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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

HUNG THANH MAI,

Defendant & Appellant.

CAPITAL CASE

Case No. S089478

Orange Co. Super. Ct. Case No. 96NF1961

OPPOSITION TO MAI'S MOTION FOR JUDICIAL NOTICE

Appellant Hung Thanh Mai ("Mai") filed a Motion for Judicial Notice on March 30, 2010, seeking judicial notice of materials relied upon in his Opening Brief. Pursuant to California Rules of Court, rule 8.54(a)(3), respondent submits this Opposition, and respectfully requests this Court deny Mai's Motion in its entirety for the reasons detailed below.

A. Mai's Request for Judicial Notice of an Internet Website for the Old Farmer's Almanac to Support His Ineffective Assistance of Counsel Claim on Direct Appeal Should Be Declined

Mai requests this Court take judicial notice of an internet website for the Old Farmer's Almanac for the precipitation, visibility and time of sunset for Fullerton, California on July 13, 1996. (Mot. at pp. 2-5, Exhs. A & B.) Mai states that the "facts" reflected in the Almanac are a proper subject of judicial notice pursuant to Evidence Code section 452, subdivision (h). (Mot. at p. 3.) Mai relies on *People v. Harkness* (1942) 51 Cal.App.2d 133, 138-139, for the proposition that it is proper for a court sitting as trier of fact to take judicial notice of the time the sun set on a certain date. (Mot. at p. 3.) Mai's attempt to show ineffective assistance of counsel based on the failure to challenge the legality of a traffic stop predicated on the theory that it was not dark enough to require his headlights be on between 8:00 and 8:20 p.m. on July 13, 2006, based on a request for judicial notice of an internet website for the Old Farmer's Almanac should be declined.

Evidence Code section 459[1] permits a reviewing court to take judicial notice of matters specified in Evidence Code section 452. As Mai notes,

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[1] Evidence Code section 459 states, in relevant part:

> The reviewing court may take judicial notice of any matter specified in Section 452. [¶] (c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

Subdivision (a) of Evidence Code section 455 provides:

(continued...)

subdivision (h) of section 452[2] permits judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of

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(...continued)

> If the trial court has been requested to take or has taken or proposed to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed to before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

[2] Evidence Code Section 452 provides:

> Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:
> (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.
> (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.
> (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
> (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
> (e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
> (f) The law of an organization of nations and of foreign nations and public entities in foreign nations.
> (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
> (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

immediate and accurate determination by resort to sources of reasonably indisputable accuracy." While the appropriateness of a trial court taking judicial notice of the time of sunrise or sunset has long been recognized (see *People v. Chee Kee* (1992) 61 Cal. 404; *People v. Mayes* (1896) 113 Cal. 618), the purpose for which Mai is requesting judicial notice on direct appeal is inappropriate.

Mai is seeking to use judicial notice to prove that Officer Don Joseph Burt was not acting lawfully when he executed a traffic stop of the car Mai was driving shortly before Mai murdered the officer in support of a claim of ineffective assistance of counsel raised in his Opening Brief. (Mot. at pp. 4-5.) Mai is asserting that his trial counsel was ineffective for failing to challenge the sufficiency of evidence to prove that he was stopped by Officer Burt because he was driving with his headlights off "during darkness" or "from one-half hour after sunset to one-half hour before sunrise" in violation of Vehicle Code section 38335. (Mot. at p. 5, citing AOB, Arguments I-e-5 & III.)

It is a fundamental rule of appellate procedure that "[t]he scope of an appeal is limited to the record of the proceedings below. [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 944; see also *People v. Szeto* (1981) 29 Cal.3d 20, 35.) "As a general rule the appellate court should not take ... judicial notice if, upon examination of the entire record, it appears that the matter has not been presented to and considered by the trial court in the first instance.' (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493 [138 Cal.Rptr. 828].) Such a rule prevents the unfairness that would flow from permitting one side to press an issue or theory on appeal that was not raised below." (*People v. Hardy* (1992) 2 Cal.4th 86, 134.)

While an assertion of ineffective assistance of counsel based on the failure to advance a particular challenge or theory below is distinguishable from presenting the underlying theory for the first time on appeal, the lack

of appropriateness for considering a matter outside the record in supporting a claim of ineffective assistance of counsel on direct appeal remains the same. If Mai wishes to pursue a claim of ineffective assistance of counsel and rely on matters outside the record on appeal in order to support that claim, he should do so on habeas corpus where both parties can address the merits of the claim relying on materials outside the record on appeal. This Court has repeatedly explained that a claim of ineffective of assistance of counsel is more appropriately decided by way of habeas when the record on appeal fails to explain counsel's alleged action or omission. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Pope* (1979) 23 Cal.3d 412, 426-427, fn. 17.) Indeed, the reason that a claim of ineffective assistance of counsel is cognizable on habeas even where based entirely on the record on appeal is because ineffective assistance of counsel claims are often more appropriately litigated on habeas corpus. (*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34.) Consistent with these well established principles governing consideration of claims of ineffective assistance of counsel, Mai's effort to develop a factual record on appeal through judicial notice on appeal for purposes of supporting a claim of ineffective assistance of counsel should be rejected.

