refused to concur in, and objected to, the plea agreement conflicted counsel arranged. (AOB 69-72; 2-CT 408-413.)

These conflicts in turn influenced defense counsel's decision to commit Mr. Mai to a slow plea to capital murder in state court independent

of the federal plea.[18] (AOB 73-78 [Argument I-E-3.) Although the state court and state and federal prosecutors ultimately recognized that defense counsel's promise to the federal government was not binding in state court, defense counsel nevertheless consented to Mr. Mai's slow plea to capital murder without making any attempt to negotiate a return benefit from the state by, for instance, offering his cooperation in addition to his plea. (AOB 73-78.)

Respondent's contention that Mr. Mai would never have agreed to cooperate and the prosecution would never have agreed to a return benefit is without merit for two reasons. (RB 29-30.) First, it is pure speculation: respondent points to no record evidence to support these contentions, but rather bases them on "common sense." (RB 29-30.) More importantly, respondent's focus on the likely *outcome* of attempts at plea negotiations is irrelevant under the law.

"Adverse effect" focuses on counsel's *performance*, *not* on the *outcome* of the proceedings. (See Part D, *ante*.) Therefore, when a defendant claims that a conflict influenced his attorney's performance in the plea negotiation stage, he need only show that counsel did not pursue the alternative of *attempting* to negotiate a favorable plea bargain that would inherently conflict with counsel's other interests. (*United States v. Williams* (2nd Cir. 2004) 372 F.3d 96, 106-107; *United States v. Christakis* (9th Cir.

---

[18] That is, defense counsel submitted the issue of Mr. Mai's guilt and death eligibility to the trial court based solely on the preliminary hearing transcript, without argument or the presentation of additional evidence. Respondent does not dispute the submission was a "slow plea," which was "tantamount, that is the same as" a guilty plea that made a guilty verdict a "foregone conclusion." (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602; see AOB 73.)

2001) 238 F.3d 1164, 1170; *Winkler v. Keane* (2d Cir. 1993) 7 F.3d 304, 307-309.) The defendant "need not demonstrate that the government would have reduced his sentence" or agreed to other consideration "if he had provided information implicating" others with conflicting interests. (*United States v. Christakis*, *supra*, at p. 1170; accord, *United States v. Williams*, *supra*, at pp. 106-107; *Winkler v. Keane*, *supra*, at pp. 307-309; see also *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 491 ["assess[ing] the impact of a conflict of interest on the attorney's . . . decisions in plea negotiations would be virtually impossible"].) Consequently, where, as here, Mr. Mai may well have possessed credible evidence of related attorney wrongdoing, counsel's failure to "make any significant effort to negotiate a . . . cooperation agreement on his [client's] behalf" is a plausible alternative inherently in conflict with counsel's personal interests that adversely affected counsel's performance. (*United States v. Williams*, *supra*, at p. 106; accord, e.g., *Mannhalt v. Reed* (9th Cir. 1988) 847 F.2d 576, 583.)

In any event, even if attempting to negotiate for a promised benefit from the state in return for Mr. Mai's plea was not a plausible alternative, refusing to consent to the plea was. (AOB 78-85 [Argument I-E-4].) Indeed, it was the far more reasonable alternative in this case for at least two reasons. First, defense counsel knew that Mr. Mai entered the slow plea in order to obtain a death verdict and believed that it was highly likely to result in that verdict. (AOB 78-85 [Argument I-E-4.) Second, defense counsel should have known that the preliminary hearing evidence raised compelling reasonable doubt that Mr. Mai was even eligible for the death penalty based on the sole special circumstance allegation. (AOB 85-91 [Argument I-E-5].)

Respondent does not dispute that Mr. Mai entered a slow plea to

capital murder or that defense counsel had the power to prevent it under Penal Code section 1018. (See RB 29-31; AOB 73, 80-81.) Hence, under the appropriate conflict analysis, respondent tacitly concedes that refusing to consent to the plea was a plausible alternative. (AOB 78-91; Part D, *ante*.)

Respondent does not address Mr. Mai's argument that refusing to consent to the unconditional slow plea on the ground that it was intended to result, and was highly likely to result, in a death verdict was not only a plausible alternative. It is the very "alternative" that Penal Code section 1018 was enacted to achieve (*People v. Chadd* (1981) 28 Cal.3d 739, 750-751, 753) and that prevailing professional norms demand (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989) ["1989 ABA Guidelines"], Guidelines 11.6.2 and 11.6.3 and Commentaries). (AOB 78-85.) Under the circumstances, defense counsel's consent to the plea served no interests but their own at the expense of Mr. Mai's life. (AOB 78-75.)

Furthermore, counsel's submission to a court trial based on the evidence in the preliminary hearing did not relieve the prosecution of its burden of proof on every element, preclude counsel from arguing against the sufficiency of the preliminary hearing evidence to meet that burden, or relieve the court of its duty to acquit if that evidence were insufficient to prove the charged murder and special circumstance. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 603; *People v. Martin* (1973) 9 Cal.3d 687, 695.) As discussed in the opening brief, the preliminary hearing transcript manifestly supported a challenge to the sufficiency of the evidence that Mr. Mai killed the victim while he was *lawfully* engaged in the performance of his duties as a police officer, an element of the sole special circumstance

allegation. (AOB 85-91, citing, inter alia, Pen. Code, § 190.2, subd. (a)(7) and *In re Manuel G.* (1997) 16 Cal.4th 805, 815 [crimes and special circumstances that incorporate a performance of duties element require proof beyond a reasonable doubt that officer was *lawfully* engaged in performance of duties].) Hence, refusing to consent to the slow plea and arguing that defense was a plausible, highly reasonable alternative.

Respondent counters defense counsel's performance in this regard was "reasonable" and "strategic" under *Strickland*'s first prong because there was no "viable defense." (RB 29-31.) Even assuming contrary to all precedent that *Strickland*'s first prong applies here, respondent's contention is without merit. Its "argument" in this regard is perfunctory and misleading:

> Mai contends that defense counsel should have asserted the officer was not acting lawfully because he stopped Mai for not having his headlights illuminated and [prosecution] witness Beniece Sarthou testified she was wearing her prescription sunglasses at about 8:30 p.m. when she saw that Mai had been stopped by the officer. (AOB 85-91.) Ms. Sarthou's perceived need for sunglasses is not a sufficient basis for concluding that defense counsel were affected by an actual conflict in their representation of Mai.

(RB 30-31.)

Respondent's summary bears no relation, and provides no meaningful response, to Mr. Mai's actual challenges to the preliminary hearing evidence to prove the lawful performance of duties element of the sole special circumstance allegation. (AOB 85-91 [Argument I-E-F], 168-178 [Argument II] 179-191 [Argument III]; see also Arguments II and III, *post*.) First, the preliminary hearing contained no competent evidence to explain the reason for the officer's traffic stop. (AOB 86-89.) Second,

even assuming arguendo that the officer stopped and detained Mr. Mai for driving without illuminated headlights, the prosecution failed to present *any* evidence at the hearing to prove that Mr. Mai was thereby committing a *traffic violation* for which the peace officer could *lawfully* stop and detain him. (AOB 85-91, citing, Veh. Code, §§ 38335 [requiring illumination of headlights "from one-half hour *after sunset* to one-half hour before sunrise"], 24400 [same – "during darkness"], and 280 [defining darkness as "any time from one-half hour *after sunset* to one-half hour before sunrise"].) Rather, prosecution witness Berneice Sarthou's uncontradicted testimony established that Mr. Mai was *not* committing a traffic violation and therefore Officer Burt's detention was *unlawful*. (AOB 85-91.)

Contrary to respondent's purported summary of the evidence, prosecution witness Sarthou did not simply testify that she was wearing her sunglasses when she observed the officer and Mr. Mai. (RB 30-31.) She explicitly testified that "*it was still daylight[,] [i]t wasn't sunset yet.*" (1 Muni RT 190, emphasis supplied.) Based on this evidence Mr. Mai was *not* committing a traffic violation by driving without illuminated headlights *before* sunset; therefore the officer's stop and detention of him for that reason was *not* lawful . (AOB 85-91, citing, inter alia, Veh. Code, §§ 280, 24400, 38335, *Whren v. United States* (1996) 517 U.S. 806, 809-810 and *Delaware v. Prouse* (1979) 440 U.S. 648, 653.) The preliminary hearing evidence thus supported a powerful argument that the officer was not killed while engaged in the *lawful* performance of his duties, a necessary element of the sole special circumstance allegation.

Therefore, refusing to consent to Mr. Mai's slow plea and arguing that the special circumstance has not been proved beyond a reasonable doubt were not only "plausible" or objectively reasonable alternatives to

defense counsel's "strategy" of conceding Mr. Mai's guilt and death eligibility under circumstances in which a death verdict was virtually inevitable. Even under respondent's first-prong *Strickland* analysis, counsel's expressed tactical reason for discarding those alternatives – that there was no guilt phase defense – was objectively unreasonable. (See Argument III, *post*; AOB 179-199.) Because the discarded, superior strategies inherently conflicted with defense counsel's powerful personal interests to avoid an adversarial trial and curry favor with the state and federal prosecuting authorities, the record compels the inference that the conflicts adversely affected their performance. (AOB 85-91, 103-110; Parts D, *ante*, and G-1, *post*.)

F. The Conflicts of Interest Influenced, and Thus Adversely Affected, Defense Counsel's Decision to Insist that No Competency Proceedings be Initiated Despite Their Repeatedly Expressed Belief that Mr. Mai was Not Capable of Rationally Assisting in His Own Defense

As discussed in the opening brief, defense counsel's personal interests also influenced their insistence that competency proceedings were unnecessary. (AOB 92-103.) Respondent mischaracterizes Mr. Mai's argument. According to respondent, Mr. Mai argues that his counsel's failure to "rel[y] on the filings that were made in the Ninth Circuit challenging his conditions of confinement in federal custody to support a request for a mental competency hearing" demonstrates that their personal interests adversely affected their performance, or establishes an actual conflict. (RB 31-32.) Having built up this straw man, respondent proceeds to knock it down on the ground that the trial court was "aware of those Ninth Circuit filings," yet necessarily found that they did not contain substantial evidence warranting a competency hearing by failing to order

one. (RB 31-32.)

This is not Mr. Mai's argument. As discussed in the opening brief, lead defense counsel Peters *repeatedly* represented to the trial court that Mr. Mai's mental condition had so deteriorated under the extraordinarily harsh conditions of his federal solitary confinement that he was no longer able to rationally consult with counsel, participate in the preparation of his penalty phase defense, or indeed to decide to whether to present a defense at all. (AOB 93-99.) Defense counsel's representations were based on the expert opinion of Mr. Mai's appointed psychologist, Dr. Thomas, who had regular contact with Mr. Mai before and throughout his solitary confinement, as well as the defense team's own observations and interactions with Mr. Mai. (AOB 93-99; see also AOB 200-247.) Defense counsel's representations were made to the court orally, through Dr. Thomas's state court testimony, *and* through federal and state appellate court pleadings that they served on the state court and that court reviewed. (AOB 93-99.) In other words, as Mr. Mai made abundantly clear in the opening brief, defense counsel *did* present the trial court with "the filings that were made in the Ninth Circuit" (RB 31), those "filings" detailed evidence that Mr. Mai was unable to rationally consult with counsel or participate in his defense, and the trial court was aware of those filings and the evidence they contained. (AOB 95-96; see also AOB 208-214.)

Thus, the problem is *not* that defense counsel failed to present certain evidence of Mr. Mai's incompetency to the trial court, as respondent suggests. (RB 31.) To the contrary, defense counsel presented a substantial amount of such evidence and represented in effect that Mr. Mai was not competent to stand trial within the meaning of state law and the federal Constitution. (AOB 92, 99, citing, inter alia *Drope v. Missouri* (1975) 420

U.S. 162, 171 and Pen. Code, § 1367.) In other words, "although defense counsel did not formally" declare doubt as to Mr. Mai's competency, they "did on numerous occasions express concern that [Mr. Mai] was unable to aid in his own defense . . . . was deteriorating, not communicating with defense counsel," and thereby effectively and "clearly expressed concern about [his] competence." (*Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 574-575.)

The problem is that despite defense counsel's representations that Mr. Mai was unable to rationally consult with counsel and participate in his defense – which by definition meant that they believed he was incompetent – they nonsensically insisted that he was not "1368," meaning that competency proceedings were unnecessary. (AOB 93-99; 5-RT 1077; see also 2-RT 396, 3-RT 452; 5-RT 1077; 6-RT 1081.) Given defense counsel's evidence and good cause to believe that their client was incompetent, requesting the initiation of competency proceedings was clearly a "plausible" or reasonable alternative under the appropriate conflict analysis. (AOB 93-103.) Even under respondent's *Strickland* analysis, defense counsel's failure to request the initiation of competency proceedings under these circumstances fell below objective standards of reasonable competence. (AOB 99-101, citing, inter alia, ABA Criminal Justice Mental Health Standards (1989) Standard 7-4.2, subd. (c), *Jermyn v. Horn* (3d Cir. 2001) 266 F.3d 257, 283, 301, *United States v. Boigegrain* (10th Cir. 1998) 155 F.3d 1181, 1188, and authorities cited therein, and *People v. Stanley* (1995) 10 Cal.4th 764, 804-805.) Because that discarded alternative inherently conflicted with counsel's personal interests, the record compels the inference that the conflicts adversely affected counsel's performance. (AOB 101-103.)

Respondent contends that "[d]efense counsel did not seek a mental competency hearing due to a conflict or fear of possibility of facing criminal charges, there was no request simply because there was not substantial evidence upon which to doubt Mr. Mai's competency." (RB 31-32.) In support of its contention, respondent simply incorporates by reference its later argument that the evidence was insufficient to trigger *the trial court's sua sponte duty* to declare a doubt as to Mr. Mai's competency and initiate competency proceedings. (RB 32; see also RB 53-62 [Argument IV].)

Respondent conflates two distinct legal standards. The focus of actual conflict analysis, as well as *Strickland*'s first prong, is on *defense counsel*'s *performance.* Where, as here, defense counsel has good reason to believe that his client is incompetent, his failure to request the initiation of competency proceedings falls below an objective standard of reasonableness within the meaning of *Strickland*'s first prong. (AOB 99-101.) If a conflict of interest influenced counsel's failure to make a plausible or objectively reasonable request for competency proceedings, the conflict "adversely affected" counsel's performance within the meaning of *Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273, *Mickens*, *supra*, 535 U.S. at pp. 171-172, and *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 348-349. (Part D, *ante*.)

Whether the evidence of incompetence is sufficient to *demand* the *trial court*'s sua sponte initiation of competency proceedings is an entirely different question. In determining whether defense counsel's failure to request competency proceedings satisfies *Strickland*'s first prong, the reviewing court "need not decide whether the trial court was required" to initiate competency proceedings. "The issue before [the reviewing court] is

not the *trial court's decisions* but whether [*defense counsel's*] actions – or inactions – show his ineffectiveness. The focus of the ineffectiveness claim is that [defense counsel] never even asked for" competency proceedings. (*Hummel v. Rosemeyer* (3d Cir. 2009) 564 F.3d 290, 302-303.)

Hence, respondent's muddled response to Mr. Mai's argument must be rejected. For all of the reasons discussed above and in the opening brief, the record compels the inference that defense counsel's conflicting interests in self-preservation adversely affected their inexcusable performance in insisting that competency proceedings were unnecessary despite their compelling cause to believe (and Dr. Thomas's expert opinion) that Mr. Mai was, by definition, not competent. (AOB 92-103.)

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

1. Respondent Ignores, and Thus Does Not Dispute, Counsel's Compelling Personal Interests to Avoid an Adversarial Penalty Trial At the Cost of Mr. Mai's Life

As discussed in Part C-1, *ante*, and in the opening brief, contrary to defense counsel's representation to the trial court, the state prosecutor did *not* promise to withhold evidence of the alleged conspiracy to kill prosecution witness Nguyen in this trial. (AOB 51-55, 103-110; 1-RT 80-81.) Instead, defense counsel understood that the state prosecutor reserved the right to introduce that evidence on rebuttal if Mr. Mai presented a penalty phase defense, or "put on some penalty evidence." (3/16/07 2-SCT 132-133.)[19]

---

[19] As previously noted (footnote 13, *ante*), the true nature of the prosecutor's promise only revealed to the *federal* court, *after* Mr. Mai had (continued...)

A prior felony conviction involving violence or threat of violence can be considered for its relevance under both factor (b) and factor (c) of Penal Code section 190.3. (See, e.g., *People v. Melton* (1988) 44 Cal.3d 713, 764.) Because the bare face of the judgment in the federal case would not apprise the jury of all the damaging details of the scheme, defense counsel knew that if they presented a penalty phase defense, the prosecution would likely introduce live testimony concerning the conspiracy to kill Nguyen. Daniel Watkins and Vickie Pham would be logical witnesses since they possessed direct, personal knowledge of certain of Mr. Mai's activities that the prosecutor would wish to present to jury but which he could not elicit from other witnesses.[20] Thus, were counsel to mount any penalty phase defense, insurmountable ethical dilemmas would ensue. (AOB 105-110.)

Given Watkins's allegations that he was at all times acting as defense counsel's agent in aiding and abetting the scheme to kill Nguyen, defense counsel faced the risk that he would repeat these allegations were

---

[19](...continued)
already entered his slow plea in state court and been found guilty. Thus, the true nature of the agreement may also have been that the prosecutor reserved the right to introduce the evidence in rebuttal at the guilt phase, as well. Due to the court's failure to conduct a more searching inquiry and defense counsel's misrepresentation to the trial court that the prosecutor had promised not to present the evidence *at all*, the extent of the true nature of the agreement is not revealed by the record.

[20] Watkins and Pham would have had a strong incentive to testify against Mr. Mai in light of Rule 35, Federal Rules of Criminal Procedure, which provides for a post-judgment reduction of a federal sentence on the government's motion based on a defendant's "substantial assistance" in investigating or *prosecuting* another person. (Fed.Rules Crim.Proc., rule 35(b).)

he to take the stand. As such, counsel would have a strong incentive to avoid presenting a penalty phase defense so as to keep Watkins from testifying. (AOB 106-107, citing, inter alia, *United States v. Levy*, *supra*, 25 F.3d at pp. 156-158 [where counsel had been accused of wrongdoing connected to client's crimes and pursued strategy that avoided possibility of his being called as a witness, court concluded that the conflict influenced that strategy and demonstrated adverse effect]; accord, *Rubin v. Gee*, *supra*, 292 F.3d at pp. 398, 402-405.) Further, if Watkins were called as a witness, defense counsel would then have a strong disincentive from subjecting him to any vigorous and searching cross-examination. (AOB 106, citing inter alia, *Mannhalt v. Reed*, *supra*, 847 F.2d at pp. 582-583 [when government witness makes accusation that defense counsel engaged in criminal conduct relating to client's crimes, counsel's "personal interest in his own reputation and avoiding criminal prosecution" may make effective cross-examination impossible], *United States v. Fulton*, *supra*, 5 F.3d at pp. 610, 613, and *United States v. Hobson*, *supra*, 672 F.2d at pp. 828-829.)

Furthermore, as discussed in Parts B-3 and C-1, *ante*, given counsel's representation of Ms. Pham in her federal sentencing proceedings arising from the conspiracy charge, defense counsel would have been precluded from effectively cross-examining their former client. (AOB 108-110, citing, inter alia, *United States v. Shwayder*, *supra*, 312 F.3d at pp. 118-119, *United States v. Malpiedi*, *supra*, 62 F.3d at p. 469, and *People v. Easley*, *supra*, 46 Cal.3d at pp. 730-732.) Moreover, the evidence defense counsel themselves developed and presented on Ms. Pham's behalf through Mr. Mai's own state-appointed psychologist, "to the affect [*sic*] that Ms. Pham had acted under Mr. Mai's duress caused by physical and mental abuse," from which she suffered "battered women's syndrome" (2-CT 501),

would certainly have been likely aggravating evidence in rebuttal to a penalty phase defense. (AOB 108-110, citing *People v. Easley*, *supra*, 46 Cal.3d at pp. 722-725.) Given their representation of Ms. Pham, counsel should have been disqualified in light of these fatally conflicting interests. (Part C, *ante*.)

In short, engaging in an adversarial penalty trial with the presentation of a penalty phase defense would likely result in the prosecution's introduction of evidence relating to the conspiracy to kill Nguyen, which posed severe risks to defense counsel's liberty, livelihood, and reputation, as well as creating other, insurmountable ethical dilemmas. (AOB 103-110 [Argument I-G-1].) Consequently, defense counsel had compelling personal interests to avoid opening that door.

As discussed in the opening brief and further below, fighting for Mr. Mai's life in an adversarial proceeding was certainly a plausible alternative to counsel's "strategy" of conceding death, but one that inherently conflicted with their personal interests and those they owed to Ms. Pham. (AOB 111-141.) Hence, the record establishes that defense counsel's conflicting interests influenced and adversely affected their penalty phase representation of Mr. Mai. (Part D, *ante*.)

Respondent ignores, and thereby does not dispute, the evidence that defense counsel's personal interests and those they owed to Ms. Pham created a powerful incentive to avoid an adversarial penalty trial. Nor does respondent dispute that counsel's highly irregular strategy of effectively stipulating to the death penalty served those interests at the expense of Mr. Mai's very life. Nevertheless, respondent disagrees that counsel's other interests influenced their choice of "strategy" and thereby adversely affected their performance. Respondent is wrong.

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

While Mr. Mai's professed desire for execution was not unusual, his conflicted counsel's response to that wish certainly was. (AOB 111-126.) Under prevailing professional standards, "it is ineffective assistance for counsel to simply acquiesce in [a client's wishes for execution], which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide." (AOB 111-112, quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003), reprinted in 31 *Hofstra L.Rev.* 913, 1044-1045 [hereafter "2003 ABA Guidelines"], Guideline 10.9.2, History of Guideline and citing in accord, e.g., 1989 ABA Guidelines, *supra*, Guidelines 11.4.1, 11.4.2, 11.6.3 and Commentary.) At a minimum, an attorney confronted with such a client should: (1) assure himself that the client's instructions are rational, by ensuring that the client is competent; and (2) informed, by conducting necessary investigation and fully and accurately advising the client of his options based upon the results of such investigation; and (3) even then, attempt to persuade the client to change his mind and avoid overstating the strength of the prosecution's case or understating the strength of a potential defense. (AOB 111-112, 118).

Here, defense counsel failed to pursue any of these plausible, objectively reasonable alternatives. Despite good cause to doubt Mr. Mai's competency to make such a decision, defense counsel acquiesced in his death wish without requesting competency proceedings. (AOB 112-114

[Argument I-G-2-a], citing, inter alia, *Comer v. Stewart* (9th Cir. 2000) 215 F.3d 910, 914, fn. 2.)[21]

Moreover, despite the "red flag" that Mr. Mai may have suffered brain trauma contributing, among other things, to his violent behavior and his court-appointed psychologist's recommendation that this potentially critical evidence be investigated by way of neuropsychological testing and, potentially, an M.R.I. or C.T. scan, defense counsel ignored it. (AOB 114-118 [Argument I-G-2-b], citing, inter alia, *Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1501-1502.)[22] Finally, rather than attempting to

---

[21] See also 2003 ABA Guidelines, *supra*, 31 Hoftra L.Rev. at pp. 923, 1009-1010, Commentaries to Guidelines 1.1 and 10.5; 1989 ABA Guidelines, *supra*, Guidelines 1.1, 11.4.1, 11.4.2, 11.6.2 and Commentary; ABA Criminal Justice Mental Health Standards (1989) Standard 7-4.2, subd. (c); ABA Criminal Justice Mental Health Standards (1989) Standard 7-4.2, subd. (c); *United States v. Boigegrain* (10th Cir. 1998) 155 F.3d 1181, 1188 ("if there were doubt of the defendant's competence, counsel should not necessarily respect the client's expressed desires"); *Thompson v. Wainwright* (11th Cir. 1986) 787 F.2d 1447, 1451 (defense counsel's decision to accede in his client's wishes not to investigate or present mitigating evidence "is especially disturbing in this case because [attorney] himself believed that [defendant] had mental difficulties"); *Brennan v. Blankenship* (W.D. Va. 1979) 472 F.Supp. 149, 156 ("under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect"); *Blanco v. Singletary* (11th Cir. 1991) 943 F.2d 1477, 1501-1502 (counsel provided constitutionally inadequate representation where "morose and irrational" defendant whose mental state was in question instructed counsel not to present mitigating evidence, and counsel simply acquiesced in that request; defense counsel's *independent* duties to investigate and analyze are "even greater" where defendant is "noticeably morose and irrational")

[22] See also, e.g., *Porter v. McCollum* (2009) 558 U.S. ___, 130 S.Ct. 447, 454-455 [brain trauma significant mitigating evidence]; *Sears v. Upton* (2010) ___ U.S. ___ 130 S.Ct. 3259, 3624 [brain injury or trauma evidence (continued...)

dissuade their questionably competent client from effectively stipulating to the death penalty, defense counsel fostered Mr. Mai's belief that a death verdict was inevitable. (AOB 118-126 [Argument I-F-2-c], citing, inter alia, 1989 ABA Guidelines, *supra*, Guidelines 11.4.1, 11.4.2, 11.6.2 11.6.3, and Commentary and in accord, e.g., 2003 ABA Guidelines, *supra*, 31 Hofstra L. Rev. at p. 1009, Guidelines 10.9.2 and Commentary.) The plausible alternatives defense counsel discarded inherently conflicted with their competing personal interests in avoiding an adversarial penalty trial, thus demonstrating that their choice of "strategies" to effectively stipulate to a death verdict was influenced and adversely affected by the conflict in violation of the federal and state constitutions. (See AOB 104-110; Part D, *ante*.)

a. Counsel Failed to Ensure that Mr. Mai's Decisions Were Rational and Competent

Respondent does not address Mr. Mai's claim that defense counsel failed in their duty to ensure that Mr. Mai's purported desire for execution was a rational one before acquiescing in it. (AOB 112-114 [Argument I-G-2-a]; see RB 32-37 [Argument I-C-4].) Respondent's previous contention that the evidence was insufficient to demand *the trial court's* sua sponte duty to initiate competency proceedings has no bearing on this issue, for the

---

[22](...continued)
can "turn some of the adverse evidence into the positive – perhaps in support of a cognitive deficiency mitigation theory"]; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1087-1089 [brain injury or trauma factor that can raise reasonable doubt as to competence]; *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1089-1090 [before acceding in even competent client's expressed desire to forgo presentation of mitigation, defense counsel must investigate mitigation that could be presented]; AOB 114-118.

reasons already discussed in Part F, *ante*. (RB 31-32 [Argument I-C-3].) Moreover, it is one thing for an attorney who harbors doubts about his client's competence to fail to ensure that his client is not *tried* while incompetent – an issue to which Part F, *ante*, and respondent's contention (RB 31-32) are directed. (See also AOB 93-103 [Argument I-F].) It is quite another for an attorney who does or should harbor doubts about his client's competence to fail to ensure that his client's *death wish* is a competent or rational one before acquiescing in it. (AOB 112-114 & fn. 74.) For the reasons discussed in the opening brief but ignored by respondent, requesting the initiation of competency proceedings to ensure that Mr. Mai's decision to be executed was a rational one and/or *refusing* to acquiesce in his decision given their grave doubts over his competency to make it were plausible, objectively reasonable, alternatives. (AOB 112-114.) Even under respondent's first-prong *Strickland* analysis, defense counsel's failure to pursue those alternatives fell below objective standards of reasonable competence demanded of counsel in capital cases. (*Ibid.*; Part F, *ante*.)

b. Counsel Failed to Investigate Critical Evidence and Ensure That Mr. Mai's Decisions Were Fully Informed

As to counsel's failure to ensure that Mr. Mai's decision was a fully informed one by following Dr. Thomas's advice to investigate the evidence suggestive of brain trauma (AOB 114-118 [Argument I-G-2-b]), respondent does not dispute that counsel failed to investigate this evidence, but nevertheless contends that Mr. Mai made an informed decision not to present any mitigating evidence. (RB 36-37.) Not so.

When capital defense counsel is on notice that "powerful mitigating

evidence" such as brain trauma or cognitive impairment may exist, prevailing professional norms *demand* that counsel follow up on such "red flags." (See, e.g., *Rompilla v. Beard* (2005) 545 U.S. 374, 389-393 [duty to follow up on "red flags pointing up a need to test further" into possible cognitive impairment in mitigation]; *Wiggins v. Smith* (2003) 539 U.S. 510, 525.) This duty is not relieved by the client's insistence that no mitigating evidence be presented; to the contrary, where, as here, counsel believes that his client has a mental condition that prevents him from exercising proper judgment, he has "expanded duties" to investigate and make informed decisions. (*Thompson v. Wainwright* (11th Cir. 1986) 787 F.2d 1447, 1451; accord, e.g., *Williams v. Woodford* (9th Cir. 2004) 384 F.3d 567, 622; *Rompilla v. Beard*, *supra*, at pp. 390-391 [even when defendant is "actively obstructive," defense counsel must investigate obvious leads relevant to penalty determination]; AOB 114-118.) Neither Mr. Mai nor defense counsel could make an informed decision about whether to present such mitigating evidence without first investigating it. (See, e.g., *Williams v. Woodford*, *supra*, at p. 622; *Thompson v. Wainwright*, *supra*, at p. 1451.)

Mr. Mai's decision to forgo mitigating evidence could not have been informed where counsel first failed to investigate a "red flagged" factor in mitigation and then asserted, for all to hear, that any penalty jury would disregard "psychological" evidence, such as brain trauma and its impact on behavior. (AOB 119, citing 2-RT 263.) Mr. Peters's ill-informed belief did not relieve him of the duty to investigate that evidence, but did mislead Mr. Mai about the weight such evidence could carry, and thereby further undermined the "informed" nature of Mr. Mai's decision-making in the penalty phase. (AOB 119, 126.)

Furthermore, investigating whether Mr. Mai had suffered brain

trauma and cognitive impairment was necessary not only for defense counsel and Mr. Mai to make an informed decision about to whether to present it in *mitigation*. It was critical to the fundamental question of whether Mr. Mai's purported wish for execution was a competent and rational one that defense counsel could even consider honoring. (See, e.g., *Pate v. Robinson* (1966) 383 U.S. 375, 378; *Odle v. Woodford, supra*, 238 F.3d 1084 at p. 1087; *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103, 1106 & fn. 2.) For all of these reasons, following up on Dr. Thomas's red-flag and investigating whether Mr. Mai had suffered brain trauma was clearly a "plausible" and "objectively reasonable" alternative to defense counsel's inexcusable decision to ignore it. Even under respondent's first-prong *Strickland* analysis, counsel's failure to investigate this evidence fell below an objective standard of reasonable competence. (*Rompilla v. Beard, supra*, 545 U.S. at pp. 389-393; *Wiggins v. Smith, supra*, 539 U.S. at p. 525; *Williams v. Woodford, supra*, 384 F.3d at p. 622; *Thompson v. Wainwright, supra,* 787 F.2d at p. 1451.)[23]

---

[23] Curiously, although respondent does not dispute in this argument that defense counsel did not have Mr. Mai tested for brain trauma as Dr. Thomas advised, respondent summarily asserts in a later argument that defense counsel had Dr. Thomas "conduct[] neuropsychological testing of Mr. Mai" and "explored the possibility with Dr. Thomas of having and M.R.I. or C.T. Scan performed on Mr. Mai." (RB 85 [Argument VIII].) Not surprisingly, respondent fails to support its contention that Dr. Thomas "conducted neuropsychological testing of Mr. Mai" with any record citation. (RB 85.) As Mr. Mai discussed in the opening brief but ignored by respondent, the records detailing Dr. Thomas's work and counsel's investigation in this case omits any mention of such testing, indicating that none was performed. (RB 85; AOB 116-117, citing 987.9 CT 117-118, 129-133, 153-188.)

c. Counsel Failed to Make Any Meaningful Effort to Dissuade Mr. Mai From Stipulating to the Death Penalty And Instead Effectively Encouraged That Wish

As to defense counsel's conduct in promoting rather than dissuading Mr. Mai's expressed desire for execution (AOB 118-126 [Argument I-F-2-c]), respondent contends that the colloquy between Mr. Mai, the court, and defense counsel regarding their decision to effectively stipulate to the death penalty reveals that defense counsel *did* attempt to dissuade Mr. Mai and encourage him to present mitigating evidence in his defense "to no avail." (RB 32-36, citing 8-RT 1399-1403.) Again, respondent is mistaken.

The quoted exchange does not demonstrate that counsel made a reasonable effort to change Mr. Mai's mind. To the contrary, the colloquy only reflects defense counsel Peters's representation that he had acquiesced in Mr. Mai's wishes to present neither the mitigating evidence he had unearthed nor even any argument pleading for his life largely because any attempt to save Mr. Mai's life would be futile: "I am exercising my judgment that since the nature of this case, that the odds of me convincing somebody with words, since I have almost no evidence that the mitigation outweighs, you know, is so substantial in order to keep the aggravation from causing a death penalty is very, very slight." (8-RT 1399-1400.) These statements – along with defense counsel's statements *throughout* the trial about the hopelessness of the case and futility of presenting any guilt or penalty defense could only foster what they represented as Mr. Mai's "fatalistic" belief that a death verdict was virtually a foregone conclusion –

demonstrate that Mr. Mai was "saddled with an attorney who abandoned hope before any attempt to craft a penalty defense was undertaken . . . on the [indefensible basis] that the penalty decision was a foregone conclusion because [Mr. Mai] . . had killed a . . . police officer." (*In re Gay, supra*, 19 Cal.4th at p. 828; see AOB 118-120, 122-126.)

Respondent similarly ignores defense counsel's statements throughout the public trial, including, inter alia, that "there is no question that" Mr. Mai deserved the death penalty just as Mr. Mai had testified to the jurors, and that Mr. Mai's decision to "look[] into the eyes of the jurors" and tell them that he deserved the death penalty was a "mature," "morally valid," just, and admirable one. (AOB 120-122, citing, inter alia, *Osborn v. Shillinger* (10th Cir. 1988) 861 F.2d 612, 626, *State v. Holland* (Utah 1994) 876 P.2d 357, 358-361 & fn. 3, and *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, 1074.) As the Utah Supreme Court has forcefully said in condemning similar conduct by defense counsel: "[W]e cannot countenance or condone representation of a defendant by an attorney who has stated in a public [forum] that his client is a 'prime candidate for the death penalty.' . . . An attorney is not justified in asserting that his client deserves the death penalty, *even if his client desires to have that penalty imposed.*" (*State v. Holland, supra*, 876 P.2d at pp. 358-361 & fn. 3, italics added.)

From defense counsel's negative statements throughout the proceedings, it is clear that, contrary to their duty to discourage their client's death wish, counsel improperly supported Mr. Mai's fatal decision based on

self-fulfilling preconceptions and inappropriate moral judgments.[24] "It is difficult to see how an attorney conflicted" by plausible evidence of his own related wrongdoing "could impartially [give] advice" to his client about whether and how to present a defense, when "a vigorous defense might uncover evidence or prompt testimony" about counsel's wrongdoing. (*United States v. Cancilla* (2nd Cir. 1984) 725 F.2d 867, 870 [finding actual conflict arising from related attorney wrongdoing where, inter alia, the defendant "on the advice of counsel, chose not to present a defense"].)

This case presents a striking example of such difficulty. On this record, this Court cannot be confident that Peters and O'Connell's advice and counsel to Mr. Mai in response to his expressed wish to forgo any penalty defense and effectively stipulate to the death penalty was impartial and uninfluenced by their compelling personal interests to accomplish just that.

In totality, the roads not taken by defense counsel were "plausible" ones that might have changed Mr. Mai's mind, but would have conflicted with their personal interests in avoiding a contested proceeding. (See Part D, *ante*.) Even under *Strickland*'s first prong, the advice counsel gave to Mr. Mai was objectively unreasonable. Hence, the record compels the inference that the conflict influenced and adversely affected defense counsel's performance in violation of the federal and state constitution. (Part D, *ante*.)

---

[24] In a later argument (Argument VIII), respondent repeats its assertion that defense counsel attempted to dissuade Mr. Mai's decision but adds additional "supporting" record citations that are not cited here. (RB 85, citing 3-RT 448-449, 5-RT 861, 8-RT 1488.) The additional record citations do not support respondent's assertion, either.

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

As "captain of the ship," defense counsel had the power to mount a penalty phase defense over Mr. Mai's objections by presenting mitigating evidence, challenging the prosecution's case for death, refusing to assent to Mr. Mai's opinion that death was the appropriate penalty, preventing the prosecution and the jurors from relying on that opinion as a basis for a death verdict, and presenting a closing argument pleading for Mr. Mai's life. (AOB 127-142, citing, inter alia, *In re Barnett* (2000) 31 Cal.4th 466, 472 and *Jones v. Barnes* (1983) 463 U.S. 745, 751-752.) Indeed, defense counsel Peters not only acknowledged that he had such power. (2-RT 241; 8 RT 1399-1400). He has *exercised* that power in at least one other case. (AOB 128-129, citing *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1087-1089 [Mr. Peters "disregarded his client's wishes and did put on what mitigating evidence he had unearthed" and disregarded his client's instructions not to present closing argument despite fear that client would physically attack him if he did so].)

In other words, while in one case lead defense counsel Peters pursued the "plausible alternative" of disregarding a client's wishes and presenting a penalty phase defense, in this case, he discarded that same plausible alternative. The difference between the two cases is that in Mr. Mai's case that plausible alternative inherently conflicted with defense counsel's *own* interests in avoiding an adversarial penalty trial. (AOB 128-141.)

Respondent does not dispute that defense attorneys have the power to present a penalty phase defense with mitigating evidence over their

client's objections, nor does it address the availability of plausible or objectively reasonable alternatives to defense counsel's submission to Mr. Mai's fatal decisions. (RB 32-37; AOB 129-135 [Arguments I-G-3-a & 1-G-3-b.) Instead, respondent contends that defense counsel's choices to forgo the presentation of mitigating evidence or argument and present Mr. Mai's testimony that death was the appropriate penalty were not objectively unreasonable under *Strickland*'s first prong because they were only following Mr. Mai's wishes. (*Ibid.*) Since an unconflicted attorney could reasonably have made the same choices under *Strickland*, respondent reasons that the conflict did not adversely affect counsel's performance. (*Ibid.*) As already discussed, respondent's analysis is inapt. (Part D, *ante*.)

As Mr. Mai acknowledged in the opening brief, it is true that this Court has held that objective standards of reasonableness do not *demand* an attorney to override a competent client's fully informed decision to forgo the presentation of a penalty phase defense. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1031.) But even assuming for purposes of argument that an unconflicted attorney could reasonably (within the meaning of *Strickland*) have acquiesced in Mr. Mai's wishes and made precisely the same choices that conflicted counsel made in this case, that is not the question before this Court. (See Part D, *ante*.)

Again, the question is whether there was a "plausible" or objectively reasonable alternative to that choice and, if so, whether that discarded alternative inherently conflicted with counsel's competing interests. (Part D, *ante*.) Here, defense counsel were fully aware of the plausible alternatives, ratified by the courts, to total submission to Mr. Mai's effective stipulation to a death sentence. Since those plausible alternatives inherently conflicted with defense counsel's competing personal interests to avoid an

adversarial penalty trial, the record demands the inference that the conflict influenced and adversely affected their performance. (Part D, *ante*.) This is so even if, as respondent contends, an unconflicted attorney could have reasonably have pursued precisely the same strategy. "The point is, of course, that if that had happened, it would have happened because [unconflicted counsel] decided that it should, thinking only of his own client's interests and *not* those of" anyone else. (*People v. Mroczko*, *supra*, 35 Cal.3d at pp. 107-108.)[25]

Respondent further appears to argue that defense counsel did *not* have the power to prevent Mr. Mai from testifying that death was the appropriate penalty in this case. (See AOB 136-138 [Argument I-G-3-c].) Respondent contends that Mr. Mai had a "'fundamental right to testify on his own behalf'" which entitled him to "tell the jury the appropriate punishment for the crimes committed is death." (RB 36.)

For the reasons discussed in the opening brief (AOB 136-138, 249-271) and more fully in Argument V, *post*, which is incorporated by reference herein, a defendant does not have the right to testify to his opinion that death is the appropriate penalty. Hence, objecting to Mr. Mai's testimony as irrelevant and inadmissible was a "plausible" or "objectively reasonable" alternative that was available to but discarded by defense counsel. (AOB 137-138, citing, e.g., *United States v. Pierce* (5th Cir. 1992) 959 F.2d 1297, 1304 & fn. 13 [counsel's objection/refusal to present

---

[25] Respondent also suggests that Mr. Mai threatened to disrupt the proceedings if defense counsel presented mitigating evidence. (RB 36-37.) Not so. Mr. Mai's only threatened to disrupt the proceedings if defense counsel *presented closing argument* pleading for his life. (8-RT 1399, 1402-1403.)

client's testimony to irrelevant matter was objectively reasonable]; Part D, *ante*.) Certainly, refusing to *join* in his request to so testify or actively present it to the jurors as "the only defense evidence" offered (8-RT 1409) was a plausible or objectively reasonable alternative. (AOB 137-138, citing, e.g., *People v. Klvana* (1993) 11 Cal.App.4th 1679, 1713-1718 [counsel properly refused to join in defendant's request to testify to matter that would not be in his best interest and for court to refuse the request on the ground, inter alia, that defendant was on a "suicide mission"].)[26]

In any event, even if Mr. Mai did have the "right" to testify to his irrelevant opinion that death was the appropriate penalty, state law and the federal Constitution prohibit jurors from relying on such evidence as a basis for death. (Argument V, *post*; AOB 265-271 [Argument V-E].) Respondent does not dispute as much. (See RB 62-66 [Argument V].) However, respondent ignores that the prosecutor urged the jurors to rely on Mr. Mai's opinion as aggravating evidence weighing in favor of a death verdict. (8-RT 1424; AOB 136-137; see also AOB 265-271 [Argument V-E].) In so doing, respondent does not dispute the prosecutor's argument was improper. (AOB 265-271; see also RB 62-66 [Argument V].) Hence, even if objecting to Mr. Mai's opinion testimony was not a "plausible"

---

[26] Respondent also contends that defense counsel attempted to dissuade Mr. Mai from so testifying. (RB 32-33.) The record does not support this contention. To the contrary, defense counsel joined in his request to so testify (8-RT 1399-1400), *affirmatively presented* his testimony to the jurors as "the only defense evidence" they were offering (8-RT 1409), permitted the prosecutor and the jurors to rely on his testimony as aggravating evidence weighing in favor of a death verdict (8-RT 1424), and later *expressed admiration* for his testimony (8-RT 1491). Defense counsel clearly had no qualms about Mr. Mai's testimony or about the jurors relying on it as a basis for their death verdict.

alternative because Mr. Mai had an "absolute right" to testify to it, as respondent contends, objecting to the prosecutor's improper use of that testimony in argument and requesting instructions prohibiting the jurors from basing a death verdict upon it were "plausible" alternatives to defense counsel's silence. (8-RT 1424; see AOB 265-271 [Argument V-E].) As respondent does not dispute these facts, no further discussion of this aspect of the issue is necessary.

As to the alternative of presenting closing argument pleading for Mr. Mai's life (AOB 138-140 [Argument I-G-3-c]), respondent contends that "it was the strategic decision of defense counsel to forgo the presentation of . . . penalty phase argument based on Mr. Mai informing counsel that he would disrupt the proceedings or otherwise act out" if counsel did so. (RB 36.) The real question is whether Mr. Mai's threat to disrupt the proceedings meant that presenting closing argument was *not* a "plausible" or "objectively reasonable" alternative available to counsel. (Part D, *ante*.) The answer is no.

The court had removed Mr. Mai from the courtroom on prior occasions for his disturbances and repeatedly threatened to do so again if he caused further disruptions of the proceedings which would have allowed defense counsel to present closing argument on Mr. Mai's behalf. (AOB 139, citing *People v. Majors* (1998) 18 Cal.4th 385, 413-415, and authorities cited therein [trial court may order removal of capital defendant from penalty phase based on his *threats* to disrupt the proceedings] and *Illinois v. Allen* (1970) 397 U.S. 337, 343.)

Respondent does not dispute that defense counsel had the power to plead for their client's life in argument, even over Mr. Mai's objections (AOB 135, 139-140, citing, inter alia, *Bell v. Cone* (2002) 535 U.S. 685,

701-702) as well as the ability to request Mr. Mai's removal from the courtroom in order to present that argument without disruption (AOB 139-140, citing *Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1087-1088, *State v. Morton* (N.J. 1998) 715 A.2d 228, 255, 258-259, and *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 961; see RB 32-37). These were plausible alternatives available to but discarded by defense counsel.

It is a matter of record that lead defense counsel Peters has pursued the alternative of presenting closing argument over a client's objections, despite his fear that the client would *physically assault him* for disregarding his wishes. (AOB 136, citing *Douglas v. Woodford*, *supra*, 316 F.3d at pp. 1087-1088.) The question is why he did not pursue that alternative in *this* case. Again, the answer lies in the conflicts: this strategy was inherently in conflict with defense counsel's own interests in this case but was not in the other case. (Parts D and G-1, *ante*; see also AOB 104-111, 135-140.)

Finally, it is no answer to say that the strategy counsel did pursue served both Mr. Mai's "interest" in obtaining a death verdict *and* defense counsel's interest in avoiding an adversarial penalty trial. An "attorney representing the defendant is required to 'advocate the position counsel perceives to be in the client's *best interests* even when that interest conflicts with the client's stated position." (*People v. Stanley* (1995) 10 Cal.4th 764, 804-805, and authorities cited therein; see also AOB 127-128.)

Whether it is *ever* in a client's "best interests" to be executed is a matter open to much debate. The critical question here, however, is whether defense counsel were willing or able to impartially determine *what* was in Mr. Mai's "best interests," free from any influence by their personal interests in avoiding an adversarial penalty trial. The answer is no. (See, e.g., *United States v. DeFalco* (3d Cir. 1979) 644 F.2d 132, 137 [when

defense counsel has personal interest in avoiding investigation or potential prosecution for crimes related to client's, the "inherent emotional and psychological barriers" make it nearly impossible for counsel to determine and advocate for best interests of client, uninfluenced by their own interests or for reviewing to determine to what extent counsel's decisions were influenced by conflict]; accord *United States v. Shwayder*, *supra*, 312 F.3d at p. 1119, as amended by (9th Cir. 2003) 320 F.3d 889 [under conflict analysis, "human self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon"]; *Malpiedi, supra,* 62 F.3d at p. 470.)

For all of the foregoing reasons, as well as those set forth in the opening brief, defense counsel's personal interests in currying favor with the state and federal prosecuting authorities and avoiding an adversarial trial influenced their decisions from the beginning of trial through the end. The conflicts thereby adversely affected their performance, in violation of the state and federal Constitutions.

H. The "Actual Conflict" Here Warrants Application of the *Sullivan* Limited Presumption of Prejudice

1. Application of the *Sullivan* Limited Presumption Turns on Its Purpose

As to the issue of prejudice, respondent resorts to another straw argument. According to respondent, "Mai urges this Court to . . . adopt a 'bright-line rule' to apply a presumption of prejudice in all cases where a criminal defense counsel has an actual conflict of interest. Alternatively, Mai contends that this Court should apply the presumption of prejudice enunciated in *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 347-349, to an actual conflict involving multiple concurrent and serial representation cases

and their 'functional equivalent.'" (RB 37.) Yet again, respondent misrepresents Mr. Mai's argument.

Mr. Mai agrees that the *Sullivan* limited presumption is *not* susceptible of *any* "bright-line" rules. Under the precedents of this Court and others, the presumption is not susceptible of a "bright-line" rule that applies to any and all actual conflicts. (See AOB 156-157.) Nor is it susceptible of a "bright-line" rule that *restricts* it to actual conflicts arising from the simultaneous representation of co-defendants. (AOB 148-162.)

Instead, application of the *Sullivan* presumption depends on the circumstances of each case. As discussed above and in the opening brief, the Supreme Court in *Strickland* identified two reasons that justify application of the *Sullivan* presumption. First, it is appropriate to apply the presumption when the actual conflict is attributable at least in part to the state. (*Strickland, supra*, 466 U.S. at pp. 686, 692.)

Second, it is reasonable to presume prejudice from an "actual conflict" when "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." (*Strickland, supra*, 466 U.S. at p. 692.) When an actual conflict creates a high possibility of prejudice or great difficulty in assessing prejudice, the traditional *Strickland* standard is "inadequate to assure vindication of the defendant's Sixth Amendment right to counsel" and therefore the *Sullivan* "prophylaxis" is necessary to do so. (*Mickens, supra*, 535 U.S. at p. 176; AOB 143-162, citing, inter alia, *People v. Friend* (2009) 47 Cal.4th 1, 46-47; *People v. Doolin, supra*, 45 Cal.4th at pp. 418, 429, and *People v. Rundle, supra*, 43 Cal.4th at pp. 169, 173.) In other words, application of the *Sullivan* presumption turns on its purpose, which is to "to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure

vindication of the defendant's Sixth Amendment right to counsel." (*Mickens*, *supra*, at p. 176; *People v. Rundle*, *supra*, at p. 173.) Once again, this is just such a case. (AOB 162-167.)

Respondent's "response" is based entirely on its misreading of the majority holding in *Mickens v. Taylor*, *supra*, 535 U.S. 162 and this Court's decision in *People v. Doolin* 45 Cal.4th 390. (RB 37-40.) According to respondent, the high court in *Mickens* "restricted the *Sullivan* presumed prejudice to cases where an actual conflict exists arising from multiple concurrent representation of criminal defendants by counsel [and] determined that in all other instances of an actual conflict, requiring the defendant to make the necessary showing of prejudice under *Strickland* was sufficient." (RB 38.) This Court appropriately adopted that standard in *People v. Doolin*, *supra*, 49 Cal.4th 390 and "Mai has presented no convincing basis for this Court to depart from its holding in *People v. Doolin*, *supra*." (RB 37-38.) Not so.

The *Mickens* decision, on its face, makes clear that the majority did *not* announce any binding holding or rule restricting the *Sullivan* limited presumption to any particular kind of actual conflict. (AOB 143-145; *Mickens*, *supra*, 535 U.S. at pp. 174-176.) This Court recognized as much in *Doolin*, *supra*, 45 Cal.4th 390, as well as in *People v. Rundle*, *supra*, 43 Cal.4th at pp. 169, 173 and *People v. Friend* (2009) 47 Cal.4th 1, 46-47.)

Indeed, the *Mickens* majority affirmed that the purpose of the *Sullivan* presumption is "to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel [Citation]." (*Mickens*, *supra*, 535 U.S. at p. 176.) Consistent with this purpose, the high court has recognized an exception to *Strickland's* prejudice requirement and will

presume prejudice in limited circumstances – namely, when "assistance of counsel has been denied entirely or during a critical stage of the proceeding" *or in "circumstances of that magnitude."* (*Mickens v. Taylor*, *supra*, 535 U.S. at pp. 166, 175-176, emphasis supplied.) "When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary and prejudice will be presumed." (*Ibid.*) The Supreme Court emphasized that "[w]e have held in several cases that 'circumstances of that magnitude' may . . . arise when the defendant's attorney actively represented conflicting interests." (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 162, citing, inter alia, *Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 348-349.)

Respondent ignores the majority decision and instead relies on dicta noting that the question of whether the *Sullivan* presumption *necessarily* applies to any and all "actual conflicts" is "an *open*" one under the precedents of the Supreme Court.[27] That being said, the high court has *never* held that the presumption is limited to a particular category of "actual conflicts." (AOB 143-145, 153-161, citing, inter alia, *Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273 [*Sullivan* presumption would apply if defense counsel was "influenced in his basic strategic decisions" by the conflicting interests of a third party who is paying his fees].) This and other courts have recognized as much. (AOB 143-162. citing, inter alia, *People v. Rundle*, *supra*, 43 Cal.4th at p. 173; *People v. Doolin*, *supra*, 45 Cal.4th

---

[27] As the majority itself emphasized, the sole issue presented and decided in *Mickens* was whether a defendant must prove "adverse effect" when a trial court erroneously fails to inquire into a potential conflict. (*Mickens v. Taylor*, *supra*, 446 U.S. at pp. 174-175.)

at pp. 418, 428.)[28]

Indeed, apropos of this case, the Fourth Circuit Court of Appeals has explicitly recognized that although the *Mickens* dicta "expressed doubt about whether *Sullivan* applies to *every* potential conflict of interest [citation], the Supreme Court has never indicated that *Sullivan* would not apply to a conflict as severe" as one arising from attorney wrongdoing related to his client's crimes. (*Rubin v. Gee*, *supra*, 292 F.3d at pp. 401-402 & fn. 2, italics added.) As discussed in the opening brief, conflicts arising from plausible allegations or evidence of related attorney wrongdoing present *at least* "comparable difficulties" to those arising from concurrent representation of co-defendants; indeed, some courts have held that conflicts arising under these circumstances are even *more severe* – and create an even greater danger of adversely impacting virtually ever aspect of counsel's performance – than conflicts arising from the joint representation of co-defendants. (AOB 156-162, citing, inter alia, *United States v. Perez* (2nd Cir. 2003) 325 F.3d 115, 126-127.) Hence, even post-*Mickens*, courts, judges, and other commentators have recognized that the same rationale warranting application of the *Sullivan* presumption to actual conflicts

---

[28] *Nicholson II,* 611 F.3d at pp. 205-216 [post-*Mickens* decision applying *Sullivan* presumption to actual conflict arising from simultaneous representation in *separate proceedings* of clients who were not co-defendants but whose interests diverged]; *Tueros v. Greiner* (2nd Cir. 2003) 343 F.3d 587 [under AEDPA, "for 'clearly established Federal law' . . . we must look to *Sullivan*, not to the *Mickens* postscript" which was "dicta"; no Supreme Court authority restricts *Sullivan* presumption to actual conflicts arising from multiple concurrent representation]; *United States v. Mota-Santana* (1st Cir. 2004) 391 F.3d 42, 46; *Alberni v. McDaniel* (9th Cir. 2006) 458 F.3d 860, 873-874; *Acosta v. State* (Tex.Crim.App. 2007) 233 S.W.3d 349, 353-355; *People v. Hernandez* (Ill. 2008) 238 Ill.2d 134, 305; *People v. Miera* (Colo. App. 2008) 183 P.3d 672, 676-677.)

arising from joint representation of co-defendants applies with at least equal force to actual conflicts arising from plausible evidence of an attorney's complicity in his client's crimes. (AOB 156-162; accord, e.g., *Rubin v. Gee*, *supra*, 292 F.3d at pp. 401-402 & fn. 2; Prof. Ann Poulin, "Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?" 47 *American Criminal Law Review* 1135, 1144, 1162-1169 (Summer 2010) [characterizing conflict arising from implication or accusation that attorney is involved in criminal activity closely related to client's crimes as "particularly intense," "likely to be so severe that counsel should not be permitted to represent the defendant," and its "impact on counsel's performance is likely to be [so] pervasive and profound" that application of *Sullivan* presumption is warranted].)

Similarly, actual conflicts arising from the simultaneous representation of adverse interests in separate proceedings, such as Mr. Peters's representation of Ms. Pham in her related federal conspiracy case while representing Mr. Mai in these proceedings, also presents "comparable difficulties" to conflicts arising from the simultaneous representation of co-defendants in the same proceedings. (See, e.g., *United States v. Infante* (5th Cir. 2005) 404 F.3d 376, 392 & fn. 12 [even after *Mickens*, *Sullivan* presumption would apply to actual conflict arising from successive representation of clients in separate proceedings closely related in subject matter and time]; accord, *Hall v. United States* (7th Cir. 2004) 371 F.3d 969, 974)

For all of these reasons, as well as those set forth in the opening brief, while the *Sullivan* limited "presumption of prejudice need not attach to every conflict" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 428), it can and should apply when, as here, defense counsel's conflicting interests in their

liberty, livelihood, and reputation created by plausible allegations or evidence of his wrongdoing related to their client's crimes "influenced . . . [their] basic strategic decisions" throughout his representation. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. 272-273; AOB 156-164.) Furthermore, the presumption can and should apply when, again as here, the actual conflict is attributable at least in part to the trial court's failure to comply with its constitutional duty of inquiry or other improper state action. (*Strickland*, *supra*, 466 U.S. at pp. 686, 692.)

2. The *Sullivan* Presumption is Necessary Here to Assure the Vindication of Mr. Mai's State and Federal Constitutional Rights to Counsel

The conflicts in this case adversely influenced virtually every aspect of defense counsel's representation. Defense counsel not only failed to function in any meaningful sense as advocates for their client's best interests by acting appropriately on their doubts over his competency and submitting either the guilt or the penalty phase to the adversarial process vital to a fair and reliable capital murder trial and death verdict. Their decisions and actions effectively ensured that Mr. Mai would be eligible for and receive the death penalty.

The conflict thus created "circumstances of the magnitude" of the denial of counsel "entirely or at a critical stage of the proceeding" (*Mickens v. Taylor*, *supra*, 535 U.S. at pp. 166, 175-176; accord, *People v. Rundle*, *supra*, 43 Cal.4th at p. 169), which "call[ed] into question the reliability of the proceeding and represent[ed] a breakdown in the adversarial process fundamental to our system of justice" (*Rubin v. Gee*, *supra*, 292 F.3d at p. 402). (Accord, *Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 349; cf. *Turrentine v. Mullen* (10th Cir. 2004) 390 F.3d 1181, 1207-1208 [constructive denial

of counsel under *Bell* and *Cronic* triggering presumption of prejudice exists when "'the evidence overwhelmingly established that (the) attorney abandoned the required duty of loyalty to his client,' and where counsel 'acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case"].)

Moreover, the impairment of Mr. Mai's right to the effective assistance of counsel uninfluenced by conflicting interests is attributable in part to the state, which could have prevented it. (*Strickland*, *supra*, 466 U.S. at pp. 686, 692.) As discussed in Part D, *ante*, the trial court failed adequately to inquire into the conflicts and their potential to impact counsel's representation or to prevent them from ripening into actual ones. Moreover, at the only hearing into the possible conflicts created by Watkins's indictment and the federal conspiracy prosecution, the state prosecutor, together with defense counsel, affirmatively misled court about the existence and potential for the conflicts to impact counsel's performance in this case. Application of the *Sullivan* presumption under these circumstance is appropriate and demands reversal of the death judgment. (*Strickland, supra*, 466 U.S. at pp. 686, 692.)

Respondent's only response to Mr. Mai's argument in this regard is that there was no "actual conflict" here and hence the *Sullivan* presumption does not apply. (RB 39-40.) Respondent's contention is circular, Mr. Mai has already addressed and refuted its premise that there was no "actual conflict" in this case, and thus no further reply is necessary. The judgment must be reversed.

I. Alternatively, Even if the *Strickland* Standard of Prejudice Applies, The Actual Conflicts Undermine Confidence in the Outcome of the Proceedings and Demand Reversal

Alternatively, even under *Strickland*'s second prong, the judgment must be reversed. Under *Strickland*, reversal is required if there is a "reasonable probability" that the result of the proceeding would have been different absent counsel's deficient performance. (*Strickland, supra*, 466 U.S. at pp. 693-694.) This standard does not require the defendant to prove that his or her counsel's deficient performance "more likely than not altered the outcome of the case." (*Id.* at p. 693; accord, e.g., *Nix v. Whiteside* (1986) 475 U.S. 157, 175.) This Court has made "'clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, italics in original.) Put another way, reversal is required under this standard if there is a "probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694; accord, e.g., *Nix v. Whiteside*, *supra*, at p. 175.)

As discussed above and in Arguments III, *post*, and in the opening brief, had counsel refused to consent to Mr. Mai's slow plea and presented a defense to the sole special circumstance allegation, it is reasonably probable that the outcome of the court trial on that allegation would have been different. Hence, the true finding on the sole special circumstance allegation must be set aside and the death judgment based thereon reversed.

Even if the special circumstance stands, the death judgment must nevertheless be reversed. "The United States Supreme Court [has] explained that th[e] second prong of the Strickland test *is not solely one of*

outcome determination. Instead, the question is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.' (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369.)" (*In re Harris* (1993) 5 Cal.4th 813, 833, italics added; accord, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 391-393.) For all of the reasons discussed in this and the opening brief, the death verdict in this case was the unreliable product of an effective stipulation to the death penalty without the substantive and procedural safeguards – such as a determination of Mr. Mai's competency, adversarial testing, and the exclusion of constitutionally irrelevant aggravating evidence – critical to the reliability of death judgments. As such, it must be reversed.

//

//

II

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

An essential element of the only special circumstance alleged and found true in this case, the murder of a peace officer in lawful performance of his or her duties (Pen. Code, § 190.2., subd. (a)(7)), is that Officer Don Burt was engaged in the lawful performance of his duties when he was killed. Both state law and the federal Constitution require the prosecution to prove this essential element beyond a reasonable doubt. (AOB 168-172.)[29] In his opening brief, Mr. Mai argued that the evidence before the trial court sitting as trier of fact was insufficient to prove that element. (AOB 168-178.) Thus, the trial court's true finding on the only special circumstance allegation rendering Mr. Mai eligible for the death penalty violated state law, Mr. Mai's rights under the Eighth and Fourteenth Amendments to the United States Constitution, and the special circumstance must be set aside and the death judgment reversed. (*Ibid.*)

Respondent counters that Mr. Mai's insufficiency of the evidence claim was forfeited by his counsel's failure to argue or object on that ground at trial. (RB 42, 46.) Alternatively, respondent contends that Evidence Code section 664 creates a rebuttable *presumption* that the "lawful performance of duties" element is satisfied as to all offenses and special circumstance allegations which incorporate it. (RB 43-44.) Hence, respondent contends, that element was presumptively satisfied in this case

---

[29] Hereafter "lawful performance of duties element."

and Mr. Mai failed to rebut it. (RB 43-47.) Respondent's rather astonishing arguments are utterly without merit.

A. Questions Regarding the Sufficiency of the Evidence Are Not Subject to Forfeiture

Respondent contends in a perfunctory fashion that Mr. Mai has forfeited his right to challenge the sufficiency of the evidence to prove the special circumstance by failing to object or otherwise challenge it on that ground below. (RB 42, 46.) As respondent cites no authority to support this remarkable proposition, this Court should pass on it without consideration. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may pass without consideration "argument" made without citation to supporting authority].) Of course, respondent's proposition is contrary to the black letter law discussed in the opening brief but ignored by respondent.

As this Court has recognized, "'generally, points not urged in the trial court cannot be raised on appeal. [Citation.] *The contention that a judgment is not supported by substantial evidence, however, is an obvious exception.*' [Citation.] . . . *[Q]uestions of the sufficiency of the evidence are not subject to forfeiture.*" (*People v. Butler* (2003) 31 Cal.4th 1119, 1126-1128, & fn. 4, italics added, and authorities cited therein.) This Court has explicitly held that this black law rule applies where, as here, a defendant agrees to submit the matter of his guilt to the trial court based on the evidence in the preliminary hearing transcript and presents no evidence or argument against the sufficiency of the evidence contained therein to prove guilt. (AOB 169-170, citing *People v. Martin* (1973) 9 Cal.3d 687, 694-695, and *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602-604.) "Irrespective of any foregone conclusion or understanding that he will be

found guilty," such a submission is still a court trial; hence the prosecution is not relieved of it heavy burden of proof beyond a reasonable doubt. (*Bunnell v. Superior Court*, *supra*, at p. 604; accord, *People v. Martin*, *supra*, at pp. 693-694.) Nor may the trial court "abdicate the heavy responsibility imposed upon it to determine, *on the record*, the question of guilt presented on a stipulated transcript. . . . [T]he trial court must weigh the evidence contained in the transcript and convict only if, in view of all matters properly contained therein, it is persuaded beyond a reasonable doubt of the defendant's guilt." (*People v. Martin*, *supra*, at pp. 694-695; accord, *Bunnell v. Superior Court*, *supra*, at pp. 603-604.)

Hence, just as any challenge to the sufficiency of the evidence to sustain a verdict is not subject to forfeiture, a defendant's submission under these circumstances "*cannot be held to have waived his right to challenge the sufficiency of the evidence on appeal.*" (*People v. Martin*, *supra*, at p. 695, italics added; accord, *Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 604; AOB 169-170.)[30]

Respondent's inexplicable decision to ignore or make any attempt to

---

[30] Accord, e.g., *In re Tommy E.* (1992) 7 Cal.App.4th 1234, 1236-1237 [parent's agreement to submit jurisdictional *determination* to the court based on social services report and failure to object to sufficiency of evidence in report to support jurisdictional *findings* did not forfeit right to raise that challenge for the first time on appeal]; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557, 1560-1561 [where agency bore burden of proving adoptability and only evidence offered was permanency hearing report recommending adoption, parent's failure to object to sufficiency of evidence contained therein did not waive their right to raise that challenge for first time on appeal]; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 [failure to object to or otherwise oppose reimbursement order did not waive defendant's right to challenge sufficiency of evidence to support order].

distinguish or dispute this black letter law does not make it go away. Defense counsel's failure to challenge the sufficiency of the preliminary hearing evidence to prove the sole special circumstance allegation did not forfeit Mr. Mai's right to make that challenge on appeal.

B. The Official Duty Presumption Does Not Apply, and Indeed Cannot Constitutionally be Applied, to Relieve the Prosecution of its Burden of Proving Beyond a Reasonable Doubt The "Lawful Performance of Duties" Element of Section 190.2, subdivision (a)(7)

Respondent concedes that "an element of [the section 190.2, subdivision (a)(7)] special circumstance is a requirement the officer was acting lawfully at the time he was killed." (RB 43, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 791 and *People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1217.) From this concession it necessarily follows that respondent also concedes that the prosecution bore the burden of proving this "lawful performance of duties" element beyond a reasonable doubt. (See AOB 169-170, citing, inter alia, Pen. Code, §190.4, subd. (a), *Ring v. Arizona* (2002) 536 U.S. 584, 609, *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602-604, and *People v. Martin, supra*, 9 Cal.3d at pp. 694-695.)

Nevertheless, respondent contends that absent disputed facts about the lawfulness of the officer's actions, "*it is presumed the officer acted lawfully.* (Evid. Code, § 664 ['it is presumed that official duty is regularly performed].)" (RB 43-44, italics added.) In other words, according to respondent, section 664 creates a rebuttable presumption that the "lawful performance of duties" element of all crimes and special circumstances incorporating it is satisfied even in the absence of evidence to prove as much. (RB 43-44.) Because the preliminary hearing evidence was undisputed and defense counsel offered no evidence to prove that the peace

officer victim's detention of Mr. Mai was *unlawful* and thereby rebut that presumption, respondent contends that Evidence Code section 664 mandated the presumption that the "lawful performance of duties" element of section 190.2, subdivision (a)(7), had been proved beyond a reasonable doubt. (RB 43-44.) Yet again, respondent cites no authority to support these remarkable and insupportable propositions.

Respondent cites Evidence Code section 664 for the proposition that "it is presumed that official duty is regularly performed" (RB 43-44) and *Badillo v. Superior Court* (1956) 46 Cal.2d 269, 272 (which predated the enactment of section 664) for the proposition that "[i]n the absence of evidence to the contrary, it is presumed that the officers acted legally" (RB 53). Respondent's quotations from both section 664 and *Badillo* are misleadingly incomplete.

In fact, the full text of section 664 provides: "It is presumed that official duty has been regularly performed. *This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.*" (Italics added.) Consistent with this exception, the full text of *Badillo* makes clear that a warrantless arrest or detention itself rebuts any presumption that the officer was acting lawfully.

Here, of course, it was and is undisputed that the officer's detention of Mr. Mai was made without a warrant. Hence, even if section 664 (or *Badillo*, which predated the enactment of the statute) *could* apply to relieve or lessen the prosecution's burden of proof on an element of a crime, it would not apply here.

More fundamentally, any such application of the presumption codified in section 664 would be patently unconstitutional. Section 664 is a

mandatory but rebuttable presumption, which "'impose[s] on the party against whom the presumption operates the burden of proof as to the nonexistence of the presumed fact.' [Citation.]" (*California Advocates for Nursing Home Reform v. Bontá* (2003) 106 Cal.App.4th 498, 505; see also Evid. Code, § 601.) It is well settled that application of such presumptions to eliminate, lessen, or shift to the defendant the prosecution's burden of proof beyond a reasonable doubt on the essential elements of crimes or special circumstances violates the due process clause of the federal Constitution. (See, e.g., *Carella v. California* (1989) 491 U.S. 263, 265; *Rose v. Clark* (1986) 478 U.S. 570, 592, and authorities cited therein; *People v. Roder* (1983) 33 Cal.3d 491, 500-504, and authorities cited therein.) Hence, while "[t]he presumption that public officers have done their duty . . . is undoubtedly a legal presumption[,] . . . *it does not supply proof of a substantive fact,*" which the prosecution must satisfy beyond a reasonable doubt when that fact constitutes an element of a crime. (*United States v. Ross* (1876) 92 U.S. 281, 284, italics added.)

For the same reasons, respondent's contentions that the lawful performance of duties element may be presumed when the facts are not "disputed" or the element is not specifically contested are without merit. (RB 43-44.) "[T]he prosecution's burden to prove every element of the crime *is not relieved by a defendant's tactical decision not to contest an essential element of the offense*. . . . [In California], a simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged.' [Citation.]" (*Estelle v. McGuire* (1991) 502 U.S. 62, 69-70.) Mr. Mai pleaded not guilty to the capital murder charge. (1-CT 87.) As discussed in the opening brief but ignored by respondent, although he ultimately entered a "slow plea" which operates in *effect* as and is

"tantamount to" a guilty plea and waives many important constitutional rights, a slow plea is *unlike* a guilty plea in that it does *not* override the defendant's not guilty plea. (*Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 603.) As discussed above, it is a submission to a *court trial* on the basis of a particular record (such as a preliminary transcript) in which the presumption of innocence still applies and the prosecution must rebut that presumption with proof beyond a reasonable doubt on every element of the charged offenses and special circumstance allegations. (AOB 169-170, citing *Bunnell v. Superior Court*, *supra*, at pp. 602-604, and *People v. Martin*, *supra*, 9 Cal.3d at pp. 694-695.) "There is no rationale . . . which warrants the finding of an implied admission of the existence of each element of a charged crime merely because the accused agrees to a determination by the court as to the existence of such elements on the evidence presented at the preliminary hearing." (*People v. Martin*, *supra*, at p. 694.) Hence, under state law and the federal Constitution, Mr. Mai's failure to "dispute" the facts admitted at the preliminary hearing or contest the "lawful performance of duties" element of the special circumstance allegation did not relieve the prosecution of its burden of proof.

In sum, when a defendant pleads not guilty to an offense incorporating the "lawful performance of duties element, the prosecution bears the burden of proving that element beyond a reasonable doubt. The burden cannot be relieved, lessened, or shifted to the defendant by any presumption or the defendant's failure to specifically dispute or contest that element or entry of a "slow plea." Respondent's contentions to the contrary must be rejected.

C. The Absence of Evidence to Prove the Reason for, and Thus Lawfulness of, the Detention During Which Officer Burt Was Killed

The "lawfulness" of an officer's performance of duties is obviously assessed by the "law," including the paramount "law" of the land – the United States Constitution and the Fourth Amendment. (AOB 170-171, citing, inter alia, *In re Manuel G.* (1997) 16 Cal4th 805, 815, *People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1217, *People v. Mayfield* (1997) 14 Cal.4th 668, 791, and *People v. Curtis* (1969) 70 Cal.2d 347, 352.) Under the Fourth Amendment, a temporary detention without a warrant – such as a traffic stop – is only lawful if facts known to the detaining officer are sufficient to raise a "reasonable suspicion" that the detainee is violating the law. (See, e.g., *Whren v. United States* (1996) 517 U.S. 806, 809-810; *Delaware v. Prouse, supra,* 440 U.S. at p. 663; *People v. Hernandez* (2008) 45 Cal.4th 295, 299-300).

Just as they did at trial, the People on appeal repeatedly and obliquely characterize Officer Burt's detention of Mr. Mai as a "routine traffic stop" (RB 30, 53, 86) for a "routine" or "ordinary traffic violation" (RB 2, 44), then focus primarily on what he discovered (or might have discovered) *after* – and as a direct result of – that "routine" detention, such as Officer Burt's reasonable belief that Mr. Mai was driving on a suspended license (RB 44). (See AOB 173-175.) Of course, respondent's approach begs the fundamental question of the lawfulness of the "routine" traffic stop which effectuated the detention during which Officer Burt was killed. If that detention was not lawful, then subsequent events did not transform it into a lawful one. (See AOB 171-175, citing, inter alia, *Florida v. J.L.* (2000) 529 U.S. 266, 271, *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188,

Florida v. Royer (1983) 460 U.S. 491, 507-508 and *People v. Hernandez, supra*, 45 Cal.4th at pp. 299-301.)

As discussed in the opening brief, the prosecution presented no competent evidence to prove the *reason* for Officer Burt's detention of Mr. Mai through the traffic stop. (AOB 173-175; see also AOB 87-89.) Absent such proof, there was insufficient evidence for the trial court to find true the special circumstance allegation and for this Court to uphold that finding on appeal. (AOB 173-175.)

Respondent acknowledges that Officer Burt's written citation did not cite Mr. Mai for *any* traffic violation that explained the stop and detention. (RB 44-45.) Instead, he only cited Mr. Mai for driving on a suspended license – something he discovered only after and as a direct result of the detention. (1-Muni-RT 93-94; see also 3/16/07 3-SCT 421 [People's Exhibit 20].) Nevertheless, respondent contends that it is "it is entirely possible" that Officer Burt had a lawful reason to detain Mr. Mai for which he intended to cite him, but simply did not have the chance to enter it on the "incomplete" citation he had written. (RB 45.) Based on this "possibility," respondent contends that the trial court could find the allegation to be true and this Court must uphold that finding on appeal. (*Ibid.*) Respondent's contention is unsupported by the facts and the law.

As a matter of law, the prosecution bore the burden of proving that Officer Burt was engaged in the lawful performance of his duties when he was killed with *evidence* and this Court can only uphold the special circumstance finding if substantial evidence in the record supports it. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "Possibilities," speculation, or conjecture is not substantial evidence. (See, e.g., *People v. Marshall* (1999) 15 Cal.4th 1, 35.)

As a matter of fact, Officer Burt had *signed* the citation, indicating that *he* had completed the citation. (1-Muni-RT 65-66, 93-94.) The only portion of the citation that was "incomplete" (RB 45) was the *driver's* own signature. (1-Muni-RT 65-66, 93-94.) Furthermore, the transcript of Officer Burt's conversation with police dispatch after the stop indicated only that he suspected the driver of driving on a suspended license – which he discovered as a direct result of the detention. (1-Muni-RT 23, 52-53, 70, 92, 95, 97.) Officer Burt stated no reason for the detention itself. The prosecution offered no other evidence – such as a broken taillight or outdated registration tags – from which the trial court could infer that facts known to Officer Burt at the time of the stop provided reasonable suspicion that Mr. Mai was committing a traffic violation.

Alternatively, respondent contends that Alex Nguyen's non-percipient testimony that Officer Burt told Mr. Mai that he had stopped him for driving without illuminated headlights proved both the reason for, and the lawfulness of, the stop. (RB 44-45.) However, as discussed in the opening brief, Officer Burt's statements to Mr. Mai during the detention were not offered or admitted for their truth. (AOB 175-186; see also AOB 87-89.)

Respondent disagrees. Citing Nguyen's initial testimony that Mr. Mai told him that "he was driving and he thought he had his light on, but he got pulled over by California Highway Patrolman for not having his light [*sic*]" (2-Muni-RT 278), respondent contends that the evidence was admitted and received for its truth under the hearsay exception for party statements. (RB 44, citing, inter alia, Evid. Code, § 1220.) Officer Burt's statement was not offered or admitted under this exception nor was it admissible for its truth under this exception. While Mr. Mai's own

statement about what Officer Burt had told him was a party statement, the Officer Burt's statement was not a party statement, admissible for the truth of proving that he had stopped Mr. Mai for driving without illuminated headlights.

In this regard, respondent acknowledges that defense counsel made a "multiple hearsay" objection to Nguyen's testimony purporting to recount the conversation between Mr. Mai and Officer Burt during the detention, to which the prosecutor responded that he was offering Mr. Mai's own statements as an "an admission [but] *I understand that the layer from the officer to the defendant is not for the truth of the matter.*" (2-Muni-RT 280, italics added; RB 45.) Respondent also acknowledges that the trial court agreed and accepted the officer statements to Mr. Mai only for the *non-hearsay purpose* of explaining and putting into context Mr. Mai's admissions. (2-Muni-RT 280; RB 45.) However, respondent contends, this limitation applied only to Officer Burt's statements that he was going to have Mr. Mai's car towed. (RB 44-45.) Respondent's reading of the record is nonsensical.

The "multiple hearsay" objection followed Nguyen's testimony regarding several of the officer's statements to Mr. Mai, including the alleged statement that he stopped him for driving without illuminated headlights. (2-Muni-RT 278-280.) In response, the prosecutor proffered, and the court limited, a blanket purpose for introducing Officer Burt's statements to Mr. Mai: for the *non-hearsay* purpose of explaining or putting into context Mr. Mai's admissions. Since Mr. Mai made no statements in response to Officer Burt's *remarks about towing the car* that could be construed as "admissions," this ruling was obviously not directed or limited to those statements. (RB 44-45.)

To the contrary, the only evidence about this conversation that could even conceivably be construed as an admission on Mr. Mai's part was Nguyen's vague, initial testimony in rather broken English that Mr. Mai told him that "he was driving and he thought he had his light on, but he got pulled over by California Highway Patrolman for not having his light [*sic*]." (2-Muni-RT 278.) If viewed in isolation, this account might be interpreted as Mr. Mai's admission that he had been "pulled over . . . for not having his light." However, Nguyen's testimony must be viewed as a whole. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) *After* the prosecutor's assurance that he was not offering, and the court's ruling that it was not admitting or considering, Officer Burt's statements to Mr. Mai for their truth, Nguyen clarified that Mr. Mai had told him that he "thought he have his light on" but "[*t*]*he officer told him* that he pull him over because he was driving without his headlights." (2-Muni-RT 422, italics supplied.) Hence, Mr. Mai did not admit that his headlights were actually off; he simply recounted what Officer Burt "*told him.*" And what Officer Burt "told" Mr. Mai was not offered or received for its truth. (2-Muni-RT 280.)

Hence, there was no competent evidence received for its truth that Officer Burt had stopped Mr. Mai for driving without illuminated headlights. Nor was there any other evidence regarding the reason for the detention.

Respondent thus grasps at a final straw, contending that Mr. Mai is at fault for "[a]ny absence of the specific Vehicle Code section that Mai violated with caused the officer to initiate the stop" because he killed the officer. (RB 47.) Mr. Mai is not sure what to make of this contention, but it has no legal force for several reasons. Among them, respondent seems to assume that the officer's testimony is necessary to prove that he was

lawfully engaged in the performance of his duties. Of course, that assumption is preposterous. Due to the very nature of the special circumstance, the peace officer victim is *always* unavailable to testify. Nevertheless, the lawfulness of his conduct is a necessary element of the special circumstance allegation that the prosecution must prove beyond a reasonable doubt. Like any other element, it may be proved with circumstantial or other evidence, such as the testimony of percipient witnesses that the driver was committing an obvious traffic violation like exceeding the posted speed limit or other evidence of traffic violations that would have been obvious to the detaining officer, such as expired registration tags, license plates that match a stolen vehicle, or a broken taillight. At bottom, while the defendant's act of killing a peace officer may be murder, he is not death eligible for that murder under Penal Code section 190.2, subdivision (a)(7), unless and until the prosecution proves beyond a reasonable doubt he killed the officer while the officer was lawfully engaged in the performance of his duties.

In any event, even if the officer's statement to Mr. Mai that he had detained him for driving without illuminated headlights could have been considered for its truth, that evidence only explained the *reason* for detention. It did not prove that this reason was a *lawful* ground for detaining Mr. Mai.

D. Even if Officer Burt Did Detain Mr. Mai for Driving Without Illuminated Headlights, The Prosecution Presented No Evidence to Prove that the Detention was *Lawful*

As discussed in the opening brief, driving without illuminated headlights is only illegal under limited circumstances. At the time of the 1996 traffic stop, the Vehicle Code only required that headlights be

illuminated "from one-half hour after sunset to one-half hour before sunrise" (Veh. Code, § 38335) or "during darkness" (Veh. Code, § 24400), which was defined as "any time from one-half hour after sunset to one-half hour before sunrise or at any other time when visibility is not sufficient to render clearly discernable any person or vehicle on the highway at a distance of 1,000 feet" (Veh. Code, § 280). (AOB 176-177.) The prosecution presented no evidence at the preliminary hearing to prove when the sun set on the date of the stop (July 13, 1996) or that the stop occurred "one-half hour after sunset" or "during darkness" as defined by the Vehicle Code. (*Ibid.*) To the contrary, the only preliminary hearing evidence of the time and conditions of the stop was prosecution witness Berniece Sarthou's testimony that when she observed the officer and Mr. Mai, "it was still daylight[,] [i]t wasn't sunset yet." (1-Muni-RT 190.) Therefore, even if the officer did detain Mr. Mai for driving without illuminated headlights, the prosecution's own preliminary hearing evidence established that Mr. Mai was *not* committing a traffic violation and therefore the detention was *unlawful*. (AOB 177-178.)

Respondent attempts to counter this argument by repeating its contentions that the official duty presumption conclusively established the lawful performance of duties element and Mr. Mai forfeited his right to challenge the sufficiency of the evidence to support that element by failing to do so below. (RB 46-47.) Mr. Mai has already addressed and refuted these contentions in Parts A & B, *ante*, which are incorporated by reference herein.

In addition, respondent contends that Ms. Sarthou's testimony that she was wearing sunglasses when she observed the detention did not rebut the (non-existent) "presumption" that the detention was lawful. (RB 46.)

This argument is a red herring.

As previously discussed, the basis of Mr. Mai's argument is not merely Ms. Sarthou's testimony that she was wearing sunglasses when she observed the detention, as respondent suggests. (RB 46.) Ms. Sarthou explicitly and unequivocally testified that "*it was still daylight[,] [i]t wasn't sunset yet*" (1-Muni-RT 190, italics added), and that she was wearing her sunglasses "*because the sun was still bright enough to need them.*" (1-Muni-RT 152; see also 1-Muni-RT 190-192). (AOB 176-177.) Mr. Mai takes respondent's failure to address or dispute *this* testimony as an implicit concession that it established Mr. Mai was not committing a traffic violation by driving without illuminated headlights during "daylight."

Nevertheless, respondent contends that even if Mr. Mai's unilluminated headlights was not a traffic violation, Officer Burt was simply "mistaken" that it was, which "does not make his actions unlawful. 'A mere "mistake" with respect to the enforcement of our traffic laws does not establish that the traffic stop was pretextual or in bad faith.' (*People v. Brendlin* (2008) 45 Cal.4th 262, 271.)" (RB 45.) Respondent's contention is flawed in several respects.

As a preliminary matter, there is no evidence that Officer Burt was acting on a "good faith" mistaken belief that Mr. Mai had violated the law and not that he simply stopped him based on an unlawful hunch. In any event, even accepting respondent's contention that Officer Burt was acting on a "good faith" "mistake" about the law, it is of no moment. Respondent seems to assume that so long as a peace officer is not acting in "bad faith" or on a "pretext," his or her conduct is necessarily lawful. Of course, this is not the case.

As previously discussed, a temporary detention without a warrant –

such as a traffic stop – is *only* lawful if facts known to the detaining officer are sufficient to support a "reasonable suspicion" that the detainee is violating the law. (See, e.g., *Whren v. United States* (1996) 517 U.S. 806, 809-810; *Delaware v. Prouse, supra,* 440 U.S. at p. 663; *People v. Hernandez* (2008) 45 Cal.4th 295, 299-300). "Reasonable suspicion" is measured by an *objective* standard. (See, e.g., *Whren v. United States, supra,* at pp. 812-813.) The *subjective* "good faith" or "bad faith" of the detaining officer is irrelevant to determining whether the detention was *objectively* reasonable and therefore lawful. (See, e.g., *Whren v. United States, supra,* 517 U.S. at p. 813; *People v. Tereskinski* (1982) 30 Cal.3d 822, 831-832 & fn. 6, and authorities cited therein; *United States v. Lopez-Soto* (9th Cir.2000) 205 F.3d 1101, 1103-1105; *United States v. Washington* (8th Cir. 2006) 455 F.3d 824, 827.)

Judged under this objective standard, peace officers are "reasonably expected to know" the laws which they are regularly called upon to enforce. (See, e.g., *People v. Cox* (2008) 168 Cal.App.4th 702, 710, and authorities cited therein; accord, *People v. Tereskinski, supra,* 30 Cal.3d at pp. 831-832; *People v. McNeil* (2002) 96 Cal.App.4th 1302, 1309; *United States v. Washington, supra,* 455 F.3d at p. 827; *United States v. Leon* (1984) 468 U.S. 897, 920, fn. 20 [objective reasonableness standard "requires officers to have a reasonable knowledge of what the law prohibits"].) Hence, a peace officer's traffic stop or other detention based on a good faith mistake of the law that reasonable officers in his position regularly enforce is objectively unreasonable and therefore unlawful. (*People v. Tereskinski, supra,* at pp. 831-832; *People v. Cox, supra,* at p. 710; *People v. McNeil* (2002) 96 Cal.App.4th 1302, 1309; *People v. White* (2003) 107 Cal.App.4th 636, 643-644; *United States v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1096;

United States v. Lopez-Soto (9th Cir.2000) 205 F.3d 1101, 1103-1105; *United States v. Washington*, *supra*, 455 F.3d at pp. 827-828.)

It is axiomatic that California Highway Patrol officers, like Officer Burt, are regularly called upon to enforce common provisions of the California Vehicle Code. Certainly, the provisions governing the illumination of headlights are ones that are regularly enforced by the California Highway Patrol. Hence, California Highway Patrol officers are "reasonably expected to know" those provisions. Hence, even accepting respondent's position that Officer Burt's traffic stop and detention of Mr. Mai were based on his subjective, good faith but *mistaken* belief that Mr. Mai had violated the Vehicle Code by driving without illuminated headlights "during daylight" (1-Muni-RT 190; see also 1-Muni-RT 152), the detention was nevertheless *objectively* unreasonable and therefore unlawful.

For these and all of the other reasons set forth in the opening brief, at best the prosecutor's preliminary hearing evidence was insufficient to prove beyond a reasonable doubt the "lawful performance of duties" element of the sole special circumstance allegation. At worst, the evidence affirmatively *disproved* that element. The trial court's true finding therefore violated Mr. Mai's state and federal Constitutional rights to due process and a fair and reliable death eligibility determination. (U.S. Const., Amends. VIII, XIV.) The special circumstance finding must be set aside and the death judgment reversed.

//

//

III

DEFENSE COUNSEL'S CONSENT TO MR. MAI'S SLOW PLEA TO THE SOLE SPECIAL CIRCUMSTANCE ALLEGATION AND FAILURE TO ARGUE OR PRESENT EVIDENCE IN SUPPORT OF A REASONABLE DOUBT DEFENSE VIOLATED MR. MAI'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DEMANDS THAT THE SPECIAL CIRCUMSTANCE BE SET ASIDE AND THE DEATH JUDGMENT REVERSED

Even if the evidence in the preliminary hearing transcript were legally sufficient to sustain the trial court's true finding on the special circumstance allegation, defense counsel's consent to the plea and failure to argue or pursue a strong reasonable doubt defense to the sole special circumstance allegation nevertheless deprived Mr. Mai of his state and federal constitutional rights to the effective assistance of counsel under the traditional *Strickland v. Washington* (1984) 466 U.S. 668 analysis. (AOB 179-199.) As discussed in Argument I, *ante*, the submission in this case was a bench trial in which the court sat *as the trier of fact*. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 603; *People v. Martin* (1973) 9 Cal.3d 687, 694-695.) Hence, the question before the trial court was not the bare legal sufficiency of the evidence to support the special circumstance. That test "does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt,'" but rather "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) To the contrary, the question before the trial court *was* whether it, sitting as trier of fact, was persuaded beyond a reasonable doubt that the special circumstance was true. (See. e.g., *People*

v. Martin (1973) 9 Cal.3d 687, 694-695; *In re Tommy E.* (1992) 7 Cal.App.4th 1234, 1237.)

Therefore, even if the evidence were legally sufficient to prove the special circumstance, that did not made the guilt verdict a foregone conclusion. Defense counsel's consent to Mr. Mai's slow plea knowing that Mr. Mai that it was highly likely to result in a death verdict together with their to argue or present an obvious and compelling reasonable doubt defense to the trier of fact fell below the heightened standards of reasonableness demanded of counsel in a capital murder trial. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 688-689.) Given the strength of that defense, defense counsel's deficient performance undermines confidence in the outcome of the court trial on the special circumstance allegation. (*Strickland v. Washington*, *supra*, at pp. 693-694.)

Based primarily on its misstatements of Mr. Mai's actual arguments on appeal and the law governing them, respondent disagrees. (RB 47-53.)

A. Defense Counsel's Consent to the Slow Plea Without Arguing That the Evidence Was Insufficient to Prove the Truth of the Sole Special Circumstance Allegation Deprived Mr. Mai of His State and Federal Constitutional Rights to the Effective Assistance of Counsel

According to respondent, "Mai contends, as a matter of law, whenever counsel consents to a defendant's guilty plea absent some benefit, counsel had rendered ineffective assistance." (RB 49.) Not so.

As the opening brief makes clear, Mr. Mai's argues that his counsel's consent to his slow plea *under the particular circumstances of this case* fell below objective standards of reasonable competence. Those particular circumstances are: defense counsel knew that (1) Mr. Mai entered the plea in order to obtain a death verdict, and that he would object

to any strategy that would seek to utilize his plea as mitigating evidence at penalty; (2) that Mr. Mai's plea was highly likely to result in a death verdict; and (3) defense counsel failed to argue an obvious reasonable doubt defense to theof the only special circumstance rendering Mr. Mai even *eligible* for a death sentence. (AOB 183-192; see *Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 604 [submission on preliminary hearing transcript reserves right to argue against sufficiency or weight of evidence to prove charges, but without argument or evidence a "slow plea" is "tantamount to a guilty plea" essentially making guilty verdict a "foregone conclusion"] Pen. Code, § 1018 [defense counsel must consent to guilty plea to capital murder charge]; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1296-1302, and authorities cited therein [section 1018 confers power on counsel to override defendant's wish to plead to capital murder and prevent it].)

With respect to the first of these circumstances, respondent concedes that Mr. Mai entered a "slow plea" to the capital murder charge, which required his counsel's consent under Penal Code section 1018. (See RB 47-53; see also RB 30-31.) Further, respondent does not dispute that counsel's consent to such a plea knowing that the defendant wishes to enter it in order to obtain a guilty verdict and that it will likely lead to that verdict is inconsistent with the very purpose of section 1018 and objective standards of reasonable competence in a capital murder trial. (See RB 49-51; compare AOB 184-187; see also AOB 78-85.) Instead, respondent disputes that these circumstances existed in this case. (RB 50.)

Respondent relies on three pieces of evidence: (1) defense counsel's own statements that they consented to the plea because there was no viable guilt phase defense and they intended to utilize the plea to Mr. Mai's benefit

at the penalty phase (RB 49-50; 1-RT 189-190); (2) Mr. Mai's statement – made long after his plea – that he was "not suicidal" (RB 50; 8-RT 1402); and (3) Mr. Mai's statements that he entered the plea in order to assist Ms. Pham in her related federal prosecution. (RB 49; 1-RT 207-210.) None of this evidence demonstrates that counsel did not know that Mr. Mai entered the plea in order to obtain a death verdict or that it was likely to lead to that verdict.

As to lead counsel Peters's statement that they consented to the plea because they intended to use it to Mr. Mai's benefit at the penalty phase, respondent ignores that immediately after Mr. Peters made that representation, Mr. Mai disavowed that this was his purpose for entering the plea and indeed would disagree with any such strategy. (AOB 78-79, citing 1-RT 189-198, 207-210.) As to Mr. Peters's representation that Mr. Mai's "primary purpose" for entering the plea was to help and protect Ms. Pham, he also admitted that Mr. Mai's plea could in no way help or protect Ms. Pham, who had already been convicted and sentenced. (AOB 78-79.) Hence, Mr. Mai did *not* enter the plea in order to gain a tactical advantage at penalty and knew that his plea could not gain any advantage for Ms. Pham.[31]

To the contrary, the record as a whole clearly demonstrates that Mr. Mai entered the plea in order to obtain a death verdict. The record further

---

[31] Indeed, if there were any truth to Mr. Peters's representation that Mr. Mai *believed* his plea could help or assist Ms. Pham notwithstanding the fact that it could not, then the only reasonable explanations for that belief were that defense counsel either misled Mr. Mai into entering the plea or that Mr. Mai was not rational, just as defense counsel later and repeatedly represented. (See Part F, *post* & Argument IV, *post*; and AOB 92-103, 200-247.)

demonstrates that defense counsel knew as much, and that the plea was likely to result in that verdict. (AOB 183-187; see also AOB 79-80.) In this regard, Mr. Mai not only stated that he would disagree with any effort to utilize the plea as a mitigating factor at penalty. (1-RT 189-198, 207-210.) Defense counsel made several statements to the effect that "we have *for some time* talked about putting no penalty evidence on" (3-RT 449), and "nobody would be fooled in thinking the odds of Mr. Mai getting the death penalty aren't extremely high, because of the nature of the case" (2-RT 323). Of course, as discussed in the opening brief, this is precisely the situation Penal Code section 1018 was enacted to avoid. (AOB 183-187, citing, inter alia, *People v. Chadd* (1981) 28 Cal.3d 739, 750-751, 753; see also AOB 80-85.) Further, under the professional norms that prevailed at the time of trial (and continue to apply today), when – as in California – attorneys have the power to prevent a guilty plea to capital murder, they should exercise that power when there is no guarantee that the state will not seek the death penalty and must do so "when there is a likelihood that such a plea will result in a death sentence." (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989) ["1989 ABA Guidelines"], Guidelines 11.6.2 and 11.6.3 and Commentaries, emphasis in original; AOB 183-187; see also AOB 80-85.)

As to the second component of Mr. Mai's claim, respondent contends that defense counsel's failure to argue that the preliminary hearing evidence left reasonable doubt about the truth of the sole special circumstance allegation was objectively reasonable. (RB 51-53.) Respondent points to defense counsel's explanation that they consented to the slow plea because there was no viable defense to the capital murder charge while they intended to utilize the plea to Mr. Mai's benefit at the

penalty phase. (RB 49-51.) According to respondent, defense counsel's was correct and their stated strategy was reasonable. (RB 49-53.)

As discussed in the opening brief, even asssuming *arguendo* that defense counsel consented to the plea in hope of the possibility that it might help to save his life at the penalty phase, they obviously had no valid reason for failing to pursue a strategy that could have prevented Mr. Mai from becoming even *eligible* of the death penalty and avoided a penalty phase altogether. (AOB 188-189.) In arguing to the contrary that there was no viable defense to the special circumstance allegation, respondent simply repeats it contentions from Arguments I and II of its brief based on the flawed premise that the "lawful performance of duties" element was conclusively presumed under Evidence Code section 664. (RB 51-53; see also RB 29-31, 41-47.) As Mr. Mai has already addressed and refuted these contentions in Arguments I and II, *post*, which are incorporated by reference herein, no further reply to them is necessary here.

Next, respondent contends that Mr. Mai's argument "inappropriately presupposes an absence of additional evidence" to prove the "lawful performance of duties" element, which the prosecutor simply did not present. (RB 51.) Respondent appears to reason that if defense counsel had argued that the preliminary hearing evidence left reasonable doubt regarding the truth of the special circumstance allegation, the prosecutor would have been free to counter that argument by presenting evidence outside of the preliminary hearing transcript to prove the lawful performance of duties element and contradict *its own* evidence that the officer's detention of Mr. Mai was *unlawful*. (See Arguments I-E-4 and II, *ante*.) Respondent's contention is without merit.

As discussed in the opening brief, the prosecution *agreed* to submit

its case to the trial court based *solely* upon the preliminary hearing transcript. (1-RT 181-182; AOB 190-191.) Under the law, a defendant who submits the issue of guilt to the trial court on the basis of the preliminary hearing transcript retains the right to argue against the weight and sufficiency of that evidence to prove the charges. (AOB 190-191, citing *Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 604.) The court and the parties below recognized as much.

In agreeing to the submission, the court inquired of defense counsel if they reserved their right to present additional evidence. (1-RT 180-181.) Defense counsel replied that they did not; the matter was submitted solely on the preliminary hearing transcript. (*Ibid.*) The court then inquired if the prosecutor joined in the "jury waiver and request that the matters be submitted on the transcript of the preliminary hearing[.]" (1-RT 181.) The prosecutor affirmed. (1-RT 181.) Following this colloquy, the court concluded that the parties agreed to submit the issue of guilt based solely on preliminary hearing transcript obtained Mr. Mai's personal, express agreement to that procedure. (1-RT 181-182.) Thus, the agreement was settled. The court *then* asked defense counsel if they "had a point of law that you wish to argue?" (1-RT 184.) Defense counsel declined. (1-RT 184.)

Hence, under both the law and the facts, the stipulated submission did not preclude defense counsel from arguing against the weight or sufficiency of the evidence to prove the charges. In other words, had counsel presented such argument, the stipulated submission would still stand unaffected. By his own agreement, the prosecutor would not or could not present evidence outside of the preliminary hearing transcript to prove the lawful performance of duties element or contradict its own evidence

disproving that element. (See Arguments I-E and II, *ante*.)

In any event, even if the prosecutor could have presented evidence outside of the preliminary hearing transcript regarding the circumstances of the traffic stop that detained Mr. Mai, the face of the record reveals just what that evidence would have been. Because the penalty phase jurors did not sit at the guilt phase but could consider the circumstances of the crime and existence of the special circumstance in determining penalty (Pen. Code, § 190.3, subd. (a), the prosecutor presented a full blown case on the underlying murder and special circumstance at the penalty phase. At the prosecutor's own request, the penalty jurors received instructions on all of the elements of first-degree murder and the peace officer murder special circumstance, including the "lawful" performance of duties element. (3-CT 758-763.) As discussed at length in the opening brief but inexplicably ignored by respondent, the prosecutor presented a substantial amount of evidence from numerous witnesses, including evidence about the circumstances of the stop and detention, to support those elements. (AOB 192-199.) The hole in that evidence, which was the same hole in the preliminary hearing evidence, was proof that Officer Burt's detention of Mr. Mai by way of the traffic stop was in fact *lawful*. (*Ibid.*) Indeed, that evidence only raised further doubt that the detention during which Officer Burt was killed was lawful.

(*Ibid.*)[32]

Given the prosecutor's burden to present sufficient evidence at the

---

[32] For this reason, Mr. Mai argued in the alternative that defense counsel's failure to present this evidence on Mr. Mai's behalf also fell below an objective standard of reasonable competence. (AOB 192-200; see also Part D, *ante*.)

preliminary hearing to hold Mr. Mai to answer on the special circumstance allegation (see, e.g., *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 148-149) and his penalty phase strategy of effectively litigating Mr. Mai's guilt of the underlying murder and special circumstance, the only reasonable explanation for the absence of evidence in the record to prove the lawful performance of duties element is that the prosecution simply had no such evidence. Even if the prosecution *did* possess such evidence that it inexplicably withheld at both the preliminary hearing and penalty phase, that evidence could not conclusively have proved the element given the wealth of the prosecution's own other evidence tending to disprove it. In other words, even if the prosecutor did have additional evidence and could have presented it, it would still have to be weighed against the substantial prosecution evidence tending to disprove the element. Given the strength of the evidence tending to disprove that element, as detailed at length in the opening brief, reasonably competent counsel would still have argued or presented that defense. Defense counsel's failure to do so could not be justified by any (hypothetical) belief that the prosecutor could conclusively disprove that defense.

Under the circumstances and for all of the reasons discussed above and in the opening brief, defense counsel's decision to consent to the slow plea, knowing that it was intended and likely to result in a death verdict, and without arguing against the lawful performance of duties element based on the submitted preliminary hearing transcript fell well objective standards of reasonable competence. (AOB 179-192.)

Significantly, respondent does not dispute that if counsel's performance in this regard was objectively unreasonable, counsel's deficient performance undermines confidence in the outcome of the court

trial on the special circumstance allegation. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 693; AOB 191-192.) Thus, Mr. Mai was deprived of state and federal constitutional rights to the effective assistance of counsel, which requires that the special circumstance be set aside and the death judgment based thereon reversed.

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

Even if defense counsel's consent to the slow plea without arguing against the sufficiency of the evidence to prove the special circumstance allegation did not alone deprive Mr. Mai of his rights to the effective assistance of counsel, his failure to present argument and additional evidence did. (AOB 192-199.) As discussed above and in the opening brief, assuming arguendo the truth of the *only* record evidence suggesting a reason for the traffic stop – i.e., that Mr. Mai was driving without illuminated headlights – the face of the record and indisputable facts reveal substantial additional evidence that the detention was nonetheless unlawful.

On the date and place of the traffic stop, the sun set at 8:04 p.m.; it was a clear day with zero precipitation and a mean visibility of 11.4 miles, or 60,192 feet. (*The Old Farmer's Almanac*, http://www.almanac.com.; (AOB 194-196.) Had defense counsel moved the trial court to take judicial notice of those indisputable facts, the court would have been *required* to do so. (Evid. Code, §§ 452, subd. (h), 453.) These indisputable facts would conclusively have established that the law did not require illuminated headlights that day until 8:34 p.m., which was "one-half hour after sunset. (Veh. Code, §§ 280, 24400, 38335.) (AOB 194-196.) As detailed in the

opening brief, the prosecution's own penalty phase evidence overwhelmingly established that the stop occurred *before* 8:34 p.m. (AOB 192-199.) Moreover, as previously discussed, prosecution witness Sarthou testified that when she observed the officer and Mr. Mai, "*it was still daylight[,] [i]t wasn't sunset yet*" and she was wearing her sunglasses "*because the sun was still bright enough to need them.*" (1-Muni-RT 152, 190-192.) All of this evidence demonstrated that Mr. Mai was *not* violating the law by driving without illuminated headlights when Officer Burt detained him for that reason. Hence, all of this evidence not only raised reasonable doubt that Officer Burt was engaged in the lawful performance of his duties when he was killed; it tended to affirmatively *disprove* that element. Defense counsel's consent to the slow plea without presenting and arguing this evidence to the court fell below objective standards of reasonable competence. (AOB 192-199; *Strickland v. Washington*, *supra*, 466 U.S. at pp. 688-689.)

Curiously, respondent does not even address the prosecution's own penalty phase evidence casting doubt on the lawfulness of the traffic stop. Instead, as discussed above, respondent simply contends that Mr. Mai's argument "inappropriately presupposes the absence of additional evidence" to prove the lawfulness of the stop. (RB 51.) For all of the reasons discussed above and in the opening brief, respondent's argument is without merit.

As to defense counsel's failure to move for judicial notice of the indisputable facts that the day of the traffic stop was a clear one in which the sun set at 8:04 p.m., Mr. Mai filed a motion in this Court to take judicial notice of those facts in order to review his claim pursuant to Evidence Code sections 452, subdivision (h) ["facts and propositions that are not

reasonably open to dispute and are capable of immediate and accurate determination by resort to resources of reasonably indisputable accuracy" are proper subjects of judicial notice] and 459. (See AOB 195, fn. 88.)[33] Respondent contends that this Court should not consider or take judicial notice of those facts for three reasons:

First, respondent contends that they were not presented at trial and are not contained in the record of the trial proceedings. (RB 52.) But this is the very essence of Mr. Mai's claim, i.e., defense counsel *should* have presented those facts to the trial court by way of judicial notice and their failure to do so fell below an objective standard of reasonably competent assistance. In this context, it is entirely appropriate to take judicial notice of properly noticeable facts. (See, e.g., *People v. Marlow* (2004) 34 Cal.4th 131, 149-150 [taking judicial notice of such evidence over People's arguments that it was not part of trial record and counsel forfeited issue by failing to raise it below]; *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1212 [taking judicial notice of court records proffered in support of claim defense counsel was ineffective for not moving to strike a prior conviction based on evidence contained in those records].) Respondent has not offered a reasoned basis for the Court to decline to do so here.

Second, respondent summarily asserts that taking judicial notice of those indisputable facts on appeal would "result in unfairness to the prosecution," but fails to explain *how* it would result in unfairness to the prosecution in this case. (RB 52.) Instead, respondent simply cites *People*

---

[33] Mr. Mai filed the motion in this Court on March 30, 2010, along with his opening brief. On April 14, 2010, respondent filed an opposition. On April 22, 2010, Mr. Mai filed a reply to respondent's opposition. The motion is still pending.

v. Hardy (1992) 2 Cal.4th 86, 134, in support of the general proposition that a reviewing court should not take judicial notice of facts that were not presented to the trial court *if* it would result in unfairness to a party. (RB 52.) But respondent ignores the *holding* in *Hardy*, which actually *supports* Mr. Mai's argument and undermines respondent's objection.

In *Hardy*, this Court *did* take judicial notice of facts for the first time on appeal. (People v. *Hardy*, *supra*, 2 Cal.4th at pp. 134-135.) In so doing, the Court explained:

> Evidence Code section 459, subdivision (d), provides certain procedural safeguards when a reviewing court takes judicial notice. . . [by] 'afford[ing] each party reasonable opportunity to meet such evidence before judicial notice of the matter may be taken.' . . . By providing for special rules for situations in which a party seeks judicial notice of information "not received in open court or not included in the record of the action" (Evid. Code, § 459, subd. (d)), the Evidence Code clearly contemplates that, at least in some situations, a reviewing court will grant judicial notice even when the information was not presented to the trial court. [Citations.]

(*Id.* at pp. 134-135 & fn. 8.) Furthermore, this Court emphasized that noticing the facts in that case would *not* result in unfairness to the adversary because "the facts [to be judicially noticed were] not reasonably open to dispute." (*Id.* at p. 135.)

The same considerations apply here. The time of sunset and weather conditions on July 13, 1996 "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. (h), and 453; AOB 195-196.) Indeed, respondent has been given the opportunity to "meet" those facts and *has not disputed their accuracy*. (Evid. Code, § 459, subd. (d); *People v. Hardy*, *supra*, 2 Cal.4th at pp. 134-135 & fn. 8.)

Respondent has also been given an opportunity to explain how taking judicial notice of those facts would result in unfairness to the prosecution, but has failed to do so. To the contrary, under Evidence Code section 453, had defense counsel made the motion below, judicial notice of those indisputable facts by the trial court would have been *mandatory*. Therefore, the prosecution was not unfairly deprived of an opportunity to object to judicial notice below because any such objection would have been futile. Thus, just as in *Hardy*, taking judicial notice on appeal of the indisputable and undisputed facts that the day of the detention was a clear one in which the sunset at 8:04 p.m. would not result in any unfairness to the People. And, as in *People v. Marlow*, *supra*, 34 Cal.4th at pp. 149-150, it is entirely appropriate to do so given Mr. Mai's claim that his counsel was ineffective by failing to move for mandatory judicial notice of those facts at trial.

Finally, respondent contends that this Court should refuse to take judicial notice of those facts to resolve Mr. Mai's claim on direct appeal because "claims of ineffective assistance of counsel are more appropriately raised on habeas corpus, where relevant facts and circumstances not reflected in the record on appeal, can be brought forward to inform the two pronged ineffective assistance of counsel inquiry. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196.)" (RB 52.) Respondent's contention exalts form over substance.

As Mr. Mai acknowledged in the opening brief, it is true that when the appellate record or other evidence properly before the reviewing court does not contain facts vital to assessing an ineffective assistance of counsel claim – for instance, counsel's explanations for his or her strategic choices – the claim is more appropriately raised on habeas corpus. (AOB 182-183, citing, inter alia, *People v. Pope* (1979) 23 Cal.3d 412, 425-426.) However,

it is equally true that "when counsel's ineffectiveness is so apparent from the record" that a Sixth Amendment violation may be demonstrated on direct appeal, it is appropriate to raise that issue on appeal. (*Massaro v. United States* (2003) 538 U.S. 500, 508; accord, e.g., *People v. Pope*, *supra*, 23 Cal.3d at pp. 425-426 [where, inter alia, defense counsel explains reasons for challenged acts and omissions, ineffective assistance of counsel claim is appropriately raised on direct appeal]; AOB 182-183.) Indeed, when the reviewing court has "sufficient information" to resolve such a claim on direct appeal, it not only *can* but *should* do so in the interest of judicial economy and other important considerations. (*People v. Pope*, *supra*, at p. 440, dis. opn. of Mosk, J; see also, e.g., *People v. Wiley* (1995) 9 Cal.4th 580, 594 [taking judicial notice of matters on appeal in order to avoid "revisit[ing]" the issue "on habeas corpus"]; *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 165, fn. 12 [where matters properly subject to judicial notice establish fact on which action may be disposed or decided without further proceedings, it is appropriate to do so "without further waste of judicial resources"]; *In re Harris* (1993) 5 Cal.4th 813, 827-829, 841 [explaining reasons for general rule that "issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance," including, inter alia, legislative preference that such issues be raised and resolved on direct appeal, distinctions between appeals and habeas corpus proceedings, and conservation of judicial resources].)

Here, defense counsel's ineffectiveness is apparent from the face of the record and facts that "are not reasonably subject to dispute." As respondent recognizes, defense counsel expressed their tactical reason for consenting to the slow plea and failing to present a guilt phase defense on

the record. (See, e.g., *People v. Pope*, *supra*, 23 Cal.3d at pp. 425-426.) The face of the record reveals the evidence that should have been argued and presented to the court in determining the truth of the special circumstance allegation. The time of sunset and weather conditions on the date and place of the traffic stop are not "reasonably subject to dispute," have not been disputed by respondent, are properly the subject of judicial notice on appeal, and would have been the subject of *mandatory* judicial notice at trial if counsel had made the motion. Hence, Mr. Mai's ineffective assistance of counsel claim not only *can* be, but *should* be resolved on this appeal based on the record evidence and judicial notice of relevant and indisputable facts.

For all of the foregoing reasons, as well as those discussed in the opening brief, defense counsel's failure to make any attempt to defend against Mr. Mai's death eligibility fell below objective standards of reasonableness demanded of counsel in capital cases. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 688-689.) Again, respondent does not dispute that if defense counsel's performance were deficient, it undermines confidence in the outcome of the trial on the special circumstance allegation. (*Id.* at pp. 693-694; AOB 199.) Hence, no further reply is necessary. Mr. Mai was deprived of state and federal constitutional rights to the effective assistance of counsel, which requires that the special circumstance be set aside and the death judgment based thereon be reversed.

//

//

IV

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

A. Introduction

As discussed in Argument I-F, *ante*, and the opening brief, "a person whose mental condition is such that he lacks the capacity to . . . consult with counsel, and to assist in preparing his defense may not be subjected to a trial" because he is incompetent within the meaning of the federal Constitution and state law. (*Drope v. Missouri* ["*Drope*"] (1975) 420 U.S. 162, 171; accord, Pen. Code, § 1367; AOB 217.) When the trial court is aware of substantial evidence that the defendant may be incompetent – i.e., evidence sufficient to raise a reasonable doubt as to his competency – the federal Constitution and state law impose a *sua sponte* duty to suspend criminal proceedings and initiate competency proceedings. (AOB 218-224, citing, inter alia, *Pate v. Robinson* (1966) 383 U.S. 375, 384-386, *People v. Halvorsen* (2007) 42 Cal.4th 379, 401; Pen. Code, § 1368, subds. (a)-(c).)

As detailed in the opening brief, the trial court was presented with a wealth of evidence that Mr. Mai's mental state had so deteriorated under the extraordinarily harsh conditions of his federal solitary confinement that he was no longer able to rationally consult with counsel and participate in his penalty phase defense. (AOB 200-216.) This evidence raised a reasonable doubt as to Mr. Mai's competency to stand trial at the penalty phase and triggered the trial court's sua sponte due to initiate competency proceedings. (AOB 217-241.) The trial court's failure to do so violated state law, as well as Mr. Mai's federal constitutional rights to due process and a reliable death

verdict. (*Ibid.*) Because remand for a retrospective competency determination would be inappropriate in this case, outright reversal per se of the death judgment is required. (AOB 241-248.)

At the outset, it is important to emphasize what is not in dispute. First, respondent does not dispute that it is "well accepted that conditions [of solitary confinement] . . . can cause psychological decompensation to the point that individuals may become incompetent." (AOB 225, quoting *Miller ex. rel. Jones v. Stewart* (9th Cir. 2000) 231 F.3d 1248, 1252; see RB 53-62.) Particularly in light of the overwhelming weight of authority regarding the existence of this mental disorder (AOB 225-226), this Court should treat this as a concession.

Nor does respondent dispute that if the trial court *did* err in failing to initiate competency proceedings, reversal per se of the death judgment is required because a retrospective competency determination would be inappropriate here. (AOB 241-247; see RB 53-62.) Again, this Court should treat this as a concession. (See AOB 241-247.)

Respondent's only dispute is that the evidence was insufficient to raise a reasonable doubt that Mr. Mai was able to rationally consult with counsel and participate in his penalty phase defense. (RB 53-62.) Respondent's dispute is without merit.

B. The Evidence Before the Court Was Sufficient to Raise Reasonable Doubt that Mr. Mai was Able to Rationally "Consult with Counsel and to Assist in Preparing His Defense"

As detailed at length in the opening brief, the trial court was presented with the following, well recognized indicia of incompetence:

(1) The opinion of Mr. Mai's court-appointed psychologist, Dr. Veronica Thomas, who met with him regularly and opined

that the extraordinary conditions of Mr. Mai's federal solitary confinement had caused Mr. Mai to decompensate to the point that he was no longer able to consult with his counsel or assist in the preparation of his penalty phase defense (AOB 200-215, 220, 224-228, citing, inter alia, *People v. Pennington* (1967) 66 Cal.2d 508, 519, *Drope*, *supra*, 420 U.S. at pp. 175-180);

(2) the repeated representations of his defense attorneys to the same effect (AOB 200-216, 229-230, 236-237, citing, inter alia, *Medina v. California* (1992) 505 U.S. 437, 450, *Drope*, *supra*, 420 U.S. at p. 177 & fn. 13, and *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103, 1109);

(3) Mr. Mai's self-defeating behavior in entering an unconditional, effective guilty plea to capital murder and effectively stipulating to the death penalty (AOB 223-224, 231-236, citing, inter alia, *Drope, supra*, 420 U.S. at pp. 166-167, 179-180, *United States v. Loyola-Dominguez* (9th Cir. 1997) 125 F.3d 1315, 1318-1319, and *Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 565);

(4) the report that his violent behavior increased dramatically after suffering near fatal injuries, which in Dr. Thomas's professional opinion suggested the possibility of brain injury or trauma (AOB 228-229, citing, inter alia, *Pate v. Robinson*, *supra*, 383 U.S. at p. 378);

(5) Mr. Mai's apparent disorientation in some proceedings, continual outbursts throughout the proceedings in disregard of the court's orders which prompted his removal from the

courtroom, and threats to disrupt further proceedings (AOB (See AOB 202, 204-205, 213-216, 230-231, citing, inter alia, *Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-180, *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 958-959, 961, *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109); and

(6) Mr. Mai's own statement that he was unable to control himself coupled with his self-defeating request to be chained in visible shackles during the penalty phase (AOB 233-234, *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109).

Mr. Mai argued that Dr. Thomas's opinion alone, and surely the totality of Dr. Thomas's opinion and all of the foregoing evidence, was sufficient to raise a reasonable as to Mr. Mai's competency and trigger the trial court's sua sponte to initiate competency proceedings. (AOB 219-236.)

As demonstrated below, respondent distorts or ignores much of the evidence. Otherwise, addressing each piece of evidence in isolation, respondent contends that each piece was insufficient standing alone to raise reasonable doubt as to Mr. Mai's competence. (RB 53-62.)

1. Dr. Thomas's Professional Opinion That Mr. Mai Was Unable to Assist Counsel in the Preparation of His Defense Was Substantial Evidence Triggering the Trial Court's Sua Sponte Duty to Initiate Competency Proceedings

As to Dr. Thomas's trial court testimony, the only part that respondent references is completely *irrelevant* to the issue presented here, namely, her opinion that Mr. Mai was a sociopath, or had an antisocial personality disorder, and was "highly intelligent." (RB 55.) Otherwise, respondent only obliquely acknowledges that she "testified extensively about Mai's conditions of confinement . . . and the impact those conditions

of confinement were having on Mai." (*Ibid.*) However, respondent does not address or describe her *opinion* about the impact those conditions of confinement were having on Mr. Mai.

Instead, respondent summarily asserts that Dr. Thomas "never opined that Mr. Mai was mentally incompetent" (RB 55), and "never testified that the conditions of Mr. Mai's confinement had caused him to become mentally incompetent" or "unable to assist his defense counsel." (RB 55-56.) Therefore, respondent contends that neither Dr. Thomas's testimony alone nor her testimony in combination with any other evidence raised a reasonable doubt as to Mr. Mai's competence to stand trial. (RB 55-60.)

Respondent's contention is plainly refuted by the testimony it so carefully avoids discussing. As detailed in the opening brief but *completely* ignored by respondent (AOB 205-207), in March 2000 – a month before the penalty phase commenced with jury selection – Dr. Thomas testified that she had been retained as a member of the defense team to investigate and develop mitigating evidence, had been meeting with Mr. Mai since January 1999, and had personally witnessed the severe deterioration of his mental health under the extreme conditions of his federal solitary confinement. (3-RT 406-411, 429.)[34] She opined that Mr. Mai could not "cope with" the stress and "sensory deprivation," under which he had become increasingly, "alternately enraged" and "irrational," "causing his emotions to, on a frequent basis, to *override his judgment.*" (3- RT 411, 414, italics added.) His condition was "impairing" his "*ability to process the issues that we*

---

[34] Both defense counsel and Dr. Thomas described at length the conditions of Mr. Mai's solitary confinement. (See AOB 200-215.)

need[ ] to discuss with regard to his case" not only with her, but with defense counsel, which was "*impairing the process of the defense all the way around.*" (3-RT 411, italics added.) He no longer trusted anyone on his "defense team," being "*each and every one of us, myself included,*" which made it "difficult to absolutely address the *issues that are imperative*, to at least my part, *in finishing with this phase of the case.*" (3-RT 414, italics added.) Referring to Mr. Mai's "present state of sensory deprivation" (3-RT 428), defense counsel Peters explicitly asked if it was her "opinion that [Mr. Mai] needs some relief from his present situation *in order to be cooperative with his counsel*?" (*Ibid.*, italics added.) Dr. Thomas replied, "something has to change, Mr. Peters, *in order for me to do what I need to do to get him to be able to work with you.*" (*Ibid.*, italics added.) Furthermore, Dr. Thomas testified, "*I am unable to move forward at this point*" with the "work" *she* needed to accomplish in order to prepare for the penalty phase. (*Ibid.*, italics added.) If the situation remained unchanged, her prognosis was that Mr. Mai's ability to think and process information would only continue to diminish. (3-RT 428.) Consistent with her prognosis, over a month later and in the midst of the penalty phase voir dire, Mr. Peters reported that Dr. Thomas had met again with Mr. Mai the previous week and "noted there was an increase in his physiological symptoms . . . an increase in the intensity of his emotional reaction to innocuous stimuli" and "*confirmed her prior opinions that he can't be objective in dealing with her or me.*" (6-RT 1076, italics added.)

Hence, respondent's assertion that Dr. Thomas never opined that Mr. Mai was "unable to assist his defense counsel . . . ." (RB 55-56) is clearly incorrect. Dr. Thomas's professional opinion of Mr. Mai's mental condition was very the definition of incompetence within the meaning of

the federal Constitution and state law. (Pen. Code, § 1367; *Drope*, *supra*, 420 U.S. at p. 171.)

Furthermore, Dr. Thomas's state court testimony was not the only evidence of her opinions before the trial court. As discussed in detail in the opening brief but ignored by respondent, defense counsel repeatedly described Dr. Thomas's opinions based not only on her state court testimony, but also on her testimony in federal court and ongoing reports to defense counsel. (AOB 200-216, 229-230, 236-237.) And they repeatedly represented that they *shared* Dr. Thomas's opinion. (AOB 205-212, citing 3-RT 403-405; 3-RT 489; 4-RT 589; 5-RT 1075-1076; 3/16/07 2-SCT 42-44, 156, 161, 169, 175, 178-181, 187, 189-190; 3/16/07 3-SCT 365-367.) For instance, defense counsel Peters represented that defense counsel "*was unable to effectively communicate with*" Mr. Mai, there "was a breakdown in the attorney-client relationship . . . . Dr. Veronica Thomas can no longer finish her evaluation of [him] . . . [which] is a necessary component of" penalty phase preparation," and that "[t]he conditions surrounding [his] custody status . . . are so inhuman and oppressive that Petitioner's *counsel cannot complete and present to the* [*court or the jury*] *evidence of* [*Mr. Mai's*] *mental state in mitigation of the death penalty.*" (3/16/07 2-SCT 42-44., italics added.) At bottom, the "*conditions of [Mr. Mai's] confinement have caused him to become mentally unstable to a point where his Counsel and psychologist cannot prepared [Mr. Mai] for trial.*" (3/16/07-2-SCT 161., italics added.)[35]

---

[35] These quoted representations were made in a pleading defense counsel filed in the Ninth Circuit and served on the trial court. Respondent acknowledges that the trial court state that it had received and reviewed the (continued...)

Indeed, even though they had discussed the prospect of presenting no penalty phase defense with Mr. Mai, defense counsel emphasized to the state court that "Mr. Mai needs to be in a situation where he can make rational decisions about this," but his mental condition *precluded such rational decision making*. (AOB 208, citing 3-RT 449, 471-473.) Consistent with Dr. Thomas's opinion, defense counsel's description of Mr. Mai's mental condition was the very definition of incompetence. (See, e.g., *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 570 [substantial evidence warranting competency proceedings based, inter alia, on evidence that defendant's "communication with counsel was so strained" that counsel was unable to perform necessary duties]; *Deere v. Woodford* (9th Cir. 2003) 339 F.3d 1084, 1086 [substantial evidence based, inter alia, on evidence that defendant was not able to make rational judgements about his defense].)[36]

---

[35](...continued)
pleading. (RB 32, 59l; 3/16/07-2-SCT 156, 169; 5-RT 1075-1076.)

[36] In a footnote, respondent states that "Mai [also] seems to rely on his Petition for Writ of Prohibition/Mandate Request for Emergency Stay denied by the Fourth Appellate District . . . . (AOB 210-211.) The record below does not indicate that the trial judge reviewed the writ . . . ." (RB 59, fn. 17.)

Respondent is correct that Mr. Mai relies on defense counsel's representations in that petition to the effect his "mental state has been continually deteriorating" (3/16/07 2-SCT 190) "under the "dehumanizing" conditions of his solitary confinement, that he "cannot think clearly" (3/16/07-2-SCT 178), "cannot control his emotions" (3/16/07-2-SCT 178, 180-181), counsel is "unable to effectively communicate with Petitioner" (3/16/07-2-SCT 187), and Dr. Thomas can "not complete her work up for the critical penalty phase trial" (3/16/07-2-SCT 178, 190), including an

(continued...)

[36](...continued)
evaluation that "is a necessary component of the Petitioner's defense at his penalty phase trial" (3/16/07-2- SCT 187), all of which caused "a breakdown in the attorney client relationship" (3/16/07 2-SCT 187) to the extent that "Petitioner's counsel cannot complete and present to the Orange County Superior Court evidence of Petitioner's mental state in mitigation of the death penalty," in violation of his constitutional rights (3/16/07-2-SCT 189-190). (AOB 211-212.) These representations essentially mirrored the same representation defense counsel made in the pleading they filed in the Ninth Circuit Court of Appeals, and served on, received and reviewed by the trial court. (5-RT 1075-1076.)

Respondent is *incorrect*, however, in suggesting that Mr. Mai cannot rely on those representations because the record does not indicate that the trial court was aware of them. The court was *a named party* in the petition; *defense counsel personally served that pleading on the state court*; and defense counsel orally notified the court that they had done so. (3/16/07-3-SCT 365-367; 5-RT 866.) Similarly, the Court of Appeal served its denial on the trial court, specifically naming the trial judge. (3/16/07-3-SCT 369-370.) This service created a rebuttable presumption that the pleading was actually received by the court. (See, e.g., 6 *Witkin* Cal. Proc. 4th (2008) PWT, § 23, p. 445, and authorities cited therein.) Nothing in the record rebuts that presumption. To the contrary, the trial court acknowledged that it had received and reviewed the federal pleadings on the same topic, which had similarly been served on the court. (3/16/07-2- SCT 156, 169; 5-RT 1075.) There is nothing in record to suggest that the court did not also receive and review the Fourth District petition in which it was a named party and which had been served by the same method of process.

Furthermore, even if the court did not actually review the pleading with which it was served, that would only mean that the trial court erred. Again, defense counsel alerted the court that he had filed the petition in the Fourth Appellate District and the court was otherwise aware that it – like the Ninth Circuit pleadings the court had received and reviewed – challenged the conditions of Mr. Mai's confinement on the grounds that they had caused Mr. Mai's mental state to decompensate to the point that he was unable to communicate with counsel and participate in his defense in a

(continued...)

It is well settled that where, as here, "a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused states under oath with particularity that in his [or her] professional opinion the accused is, because of mental illness [or disorder] . . . is incapable of assisting in his defense or cooperating with counsel, the substantial evidence test [triggering the trial court's *sua sponte* duty to initiate competency proceedings] is satisfied." (*People v. Pennington*, *supra*, 66 Cal.2d at p. 519; AOB 220-221, 227.) The evidence of Dr. Thomas's opinion – presented to the state court through her sworn testimony and otherwise relayed to the court by defense counsel – clearly satisfied this test.

To be sure, Dr. Thomas did not use the term "mentally incompetent" in her state court testimony *because no one ever asked her that question directly*. This is so, of course, because defense counsel inexcusably failed to offer her testimony for that purpose because they insisted that competency proceedings were unnecessary (Argument I-F, *ante*) and the trial court did not receive her testimony for that purpose because it failed to make reasonably inquiry into that critical issue. (AOB 227.) Instead, as

---

[36](...continued)
rational manner. (5-RT 866, 1075-1076.) Under the circumstances, the trial court was *obligated* to review that pleading and determine if it contained evidence relevant to the issue of Mr. Mai's competency: "a trial court must always be alert to circumstances . . . that would render the accused unable to meet the standards of competence to stand trial." (See, e.g., *Drope v. Missouri*, *supra*, 420 U.S. at p. 181.) For all of these reasons, Mr. Mai appropriately relies on his trial counsel's representations in the petition they filed in the Fourth Appellate District in support of his argument that the trial court erred in failing to initiate competency proceedings.

respondent points out, Dr. Thomas's testimony was inexplicably offered only for the purpose of alleviating the conditions of Mr. Mai's confinement conditions, not for the purpose of initiating competency proceedings. (RB 56-57; see AOB 207-208, 227.)

Nevertheless, *Pennington* does not hold that a psychiatrist or qualified psychologist, who has had sufficient opportunity to examine the accused state under oath with particularity that in his professional opinion the accused is, because of mental illness or disorder "*incompetent*" in order to satisfy the substantial evidence and *demand* the initiation of competency proceedings sua sponte. Rather, *Pennington* holds that "a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused states under oath with particularity that in his professional opinion the accused is, because of mental illness [or disorder] . . . *incapable of assisting in his defense or cooperating with counsel, the substantial evidence test is satisfied.*" (*People v. Pennington*, *supra*, 66 Cal.2d at p. 519, italics added.) Here, although Dr. Thomas did not use the magic word "incompetent," the substance of her testimony clearly conveyed her opinion that, due to the mental condition caused by his solitary confinement, Mr. Mai was "incapable of assisting in his defense or cooperating with counsel." (*Ibid.*) This was enough to trigger the trial court's sua sponte duty to initiate competency proceedings. (AOB 227, citing, inter alia, *People v. Kaplan* (2007) 149 Cal.App.4th 372, 386-387 [although psychologist "did not expressly state the opinion defendant was 'incompetent,'" she submitted a report in which she "addressed at length how and why defendant was unable to assist counsel," which was sufficient to raise reasonable doubt regarding competency and demand hearing]; cf. *Maxwell v. Roe*, *supra*, 606 F.3d at pp. 574-575 ["although defense counsel

did not formally" declare doubt as to defendant's competency, they "did on numerous occasions express concern that he was unable to aid in his own defense . . . was deteriorating, not communicating with defense counsel," which was sufficient to alert the court that they were "concern[ed] about [his] competence"].)

Indeed, the trial court itself recognized and expressed its concern that defense counsel were effectively representing that Mr. Mai was incompetent based on Dr. Thomas's opinion and their own interactions with him. (AOB 236-240, citing 5-RT 1075-1076.) The trial court failed to act on that substantial, objective evidence of Mr. Mai's incompetence based on its own speculative, subjective impressions of his demeanor during a brief period of the penalty phase voir dire proceedings. (*Ibid.*, citing, inter alia, *People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153 ["substantial evidence" of incompetence is measured by an objective standard and, hence, cannot be defeated by the trial court's own observations of the defendant].)

2. The Totality of the Evidence Before the Trial Court Triggered Its Sua Sponte Duty to Initiate Competency Proceedings

Even if Dr. Thomas's testimony and opinion were not alone sufficient to meet the substantial evidence test and trigger to court's sua sponte duty to initiate competency proceedings, the totality of her diagnosis and the other evidence before the court was. (AOB 200-216, 228-236 [detailing evidence].) Respondent disagrees.

In so doing, respondent addresses each piece of evidence in isolation and contends that each one, standing alone, was not sufficient to raise a reasonable doubt as to Mr. Mai's competency. (RB 53-62.) Similarly, respondent essentially contends that since each piece of evidence did not

conclusively demonstrate incompetency because it was susceptible of interpretations consistent with competency, the evidence was insufficient to trigger the court's duty. (RB 53-62.) Respondent's analysis is fatally flawed.

In determining whether there exists substantial evidence of incompetency sufficient to require the initiation of competency proceedings, the United State Supreme Court has explicitly held that it is improper to "consider[] indicia of" the defendant's "incompetence separately[]." (*Drope*, *supra*, 420 U.S. at pp. 179-180.) Instead, the trial court *must* consider "the *aggregate* of those indicia." (*Ibid.*; accord, e.g., *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 955.)

Furthermore, as discussed in the opening brief but ignored by respondent, "substantial evidence" of incompetency does not mean conclusive, unconflicting or even persuasive evidence. (AOB 219-220, citing, inter alia, *People v. Young* (2005) 34 Cal.4th 1149, 1219 and *People v. Pennington* (1967) 66 Cal.2d 508, 518.) As with any other "substantial evidence" standard, the trial court's "sole function is to decide whether there is *any* evidence which, *assuming its truth*, raises a reasonable doubt about the defendant's competency." (*Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666, italics added; accord, e.g., *People v. Jones*, *supra*, 53 Cal.3d at pp. 1152-1153; *Speedy v. Wyrick* (8th Cir. 1983) 702 F.2d 723, 725; *United States v. Mason* (4th Cir. 1995) 52 F.3d 1286, 1290.) "Once such substantial evidence appears, "a doubt as to the [competency] of the accused exists, no matter how persuasive other evidence – testimony of prosecution witnesses or the court's own observations of the accused – may be to the contrary. . . . [I]t is immaterial that the prosecution's evidence [or contrary inferences] may seem more persuasive. The conflict can *only* be

resolved upon a special trial before the judge or jury, if a jury is requested." (*Pennington*, *supra,* at pp. 518-519, italics added; accord, e.g., *People v. Stankewitz* (1982) 32 Cal.3d 80, 93; AOB 218-220, 224,.)

With this background in mind, respondent contends that Mr. Mai's self-defeating behavior in entering an unconditional slow plea to capital murder and effectively stipulating to the death penalty was not suggestive of incompetence for two reasons. First, Mr. Mai's plea was born of a rational decision because he was guilty and there was no viable defense. (RB 57.) However, as discussed in Arguments I-E, II, and III, *ante*, and the opening brief, defense counsel's statement that there was no viable defense to the capital murder charge was not only incorrect; Mr. Mai disavowed that *he* wished to enter the plea for the reasons defense counsel expressed. (AOB 78-79, 231-232; 1-RT 207-210.) Instead, Mr. Mai explained that *his purpose for entering the plea* was to help and assist Ms. Pham in her federal prosecution. (*Ibid.*) When the court inquired of defense counsel how Mr. Mai's plea could help her, defense counsel replied that it could not – she had already been convicted and sentenced and "it is all done." (2-RT 209-210.) Nevertheless, Mr. Mai insisted on entering the plea. (2-RT 209-210.) Thus, the court was aware that *Mr. Mai's stated purpose* for entering the plea was simply nonsensical. The court was also aware that Mr. Mai and his counsel made no attempt to seek concessions from the state prosecutor in exchange for his plea. (1-RT 100, 104-106, 125-126, 148, 168; AOB 73-77, 231-232; Argument I-E, *ante*.) Hence, this evidence alone would have caused an objective, reasonable judge to have suspected that something was amiss. (AOB 231-232, citing, inter alia, *Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 565, and authorities cited therein ["guilty plea with no attempt to seek concessions from the prosecution may, when coupled with

other evidence of mental problems, raise doubts as to the defendant's competency"].)

As to Mr. Mai's effective stipulation to the death penalty, respondent simply recites this Court's oft-repeated observation that "a defendant's preference for the death penalty and overall death wish does not *alone* amount to substantial evidence of incompetence requiring the court to order an independent psychiatric evaluation." (*People v. Ramos* (2004) 34 Cal.4th 494, 509, italics added; see RB 57, and authorities cited therein.) Of course, Mr. Mai acknowledged this authority in his opening brief. While it may be true that a defendant's death or suicidal wishes *alone* do not necessarily amount to substantial evidence of incompetence, it is equally true that such evidence "*in combination with other factors*, may constitute substantial evidence raising a bona fide doubt regarding a defendant's competence to stand trial." (AOB 235-236, quoting *People v. Rogers* (2006) 39 Cal.4th 826, 848 and citing, inter alia, *Drope v. Missouri, supra*, 420 U.S. at pp. 166-167, 179-180; accord, *Maxwell v. Roe, supra*, 606 F.3d at pp. 570-571, 575-576 [substantial evidence based, inter alia, on defendant's attempted suicide and self-defeating insistence on turning over evidence helpful to prosecution].) Here, Mr. Mai's death wish was simply one of many factors, the aggregate of which combined to raise a reasonable doubt as to his competency.

Next, respondent builds yet another straw man, purporting to summarize Mr. Mai's "contention" that "his incompetency was demonstrated by" the reports of "Mai's girlfriend, Victoria Pham, [that] Mai had been in a car accident and afterward his behavior changed and he was violent. Mai speculates on appeal this could have indicate a brain injury which was the cause of Mai's violent behavior." (RB 56.) Having built up

this straw man, respondent then proceeds to knock it down, contending that this evidence did not demonstrate incompetency because: (1) the record does not support Mr. Mai's "speculation" that he actually suffered brain injury that had any impact on his cognitive functioning; and (2) in any event, "a person with significant brain damage may nonetheless be competent to stand trial." (RB 56, citing *People v. Leonard* (2007) 40 Cal.4th 1370, 1415-1416.) Respondent's contention misstates both Mr. Mai's argument and the record on which it is based.

It is not *Mr. Mai* who "speculates" that he could have brain injury that impacted his cognitive functioning. (RB 56; compare AOB 228-229.) It was *Dr. Thomas's professional opinion* that the report of Mr. Mai's near fatal injuries followed by a dramatic escalation of his violence suggested the possibility of brain injury that should have been investigated through appropriate testing. (2-CT 501; 1-RT 170-171; 2-RT 231-232.) Of course, the record does not *prove* or confirm Dr. Thomas's suspicions due to the very errors raised on this appeal: defense counsel unreasonably failed to investigate this evidence (Argument I-G-2, *ante*; AOB 114-118); defense counsel unreasonably insisted that competency proceedings were unnecessary based on this and other evidence (Argument I-F, *ante*); and the trial court did not order competency proceedings.

In any event, affirmative proof that Mr. Mai had suffered brain damage was not necessary to raise a reasonable doubt as to his competence to stand trial. It may be true that "a person with significant brain damage" is not *necessarily incompetent*, as respondent observes. (RB 56.) But Mr. Mai does not raise a *substantive* due process claim that he was actually incompetent to stand trial; instead, he raises a *procedural* due process challenge to the trial court's failure to initiate competency proceedings in

the face of evidence raising a *reasonable doubt* as to his competency. (See, e.g., *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 952 [distinction between claims, the latter of which requires a lower burden of proof than the former]) In this *procedural* due process context, the United States Supreme Court has held that evidence of a head injury followed by a change in behavior is a red flag suggestive of incompetence, particularly where, as here, it accompanies other signs of irrational thinking or behavior. (See, e.g., *Pate v. Robinson*, *supra*, 383 U.S. at p. 378.) Again, the evidence reported to Dr. Thomas that Mr. Mai had suffered near fatal injuries followed by a change in behavior, her professional opinion that this evidence suggested the possibility of brain injury, her opinion that Mr. Mai was unable to rationally consult with her or counsel or prepare his defense, and the other evidence of his irrational thinking and behavior *combined* to raise a reasonable doubt as to his competency. (*Ibid.*)

As to Mr. Mai's disruptive outbursts both inside and outside of the courtroom (AOB 229-231), respondent contends that they simply evidenced that he was "angry," not that he was incompetent. (RB 57-58.) Indeed, respondent emphasizes, after his last outburst, Mr. Mai did not disrupt the proceedings again, which "shows that Mr. Mai chose to be disruptive and that he could control his behavior." (RB 58.) Again, both the facts and the law undermine respondent's contention.

As to the facts and as discussed in detail in the opening brief, respondent ignores that despite the court's *repeated* admonishments throughout the pre-penalty and penalty proceedings, Mr. Mai *repeatedly* disrupted the proceedings with violent outbursts. (See AOB 202, 213-216, 230-231, citing 2-RT 305-309, 345, 349; 3-RT 395-400; 5-RT 1076; 6-RT 1079-1083.) These continual outbursts over the court's repeated warnings

were circumstantial evidence susceptible of a reasonable inference that Mr. Mai's was simply unable to control himself. (AOB 230-234, citing, inter alia, *United States v. Williams* (10th Cir. 1997) 113 F.3d 1155, 1160 [substantial evidence raising reasonable doubt of competency based, inter alia, on "outbursts, interruptions of the attorneys, and defiance of the district court's instructions"] and *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109.) The inference that Mr. Mai was *unable* to control himself was substantially bolstered by other evidence that respondent tellingly ignores.

For example, immediately after the court had yet again warned Mr. Mai about his disruptive behavior in the courtroom, *Mr. Mai informed the court that he was concerned about his inability to control himself.* (2-RT 348, 365; 6-RT 1086-1087; AOB 233-234.) Due to this concern, *Mr. Mai himself requested that he be shackled throughout the remainder of the proceedings.* (6-RT 1086-1087.) Defense counsel shared Mr. Mai's concerns and joined in his request for their own "safety." (6-RT 1086; see, e.g., *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [substantial evidence based, inter alia, on continually disrupting proceedings and threatening to assault attorney].) Thus, throughout the remainder of the proceedings, Mr. Mai appeared in visible shackles – his hands were cuffed and attached to chains that hung around his waist and his leg was chained to counsel table. (6-RT 1086; see also 2-RT 348, 365; AOB 230-234.)

Even after being shackled and chained, Mr. Mai's disruptive outbursts continued throughout the penalty phase proceedings in which he continually disrupted the prosecutor's opening statement and examination of witnesses. (AOB 215-216, citing 6-RT 1089-1091, 1098; 7-RT 1319, 1325-1331.) This disruption of the prosecution's case seemed particularly irrational *given Mr. Mai's own desire to effectively stipulate to the death*

penalty and receive a death verdict. Mr. Mai eventually became so irrational and enraged that he upended counsel table – to which he was shackled – in front of the jurors and had to be removed from the courtroom. (7-RT 1331; AOB 216-216, 230-231, citing, inter alia, (7-RT 1331; see, e.g., *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [substantial evidence based, inter alia, on constant disruptions that resulted in defendant's removal from courtroom].)

It is true – as respondent observes – that Mr. Mai did not have another courtroom outburst after this final spectacle, but the proceedings were nearly over at that point. (See RB 58.) Furthermore, he later *threatened* to disrupt the proceedings if defense counsel presented argument for his life. (AOB 234, citing, inter alia, *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 958-959, 961 [substantial evidence based, inter alia, on overreactive "temper tantrum" and *threats* to disrupt proceedings].) A defendant's self-destructive behavior and physical and verbal outbursts in defiance of court orders that prompt physical restraints and removal from the proceedings are all well-recognized indicia of incompetence. (See AOB 230-234, citing, inter alia, *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [substantial evidence based, inter alia, on continual disruptions prompting removal from courtroom and self-defeating insistence on being shackled during proceedings]; accord, e.g., *Maxwell v. Roe*, *supra*, 606 F.3d at pp. 570-571.) Furthermore, lack of impulse control is a common symptom of the recognized mental disorder caused by the isolation and sensory deprivation of solitary confinement – sometimes referred to as "SHU" syndrome. (See, e.g., *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1265-1266; Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing*

What We Know and Recommending What Should Change, 52 Int'l J. Offender Therapy & Comp. Criminology 622, 626-628 (2008); The Corr. Ass'n of N.Y., Mental Health in the House of Corrections 10-11, 58, 45-60 (2004)[37].) Therefore, this evidence also supported Dr. Thomas's opinion that the extraordinarily harsh conditions of Mr. Mai's long-term solitary confinement had a profound impact on his mental state and ability to participate in his trial.

Given Mr. Mai's own statements that he could not control his behavior, corroborated by the evidence demonstrating as much, and the opinions of Dr. Thomas and defense counsel that he was not capable rational decision making, consulting with counsel in a rational manner, or assisting in the conduct of his defense, the appropriate response was not to simply grant Mr. Mai's request to be chained throughout the remainder of the proceedings. The inappropriateness of that response is surely demonstrated by the fact that chaining Mr. Mai not only failed to alleviate the problem but likely *compounded it*, resulting in the appalling spectacle of his overturning the counsel table to which he was chained. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 846, and authorities cited therein [recognizing the "pain 'and consequential burden on the mind and body of the defendant'" caused by physical restraints, which can "'impair[] his mental faculties'" and his "ability to cooperate or communicate with counsel"].) Given the totality of the evidence before the court, the appropriate response was to suspend the proceedings and initiate competency proceedings in order to determine the *reasons* for Mr. Mai's

---

[37] Available at www.correctionalassociation.org/PVP/publications/Mental-Health.pdf.

troubling behavior and admission that he was unable to control himself – whether Mr. Mai's conduct was merely the manifestation of "anger" that he could control but *chose* not to, as respondent contends (see RB 57), or the manifestation of a mental disorder that rendered him *unable* to control his emotions or rationally participate in the trial, as Dr. Thomas and defense counsel believed.

In this regard, respondent's contentions that Mr. Mai's conduct was susceptible of inferences consistent with competency are immaterial. Under well-settled authority, Mr. Mai's behavior was at least equally susceptible of an inference that he was not competent, just as Dr. Thomas and defense counsel believed. (AOB 200-236.) Thus, even if the evidence were susceptible of conflicting interpretations, "[t]he conflict [could] *only* be resolved upon a special trial before the judge or jury, if a jury is requested. (Pen. Code, § 1368.)" (*Pennington*, *supra*, 66 Cal.2d at pp. 518-519; accord, e.g., *People v. Stankewitz*, *supra*, 32 Cal.3d at p. 93.) For all of these reasons, as well as those set forth in the opening brief, the trial court violated state law, as well as federal constitutional demands for procedural due process and reliable death judgments by failing to suspend criminal proceedings and initiate competency proceedings to resolve any such conflicts.

//

//

C. Neither the Trial Court's Subjective Impressions of Mr. Mai's Demeanor During a Short Portion of Trial nor Defense Counsel's Nonsensical Insistence that Competency Proceedings were Unnecessary Relieved the Trial Court of its Independent Duty to Initiate Competency Proceedings

As predicted in the opening brief, respondent contends that defense counsel's insistence that competency proceedings were unnecessary coupled with the court's *subjective* observations of Mr. Mai's demeanor during four days of the voir dire proceedings establish that there was no reasonable doubt as to Mr. Mai's competency. (AOB 236-240; RB 59-61.) As respondent has ignored Mr. Mai's argument addressing the fallacy of this position and otherwise failed to raise any point or authority that Mr. Mai did not predict and refute in the opening brief, an extended reply to respondent's contention is unnecessary. (AOB 236-240; RB 59-61.)

For all of the reasons discussed above and in the opening brief, which is incorporated by reference herein, viewed under the requisite *objective standard,* the totality of the evidence before the court – including defense counsel's repeated representations that Mr. Mai's mental condition rendered him unable to consult with them, make rational life and death decisions, or assist in the preparation of his defense – was sufficient to raise a reasonable doubt as to Mr. Mai's competency. (AOB 236-240; see also Argument I-F, *ante*.) That duty was not relieved by the court's subjective, speculative observations of Mr. Mai's demeanor during a small portion of the proceedings. (AOB 236-240, citing, inter alia, *People v. Jones*, *supra*, 53 Cal.3d at p. 1153 ["substantial evidence" is measured by an objective standard and, hence, cannot be defeated by the trial court's own observations of the defendant]; *McGregor v. Gibson*, *supra*, 248 F.3d at p.

961 ["even if we were to credit" court's subjective interpretation of one event, "one instance of demonstrable competency on [defendant's] part does not overcome the numerous occasions, occurring before and after [that event], in which his competency was called into doubt"].) Nor was it relieved by defense counsel's bizarre insistence that competency proceedings were unnecessary despite the wealth of evidence and representations they had made to the contrary. (AOB 236-237, citing, inter alia, *United States v. John* (7th Cir. 1984) 728 F.2d 953, 957 [substantial evidence raising doubt regarding defendant's competency demanded hearing despite defense counsel's statement that he believed his client was competent]; accord, e.g., *Maxwell v. Roe*, *supra*, 606 F.3d at pp. 574-575 [court's independent duty to initiate competency proceedings based on totality of evidence was not relieved by counsel's failure to "formally request a competency hearing" particular given defense counsel's representations that effectively "expressed concern about [the defendant's] competence"].)

To the contrary, rather than relieving the court of its duty to initiate competency proceedings, counsel's inexcusable insistence that competency proceedings were unnecessary despite their repeated representations that Mr. Mai was, in effect, incompetent should have alerted the court that counsel had ceased to function in any meaningful way as advocates for their client's best interests and prompted it to respond appropriately. (Cf. *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627 [by permitting proceeding to go forward when defense counsel declined to participate in trial, the trial court violated its independent "duty to protect the rights of the accused *and* its duty to ensure a fair determination of the issues on the merits" and its obligation to promote "the orderly administration of justice"]; *United States*

v. ex rel. Darcy v. Handy (3d Cir. 1953) 203 F.2d 407, 427 [when counsel's representation is "so lacking in competency or good faith" that trial may become a "farce and a mockery of justice," it becomes "the duty of the trial judge or the prosecutor, as officers of the state, to observe and correct it"].) But the trial court did nothing. "In a death penalty case, [this Court and the State's independent interest in the reliability of death judgments] expect[] the trial court and the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure. The proceedings here fell well short of this goal." (*People v. Hernandez* (2003) 30 Cal.4th 835, 878, italics added.)

D. Respondent Does Not Dispute that if the Trial Court Violated State Law and the Federal Constitution By Failing to Initiate Contemporaneous Competency Proceedings, Remand for a Retrospective Competency Determination is Inappropriate and Reversal Per Se of the Judgment is Required

Under the precedents of the United States Supreme Court and this Court, a trial court's failure to conduct a contemporaneous competency hearing amounts to a structural error demanding reversal per se that can never be "cured" by remanding for a retrospective competency determination. (AOB 241-243; accord, *People v. Murdoch* (2011) 194 Cal.App.4th 230, 239 [reversal per se of judgment without remand is required remedy]; Beaudreau, *Due Process or "Some Process?" Restoring Pate v. Robinson's Guarantee of Adequate Competency Procedures* (Spring 2011) 47 Cal. West. L. Rev. 369 [extensively analyzing law and concluding remand for retrospective or nunc pro tunc competency determination can never cure or render harmless unconstitutional failure to hold contemporaneous competency hearing].) Alternatively, if such remand

were *ever* appropriate in rare and highly unusual cases, it would not be appropriate in this case given the substantial passage of time since judgment was rendered – more than 12 years as of this writing – and the lack of contemporaneous medical evidence relevant to the issue of Mr. Mai's competency at the time of trial. (AOB 242-245; accord, *Maxwell v. Roe*, *supra*, 606 F.3d at p. 576 [while remand for retrospective competency hearing may be appropriate in some cases, it was inappropriate when "conviction [was] 12 years old"].) Respondent does not dispute as much. (See RB 53-62.) Hence, no further discussion is necessary. (See AOB 241-248.) The death judgment must be reversed.

//

//

V

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS BY PERMITTING MR. MAI TO PRESENT AN IRRELEVANT AND INFLAMMATORY STATEMENT TO THE JURORS THAT DEATH WAS THE APPROPRIATE PENALTY IN THIS CASE

A. Introduction

Mr. Mai and his counsel requested that he be permitted to testify that death was the appropriate punishment in this case. (AOB 249-250.) Although the trial court recognized that the proposed testimony would be "tantamount to suicide and the state of California doesn't assist or participate in suicides," it nevertheless granted Mr. Mai's request on the ground that he had the "*right* to take the stand and talk to the jurors." (8-RT 1401, italics added.)

Defense counsel Peters affirmatively presented Mr. Mai's testimony to the jurors as "the only defense evidence" they would hear. (8-RT 1409.) Thereafter, Mr. Mai took the stand and delivered a monologue that death was the appropriate penalty in this case. (8-RT 1409-1410.) This was the last piece of penalty phase evidence the jurors heard. (AOB 249-250.).

In the only summation presented to the jurors, the prosecutor encouraged them to return a death verdict based on Mr. Mai's testimony. (8-RT 1424.) The jurors returned their death verdict minutes later. (3-CT 867-868; AOB 249-250.)

Mr. Mai's opinion was irrelevant and inadmissible under both state law and the Eighth and Fourteenth Amendment rights, and hence Mr. Mai had no "right" to present it. (AOB 252-257, citing, inter alia, *Booth v. Maryland* (1987) 482 U.S. 496, 507-510, *Payne v. Tennessee* (1991) 501

U.S. 808, 830 & fn. 2, *People v. Smith* (2003) 30 Cal.4th 581, 622-623, and *People v. Danielson* (1992) 3 Cal.4th 691, 715.) The trial court's failure to exclude that evidence sua sponte violated state law and the Eighth and Fourteenth Amendments. (AOB 258-261, citing, inter alia, *United States v. Young* (1985) 470 U.S. 1, 10, *Glasser v. United States* (1942) 315 U.S. 60, 71, *People v. Carlussi* (1979) 23 Cal.3d 249, 256, and Pen. Code, § 1044.) Because that evidence was offered and utilized as a basis for the death verdict, the death judgment must be reversed. (AOB 265-271, citing, inter alia, *Brown v. Sanders* (2006) 546 U.S. 212, 220-221, *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586, and *Zant v. Stephens* (1983) 462 U.S. 862, 885.)

As a principle of law, respondent does not dispute that state law and the federal Constitution impose an independent duty on trial courts duty to exclude constitutionally irrelevant evidence that threatens the fairness and reliability of capital proceedings. (See RB 62-65.) Nor does respondent dispute that if Mr. Mai's opinion were irrelevant and inadmissible, the trial court in this case violated its duties by admitting that opinion and permitting its use as aggravating evidence weighing in favor of a death verdict. (*Ibid.*) Finally, respondent does not dispute that if the court violated its duties in this regard, the death judgment must be reversed. (*Ibid.*)

Instead, respondent first contends that Mr. Mai's opinion was properly admitted because he had an "'absolute right to testify, [which] cannot be foreclosed or censored based on content,'" even if that "content" it irrelevant and otherwise inadmissible. (RB 63-65.) Second, respondent appears to contend as a general matter that while an opinion that death is the appropriate penalty may be irrelevant and inadmissible when it comes from the victims or their family members, it is *not* irrelevant when it comes from

the defendant's own mouth. (RB 65.) Third, respondent contends that Mr. Mai's testimony in this particular case demonstrated his "acceptance of responsibility for his crime, as such it reflected on his character," as well as his "record and the circumstances of the offense" and was therefore relevant and admissible *mitigating* evidence. (RB 64, citing Pen. Code, § 190.3.)

As demonstrated below, respondent's first and second contentions are contrary to the law. Its third contention is belied by Mr. Mai's actual monologue to the jurors and the record evidence that it was offered, admitted, and utilized as *aggravating* evidence weighing in favor of death.

B. A Defendant Has No Right to Testify to Irrelevant Opinion Evidence that Death is the Appropriate Penalty

Respondent's response to Mr. Mai's challenges to the relevance and admissibility of his testimony presents a moving target. First, quoting from this Court's decision in *People v. Webb* (1993) 6 Cal.4th 494, respondent contends that criminal defendants enjoy the "'absolute right to testify [which] cannot be foreclosed or censored based on content.' (*People v. Webb*, *supra*, 6 Cal.4th at p. 535.)" (RB 63-64; see also RB 65 [citing *People v. Nakahara* (2003) 30 Cal.4th 705, 719, which relied on *Webb*, *supra*, for the same proposition].) Thus, by respondent's reasoning, defendants have "the absolute right to testify" to *anything* – even irrelevant matters, including their opinions that death is the appropriate penalty – and trial courts have no power or duty to curtail that right "'based on content.'" (RB 63-64.)

Of course, as discussed at length in the opening brief, this Court has explicitly disapproved the language respondent quotes from *Webb* as applying to challenges to the relevance of a defendant's testimony. (AOB 264-265.) Contrary to the broad proposition declared in *Webb*, a defendant's

right to testify is *not* "absolute" (*People v. Webb*, *supra*, 6 Cal.4th at p. 535) and *can* be limited, "foreclosed or censored based on content" (*ibid.*) when that "content" *is irrelevant*. (*People v. Lancaster* (2007) 41 Cal.4th 50, 101-102; accord, *Rock v. Arkansas* (1987) 483 U.S. 44, 51-53, 55 [recognizing "the right to present *relevant* testimony," which is not absolute]; see also AOB 251-252.) Thus, as the *Lancaster* court explained, the language in *Webb* must be limited to its context, in which this Court addressed the admissibility of the defendant's testimony in favor of the death penalty on grounds *other than relevance* and "[t]he *relevance of the testimony was not challenged.*" (*People v. Lancaster*, *supra*, at p. 102, italics added; see also *People v. Avila* (2006) 38 Cal.4th 491, 566, and authorities cited therein ["It is axiomatic that cases are not authority for propositions not considered"].) Hence, the broad language of *Webb* does not apply to *irrelevant* testimony and defendants have no "right" to testify to irrelevant matter. (*People v. Lancaster*, *supra*, 41 Cal.4th at pp. 50, 101-102; accord, *Rock v. Arkansas*, *supra*, 483 U.S. at pp. 51-53, 55; AOB 251-252.)[38]

Indeed, *Webb*'s broad language that defendants have an "'absolute right to testify [which] cannot be foreclosed or censored based on content," is not only incorrect when it comes to irrelevant testimony. It is incorrect, period. The United States Supreme Court has explicitly held that the

---

[38] For the same reasons, respondent's reliance on *People v. Nakahara*, *supra*, 30 Cal.4th 705 is misplaced. (RB 65.) In *Nakahara*, this Court relied on *Webb* in support of the proposition that "every defendant has the right to testify . . . even if that testimony indicates a preference for death." (*People v. Nakahara*, *supra*, at p. 719.) But just as in *Webb*, the *Nakahara* courtdid not address or consider whether the defendant's testimony in favor of the death penalty was *relevant* and admissible. Hence, *Lancaster*'s limitation on the broad language of *Webb* applies equally to the broad language of *Nakahara*.

defendant's "right" to testify is *not* "absolute," but rather "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process'." (*Rock v. Arkansas, supra*, 483 U.S. at p. 55, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 295; see also AOB 252, 256-257.) Excluding constitutionally and statutorily irrelevant opinion testimony regarding the appropriate penalty is certainly a "legitimate interest[] in the trial process." (*Booth v. Maryland* (1987) 482 U.S. 496, 507-510; accord, e.g., *United States v. Moreno* (9th Cir. 1996) 102 F.3d 994, 998 [under *Rock*, exclusion of irrelevant evidence is "legitimate interest[] in the trial process" which overrides defendant's limited "right" to testify].) Similarly, the state's independent interests in ensuring that criminal trials are both fair and *appear* to be fair (see, e.g., *Indiana v. Edwards* (2008) 554 U.S. 164, 177), and that death verdicts are just, based on reason, and reliable (see, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, *People v. Guzman* (1988) 45 Cal.3d 915, 962) are "legitimate interests in the trial process," which transcend a particular defendant's desire to commit suicide or choose his own sentence (see, e.g., *People v. Chadd* (1981) 28 Cal.3d 739, 744-745, 753; AOB 256-257; see also Argument VIII, *post*; AOB 332-352.)

In response to this argument, respondent makes an abrupt and inconsistent about-face from its initial position that defendants have an "absolute right to testify, [which] cannot be foreclosed or censored based on content" (RB 63) by *conceding* that the "the right [to testify] is not absolute." (RB 64.) Yet respondent fails to articulate or acknowledge any specific limitations on that right. Instead, respondent simply contends that the "cases relied upon by Mai are distinguishable." (RB 64.)

As to *Rock v. Arkansas, supra*, respondent contends – without supporting authority or analysis – that it stands for no more than the narrow

proposition that a blanket rule prohibiting hypnotically refreshed testimony is unconstitutional. (RB 64.) Not so. *Rock* is the leading case recognizing a constitutional "right to testify" but also recognizing that the "right" is *not* absolute or "without limitation" and is consistently cited as such. (See, e.g., *Portundo v. Agard* (2000) 529 U.S. 61, 65; *United States v. Dunnigan* (1993) 507 U.S. 87, 96; *People v. Gutierrez* (2009) 45 Cal.4th 789, 821-822; *People v. Fudge* (1994) 7 Cal.4th 1075, 1122-1123; *United States v. Moreno* (9th Cir. 1996) 102 F.3d 994, 998; *United States v. Byrd* (11th Cir. 2005) 403 F.3d 1278, 1282.)

Similarly, respondent appears to contend – again without any supporting authority or analysis – that *People v. Lancaster*, *supra*, stands for no more than the narrow proposition that a defendant has no right to testify to irrelevant "evidence of third parties being wrongfully convicted in other capital cases [and] experimentation upon prisoners after labeling them 'crazy,'" *not* the broad proposition that a defendant has no right to testify to *other* irrelevant matter. (RB 65.) Respondent's reading of *Lancaster* is untenable. As discussed above and in the opening brief, the *Lancaster* court clearly held that the defendant's "right" to testify does *not* encompass the right to present irrelevant testimony, of which the testimony in that case was merely and example, "it is beyond cavil that evidence presented in mitigation [or aggravation] must be relevant," and therefore the exclusion of a defendant's irrelevant penalty phase testimony does not violate the defendant's right to testify. (*People v. Lancaster*, *supra*, 41 Cal.4th at pp. 101-102.) Hence, both *Rock* and *Lancaster* stand for the broad and *well-settled* proposition that a defendant's right to testify is not absolute and does not encompass the right to present irrelevant testimony. (See AOB 251-252.)

In this regard, and as discussed at length in the opening brief, it is well-settled that opinion testimony regarding the appropriate punishment is *constitutionally irrelevant* and inadmissible in the penalty phase of a capital trial. (AOB 252-257, citing, inter alia, *Booth v. Maryland* (1987) 482 U.S. 496, 502-503, *Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2, and *People v. Smith, supra*, 30 Cal.4th at pp. 622-623.)[39] Consistent with this rule, the defendant's opinion regarding the appropriate penalty is not listed among the statutory aggravating factors that the jury may consider as a basis for a death verdict and thus is irrelevant aggravation under state law. (Pen. Code, § 190.3; see e.g., *People v. Danielson* (1992) 3 Cal.4th 691, 715.) Hence, because a defendant does not have a "right" to present irrelevant testimony, it logically follows that a defendant does not have the right to testify to his irrelevant opinion that death is the appropriate penalty.

Defying logic, however, respondent appears to contend that penalty opinion testimony is irrelevant (and inadmissible) *only* if it comes from the

---

[39] As discussed in the opening brief, this general rule of prohibition is subject to a narrow exception not relevant here, namely, namely, the "testimony from somebody 'with whom defendant had a *significant relationship*, that defendant deserves *to live*, [which] is proper *mitigating* evidence as 'indirect evidence of the defendant's character.'" (Citations)." (*People v. Smith, supra*, 30 Cal.4th at pp. 622-623; AOB 254.) This exception exists "not because the person's *opinion* is itself" relevant, but rather because testimony from a close family member or friend's testimony that the defendant *deserves* to live "provides insights into the defendant's [good] character," which is relevant and admissible *mitigation* under Penal Code section 190.3, factor (k). (*People v. Smith, supra*, at p. 623; accord *People v. Ervin* (2000) 22 Cal.4th 48, 102.)

For ease of reference, Mr. Mai's references to the prohibition against penalty opinion testimony incorporates that narrow (but irrelevant) exception without explicitly stating as much.

victims or their family members, but *not* if it comes from the defendant. (RB 65.) Respondent cites no authority in support of this perceived distinction. (RB 65.) This is no doubt because there is no authority for this distinction; to the contrary, under *Booth*, *Payne, Smith*, as well as the other authorities cited in the opening brief but ignored by respondent, there is no legal, logical, or fair basis for such a distinction. (AOB 252-257.)

In *Payne v. Tennessee, supra*, 501 U.S. 808, the high court disapproved *Booth*'s prohibition against "victim impact" evidence regarding the victim's life. (*Id.* at p. 827.) The *Payne* court's decision was based in large part on "fairness," the notion being that since the defendant is permitted to present evidence regarding his own life, it is unfair to prohibit the prosecution from presenting similar evidence regarding the victim's life. (*Id.* at pp. 822, 825-827.) At the same time, *Payne* left intact that part of *Booth* prohibiting the admission a victim's opinion that death is the appropriate penalty as, inter alia, constitutionally irrelevant to the jury's penalty decision. (*Id.* at p. 830, fn. 2; *Booth v. Maryland*, *supra*, 482 U.S. at pp. 507-510; accord, e.g., *People v. Smith*, *supra*, 30 Cal.4th at pp. 622-623.) Under the essential fairness rationale of *Payne*, that prohibition should not be applied to the prosecution but lifted for the defendant. This Court has recognized as much.

In *People v. Smith*, *supra*, this Court recognized the United States Supreme Court's prohibition against the admission of a victim's opinion that death is the appropriate penalty but further recognized that the high court "has never suggested that the defendant must be permitted to do what the prosecution may not do." (*Id.* at p. 622.) A witness's opinion regarding the appropriate penalty is simply irrelevant, regardless of whether the opinion is that death or life is appropriate and regardless of whether the opinion is

offered by the prosecution or the defense. (*Id.* at pp. 622-623.) Hence, just as the prosecution is prohibited from presenting irrelevant penalty opinion testimony, so too is the defendant prohibited from presenting irrelevant penalty opinion testimony. (*Id.* at p. 622; accord, e.g., *People v. Lancaster*, *supra*, 41 Cal.4th at pp. 96-99.) Although the defense-proffered opinion testimony in *Smith* was that life without parole was the appropriate penalty, its logic (bolstered by *Booth* and *Payne*) applies equally to defense-proffered opinion testimony that death is the appropriate penalty.[40]

C. Mr. Mai's Opinion Testimony that Death Was the Appropriate Penalty Was Offered and Utilized as Aggravating Evidence In Violation of State Law and the Federal Constitution

Respondent contends that Mr. Mai's testimony that death was the appropriate testimony was relevant *mitigating evidence* because it demonstrated an "acceptance of responsibility for his crime, as such it reflected on his character," as well as well as his "record and the circumstances of the offense." (RB 64, citing Pen. Code, § 190.3.) Not so.

Other than its bare citation to Penal Code section 190.3, respondent cites no authority for the proposition that a defendant's opinion that death is is the appropriate penalty is relevant mitigating evidence. (RB 64.) The only case that could even conceivably support such a proposition is *People v. Danielson*, *supra*, 3 Cal.4th 691. But that case actually *supports* Mr. Mai's argument and undermines respondent's.

In *Danielson*, *supra*, the defendant provided extensive "self-serving" *mitigating* testimony on direct examination regarding his religious conversion, remorse, and desire for a "fair judgment." (3 Cal.4th at pp. 714-

---

[40] See footnote 39, *ante*.

715.) On cross-examination, the prosecutor probed this mitigating testimony by asking the defendant what he believed was the "fair judgement" or appropriate penalty for his crimes. (*Ibid.*) The defendant replied, "If I were one of the 12 jurors, I would vote for the death penalty." (*Id.* at p. 715.) The prosecutor did not mention or rely on this testimony in his closing argument. (*Id.* at p. 716.) On appeal from the ensuing death judgment, the defendant argued that the prosecutor committed misconduct in asking this question because, inter alia, it sought information that was irrelevant to any statutory sentencing factor. (*Ibid.*)

This Court *agreed* that as a general matter, "*a defendant's opinion regarding the appropriate penalty the jury should impose usually would be irrelevant to the jury's penalty decision.*" (*People v. Danielson*, *supra*, 3 Cal.4th at p. 715, italics added; see also *id.* at p. 733, conc. & dis. opn. of Kennard, J. ["A defendant's opinion about the just punishment for his or her crimes has no relevance to the issue the jury must decide at the penalty phase of a capital prosecution" under California law].) However, based on the unique facts of that particular case, the majority held that the prosecutor's question was not improper due to the defendant's *mitigating* testimony on direct examination that he was remorseful and desired a "fair judgment"; the prosecutor was permitted to test that testimony by probing whether the defendant was, in fact, so remorseful and desirous of a "fair judgment" that he was "willing[] to atone for [his crimes] by paying society's highest price. *As a general rule, prosecutors should avoid asking such questions,* but under the circumstances here, we conclude no misconduct occurred." (*Id.* at p. 715, italics added; cf. *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163 [even if evidence of parole ineligibility is otherwise irrelevant and inadmissible as mitigating evidence, it may become relevant and admissible

to rebut or respond to prosecution's aggravating theory of future dangerousness; accord *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, fn. 1.) As to the defendant's *answer* to the prosecutor's question, it tended to support his *mitigating* testimony. The *Danielson* court emphasized that the prosecutor did not even mention it in his summation, much less argue it as a basis for a death verdict. (3 Cal.4th at p. 716.) Therefore, the prosecutor's *question* on cross-examination was an appropriate method of testing the defendant's mitigating testimony and the defendant's *answer* was not offered or utilized as aggravating evidence weighing in favor of a death verdict. (*Id.* at pp. 715-716; but see conc. & dis. opns. of Mosk and Kennard, JJ. at pp. 731-739 [defendant's penalty opinion testimony was irrelevant, inadmissible, and prejudicial].)

Thus, *Danielson* supports Mr. Mai's basic proposition that "a defendant's opinion regarding the appropriate penalty the jury should impose usually would be irrelevant to the jury's penalty decision." (*People v. Danielson, supra,* 3 Cal.4th at p. 715.) On its face, *Danielson* represents a very narrow exception to that rule based on unique facts that bear no relation to the facts of this case. Thus, this case falls within the general rule recognized in *Danielson* that a defendant's penalty opinion testimony is irrelevant to the jury's penalty phase decision and inadmissible.

It is true that Mr. Mai's testimony indirectly reflected an "acceptance of responsibility" for his crime, as respondent observes. (RB 64.) But it does not follow that his testimony *that the jurors should return a death verdict* was relevant and admissible *mitigating* evidence, as respondent contends. (RB 64.) As Justice Kennard pointedy observed in her concurring and dissenting opinion in *People v. Danielson, supra*, a defendant's testimony of remorse or acceptance of responsibility "is a far cry from

voluntary agreement to undergo execution." (3 Cal.4th at p. 736.)

Although respondent does not cite to a particular statutory factor to which this evidence was allegedly relevant, "acceptance of responsibility" would only fall within the catch-all provision of factor (k). (See *People v. Danielson*, *supra*, 3 Cal.4th at pp. 734-736, conc. & dis. opn. of Kennard, J., joined by Mosk, J.) But factor (k) evidence may *only* be considered in mitigation, or as a basis for a *life* verdict; factor (k) evidence may *not* be considered in aggravation, or as a basis for a death verdict. (See, e.g., *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033; *People v. Boyd* (1985) 38 Cal.3d 762, 775-776; *Zant v. Stephens* (1985) 462 U.S. 862, 885 [due process prohibits a death sentence based in any part on "factors . . . that actually should militate in favor of a lesser penalty"].)

Here, neither Mr. Mai nor his counsel offered, relied on, or utilized his penalty opinion testimony as *mitigating* evidence. Mr. Mai told the jurors that he did *not* want their "sympathy or pity" and did *not* want them "to spare [his] life." (8-RT 1409-1410.) To the contrary, he explicitly told them that he believed death was the appropriate penalty, "suited for this occasion. I also feel that it is the right thing, for you, the jurors, to do" as the "price" to be paid as "part of the game" he was in. (*Ibid.*) Defense counsel presented no argument for Mr. Mai's life at all, much less any argument that sought to utilize Mr. Mai's testimony as mitigating evidence under factor (k). The prosecutor, on the other hand, argued for Mr. Mai's death and relied on Mr. Mai's testimony as *aggravating* evidence weighing in favor of that penalty: "Mr. Mai testified and told you what he expects from you and what he believes he deserves. I don't see a reason to disappoint him on this point. . . . [T]he death penalty is the only appropriate verdict." (8-RT 1424; compare *People v. Danielson*, *supra*, 3 Cal.4th at pp. 715-716.)

Thus, Mr. Mai's opinion testimony was constitutionally and statutorily irrelevant under factor (k) (or any other penalty factor codified in section 190.3), therefore inadmissible, and Mr. Mai had no "right" to testify to it. The trial court violated state law, as well as the Eighth and Fourteenth Amendments by admitting it and permitting its use as aggravating evidence.[41]

D. The Trial Court Violated Its Independent Duty to Deny Mr. Mai's Request and Exclude His Testimony that Death Was the Appropriate Penalty, Which was Not Relieved by Or Invited by the Actions of Mr. Mai or his Counsel

Both state law and the federal Constitution impose *sua sponte* duties upon the trial court to "limit the introduction of evidence . . . to relevant and

---

[41] Mr. Mai further argued in the opening brief that *People v. Guzman* (1988) 45 Cal.3d 915 and its progeny (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 719; *People v. Clark* (1990) 50 Cal.3d 617; *People v. Webb* (1993) 6 Cal.4th 494, 535; *People v. Grant* (1988) 45 Cal.3d 829, 848-849) do not compel a contrary result in this case for several reasons, including that none of those decisions addressed the claim raised here: that the defendant's testimony in favor of death was *irrelevant*, a defendant enjoys no right to testify to irrelevant matter, and therefore his testimony was inadmissible. (AOB 261-265) Consistent with this Court's observation in *Lancaster*, discussed in the above text and in the opening brief, the decisions in those cases simply do not stand for the proposition such testimony is *relevant* and admissible. (AOB 261-265.)

Respondent contends that the "[t]he distinctions cited by Mai are insubstantial and do not make those holdings inapplicable." (RB 64-65.) Respondent makes this contention in a perfunctory fashion, unsupported by any analysis. This Court should treat respondent's contention in an equally perfunctory fashion. For all of the reasons discussed in the opening brief but ignored by respondent, *Guzman* and its progeny have no bearing on Mr. Mai's claim that his opinion "testimony" that death was the appropriate penalty was constitutionally *irrelevant*, he had no "right" to give irrelevant testimony, and therefore the testimony was inadmissible. (AOB 261-265.)

material matters" and intervene when necessary to ensure a fair penalty trial, and the *appearance* of a fair penalty trial fair, that will produce a just and reliable verdict. (AOB 258-260, quoting Pen. Code, § 1044 and citing, inter alia, *United States v. Young* (1985) 470 U.S. 1, 10, *Glasser v. United States* (1942) 315 U.S. 60, 71, *Brown v. Walter* (2nd Cir. 1933) 62 F.2d 798, 799, 256, *People v. Sturm* (2006) 37 Cal.4th 1218, 1237, *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627, and *People v. Carlussi* (1979) 23 Cal.3d 249.) The trial court violated these duties by admitting Mr. Mai's constitutionally irrelevant testimony and permitting the jurors to based their death verdict upon it. (AOB 259-260.)

As mentioned in the Introduction, *ante*, respondent does not dispute the existence of these independent duties or their constitutional bases as matters of law. (See RB 62-65.) Nor does respondent dispute that if Mr. Mai's testimony *were* constitutionally irrelevant and inadmissible, the trial court violated these duties by failing to exclude that testimony on its own motion. (*Ibid.*) This Court should treat respondent's failure to dispute these points as concessions. Hence, no further discussion of these aspects of the issue are necessary.

Respondent does however, summarily assert that "Mr. Mai voluntarily testified on his own behalf in the penalty phase trial, and cannot now claim error because the trial court did not curtail or limit the scope of that testimony." (RB 62.) Respondent makes this assertion in a perfunctory fashion, without supporting argument or authority. (RB 62.) Hence, this Court should pass it without consideration. (See, e.g.,(1995) 10 Cal.4th 764, 793; *People v. Clair* (1992) 2 Cal.4th 629, 653, fn. 2 [point made in perfunctory fashion is not properly raised].)

In any event, respondent's contention is without merit. As noted,

respondent does not dispute the existence of the sua sponte duties raised on this appeal. By definition, a sua sponte duty is one that exists independent of any request or objection below.

Nor did Mr. Mai "invite," and thus forfeit his right to challenge, the court's error. The doctrine of invited error is an application of the estoppel principle: when a party "'intentionally caused the court to err' and clearly did so for tactical reasons," he is deemed to have "invited" the error and is estopped from asserting it as a ground for reversal on appeal. (*People v. Dunkle* (2005) 36 Cal.4th 861, 923.) "At bottom, the doctrine rests on the purpose of the principle, which prevents a party from *misleading* the trial court and then profiting therefrom in the appellate court." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

Here, no one deliberately "misled" the court into believing that Mr. Mai had the "absolute right" to testify to the appropriate penalty or that the court had no power to prevent that testimony. To the contrary, Mr. Mai and his counsel presented his proposed testimony to the court by way of an offer of proof before he testified. Neither insisted that he had any "right" to present that opinion or argued or presented any authority in support of any such right. Their offer of proof was consistent with a request for *permission* to present the proposed testimony, deferring to the court's power to prevent or exclude it. (8-RT 1399-1401.) And the court made a *ruling* on the admissibility of the proposed testimony. The court acknowledged that Mr. Mai's proposed testimony would be "almost tantamount to suicide *and the state of California doesn't assist or participate in suicides.*" (8-RT 1401.) Thus, even the court appeared to appreciate that California law prohibited the state from assisting or participating in "suicides," which conferred upon it the *power* to prevent Mr. Mai's testimony as "tantamount to suicide." (See

also Argument VIII, *ante*; AOB 332-352.) Nevertheless, it was the *court*, *not* defense counsel or Mr. Mai, that reasoned Mr. Mai had the "the *right* to take the stand and talk to the jurors" about his opinion that death was the appropriate penalty and therefore ruled that his testimony was admissible. (8-RT 1401.) Hence, neither Mr. Mai nor his counsel misled the court so as to "invite" its error.[42]

Furthermore, applying forfeiture here would defeat the very purpose of the *sua sponte* duties that are the subject of Mr. Mai's challenge on appeal: the duties to exclude irrelevant matter (Pen. Code, § 1044), particularly when its admission will threaten the fairness and integrity – and the appearance of fairness – of the proceedings. (See, e.g., *People v. McKenzie*, *supra*, 34 Cal.3d at pp. 626-627; *People v. Shelley* (1984) 156 Cal.App.3d 521, 530-533; *Clisby v. Jones* (11th Cir. 1992) 960 F.2d 925, 934 & fn. 12; *United States v. ex rel. Darcy v. Handy* (3d Cir. 1953) 203 F.2d 407, 427; *Commonwealth v. McKenna* (PA 1978) 383 A.2d 174, 181.) If the parties are doing their duties and the trial is proceeding in a fair manner, there would be no duty to intervene in the first place. Therefore, it would be illogical and defeat the ends of justice to hold that the very

---

[42] Nor is there any indication that Mr. Mai deliberately misled the court into believing that it had no power to prevent his proposed testimony in order to profit from, or plant reversible error, on appeal. (See *Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 403.) To the contrary, Mr. Mai indicated his desire to *waive* his automatic appeal during trial. (See, e.g., 3/16/07 1-SCT 120; 2-SCT 180-181.) As recently as 2006 – during the pendency of this appeal and years after the court granted his request to testify – Mr. Mai attempted to waive his automatic appeal without success. (8/29/07 SCT 78-86.) Thus, it is clear that neither Mr. Mai nor his counsel misled or induced the court to error in order to *profit* from it, or "plant" reversible error, on an appeal that he did not and does not wish to pursue.

circumstances that *require* the court's *sua sponte* duty to intervene also *relieve* the court of that duty or forfeit the defendant's right to challenge its violation on appeal.

Finally, as discussed in the opening brief, the trial court's independent duties are not only to protect the defendant's rights, but also to protect the state and society's independent interests in the fairness – and appearance of fairness – of criminal proceedings and the reliability of death judgments. (AOB 258-261; see also Argument VIII, *post*; AOB 332-352.) While defendants have the power to waive rights or duties that exist for the public's benefit, they have no power to waive rights or procedures that exist for the public's benefit. (*Ibid.)*

For all of these reasons, Mr. Mai did not waive or forfeit the right to challenge on appeal the trial court's failure to exercise its sua sponte duty to exclude his testimony that death was the appropriate penalty in this case. The admission and use of that testimony as aggravating evidence weighing in favor of a death verdict violated state law, as well as the Eighth and Fourteenth Amendments.

E. The Death Judgment Must be Reversed

As noted in the Introduction, respondent does not dispute that if Mr. Mai's testimony were erroneously admitted, the death judgment must be reversed. (See RB 62-65.) Hence, for all of the reasons discussed above and in the opening brief, which is incorporated by reference herein, the death judgment must be reversed. (AOB 265-271.)

//

//

VI

THE SEATING OF A BIASED JUROR VIOLATED MR. MAI'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR AND RELIABLE PENALTY TRIAL BY AN IMPARTIAL JURY AND DEMANDS REVERSAL OF THE DEATH JUDGMENT

A. Introduction

Based on his personal knowledge of, and ties to, this particular case along with his views about the death penalty, Juror Number 12 was biased against Mr. Mai and favored his execution. (AOB 272-285.) Juror Number 12's impanelment on Mr. Mai's jury violated Mr. Mai's rights to an impartial adjudicator, a fair trial, and a reliable death verdict as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments and our state constitutional counterparts and constituted a structural defect requiring reversal per se of the death judgment. (*Ibid.*) Finally, the constitutional violations were not waived, forfeited or invited by defense counsel's failure to challenge Juror Number 12 for cause, to remove him with a peremptory challenge, or to express dissatisfaction with the jury as constituted. (AOB 285-294.)

Respondent contends that Juror Number 12's questionnaire and voir dire answers "did not demonstrate that his views on capital punishment would substantially impair the performance of his duties as a juror." (RB 68-69, 73.) From that premise, respondent concludes that Juror Number 12 was not actually biased. (RB 69-73.) Alternatively, respondent contends that the violation of Mr. Mai's fundamental rights was waived, forfeited, or invited. (RB 66-73.) Respondent's contentions are without merit.

B. Respondent's Contention that Juror Number 12 Was Not Actually Biased Misconstrues Mr. Mai's Challenge on Appeal, Ignores or Distorts the Facts and the Law on Which that Challenge is Based, and is Unsupported by Any Meaningful Legal Analysis

Whether through mistake or guile, it appears that respondent has misconstrued Mr. Mai's claim as a challenge that Juror Number 12 was actually biased based on his *general* death penalty views within the meaning of *Wainwright v. Witt* (1985) 469 U.S. 412. (See also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521 [hereafter "*Witherspoon/Witt* standard"].) Respondent limits its discussion of the legal principles to the *Witherspooon/Witt* standard and ignores Mr. Mai's discussion of the legal principles governing other claims of actual bias (RB 68-69 [Part B], 74 [Part C]; compare AOB 274-281 [Part B]). And its analysis consists of a recitation (or purported recitation) of Juror Number 12's answers to the jury questionnaire and live voir dire (RB 69-72) followed by a summary conclusion that they "did not demonstrate this his views on capital punishment would substantially impair the performance of his duties" (RB 69, 73, quoting from *Wainwright v. Witt*, *supra*, at pp. 424-426.)

1. Mr. Mai's Claim on Appeal and the Governing Legal Principles

Mr. Mai does not argue that Juror Number 12's "statements . . . demonstrate his views on capital punishment would substantially impair the performance of his duties as a juror" under the *Witherspoon/Witt* standard. (RB 69; see also RB 68-69, 73.) Instead, Mr. Mai argues that Juror Number 12 was actually biased because he admitted that he had already formed the opinion that Mr. Mai should be executed based on his knowledge of this case gleaned from media reports and the fact that one of his family members (a

fireman) had attempted to save Officer Burt's life after he had been shot by Mr. Mai. (5-CT 1413; 5-RT 886-887; AOB 272-285, citing, inter alia, *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 456-460 [actual bias where prospective juror stated that she was biased against defendant based on her close personal ties to law enforcement and did unequivocally promise to set opinion aside].)[43] In addition, it appears that Juror Number 12's general support for the death penalty was a factor, but only a single factor, in arriving at his pre-formed opinion that Mr. Mai should be executed. (5-CT 1420.) Despite Juror Number 12's candid admission that he had already formed the opinion that Mr. Mai in particular (as opposed to all murderers) should be executed, he never swore that he would or could set that opinion aside and decide the case based solely on the evidence admitted in court and the law as stated in the court's instructions. (AOB 272-285.) To the contrary, in both his questionnaire and voir dire answers, Juror Number 12 stated that the only way he could conceive of even *possibly* being able to set aside his pre-formed opinion would be if the defense "*proved* to me that defendant should be spared death." (5-CT 1413-1414, 1420; 5-RT 886-887.) Hence, Juror Number 12 was actually biased and his impanelment on the jury that voted to execute Mr. Mai violated his rights to an impartial jury and a fair and reliable penalty trial and verdict as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and their state constitutional counterparts. (AOB 272-285.)

The *Witherspoon/Witt* line of authority focuses on whether a juror's personal feelings about the death penalty *in general* (e.g., the juror's

---

[43] The crime was highly publicized in television and newspaper reports. (1-Muni-RT 201-205; 3-Muni-RT 538, 554; see also, e.g., 1-Muni -RT 3-4; 1-Muni-CT 6-16, 25-29, 31-35, 40.)

personal opinion that the death penalty should *never* be imposed in *any* case) or under circumstances similar to the case at hand (e.g., the juror's personal opinion that the death penalty should *always* be imposed for *all* premeditated murders) is alone sufficient to establish actual bias as a ground for exclusion. But the *Witherspoon/Witt* standard itself "'is not a ground for challenging any prospective juror. It is rather a *limitation* on the state's power to exclude.'" (*Wainwright v. Witt*, 469 U.S. at p. 423, quoting *Adams v. Texas* 448 U.S. 38, 47-48.)

In other words, the state not only has the power but the duty to exclude a juror for "actual bias." (AOB 274-281.) *Witherspoon*, *Witt*, and their progeny simply hold that a juror's general death penalty views do not alone establish "actual bias" and thereby limit the state's power to disqualify a jurors based solely on their general death penalty support or opposition.

In this regard, and as discussed in the opening brief, "actual bias" (or "bias in fact") is defined as "the existence of a state of mind on the part of the juror *in reference to the case, or to any of the parties*, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party" under both state law and the federal Constitution. (Code of Civ. Proc., § 225, subd. (B)(1)(c); AOB 275-276, citing, inter alia *United States v. Torres* (2nd Cir. 1997) 128 F.3d 38, 43 and (*Franklin v. Anderson* (6th Cir. 2006) 434 F.3d 412, 422.) In determining whether a juror is biased under this standard, the question is whether the juror has "*any* bias in fact which would prevent his serving as an impartial juror." (*United States v. Wood* (1936) 299 U.S. 123, 133-134.) "What constitutes actual bias of a juror varies according to the circumstances of the case." (*People v. Nesler* (1997) 16 Cal.4th 561, 580.)

Thus, a juror may be actually biased if he (or she) admits that he has

any pre-formed opinion of partiality about the case – be it based on his knowledge of the parties in the case, knowledge of putative facts or evidence de hors the courtroom, or based on his views of the law *or* beliefs about the death penalty. (See, e.g., 5 Wayne R. Lafave, *Criminal Procedure* § 22.3(c) (2d ed. 1999) ["actual bias encompasses beliefs grounded in personal knowledge or a personal relationship," as well as beliefs "grounded in the juror's feelings regarding the race, religion, and ethnic or other group to which the defendant belongs"]; *Irvin v. Dowd* (1961) 366 U.S. 717, 722-723 [pre-formed opinion about particular case based on pre-trial publicity].)

However, a prospective juror's admission of a pre-formed opinion does not necessarily establish a disqualifying actual bias. An admission of bias may be overcome if the juror is specifically questioned about it and provides explicit, unequivocal or "unwavering assurances" that he can set aside that opinion and decide the case impartially, based upon the evidence admitted in court and the law as stated in the instructions. (AOB 275-277, citing, inter alia, *Miller v. Webb* (6th Cir. 2004) 385 F.3d 666, 675, *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 456-460, *Thompson v. Altheimer & Gray* (7th Cir. 2001) 248 F.3d 621, 627, *United States v. Sithongtham* (8th Cir. 1999) 192 F.3d 1119, 1121, and *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 750, 753-754.) Absent such unwavering or unequivocal assurances of impartiality despite the juror's pre-formed opinion, the juror is actually biased and *must* be dismissed. (AOB 278-280, citing, inter alia, *Miller v. Webb*, *supra*, at p. 675; *Hughes v. United States*, *supra*, at pp. 456-460; *Thompson v. Altheimer & Gray*, *supra*, at p. 627; *United States v. Sithongtham*, *supra*, at p. 1121; *Johnson v. Armontrout*, *supra*, at pp. 750, 753-754.)

The *Witherspoon/Witt* standard applies these general legal principles

to the specific context of a juror's admission of opposition to, or support of, the death penalty in general. Thus, a juror's personal or abstract beliefs about the death penalty do not alone establish a disqualifying actual bias. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728; *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 423-426; *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-522.) A juror who has a pre-formed opinion regarding the appropriate sentence based on his personal beliefs about the death penalty may not be excluded for actual bias "so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.'" (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; accord *People v. McKinnon* (2011) 52 Cal.4th 610, 646.) On the other hand, as this Court has recently held, in the absence of "clear and unqualified statement of [the juror's] willingness and ability, despite his opposition to capital punishment, to apply the law and evaluate the penalty choices fairly," a juror who holds such a pre-formed opinion is actually biased. (*People v. McKinnon*, *supra*, at p. 646.)

Indeed, once a juror had admitted a pre-formed opinion, absent unwavering assurances of impartiality there is no ambiguity in the record, no credibility determination to be made by the court, and hence actual bias is established *as a matter of law*. (AOB 279-280, 283-285, citing, inter alia, *Hughes v. United States*, *supra*, 258 F.3d at pp. 458-460; see also *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 646-650 [juror's questionnaire answers alone indicating strong opposition to death penalty established a pre-formed opinion that defendant should be sentenced to life and disqualifying bias as matter of law given absence of "clear and unqualified" statement that he could set that opinion aside and follow the law].)

Thus, contrary to respondent's analysis, the critical question in this

case is not whether Juror Number 12's answers "demonstrate[d] this his views on capital punishment would substantially impair the performance of his duties" under the *Witherspoon/Witt* standard. (RB 69, 73.) Rather, the question is whether Juror Number 12's admitted, pre-formed opinion that Mr. Mai should be executed based primarily on his knowledge of facts or evidence outside of the courtroom, along with his strong personal support for the death penalty, established his actual bias. Because Juror Number 12 never "stated clearly" or "unequivocally" that he could set aside that pre-formed opinion, the answer is yes. Absent such unwavering assurances, there was no ambiguity in the record, no credibility determination to be made by the court, and hence Juror Number 12's actual bias was established as a matter of law and his empanelment on the jury violated Mr. Mai's due process and Sixth and Eighth Amendment rights to a reliable death verdict by an impartial adjudicator. (AOB 279-280, 283-285, citing, inter alia, *Hughes v. United States*, *supra*, 258 F.3d at pp. 458-460; see also *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 646-650.)

2. Respondent's Contention That Juror Number 12 Was Not Actually Biased Is Based on a Recitation of the Facts That Is Incomplete, Inaccurate, and Misleading. It Is Unsupported by Any Meaningful Legal Analysis, and must Be Rejected

Respondent acknowledges that Juror Number 12 "indicated in response to the question of whether he had formed an opinion as to punishment that in his opinion a death sentence was appropriate." (RB 69; 5-CT 1413.) Although it is not entirely clear, respondent appears to contend that Juror Number 12s's admission of this pre-formed opinion was based on his support for the death penalty as a general matter. (RB 68-70, 72-73.) Further, respondent appears to contend that this pre-formed opinion did not

amount to actual bias because "Juror Number Twelve stated he could set aside his personal feelings and follow the law." (RB 70.) Respondent misrepresents the record.

Again, Juror Number 12s's admission of his pre-formed opinion that Mr. Mai should be executed was not based solely on his support for the death penalty in general. (RB 69.) Rather, as discussed above, he indicated that he had formed that opinion based upon his personal connection to, and media reports of, the crime. Specifically, Question 1 asked Juror Number 12 if he had any personal knowledge or information about the case from another source, such as pre-trial publicity. (5-CT 1413.) Juror Number 12 responded in the affirmative, explaining that one of his family members was a fireman who had attempted to save the victim's life after the shooting and he had followed media reports of the crime. (5-CT 1413.) Question 2 asked: "Based upon this information [i.e., the information Juror Number 12 had supplied in response to question 1], what opinions, if any have your formed about the appropriate sentence in this case? (5-CT 1413.) It was in response to this question (and not the questions directed to his general death penalty views, discussed below) that Juror Number 12 admitted he had already formed the opinion that Mr. Mai should be sentenced to death based on his knowledge of the circumstances of the case. (5-CT 1413.)

Hence, Juror Number 12 admitted his bias based on information de hors the courtroom. (See, e.g. *Irvin v. Dowd*, *supra*, 366 U.S. at pp. 722-723; *Hughes v. United States, supra*, 258 F.3d at pp. 456-460.) Given this unequivocal admission, impartiality *demanded* Juror Number 12's equally unequivocal and unqualified promise to "lay aside his impression or opinion and render a verdict based upon the evidence presented in court" and the law as stated in the court's instructions. (*Irvin v. Dowd*, *supra*, 366 U.S. at p.

723; AOB 275-280, 283-284.)[44] The record is devoid of any such promise.

To the contrary, Question 5 asked Juror Number 12 if he could set aside his pre-formed opinion that Mr. Mai should be executed. (5-CT 1414.) In stark contrast to his "yes" and "no" answer to other questions, Juror Number 12 wrote only "*I think so.*" (5-CT 1414.) This response did not amount to an explicit or unwavering assurance that he could set aside his bias and decide the case based on the evidence and the law. (See AOB 275-280, 283-284.)[45] To the contrary, his other answers clearly indicated that he was unwilling or unable to do so.

Following the above-described questions, the questionnaire then focused on the jurors "Attitudes About the Death Penalty" and the pertinent *Witherspoon/Witt* issues. (5-CT 1417.) The jurors were asked about their personal views regarding the death penalty and Juror Number 12 indicated

---

[44] Citing, e.g., accord *Patton v. Yount* (1984) 467 U.S. 1025, 1036; *White v. Mitchell* (6th Cir. 2005) 431 F.3d 517, 540; *Miller v. Webb*, *supra*, 385 F.3d at p. 675; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 456-460; *Thompson v. Altheimer & Gray*, *supra*, 248 F.3d at p. 627; *United States v. Sithongtham*, *supra*, 192 F.3d at p. 1121; *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 750, 753-754. See also *People v. McKinnon* (2011) 52 Cal.4th 610, 646; *Lockhart v. McCree* (1986) 476 U.S. 162, 176.

[45] Citing, e.g., *Miller v. Webb*, *supra*, 385 F.3d at p. 675 (following admission of partiality, juror's statement, "I think I can be fair, but I do have some feelings about" the issue did not overcome bias and establish impartiality and her impanelment violated impartial jury right); *Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 503 (juror's tentative statements that he will "try" to be impartial and decide the case fairly insufficient to establish impartiality); *United States v. Sithongtham* (8th Cir. 1999) 192 F.3d 1119, 1121 (juror's statement that he would "probably" be fair and impartial insufficient was not "good enough"); *People v. Avila* (2006) 38 Cal.4th 491, 532-533 & fn. 26 (juror who did not know if he could set aside pre-formed opinion); *White v. Mitchell* 431 F.3d 517, 540; *Thompson v. Altheimer & Gray*, *supra*, 248 F.3d at pp. 624, 626.

that he supported it and believed it was not used often enough. (5-CT 1420.) This section of the questionnaire also contained a general overview of the law describing aggravating and mitigating circumstances and explaining that the law would require the selected jurors to weigh aggravating and mitigating circumstances and "in order to fix the penalty of death, [you] must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without the possibility of parole." (5-CT 1418.) Question 30(c) asked if the jurors could set aside their personal feelings about the death penalty and follow the law. (5-CT 1420.) That question offered two "pro forma" options: "yes" or "no." In response to this question, Juror Number 12 checked the box marked "yes"; however, he qualified that "pro forma" response with the written explanation: "I'm for the death penalty but if court proved to me that defendant should be spared death – I might not vote death." (5-CT 1420.) Of course, this written explanation was contrary to the law.

Far from overcoming his admission of bias, that explanation only reinforced Juror Number 12's unwillingness or inability to be impartial and perform his duties as a juror. (AOB 277, 281-282, citing *People v. Boyette* (2002) 29 Cal.4th 318, 418 [juror who would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty" is unable or unwilling to follow the law, actually biased, and must be excluded].) As this Court has recently held under similar circumstances, a juror's checked answer to a "pro forma" question suggestive of impartiality, or a willingness to set aside his or her personal opinions and follow the law, is overcome *as a matter of law* by a qualifying *written* explanation that demonstrates the contrary. (*People v. McKinnon, supra*, 52

Cal.4th at p. 648.)

The trial court clearly seemed to appreciate as much on live voir dire. The court inquired into Juror Number 12's answers to Questions 1 and 2 that he had already formed the opinion that Mr. Mai should be executed and to Question 5 in which he could only "say that *you think*" he could set aside that opinion. (5-RT 886, italics added.) The court pressed Juror Number 12, asking if he could unequivocally "assure counsel and I that you can set aside any preconceived opinion and decide this case," at which point Juror Number 12 interjected and simply reiterated his questionnaire answer: "I think I can if they can give me good reason that somebody shouldn't be put to death, I believe I would vote in that direction." (5-RT 886-887.) Juror Number 12 agreed with the court that his "position is that they have to prove why someone should not be put to death." (5-RT 887.)

In other words, just as he had in his questionnaire, Juror Number 12 admitted on voir dire that he had already decided that: (1) Mr. Mai should be executed; (2) he could not promise to that opinion aside in deference to the law; but (3) only "might" set his opinion aside under circumstances *inconsistent* with the law – i.e., if the defense (or "the court") proved that Mr. Mai's life should be spared. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 418.) Hence, not only did Juror Number 12 fail to give an explicit and unwavering assurance that he could subvert his admitted bias and impartially follow the law; he affirmatively stated that he was unwilling or unable to set aside his pre-formed opinion in deference to the law. This record establishes Juror Number 12's actual bias.

Although it is not entirely clear, respondent appears to contend that Juror Number 12's answers were rehabilitated on defense counsel's voir dire. According to respondent, "Juror Number Twelve [told defense counsel

that he] believed he could weigh the mitigating and aggravating evidence and render a fair verdict." (RB 72, citing 5-RT 915.) Not so.

Where, as here, a juror has explicitly admitted bias, it can only be overcome by following up on that admission and obtaining the juror's unequivocal promise to set his or her pre-formed opinion aside in deference to the law and the evidence. (AOB 279-280, 283-284, citing, inter alia, *Hughes v. United States, supra,* 258 F.3d 453, 458-460.) The court did follow up on Juror Number 12's admission, but did failed to obtain Juror Number 12's unequivocal promise. (5-RT 886-887.) Having failed to do so, the court left it to counsel to inquire further into Juror Number 12's admission of bias: "[W]ell, I am sure when we get to counsel they will have some further questions in that area." (5-RT 887.)

But counsel failed to do so. (AOB 273-274, 279-280, 282-284, citing, inter alia, *Hughes v. United States, supra*, 258 F.3d at pp. 458-460 [where neither court nor counsel specifically inquired into admission of bias and obtained unwavering assurance of impartiality, juror was actually biased and his impanelment violated impartial jury right].) Instead, as respondent points out, defense counsel simply asked Juror Number 12 whether he could "weigh the aggravating and mitigating, whatever those turn out to be, and render a fair verdict?" (RB 72.) Juror Number 12 did not unequivocally promise to do so. Instead, just as he had in his questionnaire and on voir dire by the court, Juror Number 12 only replied "I think so." (5-RT 914-915.) Of course, he had already explained what he meant by this answer: he had already formed the opinion Mr. Mai should be executed and only "thought" that he "might" be able to change his mind if Mr. Mai (or "the court") "proved" that Mr. Mai's life should be spared. (5-RT 886; 5-CT 1413-1414, 1420.)

Without citation or specific reference to the record, respondent contends that Juror Number 12's answers simply demonstrated "a mistaken belief regarding the criminal justice system as to the roles of counsel and the court regarding the burden of persuasion in connection with penalty determination in a capital case," which did not amount to bias. (RB 74.) Of course, "it is incumbent upon respondent, in responding to a claim of [error], to provide this [C]ourt with an accurate summary of the evidence, complete with page citations, that respondent believes supports the trial court's judgment." (*Air Couriers Inter. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 928; accord, Cal. Rules of Court, rules 8.204, subd. (a)(1)(c) [points must be supported by record citation] and 8.630, subd. (a)].) Because respondent has failed to do so, Mr. Mai can only assume that respondent refers to Juror Number 12's statements that he would improperly place on Mr. Mai or "the court" the burden of convincing him to change his pre-formed opinion by proving his life should be spared.

As a preliminary matter, the record does not support respondent's view that Juror Number 12 was simply "mistaken" about the law. As discussed above, Juror Number 12 was informed that "in order to fix the penalty of death," the law required that the jurors "be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without the possibility of parole." (5-CT 1418.) Thus, Juror Number 12 was told that the law did *not* place any burden on the defendant to prove that his life should be spared; to the contrary, he was told that the law only permitted the juror to vote for death if the aggravating factors admitted in court "substantial[ly]" outweighed the mitigating factors. Juror Number 12's questionnaire and live voir dire answers indicated that he was simply

unwilling or unable to follow that law. (5-RT 886; 5-CT 1420; see also 5-CT 1414.)

In any event, even assuming that Juror Number 12 was simply "mistaken" about the burden of proof, respondent misses the point. The issue is not whether Juror Number 12 was biased simply because he would place the burden on the defense (or "the court") to convince him to vote for life. (5-RT 887; 5-CT 1420.) There is no question that Juror Number 12 admitted he was biased; the critical question, then, is whether his admission of bias was overcome or rehabilitated with an unequivocal promise to set his bias aside and decide the case based on the evidence and the law. The answer is no.

For all of these reasons, respondent's remaining contentions are equally unavailing. For instance, respondent cites the well-settled proposition that when a juror provides "equivocal or conflicting" statements, the trial court is in the best position to determine partiality based on its first hand observations of the juror's demeanor and tone and its findings are binding on appeal. (RB 74, and authorities cited therein.) Mr. Mai certainly has no quarrel with this proposition; to the contrary, he acknowledge it in the opening brief. (AOB 284-285, 293.) The principle simply has no application here.

As discussed in the opening brief, Juror Number 12 unequivocally admitted his bias and did *not* provide any conflicting unequivocal assurances that he could set that bias aside that the court could weigh against that admission of bias. Thus, Juror Number 12 did not provide "equivocal or conflicting" statements nor does respondent identify any such statements. Because Juror Number 12's "declaration [of bias] was not followed by any attempt at clarification or rehabilitation, there [was] no ambiguity in the

record as to h[is] bias," no issue of credibility for the trial court to resolve and no finding to which to defer, and his "express admission is the only evidence available to review." (*Hughes v. United States*, *supra*, 258 F.3d at pp. 458-460; AOB 279-280, 284-285.)

Respondent attempts to counter this argument by misstating the record. That is, respondent asserts that "[t]he trial court sought *and obtained* from the prospective jurors, including Juror Number Twelve, the assurance that if selected the juror would keep an open mind throughout the trial and not form or express any opinion as to the appropriate punishment until in the jury room deliberating." (RB 71, citing 5-RT 886-887, italics added.)

In truth, as discussed above, the court followed up on Juror Number 12's questionnaire answers admitting bias and declining to promise to set it aside by asking him if he could "assure" the court and counsel that he would set aside his preconceived opinion. (5-RT 886.) Juror Number 12 only confirmed his inability or unwillingness to do so, repeating that he only "thought" he could do so if the defense proved that Mr. Mai's life should be spared. (5-RT 886.) Immediately after this individual voir dire, the court asked the other potential jurors en masse, "anyone else in that topic area? If selected as a juror in this case, will you keep an open mind throughout the trial and not form any express opinion as to the appropriate punishment until you are deliberating? [¶] Do I have the assurance of all the jurors?" (5-RT 886-887.) None of the jurors responded to that en masse query. (5-RT 886-887.) Hence, contrary to respondent's gross mischaracterization of the record, the court did not "obtain" Juror Number 12's explicit "assurance" that he "would keep an open mind" and would "not form or express any opinion as to the appropriate punishment until in the jury room deliberating." (RB 71.)

Respondent also recites a number of questions directed to the jurors en masse to which Juror Number 12 either did not respond to at all or provided a short "yes" answer along with all of the other jurors. (RB 70-72.)[46] Although respondent does not make the argument explicitly and cites no supporting authority for such a proposition, Mr. Mai can only assume that respondent believes these group responses and non-responses provided sufficient indicia of impartiality to weigh against and overcome Juror Number 12's admission of bias. Respondent is incorrect. As discussed in the opening brief, group responses or non-responses posed to the jurors en masse do not qualify as the unequivocal or "unwavering assurance" of impartiality required to overcome a juror's explicit admission of bias. (AOB 278-279, 284-285, citing, inter alia, *Hughes v. United States*, *supra*, 258 F.3d at p. 461, *Thompson v. Altheimer & Gray*, *supra*, 248 F.3d at pp. 624-626, and *Johnson v. Armontrout*, *supra*, 961 F.2d at pp. 750, 753-754; cf. *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 646-648 [checked answers to pro forma questions suggestive of impartiality do not qualify as "clear and unqualified statement of [the juror's] willingness and ability . . . to apply the law and evaluate the penalty choices fairly" sufficient to overcome answers indicating partiality].)

---

[46] RB 70, citing 4-RT 790-793 (when court inquired en masse if any of the potential jurors could not be fair and impartial, Juror Number 12 did not raise his hand); RB 70, citing 5-RT 878-879 (court asked jurors en masse if they could vote for death if they believed appropriate, vote for life if they believed appropriate, and carefully consider both options, to which all of the jurors, including Juror Number 12, answered "yes"); RB 71-72, citing 5-RT 890-891 (none of the jurors, including Number 12, raised his/her hand to indicate that they would not follow "court's instructions and rulings on the law" when question asked of jurors en masse).

Finally, respondent contends that Juror Number 12 was not actually biased because at the close of the penalty phase, "[t]he trial court instructed the jury as to the proper, criteria to be used to reach a penalty determination. (8-RT 1424-1474.) It is presumed the jurors followed the instructions of the trial court. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139)" and there is no record evidence to rebut that presumption. (RB 74-75). Respondent's contention is without any merit.

"Among those basic fair trial rights that "'can never be treated as harmless' is a defendant's 'right to an impartial adjudicator, be it judge or jury.'" (*Gomez v. United States* (1989) 490 U.S. 858, 876; AOB 280-281, citing in accord, inter alia, *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729 and *In re Carpenter* (1995) 9 Cal.4th 634, 654.) Therefore, the seating of a biased juror cannot be cured or rendered harmless by the provision of standard instructions directing the jurors to be impartial.

C. Because Juror Number 12 Was Actually Biased, the Death Judgment Must Be Reversed Notwithstanding Defense Counsel's Failure to Move to Exclude Him For Cause

Because Juror Number 12 was actually biased, his impanelment violated Mr. Mai's fundamentals right to a fair and reliable trial by an impartial adjudicator. (AOB 285-294, citing, inter alia, *Morgan v. Illinois* (1992) 504 U.S. 719, 727-729.) It is true that defense counsel did not attempt to move to exclude Juror Number 12 for cause and that this Court has held has held that a defendant must attempt to remove a biased juror – if he has the power to do so – in order to challenge his empanelment on appeal. (AOB 285-292, citing, inter alia, *People v. Hillhouse* (2002) 27 Cal.4th 469, 487.) However, this Court has never held that a juror was biased, but also that the defendant "waived" his right to challenge the ensuing violation of

his right to an impartial adjudicator on appeal because his attorney failed to attempt to remove that juror. (AOB 292.)

Indeed, as Mr. Mai argued in the opening brief, any such holding would be inconsistent with fundamental principles that compel remedying the constitutional violation on appeal despite counsel's inaction below. First, if the fundamental right to an impartial jury can be waived at all, it requires the defendant's express, personal, knowing and intelligent waiver on the record, which was absent in this case. (AOB 286-287.) Second, defense counsel's failure to attempt to remove a juror actually biased in favor of executing Mr. Mai not only violated his state and federal constitutional rights to trial by an impartial jury but also his rights to the effective assistance of counsel. (AOB 287-292.) Third, the court has a sua sponte duty to remove actually biased jurors, which is unaffected by counsel's inaction. (AOB 288-292, citing, inter alia, *Miller v. Webb*, *supra*, 385 F.3d at p. 675, *Hughes v. United States*, *supra*, 258 F.3d at p. 463, and *United States v. Torres* (2d Cir. 1997) 128 F.3d 38, 43.) Fourth, the issue raised here involves a fundamental right that turns on pure questions of law and thus this Court can and should resolve it for the first time on appeal (AOB 293, citing, inter alia, *United States v. Atkinson* (1936) 297 U.S. 157, 160 and *People v. Yeoman* (2003) 31 Cal.4th 93, 118.) Fifth, at the very least, the question of waiver is a close and difficult one and therefore should be resolve in favor of preservation give the fundamental nature of the right violated. (AOB 293, citing *People v. Champion* (1995) 9 Cal.4th 879, 908 & n. 6.)

Respondent only address the first two arguments described above and ignores the rest. (See RB 66-73.) Mr. Mai takes respondent's silence in the face of those arguments as concessions.

As to Mr. Mai's first argument, respondent summarily contends that "[t]here is no legal requirement for a trial court to obtain an express waiver from the defendant when the defense accepts the jury. (See *People v. Richardson* (2008) 43 Cal.4th 959, 983; *People v. Cox* (1991) 53 Cal.4th 618, 648, fn. 4.)" (RB 68.) Respondent's perfunctory assertion is without merit.

Richardson and *Cox* simply stand for the inapplicable proposition that a defense attorney's "acceptance of [the] jury without exhausting peremptory challenges is a 'strong indicator that the jurors were fair, and that the defense itself so concluded.'" (*People v. Cox, supra*, 53 Cal.3d at p. 648, fn. 4, cited in *People v. Richardson, supra*, 43 Cal.4th 983.) In neither case did the defendant argue or the Court resolve whether a defendant's fundamental right to trial by an impartial adjudicator requires the defendant's personal waiver, expressed on the record. "'"It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."' [Citation.]" (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155, and authorities cited therein.)[47]

Otherwise, respondent has failed entirely to address or attempt to refute Mr. Mai's argument that a defendant's right to trial by an impartial adjudicator is a fundamental personal right that demands his personal and express waiver on the record in open court. (AOB 286-287.) The federal

---

[47] Of course, in this case, defense counsel *did* exhaust their peremptory challenges. They simply failed to challenge Juror Number 12 for cause. To extent that they failed to do so because they believed that Juror Number 12 was impartial, they acted unreasonably. To the extent that they failed to do so because they wanted jurors partial toward execution, they also acted unreasonably.

Constitution demands that death verdicts be rendered by impartial adjudicators. (See, e.g., *Gray v. Mississippi* (1987) 481 U.S. 648, 668, and authorities cited therein; see also *Gomez v. United States* (1989) 490 U.S. 858, 876.) This right is grounded in basic due process principles as well as the Sixth Amendment, which guarantees not merely the right to a jury trial but the right to trial by an "*impartial* jury." (See, e.g., *Gray v. Mississippi*, *supra*, at p. 668; *In re Murchison* (1955) 349 U.S. 133, 136; *United States v. Nelson* (2nd Cir. 2002) 277 F.3d 164, 206, and authorities cited therein; see also *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266 [right to impartial adjudicator under California Constitution].) "[W]hen a state . . . provide[s] for jury sentencing, as California does in capital cases, the due process clause of the Fourteenth Amendment of the federal Constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial. [Citation.] Our state Constitution provides the same guarantee. [Citations].)" (*People v. Williams* (1997) 16 Cal.4th 635, 666-667.)

Under these principles, when a defendant exercises his jury trial right, his right to an impartial jury "is an inseparable and inalienable part" part of that right. (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) The right to trial by jury is a fundamental personal one that can only be waived by the defendant's knowing and intelligent, *express and personal* waiver in open court and on the record. (AOB 286-287, citing, inter alia, *Patton v. United States* (1930) 281 U.S. 276, 308-312, disapproved on another ground in *Williams v. Florida* (1970) 399 U.S. 78, 87-92, *People v. Collins* (2001) 26 Cal.4th 297, 304-305 & fn. 2, and Cal. Const., art. I, § 16.) It logically follows that the same requirements apply to any purported waiver of the inseparable right to be judged by an impartial jury or adjudicator. (AOB

286-287, citing, inter alia, *Hughes v. United States, supra*, 258 F.3d at p. 463, *Franklin v. Anderson, supra*, 434 F.3d at pp. 427-428, and *United States v. Nelson* (2d Cir. 2002) 277 F.3d 164, 204-213; cf. *People v. Traugott* (2010) 184 Cal.App.4th 492, 501-503, and authorities cited therein [because the constitutional right to jury trial guarantees right to trial by 12 jurors, "'a defendant's consent to be tried by less than 12 jurors must be as formal as a waiver of the entire jury'" and thus cannot be made by counsel or implied from defendant's conduct].) Mr. Mai takes respondent's failure to address the logic of these principles as a concession to their validity.

Alternatively, respondent appears to contend that Mr. Mai *did* make a personal and express waiver of his right to an impartial jury based on two pieces of record evidence: (1) defense counsel's representation that Mr. Mai was participating in the exercise of peremptory challenges (RB 67-68, citing 4-RT 795-796); and (2) the court's statement informing defense counsel that the "the bailiff had told me that [Mai] was concerned that he did not have a fair and impartial jury selected, that he had a biased jury" and inquiring of counsel, "is that his issue?" to which defense counsel replied, "no" (RB 73, citing 6-RT 1081). From this evidence, respondent contends that "Mr. Mai *personally* accepted the jury as it was constituted with Juror Number Twelve on it" (RB 73, italics added; see also RB 68), which respondent equates with a personal, express, knowing and intelligent waiver of his right to an impartial jury. Respondent's contention is without merit.

First, respondent conveniently ignores that the representations by defense counsel on which it relies were made *outside of Mr. Mai's presence*. (RB 67-68, 73; 4-RT 795-796; 6-RT 1081.) Defense counsel's representations about Mr. Mai, outside of Mr. Mai's presence, did not amount to the "express" and "personal" acts required to waive Mr. Mai's

personal right to trial by an impartial adjudicator. (See, e.g., *People v. Ernst* (1994) 8 Cal.4th 441, 446-448, and authorities cited therein [defendant's personal and express waiver cannot be satisfied by counsel alone or implied from defendant's conduct].) For the same reasons, even if a defendant's knowing and intelligent waiver of his right to an impartial adjudicator could be implied from his silence in the face of his counsel's representations – as respondent appears to contend – there was no valid waiver here.

Indeed, any implied waiver is affirmatively dispelled by the record. As respondent observes, the trial court noted for the record – though outside of Mr. Mai's presence outside – that Mr. Mai had informed the bailiff that he was "concerned that he did not have a fair and impartial jury selected, that he had a biased jury." (6-RT 1081; RB 73.) While respondent refers to this discussion, but misconstrues its meaning. (RB 73.) According to respondent's reading of the record, when the court informed defense counsel of Mr. Mai's complaint to the bailiff, defense counsel denied that Mr. Mai believed his jury was biased. (RB 73.) Not so.

During that in-chambers conference, the court and defense counsel were addressing Mr. Mai's disruptive behavior that morning. They noted that the proceedings had been delayed for an hour because Mr. Mai was refusing to come out of the holding cell and so agitated and "loud you can almost hear it out in the courtroom." (6-RT 1079.) The court was inquiring into the reasons for his behavior that morning. (6-RT 1079-1081.) Defense counsel explained that it was simply another manifestation of Mr. Mai's deteriorating mental condition. (6-RT 1079-1081.) It was in this context that the court informed defense counsel, "the bailiff had told me that [Mr. Mai] was concerned that he did not have a fair and impartial jury selected, that he had a biased jury," and asked "is that his issue?" (6-RT 1081.) In

other words, the court was asking if Mr. Mai's disruptive behavior that morning was due to his concern that he had a "biased jury." (6-RT 1081.) In response to this question, defense counsel responded in the negative, thus indicating that Mr. Mai's disruptive behavior that morning was due *to* other issues. (6-RT 1081.) The record does not support respondent's reading that defense counsel was denying or even specifically addressing Mr. Mai's complaint about a biased jury. (RB 73.)

Indeed, the court's failure to respond in any meaningful way to Mr. Mai's complaint about a biased jury by personally inquiring of Mr. Mai or even making specific inquiry of defense counsel is particularly troubling in given the court's own implicit concerns about Juror Number 12's impartiality, as reflected in its voir dire. As previously discussed, the court acknowledged that his questionnaire and voir dire answers admitted to a pre-formed opinion that he did not promise to set aside, unsuccessfully attempted to obtain his "assurance" that he could set aside that opinion in deference to the law and, having failed to do so, left it to counsel to follow up and respond appropriately. (5-RT 886-887.) When defense counsel failed inquire into Juror Number 12's admission of bias, obtain an unequivocal promise to subvert his pre-formed opinion to the law and the evidence, or challenge him for cause, the court had a duty to act on its own and dismiss Juror Number 12 for cause before he was sworn. (See, e.g., *Miller v. Webb*, *supra*, 385 F.3d at p. 675; *Franklin v. Anderson*, *supra*, 434 F.3d at pp. 427-428; *Hughes v. United States*, *supra*, 258 F.3d at pp. 463-464; *United States v. Torres*, *supra*, 128 F.3d at p. 43.) Certainly, when Mr. Mai himself later informed the court through the bailiff about his concern that the jury was not impartial, which reflected the court's own apparent concerns, the court had a duty to act to protect Mr. Mai's rights when his

counsel clearly failed to do so. (See, e.g., *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627 [trial court has independent duty to protect the rights of the accused [and] to ensure a fair determination of the issues on the merits," and the duty to promote "the orderly administration of justice"] *MacKenna v. Ellis* (5th Cir. 1960) 280 F.2d 592, 600 ["Fundamental fairness to a person accused of crime requires such judicial guidance of the conduct of a trial that when it becomes apparent appointed counsel are not protecting the accused the trial judge should move in and protect him"].) But the court inexcusably did nothing.

Finally, as to Mr. Mai's second argument that defense counsel's failure to attempt to remove a juror actually biased in favor of executing Mr. Mai not only violated his state and federal constitutional rights to trial by an impartial jury but also his rights to the effective assistance of counsel, respondent does not dispute that a defense attorney's failure to challenge a biased juror who is seated on the jury amounts to ineffective assistance of counsel as a matter of law. (See RB 68-73; AOB 287-292, citing, inter alia, *People v. Weaver* (2001) 26 Cal.4th 876, 911, *Virgil v. Dretke* (5th Cir. 2006) 446 F.3d 598, 609-613, *Franklin v. Anderson, supra*, 434 F.3d at pp. 427-428, cert. denied, *Houk v. Franklin* (2007) 549 U.S. 1156, and *Hughes v. United States*, *supra*, 258 F.3d at pp. 463-464.) Instead, respondent makes the circular argument that defense counsel did not render ineffective assistance in this particular case because Juror Number 12 was not actually biased. (RB 68-75.) As Mr. Mai has addressed and refuted respondent's contention that Juror Number 12 was not biased and respondent otherwise concedes that an attorney's failure to challenge a seated, biased juror necessary renders ineffective assistance of counsel, no further reply is necessary here.

For these and all of the other reasons discussed in the opening brief, this Court can and should reach the merits of Mr. Mai's claim on appeal notwithstanding his counsel's negligence below. (AOB 285-294.) Juror Number 12 was actually biased and his impanelment on the jury that voted to execute Mr. Mai violated his state and federal constitutional rights to due process, trial by an impartial adjudicator, and a reliable death verdict. The death judgment must be reversed.

//

//

VII

THE TRIAL COURT'S DENIAL OF MR. MAI'S *WHEELER/BATSON* MOTION VIOLATED STATE LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS AND DEMANDS REVERSAL OF THE DEATH JUDGMENT

A. Introduction

Respondent concedes that Mr. Mai satisfied the first of the three-step *Wheeler/Batson*[48] analysis with a prima facie showing that the prosecutor had exercised peremptory challenges against the only three African-Americans in the jury pool (all of whom were death penalty supporters) based on their race and that "[t]he trial court found a prima facie case was made by Mai." (RB 76; AOB 295-296, 303-305.) And Mr. Mai concedes that the prosecutor satisfied the second step of the analysis by providing *facially* race-neutral explanations for his challenges. (AOB 306-307; RB 79-83.) Finally, it is undisputed that if the trial court erred in denying Mr. Mai's *Wheeler/Batson* motion, the error violated the state and federal Constitutions which requires reversal per se of the death judgment without remand. (See RB 75-83; AOB 321-331.)

Therefore, the only dispute in this case centers on the most critical, third step of the *Wheeler/Batson* analysis, which required the trial court to make a "sincere and reasoned attempt to evaluate the prosecutor's" *facially* race-neutral explanations (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768; *People v. Hall* (1983) 35 Cal.3d 161, 167-168) and resolve the "decisive

---

[48] "*Wheeler/Batson*" refers to the seminal decisions of this Court and the United States Supreme Court in *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79, respectively, which recognized the state and federal constitutional prohibitions against excluding persons from a jury based on their membership in a cognizable group and mandating a three-step inquiry or analysis to prevent such violations.

question" of whether they were *actually* bona fide or pretextual (*Hernandez v. New York* (1991) 500 U.S. 352, 365). (AOB 299-321.)

Mr. Mai argued in the opening brief that the trial court's denial of his *Wheeler/Batson* motion violated state law and the Sixth and Fourteenth Amendments because the court terminated its analysis at step two and failed entirety to conduct the critical third step. (AOB 295-321.) The error is affirmatively established by the record evidence consisting of: (1) the trial court's summary denial of the motion with the statement: "Well, the Court finds that no discriminatory intent is *inherent* in the [prosecutor's] explanations, and the reasons *appear* to be race neutral, and on those grounds, the court will deny the *Wheeler* motion" (5-RT 944, italics added); (2) its refusal to hear defense counsel's argument against the credibility of the prosecutor's facially race-neutral explanations; and (3) its failure to make any findings or inquiry at all into those explanations, despite the facts that they were unsupported or contradicted by the record or otherwise raised serious credibility questions. (AOB 307-321.)

Respondent simply ignores this issue by assuming that the trial court conducted the third step of the analysis and "credited" the prosecutor's facially race-neutral reasons as bona fide. (RB 80-83.) Based on that faulty assumption – which begs the fundamental question presented in the opening brief – respondent contends that the trial court's denial of the *Wheeler/Batson* motion must be upheld on appeal because its (assumed) third-step findings are entitled to deference and supported by substantial evidence. (RB 80-83.)

It is clear that respondent has ignored the thrust of Mr. Mai's claim on appeal and applied an inappropriate legal analysis to that claim.

B. The Trial Court Violated State Law and the Federal Constitution By Denying Mr. Mai's *Wheeler/Batson* Without Conducting the Constitutionally Mandated Third Step And Ruling on the Issue of Discriminatory Intent

1. Respondent's Response Begs the Fundamental Question of Whether the Trial Court Erroneously Terminated The *Wheeler/Batson* Analysis at Step Two and Failed to Conduct the Third Step

Respondent summarily asserts that the trial court engaged in the third step of the *Wheeler/Batson* analysis and "credited" the prosecutor's facially race-neutral reasons in denying the motion. (RB 80, 83.) Respondent makes this assertion without citation to any supporting record evidence or supporting authority. (RB 76-83.)

Instead, respondent simply cites the well settled rule that "*so long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justification offered*" – i.e., actually conducts the third step of the *Wheeler/Batson* analysis – "*its conclusions are entitled to deference on appeal.*' ([*People v.*] *Lenix* [2008] 44 Cal.4th [602,] 614-614 . . .) (*People v. Mills* [2010] 48 Cal.4th [158], 175 [italics in original].)" (RB 80.) "On appeal, a finding against purposeful discrimination is reviewed for substantial evidence." (RB 81, citing, inter alia, *People v. McDermott* (2002) 28 Cal.4th 946, 971.) Under that deferential standard of review, respondent contends that the trial court's denial of the *Wheeler/Batson* motion must be upheld on appeal. (RB 80-83.) In so doing, respondent simply assumes the very premise of that deferential standard of review without explanation or analysis. (RB 80-83.)

As discussed in the opening brief, the deferential, substantial evidence standard of review applies "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to

each challenged juror." (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; accord, *People v. McDermott*, *supra*, 28 Cal.4th at p. 971; AOB 301-302.) When the trial court fails to conduct the third step of the analysis, make necessary findings, and rule on the ultimate issue of discriminatory intent, it has made no express or implied factual findings "crediting" the prosecutor's facially-race neutral explanations as bona fide to which a reviewing court can defer. (AOB 301-302, citing *People v. Silva*, *supra*, at pp. 385-386, and *Snyder v. Louisiana* (2008) 552 U.S. 472, 477-479, 482-484; accord, e.g., *United States v. Rutledge* (7th Cir. 2011) 648 F.3d 555, 560; *Dolphy v. Mantello* (2nd Cir. 2009) 552 F.3d 236, 239; *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 286-287, 290-291.)

Of course, this is precisely the question presented here: did the trial court actually conduct the third-step of the *Wheeler/Batson* analysis by making "a sincere and reasoned attempt to evaluate" whether the prosecutor's facially race-neutral explanations actually prompted the challenges and thereby rule on the ultimate issue of discriminatory intent? (AOB 295-321.) In the opening brief, Mr. Mai answered that question in the negative based on a thorough analysis of the record evidence and the legal principles governing it. (*Ibid.*)

Respondent does not answer this question with its bare assumption – unsupported by any record evidence or legal authority – that trial court conducted the third step of the analysis and "credit[ing]" the prosecutor's facially race-neutral explanations. (RB 80.) Respondent's "arguments are nothing more than conclusions of counsel made without supporting [analysis] or any citation to the record and deserve no consideration from this Court." (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 101-102.)

2. Given the Affirmative Record Evidence That the Trial Court Failed to Conduct the Third Step of the *Wheeler/Batson* Analysis, No Contrary Presumption May be Drawn from its Mere Denial of the Motion

Although respondent does not make the point explicitly or cite any authority to support it, it appears that respondent's argument rests on a *presumption* drawn solely from the trial court's denial of the motion that it necessarily conducted the third step of the *Wheeler/Batson* analysis and made implied findings "credit[ing]" the prosecutor's explanations as genuine. (See RB 80-83.) If so, respondent is mistaken.

It is well settled that a reviewing court may not indulge in such a presumption when it is belied by the record. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th at p. 386; *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 477-479, 482-484; *United States v. Rutledge*, *supra*, 648 F.3d 555, 557, 560-561; *Dolphy v. Mantello*, *supra*, 552 F.3d at pp. 238-239; *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 831-833.) As discussed in the opening brief – but completely ignored by respondent – evidence belying such a presumption includes:

> (1) the court's summary denial of the motion with statements reflecting only a finding that the prosecutor's explanations are facially race-neutral, thereby indicating that the court terminated the analysis at step two;[49]

---

[49] AOB 307-310, citing *People v. Hall*, *supra*, 35 Cal.3d at pp. 165-166, 168-169 (trial court's statements that it was denying motion because the prosecutor's explanations did not admit discriminatory intent demonstrated that it failed entirely to conduct the third step of the *Wheeler* analysis), *Dolphy v. Mantello* (2nd Cir. 2009) 552 F.3d 236, 239 (court's denial of motion with statement, "I'm satisfied that is a race-neutral

(continued...)

(2) the court's refusal to hear defense counsel's arguments against the credibility of the prosecutor's explanations;[50] and

---

[49](...continued)
explanation, so the strike stands" demonstrated that it erroneously terminated the analysis at step two and failed to engage in step three), *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 831-832 (same where court denied motion with statement that the prosecutor's proffered reason was "probably . . . reasonable," which was "more like the analysis required in *Batson* step two than in step three"), *United States v. Alanis* (2003) 335 F.3d 965, 969, fn. 3 (same, with statement "deeming the prosecutor's [race]-neutral explanations 'plausible'"), *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 286, 291 (same, with "terse" and "abrupt" "comment that the prosecutor has satisfied *Batson*"), and *Jordan v. Lefevre* (2nd Cir. 2000) 206 F.3d 196, 200 (same, with "conclusory statement" that "there is some rational basis for the exercise of the challenge"); accord, *United States v. Rutledge* (7th Cir. 2011) 648 F.3d 555, 560 (same, with statement prosecutor's explanations were "nonracial-related reason[s]").

[50] AOB 310-311, citing, inter alia, *McCain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223 (court's denial of motion with statement that prosecutor had "articulated a basis which I find to be a good faith articulation of [her] reasons" and refusal to hear defense counsel's effort to rebut those reasons demonstrated it erroneously terminated analysis at step two and failed to conduct third step), *Lewis v. Lewis*, *supra*, 321 F.3d at pp. 831-832, and *Jordan v. Lefevre*, *supra*, 206 F.3d at p. 200; accord, *Coombs v. Diguglielmo* (3d Cir. 2010) 616 F.3d 255, 258, 263-265 ("it is clear from the record that the court effectively omitted the third step of the *Batson* inquiry by unreasonably limiting the defendant's opportunity to prove that the prosecutor's proffered reasons for striking Black jurors were pretextual"); compare *People v. Jones* (2011) 51 Cal.4th 346, 361 (where, inter alia, court *invited* defense counsel to comment on prosecutor's proffered explanation, record demonstrated that court conducted third step of analysis and ruled on ultimate issue of discriminatory intent).

(3) the court's failure to make express findings or inquiry of the prosecutor when the prosecutor's explanations are unsupported or contradicted by the record, suggestive of pretext, or otherwise raise credibility questions that demand inquiry or findings under the third step of the analysis.[51]

Any one or a combination of the above factors may be sufficient to demonstrate that the trial court erroneously failed to conduct the third step of the analysis (and prohibit any contrary presumption). (AOB 307-312.) Although respondent inexplicably chooses to ignore it, all of those factors appear in this case. (AOB 307-321.)

First, after hearing the prosecutor's explanations, the trial court summarily denied the *Wheeler/Batson* motion with the remarks: "Well, the court finds that no discriminatory intent is *inherent* in the [prosecutor's] explanations, and the reasons *appear* to be race neutral, and on those grounds, the court will deny the *Wheeler* motion." (5-RT 944, italics added; AOB 307-310.) Of course, it is only "'at th[e] second step of the inquiry [that] the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason

---

[51] AOB 311-321, citing, inter alia, *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386, *People v. Turner* (1986) 42 Cal.3d 711, 727-728, *People v. Hall*, *supra*, 35 Cal.3d at pp. 168-169, *Dolphy v. Mantello*, *supra*, 552 F.3d at pp. 238-239, and *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 477-479, 482-484; accord *United States v. Rutledge*, *supra*, 648 F.3d at pp. 559-561 (where (1) trial court denied motion with remarks reflecting only findings that prosecutor's explanations were facially race-neutral; (2) prosecutor's demeanor-based explanation was not supported by cold record but court made no express finding; and (3) prosecutor's other explanation raised "credibility questions" into which court failed to inquire, record as a whole established court erroneously denied motion by failing to conduct third step of analysis).

will be deemed [facially] race-neutral'" under step two of the analysis. (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768, quoting *Hernandez v. New York, supra,* 500 U.S. at p. 360; AOB 299-302, 307-310.) Thus, it is clear that the trial court's expressed "finding" that there was "no discriminatory intent . . . inherent in the [prosecutor's] explanations," which "appear to be race neutral" was only a finding that the prosecutor had satisfied this second step of the analysis. (Footnote 49, *ante*; AOB 307-310.) The court's statement that it was denying the motion "on those grounds" affirmatively demonstrates that it erroneously terminated the analysis at step two and failed entirely to conduct the most critical third step and determine whether the prosecutor's facially race-neutral reasons were bona fide or pretextual. (*Ibid.*)[52]

Second, when defense counsel attempted to point out the inaccuracies in the prosecutor's explanations, the court immediately dismissed the point. (5-RT 943-944; AOB 306-307, 310-311.) When defense counsel pressed, "I am finding everything, I am a lawyer, I am finding every – ," the court simply cut him off, turned to the prosecutor and ensured that he had nothing "further" to add, and summarily denied the motion "on th[e] grounds" that there was "no discriminatory intent . . . inherent in [his] explanations," which "appear to be race neutral." (5-RT 943-944.) The court's remarks and refusal to hear defense counsel's arguments against the credibility of the prosecutor's explanations clearly establish that it erroneously terminated the analysis at step two and failed entirely to conduct the third step. (Footnote

---

[52] In its preliminary recitation of the relevant facts, respondent fleetingly acknowledges these statements (RB 80); however, they appear nowhere in its legal analysis, and respondent never addresses Mr. Mai's extensive arguments regarding their legal significance. (See RB 80-83.)

50, *ante*; AOB 306-307, 310-311.)[53] If there is any doubt left in the face of this evidence, it is surely answered by the court's failure to probe the prosecutor's explanations and make findings necessitated by them.

As discussed in detail in Part 3, *post*, and the opening brief, all of the excluded black jurors unambiguously supported the death penalty in general and under circumstances that applied to this case, had college degrees, and were otherwise seemingly ideal jurors for the prosecutor in this capital case. The prosecutor's facially race-neutral explanations for excluding them were unsupported or contradicted by the record, suggestive of pretext, or otherwise raised serious credibility questions. (AOB 299-302, 311-321.) When such explanations are offered, the third step of the *Wheeler/Batson* analysis demands the court's active inquiry of the prosecutor and express findings. (AOB 311-321.) The court's failure to make any inquiry or findings in this case leaves no doubt that it terminated the analysis at the second step and violated the very heart of *Wheeler*, *Batson*, and their progeny by denying the motion without making any effort, much less a "sincere and reasoned" one, to evaluate the prosecutor's challenges and determine whether they were bona fide or pretextual. (Footnote 51, *ante*; AOB 311-321.)

In the face of all of this evidence that the court did not conduct the third step of the analysis, respondent points to no contrary evidence. In the face of Mr. Mai's legal argument that the court thereby violated its constitutional obligations and made no express or implied third step findings to which to defer, respondent makes no contrary argument and cites no

---

[53] Respondent's recitation of the facts is misleading in that it omits this exchange and thereby distorts the court's ruling. (RB 80.)

contrary authority. Instead, respondent simply says that the court conducted the third step of the analysis and "credited" the prosecutor's explanations as bona fide. (RB 80.) Saying it does not make it so.

As the Seventh Circuit Court of Appeals recently observed in rejecting a similar contention in the face of similar record evidence: unable to identify any supporting record evidence, "all [the government] can say is that the [trial] court 'made a factual determination that the government's justification was race-neutral.' . . . [T]his is not enough. At the end of the day, the government's argument is really that the denial of a *Batson* challenge may serve as an implicit finding that the prosecutor's explanation was credible." (*United States v. Rutledge*, *supra*, 648 F.3d at p. 560.) But on such a record, a reviewing court simply cannot indulge a presumption that the trial court found "'that the prosecutor's race-neutral justification was credible simply because the [trial] judge ultimately denied the challenge.' [Citation.]" (*Id.* at pp. 557, 559-561, citing *Snyder v. Louisiana*, *supra*, 522 U.S. at pp. 477-479, 482-484; accord, e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386; *Dolphy v. Mantello*, *supra*, 552 F.3d at pp. 238-239; *Lewis v. Lewis*, *supra*, 321 F.3d at p. 832.)

3. The Prosecutor's Facially Race-Neutral Explanations Were Contradicted or Unsupported by the Record, Raised Credibility Questions or Otherwise Demanded Inquiry and Findings By the Trial Court, the Absence of Which Further Demonstrates that the Court Failed to Conduct the Third Step of the *Wheeler/Batson* Analysis

Based on its flawed presumption that the trial court conducted the third step of the *Wheeler/Batson* analysis and "credited" the prosecutor's explanations, respondent addresses the prosecutor's explanations under the deferential, substantial evidence standard of review that applies under those

circumstances. (RB 80-83, citing, inter alia, *People v. Mills*, *supra*, 48 Cal.4th at p. 175, and *People v. McDermott*, *supra*, 28 Cal.4th at p. 971.) Under that standard, an appellant bears a heavy burden of showing that the prosecutor's explanations were so implausible, contradicted by the record, or otherwise demonstrative of pretext that no reasonable judge could have found them to be bona fide. (*Ibid.*) But this is not Mr. Mai's burden to bear.

To be sure, the plausibility and record support for the prosecutor's explanations are relevant here, but not for the reasons respondent assumes. As discussed in the opening brief, the trial court's third step analysis requires it to consider "all of the circumstances that bear upon the issue of racial animosity" and evaluate the prosecutor's credibility (*Snyder v. Louisiana* (2008) 552 U.S. 472, 478) by assessing "among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy" (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 ["*Miller-El I*"]). When the proffered reasons are contradicted by the record, illogical or implausible, or apply equally to non-minority venirepersons whom the prosecutor has not challenged, "that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 ["*Miller-El II*"].)

In the face of such explanations suggestive of pretext under these standards, "more is required of the trial court['s step three analysis] than a global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.) The court must make active inquiry into those explanations and express findings regarding their credibility. (*Ibid.*; accord, e.g., *People v. Turner*, *supra*, 42 Cal.3d at pp. 715, 727-728; *People v. Hall*, *supra*, 35 Cal.3d at pp. 168-169; *Dolphy v. Mantello*, *supra*, 552 F.3d at pp.

238-239; *United States v. Rutledge*, *supra*, 648 F.3d at pp. 557-561; AOB 310-321.) The absence of inquiry or findings under these circumstances tends to show that the trial court failed to conduct the constitutionally mandated third step of the analysis. (*Ibid.*) Of course, this is Mr. Mai's claim.

In order to prove that claim, Mr. Mai need not prove that the prosecutor's explanations *necessarily* warranted the conclusion that they were pretexts for discrimination, as respondent suggests. (RB 80-83.) He need only show that the prosecutor's explanations were sufficiently suspect to demand the court's inquiry and findings, such that their absence demonstrate the court's failure to conduct the third step of the analysis and rule on the ultimate issue of discriminatory intent. Particularly given the other affirmative record evidence discussed above, Mr. Mai has more than satisfied that burden.

a. Prospective Juror M.H.[54]

As to prospective juror M.H. (see AOB 312-317), respondent contends that the prosecutor's "primary reason for challenging prospective juror M.H. was that she was single, had no children, and was young. (5 RT 942.)" (RB 82.) Respondent omits critical parts of the prosecutor's actual explanation.

In truth, the prosecutor explained that his "primar[]y" reason for excluding M.H. was that she was "younger than the jurors I prefer," *being in her "thirties,"* and was single with no children, while there were "*no other*

---

[54] Although Mr. Mai referred in the opening brief to the challenged jurors by their full names, which are reflected in the publicly filed appellate record, Mr. Mai follows respondent's lead in this brief and refers to those jurors by their initials.

jurors on the jury presently who fit that pattern." (5 RT 942, italics added; AOB 312-313.) As Mr. Mai argued in the opening brief, this explanation was contradicted by the record in two ways: (1) M.H. was 40, not in her "thirties" (4-RT 674, 8-CT 2416); and (2) Juror Number 12, who "was on the jury presently," *did* "fit that pattern" of M.H.'s relative "youth," marital status, and lack of children, just as defense counsel attempted to argue below (5-RT 908-909, 943-944). (AOB 312-313.)

Respondent does not dispute the inaccuracies in the prosecutor's explanation other than to point out that Juror Number 12 "was older than prospective juror M.H." (RB 82.) It is true that Juror Number 12 was 43 – three years older than M.H. However, the prosecutor's "primary" explanation for challenging M.H. was still largely contradicted by the record and therefore suggestive of pretext (see, e.g., *Miller-El II*, *supra*, 545 U.S. at p. 244), which demanded the court's inquiry under step three (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386). The fact that her *true* age was only three years "younger" than Juror Number 12 did not diminish those inaccuracies or provide such an obvious basis for exclusion that further explanation was unnecessary.[55]

Although not his "primary reason," the prosecutor also claimed that he challenged M.H. because her "attitude about the death penalty was personal and emotional, not philosophical. She's the one who talked about, if it's my family I could understand it." (5-RT 942; AOB 313-314.)

---

[55] Indeed, although the prosecutor claimed that M.H. was "younger than the jurors I prefer," the prosecutor ultimately accepted a jury without exhausting his peremptory challenges that included three members who were under 40 (CT 1516, 1519; CT 1451, 1454; CT 1477, 1480) and two members who, like M.H., were 40 (CT 1438, 1441; CT 1400; RT 1011-1012).

Respondent contends that this explanation was supported by "[p]rospective juror M.H.['s] clearly expressed . . . belief in the death penalty as punishment was personal to her family, but did not necessarily apply to others outside her family. (4-RT 695-697)." (RB 82.) Respondent misrepresents the record.

As discussed in the opening brief, M.H. unambiguously described herself as a death penalty supporter in "general." (8-CT 2420-2421; 4-RT 695-696.) In her questionnaire, she wrote that she also believed that the death penalty is "used appropriately" as a general matter (not, for instance, that it would only be appropriate for someone who killed a member of her own family). (8-CT 2420-2421.) On voir dire, she specifically disavowed that her support for the death penalty was "personal" in the sense of being grounded in some personal experience. (4-RT 695-696.) Instead, her support was grounded on retribution – as she explained it, if one of her loved ones were murdered, she would want to murderer to be executed. (*Ibid.*) She agreed that she would be "emotional" about her desire for that penalty if a member of her family were murdered. (*Ibid.*) Otherwise, however, she was not "emotional" about the issue and would *not* approach her role as a juror with the "emotion" she would have if Mr. Mai had killed her own family member. (*Ibid.*) Rather, her general beliefs were that the propriety of the death penalty in a particular case depended on the "circumstances" (4-RT 695-696), and she would consider all of the statutory circumstances in determining whether it would be appropriate in this case (8-CT 2421-2523).

Thus, considering M.H.'s questionnaire and voir dire answers as a whole – as step three of the *Wheeler/Batson* analysis requires (*Miller-El II*, *supra*, 545 U.S. at p. 247) – her support for the death penalty in general was grounded in retributivist principles and her support for that penalty in a

particular case would depend not on "emotion" but rather on the "circumstances." M.H. in no way suggested that her death penalty support was limited to retribution for the murder of her own family members that "did not necessarily apply to others outside her family," as respondent contends. (RB 82.) Nor was her support for the death penalty "not philosophical," as the prosecutor claimed. (5-RT 842.) To the contrary, retribution is not only a "philosophical" justification for the death penalty (*Furman v. Georgia* (1972) 408 U.S. 238, 394-395 & fn. 20, dis. opn. of Burger, J.); it *"the most common basis of support for the death penalty" among death penalty advocates*. (*Baze v. Rees* (2008) 553 U.S. 35, 80, fn. 14, conc. opn. by Stevens, J., italics added; AOB 313-316.)

Hence, like the prosecutor's "primar[y] reason" for challenging M.H. this reason was also contradicted by the record of M.H.'s answers as a whole. It was also implausible; the bases for M.H.'s death penalty support were common and shared by most death penalty supporters. It strains credulity to believe that a prosecutor in a capital case would want to exclude jurors for such common *pro*-death penalty beliefs. (AOB 315-316.) The implausibility of the prosecutor's explanation is reinforced by his failure to question M.H. at all, much less probe why she supported the very penalty he was seeking in this case. (AOB 313-314.) All of these factors were highly suggestive of pretext (see, e.g., *Miller-El II*, *supra*, 545 U.S. at pp. 242, 246) and thus demanded inquiry by the trial court (see, e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386).

Apparently recognizing as much, respondent is reduced to grasping at straws by hypothesizing a demeanor-based reason for the prosecutor's challenge that the prosecutor himself never offered. According to respondent, M.H. "appeared to become disagreeable" when defense counsel

inquired into her death penalty support. (RB 82.) The prosecutor evidently did not share this view since he did not include it in his explanation. In any event, it is improper for respondent – or a trial or reviewing court – to hypothesize or consider reasons to justify a prosecutor's challenge that the prosecutor himself did not offer. (See, e.g., *Miller-El II*, *supra*, 545 U.S. at p. 252; *Johnson v. California* (2005) 545 U.S. 162, 173; *People v. Lenix* (2004) 44 Cal.4th 602, 624-625; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.)

b. Prospective Juror P.F.

As to prospective juror P.F. (see AOB 319-321), respondent acknowledges that the prosecutor claimed to have challenged her because she stated that the death penalty was "appropriate *only* where there was a pattern of violent conduct, which is not the law." (5-RT 942, italics added; RB 83.) Citing *only* her questionnaire answers and ignoring her live voir dire, respondent contends that this explanation was supported by P.F's "opinion that the death penalty was for convicted felons who had a pattern of committing violent offenses, which prospective juror P.F. cited as murder." (8-CT 2408.)" (RB 83.) Again, respondent's representation of the record is incomplete, incorrect, and misleading. (*Miller-El II*, *supra*, 545 U.S. at p. 247 [step three analysis requires consideration of juror's answers *as a whole*].)

P.F. *never* stated that the death penalty should be reserved for defendants with a history of violent crimes like murder. (RB 83.) To the contrary, she expressed her personal belief that "the death penalty *is not used often enough* in cases where convicted felons have a repeated behavior pattern for committing violent crimes against others, such as murder." (8-CT 2407-2408.) On her questionnaire, she also expressed her personal,

"general feelings" that, "in order for someone to receive [the death penalty], I believe the person must have maliciously set out to destroy the life of someone else (and their loved ones) and have a history of such violent behavior w/o remorse." (8-CT 2407.)

On voir dire, P.F. clarified that she meant the death penalty was *particularly appropriate* when "the person just had a pattern of no regard for life." (4-RT 731.) That factor was *not* "*something exclusive*," or the *only* circumstance that warranted the death penalty in her opinion. Rather, it was simply *a* "strong consideration." (*Ibid.*; AOB 319-320.) Of course, that "strong consideration" inured to the prosecution's benefit in this case given its aggravating evidence against Mr. Mai. (AOB 16-18; RB 9-12.)

Hence, contrary to the prosecutor's explanation (and respondent's representations), P.F. did not express any belief that death was "appropriate *only* where there was a pattern of violent conduct" like murder. (5-RT 942, italics added.) To the contrary, the beliefs P.F. actually expressed indicated that she would be an ideal juror for the prosecution in this case given its aggravating evidence that Mr. Mai was a "convicted felon" (8-CT 2407-2408), who had killed the victim with "malic[e]" (8-CT 2407) and had committed prior "violent crimes against others" (8-CT 2407-2408; 4 RT 731). For all of these reasons, the prosecutor's explanation was highly suggestive of pretext and thus demanded inquiry and findings by the court. (See, e.g., *Miller-El II*, *supra*, 545 U.S. at pp. 242-244 [concluding prosecutor's explanations were pretextual based, inter alia, on facts prosecutor's explanations were not supported by record and that excluded venireman supported death penalty and otherwise seemed ideal juror for capital prosecutor]; *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386).)

As to the prosecutor's explanation that he also challenged P.F.

because she "had a very casual attitude and dress," "didn't seem particularly interested in the proceedings," but rather "seemed rather bored with" them (5-RT 942-943), respondent contends that in "*in crediting* the prosecutor's reasons, *the trial court confirmed* that prospective juror P.F's casual attitude and dress, and apparent disinterest in the proceedings were credible considerations." (RB 83, italics added.) Again, respondent cites to no record evidence to support this assertion, but instead appears to presume from its mere denial of the motion that the trial court "credited" the prosecutor's explanation. For the reasons discussed in Part 1, *ante*, and the opening brief (but ignored by respondent), that presumption is prohibited. (AOB 302, 319, 324-327, citing, inter alia, *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 477-479, 482-484 [refusing to presume court credited demeanor-based explanation in denying motion in absence of any affirmative evidence to prove as much], *People v. Silva*, *supra*, 25 Cal.4th at pp. 285-386, and *McCurdy v. Montgomery County, Ohio* (6th Cir. 2001) 240 F.3d 512, 521; accord, *United States v. Rutledge*, *supra*, 648 F.3d at pp. 557, 559-560; *People v. Long* (2010) 189 Cal.App.4th 826, 845-848, and authorities cited therein.)

As further discussed in the opening brief but ignored by respondent, P.F.'s thoughtful and thorough responses to the questionnaire and voir dire questions, as well as her vocation as a 911 operator, prior experience as a juror, and self-identification as a "strong" proponent of the death penalty (8-CT 2404; 4 RT 645-646, 662, 710-711) belied the prosecutor's characterization of her as a "bored" or disinterested potential juror. (AOB 318-319, *People v. Silva, supra*, 25 Cal.4th at p. 385 [since nothing in potential juror's answers supported prosecutor's explanation that he was an "extremely aggressive" person, trial court's failure to make inquiry or

findings did not satisfy step three analysis].) To the contrary, for these and the other reasons discussed above, P.F. was a seemingly ideal juror for the prosecutor in this capital case, which raised serious doubts about the credibility of his facially race-neutral explanations for excluding her. (AOB 318-319, citing *Miller-El II*, *supra*, 545 U.S. at p. 242.) For all of these reasons, step three of the *Wheeler/Batson* analysis demanded the court's active inquiry into the prosecutor's explanations for challenging P.F. demanded active inquiry and findings. (*People v. Silva, supra*, at pp. 385-386.)

c. Prospective Juror L.P

As to prospective juror L.P. (AOB 317-318), respondent contends that the prosecutor challenged her "based on her occupation as a social worker and the *potential* for her applying a heightened burden of proof as to the charges and allegations than the prosecution was required to prove. (5-RT 748, 766, 943; 8-CT 2391.)" (RB 83, italics added.) Respondent further contends that these reasons were clearly genuine because L.P. was, in fact, a social worker and she "maintained that she wanted the standard for conviction to be 'beyond a shadow of a doubt.' (4-RT 778-779.)" (RB 83.) Respondent misstates both the prosecutor's explanation for challenging L.P. and the record evidence which contradicts it.

On her questionnaire, L.P. described herself as a death penalty supporter who believed that it was used appropriately and expressed her personal, "general feelings" that "it is important when inflicting [the death penalty] to make sure that the person is guilty beyond a shadow of a doubt before imposing it." (8-CT 2394-2395.) On live voir dire, L.P. clarified that she meant she wanted to be sure that the person was "*convicted* beyond a shadow of a doubt" before imposing the death penalty. (4-RT 778, italics

added.) The distinction was a significant one in this case: the potential jurors were asked to accept that Mr. Mai had already been *convicted* of first-degree murder with special circumstances in deciding whether he should be executed for that offense. (8-CT 2393.) Under the circumstances, L.P.'s personal desire for certainty that someone, like Mr. Mai, has been *convicted* of murder (and is thereby even *eligible* for the death penalty) before imposing the death penalty for that offense was a perfectly legitimate one.

Thus, the record did not support the prosecutor's explanation that L.P. "said she couldn't vote for the death penalty unless *the facts* were proved beyond a shadow of a doubt, which is not the law." (5-RT 943, italics added.) Nor did the record support the prosecutor's explanation that L.P.'s beliefs were "*not the law*." (*Ibid.*) L.P's personal concern for certainty in *conviction* under these circumstances was entirely consistent with the law. (Pen. Code, § 190.4.) The record further contradicted the prosecutor's explanation that L.P. said that she "*couldn't vote for the death penalty*" absent such certainty. (5-RT 943, italics added.) L.P. was expressing her personal beliefs that she unequivocally promised to set aside if they conflicted with the law, taking care to emphasize that "as a county employee, I do that often (following the law)." (8-CT 2394-2395.) Given that the record contradicted every part of the prosecutor's claim that L.P. "said she couldn't vote for the death penalty unless the facts were proved beyond a shadow of a doubt, which is not the law," a "sincere and reasoned attempt" to evaluate it demanded inquiry and findings by the trial court. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386.)

It is true, as the prosecutor represented, that L.P. was a social worker. (4-RT 748-749.) However, the prosecutor did not explain why this characteristic was objectionable. (*Ibid.*) The correlation between social

work and a juror's undesirability from a prosecutor's perspective is not so obvious that it needs no further explanation. (See, e.g., *People v. Fuentes* (1991) 54 Cal.3d 707, 719-720 [prosecutor's explanation based on juror's occupation was "spurious" since he did not articulate how it "related to jury service in this case"]; *Dolphy v. Mantello*, *supra*, 552 F.3d at p. 239 [when correlation is not so obvious that it needs no further explanation, third step requires inquiry into correlation between assertedly objectionable characteristic and undesirability as juror]; *Kesser v. Cambra* (9th Cir. 2008) 465 F.3d 351, 364 [where correlation not obvious, explanation would be expected if stated characteristic were true motivation for challenge].) Even if the correlation were obvious in other cases, it was not obvious in this one. While L.P. was a social worker, she had also worked in law enforcement as a probation officer and a parole officer. (4-RT 748-749.) These characteristics, together with L.P.'s death penalty support, had an obvious correlation to her *desirability* as a juror for the prosecution. (4-RT 748-749; *Miller-El II*, *supra*, 545 U.S. at p. 242.) Under the circumstances, a "sincere and reasoned" attempt to evaluate the credibility of the prosecutor's explanation demanded inquiry and findings by the trial court. (See, e.g., *Dolphy v. Mantello*, *supra*, at p. 239.)

Finally, respondent hypothesizes other reasons to justify the prosecutor's exclusion of L.P. that the prosecutor himself never offered – namely that L.P. was "working towards a masters [*sic*] [degree] in marriage and family therapy" (RB 82-83, citing 4-RT 748-749) and "had a cousin who was a criminal defense lawyer" (RB 83, citing 4-RT 767-768 [*sic*]).[56] As

---

[56] Respondent's citation to 4-RT 767-768 in support of its assertion that L.P. "had a cousin who was a criminal defense lawyer" is incorrect; (continued...)

previously discussed, the state's hypothesized explanations for the prosecutor's challenges are irrelevant and improper. (See, e.g., *Miller-El II*, *supra*, 545 U.S. at p. 252.)

Exacerbating the impropriety of respondent's speculation is that it misstates the record. Contrary to respondent's representation, L.P never said that she had a "cousin who was a criminal defense lawyer." (RB 83.) Instead, she merely stated that she had a "cousin who is an attorney." In response to the court's query about whether her cousin had done any "criminal defense *or* criminal *prosecutive* work[,]" L.P. replied that she "thought" her cousin "*may* have," but she was not certain. (4-RT 762-763, italics added.) Respondent's attempt to justify the prosecutor's challenge with reasons that were not only omitted from the prosecutor's own explanations but are also flatly untrue is a potent indication of respondent's recognition that the explanations the prosecutor did offer were highly suggestive of pretext.

For these and all of the other reasons discussed in the opening brief, the prosecutor's explanations for challenging the only black jurors from the venire – all of whom supported the death penalty and voiced no hesitation about imposing it in this case – were unsupported or contradicted by the record, implausible or otherwise raised serious credibility questions. (AOB 311-321.) Hence, a "sincere and reasoned" attempt to evaluate those explanations and determine whether they were bona fide or pretextual demanded active inquiry and findings by the court. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386; *People v. Turner*, *supra*, 42 Cal.3d

---

[56](...continued)
those page citations reflect another juror's voir dire. L.P.'s discussion of her cousin's vocation is at 4-RT 762-763.

at pp. 715, 727-728; *United States v. Rutledge*, *supra*, 648 F.3d at pp. 557-561; *Dolphy v. Mantello*, *supra*, 552 F.3d at pp. 238-239.) The court's failure to make any inquiry or third step findings at all tends to prove that it did not conduct the third step of the required analysis. (*Ibid.*) When those omissions are considered with the court's only expressed finding that the prosecutor's explanations were facially race-neutral, its statement that it was denying the motion "on those grounds," and its refusal to hear defense counsel's arguments against the credibility of the prosecutor's explanations, the record leaves no doubt that the trial court violated its constitutional obligations by terminating the *Wheeler/Batson* analysis at step two and failing entirely to conduct the most critical third step. (AOB 307-321, and authorities cited therein; Footnotes 49-51, *ante*.)

C. Respondent Does Not Dispute That If the Trial Court Failed to Conduct the Third Step of the *Wheeler/Batson* Analysis, the Death Judgment Must Be Reversed Without Remand

Finally, Mr. Mai argued that the trial court's failure to conduct the third step of the *Wheeler/Batson* analysis requires reversal per se of the death judgment. (AOB 321-331.) It would be inappropriate for this Court to find harmless error based on its based on its own third-step analysis on the cold record. (AOB 321-328.) Further, a remand for the trial court to conduct the third step of the analysis more than 12 years after the fact would be futile. (AOB 328-331, citing inter alia, *Snyder v. Lousiana*, *supra*, 552 U.S. at p. 486 [reversing without remand for trial court to conduct third step of analysis because there was "no realistic possibility that" the prosecutor's proffered explanations "could be profitably explored further on remand at this late date, more than a decade after petitioner's trial"] and *People v. Hall*, *supra*, 35 Cal.3d at pp. 170-171 [same – three years].)

Significantly, respondent does not dispute any of these arguments. Hence, no further discussion of this issue is necessary. Reversal of the death judgment is required.

//

//

VIII

THE DEATH ELIGIBILITY FINDING AND DEATH VERDICT VIOLATE THE STATE'S INDEPENDENT INTERESTS IN THE FAIRNESS AND RELIABILITY OF ITS CAPITAL PROCEEDINGS AND VERDICTS UNDER STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS AND MUST BE SET ASIDE

As discussed in the opening brief, the state and federal Constitutions protect not only individual rights but also our community's independent interests in the fairness and integrity of its criminal proceedings and the reliability of death judgments. (AOB 332-347, citing, inter alia, *Indiana v. Edwards* (2008) 554 U.S. 164, 177, and *Gardner v. Florida* (1977) 430 U.S. 349 357-358) California's death penalty scheme reflects those independent interests. (AOB 332-347, citing, inter alia, *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300, and *People v. Chadd* (1981) 28 Cal.3d 739, 750-752.) When those interests conflict with a particular defendant's desire for execution, the state's interests win out. (AOB 332-347.) Indeed, "to allow a defendant to choose his own [death] sentence introduces unconscionable arbitrariness into the capital punishment system." (*Comer v. Schriro* (9th Cir. 2006) 463 F.3d 934, 950.)

This is precisely what occurred here. Mr. Mai's death penalty "trial" was an empty charade, nothing more than an instrument to achieve his own execution which violated the state's independent interests in the fairness and integrity of its proceedings, the appearance of fairness, and the reliability of its death judgments. (AOB 347-352.) The sole death eligibility finding and death judgment must be reversed.

Respondent disagrees based on its previous contentions that, inter alia, Mr. Mai was represented and adequately advised by competent, unconflicted counsel, there was no doubt about the truth of the sole special

circumstance allegation that rendered Mr. Mai eligible for the death penalty, and no doubt that he was competent to make a "reasoned choice" to effectively stipulate to the death penalty. (RB 83-87.) Mr. Mai has addressed these contentions – including the many misstatements of facts on which they are based and which are repeated here – in the preceding arguments, which are incorporated by reference herein.

Otherwise, respondent assumes that if a defendant is competent within the meaning of the Fourteenth Amendment and represented by competent counsel within the Sixth Amendment, he can "waive" the substantive and procedural safeguards intended to protect and serve the state's *independent* interests in fair and reliable death judgments. Respondent's assumption, however, "fails to recognize the larger public interest at stake" when even a competent defendant pleads guilty to a capital offense and effectively stipulates to the death penalty. (*People v. Chadd*, *supra*, 28 Cal.3d at p. 747.) In this regard, "we are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual." (*People v. Stanworth* (1969) 71 Cal.2d 820, 834, internal quotation marks and citations omitted.)

As discussed in the opening brief, "the state[] [has] a strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings." (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300; *People v. Chadd*, *supra*, 28 Cal.3d at p. 751.) The heightened degree of reliability state law and the Eighth and Fourteenth Amendments demand of death verdicts is achieved by a trier of

fact's consideration of all evidence relevant to the defendant's death worthiness – including both constitutionally relevant "aggravating" evidence that weighs in favor of death and "mitigating" evidence that may serve as a basis for a sentence less than death (see, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 605; Pen. Code, § 190.3) – and through the crucible of "meaningful adversarial testing" (*United States v. Cronic* (1984) 466 U.S. 648, 656-659 [when trial "loses its character as a confrontation between adversaries," the "trial process" itself becomes "unreliable" and produces an unreliable result]; *Herring v. New York* (1975) 422 U.S. 853, 856-864 [discussing constitutionally fundamental importance of closing argument in adversary process]). California's death penalty scheme is intended to serve the state's paramount, independent interests in the fairness and reliability of its capital proceedings and reflects "a fundamental public policy against misusing the judicial system" (*People v. Deere* (1985) 41 Cal.3d 353, 362-364) by curtailing even *competent* capital defendants' abilities to "waive" or forgo the substantive and procedural safeguards that are vital to achieving these interests. (AOB 334-352.)[57]

Hence, even a competent defendant cannot: (1) plead guilty to a capital offense without the representation and consent of counsel, whose duty is not to acquiesce in his client's wishes but rather to exercise his independent professional judgement and safeguard against the risk of a mistaken death judgment (Pen. Code, § 1018; *People v. Alfaro* (2007) 41

---

[57] As discussed in the opening brief, *Deere*, *supra*, has been disapproved on other grounds, to the extent that it held that the failure to present mitigating evidence "*in and of itself*" renders a death verdict unreliable and/or necessarily establishes ineffective assistance of counsel as a matter of law. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9; *People v. Lang* (1989) 49 Cal.3d 991, 1031; AOB 341-342 & fn. 104.)

Cal.4th 1277, 1300-1302; *People v. Massie* (1985) 40 Cal.3d 620, 625; *People v. Chadd* (1981) 28 Cal.3d 739, 750, 753; (2) stipulate to the death penalty and waive a penalty trial (*People v. Teron* (1979) 23 Cal.3d 103, 115, fn. 7, and authorities cited therein, overruled on other grounds in *People v. Chadd*, *supra*, at p. 750, fn. 7; Pen. Code, §§ 190.3, 190.4, subd. (a)); (3) prevent counsel from investigating and presenting mitigating evidence and closing argument – which are tactical matters controlled by counsel (see, e.g., *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1301-1302, 1320-1321; see also *New York v. Hill* (2000) 528 U.S. 110, 114-115; *Jones v. Barnes* (1983) 463 U.S. 745, 751-752; *People v. Roldan* (2005) 35 Cal.4th 646, 682; or (4) waive the mandatory, automatic appeal from a death judgment, waive counsel on appeal, or control the issues to be reaised on that on appeal (Pen. Code, § 1239, subd. (b); *People v. Massie* (*Massie II*) (1998) 19 Cal.4th 550, 566, 570-572; *People v. Stanworth*, *supra*, 71 Cal.2d at p. 834).

In rejecting challenges to these limitations, this Court has recognized that defendants enjoy fundamental rights to the assistance of counsel in their defense, to control certain fundamental aspects of their defense, and even to waive counsel in order to represent their own defense. (See, e.g., *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1298-1302, and authorities cited therein.) However, when a capital defendant seeks to present no defense for no tactical advantage or benefit, those rights either are not implicated at all (*ibid*) or must bow to accommodate the weightier, legitimate interests of the state (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 746-747). (Accord, *Massie II, supra*, 19 Cal.4th at p. 566, 570-572; *People v. Massie*, *supra*, 40 Cal.3d at p. 625; *People v. Stanworth*, *supra*, 71 Cal.2d at p. 834; *Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, 74; see also *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171 [right to self-representation is not absolute but may bow the

legitimate state interests in fairness of its proceedings under certain circumstances].)[58]

To be sure, this Court has held that the "failure to present mitigating evidence, *in and of itself*, is sufficient to make a death judgment unreliable." *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9, italics added; AOB 341-343.) For instance, in *People v. Sanders* (1991) 51 Cal.3d 471, where a presumably competent defendant made "knowing and voluntary" decision not to present a penalty phase defense, the jurors otherwise heard mitigating evidence from the guilt phase, the lack of a penalty defense "did not amount to an admission that [the defendant] believed death was the appropriate penalty," and there was no "showing that counsel failed to investigate mitigating evidence or advise the defendant of its significance," this Court

---

[58] In addition to these provisions cited in the opening brief, the Legislature also enacted Penal Code section 686.1, which *mandates* representation by counsel at all stages of a capital proceeding. This Court had held that section 686.1 is invalid to the extent that it conflicts with the *federal* Constitution as stated in *Faretta v. California* (1975) 422 U.S. 806 (a non-capital case), but "'remains good law as to the California Constitution and the Penal Code.' [Citation.]" (*People v. Johnson* (2012) 53 Cal.4th 519, 525-526.) In light of the high court's recent decision in *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171, which recognized that the right to self-representation recognized in *Faretta* is not absolute, but rather may bow to accommodate other legitimate state interests such as the fairness and appearance thereof in its proceedings, it is no longer clear that a construction of section 686.1 mandating representation by counsel at the penalty phase of a capital trial conflicts with *Faretta*.

The question does not need resolution in this case because Mr. Mai did not formally discharge counsel and represent himself (or threaten to do so if they disregarded his wishes). What is significant in this case is that section 686.1 is yet another reflection of California's clear legislative intent to subvert an individual defendant's autonomy in capital cases to the paramount interests of the state.

held that the proceedings and ensuing death judgment did not violate the state's interest in, or the constitutional guarantees to, reliable death judgments. (*Id.* at pp. 524-527.)

Similarly, this Court has held that a defendant's request for the death penalty does not, in and of itself, necessarily render an ensuing death judgment unreliable. (AOB 261-265, 351.) For instance, in *People v. Guzman* (1988) 45 Cal.3d 915, the defendant's testimony that he preferred the "mercy" of the death penalty over a "cruel and inhumane" sentence of life in prison without the possibility of parole did not render the resulting death verdict unreliable where prosecution did not rely on that testimony as a basis for a death verdict, the defendant also testified to substantial mitigating evidence, and defense counsel presented closing argument for the defendant's life relying on that mitigating evidence. (*Id.* at pp. 959-960, 962-963.)

Otherwise, this Court has recognized that these factors *combined together* (*People v. Deere*, *supra*, 41 Cal.3d at pp. 361, 364; *People v. Burgener* (1986) 41 Cal.3d 505, 541-543) or with other factors (AOB 346-347, 351-352) may violate the state's independent interests in fair and reliable capital proceedings. For instance, when the defendant enters an unconditional plea to a capital offense for reasons other than to achieve some benefit for his defense (*People v. Chadd*, *supra*, 28 Cal.3d at p. 753; *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1300-1302); defense counsel presents no opening statement, challenge to the state's aggravating evidence, no mitigating evidence, and no closing argument at the penalty phase (*People v. Snow* (2003) 30 Cal.4th 43, 122-123); the penalty jury hears the defendant's request for a death verdict (*People v. Williams* (1988) 44 Cal.3d 1127, 1152; *People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527); and the

jury hears "misleading argument" or is given "misleading instructions" (*People v. Sanders*, *supra*, 51 Cal.3d at p. 526, fn. 23).[59]

All of these factors appear in this case. Mr. Mai entered an unconditional plea to capital murder and conceded his death eligibility in order to receive that verdict or for reasons other than seeking a tactical benefit at penalty (Arguments I, III, and IV, *ante*; AOB Arguments I, III, and IV.) At penalty, defense counsel presented no opening statement, no meaningful challenge to the state's aggravating evidence, no mitigating evidence, and no closing argument. (Argument I, *ante*; AOB Argument I.) The jurors did not sit at the guilt phase and hence heard no other evidence they could consider in mitigation. (Compare *People v. Sanders*, *supra*, 51 Cal.3d at pp. 524-527.)[60] The lack of any defense combined with Mr. Mai's explicit testimony "amount[ed] to an admission that he believed death was the appropriate penalty." (*Ibid.*; Argument V, *ante*; AOB Arguments V, VIII.) And the jurors heard "misleading argument" and were given "misleading instructions": (1) the prosecutor improperly urged the jurors to base their death verdict on Mr. Mai's testimony that death was the

---

[59] In *Snow*, *supra*, this Court emphasized that "it is difficult to imagine how a penalty phase in which counsel present no mitigating evidence, call no witnesses, refrain from cross-examining the prosecution's witnesses, and make no argument to the jury on the defendant's behalf, could ever produce a reliable penalty verdict . . ." (*People v. Snow*, *supra*, 30 Cal.4th at pp. 109-111, 122-123.) However, because the appellant in *Snow* had only challenged the objective reasonableness of his counsel's failure to present penalty phase argument on his behalf and not the broader question of whether such a proceeding is constitutionally unreliable as a matter of law, this Court did not resolve that question. (*Ibid.*) Of course, that question is squarely presented to this Court in this case.

[60] Indeed, the jurors were not even informed that Mr. Mai had been convicted upon his plea. (AOB 350 & fn. 107.)

appropriate penalty (Arguments I-G-3 and V, *ante*; AOB Arguments I–F-3-c, V-D & V-E, and VIII); the trial court's admission and defense counsel's affirmative presentation of that testimony as the "only defense evidence" created the misleading impression that it was relevant evidence that the jurors could weigh in favor of death (Argument V, *ante*; AOB Argument V-E & VIII); and the court's misleading instructions only confirmed that impression (*ibid*).

For all of these reasons, Mr. Mai's capital murder trial subverted society's independent interests in the fairness and reliability of its capital proceedings and failed to produce a death verdict reflecting a highly reliable determination that Mr. Mai was not only eligible for the death penalty but also bereft of any value as a human being deserving of mercy. As such, the trial and death eligibility and death verdicts it produced violated state law and the Eighth and the Fourteenth Amendments even if – as respondent insists – Mr. Mai's desire to obtain a death verdict was a competent one under the Fourteenth Amendment and his counsel's decision to acquiesce was a objectively reasonable one under the Sixth Amendment. As Mr. Mai had no right to waive the state's independent interests in the fairness and reliability of its capital proceedings or to "compel the people of the State of California to use their resources to take his life" (*People v. Deere*, *supra*, 41 Cal.3d at p. 362), the death eligibility finding and death judgment must be reversed. (AOB 332-352.)

//

//

IX

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. MAI'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In his opening brief, Mr. Mai argued that many features of California's capital-sentencing scheme, both on their face and as applied in this case, violate the United States Constitution and international law. (AOB 353-365.) Respondent disagrees. (RB 87-89.)

Mr. Mai considers this issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in the opening brief, Mr. Mai's death judgment violates international law and the federal Constitution and must be reversed.

//

//

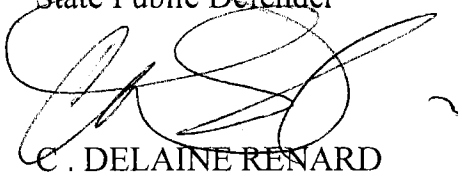
CONCLUSION

For the foregoing reasons, as well as those stated in Mr. Mai's opening brief, the judgment must be reversed.

DATED: June 28, 2012

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

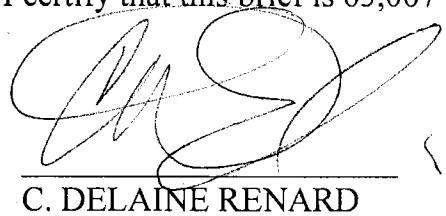


C. DELAINE RENARD
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
Cal. Rules of Court, rule 8.630

I, C. Delaine Renard, am the Senior Deputy State Public Defender assigned to represent appellant, Hung Thanh Mai, in this automatic appeal. On May 2, 2012, this Court granted my motion to file appellant's reply brief in excess of the 47,600-word limit specified in Rule 8.630, subd. (b)(1)(C) of the California Rules of Court (up to 64,000 words). I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 63,007 words in length.



C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Hung Thanh Mai*

Cal. Supreme Ct. No. S089478
Orange Co. Superior Ct. No. 96NF1961

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California, 94607, that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing the same in an envelope addressed (respectively) as follows:

Adrienne Denault, D.A.G.
Office of the Attorney General
P. O. Box 85266
110 West "A" St., Ste. 1100
San Diego, CA 92186-2024

Hon. Francisco P. Briseno
Orange County Superior Court
P. O. Box 22024
700 Civic Center Dr. W. Dept. C-45
Santa Ana, CA 92702-2024

Orange County Superior Court
Clerk of the Court
P. O. Box 22024
700 Civic Center Dr. W. Dept. C-45
Santa Ana, CA 92702-2024

Hung Thanh Mai
Reg # 09481-112
P.O. Box 8500
Florence, CO 81226-8500

Verna Wefald
Attorney at Law
65 N. Raymond Ave., # 320
Pasadena, CA 91103

Each said envelope was then, on June 28, 2012, sealed and deposited in the United States Mail at Alameda, 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 June 28, 2012, at Oakland, California.

DECLARANT