B. Mai's Request for Judicial Notice of Unpublished Decisions of State and Federal Cases and Documents from Other Court Proceedings Should Be Declined

Mai also requests judicial notice of (1) three unpublished court opinions, two California appellate court decisions in criminal cases, and a Ninth Circuit Court of Appeals habeas corpus case (Mot. at pp. 5-7, Exh. C.); (2) the federal indictment of Mai, in the case of *United States v. Hung Thanh Mai, Victoria Pham, Huy Ngoc Ha, and Daniel Bruce*

Watkins, filed in the United States District Court for the Central District of California, Case No. 98-82 LHM, on August 6, 1998 (Mot. at pp. 7-8, Exh. D); and (3) certain federal court records from the cases of *United States v. Pham*[3] and *United States v. Hung Mai, et al.,*[4] for the purpose of supporting his claim on appeal that a conflict of interest existed with his being represented by his defense trial counsel who also represented Pham and previously employed Watkins as an investigator (Mot. at pp. 5-11). Mai contends that unpublished decisions and other court documents are a proper subject of judicial notice pursuant to Evidence Code section 452, subdivisions (d) and (f). To the contrary, the request circumvents well established limitations governing consideration of materials that are not a part of the record on appeal.

Mai is attempting more than notice of the existence of the requested items, as he is seeking to rely on the truth of matters contained in the documents to support his arguments in his opening brief on direct appeal. (Mot. at pp.1, 4-5, 6-7, 9-11.) Mai did not present this information in the trial court, yet he is attempting to rely on it to develop a factual predicate to support his claim of a conflict of interest. A factual record should not be developed unilaterally by one party through judicial notice on appeal. Under well established appellate rules, Mai should be foreclosed from expanding the appellate record with the documents attached to his Motion

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[3] The specific documents are: Plea Agreement for Defendant Victoria Pham filed April 29, 1999; the minutes for April 29, 1999; the minutes, sentencing and judgment dated June 30, 1999; and the judgment and probation/commitment order filed July 2, 1999. (Exh. E.)

[4] The specific documents are: Plea Agreement for Defendant Daniel B. Watkins filed June 10, 1999; First Superceding Information; the minutes for June 14, 1999; and the judgment and probation/commitment order on sentencing filed August 19, 1999. (Exh. E.)

for Judicial Notice. (See *People v. Jarrett* (1970) 6 Cal.App.3d 737, 738 ["under well established appellate rules, this court need not consider issues not raised at trial and may not properly consider alleged facts which are wholly outside the record on appeal"].)

An additional requirement for judicial notice is that the matters that are the subject of the judicial notice must be relevant to an issue in the action. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, citing 2 Jefferson, Cal.Evidence Benchbook (2d ed. 1982) § 47.1, p. 1749.) It is clear from Mai's Motion that the items themselves are not relevant to his case absent the truth of matters asserted within the documents. (Mot. at pp.1, 4-5, 6-7, 9-11.) Thus, Mai seeks to have this Court notice the truth of the matters asserted in the documents, not merely the existence of the documents themselves. As this Court has stated in such a context, "'we do not take judicial notice of the truth of all matters stated therein.'" (*Mangini v. R.J. Reynolds Tobacco Co.*, *supra*, 7 Cal.4th at p. 1063, quoting *Love v. Wolf* (1964) 226 Cal.App.2d 378, 403.)

> "The taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom." (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134, 219 Cal.Rptr. 661.)

(*Mangini v. R.J. Reynolds Tobacco Co., supra*, 7 Cal.4th at pp. 1063-1064.)

Judicial notice is an exception to the general rule that the facts must be presented and tried in the trial court. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 134.) *Hardy* provides "an exception where the request for judicial notice is unopposed and the matters to be judicially noticed are not

reasonably open to dispute." (*Carleton v. Tortosa* (1995) 14 Cal.App.4th 745, 754, fn. 1, citing *People v. Hardy, supra*, 2 Cal.4th at pp. 134-135.) Here, as in *Carleton*, "the request is opposed, and the general rule applies." The request should be denied. (*Ibid.*)

For the reasons stated in this Opposition, respondent respectfully requests this Court deny Mai's Motion for Judicial Notice in its entirety.

Dated: April 14, 2010

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Hung Thanh Mai*
No.: **S089478**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 14, 2010, I served the attached **OPPOSITION TO MAI'S MOTION FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 14, 2010, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature